UNDUE HARDSHIP IN THE BANKRUPTCY COURTS: AN EMPIRICAL ASSESSMENT OF THE DISCHARGE OF EDUCATIONAL DEBT

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The discharge in bankruptcy embodies the policy that relief should be granted to an individual who has ceased to be economically productive by virtue of burdensome debt obligations (the fresh start policy). Once the debtor has been deemed eligible for discharge, forgiveness of debt is automatic, accomplished through legislative rule and its judicial enforcement. With regard to the discharge of educational debt, however, Congress has devolved the exercise of debt relief to courts. An obligation to repay such debt will be discharged if a debtor establishes that undue hardship would be suffered in the absence of its discharge. A court must therefore wrestle to define the boundaries of the fresh start policy as it decides whether a debtor's circumstances warrant forgiveness of educational debt. Commentators and reformers have criticized both the law itself, for granting educational debt conditionally dischargeable status in the first instance, and its application, arguing that the standard has been interpreted too narrowly by courts. The literature, however, has yet to analyze systematically—with the purpose of ascertaining whether such criticism is warranted—the decision-making process of bankruptcy judges who make undue hardship determinations. This Article undertakes such an analysis and provides an empirical account of undue hardship discharge determinations made by bankruptcy courts and documented in issued opinions.

The information gathered in this study illustrates that debtors who have sought relief from educational debt have done so under conditions evincing financial distress. This portrait starkly contrasts with the image of an opportunistic debtor seeking to avoid repayment of student loans on

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This Article benefited significantly from presentations at the Tulane-Loyola Junior Faculty Workshop, the Tulane Law School Faculty Workshop, and the Young Scholars Workshop at the Annual Meeting of the Southeastern Association of Law Schools. We owe special thanks to the Honorable Alan M. Ahart, Stephanie Ben-Ishai, Christopher Cotropia, Martin Davies, Marjorie Kornhauser, Margaret Lemos, Jonathan Nash, Nina Pardo, and Nancy Staudt for their helpful comments and suggestions on prior drafts. Todd Lowther (Tulane Law School, Class of 2005) and Emily Ma (Tulane Law School, Class of 2005) provided excellent research assistance with unfailing diligence and good cheer. We gratefully acknowledge the generous research support provided by Tulane Law School.

the eve of a lucrative career, a stereotype stylized by courts on the basis of what they have deemed to have been Congress's intent when it made educational debt conditionally dischargeable. After portraying the class of individual that has been subject to the law, the Article examines how the law has functioned in its application. One might expect that, in separating the group of debtors in this study by legal outcome (i.e., grant of discharge and denial of discharge), significant differences would reveal themselves with respect to certain demographic and financial characteristics. After all, it is factual circumstances that give content to the law. Contrary to that expectation, however, the data reveal few statistically significant differences between the two groups. Instead, legal outcome is best explained by differing judicial perceptions of how the same standard applies to similarly situated debtors. This Article concludes that the law governing the discharge of educational debt, by virtue of its application, has been uniform only in form and not in substance, and it prescribes a reorientation of the undue hardship standard that comports with the structure of the Bankruptcy Code and that better effectuates uniformity in the implementation of debtor relief.

> [T]oday, more than ever before in the history of the United States, education is the fault line, the great Continental Divide between those who will prosper and those who will not in the new economy.[1]

> Whether a society forgives its debtors and how it bestows or withholds forgiveness are more than matters of economic or legal consequence. They go to the heart of what a society values.[2]

I. INTRODUCTION

At first blush it may seem that, when juxtaposed, the two quotations above are wholly unrelated. The former suggests that the pursuit of higher education will bestow substantial economic benefit on an individual.[3] The latter evokes the image of financial failure by an

1. President William Jefferson Clinton, Address at Princeton University Graduation (June 4, 1996) (excerpts available in *Excerpts from Address to Princeton Graduates*, N.Y. TIMES, June 5, 1996, at B6, *available at* LEXIS, News Library, NYT File).

2. Bruce H. Mann, *Failure in the Land of the Free*, 77 AM. BANKR. L.J. 1, 1 (2003).

3. Congress ostensibly recognized the nexus between higher education and economic advancement when it amended the Bankruptcy Code's antidiscrimination provision to prohibit a governmental unit from denying an educational loan to an individual who has filed for bankruptcy. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 313, 108 Stat. 4106, 4140–41 (codified at 11 U.S.C.A. § 525(c) (West 2004 & Supp. I 2005)). This Article uses the terms "Bankruptcy Code" and "Code" interchangeably to refer to the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended primarily at 11 U.S.C.A. §§ 101–1532 and in scattered sections of 28

individual desperately in need of relief in the form of forgiveness of debt. What connects these seemingly disparate observations? In order to attain the higher education that has become increasingly important for financial success in our society, some individuals have inevitably mortgaged their future by incurring educational debt.[4] In the process, some have discovered that the financial rewards have not been commensurate with the costs of obtaining their education, and they have suffered financial distress as a result.[5]

Over the last several decades, the student loan program in this country has proliferated at an unprecedented level. Between 1991 and 1997, the federal student loan program more than doubled the amount of loans it guaranteed, from $13 billion to $30 billion per year.[6] New student loan volume generated by federal guaranteed and direct loan programs surpassed $33 billion in fiscal year 2000.[7] Americans have funded their pursuit of higher education by borrowing at a rate that has outpaced both the rise in college costs and growth in personal income.[8] Educational debt now represents the fourth-largest category of debt held by consumers.[9] In light of the considerations that follow, this phenomenon clearly has implications not only for the welfare of the individual, but also for the financial health of this country.

Simply put, we are a nation of consumers that lives on borrowed money: As of December 2005, the amount of consumer credit

U.S.C.). For further discussion regarding the Code's antidiscrimination provision, see *infra* note 39.

4. One court has gone so far as to liken the situation of one student loan debtor to that of an indentured servant. *See* Soler v. United States (*In re* Soler), 261 B.R. 444, 458 & n.12 (Bankr. D. Minn. 2001); *see also* James C. Hearn, *The Growing Loan Orientation in Federal Financial Policy: A Historical Perspective*, *in* CONDEMNING STUDENTS TO DEBT: COLLEGE LOANS AND PUBLIC POLICY 47, 47 (Richard Fossey & Mark Bateman eds., 1998) (noting that Senator Claiborne Pell, "a senator closely associated with the rise of federal student aid grants[,] has worried publicly that rising debt levels might be creating 'a new class of indentured servants'").

5. At least one bankruptcy court has expressly exhibited awareness that this is the dynamic that underlies a determination regarding the discharge of a debtor's student loans:

> As with any investment, many who pursue a college education are financially rewarded for their efforts. Every year there are students who graduate and are highly successful in their chosen career paths. Their stories fuel the ambitions of others who embark upon their own college careers and meet a far less pleasant—and less financially rewarding—reality.

Salinas v. United Student Aid Funds, Inc. (*In re* Salinas), 240 B.R. 305, 308–09 (Bankr. W.D. Wis.), *rev'd*, 262 B.R. 457 (W.D. Wis. 1999).

6. Richard Fossey, *The Dizzying Growth of the Federal Student Loan Program*, *in* CONDEMNING STUDENTS TO DEBT, *supra* note 4, at 7, 8, 10–11.

7. Adam Stoll, *Federal Student Loans: Program Data and Default Statistics*, *in* FEDERAL STUDENT LOANS 1, 1 (Tatiana Shohov ed., 2004).

8. Fossey, *supra* note 6, at 10.

9. *Id*.

outstanding in the United States exceeded $2.1 trillion.[10] Not surprisingly, consumer spending undergirds our economy.[11] Given this state of affairs, each individual will inevitably owe at some point (if not always) money to a creditor, although the individual will more likely owe many creditors rather than just one. Some individuals will ultimately find themselves with too many debts and insufficient income to pay them. When this occurs, federal bankruptcy law offers refuge and respite from economic failure.[12]

More and more individuals seek bankruptcy relief every year as evidenced by the explosion in nonbusiness bankruptcy filings over the past decade—precisely 12,644,305 filings during the ten-year period beginning January 1, 1994 and ending December 31, 2003.[13] In the calendar year ending December 31, 1996, total bankruptcy filings surpassed the one million mark for the first time in our nation's history.[14] Of those filings, approximately 95% constituted nonbusiness bankruptcy filings.[15] Seven years later, nonbusiness bankruptcy filings

10. *See* FEDERAL RESERVE STATISTICAL RELEASE NO. G.19 (CONSUMER CREDIT), BD. OF GOVERNORS OF THE FED. RESERVE SYS. (Dec. 7, 2005), *available at* http://www.federalreserve.gov/releases/g19/Current/g19.pdf. The Federal Reserve Board defines "consumer credit" to include "most short- and intermediate-term credit extended to individuals, excluding loans secured by real estate." *Id*. at 2 n.1.

11. *See* Edmund L. Andrews, *Job Growth Down Sharply from Pace Set in October*, N.Y. TIMES, Dec. 4, 2004, at C1 (noting that consumers "have been the driving force of [U.S. economic] growth for the last four years"); Steve Lohr, *Maybe It's Not All Your Fault*, N.Y. TIMES, Dec. 5, 2004, § 4 (Week in Review), at 1 ("[T]he United States economy depends on its citizens' penchant for spending with abandon. Consumer spending accounts for two-thirds of the nation's $11 trillion economy.").

12. In the recommendations set forth in the report issued in 1973 by the Commission on the Bankruptcy Laws of the United States (respectively, the 1973 Commission Report and the Bankruptcy Act Commission), *see* Pub. L. No. 91-354, 84 Stat. 468 (1970) (establishing the Bankruptcy Act Commission to analyze and evaluate our then-existing system of bankruptcy administration and to suggest recommendations for its reform), the Bankruptcy Act Commission took the view that "increase in bankruptcy filings is a natural if not inevitable result of the increased availability of consumer credit in this country." REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 9 (1973). The legislative history of the Bankruptcy Code further echoes this concept in greater detail. *See* H.R. REP. NO. 95-595, at 116 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6076–77; *see also* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 22–23 (2000) ("[C]onsumer debt has lowered many middle-class families' threshold for financial collapse. High consumer debt loads increase families' vulnerability to every other problem—job, medical, divorce, housing—that befalls them. . . . A growing consumer debt burden means a shrinking buffer against financial disaster.").

13. *See* U.S. Courts, Bankruptcy Statistics, http://www.uscourts.gov/bnkrpctystats/statistics.htm #calendar (last visited Oct. 24, 2005) (providing statistics for bankruptcy filings by calendar year and fiscal year, among others).

14. *See* Press Release, Admin. Office of the U.S. Courts, Calendar Year Shows Bankruptcy Filings Up 27 Percent Over 1995 (Mar. 18, 1997), *available at* http://www.uscourts.gov/pressrel/bk1296.htm (last visited Oct. 24, 2005).

15. *See id*. (1,124,006 nonbusiness filings out of 1,178,555 total filings). Given the methodology implemented by the Administrative Office of the United States Courts in counting the number of

alone during the calendar year period ending December 31, 2003, amounted to 1,625,208 and represented approximately 98% of total filings.[16]

Based on data from an empirical study of debtors who filed for bankruptcy in 1991 in sixteen judicial districts across five different states, Professors Sullivan, Warren, and Westbrook have characterized bankruptcy law as a mechanism that, with respect to consumer debtors, addresses deficiencies in social insurance benefits—for example, those related to health care and unemployment—with the result that bankruptcy law functions as a social safety net preventing complete financial collapse of the consumer debtor.[17] Of increasing concern has been the notion that deficiencies in the student loan system, including the manner in which such funding is allocated, may adversely affect individuals who participate in it.[18] Notwithstanding the absence of empirical data regarding judicial treatment of educational debt within the bankruptcy system, many have been quick to criticize, on the basis of what can only be characterized as abstract generalizations and intuitive hunches, the current state of the law providing that educational debt cannot be discharged absent a showing by the debtor that excepting

nonbusiness bankruptcy filings, the figure provided may actually underreport the number of *individuals* who seek bankruptcy relief. KAREN GROSS, FAILURE AND FORGIVENESS 76–78 (paperback ed. 1999); Elizabeth Warren, *Bankrupt Children*, 86 MINN. L. REV. 1003, 1007–08 & 1007 n.9 (2002).

16. *See* News Release, Admin. Office of the U.S. Courts, Bankruptcy Filings Up for Calendar Year: Total for Year Misses Historic High (Feb. 25, 2004), *available at* http://www.uscourts.gov/Press_Releases/pr02252004.pdf. (last visited Oct. 24, 2005).

17. *See* SULLIVAN ET AL., *supra* note 12, at 7, 75–107, 141–71. Professors Jacoby, Sullivan, and Warren have argued elsewhere that our health care finance system leaves hundreds of thousands of middle-class families in financial distress each year. Melissa B. Jacoby, Teresa A. Sullivan & Elizabeth Warren, *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375 (2001).

18. Observing that the dramatic rise in the cost of higher education has placed a financial strain on both families and individuals, Sullivan, Warren, and Westbrook ultimately suggest that "[t]he long-term effects of student loans may be an important and growing source of middle class financial strain that is only beginning to become apparent." SULLIVAN ET AL., *supra* note 12, at 251–52; *see also* Steve Lohr, *The Nation: 'Ka-Ching'; Maybe It's Not All Your Fault*, N.Y. TIMES, Dec. 5, 2004, § 4 (Week in Review), at 1 (noting that "rising costs of necessities like education and housing" may be the root of the overindebtedness suffered by consumers in America). The concern over the burden of educational debt on individuals has been so pervasive that it infused its way into the political rhetoric expressed on the eve of the 2004 presidential election. Editorial, *The 2004 Campaign: On the Trail; Kerry Promises a Fresh Start; Bush Looks Ahead to a Second Term*, N.Y. TIMES, Oct. 30, 2004, at A13 ("'In four days, a young woman is going to pick up her ballot and she's going think [sic] about her future. She's going to wonder whether she's going to be able to find a good job that's going to pay off her college loans when she graduates.'" (quoting Sen. John Kerry)). In their analysis of the various financial factors that prompt individuals to file for bankruptcy, Sullivan, Warren, and Westbrook were unable to address the effect of educational debt because of the infrequency with which it appeared in their data. SULLIVAN ET AL., *supra* note 12, at 251.

the debt from discharge will impose an undue hardship.[19] As of this Article, only one study attempted to explore application of the undue hardship standard in a comprehensive manner.[20]

This Article seeks to shift the debate over undue hardship from one of abstraction to a more informed evaluation of educational debt discharge based on a substantive set of data. It draws from the information reported in 261 undue hardship opinions issued by bankruptcy courts within the ten-year period beginning on October 7, 1993 and ending on October 6, 2003.[21] It should be noted from the outset that, because the sample of opinions studied for this Article constitutes a nonrandom sample, the findings derived from the data purport to be statistically

19. *See* 11 U.S.C.A. § 523(a)(8) (West 2004 & Supp. I 2005). For example, in expressing doubt whether the test applied by courts to determine the presence of undue hardship ultimately affects the outcome, a pair of commentators has remarked that "[m]ost courts find that the debtor has not established undue hardship." Darrell Dunham & Ronald A. Buch, *Educational Debts Under the Bankruptcy Code*, 22 MEM. ST. U. L. REV. 679, 702 (1992). To support that proposition, the authors cited thirteen decisions—one from a federal court of appeals and twelve from bankruptcy courts. *See id*. at 702 n.127. In similar fashion, the National Bankruptcy Review Commission, which was charged by Congress in 1994 to evaluate the functioning of the Bankruptcy Code (the 1994 Commission), *see* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 603, 108 Stat. 4106, 4147, stated in its final report that, "in practice, nondischargeability [of educational debt] has become the broad rule with only a narrowly construed undue hardship discharge." 1 NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 211 (1997). The 1994 Commission cited only four decisions published by federal courts of appeal for its broad assertion. *See id*. at 211 n.530. Two of the four cases cited were from the same circuit. *See id*. More recently, a front-page article appearing in the *Wall Street Journal*, with one of its headings entitled "No Breaks in Bankruptcy Court," asserted that a 1998 revision to the Bankruptcy Code has "made it *extremely difficult* for people to escape student loans through personal bankruptcy," and that the standard is a "*very hard test to meet*." John Hechinger, *U.S. Gets Tough on Failure to Repay Student Loans: Education Department Wields Heavy Hand, Critics Say, in Some Hard-Luck Cases*, WALL ST. J., Jan. 6, 2005, at A1 (emphasis added); *see also* Robert F. Salvin, *Student Loans, Bankruptcy and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans*?, 71 TUL. L. REV. 139, 143 (1996) (arguing that the "undue hardship exception should be interpreted more leniently, in a manner consistent with the Bankruptcy Code's overall goal of providing debtors a fresh start and freedom from oppressive debt"); Jennifer L. Frattini, Note, *The Dischargeability of Student Loans: An Undue Burden?*, 17 BANKR. DEV. J. 537, 566 (2001) (stating that the "majority of courts dealing with the dischargeability of educational loans have strictly construed the undue hardship standard in a manner that is extremely unfavorable to debtors bearing student loans").

20. Richard Fossey, *Are Bankruptcy Courts Creating "the Certainty of Hopelessness" for Student Loan Debtors: Examining the "Undue Hardship" Rule*, *in* CONDEMNING STUDENTS TO DEBT, *supra* note 4, at 161. The author of the study reviewed forty-four decisions that had been published in West's *Bankruptcy Digest* during the four-year period beginning in 1990 and ending in 1993. *Id*. at 172. While the author suggested that a review of such decisions would help portray the type of debtor who seeks relief from educational debt through bankruptcy, *id*. at 171, he did not set forth any data, with the exception of the statistic that only nine of the forty-four decisions granted full discharge, *id*. at 172, to support the conclusion that "most courts have interpreted the Bankruptcy Code's 'undue hardship' provision too harshly and without compassion," *id*. at 162.

21. This Article defines "issued opinions" as those disseminated to the electronic database Westlaw, irrespective of whether those decisions were ultimately published in a reporting service, such as *West's Bankruptcy Reporter*. The Appendix lists the sample of issued opinions analyzed in this Article.

relevant *only* with regard to those undue hardship opinions analyzed.[22] These findings serve to test and reconsider certain assumptions that have evolved regarding the undue hardship discharge and to raise awareness of the general issues that pervade that particular context. By focusing on the circumstances that inform undue hardship determinations, our hope is to generate a better understanding of process and outcome to conclude whether formulation of the law has been a success or failure. The data are implemented not only to test the accuracy of broad assertions made by commentators regarding the discharge of educational debt,[23] but also, and more importantly, to spark dialogue over the appropriate form of conditional discharge—to the end of ensuring proper calibration of debtor relief.

A concern arises that Congress's failure to define undue hardship, the requisite condition for discharge of educational debt, has resulted in a fragmentation of debtor relief—that is, inconsistent and unprincipled application of the standard by bankruptcy courts. Bemoaning the fact that Congress did not define undue hardship,[24] courts have devised a variety of tests aimed at implementing the standard in a more "rule-like" fashion.[25] Because these tests do not mirror one another, however, the natural result has been disparity in approaches to the same legal issue, which has caused concern by courts.[26] The question arises whether such disparity undermines the cohesiveness of the federal bankruptcy system by producing inconsistent results.[27] To expect a perfectly functioning

22. *See infra* Part III.A. For a general discussion on population identification and sampling, see NOREEN L. CHANNELS, SOCIAL SCIENCE METHODS IN THE LEGAL PROCESS 82–115 (1985).

23. *See supra* notes 19–20 and accompanying text.

24. *See, e.g.*, Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 191 (Bankr. W.D. Tex. 2001) ("As an additional irritation, the statute Congress crafted gives the Courts absolutely no guidance as to what would constitute 'undue hardship' other than a Webster's dictionary.").

25. *See, e.g.*, Grigas v. Sallie Mae Servicing Corp. (*In re* Grigas), 252 B.R. 866, 874 n.8 (Bankr. D.N.H. 2000) (proclaiming that, by adopting the *Brunner* test for undue hardship, "this Court strives to create uniformity within this district in an effort to foster predictability and avoid the unseemliness that flows from outcomes being dependent on the random assignment of a case to a judge"). A discussion of the various tests devised by courts is set forth in *infra* Part III.C.2.a.

26. *See, e.g.*, Andresen v. Neb. Student Loan Program, Inc. (*In re* Andresen), 232 B.R. 127, 129 (B.A.P. 8th Cir. 1999); Mathews v. Higher Educ. Assistance Found. (*In re* Mathews), 166 B.R. 940, 943 (Bankr. D. Kan. 1994); Sands v. United Student Aid Funds, Inc. (*In re* Sands), 166 B.R. 299, 303 (Bankr. W.D. Mich. 1994).

27. Professor Girth has noted that this was one of the animating concerns that resulted in repeal of the Bankruptcy Act of 1898 through enactment of the Bankruptcy Code. *See* Marjorie L. Girth, *A Response to* The New Economics of the American Family, 12 AM. BANKR. INST. L. REV. 59, 60 (2004); *see also* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 4 (1973) (noting that "lack of uniform standards creates many variations in district court practices, and they, in turn cause unequal treatment of creditors and debtors"). There is no reason that this should not remain a motivating concern today that focuses and informs the manner in which we evaluate the system.

system would, of course, be unrealistic. There will be slight variations and even aberrations. Nonetheless, the system should ultimately strive to promote uniform results. If, however, disparate treatment is the norm as a result of the bankruptcy court that handles the debtor's case, then we only have a uniform law in form and not in substance.[28]

Ultimately, our aim is to provide an account that will contribute to a better understanding and explanation of judicial behavior and legal outcome in the context of educational debt relief. Part II begins with a brief overview of the fresh start policy in bankruptcy and the manner in which the Bankruptcy Code implements and effectuates it. Discussion then shifts to the status of educational debt in bankruptcy. Part III presents the findings of this study. Part III.A briefly discusses the methodology by which undue hardship opinions were selected for analysis. Part III.B presents the findings of this study as a general portrait of the type of individual who seeks to have his or her student loans discharged in bankruptcy and concludes that the data do not evidence abuse of the bankruptcy system by student loan debtors. Part III.C documents the manner in which bankruptcy courts have adjudicated determinations regarding the dischargeability of educational debt in order to assess whether the law has treated such debtors uniformly. It compares the demographic and financial characteristics of debtors who have received an undue hardship discharge and those who have not. It also traces the doctrinal factors stemming from the judicial tests applied by courts before which such debtors appear and forming the basis for a court's legal disposition. Analysis of the data from this perspective reveals that those debtors granted a discharge and those denied a discharge predominantly resemble one another and that there are few statistically significant differences in the factual circumstances of the two groups. Instead, the manner in which courts *perceive* the law to apply to these similarly situated debtors best accounts for the outcome of the discharge determinations made by courts in this study. Part IV marshals statutory arguments regarding how the law ought to be applied, and it prescribes judicial reform to achieve uniform treatment of student loan debtors.

This Article concludes in Part V with some initial reflections on the form of conditional discharge in consumer bankruptcy. Part and parcel of the debtor-creditor adversarial process, undue hardship

28. One student commentator has reached this conclusion with little empirical support. Robert B. Milligan, Comment, *Putting an End to Judicial Lawmaking: Abolishing the Undue Hardship Exception for Student Loans in Bankruptcy*, 34 U.C. DAVIS L. REV. 221, 268 & n.316 (2000) (arguing that "[d]isparate judicial values have created inconsistent determinations of what constitutes undue hardship," and citing two opinions for that proposition).

determinations are fundamentally stories fraught with the subtleties and complexities of economic and noneconomic hardship suffered by individuals.[29] Our society has fashioned a law that grants relief from such hardship only if it reaches a particular threshold, and it has relied on courts to define that threshold. We hope our findings will introduce the following question to the debate: How might we, as society, prefer judges to implement the fresh start policy in bankruptcy—through a rule that divests a judge of most of his or her discretion or through a standard that heightens the degree of discretion exercised? Put another way, we should ask ourselves the extent to which a court ought to be granted control over the discharge of educational debt in bankruptcy.

II. ON THE DISCHARGE OF EDUCATIONAL DEBT IN BANKRUPTCY

This Part begins with a discussion of the policy of granting a debtor an economic fresh start by means of the discharge in bankruptcy and thereafter describes the manner in which the Bankruptcy Code implements such relief. This functional description serves as a backdrop for introduction of the concept of the conditional discharge of educational debt in bankruptcy. In order to contextualize the manner in which courts have often applied the law, based on their interpretation of Congress's objectives in making student loans conditionally dischargeable, Part II.B provides an account of the legislative history of the Bankruptcy Code's educational debt dischargeability provision. Part II.C concludes with a critique of the provision's policy objectives and suggests that some courts have blindly embraced those objectives without considering whether they should inform the meaning and application of the law.

A. The Fresh Start Principle

Two principles generally provide the metric against which bankruptcy law and policy are tested for their soundness: (1) a fresh start for the debtor (the fresh start principle) and (2) equal treatment of similarly

29. *See* Lohr v. Sallie Mae (*In re* Lohr), 252 B.R. 84, 90 (Bankr. E.D. Va. 2000) ("A survey of the facts behind the case law regarding § 523(a)(8) reveals many heart rendering stories. This case is no exception."); Harris v. Unipac Serv. Corp. (*In re* Harris), 198 B.R. 190, 192 (Bankr. W.D. Va. 1996) ("Every case that enters this Court with debts and dischargeability issues, including student loan debts, are all reflections of some imperfection of the lives of people and are not circumstances which are necessarily deliberately contrived. These imperfections arise out of such things as medical illnesses, unemployment, and increased expenses due to domestic separations and problems."), *vacated*, N. 95-2505, 1997 WL 712940, at *2 (Nov. 17, 1997).

situated creditors (the equality principle).[30] The fresh start principle captures the notion that substantive relief should be afforded in the form of forgiveness of existing debt, with relinquishment by the debtor of either existing nonexempt assets or a portion of future income, in order to restore the debtor to economic productivity.[31] The equality principle, on the other hand, accords procedural relief to creditors in the form of an orderly, collective process that administers the assets of a debtor to its creditors as a response to the common pool problem that arises when a debtor has insufficient assets to repay his or her debts.[32] Although these principles have been characterized to be inherently at odds with one

30. For example, Professor Jackson has identified the fresh start principle and the equality principle as "first principles" that establish a "normative view of bankruptcy law [that] can then be contrasted with the Bankruptcy Code as enacted to see whether and to what extent the existing regime follows the path the principles suggest is the proper one." THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 2–4 (1986). The legislative history to the Bankruptcy Code references both these principles. *See* S. REP. NO. 95-989, at 7 (1978) (fresh start principle), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5793; H.R. REP. NO. 95-595, at 177–78 (1977) (equality principle), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6138. Both the Code's legislative history and commentators often refer to "equality of distribution" as one of the primary goals of bankruptcy law. *See, e.g.*, *id.* at 178, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6138; Lawrence Ponoroff, *Exemption Impairing Liens Under Bankruptcy Code Section 522(f): One Step Forward and One Step Back*, 70 U. COLO. L. REV. 1, 1 (1999); Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 AM. BANKR. L.J. 483, 483 (1997). However, given that certain provisions of the Code (1) arrange creditors into distinct classes for purposes of ascertaining priority entitlement to distribution of assets from property of the debtor's estate, *see, e.g.*, 11 U.S.C.A. § 726(a) (West 2004 & Supp. I 2005), and (2) maintain that ordered priority in a variety of contexts, *see*, *e.g.*, 11 U.S.C. §§ 1129(a)(7), 1325(a)(4) (2000), with the result that there will be *no distribution* to creditors who find themselves classified below a class for which there are inadequate funds to pay its members in full, a more apt characterization is "equal treatment of similarly situated creditors." *See* Rafael I. Pardo, *On Proof of Preferential Effect*, 55 ALA. L. REV. 281, 283 n.11 (2004); *see also* Melissa B. Jacoby, *The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking*, 78 AM. BANKR. L.J. 221, 222 (2004) (referring to "equal treatment of similarly-situated creditors" as one of the "oft-cited substantive goals of bankruptcy").

31. A debtor who files for Chapter 7 relinquishes all property in which he or she had a "legal or equitable interest" prior to filing except property that can be claimed as exempt. *See* 11 U.S.C. § 541(a)(1) (providing that commencement of a case creates an estate consisting of "all legal or equitable interests of the debtor in property as of the commencement of the case"); 11 U.S.C.A. § 704(a)(1) (requiring trustee to "collect and reduce to money the property of the estate"); *id.* § 726(a) (providing for distribution of property of the estate to unsecured creditors); *id.* § 522(b) (allowing debtor to exempt certain property from property of the estate). On the other hand, a debtor who files for Chapter 13 retains all property of the estate (as defined *supra*) but must devote future income for repayment to creditors. *See* 11 U.S.C. § 1306(b) (stating that "[e]xcept as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate"); *id.* § 1327(b) (providing that confirmation of debtor's repayment plan "vests all of the property of the estate in the debtor"); *id.* § 1322(a)(1) (requiring debtor's repayment plan to "provide for the submission of all or such portion of future earnings or other future income of the debtor . . . as is necessary for the execution of the plan").

32. See JACKSON, *supra* note 30, at 7–19, for a comprehensive analysis of the role of bankruptcy law as a "collective debt-collection device," *id*. at 5.

another,[33] they are not. The amount of debt that bankruptcy law forgives is wholly unrelated to the distributional treatment afforded to creditors according to the status of their claims.[34] The two principles can be viewed as distinct goals of bankruptcy law that peacefully coexist.[35] Accordingly, any modification to the fresh start principle does not encroach upon the equality principle.[36] Any discussion on bankruptcy reform should not overlook this point.

The fresh start principle has been codified in the Bankruptcy Code in its various discharge provisions. The discussion from this point forward, unless noted otherwise, discusses discharge within the Chapter 7 context (as opposed to the Chapter 13 context)—in large part because the Chapter 7 discharge undeniably has greater applicability.[37] With certain exceptions, the discharge in bankruptcy releases an individual debtor from personal liability on prebankruptcy debts.[38] It is the *sine*

33. *See* Ponoroff, *supra* note 30, at 1; Warren, *supra* note 30, at 483.

34. *See* JACKSON, *supra* note 30, at 225. Furthermore, the amount of property a debtor can claim as exempt could conceivably impact the equality principle, but only in the most narrow and unimaginable circumstance—namely, if bankruptcy law one day were to provide that *all* property of the debtor's estate could be claimed by the debtor as exempt. In such a world, there would never be any property to be distributed for the benefit of unsecured creditors with the result that no role would exist for the equality principle. Note, however, that a law that would effectuate such a change would relate not to the amount of debt forgiven by bankruptcy law, but rather would relate to the amount of exemptions to which the debtor is entitled to effectuate the fresh start. In the end, provided the possibility exists of some distribution to creditors exists—regardless of the amount—the equality principle remains unaffected by the fresh start principle.

35. In fact, certain Code provisions further both the fresh start principle and the equality principle. One example is that of the automatic stay, which enjoins certain actions—including creditor collection efforts—against the debtor, property of the debtor, and property of the debtor's estate. *See* 11 U.S.C.A. § 362(a). Not only does the automatic stay demarcate the debtor's fresh start from his or her past financial situation, it also acts as a stabilizing force that safeguards the equality principle by preventing a creditor from satisfying its claim to the detriment of others. *See* H.R. REP. NO. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296–97.

36. On the other hand, the fresh start principle and its implementation have the natural effect of reducing the recovery by creditors on account of their prebankruptcy claims against the debtor. Any property that bankruptcy law allows the debtor to claim as exempt reduces the distribution to unsecured creditors in bankruptcy. *See supra* note 31. Furthermore, a discharge of prebankruptcy debt precludes a creditor from seeking repayment from the debtor postbankruptcy on account of that debt. *See* 11 U.S.C.A. § 523(a). The fresh start principle and a principle of maximizing creditor recovery are thus inversely related such that enlargening the reach of one necessitates narrowing the scope of the other. For a "normative theory of bankruptcy law that views the core role of bankruptcy law as the maximization of recoveries for those with nonbankruptcy legal entitlements relating to financially distressed debtors," see Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931, 934 (2004).

37. This is evidenced, for example, by a comparison of total nonbusiness filings under Chapter 7 and under Chapter 13 during the 2003 calendar year. *See* News Release, *supra* note 16, tbl.F-2 (listing 1,156,274 nonbusiness Chapter 7 filings and 467,999 nonbusiness Chapter 13 filings).

38. *See*, *e.g.*, 11 U.S.C. § 727(b) (2000); 11 U.S.C.A. § 1328(a).

qua non of the debtor's fresh start,[39] and it represents the consensus that society should in fact forgive its debtors' financial obligations.[40] Perhaps the most remarkable aspect of the bankruptcy discharge is that a debtor who has been deemed eligible for both bankruptcy relief and discharge relief will automatically be granted a discharge without any inquiry by the court. Bankruptcy eligibility rules define whether an individual may be a debtor under a particular chapter of the Bankruptcy Code, and accordingly whether the debtor may be extended the full array of debtor relief afforded by the Code's operative provisions.[41] On the other hand, discharge eligibility rules define whether a debtor who has already been deemed eligible for bankruptcy relief is also entitled to relief in the form of discharge of debt. Unless the debtor falls within a particular class of individual, generally defined by reference to a limited set of circumstances that relate to debtor fraud or misconduct in

39. We take the view that the discharge in bankruptcy by itself constitutes the fresh start. Other provisions of the Code that relate to the fresh start do so in the sense of its implementation and protection. An example of implementation of the fresh start is the debtor's ability to claim certain property as exempt, *see* 11 U.S.C.A. § 522(b), which provides the debtor no longer burdened with past debts the means to support himself or herself with the aim that the fresh start have longevity and vitality. Examples regarding protection of the fresh start include (1) the discharge injunction which enjoins postbankruptcy debt collection efforts by creditors with respect to discharged debts, *see* 11 U.S.C. § 524(a)(2); *see also In re* Latanowich, 207 B.R. 326, 334 (Bankr. D. Mass. 1997) ("The purpose of the permanent injunction set forth at § 524(a)(2) . . . is to effectuate one of the primary purposes of the Bankruptcy Code: to afford the debtor a financial 'fresh start.'"); and (2) the Code's antidiscrimination provision that prohibits discrimination both during and after a bankruptcy case against the debtor by governmental units, private employers, and governmental units and private entities that operate student loan programs on the basis that the debtor either sought bankruptcy relief, was insolvent, or did not pay a discharged debt, *see* 11 U.S.C.A. § 525; *cf.* Douglass G. Boshkoff, *Fresh Start, False Start or Head Start?*, 70 IND. L.J. 549, 549 (1995) (describing Code's prohibition against debtor discrimination as one of the "three primary components" of the debtor's fresh start).

40. This has not always been the case. Originally, bankruptcy law served as a creditor's collection tool rather than as a forum for relief from oppressive debt. *See* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325 (1991). It was the Bankruptcy Act of 1898, Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978), that marked the dawn of a new era where bankruptcy came to be viewed primarily as a law favorable to the debtor. *See* Tabb, *supra*, at 365.

41. *See* 11 U.S.C. § 109(a) (defining who may be a debtor under the Bankruptcy Code); 11 U.S.C.A. § 109(b) (providing that anyone may be a debtor under Chapter 7 except for three classes of individuals). Even though the ultimate substantive relief sought by the debtor is discharge, a bankruptcy filing immediately effectuates relief for the debtor by staying, among other things, creditor collection efforts. *See id.* § 362(a). The breathing room provided to the debtor by the automatic stay represents the first step in relieving the debtor of the financial pressures that prompted the seeking of bankruptcy relief. *See* H.R. REP. NO. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296–97. The Bankruptcy Code's provision regarding dismissal of a debtor's Chapter 7 case on the basis of abuse further augments the Code's bankruptcy eligibility rules by deeming certain cases to be improperly adjudicated and administered under that chapter. *See* 11 U.S.C.A. § 707(b)(1). Dismissal restores the status quo ante by revesting property of the estate back to the debtor, *see* 11 U.S.C. § 349(b)(3), and extinguishing the protection afforded to the debtor by the automatic stay, *see* 11 U.S.C.A. § 362(c)(2)(B).

connection with the bankruptcy case, the Bankruptcy Code establishes a hard-and-fast rule that *requires* a court to grant an individual debtor a discharge.[42] Thus, the general approach to bankruptcy discharge assigns a limited monitoring function to the court and does not invite inquiry as to whether a debtor's particular circumstances warrant forgiveness of debt.[43]

The most expansive form of discharge would provide for release from all prebankruptcy debts notwithstanding the identity of the claimants to whom such debts are owed or the circumstances under which such debts were incurred.[44] The current state of the law, however, does not afford such generous treatment to debtors. Rather, the scope of discharge relief has been curtailed to exclude release of the debtor from personal liability for certain debts. In effect, society has determined that a debtor's fresh start should not be absolute: Our interest in the repayment of certain types of debts outweighs our interest in forgiving debtors.[45] Thus, certain debts have been specifically excepted from discharge—for example, debt in the nature of domestic support, as well as certain tax debts.[46] Over time, this list of debts has grown longer and longer to account for specific types of creditors and circumstances.[47]

Any exception to discharge, of course, encroaches upon the fresh start

42. *See* 11 U.S.C.A. § 727(a) (setting forth grounds for denial of Chapter 7 discharge). Even if one of the grounds for denial of discharge set forth in the Bankruptcy Code exists, failure of a party in interest to file a complaint objecting to discharge within the time allotted by the Federal Rules of Bankruptcy Procedure precludes denial of the discharge, unless procedural considerations—such as an extension of the time for filing a complaint objecting to discharge or a pending motion to dismiss the debtor's case—warrant otherwise. *See* FED. R. BANKR. P. 4004(c)(1); *In re* Harmon, 324 B.R. 383, 386–87 (M.D. Fla. 2005). A court may revoke the discharge granted to the debtor, however, if obtained fraudulently and if the requesting party lacked knowledge of the fraud when the discharge was originally granted. 11 U.S.C. § 727(d)(1).

43. *See* Robert A. Hillman, *Contract Excuse and Bankruptcy Discharge*, 43 STAN. L. REV. 99, 128 (1990); Tabb, *supra* note 40, at 363.

44. *See infra* note 47.

45. *See* Cazenovia Coll. v. Renshaw (*In re* Renshaw), 222 F.3d 82, 86 (2d Cir. 2000); 1 NAT'L BANKR. REV. COMM'N, *supra* note 19, at 179–80. Inherent in a bankruptcy system that excepts certain debts from discharge is a belief in a debtor's ability to repay his or her prebankruptcy creditors from postbankruptcy earnings and assets. *See* Douglass G. Boshkoff, *Limited, Conditional and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69, 89 (1982).

46. 11 U.S.C.A. § 523(a)(1), (a)(5).

47. A nondischargeable debt will generally be characterized as such on the basis of creditor status or the circumstance that gave rise to the obligation. *See* Boshkoff, *supra* note 45, at 89 n.99. A bankruptcy policy of this nature essentially focuses on the worthiness of the debt or the claimant. *See* Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1057–59 (1987); *see also* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS 293 (reprint ed. 1999) ("Sporadic policy discussions of special treatment for certain creditors focus almost exclusively on the sympathetic circumstances of a particular creditor . . . .").

principle,[48] and the threat looms that, when such incursion is overextensive, the debtor will fail to reintegrate into society as an economically productive individual.[49] Should this threat materialize, the debtor will remain a burden to society thus defeating the purpose of filing for bankruptcy in the first instance. Curiously, the Bankruptcy Code addresses this concern only with respect to educational debt by providing a means for release from personal liability if the debtor can demonstrate that undue hardship will result from continued obligation to repay the debt.[50] Although the Bankruptcy Code provision relating to educational debt is found in the section of the Code that sets forth *nondischargeable* debts,[51] this provision is instead properly characterized as a species of *conditional* discharge whereby the debt will be discharged upon the satisfaction of a certain condition.[52] The notion

48. The Bankruptcy Act Commission recognized this in its study of the bankruptcy laws then in effect. *See* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 3–4 (1973).

49. This consideration generally warrants narrow tailoring of the exceptions to discharge. *See In re* Pelokowski, 990 F.2d 737, 744 (3d Cir. 1993); Snoke v. Riso (*In re* Riso), 978 F.2d 1151, 1154 (9th Cir. 1992).

50. 11 U.S.C.A. § 523(a)(8); *see also* Ivory v. United States (*In re* Ivory), 269 B.R. 890, 912 (Bankr. N.D. Ala. 2001) ("But, as a society we have decided that we are not going to demand certain levels of sacrifice, at least with regard to payment of student loans." (emphasis omitted)); Windland v. U.S. Dep't of Educ. (*In re* Windland), 201 B.R. 178, 181 (Bankr. N.D. Ohio 1996) (noting that "policy choice" reflected in Code § 523(a)(8) to favor repayment of educational debt obligations over debtor's fresh start "is tempered by the 'undue hardship' exception"); Heckathorn v. United States *ex rel.* U.S. Dep't of Educ. (*In re* Heckathorn), 199 B.R. 188, 196 (Bankr. N.D. Okla. 1996) (stating that "[t]he policy underlying [Code] § 523(a)(8)[] is dual" and that "[i]t requires accommodating *both* the discharge of debt in furtherance of debtor's 'fresh start' *and* the exception from discharge of student loan debts which may be repaid"). Until recently, the Bankruptcy Code also extended conditionally dischargeable status to property settlement debt incurred in connection with a separation or divorce decree (nonsupport domestic-relations debt). The debtor could discharge nonsupport domestic-relations debt if the debtor either (1) proved an inability to pay the debt "from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor," or (2) demonstrated that the benefits of discharge to the debtor would outweigh the detrimental consequences to the debtor's former spouse or child. 11 U.S.C. § 523(a)(15)(A), (B) (2000) (amended 2005). However, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 amended the provision such that nonsupport domestic-relations debt is now nondischargeable. Pub. L. No. 109-8, § 215, 119 Stat. 23, 54 (codified at 11 U.S.C.A. § 523(a)(15)). Accordingly, educational debt stands as the last bastion of conditional discharge in the Chapter 7 context. In the Chapter 13 context, the two types of discharge available to a debtor can be characterized as conditional discharges since neither will be granted until the debtor has satisfied certain conditions. *See* 11 U.S.C.A. § 1328(a) (requiring completion of all payments proposed in debtor's repayment plan as a condition to discharge); *id.* § 1328(b) (allowing court to grant discharge if debtor failed to complete payments proposed in repayment plan, but only if certain conditions satisfied, including that the debtor's failure to complete payments have been due to circumstances for which debtor should not be held accountable).

51. 11 U.S.C.A. § 523.

52. *See* Boshkoff, *supra* note 45, at 73–74 (defining conditional discharge rules and noting that Code § 523(a)(8) qualifies as such a rule since "it invites the court to look at the earning power of the debtor and to decide whether some or all of the loan can be repaid out of future earnings").

of conditional discharge stands in stark contrast to our historical tradition of not incorporating conditional discharge rules into the law of bankruptcy.[53] The significance of the discretion afforded by the Code's undue hardship discharge provision is that it provides a bankruptcy judge the opportunity to determine whether the educational debt in question should be forgiven.[54] This exercise of discretion is the focus of this Article. To fully understand judicial application of the law, a discussion of its origins and evolution is necessary.

B. The Stereotype of the Abusive Student Loan Debtor

Stereotype has dominated the genesis, evolution, and application of the law that makes educational debt conditionally dischargeable. In their seminal study debunking the persistent stereotype that bankruptcy is a lower-class phenomenon, Professors Sullivan, Warren, and Westbrook made the following observations regarding the role of stereotype:

> Most stereotypes originate from a kernel of truth, but that kernel becomes so overwrapped with layers of myth that the stereotype often outgrows or outlives the underlying reality. Stereotypes are durable because they help people reduce their uncertainty about the world; dealing in stereotypes can save the energy required to consider complex realities. When the uncertainties involve risks that are unpleasant to contemplate, the temptation to characterize that risk in terms of stereotypes is even greater.[55]

Those same observations transcend into the world of student loan borrowers who find themselves in bankruptcy. We now trace the origins of the stereotype and how that stereotype became entrenched.

1. The Genesis and Evolution of Bankruptcy Code § 523(a)(8)

Prior to 1976, a debtor could obtain a discharge of educational debt in bankruptcy. Although the scope of discharge excluded certain types of debt, student loans were dischargeable.[56] What, then, prompted Congress to change this state of affairs? The answer to that question begins with a discussion of the report issued in 1973 by the Commission

53. *See id*. at 73.

54. *See* Tabb, *supra* note 40, at 363 & n.315 (noting that undue hardship discharge stands as "principal exception" to bankruptcy court's limited control over discharge).

55. SULLIVAN ET AL., *supra* note 12, at 33.

56. *See* 11 U.S.C. § 35(a) (1976) (listing debts unaffected by discharge and making no mention of educational debt) (repealed 1978).

on the Bankruptcy Laws of the United States (the 1973 Commission Report and the Bankruptcy Act Commission, respectively).[57] Congress established the Bankruptcy Act Commission in 1970 to analyze and evaluate the then-existing system of bankruptcy administration, the Bankruptcy Act of 1898 (the Bankruptcy Act),[58] and to suggest recommendations for its reform.[59] Until passage of the Bankruptcy Act, all federal bankruptcy legislation had been short lived and had been oriented as a creditors' collection remedy.[60] The Bankruptcy Act, however, marked "the arrival of the 'modern' American pro-debtor discharge policy,"[61] a policy that the Bankruptcy Act Commission embraced.[62] The Commission nonetheless felt compelled to carve out an educational debt exception to discharge in order to reinstate public confidence in the bankruptcy system.[63] Despite evidence presented to the Commission that *less than one percent* of federally insured student loans were discharged in bankruptcy,[64] its recommendation essentially sought to preempt "potential abuses,"[65] defaults that industry representatives of the student loan system anticipated would occur.[66] The Commission thus reacted viscerally to anecdotal evidence of recent graduates who had obtained discharges of their student loans without any attempted repayment and in the absence of extenuating circumstances.[67] In the name of ensuring continued existence of the student loan program,[68] the Commission proposed that educational debt be made nondischargeable only if the debt had first become due less than five years prior to the bankruptcy filing (the time-lapse rule) and its repayment would not impose an undue hardship on the debtor and his or her dependents.[69] Three years later and two years prior to enactment of the Bankruptcy Code, Congress followed the Commission's recommendation and amended the Higher Education Act of 1965 (the

57. *See* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pts. 1 & 2 (1973).

58. *See* Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978).

59. Pub. L. No. 91-354, 84 Stat. 468 (1970).

60. *See generally* Tabb, *supra* note 40, at 325–62 (discussing federal bankruptcy legislation prior to 1898).

61. *Id*. at 364.

62. *See* H.R. DOC. NO. 93-137, pt. 1, at 169 (1973).

63. *See id.* at 170.

64. *Id.* at 178 n.5.

65. *Id*. at 176.

66. *Id.* at 178 n.5; *see also id.* pt. 2, at 140 ¶ 14.

67. *Id.* pt. 1, at 176.

68. *Id.* at 177.

69. *See id*. pt. 2, at 136.

Higher Education Act) by adding section 439A, which made federally insured and guaranteed student loans nondischargeable under the conditions enumerated by the Commission.[70] And so it was that educational debt came to be anointed with conditionally dischargeable status.

But that is not the end of what appears on the surface to be a simple story. Rather, it is the beginning of a "long and tortured history."[71] From its inception, section 439A was enshrouded with uncertainty. The legislation for the Higher Education Amendments of 1976 originated in the Senate and, subsequent to its approval, was sent to the House.[72] The House proposed various amendments and referred the bill back to the Senate.[73] While the Senate bill had only provided for discharge of educational debt via the time-lapse rule, one of the House amendments expanded the scope of the provision by allowing discharge earlier if repayment would result in undue hardship.[74] What is particularly noteworthy is that Representative James O'Hara, Chairman of the Subcommittee on Postsecondary Education of the House Committee on Education and Labor and the *primary sponsor* of the House bill containing that amendment,[75] while applauding the bipartisan effort that had generated the bill,[76] decried the amendment that would ultimately become section 439A as "a discriminatory remedy for a 'scandal' which exists primarily in the imagination."[77] Drawing comparisons to existing provisions of bankruptcy law that designated debts incurred through fraud and felony as nondischargeable, Representative O'Hara leveled both barrels at the provision and fired off the following attack:

> [T]he major flaw in the bankruptcy provision is not that it treats students

70. *See* Higher Education Amendments of 1976, Pub. L. No. 94-482, § 127(a), 90 Stat. 2081, 2141 (codified at 20 U.S.C. § 1087-3 (1976)), *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 316, 92 Stat. 2549, 2678 (effective Oct. 1, 1979).

71. Mallinckrodt v. Chem. Bank (*In re* Mallinckrodt), 260 B.R. 892, 897 (Bankr. S.D. Fla. 2001), *rev'd*, 270 B.R. 560 (S.D. Fla. 2002).

72. S. 2657, 94th Cong. (1976) (enacted). *See* Library of Congress, THOMAS: Search Bill Summary & Status for the 94th Congress (1975–1976), http://thomas.loc.gov/bss/94search.html (search by "Bill Number" for "S. 2657"; then follow "All Bill Summary & Status Info" hyperlink) (last visited Dec. 16, 2005).

73. H.R. 12835, H.R. 12851, H.R. 14070, 94th Cong. (1976). *See id*.

74. H.R. REP. NO. 94-1701, at 196 (1976) (Conf. Rep.), *reprinted in* 1976 U.S.C.C.A.N. 4877, 4896–97.

75. H.R. 14070, 94th Cong. (1976). *See* Library of Congress, THOMAS: Search Bill Summary & Status for the 94th Congress (1975–1976), http://thomas.loc.gov/bss/94search.html (search by "Bill Number" for "H.R. 14070") (last visited Dec. 16, 2005).

76. *See* H.R. REP. NO. 94-1232 (1976), *reprinted in* H.R. REP. NO. 95-595, at 147 (1977), *and in* 1978 U.S.C.C.A.N. 5963, 6108.

77. *Id., reprinted in* H.R. REP. NO. 95-595, at 148 (1977), *and in* 1978 U.S.C.C.A.N. 5963, 6109.

> like everyone else, but that it treats them differently. . . . [I]t visits a special discrimination upon them. It treats them—this is not rhetoric, this is a precise and accurate reference to the actual proposal in the bill—it treats educational loans precisely as the law now treats loans incurred by fraud, felony, and alimony-dodging. No other legitimately contracted consumer loan, applied to a legitimate undertaken [sic], is subjected to the assumption of criminality which this provision applies to every educational loan. This part of H.R. 14070, whatever else it may be called, hardly deserves the name of "student assistance." On the contrary, it is a direct, unmitigated, slap in the face of every single student borrower in the nation. It assumes that borrower's bad intentions . . . .[78]

Notwithstanding Representative O'Hara's objections, the law took effect. However, section 439A did not take effect immediately. Congress instead delayed the provision's effective date until September 30, 1977,[79] nearly a year after the Higher Education Amendments were signed into law.[80] It did so primarily for two reasons: first, to allow Congress the opportunity to review forthcoming results of a General Accounting Office (GAO) study of the discharge of federally insured and guaranteed student loans in bankruptcy, which had been requested by Representative O'Hara and Representative Don Edwards, one of the primary sponsors of the legislation to reform the Bankruptcy Act; and second, to allow the House Judiciary Committee, in its development of legislation to reform the bankruptcy system, to reconsider the propriety of section 439A.[81] The second reason takes on added significance when one considers (1) that the House Judiciary Committee raised a jurisdictional objection to the House bill regarding the Higher Education Amendments of 1976 because of the presence of its educational debt dischargeability provision and (2) that the Committee contemplated requesting a sequential referral of the bill to consider the provision.[82] Ultimately, however, the House Judiciary Committee decided not to request a referral given the imminent expiration of the student loan program whose continuance depended on passage of the law.[83]

Educational debt therefore seems to have initially gained its conditionally dischargeable status in do-or-die fashion and perhaps should never have made its way into the Higher Education

78. *Id.*, *reprinted in* H.R. REP. NO. 95-595, at 149 (1977), *and in* 1978 U.S.C.C.A.N. 5963, 6110.

79. Higher Education Amendments of 1976, Pub. L. No. 94-482, § 127(b), 90 Stat. 2081, 2141 (repealed 1978).

80. The Higher Education Amendments were signed into law on October, 11, 1976. *See* Library of Congress, *supra* note 72.

81. H.R. REP. NO. 95-595, at 132 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6093.

82. *Id.*, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6093.

83. *Id.*, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6093.

Amendments. But that is conjecture, and the reality is that section 439A did become law. Uncertainty, however, continued to shadow the provision. Before it took effect,[84] the House Judiciary Committee reported House Bill 8200 (the bankruptcy bill), which would ultimately be enacted as the Bankruptcy Code, to the entire chamber on September 8, 1977.[85] As the accompanying report to the measure indicated, the bankruptcy bill proposed to repeal section 439A and to reinstate the dischargeable status of educational debt.[86] The unanimous support of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary and the near-unanimous support of the House Judiciary Committee accompanied the provision.[87] The House report confirmed Representative O'Hara's view that section 439A addressed a perceived rather than real abuse: The results of the GAO report indicated that *less than one percent* of all federally insured and guaranteed educational loans were discharged in bankruptcy.[88] The House report also dismissed concerns of the increased rate of student loan bankruptcies by noting that it proportionately corresponded to the increased rate of lending under the student loan program,[89] ultimately concluding that a few bad apples had spoiled the barrel rotten for everyone.[90]

But the efforts of the House Judiciary Committee to restore the dischargeable status of educational debt would become undone. The report accompanying the bankruptcy bill out of the Committee included

84. *See supra* note 79 and accompanying text.

85. H.R. 8200, 95th Cong. (1977) (enacted). *See* Library of Congress, THOMAS: Search Bill Summary & Status for the 95th Congress (1977–1978), http://thomas.loc.gov/bss/95search.html (search by "Bill Number" for "H.R. 8200"; then follow "All Bill Summary & Status Info" hyperlink) (last visited Dec. 16, 2005).

86. H.R. REP. NO. 95-595, at 132, 536 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6093, 6423.

87. *Id.* at 132, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6093.

88. *Id.* at 133, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6094. For detailed results of the GAO study, see *id*. at 139–47, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6100–08.

89. *See id.* at 133, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6094; *see also* Letter from Don Edwards, Chairman, Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, to Representative John N. Erlenborn, (June 16, 1977), *reprinted in* H.R. REP. NO. 95-595, at 153, *and in* 1978 U.S.C.C.A.N. 5963, 6114. Historical data confirm that federal investment in postsecondary education in the form of government appropriations began expanding in 1952 and reached its peak in 1979. *See* Thomas G. Mortenson, *How Will We Do More with Less?: The Public Policy Dilemma of Financing Postsecondary Educational Opportunity*, *in* CONDEMNING STUDENTS TO DEBT, *supra* note 4, at 37, 40.

90. H.R. REP. NO. 95-595, at 133 ("[A] few serious abuses of the bankruptcy laws by debtors with large amounts of educational loans, few other debts, and well-paying jobs, who have filed bankruptcy shortly after leaving school and before any loans became due, have generated the movement for an exception to discharge."), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6094.

the dissenting view of Representative Allen E. Ertel who criticized the House bill for its failure to preserve the conditionally dischargeable status of educational debt.[91] He couched his dissent in inflammatory terms, resorting to politics of fear:

> 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. 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 [S]tudent 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 discharged debtor cannot go bankrupt again for six years), Student B is rewarded for refusing to honor a legal obligation. The lesson that Students A and B have learned is that it "does not pay" to honor one's debts or other legal obligations.[92]

Representative Ertel concluded his remarks by indicating that he would propose an amendment, arguing that "[a] valuable educational program should not be destroyed because of a loophole that Congress can easily correct."[93]

Representative Ertel's proposal prevailed in the end. On February 1, 1978, the House considered the bankruptcy bill.[94] After the bill passed by electronic vote,[95] Representative Ertel introduced an amendment to the bankruptcy bill that would preserve the conditionally dischargeable status of educational debt. He once again spoke in terms of a fiscal doomsday scenario were the amendment not to be approved,[96] and others joined him.[97] Representative Edwards, one of the two primary sponsors of the bankruptcy bill, spoke out against the amendment urging its defeat.[98] His efforts, however, were to no avail. The House adopted

91. *See id*. at 536–38, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6423–25.

92. *Id.* at 536–37, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6424. The idea that one's credit rating is excellent following bankruptcy is, of course, preposterous.

93. *Id.* at 538, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6425.

94. 124 CONG. REC. 1783 (1978).

95. *Id*.

96. *Id*. at 1792 ("Without this amendment, we are discriminating against future students, because there will be no funds available for them to get an education.").

97. *Id*. (statement of Rep. Mottl); *id*. at 1793 (statement of Rep. Erlenborn).

98. *Id*. at 1797.

the amendment by a voice vote.[99] Surprisingly, the Senate report, issued after referral of the bankruptcy bill by the House to the Senate Judiciary Committee, remained virtually silent on the provision, solely describing its operative effect without reference to its purpose.[100] In other words, it addressed neither the issues of the financial solvency of the federal student loan program nor the purported abuse of the bankruptcy system by student loan borrowers. Moreover, Senator Dennis DeConcini, the other primary co-sponsor of the legislation, only discussed the functional aspects of the provision when introducing to the Senate the bill referred by the House.[101]

It seems impossible to say from this convoluted history that an unequivocal legislative intent underlies the Bankruptcy Code's provision regarding educational debt discharge. On the one hand, there is the House report, which unmistakably rejects granting any nondischargeable status—whether conditional or not—to educational debt in bankruptcy, and the Senate report, which remains silent on the issue. On the other hand, there are several statements by members of the House, including those of the representative who proposed the nondischargeability provision, advocating preservation of the status quo. Finally, one of the principal sponsors of the legislation spoke out against the provision, while the other confined his floor statements to a descriptive account of the provision without discussing its rationale. Given that the House ultimately rejected its Judiciary Committee's proposal to reinstate the dischargeable status of educational debt, it would be inappropriate to construe the Code's undue hardship discharge provision narrowly in accordance with the tenor and thrust of its report.[102] Moreover, while the Supreme Court has made it expressly clear that "the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history,"[103] the Court has, in its interpretation of the Bankruptcy Code, afforded "considerable, but not limitless, weight" to the floor statements of

99. *Id*. at 1798.

100. *See* S. REP. NO. 95-989, at 79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5865. H.R. 8200 was referred to the Senate Judiciary Committee on February 8, 1978. *See* Library of Congress, *supra* note 85. The Committee issued its report on July 14, 1978.

101. *See* 124 CONG. REC. 33,998.

102. *See* Rafael Ignacio Pardo, Note, *Beyond the Limits of Equity Jurisprudence: No-Fault Equitable Subordination*, 75 N.Y.U. L. REV. 1489, 1506–07 (2000) (noting that "the [Supreme] Court will not interpret a statute in accordance with statutory language that Congress has considered and rejected"). Although Congress did not reject the provision that repealed section 439A, it did enact its substitute—so for all intents and purposes, it did reject the House Judiciary Committee's view on the status of educational debt in bankruptcy.

103. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980).

Senator DeConcini and Representative Edwards, the *primary sponsors* of the bill.[104] Pursuant to these principles, Representative Ertel's comments regarding abuse of the bankruptcy process by student loan borrowers should not be given much weight in interpreting the thrust of undue hardship whereas those of Senator DeConcini and Representative Edwards should. Since DeConcini did not expressly discuss the rationale for the provision, and since Edwards unsuccessfully objected to it, we are left with no clear history of congressional intent.

But this has not prevented courts from concluding otherwise.[105] In fact, nearly half (48%) of the discharge determinations analyzed in this study invoked congressional intent in interpreting the meaning of undue hardship. This seems especially troubling given the absence of express congressional intent and given the presence of contemporaneous empirical evidence contained in the GAO report confirming that abuse of the bankruptcy system by student loan debtors was virtually nonexistent.[106] Worse yet, some courts that have been called upon to apply the Bankruptcy Code's undue hardship discharge provision have imputed to Congress the Bankruptcy Act Commission's rationale for initially proposing the law, without any discussion of the propriety of citing the 1973 Commission Report as evidence of congressional intent.[107] Even though this might be appropriate in certain circumstances given Congress's reliance on the recommendations set forth in the 1973 Commission Report when drafting the Code,[108] confusing the Commission's intent with Congress's intent regarding the undue hardship discharge seems (1) particularly troubling given the controversy surrounding the provision's enactment and (2) somewhat reckless given the concrete evidence documented in the GAO report, reproduced in the House report accompanying the bill that eventually became the Bankruptcy Code,[109] that widespread abuse did not exist.[110]

104. Pardo, *supra* note 102, at 1505 (citing Begier v. IRS, 496 U.S. 53, 64 n.5 (1990)).

105. *See, e.g.*, *In re* Pelkowski, 990 F.2d 737, 742–43 (3d Cir. 1993); Pace v. Educ. Credit Mgmt. Corp. (*In re* Pace), 288 B.R. 788, 791 (Bankr. S.D. Ohio 2003).

106. *See supra* note 88 and accompanying text.

107. *See, e.g.*, Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1306 (10th Cir. 2004); Cazenovia College v. Renshaw (*In re* Renshaw), 222 F.3d 82, 87 (2d Cir. 2000); United Student Aid Funds, Inc. (*In re* Pena), 155 F.3d 1108, 1111 (9th Cir. 1998); Kapinos v. Graduate Loan Ctr. (*In re* Kapinos), 243 B.R. 271, 276 (W.D. Va. 2000); Boyd v. U.S. Dep't of Educ. (*In re* Boyd), 254 B.R. 399, 403 (Bankr. N.D. Ohio 2000); Law v. Educ. Res. Inst., Inc. (*In re* Law), 159 B.R. 287, 291 (Bankr. D.S.D. 1993).

108. *See* S. REP. NO. 95-989, at 1–2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5787–88.

109. *See supra* note 85 and accompanying text.

110. Worse, some courts have not been shy to engage in revisionist history. *See, e.g.*, Mallinckrodt v. Chem. Bank (*In re* Mallinckrodt), 260 B.R. 892, 897 (Bankr. S.D. Fla. 2001) (noting that "[i]n the 1960s and early 1970s, students *frequently* sought to discharge their student loans as

Ironically, the language from the House report opposing nondischargeability spawned the stereotype of the abusive student loan debtor—that is, the recent graduate on the eve of a lucrative career,[111] and some bankruptcy courts have been all too willing to embrace that stereotype in applying the law.[112] Courts have gone beyond appropriating language from the House report and have engrafted their own images into the stereotype—namely, those of attorneys and doctors seeking to discharge their student loans.[113] Incredibly, the only reference to either profession in the House report is in the reproduced GAO report documenting that, of the 411 employed debtors in that study, only seven listed their occupation as attorney, and fewer than five listed their occupation as doctor.[114] In fact, the occupation of attorney was not even one of the ten most frequently occurring occupations.[115] We see, then, that some courts have been willing accomplices in allowing the myth of the abusive student loan debtor to take on a life of its own.

As Congress has retooled the law, some courts have become more emboldened to apply the undue hardship standard from a less forgiving stance, which in turn has allowed the myth to further entrench itself. Since enacting the Bankruptcy Code, Congress has amended the dischargeability provision relating to educational debt on five occasions in order to reduce the incidence of discharge through one of two means: (1) broadening the class of creditor that can avail itself of the exception, or (2) narrowing the conditions under which educational debt may be discharged.[116] Every time the statute has been amended, however,

general unsecured claims in bankruptcy" (emphasis added)), *rev'd*, 270 B.R. 560 (S.D. Fla. 2002).

111. *See supra* note 90.

112. *See, e.g.*, Salinas v. United Student Aid Funds, Inc. (*In re* Salinas), 240 B.R. 305, 310 (Bankr. W.D. Wis.), *rev'd*, 262 B.R. 457 (W.D. Wis. 1999); Green v. Sallie Mae Servicing Corp. (*In re* Green), 238 B.R. 727, 732 (Bankr. N.D. Ohio 1999); Roe v. Law Unit (*In re* Roe), 226 B.R. 258, 268 (Bankr. N.D. Ala. 1998); Stein v. Bank of New England, N.A. (*In re* Stein), 218 B.R. 281, 285 (Bankr. D. Conn. 1998).

113. *See, e.g.*, Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 191 (Bankr. W.D. Tex. 2001); *Salinas*, 240 B.R. at 310; Vazquez v. United Student Aid Funds, Inc. (*In re* Vazquez), 194 B.R. 677, 678 (Bankr. S.D. Fla. 1996); Carter v. Kent State Univ. (*In re* Carter), 29 B.R. 228, 232 (Bankr. N.D. Ohio 1983).

114. H.R. REP. NO. 95-595, at 143 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6104.

115. *Id.*, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6104.

116. *See* Act of August 14, 1979, Pub. L. No. 96-56, § 3(1), 93 Stat. 387, 387 (1979) (broadening class of creditor and narrowing conditions under which educational debt may be discharged); Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 454(a)(2), 98 Stat. 333, 375 (broadening class of creditor); Crime Control Act of 1990, Pub. L. No. 101-647, § 3621(1), 104 Stat. 4789, 4964 (broadening class of creditor and narrowing conditions under which educational debt may be discharged); Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1581, 1837 (narrowing conditions under which educational debt may be discharged); Bankruptcy

Congress has left the term "undue hardship" untouched.[117] Some courts have failed to recognize that the import of the statutory language should remain constant absent any change. Instead, they have prefaced their undue hardship analysis with the observation that Congress has increasingly made it more difficult to discharge educational debt.[118] Those amendments, however, are irrelevant in construing the meaning of the phrase, and courts should refrain from reading too much into the amendment of Bankruptcy Code § 523(a)(8) when conducting an undue hardship analysis.[119] We now turn to a critique of the policy objectives courts have discerned to be embodied in the Code's provision on educational debt dischargeability in order to demonstrate that the myth of the abusive student loan debtor has needlessly complicated and colored application of the law.

2. The Incoherent Policy Behind Bankruptcy Code § 523(a)(8)

Thus far, we have seen that, from the moment policymakers conceived that student loans should be conditionally excepted from the scope of discharge in bankruptcy, perceived rather than real abuse gripped their consciences. Congress's special treatment of educational debt, based on anecdotal evidence rather than empirical data,[120] has resulted in the uneasy marriage of two disparate policies that some have deemed to be related: (1) preserving the financial solvency of the student aid system and (2) preventing abuse of the bankruptcy

Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (broadening class of creditor). In 1990, Congress curtailed the scope of the Chapter 13 discharge, which generally is broader in scope than the Chapter 7 discharge, *see* 11 U.S.C.A. § 523(a) (West 2004 & Supp. I 2005) (providing that exceptions to discharge apply in Chapter 7 and 12 cases, Chapter 11 cases involving an individual debtor, and Chapter 13 cases in which the debtor is granted a hardship discharge); *id.* § 1328(a)(2) (excepting from discharge only certain debts enumerated in 11 U.S.C. § 523(a)), by adding student loans to the list of debts excepted from discharge under that chapter. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3007(a)(3), 104 Stat. 1388, 1388–28. Although Congress originally intended the amendment to be temporary, *see* § 3008, 104 Stat. at 1388–29, it subsequently repealed the sunset provision thereby permanently excepting educational debts from Chapter 13 discharge, Higher Education Amendments of 1992, Pub. L. No. 102-325, § 1558, 106 Stat. 448, 841.

117. *See supra* note 116.

118. *See, e.g.*, *Salinas*, 240 B.R. at 311; Douglass v. Great Lakes Higher Educ. Servicing Corp. (*In re* Douglass), 237 B.R. 652, 653 (Bankr. N.D. Ohio 1999).

119. *See* Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 735 (Bankr. D. Me. 2000).

120. *See supra* Part II.B.1; *see also* 1 NAT'L BANKR. REV. COMM'N, *supra* note 19, at 209 ("[T]he 1970 Commission acknowledged that student loan abuse was more perception than reality."); Howard, *supra* note 47, at 1087 ("The educational loan provision was not a legislative response to a statistically significant problem. Rather, the provision is a perfect example of legislation based on pathological cases, in which a result appropriate for a small minority of cases is imposed on substantially all." (footnotes omitted)).

system.[121] In our view, however, the Bankruptcy Code's educational debt provision is ineffective and unnecessary to meet the first policy objective and is unsuitable to meet the second. We conclude that, although the statute is poorly designed, courts need not cloud analysis of a debtor's claim of undue hardship with such policy considerations.[122]

While the abusive discharge of educational debt would impact to some extent the financial solvency of the student loan program, threats to the program's viability exist independently and are of concern outside of bankruptcy. For those individuals who default on their educational debt obligations, but who do not avail themselves of bankruptcy relief, the resulting nonrepayment will still pose a threat to the viability of such programs.[123] Accordingly, since it has never been shown that the discharge of educational debt in bankruptcy threatened to collapse the student loan system, any legislative history references to the policy objective of protecting the financial integrity of that system should not inform application of the undue hardship standard. We think this especially to be the case now that Congress has amended the Bankruptcy Code to except from discharge educational loans made by *for-profit* entities.[124]

Similarly, concern over abuse of the bankruptcy system by student loan debtors should not define the contours of what is meant by the term "undue hardship." The concern over debtor abuse can be explained in part by reference to the economic principles of private information and moral hazard. As a general matter, a debtor who borrows money from a creditor knows (1) whether or not he intends to repay the debt, and (2) what circumstances exist or may come into being that reduce the likelihood of repayment. To some extent, the creditor may be able to obtain that information by asking the debtor or by looking for indicators that payment will be forthcoming from the debtor (e.g., a credit report). To the extent that the debtor's intentions cannot be (or are too costly to be) unearthed by the creditor, that knowledge is private information unavailable to the creditor. In a legal regime that discharges debtors from personal liability for past debts, private information creates a moral

121. *See* 1 NAT'L BANKR. REV. COMM'N, *supra* note 19, at 213.

122. For an example of the manner in which courts typically incant the congressional policy objectives of Bankruptcy Code § 523(a)(8), see *Law v. Educational Resources Institute, Inc.* (*In re Law*), 159 B.R. 287, 291 (Bankr. D.S.D. 1993).

123. *See* 1 NAT'L BANKR. REV. COMM'N, *supra* note 19, at 213–14; Letter from Representative Don Edwards, Chairman, Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, to John N. Elrenborn, Member of Congress (June 16, 1977), *reprinted in* H.R. REP. NO. 95-595, at 154 (1977), *and in* 1978 U.S.C.C.A.N. 5963, 6115.

124. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (codified at 11 U.S.C.A. § 523(a)(8)(B) (West 2004 & Supp. I 2005)).

hazard. A debtor who knows that he can obtain a discharge has an incentive to obtain the extension of credit, use the credit, default on his repayment obligation, and ultimately file for bankruptcy to discharge the debt. This precise situation prompted Representative Ertel to argue for a provision in the Bankruptcy Code that would preserve the conditionally dischargeable status of educational debt.[125]

Two reasons occur to us why moral hazard should be deemed an inappropriate justification for the conditionally dischargeable status of educational debt. First, past empirical evidence did not indicate systemic manipulation by debtors of the legal opportunity to discharge their student loans when bankruptcy law allowed for their automatic discharge.[126] Second, and above all else, the Code has already created safeguards against such abusive and opportunistic behavior on a general basis. These safeguards can adequately respond to moral hazard in the educational debt context. First, the Code excepts from discharge a debt for money to the extent that it was obtained by false pretenses, a false representation or actual fraud.[127] Thus, where a debtor obtains a student loan intending to seek a discharge prior to or shortly after completing his education and the creditor justifiably relied on the representation of the debtor that repayment would be forthcoming, a court should find the educational debt to be nondischargeable—not on the basis of undue hardship, but rather on the basis that the debtor either (a) intentionally made a false representation of his intent to repay the debt, or (b) recklessly made the representation of his intent to repay the debt.[128] Such a determination would be made irrespective of the *amount* of credit extended to the debtor. Thus, it is inappropriate to incorporate a judicially implied rule that accounts for debtor fraud into the standard for undue hardship when the Code already provides an adequate statutory remedy to address this situation.[129]

125. *See supra* text accompanying note 92.

126. *See supra* Part II.B.1; *see also* 1 NAT'L BANKR. REV. COMM'N, *supra* note 19, at 213 ("The fear that soon-to-be rich professionals would line up for bankruptcy to do away with their student loans remains a questionable proposition judging by earlier experiences when student loans were dischargeable and by long-term data on influences on bankruptcy filings.").

127. 11 U.S.C. § 523(a)(2)(A) (2000).

128. *See* Marks v. Educ. Credit Mgmt. Corp. (*In re* Marks), No. 00-10372, 2002 WL 1448305, at *1–*2 (Bankr. N.D. Cal. Feb. 26, 2002), *rev'd in part and remanded*, No. C-02-3213 PJH, 2003 WL 22004844 (N.D. Cal. Feb. 13, 2003); *cf.* Howard, *supra* note 47, at 1087 ("The functional economic approach does not support generalized nondischargeability of educational loans. Educational loans should be nondischargeable under the proposed standard only if the debtor incurred the obligation with the intention of filing bankruptcy rather than repaying the loan. In that case, a noneconomic factor—the availability of bankruptcy—would have skewed the economic decision.").

129. *Cf.* Lawrence Ponoroff & F. Stephen Knippenberg, *Debtors Who Convert Their Assets on the Eve of Bankruptcy: Villains or Victims of the Fresh Start*, 70 N.Y.U. L. REV. 235, 286 (1995) (arguing

But what of the situation where the creditor did not justifiably rely on the false representation of the debtor? Does the Code safeguard against moral hazard? In the case of a Chapter 7 debtor whose debts are primarily consumer debts, the bankruptcy court may dismiss the case on the basis that the granting of relief would constitute an "abuse" of the provisions of Chapter 7.[130] Under certain circumstances, the provision would ostensibly safeguard against the debtor whose motive for filing for bankruptcy was to discharge primarily educational debt. The definition of a "consumer debt" includes any debt incurred by an individual primarily for a personal purpose.[131] Were a court to characterize the educational debt incurred by a debtor as consumer debt, a debtor whose debts consisted predominantly of educational debt would not be eligible for bankruptcy relief in the first instance, so long as the court concluded that the granting of such relief would constitute an abuse.

Notwithstanding the incoherence of the policy justifications for the conditional dischargeability of student loans, we are not surprised that the stereotype of the abusive student loan debtor has found its own legs upon which to stand. As observed by Professor Gross, "Bankruptcy involves failures that manifest themselves in economic terms but that are not purely economic failures."[132] Perhaps it is easier to fit borrowers who seek a discharge of their student loans into a discrete category of individual who has not put forth his or her best effort to repay than it is to admit that there is something wrong with the administration of the student loan program.[133] Given some of the abuses documented in the

that, when debtor borrows money to acquire exempt property on eve of bankruptcy, courts should not fashion a rule that disallows debtor's exemption claim, for "if money is borrowed or goods are acquired on false pretenses, the aggrieved creditor has recourse under § 523(a)(2), and there is no reason to impose an extrastatutory penalty inuring to the benefit of other creditors who were not harmed by the offensive behavior"). In fact, the Code provides a defrauded educational debt creditor added statutory protection by permitting it to pursue on account of its prebankruptcy claim property of the debtor that would otherwise be deemed exempt from collection efforts. *See* 11 U.S.C. § 522(c)(4).

130. 11 U.S.C.A. § 707(b)(1) (West 2004 & Supp. I 2005).

131. Id. § 101(8).

132. Gross, *supra* note 15, at 23.

133. *Cf*. SULLIVAN ET AL., *supra* note 12, at 34 ("The persistence of a bankruptcy stigma actually fuels stereotypes because it provides an incentive to pigeonhole bankrupts as 'them,' not 'us.' The risk is farther away if those who are in trouble are a comfortable social distance from everyone else."). For the view that bankruptcy law cannot remedy deficiencies in administration of the student loan program, see H.R. REP. NO. 95-595, at 134 (1977) ("[I]f the [student] loans are granted too freely and that is what is causing the increase in bankruptcies, then the problem is a general problem, not a bankruptcy problem. The loan program should be tightened, or collection efforts should be increased. If neither of those alternatives is acceptable, then the loan programs should be viewed as general social legislation that has an associated cost."), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6095; *see also* H.R. REP. NO. 94-1232 (1976) ("Treating students, all students, as though they were suspected frauds and felons is no

undue hardship opinions reviewed in this study, it is reasonable to conclude that institutional failures regarding the manner in which the federal government has structured and implemented the student loan program have created a situation that has led some individuals with educational debt to seek bankruptcy relief.[134] In light of these considerations, we believe courts must abandon their adherence to incoherent policy objectives in their analysis of the law—an adherence that has allowed the unsubstantiated myth of the abusive student loan debtor to persist.[135]

III. JUDGING FORGIVENESS OF EDUCATIONAL DEBT: EVIDENCE FROM BANKRUPTCY COURT OPINIONS

In this Part, we look to answer two questions: (1) Does ten years' worth of case law evidence abuse of the bankruptcy system by student loan debtors; and, (2) has the law been uniformly applied to such debtors? We first start with a discussion of the methodology we implemented to select undue hardship opinions for analysis in this study and then proceed to portray the type of debtor who has claimed undue hardship on the basis of burdensome educational debt. We do so to demonstrate that such a debtor does not fit the stereotype of the recent

substitute for improving the administration of the [student loan] program."), *reprinted in* H.R. REP. NO. 95-595, at 151 (1977), *and in* 1978 U.S.C.C.A.N. 5963, 6112. For examples of courts that have critiqued administration of the student loan program, see *Speer v. Educational Credit Management Corp.* (*In re Speer*), 272 B.R. 186, 192 (Bankr. W.D. Tex. 2001) (describing the administration of the student loan program in those instances where the school fails to provide a proper education as a "situation . . . akin to the farmer (U.S. government) putting the fox . . . in charge of the hen house . . . and not only blaming the students if they get eaten, but also charging them for the cost of the meal"); *Sands v. United Student Aid Funds, Inc.* (*In re Sands*), 166 B.R. 299, 306 n.10 (Bankr. W.D. Mich. 1994) ("The system itself is somewhat crazy. Why should a student even be permitted to borrow tens of thousands of dollars to pursue a degree with very limited marketability? If banks were lending their *own* money rather than government-guaranteed dollars, would such questionable loans be made?").

134. *See, e.g.*, Soler v. United States (*In re* Soler), 261 B.R. 444, 448–50 (Bankr. D. Minn. 2001) (noting, among other things, that debtor, who was not fluent in English, was accepted at dental school at Marquette University without an interview, that "Marquette was primarily dependant on tuition for its operating funds, which in turn was funded by student loans," that "Marquette recruited many students from Puerto Rico," and that "Marquette's procedure for signing promissory notes was akin to an assembly line"); Hurley v. Student Loan Acquisition Auth. of Ariz. (*In re* Hurley), 258 B.R. 15, 18 n.5 (Bankr. D. Mont. 2001) ("The actual course work offered by the Al Collins School appears of dubious value. For example, in the 'marketing' course Phyllis took 'the instructor showed films of "Batman" the whole class.'" (quoting trial transcript)); Law v. Educ. Res. Inst., Inc. (*In re* Law), 159 B.R. 287, 293 (Bankr. D.S.D. 1993) (noting that "[d]ebtor received the equivalent of two or two-and-a-half weeks' worth of training and a private pilot's license, useless for employment purposes," and that "[t]he real abuse is found with the community college, which was also quick to close its door of responsibility and accountability").

135. For the argument that educational debt should be dischargeable in bankruptcy, see 1 NAT'L BANKR. REV. COMM'N, *supra* note 19, at 216; Howard, *supra* note 47, at 1087.

graduate on the eve of a lucrative career looking to avoid the obligation to repay his or her student loans. The data indicate that, on the whole, student loan debtors have sought forgiveness of educational debt after having suffered severe financial distress. Given that the debtors in this study have experienced hardship on account of their student loans, we look to identify those factors upon which courts have relied to conclude that such hardship has been undue. Surprisingly, we find very few statistically significant differences in the factual circumstances of those debtors granted a discharge and those debtors denied a discharge, which leads us to conclude that the law has not treated student loan debtors uniformly and that judicial perception of the law best explains whether the court will grant a discharge. Ultimately, these findings have profound implications for the manner in which participants in the bankruptcy system ought to think about application of the undue hardship standard.

A. Selection Criteria

Before presenting the findings of this study, an explanation is warranted of the methodological approach by which undue hardship determinations were selected for analysis. An important disclaimer is that we do not claim that the data are representative of the manner in which *all* such determinations are adjudicated. When a court makes an undue hardship determination, presumably it does so in one of two forms: (1) as an oral ruling from the bench; or, (2) as a written order or opinion. Regardless of the form in which the court issues its determination, a record of the determination is obtainable. With respect to oral rulings, one could obtain transcripts provided that the court had arranged for transcription. With respect to written orders or opinions, one could obtain the records from either bankruptcy court files, reporting services (e.g., *West's Bankruptcy Reporter*), or from electronic databases (e.g., Westlaw, Lexis).[136] Each of these records documents a court's decision-making process and therefore constitutes the proper unit of analysis for the study that we conducted. The aggregate of all these units constitutes the population of existing undue hardship determinations. In order to ascertain whether statistically sound generalizations can be made from the sample studied, one would have to (1) create a sample of debtor filers, (2) determine how many of those debtors sought to discharge educational debt, and (3) calculate in how

136. If a bankruptcy court does not disseminate its written order or opinion to a reporting service or an electronic database, one would be confined to bankruptcy court files.

many of those instances the court issued an opinion regarding its dischargeability determination. Only then could the representativeness of our findings be ascertained.

In light of the constraints presented in accessing both transcripts of oral decisions and records of written orders or opinions that had not been published in a service or disseminated by the court to an electronic database,[137] and for purposes of convenience, we opted to analyze only those written undue hardship opinions appearing in Westlaw. In order to constitute the sample of discharge determinations for this study, we formulated a search query in Westlaw's FBKR-BCT database,[138] which contains, among other things, (1) opinions issued by United States Bankruptcy Courts and Bankruptcy Appellate Panels that have been released for publication in *West's* Bankruptcy Reporter (the Bankruptcy Reporter),[139] as well as (2) decisions not scheduled to be reported. Coverage for the FBKR-BCT database begins with the year 1979. The query consisted of the single term "523(a)(8)," the section number of the Bankruptcy Code that pertains to the discharge of educational debt, coupled with a date restriction that limited query retrieval to opinions issued during the ten-year period beginning on October 7, 1993 and ending on October 6, 2003.[140] By searching solely for one term in the

137. For acknowledgement by a court that it does not always issue a written decision, see *Coutts v. Massachusetts Higher Education Corp.* (*In re Coutts*), 263 B.R. 394, 398 (Bankr. D. Mass. 2001) ("However, this Court has also granted relief, without written decision, to other debtors who have filed complaints which met the standard set forth above, resulting in discharge of their student loan obligations.").

138. Westlaw is a commercial electronic database that can be accessed via internet at http://www.westlaw.com.

139. The Bankruptcy Reporter is a unit of the National Reporter System. It is published weekly twelve months of the year, and it includes the full text of reported decisions issued by the Supreme Court and U.S. Courts of Appeals, Bankruptcy Appellate Panels, District Courts and Bankruptcy Courts regarding bankruptcy matters. *See* http://west.thomson.com/product/22064327 product.asp (last visited Aug. 8, 2005).

140. The entire query read as follows: "523(a)(8) & DA (AFT 12/31/1992 & BEF 01/01/2004)." We limited our search to the ten-year period specified in order to account for a change in the law. Prior to October 7, 1998, a debtor could obtain an automatic discharge of his or her student loans if they had first become due seven years prior to the debtor's bankruptcy filing (the time-lapse rule). 11 U.S.C. § 523(a)(8)(A) (1994) (repealed 1998). The Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1581, 1837, amended the statute to delete subparagraph (A) of 11 U.S.C. § 523(a)(8) with the result that, regardless of when the educational debt first became due, it would be discharged only if the debtor could establish a claim of undue hardship. This amendment did not take effect until the enactment date of the Higher Education Amendments of 1998, § 971(b), 112 Stat. at 1837, which was October 7, 1998. Accordingly, the ten-year period we have chosen includes the five years prior to and the five years after the amendment. Because the amendment changed the statutory scheme from (a) one that provided educational debt relief either pursuant to a relatively bright-line rule (the time-lapse rule) or pursuant to a vague and indeterminate standard (undue hardship) to (b) one that provides educational debt relief solely pursuant to the vague and indeterminate standard, we hope to explore in the future the framing effect, if any, the amendment had on courts' interpretation of the

database, the aim was to err on the side of overinclusiveness and ensure retrieval of all issued opinions regarding undue hardship. Because a bankruptcy court derives its authority to discharge educational debt from 11 U.S.C. § 523(a)(8), it seems reasonable to conclude that a judge, in making an undue hardship determination, would cite that operative provision in the authored opinion.[141] The search proved to be overinclusive as it produced nearly 700 opinions, only 261 of which were included in the study according to the criteria that follow.

As a general matter, all opinions involving a determination of whether a debtor was entitled to a discharge of his or her educational debt on the basis of undue hardship were included in the database.[142] One exception, however, was to exclude opinions that were resolved on procedural grounds and that never addressed the issue of dischargeability on the merits. The search query retrieved opinions issued both by bankruptcy courts and bankruptcy appellate panels. Because the study focused on judicial decisionmaking at the trial level (i.e., when the undue hardship determination is originally made), only those opinions issued by bankruptcy courts were included in the database. A possible drawback of this criterion is that the opportunity to catalogue undue hardship determinations for which no Westlaw record exists, other than at the appellate level, is foregone. However, because of the study's focus on the decision-making process at the trial level by bankruptcy judges, this foregone opportunity was not a cause for concern.

All bankruptcy court opinions involving a determination of whether a debtor was entitled to a discharge of his or her educational debt on the

standard—specifically, whether they began to view the meaning of undue hardship in a more forgiving light. See Scott Pashman, Note, *Discharge of Student Loan Debt Under* 11 U.S.C. § 523(a)(8): *Reassessing "Undue Hardship" After the Elimination of the Seven-Year Exception*, 44 N.Y.L. SCH. L. REV. 605 (2001), for the argument that, as a result of repeal of the time-lapse rule, courts should adopt a more forgiving stance in their interpretation of the meaning of undue hardship. An initial look at the data reveals that the discharge rate during the preamendment period (October 7, 1993 through October 6, 1998) was slightly more favorable toward undue hardship claimants than during the postamendment period (October 7, 1998 through October 6, 2003): 47% as compared to 42%. While these figures do not suggest to us the presence of significant framing effects, a full satisfactory account requires further analysis.

141. Of course, the possibility exists that the search query may have been *underinclusive* if a court did not reference 11 U.S.C. § 523(a)(8) in its entirety. For instance, one could imagine that, in its introductory discussion of the law, a court might reference the operative provision of the Code pertaining to the exceptions to discharge in a citation sentence as "11 U.S.C. 523(a)," and thereafter reference subsection (a)(8) in its textual discussion of the governing law for discharge of educational debt (e.g., "subsection (a)(8) provides").

142. Because of the overinclusive nature of the term used in the search query, many of the decisions retrieved either did not involve the discharge of educational debt, or, if they did address the discharge of educational debt, it was not within the undue hardship context.

basis of undue hardship were included in the database, irrespective of whether the decisions had been reported in the Bankruptcy Reporter, which officially publishes opinions of federal bankruptcy courts. The rationale for including unreported opinions was that, notwithstanding their lack of binding authority,[143] they nonetheless document the decision-making process of bankruptcy judges in their undue hardship determinations.

The study excluded all bankruptcy opinions subsequently overruled on the basis that the bankruptcy court's findings of facts were clearly erroneous.[144] In instances where a reviewing court found a bankruptcy court's findings of fact improper, we found the bankruptcy court opinion lacked value since no one could say with certainty that the bankruptcy court's disposition would have remained the same under a different set of facts. Given that facts are the engine that drives the legal conclusion of undue hardship (at least in theory),[145] it made no sense to include bankruptcy court opinions that had been overturned on the basis of clearly erroneous findings of fact.

In contrast to the standard of review for findings of fact, a bankruptcy court's undue hardship determination constitutes a conclusion of law subject to de novo review.[146] We included in the study opinions subsequently reversed on appeal on the basis that the bankruptcy court's conclusions of law were incorrect.[147] Although reversal ultimately signifies negative appraisal by the reviewing court on the judicial competence of the lower court, for purposes of evaluating judicial behavior, as long as the bankruptcy court properly engaged in its findings of fact, excluding such opinions from the study would have run

143. *See, e.g.*, Dolph v. Pa. Higher Educ. Assistance Agency (*In re* Dolph), 215 B.R. 832, 835 (B.A.P. 6th Cir. 1998); *In re* Mays, 256 B.R. 555, 559 (Bankr. D.N.J. 2000).

144. Appellate courts must give deference to and accept a bankruptcy court's findings of fact unless they are clearly erroneous. *See* FED. R. BANKR. P. 8013. The Supreme Court has defined a finding of fact to be clearly erroneous where, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). The Supreme Court more recently reiterated this definition in *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting definition of "clearly erroneous" set forth in *Gypsum*).

145. The findings from this study suggest otherwise. *See infra* Part III.C.1.

146. *E.g.*, Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1305 (10th Cir. 2004); Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 553 (8th Cir. 2003); Brightful v. Pa. Higher Educ. Assistance Agency (*In re* Brightful), 267 F.3d 324, 327 (3d Cir. 2001); Rifino v. United States (*In re* Rifino), 245 F.3d 1083, 1087 (9th Cir. 2001); Tenn. Student Assistance Corp. v. Hornsby (*In re* Hornsby), 144 F.3d 433, 436 (6th Cir. 1998); *In re* Roberson, 999 F.2d 1132, 1137 (7th Cir. 1993); Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (per curiam).

147. *See, e.g.*, Nys v. Cal. Student Aid Comm'n (*In re* Nys), Case No. 02-11455, Adv. No. 02-1162, 2003 WL 22888941 (Bankr. N.D. Cal. Aug. 11, 2003), *rev'd and remanded*, Nys v. Educ. Credit Mgmt. Corp. (*In re* Nys), 308 B.R. 436 (B.A.P. 9th Cir. 2004).

counter to one of the purposes of the study—to document and analyze what bankruptcy courts viewed to be correct application of the law.

Finally, the study excluded all bankruptcy court opinions that were a reconsideration of a prior judgment that had been remanded by an appellate court.[148] Per the parameters of the study, of concern and significance was the disposition the bankruptcy court made with its first bite at the apple. Once a judgment has been remanded, whether the appellate court instructs the bankruptcy court either to rule in a particular manner or to reconsider its ruling in light of specific factors, the subsequent opinion issued by the bankruptcy court is tainted with an appellate patina that diminishes the opinion's value for purposes of evaluating the initial decision-making process of bankruptcy courts.

As a general matter, each opinion generated one discharge determination. However, 25 opinions generated *two* discharge determinations, either:

(1) because the opinion involved joint debtors (i.e., husband and wife), both who sought to discharge educational debt (21 opinions);[149]

(2) because the opinion involved two related, individual debtors, who had both filed for bankruptcy individually and sought discharge of educational debt for which they were jointly liable (1 opinion);

(3) because the court, for purposes of administrative convenience, issued one opinion with respect to separate discharge determinations for two unrelated debtors (2 opinions); or,

(4) because the court issued two separate discharge determinations in the same opinion with respect to each creditor to whom the debtor was indebted (1 opinion).

By virtue of the foregoing, the 261 opinions included in this study generated 286 undue hardship discharge determinations for analysis.[150]

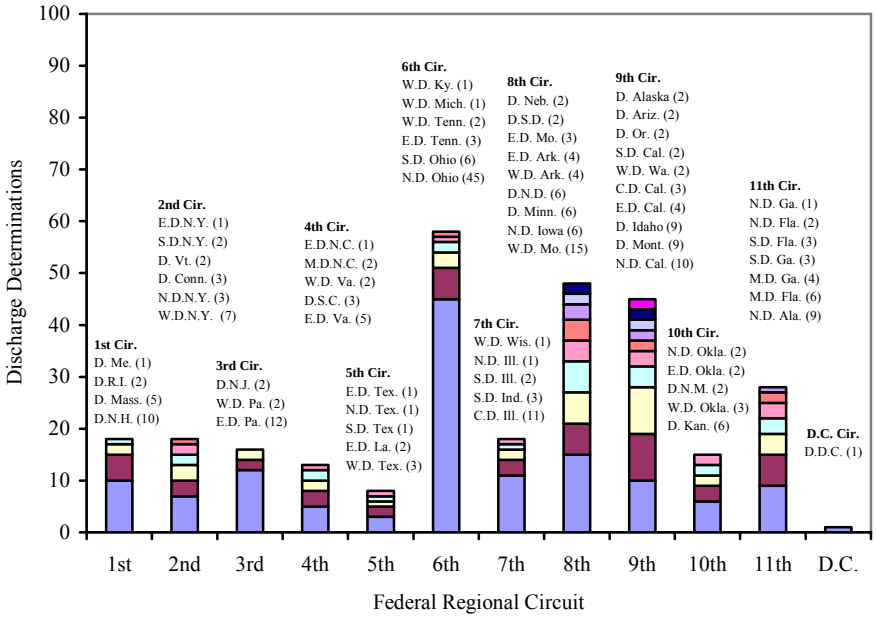
148. *See, e.g.*, Kapinos v. Graduate Loan Ctr. (*In re* Kapinos), 253 B.R. 709 (Bankr. W.D. Va. 2000) (reconsidering determination granting partial discharge to debtor upon remand by district court for additional findings of fact); Hornsby v. Tenn. Student Assistance Corp. (*In re* Hornsby), 242 B.R. 647 (Bankr. W.D. Tenn. 1999) (reconsidering determination granting discharge to debtors upon reversal and remand by court of appeals, 144 F.3d 433).

149. A husband and wife may file jointly for bankruptcy. *See* 11 U.S.C. § 302(a) (2000).

150. Each opinion was read in its entirety and was coded for demographic and financial data pertaining to the debtor as well as legal factors that formed the basis for the court's holding. In order to ensure consistency in coding, one of us (Pardo) did all of the coding. In order to ensure reasonable accuracy of the coded data, we compared our coding to the data recorded in spreadsheets by research assistants Todd Lowther and Emily Ma. Both Mr. Lowther and Ms. Ma independently read each opinion and produced their own spreadsheet, which contained the above-referenced data. Where a discrepancy was found between our database and the data recorded by the research assistants, the opinion was reread to resolve the discrepancy. Pardo made the final determination as to the proper coding of every variable.

In terms of the distribution of discharge determinations by location of bankruptcy court, every federal regional circuit and approximately 70% of all federal judicial districts are represented in this study. The three most commonly represented circuits are (1) the Sixth Circuit (20%), (2) the Eighth Circuit (17%), and (3) the Ninth Circuit (16%). The most commonly represented judicial district is the Northern District of Ohio, issuing approximately 16% of all discharge determinations analyzed, followed by the Western District of Missouri (5%) and the Eastern District of Pennsylvania (4%). Finally, 129 judges issued the opinions involved in this study, and 52 of those judges issued multiple opinions.[151] Figure 1 illustrates the regional circuits and judicial districts represented in this study.

Figure 1
Distribution of Discharge Determinations
by Location of Bankruptcy Court



151. The most prolific judges in the sample, in terms of opinion-writing, are: (1) the Honorable Richard L. Speer writing for the U.S. Bankruptcy Court for the Northern District of Ohio, who accounts for 23 of the issued opinions and 26 of the discharge determinations; (2) the Honorable Thomas L. Perkins writing for the U.S. Bankruptcy Court for the Central District of Illinois, who accounts for 8 of the issued opinions and 9 of the discharge determinations; and (3) the Honorable Arthur B. Federman writing for the U.S. Bankruptcy Court for the Western District of Missouri, who also accounts for 8 of the issued opinions and discharge determinations. While the prolific tendencies of certain judges to issue undue hardship opinions might best explain the distribution of determinations in this study, further inquiry is warranted.

B. The Educated Bankrupt

On the eve of consideration of the bankruptcy bill by the House Committee on the Judiciary, which ultimately would be enacted into law as the Bankruptcy Code,[152] the heads of the National Student Lobby, the National Student Association, and the Coalition of Independent College and University Students wrote a letter to the bill's sponsor, Representative Edwards, expressing their support for the proposal by the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary to repeal section 439A of the Higher Education Act and to restore the dischargeable status of educational debt.[153] The letter focused on debunking what they viewed to be the "cluster of myths" that had enshrouded bankruptcy filings by individuals with educational debt.[154] One of those myths bears repeating in its entirety:

> Myth No. 2
>
> *Bankruptcies involving education loans are less legitimate than bankruptcies involving other consumer loans*.
>
> Absenting a few publicized horror stories, there is no evidence to suggest that the overwhelming majority of education loans related to bankruptcies are anything but legitimate. *No data exists describing the situation of those declaring bankruptcy*. How many of these former students completed their education and received their degrees? How many were unemployed when they filed for bankruptcy, and for how long? How many felt obliged to take out educational loans they didn't originally want, or in amounts greater than thoughtful credit counseling would have advised? How many found work, but in occupations far removed in form and earning power from their mortgaged educational careers? *We need detailed answers to these questions*.
>
> *The lack of concrete evidence as to actual widespread abuse of bankruptcy and the characteristics of those declaring bankruptcy disturbs us greatly*. It suggests that some are willing to legislate, not with a broad and comprehensive understanding of the problem, but in a reflex-like response to a few sensational newspaper stories.[155]

152. *See supra* note 85 and accompanying text.

153. *See* Letter from David Rosen, Legislative Director, National Student Lobby, Tom Tobin, President National Student Association, and Larry Zaglaniczny, National Director, Coalition of Independent College and University Students, to Representative Don Edwards, Chairman, Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary (July 13, 1977), *reprinted in* H.R. REP. NO. 95-595, at 160–62 (1977), *and in* 1978 U.S.C.C.A.N. 5963, 6121–23.

154. *Id*., *reprinted in* H.R. REP. NO. 95-595, at 161–62 (1977), *and in* 1978 U.S.C.C.A.N. 5963, 6122–23.

155. *Id*. (emphasis added), *reprinted in* H.R. REP. NO. 95-595, at 161–62 (1977), *and in* 1978

We now embrace the tenor of the excerpted letter and seek to provide a long-overdue reappraisal of whether cause for concern exists over abuse of the bankruptcy system by student loan debtors. We present the data from this study as a portrait of the class of individual who has sought an undue hardship discharge in those opinions issued by bankruptcy courts over the ten-year period beginning on October 7, 1993, and ending on October 6, 2003. This summary portrait looks to shed light on the overall financial condition of certain student loan debtors in bankruptcy in order to ascertain whether their circumstances evince financial distress that imposes undue hardship and that might therefore be construed to warrant relief in the form of forgiveness of their educational debt. Our data challenge the congressional stereotype, discussed above in Part II.B, of the abusive student loan debtor—a recent graduate on the eve of a lucrative career seeking to discharge his or her student loans through bankruptcy. At the core, we offer our summary portrait to challenge prevailing opinion regarding the class of individual who seeks educational debt discharge and to prompt renewed policy analysis that will hopefully encourage individuals within the bankruptcy system, especially judges and lawyers, to rethink how the law ought to be applied and to re-evaluate whether the law makes sense in the first instance.[156] We posit that the case law has not evinced a debtor with an ability to repay his or her student loans, but rather a debtor struggling under the weight of oppressive educational debt from which release is imperative.

As we discuss the human dimension of the student loan debtors who appear in the issued opinions analyzed for this study (the undue hardship debtors), we will draw comparisons both to the general population as well as to studies previously conducted on bankruptcy debtors in order to give a better sense of the undue hardship debtors' relative position in society. For our comparisons to the general population, we primarily draw on data from the U.S. Census Bureau, including data from the U.S. Census in 2000 (Census 2000).[157] For our comparisons to prior studies of bankruptcy debtors, we primarily rely upon the profiles of the debtors documented in the first two phases of the study of the consumer bankruptcy system by Professors Sullivan, Warren, and Westbrook, the Consumer Bankruptcy Project I and the Consumer Bankruptcy Project

U.S.C.C.A.N. 5963, 6122–23.

156. For the argument that, because of certain congressional indifference, we should not expect deficiencies in bankruptcy law to be remedied by legislative solution, see Jacoby, *supra* note 30.

157. The U.S. Census Bureau's internet site for Census 2000 can be accessed at http://www.census.gov/main/www/cen2000.html (last visited Dec. 17, 2005).

II, which were conducted in 1981 and 1991, respectively.[158] We will refer to the debtors in these respective studies as the CBP1 and CBP2 debtors. Finally, we will compare the undue hardship debtors to those debtors profiled in the GAO report, which explored the connection between student loans and bankruptcy in the mid-to-late 1970s and upon which the House Judiciary Committee relied in recommending that educational debt should be dischargeable in bankruptcy.[159] The debtors in that report will be referred to as the GAO student loan debtors.[160]

1. Demographic Characteristics

The demographic characteristics of the undue hardship debtors are rich in detail and present myriad opportunities to examine the role of educational debt in society and its impact on individual lives. For purposes of this Article, however, we look to focus on the manner in which these demographics can be interpreted as (1) the disquieting signs of the inability to repay that has ultimately prompted some student loan debtors to make a claim of undue hardship in the hopes of obtaining relief from their educational debt, and (2) persuasive evidence of lack of abuse of the bankruptcy system by student loan debtors. We now consider data pertaining to gender, age, marital status and dependents, health status, employment status and occupation, and educational attainment.

a. Gender

Women predominated the group of individuals seeking relief from educational debt, constituting approximately 64% of the sample. This contrasts with the percentage of women in the general population reported in Census 2000 as approximately 51%.[161] The predominance of women as debtors who made a claim of undue hardship may be explained by a variety of factors, including the following: First, these

158. The Consumer Bankruptcy Project I studied the profiles of debtors who filed for bankruptcy in 1981 in ten judicial districts across three different states. *See* SULLIVAN ET AL., *supra* note 47, at 17–20. The Consumer Bankruptcy Project II studied the profiles of debtors who filed for bankruptcy in 1991 in sixteen judicial districts across five different states. *See* SULLIVAN ET AL., *supra* note 12, at 7.

159. *See supra* notes 84–90 and accompanying text.

160. We recognize that the data from all of these sources generally relate solely to one year's worth of data while our dataset includes data that span a ten-year period. The conclusions we draw from the comparisons would be accurate only if the data from these other studies had held constant over time. Notwithstanding this deficiency, such comparisons can provide meaning and insight that would otherwise be absent were our data viewed in isolation.

161. DENISE I. SMITH & RENEE E. SPRAGGINS, U.S. DEP'T OF COMMERCE, GENDER: 2000, *at* 1 (U.S. Census Bureau, Census 2000 Brief No. C2KBR/01-9, 2001), *available at* http://www.census.gov/prod/2001pubs/c2kbr01-9.pdf.

percentages may mirror the trend that women have surpassed men as single filers for bankruptcy.[162] Second, evidence suggests that, over the past several decades, the gender gap within the higher-education system has widened in favor of women—specifically, at colleges and universities nationwide, women enrollees outnumber their male counterparts.[163] To the extent that is true, and to the extent that those women borrow more on the whole than men to fund their education, it seems reasonable to conclude that women would be more likely to encounter the adverse consequences of overwhelming educational debt and would thus be more likely to seek bankruptcy relief than men.

In terms of inability to repay, women may face financial pressures either not experienced by men or experienced less frequently by men. For example, a recent report based on Census 2000 data has documented that, even controlling for work experience, education, and occupation, there exists "a substantial gap in median earnings between men and women that is unexplained."[164] Because a lower income necessarily exacerbates the burden imposed by any debt, wage discrimination could ultimately translate into an inability to repay a student loan.[165] While these issues require further exploration and analysis, we raise them in the hopes of creating awareness by both courts and policymakers that, by virtue of gender-specific financial pressures, student loan debt may have a disproportionate impact on women.

b. Age

Debtors in this study tended to be middle-aged. Approximately 71% of the discharge determinations provided sufficiently detailed information to code for the debtor's age.[166] The mean (average) age for

162. *See* SULLIVAN ET AL., *supra* note 12, at 37; Jacoby et al., *supra* note 17, at 391–92.

163. RICHARD VEDDER, GOING BROKE BY DEGREE: WHY COLLEGE COSTS TOO MUCH 100–02 (2004). Statistics from Census 2000, which indicate that (1) college graduation rates for women aged 25 to 34 exceed that of their male counterparts, but that (2) college graduation rates for men aged 45 to 75-and-over surpass that of their female counterparts, seem to confirm this trend. *See* KURT J. BAUMAN & NIKKI L. GRAF, U.S. DEP'T OF COMMERCE, EDUCATIONAL ATTAINMENT: 2000, at 10 fig.5 (U.S. Census Bureau, Census 2000 Brief No. C2KBR-24, 2003).

164. DANIEL H. WEINBERG, U.S. DEP'T OF COMMERCE, EVIDENCE FROM CENSUS 2000 ABOUT EARNINGS BY DETAILED OCCUPATION FOR MEN AND WOMEN 21 (U.S. Census Bureau, Census 2000 Special Reports No. CENSR-15, 2004), *available at* http://www.census.gov/prod/2004pubs/censr-15.pdf.

165. The mean and median income of women debtors in this study was less than that of their male counterparts, regardless of whether debtors without income were included in the calculation.

166. Courts generally specified the exact age of the debtor. Where the court did not provide a specific age, some estimation was required. Specifically, where the court specified the debtor's age as a multiple of ten and modified that multiple with the adjective "early," "mid" or "late," *see, e.g.*, Wardlow v. Great Lakes Higher Educ. Corp. (*In re* Wardlow), 167 B.R. 148, 149 (Bankr. W.D. Mo. 1993)

this group was 41.5 years old and the median (50th percentile) was 41 years old.[167] By contrast, the median age of the general population in 2000 was 35.3 years old,[168] and the mean and median age of CBP2 debtors was 38.[169] The fact that our age data exceed that of both these populations persuades us that the undue hardship debtors were not recent graduates seeking an immediate discharge of their educational debt. While it certainly might be the case that some of the undue hardship debtors began their postsecondary education later in life than others,[170] we recall from reading the opinions that such individuals were the rare exception. In our view, the age data signify that many of the debtors had been in repayment status for quite some time,[171] and that eventually their educational debt burden became more than they could bear, thus prompting them to seek relief in bankruptcy court.[172]

The significance of age as it relates to ability to repay is that an

(describing debtors as in their "early thirties"), we coded the age as the multiple of 10 and then increased that multiple according to the adjective employed. For the adjective "early," we added 2.5 years to the multiple of ten; for the adjective "mid," we added 5 years to the multiple of ten; and for the adjective "late," we added 7.5 years to the multiple of ten. For example, early-30s would have been coded as 32.5 years; mid-30s would have been coded as 35 years; and late-30s would have been coded as 37.5 years.

167. Given that the mean exceeded the median solely by 0.5 years, this suggests that the distribution of ages reported is only slightly skewed by older ages. The oldest debtor in the sample was 67 years old, and the youngest debtor was 23 years old.

168. JULIE MEYER, U.S. DEP'T OF COMMERCE, AGE: 2000, at 6 tbl.2 (U.S. Census Bureau, Census 2000 Brief No. C2KBR/01-12, 2001), *available at* http://www.census.gov/prod/2001pubs/c2kbr01-12.pdf.

169. *See* SULLIVAN ET AL., *supra* note 12, at 38.

170. *See, e.g.*, Sequeira v. Sallie Mae Servicing Corp. (*In re* Sequeira), 278 B.R. 861, 862 (Bankr. D. Or. 2001) (noting that 55-year-old debtor "began her training for her career late in life, and, as a result, is carrying a substantial student loan debt at an older age than most").

171. The undue hardship opinions issued by courts generally did not provide sufficiently detailed information to account for the amount of time that the debtor's student loans had been in repayment.

172. For undue hardship opinions illustrating a significant gap in time between the time when the debtor's student loan obligation first arose and the time when the debtor either filed for bankruptcy or sought to discharge his or her student loans, see, for example, *Adler v. Educational Credit Management Corp.* (*In re Adler*), 300 B.R. 740, 742 (Bankr. N.D. Cal. 2003) (indicating that debtor filed for bankruptcy approximately 10 years after consolidated student loan obligation first arose); see also *Hockett v. Educational Credit Management Corp.* (*In re Hockett*), 289 B.R. 116, 117, 118 (Bankr. C.D. Ill. 2003) (noting that as of the time opinion was written, debtor had incurred student loan 15 years prior thereto, and that debtor had filed for bankruptcy in August 2001); *Cooper v. Educational Credit Management Corp.* (*In re Cooper*), 277 B.R. 853, 854 (Bankr. M.D. Ga. 2002) (stating that debtor incurred student loan obligations between 1991 and 1995 to fund undergraduate education, and noting that debtor did not seek a discharge of such debt until 2001); *Wilcox v. Educational Credit Management Corp.* (*In re Wilcox*), 265 B.R. 864, 867 (Bankr. N.D. Ohio 2001) (noting that student loans were incurred between 1988 and 1990 and that debtor filed for bankruptcy in 1999); *Scholl v. NSLP* (*Nebraska Student Loan Program*) (*In re Scholl*), 259 B.R. 345, 346, 347 (Bankr. N.D. Iowa 2001) (stating that undue hardship trial for consolidated loan obligation that arose in 1988 was held in November 2000).

individual's earning capacity plateaus (and perhaps even declines) with age.[173] According to Census 2000 data, the average earnings of year-round, full-time workers aged 55 and older exceeded those of workers aged 35 to 54 by only $1,000.[174] Aggregating our data by the same characteristics, we find a *decrease* in the average earnings of undue hardship debtors aged 55 and older who were year-round, full-time workers vis-à-vis those aged 35 to 54. If the data gleaned from the issued discharge determinations are representative, then courts ostensibly are being presented with the situation where, if the court denies a discharge, the average debtor will find himself repaying the loan almost up to the age of retirement (assuming a twenty-year loan repayment period and a retirement age of 65 years).[175] Certainly, this cannot be said to square with the stereotypical image of the recent

173. Moreover, the older one gets, the possibility heightens that health problems will arise, which may in turn heap costs on the individual in the form of out-of-pocket medical expenses as well as reduce the productivity of the individual with the result of a decrease in earnings. Some courts have taken such considerations into account in their undue hardship analysis. *See, e.g.*, Sequeira v. Sallie Mae Servicing Corp. (*In re* Sequeira), 278 B.R. 861, 862, 866 (Bankr. D. Or. 2001) (noting in case of 55-year-old debtor that "[t]he combination of the Debtor's age and medical difficulties satisfies the first two parts of the *Brunner* test, or at least demonstrates that the time will come when the test will be met"); Young v. PHEAA (*In re* Young), 225 B.R. 312, 313, 317 (Bankr. E.D. Pa. 1998) (observing in case of 50-year-old debtor that "her age . . . work[s] against her chances of finding gainful employment" and that "significant financial upward mobility at that stage in life is the exception rather than the rule"); Rivers v. United Student Aid Funds, Inc. (*In re* Rivers), 213 B.R. 616, 620 (Bankr. S.D. Ga. 1997) (noting that, over thirty-year repayment period, "it is likely . . . that Debtor's 'minimal standard of living' will increase with her maturing personal and vocational circumstances").

174. *See* WEINBERG, *supra* note 164, at 3 tbl.1.

175. *See, e.g.*, Soler v. United States (*In re* Soler), 261 B.R. 444, 456 & n.9 (Bankr. D. Minn. 2001); Grine v. Tex. Guaranteed Student Loan Corp. (*In re* Grine), 254 B.R. 191, 197 (Bankr. N.D. Ohio 2000); Weil v. U.S. Bank, N.A. (*In re* Weil), Nos. 99-00272, 99-6222, 2000 WL 33712215, at * 3 (Bankr. D. Idaho June 29, 2000). For examples of the forgiving stance towards educational debt relief resulting from consideration of a debtor's age, see *Yapuncich v. Montana Guaranteed Student Loan Program* (*In re Yapuncich*), 266 B.R. 882, 894 (Bankr. D. Mont. 2001) ("Rebecca testified that it would take her between 19 and 23 years to pay back her student loans assuming no interest. By then she would approach or exceed retirement age even if she were able to make payments." (citation omitted)); *Grigas v. Sallie Mae Servicing Corp.* (*In re Grigas*), 252 B.R. 866, 875 (Bankr. D.N.H. 2000) (noting that, pursuant to creditor's repayment proposal, "the Debtor would be required to make payments, and therefore work, until she is 80 years old" and concluding that "such a situation [is] unreasonable"); *Brown v. Union Financial Services, Inc.* (*In re Brown*), 249 B.R. 525, 527–28, 530–31 (Bankr. W.D. Mo. 2000) (observing that repayment period would require debtor to pay until she was 81 years old and finding that "age is a relevant circumstance to be considered"); *Young*, 225 B.R. at 317 ("It is obviously unrealistic to expect the instant Debtor to pay $379.22 for twenty-five years or $322.22 for thirty years, at which times she would be seventy-five and eighty years of age, respectively."). For an example of an unforgiving stance, see *Houshmand v. Missouri Student Loan Program* (*In re Houshmand*), 320 B.R. 917, 921–22 (Bankr. W.D. Mo. 2004) (observing that mere fact that debtor reaches retirement age does not warrant discharge of educational debt and concluding that "[i]t does not therefore seem unreasonable to suggest that Debtor should be required to continue to pay . . . for some period of time after his eligibility for retirement and thus to continue to work in order to generate the income necessary to make those payments").

graduate with a lifetime of opportunity and achievement on the horizon.

c. Marital Status and Dependents

Although marriage may provide some measure of economic stability, the presence of dependents in the household necessarily entails a diversion of financial resources that may ultimately contribute to bankruptcy.[176] Moreover, the financial costs associated with divorce may be one of the leading causes of bankruptcy,[177] especially for a divorced woman raising a child.[178] Finally, the probability of default on student loan repayment increases for borrowers with dependent children and for borrowers who are unmarried.[179] Our data suggest that these effects may have been experienced by a good number of the undue hardship debtors in our study.

At the time that the undue hardship debtors sought to discharge their student loans, approximately 38% were married, 35% were unmarried (i.e., single with no express indication of having previously been married),[180] 22% were divorced,[181] 4% were separated, and 1% were

176. *See* ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE 6 (2003) (noting that data from 2001 Consumer Bankruptcy Project "showed that married couples with children are more than twice as likely to file for bankruptcy as their childless counterparts").

177. SULLIVAN ET AL., *supra* note 12, at 172–98.

178. WARREN & TYAGI, *supra* note 176, at 6 (noting that data from 2001 Consumer Bankruptcy Project indicated that "[a] divorced woman raising a youngster is nearly three times more likely to file for bankruptcy than her single friend who never had children").

179. *See* James Fredericks Volkwein & Alberto F. Cabrera, *Who Defaults on Student Loans?: The Effects of Race, Class and Gender on Borrower Behavior*, *in* CONDEMNING STUDENTS TO DEBT, *supra* note 4, at 105, 111–15.

180. We use the term "unmarried" rather than "never married" given that courts generally referred to the debtor as being "single." In light of the lack of specificity in the term "single," we were not willing to infer that the debtor had never been married. Also, if the court described the debtor as single, noted that the debtor had custody of a child, and referenced a noncustodial parent, *see, e.g.*, Pace v. Educ. Credit Mgmt. Corp. (*In re* Pace), 288 B.R. 788, 790 (Bankr. S.D. Ohio 2003) ("The Plaintiff is 46 years old, and is a single parent of a 10-year-old boy. The father is located in San Diego, California, and is not presently providing any support."), we did not assume that the debtor had been married at one time to the noncustodial parent. In the absence of any discussion of a spouse and reference to the marital status of the debtor, we coded the debtor as unmarried. It strains credulity to think that a judge would not mention a debtor's spouse in an undue hardship opinion. Of course, if the debtor had at one time been married and the court failed to note that the debtor was either divorced or widowed, an overreporting bias in the number of unmarried student loan debtors would result.

181. The percentage of divorced individuals in this study (22%) represents more than twice that of the general population aged 15 and over in the year 2000 (9.7%). ROSE M. KREIDER & TAVIA SIMMONS, U.S. DEP'T OF COMMERCE, AGE: 2000, at 3 tbl.1 (U.S. Census Bureau, Census 2000 Brief No. C2KBR-30, 2003), *available at* http://www.census.gov/prod/2003pubs/c2kbr-30.pdf. It does, however, approximate the percentage of divorced debtors documented in the Consumer Bankruptcy Project II in 1991 (23%). SULLIVAN ET AL., *supra* note 12, at 183. Our data would seem to support the

widowed. The majority of debtors (56%) had a least one dependent.[182] Within this group, the average debtor had two dependents,[183] and the average age of each debtor's dependents was approximately 10 years old.[184] In the 80 discharge determinations that provided sufficiently

Project's findings that the financial costs associated with divorce may be one of the leading causes of bankruptcy. *See supra* note 177 and accompanying text.

182. We coded data regarding the number of dependents for each debtor pursuant to the following methodology. First, in the absence of any discussion by the court of children or other dependents, we coded the debtor as not having any dependents. Given that the Bankruptcy Code's educational debt discharge provision requires a court to ascertain whether an undue hardship would be imposed not only on the debtor but also on the "debtor's dependents," 11 U.S.C. § 523(a)(8) (2000) (amended 2005), we thought it reasonable to infer from the court's silence that the debtor had no dependents. We generally did not code children over the age of 18 as dependents on the basis that the age of emancipation cuts off dependent status, *see* Ciesicki v. Sallie Mae (*In re* Ciesicki), 292 B.R. 299, 305 (Bankr. N.D. Ohio 2003); Flores v. U.S. Dep't of Educ. (*In re* Flores), 282 B.R. 847, 854 (Bankr. N.D. Ohio 2002), unless the court specified or suggested otherwise, *see, e.g.*, Wetzel v. N.Y. State Higher Educ. Servs. Corp. (*In re* Wetzel), 213 B.R. 220, 223 (Bankr. N.D.N.Y. 1996); Hoyle v. Pa. Higher Educ. Assistance Agency (*In re* Hoyle), 199 B.R. 518, 520, 521 (Bankr. E.D. Pa. 1996). Also, if at the time of trial it had been anticipated that a child would be born into the debtor's household, we did not code the unborn child as a dependent. *See, e.g.*, Wynn v. Mo. Coordinating Bd. of Educ. (*In re* Wynn), 270 B.R. 799, 802, 803 (Bankr. S.D. Ga. 2001). We also coded noncustodial children for whom the debtor was obliged to contribute financial support as dependents. *See, e.g.*, Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 190 (Bankr. W.D. Tex. 2001). If, however, only the debtor's spouse was obliged to provide support to a noncustodial child, that child was not coded as a dependent. *See, e.g.*, Hall v. U.S. Dep't of Educ. (*In re* Hall), 293 B.R. 731, 735 (Bankr. N.D. Ohio 2002); Naranjo v. Educ. Credit Mgmt. Corp. (*In re* Naranjo), 261 B.R. 248, 256 (Bankr. E.D. Cal. 2001). If the debtor did not have custody of his or her child and did not have to provide financial support for the child, the child was not coded as a dependent. *See, e.g.*, Morris v. Univ. of Ark., 277 B.R. 910, 912 (Bankr. W.D. Ark. 2002). With respect to nonchildren, we coded them as dependents only if categorized as such by the court. *See, e.g.*, Hockett v. Educ. Credit Mgmt. Corp. (*In re* Hockett), 289 B.R. 116, 117 (Bankr. C.D. Ill. 2003). Finally, we did not code the debtor's spouse as a dependent unless the court expressly categorized the spouse as one. *See, e.g.*, Pichardo v. United Student Aid Funds, Inc. (*In re* Pichardo), 186 B.R. 279, 281, 282 (Bankr. M.D. Fla. 1995).

183. The mean and median number of dependents for undue hardship debtors with dependents were respectively 2.2 and 2.

184. The mean and median were both 9.8 years. These figures are based on the 135 discharge determinations that provided sufficiently detailed information to code for a dependent's age. In each of those cases, we averaged the ages of all the debtor's dependents, as that term is defined in *supra* note 182, and reported that figure. In those instances where the court provided ages only for the oldest and youngest child of the debtor, but did not report the other children's ages, we reported the median age. *See, e.g.*, Williams v. Mo. S. State College (*In re* Williams), 233 B.R. 423, 425 (Bankr. W.D. Mo. 1999) (observing that debtors have four children ranging in age from 11 to 16 years old); Muto v. Sallie Mae (*In re* Muto), 216 B.R. 325, 327 (Bankr. N.D.N.Y. 1996) (noting that debtor has "four children ranging in age from 2 to 15 years old"). There were two instances in which the court neither listed the age for each dependent nor provided an age range for all of the dependents from which dependent age could be coded pursuant to the methodology we have just described. The court did, however, report ages for some of the dependents. *Hall*, 293 B.R. at 734 (reporting birthdates for two of four children); Afflito v. United States (*In re* Afflito), 273 B.R. 162, 167 (Bankr. W.D. Tenn. 2001) (reporting ages for debtor's two custodial children, but not reporting age for debtor's noncustodial child). We averaged the ages provided by the court and reported those figures notwithstanding that the ages of the other dependents could not be ascertained.

detailed information to code for a dependent's health status, nearly two-thirds (63%) of the debtor households with dependents included at least one dependent who was unhealthy.[185] The majority of both married debtors (73%) and divorced debtors (62%) in our study had at least one dependent, whereas a dependent was present in less than one-third of the households of unmarried debtors (30%). However, the overwhelming majority (87%) of unmarried undue hardship debtors with dependents were women. Similarly, approximately 84% of the divorced undue hardship debtors were women. When we consider the significant and ongoing financial commitments required of married debtors to their dependents,[186] especially if some of those dependents are ill, and when we consider the adverse financial consequences stemming from marital discord and single parenting (and that such consequences were confined predominantly among women in our sample),[187] we reach the conclusion that the burden of educational debt was exacerbated by extrinsic factors. Such considerations counter the judicially stylized image of the abusive student loan debtor.

d. Health Status

In the 242 discharge determinations that provided sufficiently detailed information to classify the health status of the undue hardship debtors, approximately 62% of the debtors suffered from either a physical or mental condition (or both).[188] The adverse health of a debtor has

185. We coded a dependent as healthy if the court observed that the dependent did not suffer from any mental or physical condition. *See, e.g.*, Holmes v. Sallie Mae Loan Servicing Ctr. (*In re* Holmes), 205 B.R. 336, 338 (Bankr. M.D. Fla. 1997). Conversely, if the court indicated that the dependent suffered from such a condition, we coded the dependent as unhealthy. *See, e.g.*, *Afflitto*, 273 B.R. at 167 (stating that debtor's seven-year-old child suffers from post-traumatic stress syndrome and undergoes psychiatric treatment).

186. *See, e.g.*, Markley v. Educ. Credit Mgmt. Corp. (*In re* Markley), 236 B.R. 242, 248 (Bankr. N.D. Ohio 1999) ("[G]iven that Debtor's children are currently ages 7 and 8, Debtor will remain responsible for their living expenses for a considerable period of time.").

187. We often noted references in the opinions to past due amounts of alimony and child support owed to the debtor. *See, e.g.*, Garybush v. U.S. Dep't of Educ. (*In re* Garybush), 265 B.R. 587, 590 (Bankr. S.D. Ohio 2001) (stating that debtor was owed $6000 in child support); Brown v. USA Group Loan Servs. (*In re* Brown), 234 B.R. 104, 106 (Bankr. W.D. Mo. 1999) (observing that debtor was owed thousands of dollars in child support); *Holmes*, 205 B.R. at 338 (noting that debtor's ex-husband had failed to pay child support and alimony); Windland v. U.S. Dep't of Educ. (*In re* Windland), 201 B.R. 178, 179 n.2 (Bankr. N.D. Ohio 1996) (noting that debtor is owed $13,000 in child support); Keilig v. Mass. Higher Educ. Assistance Corp. (*In re* LaFlamme), 188 B.R. 867, 871 (Bankr. D.N.H. 1995) (stating that debtor's ex-husband had ceased making alimony and debtor's student loan payments as required by divorce decree).

188. As a general matter, we coded a debtor as healthy if either (1) the court expressly characterized the debtor as such, *see, e.g.*, *Brown*, 234 B.R. at 107, or (2) the court observed that the debtor did not suffer from any mental or physical condition, *see, e.g.*, Williford v. Okla. State Regents

various implications in understanding what prompts a debtor to seek a discharge of educational debt. First, the health condition of a debtor may interfere with the debtor's ability to work, with the end result of either a reduction or total loss of income that hampers the debtor's ability to repay the educational debt.[189] In fact, approximately 37% of the debtors identified as unhealthy suffered from work-limiting health conditions.[190] Second, illness and injury have been among the leading causes that have prompted individuals to file for bankruptcy, in part because medical insurance coverage has proved to be inadequate to shield individuals from overly burdensome debt obligations associated with such illness or injury.[191] We frequently observed references in the opinions that the student loan debtor could not afford health insurance.[192] This suggests that, unlike the abusive debtor who filed for

for Higher Educ. (*In re* Williford), 300 B.R. 70, 73 (Bankr. W.D. Okla. 2003); *Holmes*, 205 B.R. at 338. We coded a debtor as unhealthy if the opinion indicated that the debtor had been suffering from either a physical or mental condition. *See, e.g.*, Lawson v. Hemar Serv. Corp. of Am. (*In re* Lawson), 190 B.R. 955, 957 (Bankr. M.D. Fla. 1995). If the court did not give weight to the debtor's testimony regarding his or her health because of the absence of corroborative evidence, we nonetheless coded the debtor as unhealthy. *See, e.g.*, Johnson v. Educ. Credit Mgmt. Corp. (*In re* Johnson), 299 B.R. 676, 681 (Bankr. M.D. Ga. 2003). For purposes of portraying the situation of a debtor who makes a claim of undue hardship, it is irrelevant whether the court ultimately deems the debtor to have corroborated his or her medical condition from an evidentiary perspective—especially when considering that a debtor testifies under oath and the court has the opportunity to evaluate the debtor's credibility. *See* Myers v. Fifth Third Bank (*In re* Myers), 280 B.R. 416, 419 (Bankr. S.D. Ohio 2002). If, however, the court rejected the debtor's testimony on the basis that it deemed the debtor to lack credibility, we coded the debtor as healthy. *See, e.g.*, Swinney v. Academic Fin. Servs. (*In re* Swinney), 266 B.R. 800, 805 (Bankr. N.D. Ohio 2001). Finally, for opinions involving two debtors with educational debt (and hence constituting two undue hardship determinations), if the court commented on the physical or mental condition of one of the debtors but did not comment on the health status of the other debtor, we inferred from the court's silence that the other debtor did not suffer from any health condition and accordingly coded that debtor as healthy. *See, e.g.*, Lindberg v. Am. Credit & Collection, Student Loan Servicing Ctr. (*In re* Lindberg), 170 B.R. 462, 463–64 (Bankr. D. Kan. 1994) (discussing medical conditions of debtors' children and on-the-job injury of debtor-husband, but failing to discuss debtor-wife's health status). This approach might have produced an underreporting bias regarding the number of unhealthy debtors.

189. *See, e.g.*, Armesto v. N.Y. State Higher Educ. Servs. Corp. (*In re* Armesto), 298 B.R. 45, 48 (Bankr. W.D.N.Y. 2003) (concluding that debtor's agoraphobic condition precluded pursuit of more lucrative employment).

190. We coded a debtor as having a work-limiting medical condition if the court noted that the debtor's condition interfered with his or her ability to obtain employment and/or perform at the place of employment. *See, e.g.*, Kelsey v. Great Lakes Higher Educ. Corp. (*In re* Kelsey), 287 B.R. 132, 142–43 (Bankr. D. Vt. 2001).

191. *See* Jacoby et al., *supra* note 17. Moreover, lack of health care coverage might not only indicate financial instability, it might also exacerbate such instability. *See id*. at 400–01.

192. *See, e.g.*, Armesto v. N.Y. State Higher Educ. Servs. Corp. (*In re* Armesto), 298 B.R. 45, 47 (Bankr. W.D.N.Y. 2003); Warner v. Educ. Credit Mgmt. Corp. (*In re* Warner), 296 B.R. 501, 503 (Bankr. D. Neb. 2003); McGinnis v. Pa. Higher Educ. Assistance Agency (*In re* McGinnis), 289 B.R. 257, 263 (Bankr. M.D. Ga. 2003); Hockett v. Educ. Credit Mgmt. Corp. (*In re* Hockett), 289 B.R. 116, 119 (Bankr. C.D. Ill. 2003); England v. United States (*In re* England), 264 B.R. 38, 48 (Bankr. D. Idaho 2001); Hurley v. Student Loan Acquisition Auth. of Ariz. (*In re* Hurley), 258 B.R. 15, 18 (Bankr. D.

bankruptcy as an easy way out of having to repay recently incurred educational debt and for whom courts have perceived a legislative response to have been warranted, some of the debtors in this study may have filed for bankruptcy as a response to medical calamity that ultimately manifested itself in financial misfortune.[193]

e. Employment Status and Occupation

In the 285 discharge determinations that reported sufficiently detailed information to code for the debtor's employment status, more than three-quarters (76%) of the debtors were employed at the time they sought to discharge their student loans.[194] We classified debtors according to the type of work performed by the debtor for his or her employer (occupation type). Approximately 77% of the determinations involving employed debtors reported sufficiently detailed information to classify them according to the Standard Occupational Classification (SOC) System, which classifies all occupations in the United States performed for pay or profit.[195] The four most commonly represented categories of major occupational group were: (1) office and administrative support occupations (16%); (2) education, training, and library occupations (15%); (3) sales and related occupations (11%); and (4) legal occupations (11%).[196] With one exception, these occupational categories do not square with the stereotype of an abusive student loan debtor. Individuals who are secretaries, middle-school teachers, or retail

Mont. 2001); Anelli v. Sallie Mae Servicing Corp. (*In re* Anelli), 262 B.R. 1, 5 (Bankr. D. Mass. 2000); Hatfield v. William D. Ford Fed. Direct Consolidation Program (*In re* Hatfield), 257 B.R. 575, 579 (Bankr. D. Mont. 2000); Berry v. Educ. Credit Mgmt. Corp. (*In re* Berry), 266 B.R. 359, 362 (Bankr. N.D. Ohio 2000); Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 746 (Bankr. D. Me. 2000); Coats v. N.J. Higher Educ. Assistance Auth. (*In re* Coats), 214 B.R. 397, 401 (Bankr. N.D. Okla. 1997); Dotson-Cannon v. U.S. Dep't of Educ. (*In re* Dotson-Cannon), 206 B.R. 530, 532 (Bankr. W.D. Mo. 1997); Wetzel v. N.Y. State Higher Educ. Servs. Corp. (*In re* Wetzel), 213 B.R. 220, 223 (Bankr. N.D.N.Y. 1996); Plumbers Joint Apprenticeship & Journeyman Training Comm. v. Rosen (*In re* Rosen), 179 B.R. 935, 941 (Bankr. D. Or. 1995).

193. *See, e.g.*, *England*, 264 B.R. at 47 (noting that "medical bills are what motivated [the debtors] to seek relief in bankruptcy").

194. Of those employed undue hardship debtors, approximately 29% were employed full time, which we defined as individuals who worked 52 weeks per year and 40 or more hours per week, and 24% were employed part time. For the remaining 47%, the court did not provide sufficient information to specify whether the debtor was employed full time.

195. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, STANDARD OCCUPATIONAL CLASSIFICATION (SOC) USER GUIDE, http://www.bls.gov/soc/socguide.htm (last visited Dec. 19, 2005). The SOC System consists of a four-tiered hierarchical structure divided into 23 major occupational groups. *Id*. It further divides the major occupational groups into 96 minor groups, 449 broad occupations, and 821 detailed occupations. *Id*.

196. Not all of the debtors whose occupation type fell within the category of legal occupation were lawyers. *See infra* note 199.

workers are not individuals on the eve of a lucrative career.[197] And even though lawyers had the fourth-highest median earnings for year-round, full-time workers in 1999,[198] the lawyers in our sample were not so fortunate: With median annual earnings of approximately $32,500 (in 2003 dollars),[199] they paled in comparison to their cohorts in the general population in 1999 who enjoyed approximately $88,400 (in 2003 dollars) in median earnings.[200]

What strikes us most about our data on the employment status and occupation type of the undue hardship debtors is the similarity to the GAO student loan debtors. Nearly three-quarters (72%) of the GAO student loan debtors were employed at the time they filed for bankruptcy,[201] a difference of only 4 percentage points in comparison to our sample.[202] Moreover, the three most frequently occurring occupations among the GAO debtors were: (1) teacher, (2) clerk, and (3) salesman.[203] Each of those occupations falls within one of the four most represented major occupational groups in our study.[204] Given that the GAO report analyzed student loan bankruptcies filed prior to the time educational debt became conditionally dischargeable,[205] and given that the House Judiciary Committee viewed the GAO report as evidence of lack of abuse of the bankruptcy system,[206] we construe our data to confirm that educational debt relief has generally been sought only by those truly in need.

f. Educational Attainment

While we explore the relationship between education and income

197. According to data from Census 2000, the median earnings of year-round, full-time secretaries and administrative assistants was 21% below the national median earnings of all year-round, full-time workers. WEINBERG, *supra* note 164, at 6.

198. *See id*. at 8 fig.3

199. Of the 19 discharge determinations involving debtors whose occupation type fell within the category of legal occupation, 13 were lawyers and 6 were legal support workers (e.g., paralegals). For the 13 discharge determinations involving lawyers, only 11 of them reported income data.

200. According to data from Census 2000, the median annual earnings of lawyers was approximately $80,000 in 1999 dollars. *See* WEINBERG, *supra* note 164, at 8 fig.3. Pursuant to the Consumer Price Index, that income figure has been adjusted to 2003 dollars by dividing by a factor of 0.905, the factor for converting 1999 dollars to 2003 dollars, and rounding to the nearest hundred dollars. *See* Robert Sahr, Inflation Conversion Factors for Dollars 1665 to Estimated 2015, http://oregonstate.edu/dept/pol_sci/fac/sahr/sahr.htm (last visited Dec. 19, 2005).

201. H.R. REP. NO. 95-595, at 143 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6104.

202. *See supra* text accompanying note 194.

203. H.R. REP. NO. 95-595, at 143, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6104.

204. *See supra* text accompanying note 196.

205. *See supra* text accompanying notes 79–81; *infra* note 250.

206. *See supra* notes 84–90 and accompanying text.

below,[207] here we will briefly point to the signs that postsecondary education has not translated into financial success for all. Of the 259 discharge determinations reporting sufficiently detailed information on the debtor's level of educational attainment (i.e., the highest level of education *completed* by the debtor and resulting in conferral of a degree or its equivalent, such as a certificate),[208] approximately 39% involved debtors who had obtained an advanced degree (e.g., master's degree, professional degree, or doctoral degree);[209] 35% involved debtors who had obtained an undergraduate degree (associate's degree or bachelor's degree);[210] and 26% involved debtors who had either obtained a high-school level of education (and less than high school in one instance) or who had completed vocational or technical training.[211] We find it quite troubling that slightly more than a quarter of the debtors did not earn an undergraduate degree. Those debtors pursued either vocational or technical training or an undergraduate degree with the student loans they borrowed, yet failed to achieve that level of education. In the former instance, this might be symptomatic of the fraud, waste, and abuse visited upon the student loan program by some vocational and trade schools;[212] in the latter instance, it suggests the absence of institutional

207. *See infra* Part III.B.2.a.

208. We classified a debtor's educational attainment according to one of the following six categories: (1) high school diploma or equivalent, such as completion of the Test of General Educational Development (G.E.D.); (2) vocational or technical training; (3) undergraduate degree; (4) master's degree (e.g., M.A., M.S., M.S.W., M.Ed., M.B.A.); (5) professional degree (e.g., M.D., D.D.S., J.D.); and (6) doctoral degree (e.g., Ph.D.). The hierarchical order adopted for this study follows that employed by the U.S. Census Bureau for Census 2000. *See* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, PUB. NO. SF3/14 (RV), SUMMARY FILE 3: 2000 CENSUS OF POPULATION AND HOUSING app. B at B-8 to -9 (2005), *avaiable at* http://www.census.gov/prod/cen2000/doc/sf3.pdf. Census 2000, however, excluded vocational and technical training as a category. *Id.* app. B at B-9. We further classified undergraduate degrees according to one of three categories: (1) associate degree (e.g., A.A., A.S.); (2) bachelor's degree (e.g., B.A., B.S., B.B.A.); or (3) unspecified undergraduate degree. As defined by the U.S. Census Bureau, an associate degree "generally requires 2 years of college level work and is either in an occupational program that prepares [the student] for a specific occupation, or an academic program primarily in the arts and sciences." *Id.* app. B at B-8.

209. For the group of debtors whose highest level of educational attainment was an advanced degree, 40 debtors obtained a master's degree; 52 debtors obtained a professional degree; and 7 debtors obtained a doctoral degree. Also, 1 debtor was identified as having obtained an unspecified graduate degree.

210. For the group of debtors whose highest level of educational attainment was an undergraduate degree, 17 debtors obtained an associate's degree, and 67 debtors obtained a bachelor's degree. Also, 7 debtors were identified as having obtained an unspecified undergraduate degree.

211. For the group of debtors whose highest level of educational attainment was high school or vocational/technical training, 43 debtors obtained a high school diploma or its equivalent (G.E.D.), and 24 debtors completed a program of vocational or technical training. Also, 1 debtor did not achieve a high-school level of education.

212. *See, e.g.*, U.S. GEN. ACCT. OFF., REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES: MANY PROPRIETARY SCHOOLS DO NOT COMPLY WITH DEPARTMENT OF EDUCATION'S PELL

mechanisms to ensure completion of education.[213] To the extent that deficiencies in the administration of the student loan program or in institutions of higher education result in unattained education, we see the availability of bankruptcy relief as an appropriate form of social insurance for student loan borrowers. As for those student loan debtors who attained an undergraduate level of education or more, we interpret the fact that they found themselves in bankruptcy court as a sign that their education failed to insulate them from financial demise. In light of the other demographic data we have presented, and the financial data to which we now turn, we attribute the unfulfilled financial promise suffered by these highly educated student loan debtors to be the result of unfortunate circumstances.

2. Financial Characteristics

The data that best indicates a debtor's ability to repay educational debt are his or her financial characteristics. Our study compiled data on: (1) monthly income attributable solely to the debtor; (2) monthly income attributable to the debtor's household; (3) monthly expenses attributable to the debtor's household (exclusive of educational debt expenses); (4) monthly disposable household income (i.e., household income in excess of household expenses); (5) the amount of the debtor's household income in relation to the poverty line established by the U.S. Department of Health and Human Services (the poverty ratio); (6) the amount of educational debt originally incurred; (7) the amount of educational debt sought to be discharged; (8) the amount by which the educational debt had ballooned at the time that discharge was sought; (9) the number and amount of payments on the educational debt; and, (10) the amount of educational debt owed in relation to annual household income (the educational debt-to-household income ratio).

In order to indicate the relative position of the undue hardship debtors, we report on a debtor-by-debtor basis, rather than on an aggregate basis, financial data regarding (a) disposable income, (b) the educational debt-to-household income ratio, and (c) the amount by

GRANT PROGRAM REQUIREMENTS, REPORT NO. GAO/HRD-84-17 (1984); Michael D. Coomes, *Trade School Defaults: Proprietary Schools and Federal Family Educational Loan Program*, *in* CONDEMNING STUDENTS TO DEBT, *supra* note 4, at 126–60.

213. We identified 77 discharge determinations where the debtor failed to complete the education for which he or she borrowed student loans, 75 of which identified the highest level of education attained by the debtor. More than a quarter of those determinations (27%) involved a debtor whose highest level of education attained was a bachelor's degree. Ostensibly, such individuals sought an advanced degree, yet failed to achieve it. We find this similarly disturbing for the reasons discussed above.

which the educational debt had ballooned at the time the debtor sought a discharge. Moreover, because the majority of the financial data references income either directly or indirectly, we mostly report such data based on income type. Courts often specified the debtor's income type as either *net* monthly income or *gross* monthly income.[214] None of the opinions in this study, however, defined the meaning of net or gross monthly income. It seems appropriate to derive the meaning of these terms, however, from the schedule of current income that a debtor must file with the court upon filing for bankruptcy, officially known as Schedule I.[215] The schedule requires the debtor to list current monthly gross wages, salary, and commissions. It also requires the debtor to account for payroll deductions (e.g., payroll taxes, social security, insurance, union dues).[216] The form designates a debtor's "total net monthly income take home pay" as the amount of current monthly gross income reduced by the amount of payroll deductions.[217] Presumably, when a court refers to a debtor's gross or net monthly income, it has referenced the debtor's schedule of current income and means to use the terms net and gross in that sense.[218] Finally, we refer to a debtor's income as unspecified where (1) the court reported the debtor as earning zero income; (2) the court did not provide sufficiently detailed information regarding the debtor's income type; (3) the court reported a debtor's income as the aggregate of multiple sources of income of different income types; or, (4) the court reported a debtor's income as the aggregate of multiple sources of income but failed to specify the income type of one of the sources of income.[219] These data appear in

214. *See, e.g.*, Cota v. U.S. Dep't of Educ. (*In re* Cota), 298 B.R. 408, 411 (Bankr. D. Ariz. 2003) (reporting *net* monthly income); Mulherin v. Sallie Mae Servicing Corp. (*In re* Mulherin), 297 B.R. 559, 564 (Bankr. N.D. Iowa 2003) (reporting *gross* monthly income).

215. The Bankruptcy Code imposes a duty upon the debtor to file with the court a schedule of assets and liabilities. 11 U.S.C.A § 521(a)(1)(B)(i) (West 2004 & Supp. I 2005). Official Bankruptcy Form 6 consists of the set of schedules that the debtor must file. *See* 11 U.S.C. app. at 968 Official Bankruptcy Form 6, *available at* http://www.uscourts.gov/bkforms/bankruptcy_forms.html#official.

216. 11 U.S.C. app. at 984 Official Bankruptcy Form 6, Schedule I.

217. *Id*. The schedule also accounts for income from other sources—such as income from real property, interest and dividends, alimony payments, government assistance, and pension or retirement income. *Id*. Adding those amounts to the debtor's total net monthly take home pay yields the debtor's total monthly income. *Id*. For purposes of this study, government assistance income, child support income, and retirement income were presumed to be net income (i.e., nontaxable income). Where such characterization is inappropriate, the effect would be to overstate the debtor's income.

218. *See, e.g.*, Weil v. U.S. Bank, N.A. (*In re* Weil), Bankr. No. 99-00272, Adv. No. 99-6222, 2000 WL 33712215, at *2 (Bankr. D. Idaho June 29, 2000) ("Plaintiffs' Schedule I shows combined monthly take home income of approximately $1,749. This appears to be the best estimate of Plaintiffs' monthly income.").

219. However, when a nonspecified or specified type of income was *de minimis* as compared to another source of income for which the court specified income type (i.e., less than 5% of the latter

Table 1, where *N* represents the number of discharge determinations that provided sufficiently detailed information to report the data.[220] All financial data have been adjusted to 2003 dollars using Consumer Price Index (CPI) Conversion Factors.[221]

Table 1
Financial Characteristics by Income Type (in 2003 Dollars)[222]

Unspecified income	*Monthly debtor income*	*Monthly household income*	*Monthly household expenses*	*Monthly disposable household income*	*Poverty ratio*	*Educational debt-to-household income ratio*
Mean	1268.75	1934.22	2087.45	81.80	1.73	2.88
s.d.	1304.22	1631.62	1442.58	1483.53	1.66	4.69
25th percentile	0.00	800.93	944.09	-400.80	0.75	0.81
Median	1058.61	1941.40	2022.09	-35.76	1.34	1.34
75th percentile	2051.58	2645.46	2473.69	168.80	2.45	3.36
N	85	87	55	52	87	67
Zero Income	25	13	5	5	13	0
Gross income	*Monthly debtor income*	*Monthly household income*	*Monthly household expenses*	*Monthly disposable income*	*Poverty ratio*	*Educational debt-to-household income ratio*
Mean	2020.29	2461.32	2433.49	6.49	2.11	2.22
s.d.	1241.64	1418.85	1289.88	1076.80	1.21	1.82
25th percentile	967.45	1159.43	1297.10	-350.73	1.05	0.71
Median	1809.58	2374.39	2207.41	93.20	1.94	1.96
75th percentile	2670.35	3460.34	3461.87	636.78	2.99	3.16
N	30	28	21	21	28	25
Net income	*Monthly debtor income*	*Monthly household income*	*Monthly household expenses*	*Monthly disposable income*	*Poverty ratio*	*Educational debt-to-household income ratio*
Mean	1688.40	2111.33	2251.45	-83.66	1.81	2.17
s.d.	988.65	1300.16	1135.44	498.04	1.06	2.37
25th percentile	1049.66	1335.47	1447.83	-307.98	1.09	0.62
Median	1552.09	1839.46	2089.50	-41.41	1.64	1.54
75th percentile	2121.21	2720.64	2762.82	144.85	2.30	3.03
N	138	147	133	133	147	139

source of income), we coded the monthly income type as the source of income that the court did specify. *See, e.g.*, Hall v. U.S. Dep't of Educ. (*In re* Hall), 293 B.R. 731, 736 (Bankr. N.D. Ohio 2002) (noting that debtor and debtor's husband earned combined *net* monthly income of $1271 and that court exhibits indicated that debtor earned approximately $500 *per year* in preparing income tax returns for individuals).

220. *N* is used in this fashion throughout the Article.

221. *See* Sahr, *supra* note 200.

222. Since the income type of debtors who were reported as earning zero income was coded as unspecified, *see supra* note 219 and accompanying text, those debtors will have the effect of distorting the averages for monthly income and the poverty ratio. Accordingly, we have listed the number of debtors without income in order to provide a sense of the magnitude of the distortion effect. Also, in order to indicate the relative position of the debtors in the sample, we report monthly disposable household income as well as educational debt-to-household income ratios on a debtor-by-debtor basis.

a. Income

Reporting income for the debtors in this sample proved to be quite difficult for a host of reasons, among them (1) discrepancies between the income reported by the debtor in his or her schedule of current income and testimony subsequently provided at trial, (2) the failure of courts to provide a consistent measure of income (e.g., monthly or yearly), (3) the failure of courts to provide a precise amount of income, and (4) the inconsistent approach of courts with regard to recurring and nonrecurring sources of income. Despite the methodological difficulties presented in reporting the data,[223] we nonetheless have confidence that the figures provided in the issued opinions are a fairly good measure of the financial shape of the undue hardship debtors given (1) that a debtor who knowingly and fraudulently provides false financial information to the court faces imprisonment and/or fine,[224] and (2) that the figures provided by the debtor to the court have undergone judicial scrutiny and ostensibly have been confirmed, clarified, and updated at trial.

Our guiding principle in making our coding decisions was to paint as accurate a picture as possible of a student loan debtor's financial circumstances at the time the court made its undue hardship determination. As a general matter, we report the most current income figure provided by the court.[225] If, for example, the court noted that the debtor's income had increased, we coded the higher amount.[226] We provide monthly income figures, and so for those instances where the court did not provide such a measure, we prorated the amount reported.[227] Where the court did not report a specific amount of income,

223. For an articulation of the difficulty and frustration associated with a determination of a debtor's financial circumstances, see *Schmidt v. SLM Corp.* (*In re Schmidt*), 294 B.R. 741, 749 n.6 (Bankr. W.D. Mo. 2003) ("The Court notes that the Debtors testified that there had not been any significant changes since filing their Income and Expense Schedules at the time of the bankruptcy filing in May 2002. However, on cross-examination they testified to several changes in both of these Schedules which the Court will examine in length to determine the actual income and expenses for this analysis. *It is most helpful to the Court in these cases when Debtors come prepared to show the Court their actual income and expenses at the present time*." (emphasis added)).

224. *See* 18 U.S.C. § 152(3) (2000).

225. For an example of a court that has embraced this approach, see *Ritchie v. Northwest Education Loan Association* (*In re Ritchie*), 254 B.R. 913, 918 n.10 (Bankr. D. Idaho 2000).

226. *See, e.g.*, VerMaas v. Student Loans of N.D. (*In re* VerMaas), 302 B.R. 650, 653 (Bankr. D. Neb. 2003). Likewise, if the court noted that the debtor's income had decreased, we reported the lower amount.

227. Where a court reported weekly income, *see, e.g.*, Bruns v. Educ. Credit Mgmt. Corp. (*In re* Bruns), 300 B.R. 737, 738 (Bankr. D. Neb. 2003), we used a conversion factor of 4.33 weeks/month to calculate monthly income. If the court provided a biweekly figure, *see, e.g.*, Hall v. U.S. Dep't of Educ. (*In re* Hall), 293 B.R. 731, 735 (Bankr. N.D. Ohio 2003), we divided the figure by two and multiplied the result by 4.33, even if the court provided a monthly income figure by using a multiplier of 2 on the

but rather a range, the median was coded (and adjusted, if necessary, to reflect a monthly income measure).[228] To the extent calculable, we included monthly recurring wage and nonwage sources of income (e.g., public assistance income) in the income figures. However, we chose to exclude from the income figures those amounts reported by the court that related to nonmonthly recurring sources of income, primarily income tax refunds.[229] Our rationale for doing so was that such sources of income are advanced only once a year and cannot pragmatically be applied to monthly recurring expenses, such as educational debt payments.[230] Moreover, notwithstanding that such income recurs, the amount is bound to fluctuate from year to year.[231] Although this coding

bi-weekly figure, *see e.g.*, Elmore v. Mass. Higher Educ. Assistance Corp. (*In re* Elmore), 230 B.R. 22, 25 n.2 (Bankr. D. Conn. 1999). For an example of a court that has employed the conversion factor of 4.3 weeks/month to calculate monthly income and expenses, see *Turretto v. United States* (*In re Turretto*), 255 B.R. 884, 886 nn.5–7, 888 (Bankr. N.D. Cal. 2000). Finally, if the court provided a yearly income figure, the figure was divided by the conversion factor of 12 months/year to calculate monthly income.

228. *See, e.g.*, Nanton-Marie v. U.S. Dep't of Educ. (*In re* Nanton-Marie), 303 B.R. 228, 230 (Bankr. S.D. Fla. 2003) (providing a range of $7000 to $8000 of average annual income).

229. *See, e.g.*, Lamanna v. EFS Servs., Inc. (*In re* Lamanna), 285 B.R. 347, 354 (Bankr. D.R.I. 2002) (noting that debtor had averaged in excess of $3800 per year in tax refunds over the past five years); Cobb v. Univ. of Toledo (*In re* Cobb), 188 B.R. 22, 23 (observing that debtor "receives approximately $1,200.00 in yearly bonuses"). For the contrary view that tax refunds should be part of the income calculation, see *Lamanna*, 285 B.R. at 354 ("[N]o reason has been shown why the [tax] refunds should not be considered as part of the [d]ebtor's disposable income."); Flores v. U.S. Dep't of Educ. (*In re* Flores), 282 B.R. 847, 855 (Bankr. N.D. Ohio 2002) (adjusting debtor's net monthly income upward "on account of the fact that the Debtor has in the past, and will likely in the future, receive federal and state tax refunds"). The rationale for doing so might be that, otherwise, a debtor could create the perception of an inability to repay by purposefully having the government overwithhold the amount of taxes to which it is entitled to from the debtor's wages. *See* Shirzadi v. U.S.A. Group Loan Servs. (*In re* Shirzadi), 269 B.R. 664, 669 (Bankr. S.D. Ind. 2001) (noting that debtor "typically receives a tax refund of over $3,600 each year, indicating that too much is being withheld in federal taxes from her salary").

230. The Bankruptcy Act Commission's approach to determining undue hardship supports our rationale. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 2, at 140 ¶ 17 (1973) ("The total amount of income, its reliability, and the *periodicity* of its receipt should be adequate to maintain the debtor and his dependents, at a minimal standard of living with *their management capability*, as well as to pay the educational debt." (emphasis added)); *see also* Powers v. Sw. Student Servs. Corp. (*In re* Powers), 235 B.R. 894, 899 (Bankr. W.D. Mo. 1999) ("While it is tempting to consider the prospect of a substantial federal income tax refund each year that could be used to pay the student loan, the Court believes that the tax refund cannot be relied upon in future years for that purpose. There is no assurance that the Debtor will continue to be eligible for an earned income credit, and that is the primary reason she received such a substantial tax refund . . . . Moreover, a tax refund is not received on a monthly basis and therefore is not available to enable the Debtor to make some kind of regular payments on the student loan.").

231. *See, e.g.*, *Flores*, 282 B.R. at 851 (observing that, during three-year period, debtor has received federal and state tax refunds ranging in amount from $882 to $2433); Hoyle v. Pa. Higher Educ. Assistance Agency (*In re* Hoyle), 199 B.R. 518, 523 n.4 (Bankr. E.D. Pa. 1996) ("There is no evidence in the record as to the likelihood that Debtor will continue receiving tax refunds or, if she does,

methodology can potentially result in underreporting a debtor's overall income, we think that it better depicts whether the debtor had the ability to repay his or her educational debt on a monthly basis. We also excluded nonrecurring sources of income, such as a limited disbursement from a retirement account. Finally, we separately coded for income that could be attributed solely to the debtor (debtor income or individual income) and income attributable to the debtor's entire household, which included income from the debtor's nonfiling spouse[232] and the debtor's dependents (household income).[233]

Of the three income types reported, the greatest number of discharge determinations reporting sufficiently detailed information to analyze financial characteristics were those relating to debtors with net income.[234] Since those financial characteristics represent the financial

that they will be in same approximate amount as her [past] tax refunds . . . .").

232. Courts generally take into account the income attributable to a debtor's nonfiling spouse in ascertaining whether the debtor has the ability to repay his or her educational debt, notwithstanding the fact that the nonfiling spouse has no liability on the debt. *See, e.g.*, Chime v. Suntech Student Loan (*In re* Chime), 296 B.R. 439, 444 (Bankr. N.D. Ohio 2003); Garybush v. U.S. Dep't of Educ. (*In re* Garybush), 265 B.R. 587, 591 (Bankr. S.D. Ohio 2001); England v. United States (*In re* England), 264 B.R. 38, 49 (Bankr. D. Idaho 2001); Tex. Guaranteed Student Loan Corp. v. Barron (*In re* Barron), 264 B.R. 833, 838 n.6 (Bankr. E.D. Tex. 2001); *cf.* Archibald v. United Student Aid Funds, Inc. (*In re* Archibald), 280 B.R. 222, 228–29 (Bankr. S.D. Ind. 2002) (taking into account income attributable to debtor's live-in boyfriend in determining whether debtor has ability to repay educational debt). *But see* Coats v. N.J. Higher Educ. Assistance Auth. (*In re* Coats), 214 B.R. 397, 402–03 (Bankr. N.D. Okla. 1997) (determining debtor's ability to repay educational debt solely by reference to debtor's income and expenses and disregarding nonfiling spouse's income and expenses). The propriety of this seems questionable on the ground that accounting for the nonfiling spouse's income unjustifiably imposes the risk of default by the debtor on the nonfiling spouse. *See* Elebrashy v. Student Loan Corp. (*In re* Elebrashy), 189 B.R. 922, 928 (Bankr. N.D. Ohio 1995). On the other hand, given that the Bankruptcy Code references undue hardship that will be suffered by the debtor's dependents, 11 U.S.C.A. § 523(a)(8) (West 2004 & Supp. I 2005), if the court takes into account expenses required to support the debtor's dependents, then the income of the nonfiling spouse that reduces those expenses should be taken into account. It would be inaccurate to say that a debtor bears the entire costs of supporting his or her dependents if the nonfiling spouse's income is used to pay some of those expenses. For a discussion of a nonfiling spouse's economic obligations to a debtor, see generally Mechele Dickerson, *To Love, Honor, and (Oh!) Pay: Should Spouses Be Forced to Pay Each Other's Debts?*, 78 B.U. L. REV. 961 (1998). For the failed argument that consideration of a spouse's income for purposes of determining undue hardship violates the Fourteenth Amendment's guarantee of equal protection, see *Greco v. Sallie Mae Servicing Corp.* (*In re Greco*), 251 B.R. 670, 678–80 (Bankr. E.D. Pa. 2000).

233. We defined household income to include income attributable to any of the debtor's dependents. For example, it might be the case that the debtor's child receives Supplemental Security Income (SSI) on account of a disability. *See, e.g.*, Johnson v. Educ. Credit Mgmt. Corp. (*In re* Johnson), 299 B.R. 676, 680 (Bankr. M.D. Ga. 2003). SSI provides disability benefits to a child "if his or her physical or mental condition is so severe that it results in marked and severe functional limitations," and if the condition lasts or is expected to last at least one year. Social Security Online, KIDS AND FAMILIES: BENEFITS FOR DISABLED CHILDREN, http://www.ssa.gov/kids/parent6.htm (last visited Dec. 19, 2005).

234. The largest amounts reported were for gross income, and the lowest amounts reported were for unspecified income. *See supra* tbl.1. The fact that the lowest income amounts in the sample are for unspecified income suggests that such income most likely is net income.

situation of the majority of the undue hardship debtors, they will be implemented to make our initial point that most of the student loan debtors did not have the wherewithal to repay their educational debt.[235] The undue hardship opinions in this study reported that the mean net monthly debtor income was $1688.40. The median net monthly debtor income was $1552.09, which means that half of the undue hardship debtors had incomes below that point.[236] One in every four of those debtors earned less than $1049.66 per month (the first income quartile), while another quarter earned in excess of $2121.21 per month (the third income quartile). Accordingly, half of those debtors earning net monthly income found themselves earning approximately between $1050 and $2120 per month. These figures generally point to a lack of affluence—to wit, annual individual income between approximately $12,600 and $25,440—and suggest that the undue hardship debtors had been living on the financial margins of society.

A comparison of the median household income of the undue hardship debtors to that of the general population and to that of the CBP2 debtors reveals that the undue hardship debtors found themselves much worse off than the former and in a comparable situation to the latter. Disaggregated according to income type, the annual median household income for undue hardship debtors was approximately $23,297 for unspecified income, $28,493 for gross income, and $22,074 for net income. Meanwhile, in 2003, the general population fared much better as evidenced by the median household income of $43,318 for all households.[237] The fact that the median household income for the general population is nearly twice as much as the median household income for the undue hardship debtors (with the exception of those with gross income) suggests that the undue hardship debtors were clustered in the lower half of the nation's income distribution for 2003. On the other hand, the median household income for the CBP2 debtors in 1991 was $24,276 (in 2003 dollars).[238] Thus, their household median income

235. Our conclusions would remain unaltered were we to use gross income figures.

236. The fact that the mean is greater than the median reflects that the mean has been inflated by those debtors with relatively higher income. Reference to the median proves useful since it remains unaffected by the income of such debtors.

237. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & ROBERT J. MILLS, U.S. DEP'T OF COMMERCE, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2003, at 4 tbl.1 (U.S. Census Bureau, Current Population Report No. P60-226, 2004), *available at* http://www.census.gov/prod/2004pubs/p60-226.pdf.

238. According to data from the Consumer Bankruptcy Project II, the median household income in 1991 dollars of the debtors in the study was $17,952. SULLIVAN ET AL., *supra* note 12, at 65 tbl.2.3. Pursuant to the Consumer Price Index, that income figure has been adjusted to 2003 dollars by dividing by a factor of 0.740, the factor for converting 1991 dollars to 2003 dollars, and rounding to the nearest

bears a striking resemblance to that of the undue hardship debtors. This similarity further bears itself out when comparing the mean household income for the two groups of debtors: (1) The mean annual household income for undue hardship debtors was approximately $23,211 for unspecified income, $29,536 for gross income, and $25,336 for net income; and (2) the mean annual household income for the CBP2 debtors was $27,439 (in 2003 dollars).[239] The overall similarity indicates that, just as the debtors who filed for bankruptcy in 1991 faced financial hardship, so too did the undue hardship debtors. Our income data thus suggest that the undue hardship debtors appeared before the bankruptcy courts not as abusers of the bankruptcy system, but rather as individuals in genuine need of a fresh start.

Given that this Article concerns itself with the repayment of educational debt, and given that higher levels of income are generally associated with a higher level of educational attainment,[240] we proceed to analyze debtor income data according to the level of educational attainment achieved by the individual. This analysis confirms that undue hardship determinations have involved individuals with objectively low incomes. First, a comparison of the undue hardship debtors to the general population indicates that they were much worse off financially than individuals in the general population with the same level of educational attainment as well as those with a *lower* level of educational attainment. Census 2000 reported data on individual earnings for year-round, full-time workers by selected characteristics, among them educational attainment.[241] According to those data, year-round, full-time workers in the general population solely with a high school education earned on average approximately $36,500 (in 2003 dollars), while those individuals with a bachelor's degree or higher on average earned approximately $71,800 (in 2003 dollars).[242] These

dollar. *See* Sahr, *supra* note 200.

239. According to data from the Consumer Bankruptcy Project II, the mean household income in 1991 dollars of the debtors in the study was $20,305. SULLIVAN ET AL., *supra* note 12, at 65 tbl.2.3. Pursuant to the Consumer Price Index, that income figure has been adjusted to 2003 dollars by dividing by a factor of 0.740, the factor for converting 1991 dollars to 2003 dollars, and rounding to the nearest dollar. *See* Sahr, *supra* note 200.

240. For example, in 1999 the average earnings of a year-round, full-time worker with a bachelor's degree or higher nearly doubled those of a year-round, full-time worker with only a high school education. WEINBERG, *supra* note 164, at 3 tbl.1.

241. *Id*.

242. The U.S. Census Bureau reported that, in 1999, year-round, full-time workers with a high school education earned on average $33,000 per year and that workers with a bachelor's degree or higher earned on average $65,000 per year. *Id*. Pursuant to the Consumer Price Index, those income figures have been adjusted to 2003 dollars by dividing by a factor of 0.905, the factor for converting 1999 dollars to 2003 dollars, and rounding to the nearest hundred dollars. *See* Sahr, *supra* note 200.

figures contrast starkly to the individual earnings of the undue hardship debtors who were also year-round, full-time workers:[243] Aggregating the income data without regard to income type, those undue hardship debtors whose highest level of educational attainment was high school earned on average approximately $22,900 per year,[244] while those undue hardship debtors who earned a bachelor's degree or higher earned on average only $23,900.[245] Even after accounting for the fact that the income figures reported by Census 2000 with respect to earnings from wages, salary commissions, and the like are for amounts before deductions for taxes,[246] and thus more resemble what we have labeled as gross income for purposes of this study,[247] the undue hardship debtors were nonetheless worse off than the general population. As evidenced by the internal difference of $1000 per year between the two subgroups of undue hardship debtors, their educational attainment did not translate into the increased level of income that the general population experienced.

Our data thus generally confirm the findings of the Consumer Bankruptcy Project II, which found that, in spite of educational attainment, bankrupt debtors in 1991 were financially worse off than individuals in the general population at the same educational level.[248] Unexpectedly, however, the undue hardship debtors were considerably worse off than the CBP2 debtors who had achieved the same level of educational attainment, as shown below in Table 2.

243. We defined an individual as a year-round, full-time worker (52 weeks per year and 40 or more hours per week) more narrowly than the Census, which defined such an individual as one who worked 50 or more weeks during 1999 for 35 or more hours each week.

244. This figure is based on 9 discharge determinations.

245. This figure is based on 106 discharge determinations.

246. *See* WEINBERG, *supra* note 164, at 1.

247. *See supra* notes 214–18 and accompanying text.

248. SULLIVAN ET AL., *supra* note 12, at 63–64.

Table 2
Average Annual Earnings by Educational Level: Consumer Bankruptcy Project II Debtors and Undue Hardship Debtors (in 2003 Dollars)[249]

Educational level	*Consumer Bankruptcy Project II debtors (1991)*	*Undue hardship debtors (1993-2003)*
High school graduate	23,900	14,500 (N = 41)
Bachelor's degree	30,800	18,200 (N = 62)
Advanced degree	34,200	23,600 (N = 89)

A comparison of the undue hardship debtors to the GAO student loan debtors, however, reveals relatively comparable situations with regard to individual incomes. The GAO report indicated that the average individual earnings for a student loan debtor for the year prior to filing for bankruptcy were approximately $23,200 in 2003 dollars.[250] Disregarding income type, an undue hardship debtor's annual individual income averaged approximately $19,000, which is roughly $4200 less per year than the GAO student loan debtors. This comparison makes it reasonable to conclude that, if the House Judiciary Committee deemed the GAO student loan debtors to be in true financial distress and in need of relief, then that need has not disappeared but instead has persisted.

249. According to data from the Consumer Bankruptcy Project II, the following were the average yearly earnings in 1991 dollars of the debtors in the study based on their level of educational attainment: (1) $17,697 for a high school graduate, (2) $22,790 for an individual with a bachelor's degree, and (3) $25,344 for an individual with an advanced degree. SULLIVAN ET AL., *supra* note 12, at 64 tbl.2.2. Pursuant to the Consumer Price Index, those income figures have been adjusted to 2003 dollars by dividing by a factor of 0.740, the factor for converting 1991 dollars to 2003 dollars, and rounding to the nearest hundred dollars. *See* Sahr, *supra* note 200. The income data for the undue hardship debtors have been aggregated regardless of income type and have been rounded to the nearest hundred dollars.

250. The GAO report stated that the average earnings for such debtors was $6490. H.R. REP. NO. 95-595, at 144 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6105. It did not, however, indicate when the debtors filed their bankruptcy cases. The report merely observed that the GAO obtained information for bankruptcy claims paid by the Office of Education during the period July 1, 1975 through June 30, 1976, *see id*. at 140, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6101, and that the GAO subsequently contacted the corresponding bankruptcy courts for information regarding the debtor cases related to those claims, *see id*. at 141, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6102. For purposes of converting the average earnings of the debtors to 2003 dollars, we have assumed that the debtor cases analyzed in the GAO report were all filed in 1975 and 1976. Accordingly, because the report provided average earnings for the year prior to the bankruptcy filing: (1) we have adjusted the income figure to 2003 dollars pursuant to the Consumer Price Index by dividing by a factor of 0.292, the factor for converting 1975 dollars to 2003 dollars; (2) we then have repeated the calculation, except we have divided by a factor of 0.268, the factor for converting 1974 dollars to 2003 dollars; and (3) we have calculated the average of the two figures, rounding to the nearest hundred dollars. *See* Sahr, *supra* note 200.

b. Poverty

The degree to which the household income of the undue hardship debtors failed to shield them from financial distress can be seen by analyzing how far such income distanced them from the poverty line. We did so by calculating the ratio of the student loan debtor's annual household income to the amounts set forth in the poverty guidelines established by the U.S. Department of Health and Human Services (the poverty ratio).[251] While the U.S. Census Bureau establishes poverty thresholds used to calculate all official poverty population statistics, the U.S. Department of Health and Human Services (HHS) issues poverty guidelines, which constitute a simplified version of the federal poverty thresholds and are administratively used to determine financial eligibility for certain federal assistance programs.[252] Because the HHS poverty guidelines for any given calendar year approximate the Census Bureau poverty thresholds from the *previous* calendar year,[253] and because we have adjusted our financial data to 2003 dollars, we used the 2004 HHS poverty guidelines to calculate the poverty ratio.

The poverty guidelines measure poverty according to the size of the family unit in question,[254] a concept that looks to the number of individuals within a particular household.[255] For our purposes, we expanded the concept of family unit to include those individuals deemed to be financially dependent upon the debtor but who did not reside in the debtor's household (e.g., noncustodial children).[256] We believe this

251. Reference to the poverty guidelines as a proxy for ability to repay is consistent with both (1) the approach adopted by the U.S. Bankruptcy Court for the Eastern District of Pennsylvania in *Bryant v. Pennsylvania Higher Education Assistance Agency* (*In re Bryant*), 72 B.R. 913 (Bankr. E.D. Pa. 1987), which attempted to bring a measure of objectivity to undue hardship analysis by analyzing whether the debtor's income substantially exceeds the amounts set forth in the federal poverty guidelines, *id*. at 916; and (2) the William D. Ford Federal Direct Program's income contingent repayment plan, which calculates discretionary income available to a student loan borrower by reference to the poverty guidelines, *see* 34 C.F.R. § 685.209(a)(3) (2005).

252. *See* Annual Update of the HHS Poverty Guidelines, 69 Fed. Reg. 7336, 7337 (Feb. 13, 2004). For a more detailed discussion of the differences between the Census Bureau poverty thresholds and the HHS poverty guidelines, see U.S. Dep't of Health & Human Servs., Frequently Asked Questions Related to the Poverty Guidelines and Poverty, http://aspe.hhs.gov/poverty/faq.shtml (last visited July 25, 2005).

253. *See* Annual Update of the HHS Poverty Guidelines, 69 Fed. Reg. at 7337.

254. *Id*. at 7336.

255. *See id*. at 7337 (defining family unit as used in the poverty guidelines).

256. The HHS poverty guidelines seem to invite such discretion. *See id.* ("There is no universal administrative definition of 'family,' 'family unit,' or 'household' that is valid for all programs that use the poverty guidelines. . . . [N]on-Federal organizations which use the poverty guidelines in non-Federally-funded activities may use administrative definitions that differ from the statistical definitions given below.").

approach better reflects the true financial situation of the undue hardship debtors. The 2004 HHS poverty guidelines define the poverty line for the contiguous United States as a household with income of $9310 for the first member and $3180 for each additional member.[257] Subdividing the undue hardship debtors by income type (unspecified, gross, and net), we found that approximately 23% of the 262 discharge determinations that reported household income involved households *below* the poverty level. This is more than twice the percentage of American families deemed to live below the poverty level in 2003.[258] On the other hand, the debtors in our study did not fare as badly as the CBP2 debtors, 32% of whom lived below the poverty line.[259]

The fact that nearly one quarter of these 262 debtors had been in poverty does not tell us the relative situation of the other three-quarters of the group. By looking to the poverty ratio, we can ascertain how close or far away from poverty the undue hardship debtors were situated. Based on the figures set forth above in Table 1, the household income of the debtors, irrespective of income type, placed them on average somewhere between two to three times over the poverty level.[260] Also, by reference to the median poverty ratio, we observe that half of the debtor households did not generate sufficient income to place them twice over the poverty level.[261] While individuals slip in and out of poverty because of the volatile nature of income,[262] these data nonetheless evoke the image of individuals living precariously close to the outer margins and thus point to need for some form of financial relief.

257. *Id*. at 7336. The poverty guideline amounts increase for individuals who live in Alaska and Hawaii. *Id*. We have accounted for this difference with regard to the one opinion in the study issued by the U.S. Bankruptcy Court for the District of Alaska. *See* Furneri v. Graduate Loan Ctr. (*In re* Furneri), 266 B.R. 447 (Bankr. D. Alaska 2001). The poverty guidelines do not provide a definition of income since its precise definition "is very sensitive to the specific needs and purposes of that program." Annual Update of the HHS Poverty Guidelines, 69 Fed. Reg. at 7338. The court in *Bryant v. Pennsylvania Higher Education Assistance Agency* (*In re Bryant*), 72 B.R. 913 (Bankr. E.D. Pa. 1987), adopted the view that the poverty guidelines should be implemented by reference to an individual's *net* income rather than *gross* income. *Id*. at 916 & n.4. Since we were limited by the income type reported by the court, we have analyzed the poverty ratio according to each income type represented in our study (unspecified, gross, and net).

258. DENAVAS-WALT ET AL., *supra* note 237, at 10 tbl.3.

259. SULLIVAN ET AL., *supra* note 12, at 63.

260. *See supra* tbl.1.

261. *Id*.

262. SULLIVAN ET AL., *supra* note 12, at 63. Between 2002 and 2003, however, the percentage of families in poverty increased by only 0.4%. DENAVAS-WALT ET AL., *supra* note 237, at 10 tbl.3.

c. Disposable Income and Educational Debt-to-Income Ratios

So far, the financial data have painted a fairly gloomy picture, and one that certainly does not evidence abuse of the bankruptcy system by student loan debtors. Yet, to get at the core of whether the case law has truly evidenced such abuse, we must ultimately ask whether the financial data suggest that the undue hardship debtors had the ability to repay their educational debt. If they did have such an ability, then we might conclude that they would not have suffered hardship absent a discharge of their educational debt and that their resort to bankruptcy was inappropriate. But how does one get a sense of an individual's ability to repay a debt? The simplest way of course is to determine whether the amount of disposable income available to the individual (i.e., income in excess of expenses) is sufficient to satisfy the debt owed. Certain difficulties associated with the measure of expenses, however, weigh in favor of looking to a measure that does not reference expense data, such as the number of years worth of income that an individual would have to devote in order to repay the debt in full. We now discuss both indicia of repayment ability and ultimately conclude that the undue hardship debtors did not realistically have such an ability, again confirming the lack of abuse of the bankruptcy system by such individuals.

(1) Disposable Income

We calculated monthly disposable income for the undue hardship debtors by identifying those discharge determinations that reported both monthly household income and monthly expenses for the debtor and then subtracting the expense amount from the income amount. Accordingly, we report the amounts for monthly disposable income on a debtor-by-debtor basis, which enables us to better depict ability to repay than had we calculated disposable income by reference to unmatched, aggregate amounts of income and expenses. As we have already discussed household income data and the methodology by which we coded it,[263] we only need to discuss briefly the methodology by which we coded monthly expense data for a debtor's household.

Again, our guiding principle in making our coding decisions was to portray the financial characteristics of the undue hardship debtors closest to the point in time that the court issued its discharge determination. Thus, we coded the most current monthly expense figure

263. *See supra* notes 225–33 and accompanying text.

provided by the court. If, for example, the court noted that the debtor's scheduled expenses had increased or omitted certain expenses that were being incurred,[264] we adjusted the originally scheduled expenses upward. Similarly, if the debtor's originally scheduled expenses had been reduced or were no longer incurred,[265] or where an inaccurate representation had been made on the schedule of monthly expenses,[266] or in the evidence presented at trial,[267] we adjusted the expense figures downward. Where the court did not report a precise expense amount, but rather a range, the median was reported (and adjusted, if necessary, to reflect a monthly expense measure).[268] Where the court reported various estimates of monthly expenses, we reported the mean.[269] If the court observed that the debtor's monthly expenses equaled or exceeded the debtor's monthly income, but the court failed to specify the amount of expenses, we reported the monthly expense figure as equal to the monthly income figure.[270] This likely had the effect of underreporting the amount of monthly expenses. Finally, we reported monthly expense figures *exclusive* of any educational debt expenses that related to a student loan subject to the court's discharge determination.[271] This

264. *See, e.g.*, Ivory v. United States (*In re* Ivory), 269 B.R. 890, 900 (Bankr. N.D. Ala. 2001) (noting that debtor's schedule of expenses "does not even represent [her] post-filing expenses or her current circumstances," and finding that, if "she paid for necessary expenses omitted by her from the schedule, . . . her monthly expenses would be, at a minimum, $3,100"); Elebrashy v. Student Loan Corp. (*In re* Elebrashy), 189 BR. 922, 927 (Bankr. N.D. Ohio 1995) (noting that debtor's "monthly expenses must now be increased by $200 per month . . . for payments on the HEAL loan").

265. *See, e.g.*, Law v. Educ. Res. Inst., Inc. (*In re* Law), 159 B.R. 287, 291 (Bankr. D.S.D. 1993) (noting that debtors' monthly expenses had been reduced since filing for bankruptcy and enumerating most current expenses).

266. *See, e.g.*, Block v. U.S. Dep't of Educ. (*In re* Block), 273 B.R. 600, 605–06 (Bankr. W.D. Mo. 2002) (noting that debtor was not actually incurring $150 in monthly educational expense that debtor had listed in his schedule of expenses).

267. *See, e.g.*, Young v. Educ. Fin. Servs., Inc. (*In re* Young), 237 B.R. 139, 143–44 (Bankr. N.D. Ohio 1999) (noting that evidence at trial had revealed that debtor's monthly expenses were $817 rather than the amount of $1762.21 listed in her bankruptcy petition).

268. *See*, *e.g.*, Johnson v. Educ. Credit Mgmt. Corp. (*In re* Johnson), 299 B.R. 676, 678 (Bankr. M.D. Ga. 2003) (reporting that total monthly expenses ranged from $2668 and $2783); Stein v. Bank of New Eng. (*In re* Stein), 218 B.R. 281, 285 (Bankr. D. Conn. 1998) (reporting annual expenses of approximately $33,000 to $34,000).

269. *See*, *e.g.*, Logan v. N.C. State Educ. Assistance Auth. (*In re* Logan), 263 B.R. 796, 798 (Bankr. W.D. Ky. 2000).

270. *See*, *e.g.*, Kirchhofer v. Direct Loans (*In re* Kirchhofer), 278 B.R. 162, 165 (Bankr. N.D. Ohio 2002) (noting that debtor "submitted . . . an itemized list of expenses which utilize, in full, her husband's take-home income").

271. If the court included the educational debt expense in the monthly expense figure, we subtracted it. *See*, *e.g.*, Hall v. U.S. Dep't of Educ. (*In re* Hall), 277 B.R. 882, 886 (Bankr. S.D. Ohio 2002); Anelli v. Sallie Mae Servicing Corp. (*In re* Anelli), 262 B.R. 1, 5–6 (Bankr. D. Mass. 2000). In those instances where the court only provided a monthly expense figure but did not provide a breakdown of the individual expenses, we coded that figure and assumed that it excluded any

practice mirrored that of the majority of courts in ascertaining whether a debtor had sufficient disposable income to repay his or her educational debt.[272]

One final point bears mentioning regarding our coding methodology for expenses. For courts, any analysis of expenses for purposes of ascertaining disposable income and a debtor's ability to repay his or her student loans inherently entails consideration of which expenses can actually be deemed necessary, as well as reasonable in amount, to maintain the debtor and the debtor's dependents.[273] In conducting such an analysis, courts often made one of two observations: Either a debtor's expenses were overly conservative and insufficient to maintain a minimal lifestyle (i.e., underconsumption),[274] or some of the debtor's budgeted expenses were unnecessary or necessary but excessive (i.e., overconsumption).[275] In such instances when the court made upward or downward departures, we disregarded such departures and did not code the expense figures revised by the court. This allowed us to portray a debtor's actual budgeted expenses, rather than what a court believed the debtor's budgeted expenses ought to be.

Before discussing the disposable income available to the undue hardship debtors, a brief discussion of their expenses is warranted, primarily to demonstrate that these debtors, on the whole, were living on very limited budgets. Based on the 209 discharge determinations that provided sufficiently detailed information to code for monthly expense data, the mean monthly expense figure reported by a court was $2227,[276] and the median was $2102, indicating that some debtors with

educational debt expenses.

272. *See, e.g.*, Fuller v. U.S. Dep't of Educ. (*In re* Fuller), 296 B.R. 813, 817 (Bankr. N.D. Cal. 2003) ("[The debtor] listed $3,000 per month as his income and $5,215 as his expenses. However, $3,000 of his expenses represented payments on his student loans. If the student loan payments are deducted from his expenses, the Debtor has disposable income of $785 per month."); Fox v. Student Loan Mktg. Ass'n (*In re* Fox), 189 B.R. 115, 118 (Bankr. N.D. Ohio 1995) (omitting educational debt expenses from monthly expense analysis).

273. As discussed in *infra* Part III.C.2.a, courts have incorporated this concept into their analyses of what constitutes undue hardship. Elsewhere in the Bankruptcy Code, Congress has expressly incorporated the concept of reasonably necessary expenses for purposes of ascertaining disposable income. *See* 11 U.S.C.A. § 1325(b)(2) (West 2004 & Supp. I 2005).

274. *See, e.g.*, Cota v. U.S. Dep't of Educ. (*In re* Cota), 298 B.R. 408, 416 (Bankr. D. Ariz. 2003); Korhonen v. Educ. Credit Mgmt. Corp. (*In re* Korhonen), 296 B.R. 492, 495 (Bankr. D. Minn. 2003); Brown v. Sallie Mae Servicing Corp. (*In re* Brown), 227 B.R. 540, 544 (Bankr. S.D. Cal. 1998).

275. Hollins v. U.S. Dep't of Educ. (*In re* Hollins), 286 B.R. 310, 317 (Bankr. N.D. Tex. 2002); Block v. U.S. Dep't of Educ. (*In re* Block), 273 B.R. 600, 605–06 (Bank. W.D. Mo. 2002).

276. A 1997 study of consumer bankruptcy cases filed in thirteen judicial districts from May through July 1996, JOHN M. BARRON & MICHAEL E. STATEN, PERSONAL BANKRUPTCY: A REPORT ON PETITIONERS' ABILITY-TO-PAY 6–7 (Credit Research Ctr., Monograph No. 33, 1997), *available at* http://www.msb.edu/faculty/research/credit_research/pdf/Mono33.pdf, reported the average annual

greater amounts of expenses have skewed the average upward. One quarter of these debtors had monthly expenses of less than approximately $1340 (the first quartile), while another quarter had monthly expenses greater than approximately $2800 (the third quartile). The rest of the debtors found themselves somewhere in between these two figures.

An average expense budget of less than $27,000 per year does not suggest to us that the undue hardship debtors were going out and purchasing plasma televisions or booking expensive vacations. Instead, they were most likely struggling to make ends meet. Take, for example, the basic necessity of housing and assume that the overwhelming majority of the undue hardship debtors were renters rather than homeowners (as is our recollection from our review of the opinions). According to Census 2000 data, median monthly gross rent, which includes the average monthly cost of utilities and fuels, amounted to $602 for the general population,[277] or approximately $643 in 2003 dollars.[278] If the median monthly gross rent incurred by the undue hardship debtors approximated that of the general population in 1999,[279] then the median monthly gross rent as a percentage of their median monthly household income would equal approximately 34%.[280] Gross rent that equals or exceeds 30% of household income has been deemed to constitute a financial burden.[281] Thus, for the 262 discharge determinations reporting monthly household income data, rent alone

expenses of Chapter 7 debtors as $21,150, *id.* at 18 tbl.5. This expense figure amounts to approximately $24,795 in 2003 dollars (obtained by dividing $21,150 by a factor of 0.853, the factor for converting 1996 dollars to 2003 dollars). *See* Sahr, *supra* note 200. We positively identified 226 discharge determinations as having been made within the context of a Chapter 7 case. Approximately 77% of those determinations reported expense data. The average annual expenses for this subset of debtors amounted to approximately $27,500. Accordingly, we see that the monthly budgets of these undue hardship debtors did not radically differ from those of the general debtor population in 1996.

277. ROBERT BONNETTE, U.S. DEP'T OF COMMERCE, HOUSING COSTS OF RENTERS: 2000, at 2 (U.S. Census Bureau, Census 2000 Brief No. C2KBR-21, 2003) [hereinafter BONNETTE, HOUSING COSTS OF RENTERS], *available at* http://www.census.gov/prod/2003pubs/c2kbr-21.pdf. Median monthly owner costs for homeowners with a mortgage constituted 21.7% of household income in 2000. ROBERT BONNETTE, U.S. DEP'T OF COMMERCE, HOUSING COSTS OF HOMEOWNERS: 2000, at 7 tbl.3 (U.S. Census Bureau, Census 2000 Brief No. C2KBR-27, 2003), *available at* http://www.census.gov/prod/2003pubs/c2kbr-27.pdf

278. Pursuant to the Consumer Price Index, that income figure has been adjusted to 2003 dollars by dividing by a factor of 0.936, the factor for converting 2000 dollars to 2003 dollars, and rounding to the nearest dollar. *See* Sahr, *supra* note 200.

279. Median gross rent for the United States as a whole increased by only $31 (in 2000 dollars) between 1990 and 2000. *See* BONNETTE, HOUSING COSTS OF RENTERS, *supra* note 277, at 2 n.1.

280. We calculated this percentage by dividing the median monthly gross rent amount of $634 by the aggregate median household income of the undue hardship debtors, without regard to income type, which was $1868.34.

281. BONNETTE, HOUSING COSTS OF RENTERS, *supra* note 277, at 4.

would have placed a financial strain on more than half of those debtors. Moreover, if this amount is reflected as part of the undue hardship debtor's median monthly expense budget of $2102, then the remaining $1459 would remain to be allocated among other necessities such as food, clothing, transportation, and out-of-pocket medical expenses. This does not strike us as unreasonable given that approximately two-thirds (66%) of the undue hardship debtors had financial responsibility for at least one dependent and/or were married.[282] At bottom, the monthly expense data do not convince us that the undue hardship debtors can be characterized as spendthrifts. Rather, we conclude that, more likely than not, they devoted their monthly budgets to meet basic needs and that they had very little flexibility, if any at all, to reduce their monthly expenses. This point should not be overlooked as we consider the amount of disposable income these debtors had available to repay their student loans.

Our data on disposable income lead us to conclude that the undue hardship debtors did not have the wherewithal to make meaningful payment, if any at all, on their educational debt—and by meaningful, we mean payments in an amount that would sufficiently reduce outstanding principal such that the educational debt would eventually be repaid.[283] From time to time, either a court would note or a creditor would concede that the debtor only had the ability to repay interest on the educational debt and nothing more.[284] Our data appear to confirm this. For those discharge determinations reporting data on monthly household income and expenses, debtors averaged the following amounts of disposable monthly income according to income type: approximately $82 for unspecified income, $7 for gross income, and -$84 for net income.[285] When accounting for the fact that the measure of gross income is in pretax dollars,[286] those debtors for whom the court reported gross income probably averaged *negative* net monthly disposable income. Furthermore, the medians for unspecified and net monthly disposable income are both negative, while the median for gross monthly disposable income is only approximately $93,[287] which again probably

282. For a discussion of how we defined dependent for purposes of this study, see *supra* note 182.

283. As stated by one court, "The debtor must be able, at least over the long haul, to slay the beast, not merely keep it at bay." Coats v. N.J. Higher Educ. Assistance Auth. (*In re* Coats), 214 B.R. 397, 403–04 (Bankr. N.D. Okla. 1997).

284. *See, e.g.*, Afflitto v. United States (*In re* Afflitto), 273 B.R. 162, 172 (Bankr. W.D. Tenn. 2001); Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 188 (Bankr. W.D. Tex. 2001); Thomsen v. U.S. Dep't of Educ. (*In re* Thomsen), 234 B.R. 506, 509 (Bankr. D. Mont. 1999).

285. *See supra* tbl.1.

286. *See supra* notes 214–18 and accompanying text.

287. *See supra* tbl.1.

translates into *negative* net monthly disposable income.

These figures become more tangible if we focus on a specific subgroup. Consider the fact that the average monthly student loan payment for individuals who obtained their bachelor's degree in 1999–2000 and who were repaying their student loans in 2001 amounted to $210,[288] or approximately $218 in 2003 dollars.[289] Of the 67 discharge determinations identifying the level of education attained by a debtor as bachelor's degree, 44 involved debtors who did not fund pursuit of education beyond that level with student loans. For that group of debtors, courts provided disposable household income data for 35 of the debtors. Assuming that the monthly student loan payments for this group approximated those of the nondebtor cohort, only 20% of the undue hardship debtors would have had sufficient disposable income (i.e., greater than or equal to $218) to make their monthly student loan payments.

Whichever way we look at our disposable income data, we come away with the impression that the undue hardship debtors, on average, had insufficient income to meet their monthly expenses, let alone their educational debt payments. One might ask how such debtors subsisted when their monthly household expenses exceeded their monthly household income.[290] Our best guess would be that they fell behind on their monthly bills and paid only when threatened with collection efforts (e.g., garnishment of wages) or discontinuation of services by the creditor.[291] In fact, such collection efforts might have prompted some debtors to file for bankruptcy.[292] And even for those debtors who could meet their monthly expenses, if their income was insufficient to make their educational debt payments, they nonetheless may have faced

288. SUSAN P. CHOY & XIAOJIE LI, U.S. DEP'T OF EDUC., DEBT BURDEN: A COMPARISON OF 1992–93 AND 1999–2000 BACHELOR'S DEGREE RECIPIENTS A YEAR AFTER GRADUATING 34 tbl.11 (Nat'l Ctr. for Educ. Statistics, Postsecondary Education Descriptive Analysis Reports No. NCES 2005-170, 2005), *available at* http://nces.ed.gov/pubs2005/2005170.pdf.

289. Pursuant to the Consumer Price Index, that income figure has been adjusted to 2003 dollars by dividing by a factor of 0.963, the factor for converting 2001 dollars to 2003 dollars, and rounding to the nearest dollar. *See* Sahr, *supra* note 200.

290. In one extreme circumstance, an undue hardship debtor from Montana hunted wild game to help cover her food expenses. Yapuncich v. Mont. Guaranteed Student Loan Program (*In re* Yapuncich), 266 B.R. 882, 886 (Bankr. D. Mont. 2001).

291. *See*, *e.g.*, Fox v. Student Loan Mktg. Ass'n (*In re* Fox), 189 B.R. 115, 118 (Bankr. N.D. Ohio 1995) ("To account for the discrepancy in monies received and monies paid out, Debtor states that she does not pay all of her bills when they are received, but only pays the creditors which threaten to discontinue their services.").

292. *See*, *e.g.*, Cooper v. Neb. Student Loan Program, Inc. (*In re* Cooper), 167 B.R. 966, 969 (Bankr. D. Kan. 1994) (noting that debtor testified that "garnishments by medical care providers prompted the original decision to file for Chapter 13 relief").

collection efforts by a student loan creditor and ultimately were forced to seek bankruptcy relief.[293]

We see that the financial circumstances of the undue hardship debtors, as depicted by their lack of disposable income, suggest an inability to repay their educational debt. Data on attempts at repayment, as measured by the number and amount of payments the debtors made on their educational debt, confirm this. As an initial matter, 233 discharge determinations provided information on whether any payment had been made on the student loans sought to be discharged and ultimately subjected to undue hardship analysis by the court.[294] In approximately 77% of those determinations, some repayment had been made, whether voluntary or involuntary (e.g., via garnishment or offset by the government of the debtor's income tax refund).[295] However, both the frequency and amount of repayment proved to be negligible. In the 74 discharge determinations that reported the number of payments a debtor made, half of the debtors made 5 payments or less.[296] In the 105 discharge determinations that reported the total amount of payments a debtor made, approximately 58% of the debtors paid less than $2000 (in 2003 dollars).[297] We realize that these data could be construed to mean that the debtors evaded repaying their student loans, but we ultimately conclude that such a reading would not comport with the rest of the financial picture that has been presented. Rather, we view the failure of the undue hardship debtors to have made frequent payments in

293. *See*, *e.g.*, *Yapuncich*, 266 B.R. at 886; Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 188 (Bankr. W.D. Tex. 2001).

294. Because we coded payment data only for those student loans ultimately subject to undue hardship analysis, there are certain instances where the debtor had made payments on other student loans that are not included in our data. Accordingly, our data understate the full extent of the repayment efforts of the student loan debtors in this study.

295. While we coded payments made to a student loan creditor via a Chapter 13 repayment plan as repayment on the educational debt, *see, e.g.*, Elebrashy v. Student Loan Corp. (*In re* Elebrashy), 189 B.R. 922, 929 (Bankr. N.D. Ohio 1995), we did not code any payments made to a student loan creditor via a Chapter 7 distribution as such, *see, e.g.*, Ivory v. United States (*In re* Ivory), 269 B.R. 890, 895 (Bankr. N.D. Ala. 2001). Rarely did a court indicate whether any disbursements had been made to the student loan creditor in the debtor's Chapter 7 proceeding. For the holding that a debtor's Chapter 13 payments to a student loan creditor are evidence of the debtor's good faith effort to repay her educational debt, see *Sequeira v. Sallie Mae Servicing Corp.* (*In re Sequeira*), 278 B.R. 861, 866 n.7 (Bankr. D. Or. 2001).

296. In those instances in which the court did not specify the exact number of payments made, but rather provided a range, we coded the mean. *See*, *e.g.*, Williford v. Okla. State Regents for Higher Educ. (*In re* Williford), 300 B.R. 70, 73 (Bankr. W.D. Okla. 2003) ("Debtor said she has made between ten and fifteen payments on her student loans since the loan repayment periods began in 1999.").

297. In those instances in which the court did not specify the exact amount of payments made, but rather provided a range, we coded the mean. *See*, *e.g.*, Fuller v. U.S. Dep't of Educ. (*In re* Fuller), 296 B.R. 813, 815 (Bankr. N.D. Cal. 2003) (noting that debtor paid $2000 to $3000 toward student loans).

substantial amounts as a natural consequence of their financial distress.

(2) Educational Debt-to-Household Income Ratios

Another useful measure by which we can get a sense of an undue hardship debtor's ability to repay is a calculation of the number of years' worth of household income the debtor would have had to devote to repay his or her student loans in full. Given that reasonable minds will differ as to what might constitute a reasonable household budget for maintenance of a debtor and his or her dependents, reference to an educational debt-to-household income ratio as a metric of ability to repay might be more palatable for some since it does not take into account expense data. Again, since household income data and the methodology by which we coded it have been discussed above,[298] we need only discuss briefly the methodology by which we coded educational debt data before presenting the relation of educational debt to household income.

We coded for data regarding the amount of educational debt that a debtor sought to discharge and that the court ultimately scrutinized for undue hardship analysis. If the debtor received a discharge of educational debt of certain student loans by virtue of default judgment entered against a creditor that failed to appear, answer to, or defend against the debtor's complaint, we excluded those amounts from our data.[299] We did so in light of our objective to ascertain the meaning of undue hardship by reference to those factual circumstances to which courts applied the law. We included amounts for both principal and interest. We also included attorneys' fees and costs associated with collection to which the creditor was entitled by agreement, but only if the court granted such an award.[300] Where a discrepancy existed between the amount of educational debt reported by the debtor and by the creditor, and where the court did not resolve the discrepancy, we reported the creditor's figure on the assumption that the creditor would have kept better track of those amounts owed to it.[301] If the court

298. *See supra* notes 225–33 and accompanying text.

299. *See*, *e.g.*, Borrero v. Conn. Student Loan Found. (*In re* Borrero), 208 B.R. 792, 795 (Bankr. D. Conn. 1997).

300. *See*, *e.g.*, Pichardo v. United Student Aid Funds, Inc. (*In re* Pichardo), 186 B.R. 279, 281, 284 (Bankr. M.D. Fla. 1995); Daugherty v. First Tenn. Bank (*In re* Daugherty), 175 B.R. 953, 961 (Bankr. E.D. Tenn. 1994). For an example of a court that denied the award of attorneys' fees and costs, notwithstanding that the promissory notes provided for their recovery, see *Webb v. Law Student Loan/Edu Serv.* (*In re Webb*), No. 94-4077, 1995 WL 17005053, at *2, *5 (Bankr. S.D. Ga. Mar. 1, 1995).

301. *See*, *e.g.*, Hollins v. U.S. Dep't of Educ. (*In re* Hollins), 286 B.R. 310, 313 (Bankr. N.D. Tex.

reported the amounts owed on different student loans, but the respective amounts related to different dates, we generally reported the amounts owed at the time the debtor filed for bankruptcy,[302] unless the former amounts were the only ones available to report.[303] In certain instances, the failure of the court to provide detailed information resulted in underreporting the amount of educational debt owed—for example, if the court only reported the amount of principal owed,[304] or if the court did not specify the exact amount owed.[305] Finally, in order to provide the financial circumstance of the debtor closest to the time that the court issued its decision, we coded the most recent amount of educational debt owed.[306] Note, however, that a bankruptcy filing will not prevent the accrual of interest on a debt.[307] Accordingly, even those amounts reported at the time of trial will be less than the amount the debtor would have owed at the time the court issued the opinion.[308] Given this consideration and the underreporting biases indicated above, the data that follow likely understate the educational debt loads carried by the

2002).

302. *See*, *e.g.*, Williford v. Okla. State Regents for Higher Educ. (*In re* Williford), 300 B.R. 70, 72, 73 (Bankr. W.D. Okla. 2003); Pantelis v. Kent State Univ. (*In re* Pantelis), 229 B.R. 716, 717, 720 (Bankr. N.D. Ohio 1998).

303. *See*, *e.g.*, Korhonen v. Educ. Credit Mgmt. Corp. (*In re* Korhonen), 296 B.R. 492, 495 (Bankr. D. Minn. 2003); Young v. Educ. Fin. Servs., Inc. (*In re* Young), 237 B.R. 139, 141 (Bankr. N.D. Ohio 1999).

304. *See, e.g.*, Hall v. U.S. Dep't of Educ. (*In re* Hall), 293 B.R. 731, 734 (Bankr. N.D. Ohio 2002).

305. *See*, *e.g.*, Lamanna v. EFS Servs., Inc. (*In re* Lamanna), 285 B.R. 347, 349 (Bankr. D.R.I. 2002) (noting that total amount owed on student loans "exceeds $148,500"); Doherty v. United Student Aid Funds, Inc. (*In re* Doherty), 219 B.R. 665, 668 n.6 (Bankr. W.D.N.Y. 1998) (noting that debtor owes "over $20,000 in student loan debts").

306. For example, if the court reported figures for both the amount of educational debt owed at the time the debtor filed for bankruptcy and the amount owed at the time of trial, we coded the latter. *See*, *e.g.*, Perry v. Student Loan Guarantee Found. of Ark. (*In re* Perry), 239 B.R. 801, 804, 808 (Bankr. W.D. Ark. 1999).

307. *Cf.* Leeper v. Pa. Higher Educ. Assistance Agency, 49 F.3d 98, 102 (3d Cir. 1995) (stating that "creditors may accrue as to the debtor personally post-petition interest on nondischargeable debts while a bankruptcy is pending"). Because a claim for interest that accrues postbankruptcy cannot be made against a debtor's estate, 11 U.S.C. § 502(b)(2) (2000), except to the extent the claimant has an interest in property of the debtor the value of which exceeds the amount of the claimant's prebankruptcy claim, *see* 11 U.S.C.A. § 506(b) (West 2004 & Supp. I 2005), the accrued interest generally cannot be recovered by the claimant from the debtor who has been granted a discharge of the debt related to the claim, *see* 11 U.S.C. § 524(a)(2). As such, the accrual of interest postbankruptcy generally tends to be irrelevant, unless the underlying debt is nondischargeable.

308. Interest on educational debt can accrue at quite a significant rate. *See*, *e.g.*, Pincus v. Graduate Loan Ctr. (*In re* Pincus), 280 B.R. 303, 308, 309 (Bankr. S.D.N.Y. 2002) (noting that interest on debtor's two consolidated student loans accrued at a *per diem* rate of $17.67 and $14.25); Brown v. USA Group Loan Servs. (*In re* Brown), 234 B.R. 104, 106 (Bankr. W.D. Mo. 1999) (noting that interest on debtor's student loan was accruing at the *per diem* rate of $13.30).

undue hardship debtors and overstate their ability to repay as measured by educational debt-to-household income ratios.

A comparison of the undue hardship debtors to the CBP1 debtors and the GAO student loan debtors reveals that the undue hardship debtors had truly been burdened by a staggering amount of educational debt.[309] Based on 263 discharge determinations, the mean amount owed by an undue hardship debtor at the time he or she sought a discharge was $47,137, while the median amount owed was $31,322.[310] Half of these debtors owed somewhere between approximately $15,000 and $66,900. In stark contrast, three out of every four CBP1 debtors with educational debt owed $6949 or less (in 2003 dollars). This would situate them below the tenth percentile of the amount owed by the undue hardship debtors, which was approximately $9046. In other words, nine out of every ten undue hardship debtors had greater educational debt loads than three quarters of the CBP1 debtors with student loans. The only measure of dispersion provided in the GAO report regarding the amount of educational debt owed by the debtors was the average amount of educational debt discharged, which was $7633 (in 2003 dollars).[311] Based on this figure, the average GAO student loan debtor would have had a less burdensome student loan debt than 90% of the undue hardship debtors. Table 3 sets forth the data from each of the studies.

309. *See* SULLIVAN ET AL., *supra* note 47, at 17–21 (describing the Consumer Bankruptcy Project). The Consumer Bankruptcy Project II in 1991 did not report educational debt data. *See* SULLIVAN ET AL., *supra* note 12, at 251.

310. Approximately 62% of these debtors clustered below the mean, indicating that some debtors with extremely high educational debt loads distorted upward the average amount owed.

311. The GAO report was based on 648 cases involving payment on bankruptcy claims related to federally insured or guaranteed student loans during the one-year period beginning on July 1, 1975 and ending on June 30, 1976. *See* H.R. REP. NO. 95-595, at 140 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6101. For all 648 cases, it provided figures for both the average loan amount (presumably, the original amount borrowed) and the average bankruptcy claim paid by the federal government or the guarantee agency (presumably, the amount of educational debt discharged). *See id.* at 144, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6105. The latter amount was $2292. *See id*. at 144, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6105. Pursuant to the methodology set forth in *supra* note 250, we have adjusted this debt figure to 2003 dollars.

Table 3
Distribution of Educational Debt (in 2003 Dollars) Owed by GAO Student Loan Debtors, Consumer Bankruptcy Project I Debtors,[312] and Undue Hardship Debtors

Debtor group	*Mean*	*s.d.*	*25th percentile*	*Median*	*75th percentile*	*Total amount owed*	*N*
GAO student loan debtors (1975–1976)	7633	-	-	-	-	4,946,184	648
Consumer Bankruptcy Project I debtors (1981)	5644	6575	1838	3265	6949	440,172	78
Undue hardship debtors (1993–2003)	47,137	422,221	14,957	31,322	66,873	12,397,018	263

The aggregate financial data certainly point to crushing educational debt loads. But we can only get a true sense of the degree to which the undue hardship debtors must have been financially overwhelmed by examining on a debtor-by-debtor basis the amount of educational debt owed in relation to the amount of annual household income. Calculating this ratio tells us how many years' worth of household income it would have taken for each debtor to repay his or her student loans. The measure assumes that household income would remain constant, that the educational debt would not augment by virtue of interest or other charges, and that the debtor's household would live expense free. As set forth above in Table 1, regardless of income type, the average debtor would have had to devote every dollar of his or her household's income for more than two years in order to be free of student loan debt. The fact that the median educational debt-to-household income ratios for all income types are less than two indicates that a group of debtors with large educational debt burdens have inflated the means—to wit, for every income type, one quarter of all the undue hardship debtors would have had to dedicate more than three years' worth of household income to pay off their student loans.

312. Data for the CBP1 debtors are derived from SULLIVAN ET AL., *supra* note 47, at 295 tbl.16.1. Pursuant to the Consumer Price Index, those debt figures have been adjusted to 2003 dollars by dividing by a factor of 0.494, the factor for converting 1981 dollars to 2003 dollars, and rounding to the nearest dollar. *See* Sahr, *supra* note 200.

By way of comparison, in 1991, a CBP2 debtor had an average nonmortgage debt-to-income ratio of 1.48 and a median nonmortgage debt-to-income ratio of 0.96.[313] Professors Sullivan, Warren, and Westbrook characterized these ratios as "a substantial debt burden."[314] Our ratios for educational debt alone *exceed* not only the nonmortgage debt-to-income ratios in both Consumer Bankruptcy Projects, but also those of a 1997 Ohio bankruptcy study.[315] If we look to other debtor populations for which educational debt-to-income ratios can be ascertained, it cements our conclusion that the undue hardship debtors were in horrible financial shape. For GAO student loan debtors in the mid-1970s, the GAO reported average individual earnings of $6490 and an average amount of $2292 for discharged educational debt.[316] Calculating an educational debt-to-individual income ratio for the GAO debtors indicates that, on average, they owed slightly more than *four months'* worth of individual income.[317] Somewhat similarly, according to a study of consumer bankruptcy filings in 1996,[318] both Chapter 7 and Chapter 13 debtors owed on average less than *one month's* worth of net household income in relation to their educational debt.[319] We are able to match individual income and educational debt data on a debtor-by-debtor basis for 209 discharge determinations. Based on these data, the average undue hardship debtor in this group would have owed *four years*' worth of income—a striking contrast to the other debtor groups.

Our educational debt-to-household income ratios further confirm what we have witnessed with regard to a disposable income analysis of the undue hardship debtors: For many, the likelihood of repayment was slim to none. Moreover, the reality is that these ratios understate the ability to repay. Interest, charges, and fees would continue to accrue on the debt, thus increasing the burden.[320] To get a sense of how accumulation of such debt can hinder efforts at repayment, we can look at (1) the aggregate data for the averages of the original amounts borrowed and the amounts sought to be discharged, and (2) the amount

313. SULLIVAN ET AL., *supra* note 12, at 71 tbl.2.5.

314. *Id.* at 72.

315. *Id.* at 71 tbl.2.5.

316. *See* H.R. REP. NO. 95-595, at 144 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6105.

317. The GAO was only able to calculate average individual earnings data for the year prior to filing for bankruptcy for 544 of the debtors in its sample. *Id*., *reprinted in* 1978 U.S.C.C.A.N. 5963, 6105.

318. *See* BARRON & STATEN, *supra* note 276.

319. We ascertain this by dividing the average amount of student loans owed by the debtors in that study, *id*. at 21 tbl.8, by their average net household income, *id*. at 17 tbl.4, which yields ratios of less than 0.05.

320. *See supra* notes 307–08 and accompanying text.

by which educational debt ballooned on a debtor-by-debtor basis. On an aggregate basis, the undue hardship debtors borrowed an average of approximately $30,000 to fund their postsecondary education,[321] and on average owed approximately $47,100 by the time they sought a discharge of their student loans.[322] Based on these figures, we might approximate that, on average, an undue hardship debtor's educational loan obligation had grown by more than half (57%) at the time he or she sought a discharge.

We can improve on this approximation by examining the relative burden of educational debt for our sample. For 99 of the discharge determinations (slightly more than one-third), we are able to identify the original amounts borrowed by the debtor and relate them to the amounts owed at the time they sought an undue hardship discharge. For that group of debtors, their student loans had averaged an increase of slightly less than half (47%). Again, the large educational debt loads of some debtors pulled up the average: The educational debt of more than half of the debtors (57%) in this group had increased by less than one-third by the time they sought a discharge. The point remains, however, that only 14% of the debtors in the group had been able to make any headway in reducing the amount of educational debt owed to an amount that was less than what they originally borrowed, and only 5% had managed to reduce their debt to less than three-quarters of the amount they had originally borrowed. Given that the mean and median ages for this group of individuals were respectively 41 and 40 (based on 75 discharge determinations), and given that slightly more than two-thirds (68%) had attained no higher than an undergraduate level of education (based on 90 discharge determinations), we believe it is reasonable to conclude that these individuals were not recent graduates, but rather student loan borrowers who had been in repayment status for quite some time yet had been unable to make a serious dent in their educational loan obligations. This can probably be construed as further evidence of deficiencies in the student loan program. As stated by one bankruptcy court, "Something is seriously awry with a student loan system that permits unsophisticated borrowers who make a good faith effort to repay over a period of years to unwittingly end up owing more than the loan amount because the interest accrual has outpaced the payment amount."[323]

321. This figure is based on the 114 discharge determinations that provided sufficiently detailed information to code for the original amount of educational debt (i.e., principal) borrowed.

322. *See supra* tbl.3.

323. Robinson v. Ill. Student Assistance Comm'n (*In re* Robinson), Case No. 00-82044, Adv. No. 02-8018, 2002 WL 32001246, at *5 n.5 (Bankr. C.D. Ill. Oct. 22, 2002).

3. Conclusions to Be Drawn from the Summary Portrait

Based on the demographic and financial characteristics of the undue hardship debtors, we find that the great majority did not have a reasonable prospect of repaying their educational debt. This is not to say that there were *no* undue hardship debtors with an ability to repay their educational debt. But notwithstanding that there are bound to be individuals at polar extremes, debtors whose tragic circumstances make it unmistakably clear that their student loans could never be repaid and debtors whose affluence makes their resort to the bankruptcy objectionable, the aggregate data clearly suggest that most of these debtors found themselves in dire financial straits.[324] Moreover, the data indicate that the debtors looked to the bankruptcy courts for educational debt relief only as a last resort. For the 202 discharge determinations in which the court referenced whether the debtor had invoked the various forms of administrative relief available to student loan borrowers, such as deferment and forbearance in the case of federal student loans,[325] as well as whether the debtor had made any attempts to negotiate a repayment plan with the creditor, approximately 84% of the debtors had taken such measures. In other words, they tried to mitigate the financial distress caused by their educational debt prior to making a claim of undue hardship in bankruptcy court.

Filing for bankruptcy is not consequence free. It is a drastic option that ruins one's credit rating and to which social stigma attaches. The data we have analyzed persuade us that the debtors in this study legitimately needed a fresh start. Some might argue that this group as a whole merited educational debt relief solely because the law has had its intended effect—that is, if Congress truly sought to dissuade the abusive student loan debtor from filing for bankruptcy relief in the first instance by making educational debt conditionally dischargeable, then the general absence of such an individual in this study might indicate that Congress achieved its goal, and that the statute has proved to serve an effective gate-keeping function. We have three responses to that argument: First, given that the GAO report, which preceded enactment

324. *See* Mallinckrodt v. Chem. Bank (*In re* Mallinckrodt), 260 B.R. 892, 900 (Bankr. S.D. Fla. 2001) ("A debtor who lives in a cardboard box because of mental illness and unemployment may well be entitled to a discharge under § 523(a)(8) (whether such a debtor cares about the discharge is another matter entirely). A debtor who lives in a stately suburban home and finds enough surplus income to fund mutual funds and other retirement vehicles is clearly not as likely to receive a discharge. Between the two extremes are many debtors who struggle to make ends meet, who live paycheck to paycheck, who use credit cards to augment their income, and who are incapable of making a meaningful repayment on their student loans."), *rev'd*, 270 B.R. 560 (S.D. Fla. 2002).

325. 34 C.F.R. § 682.210 (2005) (deferment); *id.* § 682.11 (forbearance).

of the educational debt dischargeability provision in the Bankruptcy Code, documented a lack of abuse of the bankruptcy system by student loan debtors, we contend that our findings further confirm that it neither was a problem in the first instance nor did it ever develop into one. Second, because of the monetary costs involved in litigating a claim of undue hardship, those debtors with the wherewithal to do so dominate our sample.[326] To the extent such costs prevent those student loan debtors most in need from seeking a discharge of educational debt,[327] our data fail to account to the fullest extent for the level of hardship suffered. Third, even if our first two responses prove to be wrong and the law has truly had its intended effect, then the law has been applied to a group that Congress certainly did not contemplate when it enacted the provision—that is, nonabusive student loan debtors. If, then, the majority of these debtors have been confronted with financial hardship, the question arises as to what constitutes undue hardship. We now turn to an analysis of the application of the law in order to discern the factual circumstances upon which courts have relied to define the meaning of that phrase.

C. The Elusive Meaning of Undue Hardship

> Without express statutory definition, "undue hardship" has proved an eely notion. Courts have long struggled to articulate its content.[328]

As previously mentioned, reformers and commentators who have called for a repeal of the Bankruptcy Code's educational debt dischargeability provision have based their arguments on incomplete information. Aside from reference to a handful of undue hardship opinions, neither group has set forth any data that suggest a call for concern.[329] While the issues of what constitutes undue hardship and whether courts have applied the standard properly lie at the forefront of the debate, commentators and reformers have framed the debate *solely* from this perspective. This approach, however, ignores what has been the practice of a minority of courts: the granting of equitable relief to a

326. One proxy for a student loan debtor's ability to litigate a claim of undue hardship would be whether the debtor had been represented by counsel in his or her adversary proceeding. Of the 258 discharge determinations in this study which provided sufficiently detailed information to code whether the debtor was represented by counsel, approximately 88% of the debtors in those determinations had obtained representation. If our conjecture is correct regarding the self-selecting bias present in undue hardship discharge requests, then the data regarding debtor representation would seem to support it.

327. *See* 1 NAT'L BANKR. REV. COMM'N, *supra* note 19, at 212.

328. Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 736 (Bankr. D. Me. 2000).

329. *See supra* note 19 and accompanying text.

debtor with educational debt notwithstanding the absence of undue hardship.[330] Although this practice is highly questionable and has recently fallen into disrepute,[331] framing the issue in terms of whether a court will grant relief to debtors with educational debt, whether in the form of undue hardship discharge or otherwise, changes the view of the legal landscape. The data in this study show that the case law, more often than not, *has* provided debtors with relief from burdensome educational debt. More than half (57%) of the 286 discharge determinations in the sample granted the debtor some form of relief—whether in the form of full discharge, partial discharge, or equitable adjustment (e.g., abatement of accrual of interest, deferment of payment). But notwithstanding the granting of educational debt relief, the question remains whether it has been overly difficult for debtors to prevail in undue hardship litigation, at least as documented in the issued opinions. In other words, has it been the case that courts predominantly find a lack of undue hardship? Nearly half (45%) of the discharge determinations analyzed concluded that failing to discharge a debtor's student loans would impose an undue hardship on the debtor. Our data therefore suggest that, contrary to prevailing opinion, the situation for student loan debtors might not be as stark as it has been portrayed—that is, that an undue hardship discharge is the exception.

While bankruptcy courts have perceived the Bankruptcy Code's undue hardship provision to have been enacted by Congress as a necessary measure to curb abuse of the bankruptcy system, the data have shown that the statute has proved to be much less selective, primarily because of its inherently overbroad scope. The inevitable result has been a law applied, counter to its purported objective, to a class of individual whose behavior could not have been deemed by Congress to be a legitimate target for legislative reform. Some courts have taken this view and expressed their consternation with Congress for its faulty statutory design, perhaps none so colorfully as the court in *Speer v.*

330. Courts that grant educational debt relief absent undue hardship generally do so on the basis of the broad grant of power to courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]," 11 U.S.C. § 105(a) (2000). *See*, *e.g.*, Siegel v. U.S.A. Group Guarantee Servs. (*In re* Siegel), 282 B.R. 629, 635–36 (Bankr. N.D. Ohio 2002).

331. Absent the existence of the condition precedent to discharge of educational debt, since no other operative provision of the Code provides an independent basis for a court to provide educational debt relief, courts should not grant an equitable adjustment of a debtor's educational debt obligations. *See*, *e.g.*, Alderete v. Educ. Credit Mgmt. Corp. (*In re* Alderete), 412 F.3d 1200, 1206–07 (10th Cir. 2005); Miller v. Pa. Higher Educ. Assistance Agency (*In re* Miller), 377 F.3d 616, 622 (6th Cir. 2004); Alan M. Ahart, *The Limited Scope of Implied Powers of a Bankruptcy Judge: A Statutory Court of Bankruptcy, Not a Court of Equity*, 79 AM. BANKR. L.J. 1, 37 & n.224 (2005). For a discussion of the mischaracterization of bankruptcy courts as courts of equity, see Ahart, *supra*; Marcia S. Krieger, *"The Bankruptcy Court Is a Court of Equity": What Does That Mean?*, 50 S.C. L. REV. 275 (1999).

Educational Credit Management Corp. (*In re Speer*),[332] which made the following observations in a section of its undue hardship opinion entitled "*What could Congress possibly be thinking?, or Why does the government hate the little man?*":

> In enacting § 523(a)(8) of the Bankruptcy [Code], Congress was primarily concerned about abusive student debtors and protecting the solvency of student loan programs. . . . Unfortunately, Congress did not specifically address this abuse when crafting the undue hardship exception, but rather, it decided that all students borrowing money were potential bums and could not be trusted. As an additional irritation, the statute Congress crafted gives the Courts absolutely no guidance as to what would constitute 'undue hardship' other than a Webster's dictionary.
>
> Basically, the application of this standard requires each court to apply its own intuitive sense of what "undue hardship" means on a case by case basis. With so many Solomons hearing the cases, it is no wonder the results have varied.[333]

As suggested by the court in *Speer*, what has proved to be most troublesome regarding application of the law has not been the infrequency with which relief has been granted, but rather the haphazard fashion in which courts have determined whether a debtor's circumstances support a claim of undue hardship that warrants forgiveness of educational debt. Based upon the data appearing in the undue hardship determinations in this study, we evaluate the performance of bankruptcy courts in applying the law by separating the debtors into two groups on the basis of legal outcome—specifically, whether the court granted the debtor a discharge of educational debt on the basis that repayment thereof, whether in full or in part, would impose an undue hardship.[334] We first compare the two groups to

332. 272 B.R. 186 (Bankr. W.D. Tex. 2001).

333. *Id*. at 191.

334. The Ninth Circuit has held that, upon a finding of undue hardship, a bankruptcy court may partially discharge the amount of educational debt in question. *See*, *e.g*., Saxman v. Educ. Credit Mgmt. Corp. (*In re* Saxman), 325 F.3d 1168, 1175 (9th Cir. 2003). Bankruptcy courts have been divided on this issue. Some take the view that the Bankruptcy Code permits partial discharge. *See*, *e.g*., Adler v. Educ. Credit Mgmt. Corp. (*In re* Adler), 300 B.R. 740, 747 (Bankr. N.D. Cal. 2003) (citing *Saxman*, 325 F.3d 1168); Cota v. U.S. Dep't of Educ. (*In re* Cota), 298 B.R. 408, 422 (Bankr. D. Ariz. 2003) (same); Hollins v. U.S. Dep't of Educ. (*In re* Hollins), 286 B.R. 310, 317 (Bankr. N.D. Tex. 2002). Other courts reject this view. *See*, *e.g*., McGinnis v. Pa. Higher Educ. Assistance Agency (*In re* McGinnis), 289 B.R. 257, 265 (Bankr. M.D. Ga. 2003); Roach v. United Student Aid Fund, Inc. (*In re* Roach), 288 B.R. 437, 447–48 (Bankr. E.D. La. 2003); Pincus v. Graduate Loan Ctr. (*In re* Pincus), 280 B.R. 303, 311–12 (Bankr. S.D.N.Y. 2002). While it is an interesting issue of law that has received the attention of student commentators, e.g., Frank T. Bayuk, Comment, *The Superiority of Partial Discharge for Student Loans Under 11 U.S.C. § 523(a)(8): Ensuring a Meaningful Existence for the Undue Hardship Exception*, 31

determine the extent to which they differ according to a variety of demographic and financial characteristics. Comparison of the data in this fashion allows identification of the factual circumstances that may account for a court's disposition regarding undue hardship. Undeniably, those circumstances ought to provide content to the law: A determination of whether a debtor would suffer undue hardship absent the discharge of educational debt should ultimately turn on the facts of the case. As a normative matter, regardless of the framework superimposed by courts on the term "undue hardship," the legal outcome should not differ for similarly situated debtors. Contrary to our expectations, however, the data reveal few statistically significant differences between the two groups. The overall lack of dissimilarity between the two groups indicates that differences in judicial perception of how the law should be applied best account for whether a debtor will prevail in his or her claim of undue hardship, as illustrated by our statistical modeling. Because our findings point to unwarranted, inconsistent results in undue hardship determinations, we conclude that the doctrine is in desperate need of systemic adjudicatory reform.

1. A Uniform Law in Form, Not Substance

In order to identify those variables that prompt a bankruptcy court to conclude that a debtor would suffer undue hardship were it not to discharge his or her educational debt, we compare, on the basis of demographic and financial characteristics, the factual circumstances of those debtors granted a discharge (the discharge group) to those debtors denied a discharge (the nondischarge group). In the series of tables that follow, we document the virtual absence of statistically significant differences between the two groups. Applying two-sided Fisher tests,[335] we determine that no significant differences exist between the two groups of debtors on the basis of demographic characteristics as set forth below in Tables 4, 5, and 6.

FLA. ST. U. L. REV. 1091 (2004); Brendan Hennessy, Comment, *The Partial Discharge of Student Loans: Breaking Apart the All or Nothing Interpretation of 11 U.S.C. § 523(a)(8)*, 77 TEMP. L. REV. 71 (2004); Laura Miller, Comment, *The Option That Is Not an Option: The Invalidity of the Partial Discharge Option for the Student Loan Debtor*, 39 Wake Forest L. Rev. 1053 (2004); Milligan, *supra* note 28; Cara A. Morea, Note, *Student Loan Discharge in Bankruptcy—It Is Time for a Unified Equitable Approach*, 7 AM. BANKR. INST. L. REV. 193 (1999), it is beyond the scope of our Article. Accordingly, we do not account for legal outcome at this level of detail in analyzing our data.

335. *See generally* ALAN AGRESTI, CATEGORICAL DATA ANALYSIS (1990).

Table 4
Gender, Age, Marital Status and Number of Dependents by Legal Outcome

	Discharged Granted		**Discharge Denied**		
Gender	***N***	**Percentage**	***N***	**Percentage**	***p*-value**
Female	86	66.15	96	61.54	0.46
Male	44	33.85	60	38.46	

	Discharged Granted		**Discharge Denied**		
Age	***N***	**Percentage**	***N***	**Percentage**	***p*-value**
20-29	8	8.33	6	5.61	0.13
30-39	33	34.38	46	42.99	
40-49	29	30.21	39	36.45	
≥ 50	26	27.08	16	14.95	
Missing Values	34		49		

	Discharged Granted		**Discharge Denied**		
Marital Status	***N***	**Percentage**	***N***	**Percentage**	***p*-value**
Married	47	36.15	62	39.74	0.67
Unmarried	46	35.38	55	35.26	
Divorced	32	24.62	31	19.87	
Separated	3	2.31	7	4.49	
Widowed	2	1.54	1	0.64	

	Discharged Granted		**Discharge Denied**		
Number of Dependents	***N***	**Percentage**	***N***	**Percentage**	***p*-value**
0	59	45.38	67	42.95	0.27
1	26	20.00	35	22.44	
2	16	12.31	31	19.87	
3	17	13.08	16	10.26	
4	7	5.38	5	3.21	
5	2	1.54	2	1.28	
6+	3	2.31	0	0.00	

Table 5
Employment Status and Occupation Type by Legal Outcome

	Discharged Granted		**Discharge Denied**		
Employment	***N***	**Percentage**	***N***	**Percentage**	***p*-value**
Employed (full-time or part-time)	95	78.21	122	78.21	0.40
Unemployed	34	21.79	34	21.79	
Missing values	1		0		

	Discharged Granted		**Discharge Denied**		
Occupation	***N***	**Percentage**	***N***	**Percentage**	***p*-value**
Office and Administrative	14	17.95	12	13.33	0.38
Education, Training and Library	11	14.10	14	15.56	
Sales	8	10.26	11	12.22	
Legal	5	6.41	14	15.56	
Community and Social Services	10	12.82	5	5.56	
Healthcare Practitioners and Technicians	6	7.69	8	8.89	
Other	24	30.77	26	28.89	
Missing Values	52		66		

Table 6
Educational Attainment by Legal Outcome

	Discharged Granted		**Discharge Denied**		
Education Completed	***N***	**Percentage**	***N***	**Percentage**	***p*-value**
Less than High School	0	0.00	1	0.71	0.35
High School or GED	24	20.34	20	14.18	
Vocational Degree	13	11.02	11	7.80	
Undergraduate Degree	40	33.90	51	36.17	
Advanced Degree	41	34.75	59	41.84	
Missing Values	12		15		

We assess the statistical significance of financial and educational debt-related factors using the two-sided, nonparametric Wilcoxon rank-sum test.[336] While we note that the median monthly household income and median monthly household expenses of the discharge group are significantly lower than the nondischarge group, no significant difference exists in the data regarding median monthly disposable

336. *See generally* MYLES HOLLANDER & DOUGLAS A. WOLFE, NONPARAMETRIC STATISTICAL METHODS (1973).

household income.[337] Median levels of educational debt and educational debt-to-household income ratio are not significantly different between the two groups. These findings are set forth in Table 7.

Table 7
Financial Characteristics by Legal Outcome

	Discharge Granted		**Discharge Denied**		
Monthly Household Income	***N***	**Median**	***N***	**Median**	***p*-value**
	122	$1623	140	$2072	0.0052
Missing Values	8		16		

	Discharge Granted		**Discharge Denied**		
Monthly Household Expenses	***N***	**Median**	***N***	**Median**	***p*-value**
	103	$1837	106	$2313	0.046
Missing Values	27		50		

	Discharge Granted		**Discharge Denied**		
Monthly Disposable Household Income	***N***	**Median**	***N***	**Median**	***p*-value**
	101	-$58	105	$0	0.12
Missing Values	29		51		

	Discharged Granted		**Discharge Denied**		
Educational Debt	***N***	**Median**	***N***	**Median**	***p*-value**
	124	$28,740	139	$34,240	0.29
Missing Values	6		17		

	Discharged Granted		**Discharge Denied**		
Educational Debt-to-Household Income Ratio	***N***	**Median**	***N***	**Median**	***p*-value**
	111	1.45	120	1.52	0.97
Missing Values	19		36		

337. We also find the median poverty ratio, *see supra* Part III.B.2.b, of the discharge group to be significantly lower than the nondischarge group ($p = 0.0009$). While a former strand of case law used to incorporate references to the federal poverty guidelines as part of the undue hardship inquiry, *see infra* note 447, only one discharge determination in this study did so. Accordingly, we find this statistically significant difference to be substantively meaningless for purposes of documenting the judicial decision-making process of determining what constitutes undue hardship.

The only other statistically significant differences we witness between the two groups of debtors are those regarding health-related factors. The percentage of unhealthy debtors among the discharge group is substantially higher than among the nondischarge group. Furthermore, within the subset of unhealthy debtors, the discharge group includes a greater proportion of debtors who suffered from a work-limiting medical condition. Finally, among those debtors with dependents, the proportion of those responsible for an unhealthy family member is more than twice as large in the discharge group. Table 8 sets forth the significant differences between the two groups for all three variables as assessed by two-sided Fisher tests.

Table 8
Health-Related Characteristics by Legal Outcome

	Discharged Granted		**Discharge Denied**		
Health Status	***N***	**Percentage**	***N***	**Percentage**	***p*-value**
Unhealthy	76	71.70	73	53.68	0.0051
Healthy	30	28.30	63	46.32	
Missing Values	24		20		

	Discharged Granted		**Discharge Denied**		
Work-Limiting Nature of Medical Condition	***N***	**Percentage**	***N***	**Percentage**	***p*-value**
Non-work-limiting	39	51.32	55	75.34	0.0037
Work-limiting	37	48.68	18	24.66	

	Discharged Granted		**Discharge Denied**		
Dependent Health Status	***N***	**Percentage**	***N***	**Percentage**	***p*-value**
Unhealthy	32	86.49	18	41.86	0.0001
Healthy	5	13.51	25	58.14	
Missing Values	34		46		

While an association certainly exists between (1) the poor health of the debtor and/or the poor health of the debtor's dependents and (2) the grant of discharge, and while we believe that the debtor's illness does have some substantive effect on a court's disposition, that association alone does not explain the outcome in the undue hardship cases we have analyzed: Approximately 49% of unhealthy debtors, 33% of unhealthy debtors with a work-limiting condition, and 36% of debtors who had at least one unhealthy dependent were denied a discharge; and approximately 32% of healthy debtors, 41% of unhealthy debtors without a work-limiting condition, and 17% of debtors whose

dependents were all healthy were granted a discharge. On the other hand, we can confidently say that the lack of statistically significant differences between the two groups with regard to the other demographic and financial characteristics analyzed suggests that disparate legal outcomes have been visited on relatively similarly situated debtors. We now look to provide an account of the judicial decision-making process that explains these haphazard results.

2. Modeling the Judicial Decision-Making Process

> Rather than considering how the debtor's education, aptitude, and effort might enable him or her to repay loans without undue hardship, rather than considering how legislative objectives might *inform* the content of the statute's language, courts apply [good faith and policy] tests, often in moralistic tones, to *supplement* the legislation. That is, in a word, inappropriate.[338]

Thus far, we have not discussed the manner in which courts have defined undue hardship. We have purposefully omitted this discussion in order to emphasize our point that the facts underlying a debtor's claim of undue hardship should account for whether a court grants the debtor a discharge of his or her student loans. Our comparison of the factual circumstances of the discharge group and the nondischarge group has demonstrated that courts have not applied the law in a consistent fashion. As our modeling of the decision-making process will now reveal, the outcome of undue hardship determinations has generally been based on differing judicial perceptions of what the law commands under the relatively same set of circumstances. We will begin with a discussion of the judicial tests courts have applied in their undue hardship analysis, placing particular emphasis on the distinct doctrinal factors embodied by those tests, and we will then analyze the manner in which these different factors have aggregated to produce disparate results in legal outcome.

a. A Doctrinal Primer on Undue Hardship

Because of the absence of a statutory definition of undue hardship,[339] courts have fashioned a variety of tests to provide a framework to implement the standard. Legal scholarship has generally focused on

338. Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 741 (Bankr. D. Me. 2000).

339. *See* 11 U.S.C.A. § 101 (West 2004 & Supp. I 2005) (setting forth definitions applicable throughout the Bankruptcy Code, but failing to provide definition for the term "undue hardship").

mapping out doctrinal divergences among the various judicial tests for undue hardship and then advocating implementation of one test over all others on the basis that the test advocated best meets congressional policy objectives.[340] This approach ignores the fact that such policy objectives are incoherent, and that they should not inform how courts interpret the meaning of undue hardship.[341] Moreover, of the two judicial tests accounting for the overwhelming majority (86%) applied by bankruptcy courts in this study, the test articulated by the U.S. Court of Appeals for the Second Circuit in *Brunner v. New York State Higher Education Services Corp.*[342] (the *Brunner* test) and the test articulated by the U.S. Court of Appeals for the Eighth Circuit as the totality of the circumstances test (the totality test),[343] neither proves to be particularly more forgiving than the other. Debtors whose claim of undue hardship was analyzed pursuant to the *Brunner* test received a discharge approximately 49% of the time, whereas debtors whose claim of undue hardship was analyzed pursuant to the totality test received a discharge approximately 46% of the time.[344] While we cannot say with certainty that courts applying the *Brunner* test would have decided their discharge determinations differently under the totality test and vice-versa, we believe that this would not have been the case given our data on the judicial decision-making process.[345]

Rather than focusing on the particular test applied by a court, we emphasize the doctrinal underpinnings that formulate a court's analytical approach for ascertaining whether failure to discharge educational debt will impose an undue hardship on the debtor. Since there are instances in which courts do not address every factor expressly incorporated into the test applied, and since some legal considerations

340. *See*, *e.g.*, Patricia Somers & James M. Hollis, *Student Loan Discharge Through Bankruptcy*, 4 AM. BANKR. INST. L. REV. 457, 469–76, 484 (1996); Frattini, *supra* note 19, at 552–71; Jeffrey L. Zackerman, Note, *Discharging Student Loans in Bankruptcy: The Need for a Uniform "Undue Hardship" Test*, 65 U. CIN. L. REV. 691, 701–13, 718–25 (1997).

341. *See supra* Part II.B.2.

342. 831 F.2d 395, 396 (2d Cir. 1987) (per curiam). Courts applied the *Brunner* test in 199 discharge determinations (70%).

343. *See infra* notes 348–49. Courts applied the totality test in 46 discharge determinations (16%).

344. The third most frequently applied test, the test articulated by the U.S. District Court for the Eastern District of Pennsylvania in *Pennsylvania Higher Education Assistance Agency v. Johnson* (*In re Johnson*), 5 Bankr. Ct. Dec. (LRP) 532 (E.D. Pa. 1979), 1979 U.S. Dist. LEXIS 11428, was applied in approximately 6% of the discharge determinations. The last court in our study documented to apply the *Johnson* test did so as of September 4, 1998. Roe v. Law Unit (*In re* Roe), 226 B.R. 258, 269 (Bankr. N.D. Ala. 1998). Because of the infrequency with which it was applied, we do not ascribe much weight to the fact that the *Johnson* test proved to be less forgiving than the *Brunner* and totality tests, providing for discharge only one-third (33%) of the time.

345. *See infra* Part III.C.2.b.

are not expressly provided for by the judicial tests, examining the undue hardship opinions at this level of detail provides a better account of the decision-making process. We now discuss the *Brunner* and totality tests to provide a backdrop for the analytical framework within which the majority of bankruptcy courts have operated and then present the myriad doctrinal factors that courts consider in making their discharge determinations.

The *Brunner* test for undue hardship requires a three-part showing:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that 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) that the debtor has made good faith efforts to repay the loans.[346]

Failure by the debtor to carry his or her burden of proof on any one of the three factors (theoretically) results in denial of discharge.[347] In somewhat similar fashion, but without express reference to good faith, the totality test "requires an analysis of (1) the debtor's past, present, and reasonably reliable future financial resources; (2) calculation of the debtor's and his dependents' reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding that particular bankruptcy case."[348] Unlike the *Brunner* test, however, no factor alone is dispositive: A finding against the debtor on a particular

346. Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (per curiam).

347. *See*, *e.g.*, Brightful v. Pa. Higher Educ. Assistance Agency (*In re* Brightful), 267 F.3d 324, 327–28 (3d Cir. 2001). We say "theoretically" because we witnessed instances in which a court applying the *Brunner* test granted a discharge notwithstanding its negative disposition (i.e., one that weighed against discharge) with regard to one of the doctrinal factors, *see infra* notes 354–55 and accompanying text, incorporated into its undue hardship analysis. Of the 121 discharge determinations that fall within this category, approximately 16% resulted in a discharge.

348. Andresen v. Neb. Student Loan Program, Inc. (*In re* Andresen), 232 B.R. 127, 139 (B.A.P. 8th Cir. 1999). In its decision in *Andresen*, the Bankruptcy Appellate Panel (the BAP) for the Eighth Circuit credited the Eighth Circuit as having "expressed its preference for a totality of the circumstances test" when it issued its decision in *Andrews v. South Dakota Student Loan Assistance Corp.* (*In re Andrews*), 661 F.2d 702 (8th Cir. 1981). *Andresen*, 232 B.R. at 139. *Andresen* articulated the totality test in the form that has been quoted. The Eighth Circuit recently rejected adoption of the *Brunner* test and reaffirmed its commitment to the totality test, which it attributed to its prior decision in *Andrews*. *See* Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 553 (8th Cir. 2003). However, as pointed out by the Eighth Circuit BAP in *Andresen*, the Eighth Circuit did not articulate a test *per se*, but rather relied on (1) the Bankruptcy Act Commission's recommendations and (2) a pair of bankruptcy court opinions regarding implementation of the undue hardship standard. *Andresen*, 232 B.R. at 139 (citing *Andrews*, 661 F.2d at 704). Accordingly, it seems inappropriate to credit the *Andrews* opinion as having established the totality test, particularly in light of the fact the Eighth Circuit in *Long* referenced the framework that *Andresen* articulated for undue hardship inquiry, *see Long*, 322 F.3d at 554.

factor does not necessitate denial of discharge.[349]

Although some courts have taken the view that the *Brunner* test and the totality test are functional equivalents,[350] they are not. Burdens of proof aside, while both make express reference to the financial ability of the debtor to repay the educational debt, they cast the threshold of ability to repay in different terms. The *Brunner* test refers to the debtor's ability to maintain a "minimal standard of living," whereas the totality test impliedly incorporates analysis of disposable income by requiring the court to consider the debtor's financial resources in relation to the debtor's "reasonable necessary living expenses." In light of the varying interpretations given to the phrase "minimal standard of living" by courts,[351] it would be hard to say that the thresholds established by both tests mirror one another. Moreover, the two tests differ in that the *Brunner* test expressly invites inquiry into the debtor's prebankruptcy conduct regarding repayment of the educational debt—specifically, the debtor's good faith efforts to repay the student loan.[352] Although the totality test does not invite that inquiry, it certainly leaves the door open to such a consideration, given its reference to "other relevant facts and circumstances." In light of the differences between the two tests, and in light of the different meanings courts ascribe to the same test,[353] we concluded that the only way to document the decision-

349. *See* Morgan v. U.S.-Dep't of Higher Educ. (*In re* Morgan), 247 B.R. 776, 782 (Bankr. E.D. Ark. 2000).

350. *See*, *e.g.*, Afflitto v. United States (*In re* Afflito), 273 B.R. 162, 170 (Bankr. W.D. Tenn. 2001).

351. Williams v. EFG Tech/Rutgers (*In re* Williams), 296 B.R. 128, 134 (Bankr. D.N.J. 2003) ("A debtor's extremely low income, compared with the cost of basic necessities, establishes that a debtor is unable to maintain a minimal standard of living if forced to repay the obligations."); Ciesicki v. Sallie Mae (*In re* Ciesicki), 292 B.R. 299, 304 (Bankr. N.D. Ohio 2003) ("The minimal standard of living requirement essentially provides that [debtors] cannot allocate any of their financial resources to the detriment of their educational loan creditors after providing for their basic needs."); Robinson v. Ill. Student Assistance Comm'n (*In re* Robinson), Bankr. No. 00-82044, Adv. No. 02-8018, 2002 WL 32001246, at *3 (Bankr. C.D. Ill. Oct. 22, 2002) ("In determining a debtor's disposable income for purposes of applying the *Brunner* test under Section 523(a)(8), it is appropriate to calculate disposable income as in Chapter 13 cases pursuant to Section 1325(b)(2)."); Ivory v. United States (*In re* Ivory), 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001) ("This Court believes that a minimal standard of living is a *measure of comfort*, supported by a level of income, sufficient to pay the costs of specific items recognized by both subjective and objective criteria as basic necessities." (emphasis added)).

352. To further complicate matters, one court has set forth seven relevant factors that should be considered in determining whether the debtor made a good faith effort to repay the educational debt sought to be discharged. *See* Stupka v. Great Lakes Educ. (*In re* Stupka), 302 B.R. 236, 243–44 (Bankr. N.D. Ohio 2003).

353. Sometimes even the *same* judge will approach the *same* test from a different perspective. Within a two-year period, Judge Venters changed his mind on the appropriateness of taking into account a debtor's good faith efforts to repay his or her student loans for purposes of the totality test. *See* Crowley v. U.S. Dep't of Educ. (*In re* Crowley), 259 B.R. 361, 369 (Bankr. W.D. Mo. 2001) (rejecting

making process with consistency would be to identify the core legal considerations courts take into account, define those considerations, and determine (1) whether the court addressed the consideration in its opinion, and (2) if so, ascertain the determination the court made with respect to the core consideration.

As a general matter, we identified two major categories within which all legal considerations fell: (1) considerations regarding the debtor's financial ability to repay the educational debt, and (2) considerations regarding the debtor's conduct.[354] Within the first broad category, we identified and defined two core considerations: the debtor's *current* ability to repay the student loan, and the debtor's *future* ability to repay the student loan. Within the second broad category, we identified and defined four core considerations: (1) the debtor's good faith effort to repay his or her student loans; (2) the debtor's minimization of expenses (expense minimization); (3) the debtor's maximization of income (income maximization); and (4) the debtor's resort to administrative remedies.[355]

We recognize that some core considerations regarding a debtor's conduct could be viewed to overlap with core considerations regarding the debtor's financial circumstances. For example, income maximization and expense minimization could be construed as yet another articulation of future ability to repay. If the debtor can generate more disposable

consideration of good faith under totality test); Powers v. Sw. Student Servs. Corp. (*In re* Powers), 235 B.R. 894, 900 (Bankr. W.D. Mo. 1999) (incorporating good faith consideration under totality test).

354. This comports with the general view of undue hardship discharge espoused by one court. *See* Weir v. Paige (*In re* Weir), 296 B.R. 710, 716 (Bankr. E.D. Va. 2002) ("Regardless of the test used in determining whether repayment of student loans constitutes undue hardship under § 523(a)(8), at a minimum the court must focus on two issues: (1) the economic prospects of the debtor and (2) whether the conduct of the debtor disqualifies the debtor from taking advantage of the exception.").

355. We also coded for two other doctrinal factors that we do not consider to be core considerations because of the infrequency with which courts incorporated such factors into their legal analysis. First, we coded for a court's determination regarding the debtor's primary motivation for filing for bankruptcy. One view is that abuse of the bankruptcy system occurs if the debtor's predominant purpose in filing for bankruptcy was to discharge his or her student loans. *See* Gammoh v. Ohio Student Loan Comm'n (*In re* Gammoh), 174 B.R. 707, 711 (Bankr. N.D. Ohio 1994). The countervailing view is that such action does not constitute an abuse the bankruptcy system since the discharge of debt is the very essence of bankruptcy relief. *See* Alderete v. Colo. Student Loan Program (*In re* Alderete), 289 B.R. 410, 419 (Bankr. D.N.M. 2002), *aff'd sub nom.* Alderete v. Educ. Credit Mgmt. Corp (*In re* Alderete), 308 B.R. 495 (B.A.P. 10th Cir. 2004), *rev'd and remanded*, 412 F.3d 1200 (10th Cir. 2005). Because courts made such a disposition only 22% of the time, we do not discuss this consideration in the Article. Second, we coded for a court's disposition on whether the debtor was deemed to have received a financial benefit from the education funded with the student loans—specifically, whether the funded education increased the debtor's earning potential. Only 31% of the discharge determinations made such a disposition, and 7% rejected the factor as an inappropriate consideration. We do, however, discuss this doctrinal factor in connection with our discussion on the core consideration of future inability to repay. *See infra* Part III.C.2.b.(2).

income through such action, that in turn could translate into a future ability to repay notwithstanding a current inability to repay. Similarly, a debtor's failure to seek administrative relief prior to requesting an undue hardship discharge might also be interpreted as a consideration of future ability to repay under a different guise. Perhaps if the debtor were to seek administrative relief, with the result of procuring a more manageable payment schedule, the debtor would be deemed to have a future ability to repay. Because all of the core considerations pertaining to a debtor's conduct focus on certain action or inaction by the debtor, we take the view that they are more appropriately categorized as debtor conduct considerations, yet we concede that they are related to debtor financial considerations. We defined and coded these core considerations as follows.

(1) Financial Considerations

It has been observed that "[a] debtor's ability to pay is a function of the level of sacrifice demanded."[356] Any determination regarding a debtor's ability to repay prebankruptcy debts necessarily requires an inquiry into the degree of sacrifice that the law imposes upon debtors. With regard to educational debt, the Bankruptcy Code requires that a court discharge such debt when failure to do so "will impose an undue hardship on the debtor and the debtor's dependents."[357] Pursuant to this legal command, a court must interpret the threshold that constitutes impermissible sacrifice by a debtor. As put by one court, "the undue hardship examination should have as its essential starting point one simple question: Is there a reasonable prospect that the debtor will ever be able to repay [the] loans?"[358]

As discussed above, courts have articulated ability to repay in differing terms.[359] Moreover, courts have conflated considerations regarding the debtor's conduct into their analysis of the debtor's ability to repay. For example, some courts have infused considerations regarding income maximization and expense minimization into an analysis of whether the debtor has an ability to repay his or her student loans.[360] In order to provide consistency in coding a court's disposition

356. SULLIVAN ET AL., *supra* note 47, at 200.

357. 11 U.S.C.A § 523(a)(8) (West 2004 & Supp. I 2005).

358. *See* Mallinckrodt v. Chem. Bank (*In re* Mallinckrodt), 260 B.R. 892, 898 (Bankr. S.D. Fla. 2001), *rev'd*, 270 B.R. 560 (S.D. Fla. 2002).

359. *See supra* notes 350–51 and accompanying text.

360. *See, e.g.*, Ciesicki v. Sallie Mae (*In re* Ciesicki), 292 B.R. 299, 304 (Bankr. N.D. Ohio 2003); Berscheid v. Educ. Credit Mgmt. Corp. (*In re* Berscheid), 309 B.R. 5, 12 (Bankr. D. Minn.

regarding a debtor's *inability* to repay, we disaggregated this consideration into both a *current inability* to repay and a *future inability* to repay,[361] and we kept these considerations separate from conduct considerations. Accordingly, we coded a court to have determined that the debtor had a current inability to repay the student loan if the court deemed the debtor's monthly disposable household income insufficient to meet his or her educational debt obligation in its entirety.[362] We coded a court to have determined that the debtor had a future inability to repay the student loan if the court concluded that either (1) the debtor's current inability to repay (if discussed in the vein that we defined it) would persist into the future and prevent repayment of the debt, or (2) the debtor's financial condition would deteriorate in the future and result in an inability to repay the educational debt in its entirety.[363]

(2) Conduct Considerations

Three strands of normative thought underlie the legal considerations regarding the debtor's conduct in connection with a court's determination of whether the debtor should prevail in his or her claim of undue hardship. The first strand embodies the notion that the debtor should have acted responsibly toward the creditor in order to obtain a

2002); Archibald v. United Student Aid Funds, Inc. (*In re* Archibald), 280 B.R. 222, 227 (Bankr. S.D. Ind. 2002); Clark v. Educ. Credit Mgmt. Corp. (*In re* Clark), 273 B.R. 207, 210 (Bankr. N.D. Iowa 2002). Other courts address such considerations in connection with their assessment of the debtor's good faith efforts to repay the student loans. *See, e.g.*, Hoskins v. Educ. Credit Mgmt. Corp. (*In re* Hoskins), 292 B.R. 883, 888 (Bankr. C.D. Ill. 2003); Kirchhofer v. Direct Loans (*In re* Kirchhofer), 278 B.R. 162, 169–70 (Bankr. N.D. Ohio 2002); Weir v. Paige (*In re* Weir), 296 B.R. 710, 717 (Bankr. E.D. Va. 2002).

361. This approach roughly mirrors the first two elements of the *Brunner* test. *See supra* text accompanying note 346.

362. This definition tracks the interpretation given to the first *Brunner* factor by the court in *Sequeira v. Sallie Mae Servicing Corp.* (*In re Sequeira*). *See* 278 B.R. 861, 865 (Bankr. D. Or. 2001) ("[T]he first element of the *Brunner* test should be read to require that the debtor be unable to pay any part of the debt from remaining assets, or available post-petition income.").

363. This definition deviates from the strict evidentiary burden imposed by some courts on debtors to demonstrate the most dire of circumstances. Some courts have framed this evidentiary burden in terms of the overwhelmingly subjective phrase "certainty of hopelessness." *E.g.*, VerMaas v. Student Loans of N.D. (*In re* VerMaas), 302 B.R. 650, 657 (Bankr. D. Neb. 2003); Williford v. Okla. State Regents for Higher Educ. (*In re* Williford), 300 B.R. 70, 75 (Bankr. W.D. Okla. 2003); Williams v. EFG Tech/Rutgers (*In re* Williams), 296 B.R. 128, 134 (Bankr. D.N.J. 2003); Johnson v. Educ. Credit Mgmt. Corp. (*In re* Johnson), 299 B.R. 676, 680 (Bankr. M.D. Ga. 2003); Carter v. Pennsylvania (*In re* Carter), 295 B.R. 555, 560 (Bankr. W.D. Pa. 2003); Mulherin v. Sallie Mae Servicing Corp. (*In re* Mulherin), 297 B.R. 559, 564 (Bankr. N.D. Iowa 2003); Stern v. Educ. Res. Inst., Inc. (*In re* Stern), 288 B.R. 36, 42 (Bankr. N.D.N.Y. 2002); Soler v. United States (*In re* Soler), 261 B.R. 444, 459 (Bankr. D. Minn. 2001).

discharge.[364] The second strand embraces the idea of clean hands—that is, the debtor should not be granted an undue hardship discharge should he or she be deemed responsible for having created the hardship that forms the basis for the debtor's claim for relief.[365] The third strand focuses on the moral hazard created by the legal opportunity to seek a discharge of one's student loans in bankruptcy and the abuse of the bankruptcy system that may stem therefrom.[366] Since we will later argue that considerations of debtor conduct are inappropriate in a court's analysis of undue hardship,[367] the manner in which these strands have become infused into the decision-making process of courts is worth noting.

We coded considerations of a student loan debtor's conduct in the following manner. First, while courts have often analyzed a debtor's good faith effort to repay his or her student loans by reference to a variety of factors,[368] we coded a court to have determined that the debtor made a good faith effort to repay his or her student loans if the court deemed the debtor (1) to have made efforts to obtain *any* employment,[369] and/or (2) to have made payments on the student loan when the debtor had the financial capability to do so.[370] Second, although courts often determine good faith by reference to a debtor's efforts to minimize expenses and maximize income,[371] we coded for these considerations separately. A court's consideration of whether the debtor has minimized his or her expenses generally focuses on whether any expenses could be eliminated (a concept relating to the *necessity* of the expense) as well as a reduction of expenses (a concept relating to the

364. *See* Stupka v. Great Lakes Educ. (*In re* Stupka), 302 B.R. 236, 242 (Bankr. N.D. Ohio 2003).

365. *See* Roach v. United Student Aid Fund (*In re* Roach), 288 B.R. 437, 446 (Bankr. E.D. La. 2003) ("[U]ndue hardship encompasses a notion that debtors may not willfully or negligently cause their own default, but rather their condition must result from 'factors beyond [their] reasonable control.'" (alteration in original) (quoting *In re* Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993))).

366. *See* Bethune v. Student Loan Guarantee Found. of Ark. (*In re* Bethune), 165 B.R. 258, 259, 260 (Bankr. E.D. Ark. 1994) (applying three-prong test for undue hardship established in *Johnson* and noting that "[t]he policy test looks to whether the dominant purpose of the bankruptcy was to avoid payment of the student loans"). For our arguments discussing why moral hazard with respect to the discharge of student loans in bankruptcy should not be addressed via the Bankruptcy Code's undue hardship discharge provision, see *supra* Part II.B.2.

367. *See infra* Part IV.

368. *See, e.g.*, *Stupka*, 302 B.R. at 243–44 (specifying seven indicia of a debtor's good faith effort to repay his or her educational debt).

369. *See In re* Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993) ("With the receipt of a government-guaranteed education, the student assumes an obligation to make a good faith effort to repay these loans as measured by his or her efforts to obtain employment . . . .").

370. *See* Lohr v. Mae (*In re* Lohr), 252 B.R. 84, 89 (Bankr. E.D. Va. 2000) (noting that good faith requires "the debtor to have made payments when he or she was in a position to make such payments").

371. *See supra* note 360 and accompanying text.

reasonableness of the expense).[372] We coded a court to have made a determination that the debtor minimized expenses regardless of whether the court did so expressly or impliedly.[373] A court's consideration of whether the debtor has maximized income generally asks whether the debtor is underemployed, as measured by (1) the debtor's failure to obtain employment commensurate with education, and/or (2) the debtor's failure to work to the extent possible.[374] Similar to expense minimization, we coded a court to have made a determination regarding income maximization if the court either expressly stated it or impliedly suggested it.[375] Finally, while courts often determine good faith by reference to whether a debtor attempted to manage the repayment

372. *Cf*. Ivory v. United States (*In re* Ivory), 269 B.R. 890, 912 n.46 (Bankr. N.D. Ala. 2001) ("In terms of a minimal standard of living, unnecessary could mean one of two things: (1) that is money is spent on something that is never necessary; or, (2) that *too much* is spent on something that *is* necessary.").

373. For an example of a court that expressly stated that the debtor minimized expenses, see *Cota v. United States Department of Education* (*In re Cota*), 298 B.R. 408, 419 (Bankr. D. Ariz. 2003) ("Based on the record of this case, there is no question that the Debtors have done everything to minimize their expenses."). For an example of a court that impliedly suggested that the debtor minimized expenses, see *Carter v. Pennsylvania* (*In re Carter*), 295 B.R. 555, 559, 560 (Bankr. W.D. Pa. 2003) (noting that the debtor "makes no extravagant expenditures" and that "[t]here is no 'fat' to eliminate from the household budget"). For an example of a court that expressly stated that the debtor failed to minimize expenses, see *Stern v. Education Resources Institute, Inc*. (*In re Stern*), 288 B.R. 36, 44 (Bankr. N.D.N.Y. 2002) ("The Court also finds disturbing the Debtor's failure to maximize his income and minimize his expenses."). We coded a court to have impliedly determined that the debtor did not minimize expenses if the court noted that any of the debtor's expenses was unreasonable, notwithstanding that the court may have acknowledged efforts to minimize expenses. *See, e.g.*, Taylor v. Ill. Student Assistance Comm'n (*In re* Taylor), 198 B.R. 700, 703, 704 (Bankr. N.D. Ohio 1996) (noting that debtors "have made efforts to minimize expenses," yet also noting that their "weekly cigarette expense is wasteful in both the long and short term").

374. *See* Melton v. N.Y. State Higher Educ. Servs. Corp. (*In re* Melton), 187 B.R. 98, 104 (Bankr. W.D.N.Y. 1995) ("A debtor may not create undue hardship by a free decision to be less than optimally employed, however noble the motive.").

375. For an example of a court that expressly stated that the debtor maximized income, see *Mitcham v. United States Department of Education* (*In re Mitcham*), 293 B.R. 138, 145 (Bankr. N.D. Ohio 2003) ("[I]t is clear that the Debtor, who has actively sought other employment, has used her best efforts to maximize her income within her vocational profile."). For an example of a court that impliedly suggested that the debtor maximized income, see *Turner v. New Hampshire Higher Education Assistance Foundation* (*In re Turner*), Case No. 01-13361-JMD, Adv. No. 02-1010-JMD, 2003 WL 21639407, at *7 (Bankr. D.N.H. July 8, 2003) ("More importantly, the Debtor provided an expert witness who testified that the Debtor's current employment situation is appropriate given the Debtor's work skills and mental health issues."). For an example of a court that expressly stated that the debtor failed to maximize income, see *Stern*, 288 B.R. at 44 ("The Court also finds disturbing the Debtor's failure to maximize his income and minimize his expenses."). For an example of a court that impliedly suggested that the debtor failed to maximize income, see *Alderete v. Colorado Student Loan Program* (*In re Alderete*), 289 B.R. 410, 418 (Bankr. D.N.M. 2002) (noting that debtors "have made no real effort to search for better-paying or additional employment"), *aff'd sub nom. Alderete v. Educational Credit Management Corp.* (*In re Alderete*), 308 B.R. 495 (B.A.P. 10th Cir. 2004), *rev'd and remanded*, 412 F.3d 1200 (10th Cir. 2005).

obligation on the student loan by seeking appropriate administrative relief (e.g., forbearance, deferment, consolidation, negotiation with the creditor),[376] we also coded for this consideration separately. We generally coded a court to have made a determination regarding the debtor's resort to administrative remedies if the court incorporated into its undue hardship analysis any such action or inaction by the debtor.[377]

b. How Bankruptcy Judges Determine Undue Hardship

Before we present our model of the judicial decision-making process regarding undue hardship discharge determinations, it is important to discuss briefly how we determined whether a legal conclusion informed the court's ultimate disposition. Whenever the court referenced how a particular fact weighed in favor of or against the debtor's claim of undue hardship, we characterized that reference as a core consideration—even if that reference was made in the context of the opinion's section pertaining to findings of fact rather than the section pertaining to conclusions of law.[378] If one of the parties to the proceeding stipulated to a particular core consideration, we deemed it reasonable to code that consideration as having been incorporated into the court's decision-

376. *See, e.g.*, Williams v. EFG Tech/Rutgers (*In re* Williams), 296 B.R. 128, 135 (Bankr. D.N.J. 2003) (noting that good faith requires that "the debtor must not have ignored her obligations and must have dealt with her student loans through repayment, deferral or restructuring"); Windland v. U.S. Dep't of Educ. (*In re* Windland), 201 B.R. 178, 184 (Bankr. N.D. Ohio 1996) (noting that factor to be considered in determining good faith is debtor's attempt to negotiate with the lender); *see also* Morris v. Univ. of Ark. (*In re* Morris), 277 B.R. 910, 914 (Bankr. W.D. Ark. 2002) (considering "[w]hether the debtor has made a good faith effort to negotiate a deferment or forbearance of payment" as a relevant factor in determining undue hardship). The possibility exists that a court might view a debtor's resort to administrative remedies as an effort to *evade* repayment and thus as indicia of the debtor's bad faith. *See, e.g.*, Goulet v. Educ. Credit Mgmt. Corp. (*In re* Goulet), 264 B.R. 527, 531 (W.D. Wis. 2001) ("There is even less evidence of any good faith effort to repay. The only fact relied upon by the bankruptcy [c]ourt in support of the finding is the debtor's seeking forbearance agreements. Seeking to avoid any payment can hardly be the basis for a finding of good faith effort to repay."). It is our recollection that courts in this study rarely, if ever, adopted this view.

377. For an example of the type of case in which we coded the court as having determined that the debtor resorted to administrative remedies, see *Windland*, 201 B.R at 184 ("After being laid off, debtor spoke with the lender in an effort to make arrangements to make affordable payments."). For an example of the type of case in which we coded the court as having determined that the debtor failed to resort to administrative remedies, see *Clark v. Educational Credit Management Corp.* (*In re Clark*), 273 B.R. 207, 211 (Bankr. N.D. Iowa 2002) ("Debtors have not seriously investigated any programs which would enable Mr. Clark to change the repayment terms on the notes.").

378. This approach seems to comport with the manner in which some courts have identified in their opinions what should be deemed to be a finding of fact and a conclusion of law. *See, e.g.*, Barron v. Tex. Guaranteed Student Loan Corp. (*In re* Barron), 264 B.R. 833, 847 n.25 (Bankr. E.D. Tex. 2001) ("To the extent that any finding of fact is construed to be a conclusion of law, it is hereby adopted as such.").

making process.[379] Finally, in those instances in which the court ultimately made its disposition on the basis of one core consideration yet addressed other considerations for argument's sake,[380] we deemed it crucial to include all of the court's legal conclusions in order to provide a full account of the manner in which judges perceive application of the undue hardship standard.

For the great majority of the 286 discharge determinations, three core considerations prove to be critical in accounting for the legal outcome: (1) the debtor's current inability to repay (current inability); (2) the debtor's future inability to repay debt (future inability); and, (3) the debtor's good faith effort to repay (good faith). This might not seem surprising given that this is the general framework for undue hardship analysis under the *Brunner* test,[381] and given that discharge determinations applying that test account for approximately 70% of all discharge determinations. A closer look at the data, however, reveals that a court's disposition on future inability proves to be the most critical.[382] For the 267 discharge determinations in which the court made a disposition regarding future inability, the legal outcome can be classified correctly in approximately 94% of the determinations solely by reference to whether the court's disposition on the consideration weighed in favor of discharge—that is, future inability favoring discharge and the *absence of* future inability disfavoring discharge. But classification on this basis alone does not account for the 19 discharge determinations in which the court did not discuss future inability. In order to provide a model that accounted for all 286 discharge determinations, we employed a classification tree,[383] which referenced the three core considerations of current inability, future inability, and

379. *See, e.g.*, Turretto v. United States (*In re* Turretto), 255 B.R. 884, 890 (Bankr. N.D. Cal. 2000) (noting that creditor stipulated to fact that debtor had a current inability to repay the educational debt and that debtor made good faith effort to repay it).

380. *See, e.g.*, Gettle v. Sallie Mae Servicing Corp. (*In re* Gettle), 257 B.R. 583, 590–91 (Bankr. D. Mont. 2000); Downery v. Sallie Mae, Inc. (*In re* Downey), 255 B.R. 72, 76 (Bankr. N.D. Fla. 2000); Vinci v. Pa. Higher Educ. Assistance Agency (*In re* Vinci), 232 B.R. 644, 652 (Bankr. E.D. Pa. 1999); Lehman v. N.Y. Higher Educ. Servs. Corp. (*In re* Lehman), 226 B.R. 805 (Bankr. D. Vt. 1998); Stebbins-Hopf v. Tex. Guaranteed Student Loan Corp. (*In re* Stebbins-Hopf), 176 B.R. 784, 788 (Bankr. W.D. Tex. 1994).

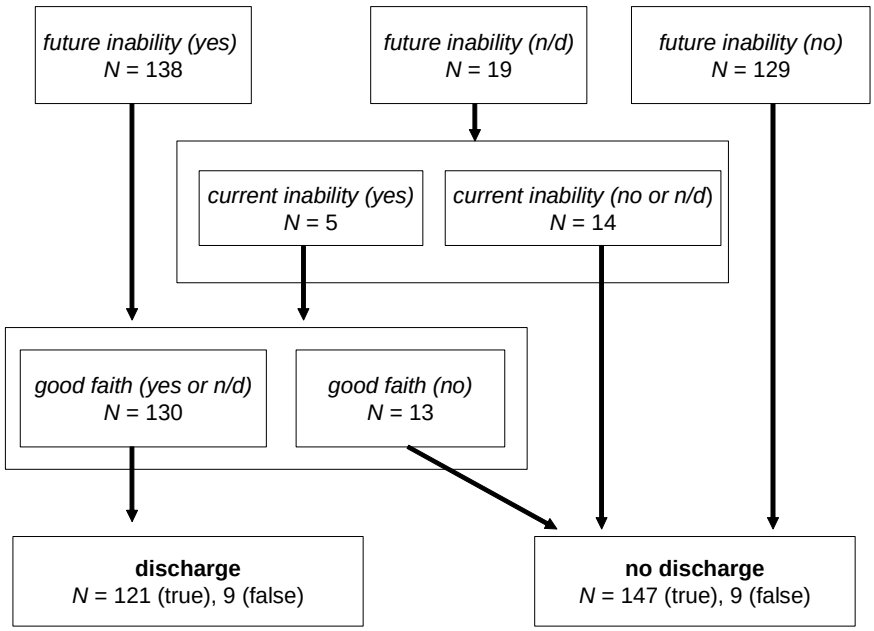
381. *See supra* text accompanying note 346.

382. Positive values (i.e., values weighing in favor of discharge) for all three considerations account for 78% of all discharges granted. *See infra* tbl.9. This is to be expected given that, for that group of determinations, approximately 88% were decided under the *Brunner* framework, which theoretically results in a grant of discharge if all three considerations are satisfied and in a denial of discharge if one of the three considerations are not satisfied. *See supra* note 347 and accompanying text.

383. *See generally* LEO BREIMAN ET AL., CLASSIFICATION AND REGRESSION TREES (1984).

good faith. As depicted in Figure 2, this classifier modeled a decision process using future inability as its starting point and then using either good faith or current inability (or both in a few instances) to predict the legal outcome of the discharge determination.

Figure 2
Classifier for Undue Hardship Discharge Determinations[384]



This model correctly classified 94% of all 286 discharge determinations using the decision process shown above. First, it predicted that the court *granted* an undue hardship discharge if the court's disposition took one of the following four paths: (1) the court determined that the debtor had a future inability to repay and had made a good faith effort to repay; (2) the court determined that the debtor had a future inability to repay and did not discuss the debtor's good faith effort to repay; (3) the court did not discuss the debtor's future inability to repay and determined that (a) the debtor had a current inability to repay and (b) the debtor had made a good faith effort to repay; or (4) the court did not discuss the debtor's future inability, determined that the debtor had a current inability to repay, and did not discuss the debtor's good

384. We denote those determinations where the court did not discuss a particular core consideration as "n/d."

faith effort to repay. Second, it predicted that the court *denied* an undue hardship discharge if the court's disposition paralleled one of the following five permutations: (1) The court determined that the debtor did *not* have a future inability to repay; (2) the court did not discuss the debtor's future inability to repay and determined that the debtor did *not* have a current inability to repay; (3) the court neither discussed the debtor's future inability to repay nor current inability to repay; (4) the court did not discuss the debtor's future inability to repay and determined that (a) the debtor had a current inability to repay yet (b) had not made a good faith effort to repay; and (5) the court determined that the debtor had a future inability to repay yet had not made a good faith effort to repay. The prevailing trends for all 286 discharge determinations are set forth in Table 9 where the patterns of current inability, future inability, and good faith are ordered by their frequencies. Given the interaction between these factors, our analysis seeks to determine which empirical variables in our data were most relevant for assessing each of these core considerations. We begin our analysis with current inability, the first consideration typically considered by courts under the *Brunner* framework.[385]

385. *See supra* text accompanying note 346.

Table 9
Legal Outcome by Current Inability, Future Inability and Good Faith[386]

Current Inability	Future Inability	Good Faith	Frequency	Percentage of Total Determinations	Discharge Granted	Percentage of Total Discharged
yes	yes	yes	106	37.06%	96.23%	78.46%
yes	no	n/d	32	11.19%	0.00%	
yes	no	yes	29	10.14%	10.34%	2.31%
yes	no	no	19	6.64%	0.00%	
yes	yes	n/d	18	6.29%	88.89%	12.31%
no	no	n/d	12	4.20%	0.00%	
yes	yes	no	10	3.50%	50.00%	3.85%
no	no	no	10	3.50%	0.00%	
n/d	no	no	10	3.50%	0.00%	
no	no	yes	9	3.15%	11.11%	0.77%
n/d	no	n/d	7	2.45%	0.00%	
no	n/d	n/d	5	1.75%	0.00%	
n/d	n/d	n/d	4	1.40%	0.00%	
yes	n/d	n/d	3	1.05%	33.33%	0.77%
n/d	n/d	no	3	1.05%	0.00%	
yes	n/d	no	2	0.70%	0.00%	
no	n/d	no	2	0.70%	0.00%	
no	yes	yes	1	0.35%	100.00%	0.77%
no	yes	no	1	0.35%	0.00%	
no	yes	n/d	1	0.35%	100.00%	0.77%
n/d	yes	n/d	1	0.35%	0.00%	
n/d	no	yes	1	0.35%	0.00%	

(1) Determining Factors for Assessing Current Inability to Repay

Approximately 91% of the discharge determinations made a disposition with respect to a debtor's current inability to repay. In 41 of these determinations (16%), the court deemed the debtor to have a current ability to repay the educational debt. This essentially guaranteed that the debtor would be denied a discharge: Only 3 of these 41

386. We denote those determinations where the court did not discuss a particular core consideration as "n/d."

determinations (7%) resulted in discharge.[387] Thus, we might wonder whether there were significant differences between the 41 debtors who were deemed able to repay and those who were not. We would expect that these differences would be reflected in financial factors such as monthly income and expenses, since an individual who is unable to meet his or her monthly obligations would probably be considered unable to pay additional student loan debt. Numerical values for income and expenses were available for only 196 of the 260 determinations for which the court considered current inability, resulting in a data reduction of approximately 25%. Focusing on this group of determinations, we first look at differences in monthly household income between the 31 debtors who were deemed *not* to have a current inability to repay and the remaining 165 debtors who were deemed to have a current inability to repay.[388]

As shown in Table 10, we see that, in general, the debtors who were deemed *not* to have a current inability generally had greater monthly household incomes than those who did, and the median income for the group of debtors with a current inability was significantly lower than the median income for their counterparts as assessed by the Wilcoxon rank-sum test ($p < 0.0001$). In particular, none of the 28 debtors whose household income was less than $946 per month were deemed to have a current ability to repay their student loans. Beyond this level, however, the distributions clearly overlap, so household income must not be the only deciding factor for the assessment of current inability to repay.

Table 10
Current Inability Status by Monthly Household Income

	Minimum	**25th percentile**	**Median**	**75th percentile**	**Maximum**	***N***
Current inability	$0	$1160	$1839	$2630	$7157	165
No current inability	$946	$2303	$2800	$3702	$8998	31

387. *See supra* tbl.9.

388. These data are likely to include some added variability because some income figures were reported as "gross" while others were reported as "net," with many additional cases unidentified. *See supra* notes 214–19 and accompanying text. We have assumed for our purposes that the effects of these differences should be essentially random and will not affect our ability to assess current inability to repay on the basis of income-related differences between the two groups.

Upon considering monthly disposable household income (i.e., household income in excess of expenses), we see a significant difference in the median levels between the two groups ($p < 0.0001$), with all 43 debtors with a budget deficit of at least $432 deemed to have a current inability to repay.

Table 11
Current Inability Status by Monthly Disposable Household Income

	Minimum	**25th percentile**	**Median**	**75th percentile**	**Maximum**	***N***
Current inability	-$2445	-$461	-$85	$74	$2103	165
No current inability	-$431	$59	$380	$673	$8615	31

However, the absence of disposable income also does not seem to perfectly delineate the two groups, as shown in Table 12.

Table 12
Current Inability Status by Presence of Monthly Disposable Household Income

	Current inability	*No current inability*	Total
Disposable Income > $0	62	26	88
Disposable Income ≤ $0	103	5	108
Total	165	31	196

Of the 88 debtors with disposable income, 70% were deemed to have a current inability to repay, while 95% of the debtors without disposable income were deemed to have a current inability to repay. While there exists a highly significant difference between these proportions (the odds for being deemed to have a current inability to repay are, in fact, 8.3 times greater for individuals without disposable income), surprisingly, many debtors with relatively high amounts of disposable income were granted current inability status while others were not. In fact, of the 38 debtors with monthly disposable household income in excess of $250, half were deemed to have a current inability to repay. Furthermore, no significant difference in income exists between these two groups. So what, then, might have prompted courts to assign current inability status to only half of these debtors? We might expect

that debtors with greater educational debt obligations would be considered less likely to be able to make their monthly payments. However, this is not the case for these 38 debtors: There is no significant difference between the median amounts of educational debt owed by the two groups, nor is there a significant difference in their median educational debt-to-household income ratios.

To summarize, current inability status was granted for the 58 debtors with very low monthly household incomes (< $946) and/or monthly expenses at least $450 in excess of their monthly household income. However, for the remaining 138 debtors, particularly those with considerable amounts of disposable income, the basis for deeming a debtor to have a current inability to repay was far less clear. While higher levels of both household income and disposable household income certainly seemed to predispose a court to determine that a debtor did *not* have a current inability to repay, the odds are essentially even for the most financially comfortable debtors. For example, of the 20 debtors with monthly household income in excess of $3,000 and disposable income of at least $500, 10 were deemed to have a current inability to repay. Thus, the initial denial of current inability to repay status, essentially the "kiss of death" for the possibility of discharge, did not appear to be decided entirely on the basis of financial considerations. In fact, considering the 64 determinations for which current inability status was decided in the absence of express reference to either income or expense data (or both), we find that the proportion of debtors deemed by the court to have a current inability to repay (15.6%) nearly mirrored the proportion of debtors granted current inability status when such data were present (15.8%). This suggests that the reference to financial data had literally no impact on the overall decision, a disturbing finding for those who would expect an empirical basis for the assignment of current inability status.[389]

389. In 26 discharge determinations, the court did not discuss the core consideration of current inability to repay. For all of these cases, which we denote as "n/d" in *supra* tbl.9, the court did not grant the debtor a discharge, regardless of the court's disposition on other core considerations. Such an omission strikes us as derelict since every evaluation of a claim of undue hardship necessarily must asses the impact of postbankruptcy repayment on the debtor. Interestingly, when excluding missing values regarding debtor representation, 26% of the debtors in those cases where the court did not discuss current inability appeared *pro se* before the court, as opposed to 11% in those cases where the court addressed current inability. According to a two-sided Fisher test, this difference is statistically significant ($p = 0.042$).

(2) Determining Factors for Assessing Future Inability to Repay

While the denial of current inability status practically guaranteed denial of discharge, a finding of current inability to repay had little impact on the final decision. Of the 219 debtors deemed to have a current inability to repay, only 58% were granted a discharge. In 214 of those 219 discharge determinations (98%), the prevailing factor was the court's assessment of the debtor's future inability to repay his or her educational debt. Of the 134 determinations in which the court deemed the debtor to have a future inability to repay, 92% of the courts granted the debtor a discharge. Conversely, those debtors deemed *not* to have a future inability were denied a discharge 96% of the time. Given this pattern, we look to assess future inability to repay in these 214 discharge determinations on the basis of differences between the two groups.

Since illness and injury would be likely to affect the debtor's future ability to work,[390] and in light of the finding that a statistically significant difference exists between those debtors granted a discharge and those denied a discharge on the basis of the debtor's health,[391] we examine the relationship between a debtor's health status and whether the court deemed the debtor to have a future inability to repay. A comparison of (1) those debtors identified as healthy as well as those debtors whose health status was not discussed by the court to (2) those debtors identified as unhealthy reveals the absence of a statistically significant relationship between the two variables ($p = 0.12$). If, however, we focus on those debtors who suffered from a medical condition that limited their capacity to work, we see a different picture. Of the debtors who had a work-limiting medical condition, 83% were determined to have a future inability to repay, and the odds of debtors with a work-limiting condition receiving future inability status are 3.7 times greater than the other debtors—that is, those debtors (1) who suffered from a medical condition that was *not* work-limiting, (2) who were healthy, or (3) whose health status was not discussed by the court ($p = 0.0011$). Furthermore, debtors who were responsible for caring for an unhealthy dependent were also significantly favored, with 80% of debtors with at least one unhealthy dependent granted future inability status compared to 58% in the remaining determinations—that is, those determinations involving (1) debtors without dependents, (2) debtors whose dependents were all healthy, and (3) debtors with dependents

390. *See supra* Part III.B.1.d.

391. *See supra* Part III.C.1.

whose health status was not discussed by the court (p = 0.0090). Finally, a total of 83 of the 214 discharge determinations where the court had deemed the debtor to have a current inability to repay and where the court also made a disposition regarding future inability involved debtors with a work-limiting medical condition and/or debtors with at least one unhealthy dependent. Within this subset of debtors, approximately 80% were deemed to have a future inability to repay their educational debt, accounting for 49% of the 139 determinations in which the court deemed the debtor to have a future inability to repay.

There are no significant differences in dispositions on future inability status by gender, age, marital status, or number of dependents, although we should note that future inability status was granted to the three plaintiffs with 7 or more dependents. Also, no significant differences exist according to level of educational attainment or whether the debtor had failed to attain the degree for which he or she had incurred educational debt. Differences with respect to occupation are difficult to assess due to the large range of categories within this variable, although one finding that stands out is that, in the 11 discharge determinations involving a debtor whose occupation type involved community and social services, the court deemed every debtor to have a future inability to repay.

We witness significant differences between the two groups based on the court's disposition on whether the debtor was deemed to have received a financial benefit from the education funded with the student loans—specifically, whether that education increased the debtor's earning potential (educational benefit).[392] Some courts have relied upon such a consideration in ascertaining whether the debtor has a future ability to repay.[393] Other courts, however, have rejected it as an inappropriate factor, arguing that the government is not an insurer of educational benefit and that, accordingly, a debtor should internalize the costs of having failed to receive such a benefit.[394] Of the 214 discharge

392. We did not attempt to categorize how much of a benefit the court perceived the debtor to have obtained. Rather, if the court viewed that the debtor's education had increased his or her earning potential, whether by a lot or a little, we coded the court to have determined that the debtor received a benefit from the education.

393. *See, e.g.*, United Student Aid Funds, Inc. v. Pena (*In re* Pena), 207 B.R. 919, 923 (B.A.P. 9th Cir. 1997), *aff'd*, 155 F.3d 1108 (9th Cir. 1998); *In re* Andresen, 232 B.R. 127, 139 (B.A.P. 8th Cir. 1999). We determined such a legal consideration to have informed a court's ultimate disposition regarding discharge according to the methodology explained in *supra* notes 378–80 and accompanying text.

394. *See, e.g.*, *In re* Roberson, 999 F.2d 1132, 1137 (7th Cir. 1993); Raymond v. Nw. Educ. Loan Ass'n (*In re* Raymond), 169 B.R. 67, 71 (Bankr. W.D. Wash. 1994); Mathews v. Higher Educ. Assistance Found. (*In re* Mathews), 166 B.R. 940, 943 n.3 (Bankr. D. Kan. 1994); Sands v. United Student Aid Funds, Inc., 166 B.R. 299, 310 n.19 (Bankr. W.D. Mich. 1994).

determinations in which the court deemed the debtor to have a current inability to repay and in which the court made a disposition regarding future inability to repay, 71 determinations took educational benefit into account, and 14 determinations rejected the factor as inappropriate. The relationship between a court's dispositions regarding educational benefit and future inability to repay, as documented in the 71 determinations, is summarized below.

Table 13
Future Inability Status by Educational Benefit

	No future inability	*Future inability*	Total
No educational benefit	4	34	38
Educational benefit	20	13	33
Total	24	47	71

The association between these two variables is highly significant ($p < 0.0001$), with a corresponding odds ratio of 13.07 in favor of debtors deemed by the court not to have received an educational benefit.

Although no significant association exists between failed educational attainment and future inability status, we might expect a significant association to exist between a debtor's failure to attain the education for which student loans were borrowed and a court's disposition on whether the debtor received an educational benefit. Of the 71 discharge determinations discussed above, only 65 determinations reported data on whether the debtor had failed to attain the funded education and made a disposition regarding educational benefit. Within this small subset of determinations, there is a significant association between the two variables: Courts deemed 23 of the 41 debtors (56%) who completed their education to have received a benefit from their education, compared to only 6 of the 24 debtors (25%) who did not complete their education.[395] Furthermore, the association between a court's disposition regarding both educational benefit and future inability is still highly significant within this subset of 65 determinations ($p = 0.0003$), but there is still no significant association between whether the debtor had failed to complete his or her education and the court's disposition on future inability ($p = 0.27$). It thus appears that, when a court made a disposition on educational benefit, the disposition had a significant impact on the future inability disposition and was positively associated with completion of the debtor's education.

395. The *p*-value for a two-sided Fisher test is 0.020.

A final avenue that warrants exploration is the relationship between (1) a court's disposition on expense minimization and income maximization and (2) a court's disposition on future inability to repay. Recall that we have focused our analysis of future inability to repay on the 214 discharge determinations for which the court found a current inability to repay. Given this latter characteristic, one might assume that future inability status would be attributed to a debtor on the basis of the debtor's ability (from the court's perspective) to improve his or her financial circumstances in the future. Thus, the core considerations of expense minimization and income maximization should be good predictors. A debtor who is deemed to have both minimized expenses and maximized income would be unlikely to repay any unpaid student loans. Alternatively, a debtor who the court considered to have failed to take such action might be expected to have the potential to repay.[396] The relationship between expense minimization, income maximization, and future inability is shown in Table 14.

Table 14
Future Inability Status as a Function of Expense Minimization and Income Maximization for Debtors with Current Inability Status

No future inability	*Income maximization (n/d)*	*Income maximization (no)*	*Income maximization (yes)*	**Total**
Expense minimization (n/d)	28	9	0	37
Expense minimization (no)	9	12	6	27
Expense minimization (yes)	2	12	2	16
Total	39	33	8	80
Future inability	*Income maximization (n/d)*	*Income maximization (no)*	*Income maximization (yes)*	**Total**
Expense minimization (n/d)	20	2	3	25
Expense minimization (no)	3	8	10	21
Expense minimization (yes)	23	4	61	88
Total	46	14	74	134

396. Elebrashy v. Student Loan Corp. (*In re* Elebrashy), 189 B.R. 922, 927 (Bankr. N.D. Ohio 1995) (noting that debtor cannot satisfy second *Brunner* prong "if pursuing a line of work different from the one he has chosen would allow him to pay off the loans").

Of the 63 determinations for which the debtor was deemed to have maximized income *and* minimized expenses, 97% of the debtors were deemed to have a future inability to repay. Furthermore, future inability status was denied in 64% of the determinations in which the debtor failed to satisfy either condition. Given the importance of these factors, we investigate whether significant differences exist between debtors who were deemed to have maximized their income and/or minimized their expenses and those who were considered not to have met these conditions. First, to assess income maximization, we consider employment status. Interestingly, there is no significant difference in this area: Of the 129 determinations that reported data on employment status and where the court considered the debtor's income maximization, 21 of the 29 unemployed debtors (72%) were deemed to have maximized their income compared to 61 of the 100 employed debtors (61%). Examining whether the median household income would be higher for the group of debtors deemed to have maximized their income, we find that no significant difference existed between the two groups.[397]

With respect to expense minimization, we examine the data for significant differences in the monthly expenses for two groups. Only 128 discharge determinations reported monthly expense data and made a disposition regarding expense minimization. The median monthly expenses for those debtors deemed to have minimized their expenses were $1871, compared to $2199 for those debtors deemed *not* to have minimized their expenses. The relationship is somewhat significant as assessed by a Wilcoxon rank-sum test ($p = 0.048$). Once again, however, there is sizeable overlap between the two groups, indicating that this variable is a poor predictor of expense minimization. We also consider expenses per individual, since one would expect debtors with larger families to incur higher monthly expenses than those debtors with smaller families. This comparison, however, yields similar results: a median monthly expense amount of $716 per individual for debtors deemed to have minimized expenses and $1,003 per individual for their counterparts with a large overlap between the two distributions ($p = 0.043$).

397. There are also no statistically significant differences on the basis of gender, age, health status, level of educational attainment, and failed educational attainment.

(3) Determining Factors for Assessing Good Faith Effort to Repay

The final core consideration that seems to have had a large impact on the legal outcome of a discharge determination is the debtor's good faith effort to repay his or her student loans. For the 203 discharge determinations that took into account good faith, the legal outcome could be classified correctly in approximately 78% of the determinations solely by reference to whether the court's disposition on the consideration weighed in favor of discharge—that is, good faith favoring discharge and lack of good faith disfavoring discharge. There are a couple of possible predictors of good faith we might consider, such as whether the debtor made any payments on his or her student loans and whether the debtor was employed. We find that neither of these is a significant factor in determining good faith. We do find, however, a significant association between a court's disposition on good faith and other core conduct considerations. A significant association exists between (1) the court's disposition on whether the debtor had sought to mitigate the financial distress created by his or her student loans by resorting to administrative remedies,[398] and (2) the court's disposition on the debtor's good faith effort to repay the loans ($p < 0.0001$).[399] Of the 92 discharge determinations in which the court made a disposition with respect to both core considerations, a court deemed the debtor to have made a good faith effort to repay in 54 of the 58 determinations (93%) where it also deemed the debtor to have invoked administrative relief. By contrast, a court deemed the debtor to have acted in good faith only in 13 of the 34 determinations (38%) where it deemed the debtor to have *failed* to resort to administrative remedies. A court's dispositions on expense minimization and income maximization are also strongly associated with the court's assessment of good faith. However,

398. Not surprisingly, a significant association exists between the factual circumstance of whether the debtor invoked any administrative relief prior to seeking a discharge of his or her student loans and a court's disposition on the debtor's resort to administrative remedies. Of the 91 discharge determinations that provided data on the debtor's implementation of administrative relief and where the court made a disposition on both the debtor's resort to administrative remedies and the debtor's good faith, a court deemed the debtor to have failed to resort to administrative remedies in 18 of the 19 determinations (95%) where the debtor did not invoke any administrative relief. By contrast, a court deemed the debtor to have failed to resort to administrative remedies in only 15 of the 72 determinations (21%) involving a debtor who had sought administrative relief prior to bankruptcy. The association between these two variables is highly significant ($p < 0.0001$) with a corresponding odds ratio of 64.6.

399. In light of the highly significant association between a debtor's resort to administrative relief and a court's disposition on whether the debtor had sufficiently availed herself of administrative remedies prior to seeking an undue hardship discharge, *see supra* note 398, it follows that there exists a significant three-way association among these two variables and a court's disposition on good faith in the subset of 91 determinations which accounted for all three variables.

as noted in the analysis of future inability status,[400] the factual criteria for assessing either of those considerations cannot be clearly determined from the data. These findings suggest to us that, given the absence of factual circumstances to account for a debtor's good faith, and given the strong association between a court's dispositions on other core considerations regarding the debtor's conduct, courts that are predisposed to view the debtor's claim for undue hardship from a forgiving stance ruled favorably for the debtor on those considerations and vice-versa. Put another way, some courts engaged in result-oriented adjudication.

IV. REORIENTING THE DISCHARGE OF EDUCATIONAL DEBT

> Sure enough, "undue hardship" is an opaque concept, but many courts reach too far trying to clarify it. Legislative interpretation is a less expansive exercise.[401]

The preceding Part of this Article has focused on the manner in which courts have applied the standard of undue hardship. Assuming that the discharge determinations analyzed in this study represent the methodological approach implemented by other courts, then empirical analysis suggests that they have applied the law to similar sets of factual circumstances based on differing perceptions of the meaning of the law—perceptions that have produced asymmetrical results. This Article now turns to the question of how courts *ought* to interpret and apply the law. It prescribes, through resort to principles of statutory interpretation, the legal factors that a court should and should not consider. We seek to provide a correct interpretation of the meaning of undue hardship that will enable courts to apply the standard in a way that comports with the command and structure of the Bankruptcy Code, as well as with the fresh start principle, and that will be more conducive to producing uniform results. We hope that our empirical account of the judicial decision-making process regarding undue hardship discharge determinations prompts bankruptcy courts into action and encourages them to abandon the flawed precedent that has undermined the uniformity and certainty in the granting of debtor relief.[402]

400. *See supra* Part III.C.2.b.(2).

401. Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 742 n.20 (Bankr. D. Me. 2000).

402. As our proposal advocates statutory coherency through a principled reading of the Bankruptcy Code, we hope that courts will not view the proposal in a light akin to the tone of the undue hardship opinion issued by the court in *Lawson v. Sallie Mae, Inc.* (*In re Lawson*), 256 B.R. 512, 517 (Bankr. M.D. Fla. 2000), in which the court expressed that it did "not believe itself empowered to repeal or rewrite legislation law professors deem foolish." *Id.* at 517.

As the heading to this Part suggests, we believe that courts have lost their way in the morass of decisional law that has dominated understanding of undue hardship. This phenomenon perhaps can be explained by the fact that judicial decisionmaking is not immune from the polarizing effects of the two issues that have dominated the debate over affording individuals relief in the form of debt forgiveness: (1) the ability of an individual debtor to repay some portion of his or her prebankruptcy debts, and (2) the causes of the individual's financial situation that have prompted the debtor to file for bankruptcy. The former issue reflects the concern that some individual debtors have the means to repay and that, accordingly, the scope of bankruptcy relief should be limited with respect to that class of individual. The latter issue focuses on the debtor's prebankruptcy conduct and asks whether the individual debtor's bankruptcy stems from irresponsibility or rather true misfortune. In conducting their undue hardship determinations, courts have impermissibly focused on the latter issue.

This Part first argues that an undue hardship inquiry should be confined to consideration of a debtor's ability to repay his educational debt, without reference to the debtor's prebankruptcy conduct. It then argues that consideration of such conduct is misplaced. Both arguments are premised on the following overarching approach: Among the many textual canons of statutory interpretation, one approach commands that the interpreter consider the words whose meaning is unclear in relationship to the other portions of the entire statutory enactment, for to consider them in isolation would distort legislative intent (the whole act rule).[403] Accordingly, because Congress failed to define the term "undue hardship," courts must look elsewhere within the structure of the Bankruptcy Code to glean what Congress meant in using that term. Viewed through the lens of the whole act rule, it becomes apparent that undue hardship should concern itself with the effect of nondischarge on the debtor and nothing more.

A. The Relevance of Ability to Repay

In one of its decisions interpreting the Bankruptcy Code, the Supreme Court made the following observation:

> Statutory construction . . . is a holistic endeavor. A provision that may

403. 2A STATUTES AND STATUTORY CONSTRUCTION § 47.02, at 212 (Norman J. Singer ed., 6th ed. 2000) ("[A] legislature passes judgment upon the act as an entity, not giving one portion of the act any greater authority than another. Thus any attempt to segregate any portion or exclude any other portion from consideration is almost certain to distort the legislative intent.").

> seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.[404]

The notion that the meaning of identical terms within the Bankruptcy Code should be read consistently with one another has particular import in ascertaining the proper interpretation of the term "undue hardship." That term reappears elsewhere in the Code in one other instance: If a debtor seeks to enter into an agreement with a creditor that would make the debtor legally bound to repay a debt that would otherwise have been discharged, that reaffirmation agreement will be enforceable only if a variety of requirements meant to safeguard the debtor's fresh start are all satisfied.[405] The reaffirmation provision requires, among other things, that the agreement "not impose an undue hardship on the debtor or a dependent of the debtor."[406] As evidenced by the lengthy disclosures that a creditor must provide to the debtor,[407] the provision clearly concerns itself with the debtor's postbankruptcy welfare by seeking to protect the fresh start provided by the discharge. Reference to the meaning of undue hardship in the reaffirmation context crystallizes the level of sacrifice that should be deemed to constitute undue hardship in the context of discharge of educational debt. We now explore that connection.[408]

Congress has finally provided a firm sense of what constitutes undue hardship thanks to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[409] BAPCPA amended the Bankruptcy Code to provide that a presumption of undue hardship arises in the reaffirmation context if the debtor's disposable income (i.e., income less expenses) is insufficient to make the payments specified in the reaffirmation agreement.[410] If the presumption arises, it may be

404. United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (Scalia, J.) (citations omitted).

405. *See* 11 U.S.C.A. § 524(c) (West 2004 & Supp. I 2005).

406. If the debtor is represented by counsel, the debtor's attorney must file a declaration or affidavit to this effect. *See* 11 U.S.C. § 524(c)(3)(B) (2000). If the debtor is *pro se*, then the court must make that determination. *See id.* § 524(c)(6)(A)(i).

407. 11 U.S.C.A. § 524(c)(2), (k).

408. Amazingly, only one opinion in this study identified this connection. *See* Naranjo v. Educ. Credit Mgmt. Corp. (*In re* Naranjo), 261 B.R. 248, 257 (Bankr. E.D. Cal. 2001) ("The term 'undue hardship' appears in both sections 524(c)(3) and in 523(a)(8) and should be read to be consistent with each other.").

409. Pub. L. No. 109-8, 119 Stat. 23.

410. 11 U.S.C.A. § 524(m)(1) (West Supp. I 2005).

rebutted only if the debtor identifies an additional source of funds that will enable him or her to make the scheduled payments.[411] Given the terms in which Congress has cast the presumption and how it may be rebutted, the thrust of the provision focuses on considerations regarding the debtor's ability to repay as measured by the debtor's disposable income.

Notably, the presumption of undue hardship provided in the reaffirmation context assumes that the debtor will have a future inability to repay the debt based on his current inability to repay. This assumption strikes us as eminently reasonable. In the educational debt context, however, courts have ultimately based their discharge determinations not on whether the debtor has a current inability to repay his or her student loans, but rather on whether the debtor has a future inability. Recall that courts granted a discharge to only 58% of the debtors in this study deemed to have a current inability to repay and that a court's disposition on future inability to repay ultimately directed the legal outcome for this group of debtors.[412] Further recall that, with few exceptions, courts generally did not base their disposition on a debtor's future inability to repay on any factual circumstances.[413] For the group of debtors who were deemed to have a current inability to repay yet were deemed *not* to have a future inability to repay, this suggested a predisposed unwillingness by the courts before which such debtors appeared to grant a discharge. Such debtors found themselves with the unenviable and nearly impossible task of proving a negative about the future—that is, convincing the court that nothing could improve their financial circumstances.[414] This situation can only be remedied if courts place greater emphasis on their dispositions regarding current inability to repay and assume that such an inability will persist absent positive

411. *Id*.

412. *See supra* Part III.C.2.b.

413. *See id.*

414. *See*, *e.g.*, Hutchison v. Pa. Higher Educ. Assistance Admin. (*In re* Hutchison), 296 B.R. 819, 827 (Bankr. D. Mont. 2003) ("[T]here is not sufficient credible evidence that Steven cannot find employment at some time during the repayment period . . . ."); Ciesicki v. Sallie Mae (*In re* Ciesicki), 292 B.R. 299, 306 (Bankr. N.D. Ohio 2003) ("Plaintiffs have failed to prove that Mrs. Ciesciki is unlikely to obtain gainful employment using her degree during a significant portion of the repayment period. Accordingly, the second prong of the *Brunner* test is not satisfied."). For an example of a court that has acknowledged the difficulty and inherent subjectivity in forecasting a debtor's future ability to repay his or her student loans, see *Rivers v. United Student Aid Funds, Inc.* (*In re Rivers*), 213 B.R. 616, 619 (Bankr. S.D. Ga. 1997). For an example of a pragmatic approach that rejects speculation regarding future earnings, see *Powers v. Southwest Student Services Corp.* (*In re Powers*), 235 B.R. 894, 898 (Bankr. W.D. Mo. 1999) ("The only 'reasonably reliable future financial resources' the Court can foresee for the Debtor in this case are the rather minimal annual pay increases . . . . Anticipating anything more than this would be sheer speculation.").

evidence to the contrary.[415]

Finally, the meaning of undue hardship suggested in the reaffirmation provision would appear to render irrelevant a consideration of the debtor's prebankruptcy conduct. Recall that, in the educational debt context, some courts will deny an undue hardship discharge on the basis that the debtor did not make a good faith effort to repay or that the requested relief constitutes an abuse of the bankruptcy system.[416] Put another way, the court will deem that no undue hardship exists where the debtor has acted in bad faith and/or has abused the bankruptcy system. Imagine how foolish it would be to import this meaning of undue hardship into the reaffirmation context. Let us consider the hypothetical case of a debtor who seeks to rebut the presumption of undue hardship with respect to a reaffirmation agreement and that the court has decided to hold a hearing on the matter. The exchange between the court and the debtor might go something like this:[417]

> COURT: Mr. Debtor, you have proposed to enter into a reaffirmation agreement. In order to maintain your line of credit with the merchant, the agreement requires that you pay $100 per month for two years. You have listed monthly unemployment income of only $500 and monthly expenditures of $1500 in your statement in support of the agreement, yet you have failed to explain how you will make such payments with a monthly deficit in your budget.

415. We believe that courts' misdirected emphasis on the consideration of future inability to repay can be attributed in part to a blind application of the *Brunner* test without a critical reassessment of the impact that amendment to 11 U.S.C. § 523(a)(8) may have had on its underlying rationale. The Second Circuit established the *Brunner* framework for interpreting the meaning of "undue hardship" at the time when a debtor could obtain a discharge of educational debt if such debt "first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition." 11 U.S.C. § 523(a)(8)(A) (1988) (amended 1990 and repealed 1998); *see also* Ordaz v. Ill. Student Assistance Comm'n (*In re* Ordaz), 287 B.R. 912, 918 (Bankr. C.D. Ill. 2002) ("The *Brunner* test was developed in th[e] context of undue hardship as a shorter-term alternative to automatic dischargeability after five years."). Accordingly, the inquiry of whether "additional circumstances exist indicating that [the debtor's current inability to repay] is likely to persist for a significant portion of the repayment period of the student loans," Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (per curiam), must have necessarily contemplated that a "significant portion" of the repayment period could not have exceeded five years: Since a debtor automatically would have received a discharge at that point in time, regardless of his or her financial situation, it logically follows that the concept of future inability to repay was limited by then-existing Code § 523(a)(8)(A). *See Brunner*, 831 F.2d at 397. Given that repayment periods today can span multiple decades, *see supra* note 175, and given the manner in which the Code's educational debt dischargeability provision has been amended to eliminate automatic relief after a certain passage of time, courts need to rethink critically the evidentiary burden required of a student loan debtor to establish a future inability to repay.

416. *See supra* Part III.C.2.a.

417. We draw our inspiration for this illustrative approach from Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 543–46 (1967).

DEBTOR: I'll make ends meet somehow.

COURT: That's not good enough Mr. Debtor. You must convince this court that you will have enough income to pay your regular expenses as well as this debt. Do you anticipate an increase in your income?

DEBTOR: No.

COURT: Do you realize that the law creates a presumption of undue hardship in a situation such as yours? Honestly, I'm inclined to disapprove this agreement unless you have some other evidence you would like to submit to the court.

DEBTOR: Your Honor, I just don't understand. Last month you said I couldn't discharge my student loans even though I couldn't afford to repay them. You told me that I demonstrated bad faith by failing to get a job and because of this I failed to establish undue hardship.

We have offered this vignette to challenge courts to reconsider the propriety of considerations regarding the debtor's conduct in making their undue hardship discharge determinations. Although the above scenario might seem far-fetched, it has played itself out in reverse. In *Naranjo v. Educational Credit Management Corp. (In re Naranjo)*,[418] the court partly relied on the fact that the debtors had reaffirmed a credit union loan and that their attorney had represented that they would not suffer undue hardship to reach its conclusion that the debtors had failed to establish that they would suffer undue hardship in the absence of a discharge of their student loans.[419] If courts are to read the term "undue hardship" consistently throughout the Bankruptcy Code, then they should only concern themselves with an analysis of the financial characteristics of the debtor. If courts believe that a principled approach exists that justifies interpreting the phrase differently, depending on the context in which it is applied, we now marshal other statutory arguments that bolster our contention that courts should not infuse an analysis of debtor conduct into their undue hardship discharge determinations.

B. The Irrelevance of Debtor Conduct

By focusing on a debtor's prebankruptcy conduct, courts have misdirected their analysis of whether the nondischarge of educational debt will result in an undue hardship. They have placed emphasis on

418. 261 B.R. 248, 257 (Bankr. E.D. Cal. 2001).

419. *Id*. at 257.

ascertaining the reason *why* student loan debtors who make a claim of undue hardship have reached that point. The language of the statute, however, does not invite such a focus. Rather, it limits the court's inquiry to that of *effect*—that is, whether nondischargeability will result in undue hardship. This departure from congressional command can perhaps be attributed to the type of individual that jurists (and perhaps society) have come to perceive as meriting relief in the form of forgiveness of debt—the "honest but unfortunate debtor."[420] Reliance on this image has added complexity in the process of determining discharge of educational debt.[421] Pursuant to the whole act rule, we should look elsewhere within the structure of the Code to infer what Congress might *not* have meant by using the term "undue hardship." Reference to the manner in which Congress has expressly provided for good faith in other Bankruptcy Code provisions as well as to the structure of the Chapter 13 hardship discharge, a form of conditional discharge,[422] further clarifies that courts should formulate their undue hardship discharge determinations without considering debtor conduct.

First, Congress has made it patently clear when it desires good faith to be part of a bankruptcy court's analysis. Many Bankruptcy Code provisions expressly require a court to look at a debtor's good faith in one vein or another.[423] Given the absence of express reference to good faith in the Code's undue hardship discharge provision, courts should refrain from implying such a condition where none exists.[424] Second, causation has not expressly infused itself, as a general matter, into the content of bankruptcy law as part of any legal command that instructs

420. This conceptual category has repeatedly been invoked by courts, including the Supreme Court. Perhaps the most well-known iteration thereof stems from the Court's opinion in *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934), wherein the Court stated that the purpose of bankruptcy law is to give the "honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt," *id.* at 244. *Local Loan* has not escaped invocation in the educational debt context. *See*, *e.g.*, Chambers v. Nat'l Payment Ctr. (*In re* Chambers), 239 B.R. 767, 770 (Bankr. N.D. Ohio 1999); Powers v. Sw. Student Servs. Corp. (*In re* Powers), 235 B.R. 894, 901 (Bankr. W.D. Mo. 1999); Green v. Sallie Mae Servicing Corp. (*In re* Green), 238 B.R. 727, 732 (Bankr. N.D. Ohio 1999); Brown v. USA Group Loan Servs. (*In re* Brown), 234 B.R. 104, 109 (Bankr. W.D. Mo. 1999); Kasey v. Pa. Higher Educ. Assistance Auth. (*In re* Kasey), 227 B.R. 473, 474–75 (Bankr. W.D. Va. 1998). For a discussion of the origins of the phrase "honest but unfortunate debtor," see Howard, *supra* note 47, at 1047 n.1.

421. For a critique of this archetype, see Ponoroff & Knippenberg, *supra* note 129, at 293–99.

422. *See supra* note 52 and accompanying text.

423. *See* 11 U.S.C. §§ 921(c), 1129(a)(3), 1325(a)(3) (2000); *see also* 11 U.S.C.A. §§ 348(f)(2), 707(b)(3)(A) (West 2004 & Supp. I 2005) (incorporating concept of bad faith).

424. *See* Crowley v. U.S. Dep't of Educ. (*In re* Crowley), 259 B.R. 361, 366–69 (Bankr. W.D. Mo. 2001); Daugherty v. First Tenn. Bank (*In re* Daugherty), 175 B.R. 953, 959 (Bankr. E.D. Tenn. 1994).

the court whether or not relief should be granted to the debtor in the form of discharge.[425] The majority of the grounds for denial of discharge in Chapter 7 involve the debtor's misconduct in connection with the administration of his or her case.[426] Accordingly, the grant of discharge in Chapter 7 neither invites inquiry by the court into the causes of the debtor's financial situation nor provides a statutory basis for the court to deny discharge on the basis of financial irresponsibility. The sole exception whereby the Bankruptcy Code expressly incorporates a causative element into one of its statutory provisions is that of the Chapter 13 "hardship discharge," to which our discussion now turns.

The structure of the Code and its legislative history both suggest that debtor culpability should not be a relevant factor in a court's consideration of undue hardship. A debtor may receive a discharge in Chapter 13 in one of two forms. First, the Bankruptcy Code directs the court to grant a discharge "as soon as practicable" to a debtor who has completed all payments proposed in his Chapter 13 plan.[427] Thus, full compliance with the scheduled payments is the condition that needs to be satisfied for relief to be granted to the debtor (the full compliance discharge).[428] Conversely, the possibility exists that the debtor may not be able to comply fully with the scheduled payments proposed in his repayment plan. Under those circumstances, the debtor may nonetheless receive a discharge, but only upon the satisfaction of three conditions, including that the debtor's inability to complete the scheduled payments be "due to circumstances for which the debtor should not justly be held accountable."[429] This discharge is generally referred to as the "hardship discharge."[430] Thus, when making a Chapter 13 hardship discharge determination, a court is confronted with a debtor who has an inability to repay, yet discharge will be granted only if the debtor establishes, among other things, that he does not bear responsibility for the financial state of affairs that have resulted in the inability.[431]

425. *See Crowley*, 259 B.R. at 368 ("[A]s a general policy, the Bankruptcy Code doesn't concern itself with how a debtor came to be in the financial position that made bankruptcy necessary.").

426. *See* 11 U.S.C. § 727(a)(2)(B), (a)(3)–(a)(5).

427. 11 U.S.C.A. § 1328(a).

428. With certain exceptions, the full compliance discharge provides a discharge of all debts scheduled in the Chapter 13 plan. *See id.* Accordingly it is broader in scope than the Chapter 7 discharge. *See* 11 U.S.C. § 727(b) (excluding from discharge all debts enumerated in 11 U.S.C. § 523(a)).

429. 11 U.S.C.A. § 1328(b)(1).

430. H.R. REP. NO. 95-595, at 430 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6386.

431. For an example of the considerations that may be relevant in making such a determination, see *Bandilli v. Boyajian* (*In re Bandilli*), 231 B.R. 836, 840 (B.A.P. 1st Cir. 1999) (enumerating six

The Chapter 13 hardship discharge is the *sole* instance in the Bankruptcy Code that *expressly* incorporates the absence of fault as a prerequisite for relief in the form of forgiveness of debt. No other discharge provision of the Bankruptcy Code invites the court to delve into the causes of what precipitated the debtor's financial situation. By virtue of negative implication, a possible interpretation is that Congress did not intend for courts to analyze the causes of a debtor's inability to repay his or her educational debt when conducting its undue hardship inquiry.[432] Close analysis of the recommendations set forth in the 1973 Commission Report,[433] upon which Congress relied in drafting the Bankruptcy Code,[434] provides useful insight that further supports the conclusion that inability to repay and debtor culpability are distinct issues of which Congress was aware and knew how to separate for individual consideration and treatment when it enacted the Bankruptcy Code.

Prior to BAPCPA's enactment, the Bankruptcy Code prohibited a court from granting a Chapter 7 discharge to a debtor if the debtor received such a discharge within the past six years (the six-year bar to discharge).[435] This provision mirrored the substance of its predecessor under the Bankruptcy Act.[436] In its report, however, the Bankruptcy Act Commission recommended to Congress that the six-year bar to discharge be reduced to five years,[437] which Congress clearly rejected. More importantly, however, the Commission sought to mitigate the overinclusiveness of its proposed five-year bar to discharge by infusing the concept of conditional discharge: The court could grant the debtor a discharge, notwithstanding that the debtor had received a prior discharge within five years, if the debtor established that: (1) the inability to repay

relevant factors).

432. *See* Bates v. United States, 522 U.S. 23, 29–30 (1997) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (quoting Russelo v. United States, 464 U.S. 16, 23 (1983))).

433. *See supra* note 57 and accompanying text.

434. *See* S. REP. NO. 95-989, at 1–2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5787–88.

435. *See* 11 U.S.C. § 727(a)(8) (2000) (amended 2005). BAPCPA amended the Bankruptcy Code to provide an eight-year bar to discharge. Pub. L. No. 109-8, § 312(1), 119 Stat. 23, 87 (codified at 11 U.S.C.A. § 727(a)(8) (West 2004 & Supp. I 2005)).

436. *See* 11 U.S.C. § 32(c)(5) (1976) (providing that "[t]he court shall grant the discharge unless satisfied that the bankrupt . . . in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy has been granted a discharge") (repealed 1978); *see also* S. REP. NO. 95-989, at 99 (1978) (noting that six-year bar to discharge "is no change from current law with respect to straight bankruptcy"), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5885; H.R. REP. NO. 95-595, at 385 (1977) (same), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6341.

437. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 2, at 132 (1973).

his prebankruptcy debts resulted from "causes not reasonably within his control," and (2) repayment of the prebankruptcy debts "from future income or other wealth [would] impose an undue hardship on the debtor and his dependents."[438] In this recommendation, we witness a form of conditional discharge that distinctly separates the concepts of (a) inability to repay and (b) culpability regarding inability to repay. Moreover, inability to repay was cast in terms of "undue hardship." Finally, one must contrast the Bankruptcy Act Commission's proposed revision to the six-year bar to discharge with its recommendation regarding the discharge of educational debt. The Bankruptcy Act Commission suggested that all educational debt for which the first payment became due more than five years prior to the debtor's bankruptcy filing be discharged automatically; for educational debt for which the first payment became due *less* than five years prior to the filing, discharge would be granted "if its payment from future income or other wealth [would] . . . impose an undue hardship on the debtor and his dependents."[439] Congress ultimately adopted this recommendation.

We can draw several conclusions from both Congress's adoption of the Bankruptcy Act Commission's recommendation on the discharge of educational debt and Congress's rejection of the Commission's recommendation to implement conditional discharge with respect to a debtor initially deemed to be ineligible for discharge on account of having received a prior discharge. First, the Commission clearly knew how to implement the concept of debtor culpability in conjunction with inability to repay cast in terms of "undue hardship"—to wit, the conditional discharge proposed to be implemented into the discharge eligibility rule for a Chapter 7 debtor. Congress chose not to implement that concept when it proposed to make educational debt conditionally dischargeable.[440] Assuming that Congress was aware of both

438. H.R. DOC. NO. 93-137, pt. 2, at 132–33; *see also* H.R. DOC. NO. 93-137, pt. 1, at 175 (noting that conditional discharge with respect to five-year bar to discharge "furthers the discharge and rehabilitative goals of the Bankruptcy Act, without opening the door to the abuse of repetitive discharge," and that "[t]he arbitrariness of any time period that must expire before another discharge can be obtained is ameliorated by giving the court discretion to deal with a hardship case").

439. H.R. DOC. NO. 93-137, pt. 2, at 136; *see also* H.R. DOC. NO. 93-137, pt. 1, at 177 ("The Commission . . . recommends that, in the absence of hardship, educational loans be nondischargeable unless the first payment falls due more than five years prior to the petition.").

440. The Bankruptcy Act Commission, in delineating the principles according to which educational debt would be deemed nondischargeable, referenced the concept of debtor culpability:

> [T]he claimant must establish that the debtor can pay the educational debt from future earnings or other wealth, such as trust fund income or an inheritance. This requirement recognizes that in some circumstances the debtor, *because of factors beyond his reasonable control*, may be unable to earn an income adequate both to meet the living costs of himself and his dependents and to make the educational debt payments.

recommendations by the Commission, and there is no reason to believe that Congress would not have carefully considered the recommendations suggested to it by a commission that Congress authorized for that express purpose, we can conclude that Congress probably did not want to incorporate any concept of debtor culpability with respect to the discharge of educational debt. Moreover, Congress indicated its willingness to incorporate the concept of debtor culpability as a component of conditional discharge when it enacted the Chapter 13 hardship discharge. In light of these considerations, courts ought to refrain from interpreting the term "undue hardship" to incorporate causative elements. Given that lack of improvidence is not one of the qualifications for general discharge in bankruptcy, judges should not read such a qualification into the undue hardship standard since the result is an unjustifiable asymmetry between eligibility for a general discharge and an undue hardship discharge of educational debt.

V. CONCLUSION

> It is regrettable that Congress shed so inadequate a spotlight on the exculpating phrase "undue hardship". . . . It is also regrettable that so much is therefore left to the individual view of each judge who, after all, brings the sum of who and what he was, what he has become, and what he sees through his own eyes to this basically disagreeable task.[441]

More than twenty years ago, at a time when the Bankruptcy Code was still in its infancy,[442] Professor Boshkoff wrote that "[t]he treatment of student loans in the new Bankruptcy Code suggests a limited acceptance of the concept of conditional discharge in the United States."[443] With that observation as a basis of departure, this Article concludes by introducing the following questions: Assuming we favor the presence of conditional discharge in our bankruptcy system, in what *form* should conditional discharge be structured—as a rule or a standard? What principles *should* govern the exercise of discretion? Is there a genuine concern that courts will not exercise their discretion in a compassionate

H.R. DOC. NO. 93-137, pt. 2, at 140 (emphasis added). However, given that this reference to debtor culpability appears in the form of explanatory text, rather than in the form of a proposed revision (as in the case of conditional discharge regarding the time-bar to discharge), little, if any weight, should be afforded to it.

441. N.Y. State Higher Educ. Serv. Corp. v. White (*In re* White), 6 B.R. 26, 29 (Bankr. S.D.N.Y. 1980) (citation omitted).

442. Congress enacted the Bankruptcy Code in 1978, *see supra* note 3, which did not take effect until October 1, 1979.

443. Boshkoff, *supra* note 45, at 72 n.10 (citation omitted).

manner? These questions can begin to be answered by reference to the data from this study, which suggest that undue hardship has not been a judicially manageable standard. Past experience can inform the way in which we might tailor conditional discharge in the future, should we want to reform it or should we want to incorporate it further into the bankruptcy system. If we are to grant courts the ultimate decision-making authority over forgiveness of debt, we need to ascertain the optimal level of discretion that should be afforded to judges.

Among the most troubling aspects regarding the implementation of undue hardship is the notion that a judge, in making the determination of whether to discharge educational debt, will invariably impose his or her personal views on the proper role of bankruptcy, on the proper role of the fresh start, and on the type of debtor who is worthy of relief embodied in the Bankruptcy Code.[444] If the meaning of undue hardship ultimately rests on the particularized ideals held by the judge, legislative enactment becomes permeated with an impermissible judicial gloss. Worse yet, problems of uncertainty and unequal treatment of debtors inevitably abound, as our data have shown. It may be reasonable to conclude that a court *should* have the discretion to dispense particularized justice on a case-by-case basis where Congress has spoken with broad, general pronouncement rather than highly specific language. But notwithstanding the guideposts left for judges to figure out the proper path of undue hardship, many have gotten it wrong. Discretion has thus come to undermine the integrity of the system by producing haphazard results that have compromised the fresh start principle.[445]

444. Professor Boshkoff foresaw these complications at the time when the undue hardship discharge provision had been in effect less than five years:

> [E]xperience with the conditional discharge of educational debts in our country suggests that the bankruptcy judge will be given almost unlimited power to determine the lifestyle of a debtor who seeks a discharge. Whether this change will produce a system which is any less or more desirable than that which we have now depends upon one's values. It is probable that the relative success or failure of a new approach to discharge policy will depend, to a great extent, upon the humanity with which the bankruptcy judges exercise the powerful discretion to be conferred upon them.

Boshkoff, *supra* note 45, at 125; *cf.* Jackson, *supra* note 30, at 243 ("[A] case-by-case attempt to single out individuals who need the protection of a right of discharge may result . . . in the identification of individuals whose choices strike judges as somehow odd or aberrant."). For an example of blatant predisposition by a court, see *Coveney v. Costep Servicing Agent* (*In re Coveney*), 192 B.R. 140, 143 (Bankr. W.D. Tex. 1996) ("[A]n able-bodied person with a college degree should be able to work and pay her debts.").

445. Of course, some courts view such discretion as indispensable. *See* Salinas v. United Student Aid Funds, Inc. (*In re* Salinas), 240 B.R. 305, 313 n.14 (Bankr. W.D. Wis.) (noting that the "peril of [the *Brunner* test] is not that it fails to reflect congressional intent but that rigid adherence to any one

In the hopes of ensuring fair debtor treatment, promoting certainty, and reducing costs, we have prescribed an interpretation of undue hardship as a salve for the doctrinal malaise that has gripped undue hardship determinations. But this measure alone will not suffice. A court's consideration of whether a debtor's financial circumstances will permit repayment of educational debt will not be immune to the biases that have plagued consideration of a debtor's conduct,[446] and disparate results will continue to abound. Perhaps, then, the time has come to rearticulate "undue hardship" as a bright-line rule that will cabin judicial discretion.[447]

APPENDIX: DATA SET

The list below sets forth the issued undue hardship opinions whose data were analyzed and coded for this study. Opinions in bold typeface generated *two* discharge determinations.[448] Subsequent history has been omitted for all citations.

Adler v. Educ. Credit Mgmt. Corp. (*In re* Adler), 300 B.R. 740 (Bankr. N.D. Cal. 2003)

Afflitto v. United States (*In re* Afflitto), 273 B.R. 162 (Bankr. W.D. Tenn. 2001)

Alderete v. Colo. Student Loan Program (*In re* Alderete), 289 B.R. 410 (Bankr. D.N.M. 2002)

approach can become a straight-jacket, precluding a fair analysis of the circumstances of the particular case"), *rev'd*, 262 B.R. 457 (W.D. Wis. 1999).

446. *See In re* Packham, 126 B.R. 603, 609 (Bankr. D. Utah 1991) ("'[A]n inquiry into a debtor's "reasonably necessary" expenses is unavoidably a judgment of values and lifestyles and close questions emerge.' While the court attempts to avoid superimposing its values for those of the debtors', certain sections of the Code require it to make decisions that unavoidably are made based on its sense of equity of what is right and wrong." (citation omitted) (quoting *In re* Sutliff, 79 B.R. 151, 156 (Bankr. N.D.N.Y. 1987))).

447. The U.S. Bankruptcy Court for the Eastern District of Pennsylvania attempted to accomplish this through its opinion in *Bryant v. Pennsylvania Higher Education Assistance Agency* (*In re Bryant*), 72 B.R. 913 (Bankr. E.D. Pa. 1987), by establishing objective criteria, the federal poverty guidelines, by which a debtor would be adjudged to suffer undue hardship. *See id*. at 915 ("We feel that such a test will decrease, if not eliminate, the resort to the unbridled subjectivity which seems to pervade many of the decisions in this area."); *see also* Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 737 n.11 (Bankr. D. Me. 2000) (noting that *Bryant* test "is a product of efforts to instill objectivity into the undue hardship inquiry"). The Third Circuit subsequently rejected the test, arguing, among other things, that it "does not adequately account for the fact that one of the most common reasons student-loan debtors find themselves in bankruptcy court is that their 'subjective value judgments' are often (but not always) indicative of a spendthrift philosophy which a bankruptcy court should be competent to consider before discharging their student loans." Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 304 (3d Cir. 1995). In light of our findings, we consider the assumptions and conclusions made in this statement to be horribly flawed.

448. *See supra* Part III.A.

Alston v. U.S. Dep't of Educ. (*In re* Alston), 297 B.R. 410 (Bankr. E.D. Pa. 2003)

Anelli v. Sallie Mae Servicing Corp. (*In re* Anelli), 262 B.R. 1 (Bankr. D. Mass. 2000)

Archibald v. United Student Aid Funds, Inc. (*In re* Archibald), 280 B.R. 222 (Bankr. S.D. Ind. 2002)

Armesto v. N.Y. State Higher Educ. Servs. Corp. (*In re* Armesto), 298 B.R. 45 (Bankr. W.D.N.Y. 2003)

Askew v. Bank of N.D. (*In re* Askew), Bankr. No. 98-32027, Adv. No. 99-7015, 1999 WL 33520526 (Bankr. D.N.D. 1999)

Balaski v. Educ. Credit Mgmt. Corp. (*In re* Balaski), 280 B.R. 395 (Bankr. N.D. Ohio 2002)

Barron v. Tex. Guaranteed Student Loan Corp. (*In re* Barron), 264 B.R. 833 (Bankr. E.D. Tex. 2001)

Barrows v. Ill. Student Assistance Comm'n (*In re* Barrows), 182 B.R. 640 (Bankr. D.N.H. 1994)

Belcher v. Columbia Univ. (*In re* Belcher), 287 B.R. 839 (Bankr. N.D. Ga. 2001)

Berry v. Educ. Credit Mgmt. Corp. (*In re* Berry), 266 B.R. 359 (Bankr. N.D. Ohio 2000)

Berscheid v. Educ. Credit Mgmt. Corp. (*In re* Berscheid), 309 B.R. 5 (Bankr. D. Minn. 2002)

Bethune v. Student Loan Guarantee Found. of Ark. (*In re* Bethune), 165 B.R. 258 (Bankr. E.D. Ark. 1994)

Bloch v. Windham Prof'ls (*In re* Bloch), 257 B.R. 374 (Bankr. D. Mass. 2001)

Block v. U.S. Dep't of Educ. (*In re* Block), 273 B.R. 600 (Bankr. W.D. Mo. 2002)

Boots v. N.H. Higher Educ. Assistance Found. (*In re* Boots), Case No. 01-12110-JMD, 01-1173-JMD, 2003 WL 1878085 (Bankr. D.N.H. Mar. 26, 2003)

Borrero v. Conn. Student Loan Found. (*In re* Borrero), 208 B.R. 792 (Bankr. D. Conn. 1997)

Boyd v. U.S. Dep't of Educ. (*In re* Boyd), 254 B.R. 399 (Bankr. N.D. Ohio 2000)

In re Brightful, Nos. 99-15518DAS, 99-0783, 99-0788, 99-0789, 1999 WL 1024516 (Bankr. E.D. Pa. Nov. 8, 1999)

Brown v. Educ. Credit Mgmt. Corp. (*In re* Brown), 247 B.R. 228 (Bankr. N.D. Ohio 2000)

Brown v. Salliemae Servicing Corp. (*In re* Brown), 227 B.R. 540 (Bankr. S.D. Cal. 1998)

Brown v. Union Fin. Servs., Inc. (*In re* Brown), 249 B.R. 525 (Bankr. W.D. Mo. 2000)

Brown v. USA Group Loan Servs. (*In re* Brown), 234 B.R. 104 (Bankr. W.D. Mo. 1999)

Bruen v. United States (*In re* Bruen), 276 B.R. 837 (Bankr. N.D. Ohio 2001)

Bruns v. Educ. Credit Mgmt. Corp. (*In re* Bruns), 300 B.R. 737 (Bankr. D. Neb. 2003)

Burgess v. Bank One Cleveland, N.A. (*In re* Burgess), 204 B.R. 521 (Bankr. N.D. Ohio 1997)

Butler v. Tenn. Student Assistance Corp. (*In re* Butler), Bankr. No. 95-28281-WHB, Adv. No. 96-0393, 1997 WL 35195 (Bankr. W.D. Tenn. Jan. 24, 1997)

Carlson v. UNIPAC Student Loan (*In re* Carlson), 273 B.R. 481 (Bankr. D.S.C. 2001)

Carter v. Pennsylvania (*In re* Carter), 295 B.R. 555 (Bankr. W.D. Pa. 2003)

Caulder v. Educ. Credit Mgmt. Corp. (*In re* Caulder), No. CIV. A. 98-06808-W, 98-80273-W, 1999 WL 33486102 (Bankr. D.S.C. Apr. 2, 1999)

Chambers v. Nat'l Payment Ctr. (*In re* Chambers), 239 B.R. 767 (Bankr. N.D. Ohio 1999)

Chapman v. Cal. Student Aid Comm'n (*In re* Chapman), 238 B.R. 450 (Bankr. W.D. Mo. 1999)

Cheary v. U.S. Dep't of Educ. (*In re* Cheary), Case No. 02-28504-B-7, Adv. No. 02-2479, 2003 WL 21466918 (Bankr. E.D. Cal. June 16, 2003)

Chime v. Suntech Student Loan (*In re* Chime), 296 B.R. 439 (Bankr. N.D. Ohio 2003)

Ciesicki v. Sallie Mae (*In re* Ciesicki), 292 B.R. 299 (Bankr. N.D. Ohio 2003)

Clark v. Educ. Credit Mgmt. Corp. (*In re* Clark), 273 B.R. 207 (Bankr. N.D. Iowa 2002)

Clark v. United Student Aid Funds, Inc. (*In re* Clark), 240 B.R. 758 (Bankr. W.D. Mo. 1999)

Clevenger v. Neb. Student Loan Program (*In re* Clevenger), 212 B.R. 139 (Bankr. W.D. Mo. 1997)

Cline v. Ill. Student Loan Assistance Ass'n (*In re* Cline), 245 B.R. 617 (Bankr. W.D. Mo. 2000)

Coats v. N.J. Higher Educ. Assistance Auth. (*In re* Coats), 214 B.R. 397 (Bankr. N.D. Okla. 1997)

Cobb v. Univ. of Toledo (*In re* Cobb), 188 B.R. 22 (Bankr. N.D. Ohio 1995)

Cooper v. Educ. Credit (*In re* Cooper), 277 B.R. 853 (Bankr. M.D. Ga. 2002)

Cooper v. Neb. Student Loan Program, Inc. (*In re* Cooper), 167 B.R. 966 (Bankr. D. Kan. 1994)

Cota v. U.S. Dep't of Educ. (*In re* Cota), 298 B.R. 408 (Bankr. D. Ariz. 2003)

Coutts v. Mass. Higher Educ. Corp. (*In re* Coutts), 263 B.R. 394 (Bankr. D. Mass. 2001)

Coveney v. Costep Servicing Agent (*In re* Coveney), 192 B.R. 140 (Bankr. W.D. Tex. 1996)

Crowley v. U.S. Dep't of Educ. (*In re* Crowley), 259 B.R. 361 (Bankr. W.D. Mo. 2001)

Daugherty v. First Tenn. Bank (*In re* Daugherty), 175 B.R. 953 (Bankr. E.D. Tenn. 1994)

Dennehy v. Sallie Mae (*In re* Dennehy), 201 B.R. 1008 (Bankr. N.D. Fla. 1996)

Derby v. Student Loan Servs. (*In re* Derby), 199 B.R. 328 (Bankr. W.D. Pa. 1996)

Doherty v. United Student Aid Funds, Inc. (*In re* Doherty), 219 B.R. 665 (Bankr. W.D.N.Y. 1998)

Dolan v. Am. Student Assistance (*In re* Dolan), 256 B.R. 230 (Bankr. D. Mass. 2000)

Dotson-Cannon v. Dep't of Educ. (*In re* Dotson-Cannon), 206 B.R. 530 (Bankr. W.D. Mo. 1997)

Douglas v. U.S. Dep't of Educ. (*In re* Douglas), 247 B.R. 417 (Bankr. N.D. Ohio 2000)

Douglass v. Great Lakes Higher Educ. Servicing Corp. (*In re* Douglass), 237 B.R. 652 (Bankr. N.D. Ohio 1999)

Downery v. Sallie Mae, Inc. (*In re* Downey), 255 B.R. 72 (Bankr. N.D. Fla. 2000)

East v. Educ. Credit Mgmt. Corp. (*In re* East), 270 B.R. 485 (Bankr. E.D. Cal. 2001)

Elebrashy v. Student Loan Corp. (*In re* Elebrashy), 189 B.R. 922 (Bankr. N.D. Ohio 1995)

Elmore v. Mass. Higher Educ. Assistance Corp. (*In re* Elmore), 230 B.R. 22 (Bankr. D. Conn. 1999)

England v. United States (*In re* England), 264 B.R. 38 (Bankr. D. Idaho 2001)

Flores v. U.S. Dep't of Educ. (*In re* Flores), 282 B.R. 847 (Bankr. N.D. Ohio 2002)

Foley v. ELSC (*In re* Foley), 204 B.R. 582 (Bankr. M.D. Fla. 1996)

Fox v. Student Loan Mktg. Ass'n (*In re* Fox), 189 B.R. 115 (Bankr. N.D. Ohio 1995)

Franklin v. Nat'l City Bank (*In re* Franklin), Case No. 4-93-6489, Adv. No. 4-95-032, 1995 WL 539549 (Bankr. D. Minn. Sept. 8, 1995)

Fuertes v. Fla. Dep't of Educ. (*In re* Fuertes), 198 B.R. 379 (Bankr. S.D. Fla. 1996)

Fuller v. U.S. Dep't of Educ. (*In re* Fuller), 296 B.R. 813 (Bankr. N.D. Cal. 2003)

Furneri v. Graduate Loan Ctr. (*In re* Furneri), 266 B.R. 447 (Bankr. D. Alaska 2001)

Gammoh v. Ohio Student Loan Comm'n (*In re* Gammoh), 174 B.R. 707 (Bankr. N.D. Ohio 1994)

Garrett v. N.H. Higher Educ. Assistance Found. (*In re* Garrett), 180 B.R. 358 (Bankr. D.N.H. 1995)

Garybush v. U.S. Dep't of Educ. (*In re* Garybush), 265 B.R. 587 (Bankr. S.D. Ohio 2001)

Gerhardt v. Sw. Student Servs. Corp. (*In re* Gerhardt), 276 B.R. 424 (Bankr. E.D. La. 2002)

Gettle v. Sallie Mae Servicing Corp. (*In re* Gettle), 257 B.R. 583 (Bankr. D. Mont. 2000)

Goranson v. Pa. Higher Educ. Assistance Agency (*In re* Goranson), 183 B.R. 52 (Bankr. W.D.N.Y. 1995)

Gotay v. Educ. Credit Mgmt. Corp. (*In re* Gotay), 258 B.R. 531 (Bankr. D. Mass. 2001)

Grawey v. Ill. Student Assistance Comm'n (*In re* Grawey), Case No. 00-83643, Adv. No. 01-8010,

2001 WL 34076376 (Bankr. C.D. Ill. 2001)

Greco v. Sallie Mae Servicing Corp. (*In re* Greco), 251 B.R. 670 (Bankr. E.D. Pa. 2000)

Green v. Sallie Mae Servicing Corp. (*In re* Green), 238 B.R. 727 (Bankr. N.D. Ohio 1999)

Gregoryk v. United States (*In re* Gregoryk), Nos. 00-31050, 00-7056, 2001 WL 1891469 (Bankr. D.N.D. Mar. 30, 2001)

Griffin v. Eduserv (*In re* Griffin), 197 B.R. 144 (Bankr. E.D. Okla. 1996)

Grigas v. Sallie Mae Servicing Corp. (*In re* Grigas), 252 B.R. 866 (Bankr. D.N.H. 2000)

Grine v. Tex. Guaranteed Student Loan Corp. (*In re* Grine), 254 B.R. 191 (Bankr. N.D. Ohio 2000)

Hall v. U.S. Dep't of Educ. (*In re* Hall), 277 B.R. 882 (Bankr. S.D. Ohio 2002)

Hall v. U.S. Dep't of Educ. (*In re* Hall), 293 B.R. 731 (Bankr. N.D. Ohio 2002)

Halverson v. Pa. Higher Educ. Assistance Agency (*In re* Halverson), 189 B.R. 840 (Bankr. N.D. Ala. 1995)

Harris v. Unipac Serv. Corp. (*In re* Harris), 198 B.R. 190 (Bankr. W.D. Va. 1996)

Hatfield v. William D. Ford Fed. Direct Consolidation Program (*In re* Hatfield), 257 B.R. 575 (Bankr. D. Mont. 2000)

Hawkins v. Buena Vista College (*In re* Hawkins), 187 B.R. 294 (Bankr. N.D. Iowa 1995)

Heckathorn v. United States *ex rel.* U.S. Dep't of Educ. (*In re* Heckathorn), 199 B.R. 188 (Bankr. N.D. Okla. 1996)

Herrmann v. U.S. Dep't of Educ. (*In re* Herrmann), Nos. 99-70791, 99-7058, 2000 WL 33961388 (Bankr. C.D. Ill. Feb. 7, 2000)

Himes v. Educ. Credit Mgmt. Corp. (*In re* Himes), Nos. 00-80532, 00-8072, 00-8073, 2001 WL 34076414 (Bankr. C.D. Ill. Aug. 29, 2001)

Hinkle v. Wheaton College (*In re* Hinkle), 200 B.R. 690 (Bankr. W.D. Wa. 1996)

Hockett v. Educ. Credit Mgmt. Corp. (*In re* Hockett), 289 B.R. 116 (Bankr. C.D. Ill. 2003)

Hollins v. U.S. Dep't of Educ. (*In re* Hollins), 286 B.R. 310 (Bankr. N.D. Tex. 2002)

Hollister v. Univ. of N.D. (*In re* Hollister), 247 B.R. 485 (Bankr. W.D. Okla. 2000)

Holmes v. Sallie Mae Loan Servicing Ctr. (*In re* Holmes), 205 B.R. 336 (Bankr. M.D. Fla. 1997)

Holtorf v. Ill. Student Assistance Comm'n (*In re* Holtorf), 204 B.R. 567 (Bankr. S.D. Cal. 1997)

Hornsby v. Tenn. Student Assistance Corp. (*In re* Hornsby), 201 B.R. 195 (Bankr. E.D. Tenn. 1995)

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

Howell v. Educ. Res. Inst., Inc. (*In re* Howell), Case No. 95-70202-CMS-7, Adv. No. 70374, 1996 WL 1062559 (Bankr. N.D. Ala. Jan. 5, 1996)

Hoyle v. Pa. Higher Educ. Assistance Agency (*In re* Hoyle), 199 B.R. 518 (Bankr. E.D. Pa. 1996)

Hurley v. Student Loan Acquisition Auth. of Ariz. (*In re* Hurley), 258 B.R. 15 (Bankr. D. Mont. 2001)

Hutchison v. Pa. Higher Educ. Assistance Admin. (*In re* Hutchison), 296 B.R. 819 (Bankr. D. Mont. 2003)

Ivory v. United States (*In re* Ivory), 269 B.R. 890 (Bankr. N.D. Ala. 2001)

Johansen v. Student Loan Mktg. Ass'n (*In re* Johansen), Nos. 99-30065, 99-7033, 2000 WL 33792326 (Bankr. D.N.D. Mar. 14, 2000)

Johnson v. Educ. Credit Mgm't. Corp. (*In re* Johnson), 299 B.R. 676 (Bankr. M.D. Ga. 2003)

Jones v. Catholic Univ. of Am. (*In re* Jones), Bankr. No. 96-00033, Adv. No. 96-0061, 1997 WL 52188

(Bankr. D.D.C. Feb. 4, 1997)

Jones v. Nat'l Payment Ctr. (*In re* Jones), 242 B.R. 321 (Bankr. E.D. Va. 1998)

Junghans v. U.S. Dep't of Educ. (*In re* Junghans), Case No. 01-41733-7, Adv. No. 02-7006, 2003 WL 23807971 (Bankr. D. Kan. May 13, 2003)

Kasey v. Pa. Higher Educ. Assistance Auth. (*In re* Kasey), 227 B.R. 473 (Bankr. W.D. Va. 1998)

Kearney v. Neb. Student Loan Program (*In re* Kearney), 162 B.R. 335 (Bankr. D. Kan. 1993)

Keilig v. Mass. Higher Educ. Assistance Corp. (*In re* LaFlamme), 188 B.R. 867 (Bankr. D.N.H. 1995)

Kelsey v. Great Lakes Higher Educ. Corp. (*In re* Kelsey), 287 B.R. 132 (Bankr. D. Vt. 2001)

Kettler v. Great Lakes Higher Educ. Servicing Corp. (*In re* Kettler), 256 B.R. 719 (Bankr. S.D. Tex. 2000)

Kirchhofer v. Direct Loans (*In re* Kirchhofer), 278 B.R. 162 (Bankr. N.D. Ohio 2002)

Koll v. U.S. Dep't of Educ. (*In re* Koll), Case No. 01-82174, Adv. No. 01-8068, 2002 WL 32001509 (Bankr. C.D. Ill. May 3, 2002)

Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731 (Bankr. D. Me. 2000)

Korhonen v. Educ. Credit Mgmt. Corp. (*In re* Korhonen), 296 B.R. 492 (Bankr. D. Minn. 2003)

Kramer v. Bank of N.D. (*In re* Kramer), Bankr. No. 98-32180, Adv. No. 99-7023, 1999 WL 33520524 (Bankr. D.N.D. June 30, 1999)

Lamanna v. EFS Servs., Inc. (*In re* Lamanna), 285 B.R. 347 (Bankr. D.R.I. 2002)

Law v. Educ. Res. Inst. (*In re* Law), 159 B.R. 287 (Bankr. D.S.D. 1993)

Lawson v. Hemar Serv. Corp. of Am. (*In re* Lawson), 190 B.R. 955 (Bankr. M.D. Fla. 1995)

Lawson v. Sallie Mae, Inc. (*In re* Lawson), 256 B.R. 512 (Bankr. M.D. Fla. 2000)

Leahy v. Ill. Student Assistance Comm'n (*In re* Leahy), Nos. 01-70247, Adv. 01-7072, 2001 WL 34079569 (Bankr. C.D. Ill. June 28, 2001)

Lebovits v. Chase Manhattan Bank (*In re* Lebovits), 223 B.R. 265 (Bankr. E.D.N.Y. 1998)

Ledbetter v. U.S. Dep't of Educ. (*In re* Ledbetter), 254 B.R. 714 (Bankr. S.D. Ohio 2000)

Lehman v. N.Y. Higher Educ. Servs. Corp. (*In re* Lehman), 226 B.R. 805 (Bankr. D. Vt. 1998)

Lewis v. Ill. Student Assistance Comm'n (*In re* Lewis), 276 B.R. 912 (Bankr. C.D. Ill. 2002)

Leyvas v. Student Loan Fund of Idaho Mktg. Ass'n (*In re* Leyvas), Case No. 94-00452, 94-6275, 1995 WL 358228 (Bankr. D. Idaho June 15, 1995)

Lieberman v. Educ. Credit Mgmt. Corp. (*In re* Lieberman), Case No. 00-50978, Adv. No. 02-5018, 2003 WL 21397713 (Bankr. D. Minn. 2003)

Lindberg v. Am. Credit & Collection, Student Loan Servicing Ctr. (*In re* Lindberg), 170 B.R. 462 (Bankr. D. Kan. 1994)

Linville v. Hills Bank & Trust Co. (*In re* Linville), Case No. 95-60183, Adv. No. 95-6145, 1995 WL 783218 (Bankr. N.D. Ohio Dec. 12, 1995)

Logan v. N.C. State Educ. Assistance Auth. (*In re* Logan), 263 B.R. 796 (Bankr. W.D. Ky. 2000)

Lohr v. Sallie Mae (*In re* Lohr), 252 B.R. 84 (Bankr. E.D. Va. 2000)

Luna v. Educ. Credit Mgmt. Corp. (*In re* Luna), 236 B.R. 291 (Bankr. M.D. Fla. 1999)

Lynn v. Diversified Collection Service (*In re* Lynn), 168 B.R. 693 (Bankr. D. Ariz. 1994)

Mallinckrodt v. Chem. Bank (*In re* Mallinckrodt), 260 B.R. 892 (Bankr. S.D. Fla. 2001)

Markley v. Educ. Credit Mgmt. Corp. (*In re* Markley), 236 B.R. 242 (Bankr. N.D. Ohio 1999)

Marks v. Educ. Credit Mgmt. Corp. (*In re* Marks), No. 00-10372, 2002 WL 1448305 (Bankr. N.D. Cal.

Feb. 26, 2002)

Marsh v. Moorehead State College (*In re* Marsh), 257 B.R. 569 (Bankr. D. Mont. 2000)

Mathews v. Higher Educ. Assistance Found. (*In re* Mathews), 166 B.R. 940 (Bankr. D. Kan. 1994)

Matthess v. U.S. Dep't of Educ. (*In re* Matthess), Bankr. No. 98-12955C-7G, Adv. No. 99-2029, 2000 WL 33673763 (Bankr. M.D.N.C. Feb. 4, 2000)

Maulin v. Salliemae (*In re* Maulin), 190 B.R. 153 (Bankr. W.D.N.Y. 1995)

Mayer v. Pa. Higher Educ. Assistance Agency (*In re* Mayer), 198 B.R. 116 (Bankr. E.D. Pa. 1996)

Mayes v. Okla. State Regents for Higher Educ. (*In re* Mayes), 183 B.R. 261 (Bankr. E.D. Okla. 1995)

McClain v. Am. Student Assistance (*In re* McClain), 272 B.R. 42 (Bankr. D.N.H. 2002)

McCleod v. Diversified Collection Servs. (*In re* McCleod), 176 B.R. 455 (Bankr. N.D. Ohio 1994)

McCormack v. Educ. Credit Mgmt. Corp. (*In re* McCormack), Nos. C/A 99-10637-W, Adv. 99-80401-W, 2000 WL 33710278 (Bankr. D.S.C. 2000)

McGinnis v. Pa. Higher Educ. Assistance Agency (*In re* McGinnis), 289 B.R. 257 (Bankr. M.D. Ga. 2003)

McGrane v. Student Loan Servicing Ctr. (*In re* McGrane), Case No. 96-18620DAS, Adv. No. 96-1132DAS, 1996 WL 735580 (Bankr. E.D. Pa. Dec. 13, 1996)

McLeod v. AFSA Data Corp. (*In re* McLeod), 197 B.R. 624 (Bankr. N.D. Ohio 1996)

Meadow v. U.S. Dep't of Educ. (*In re* Meadow), Nos. 00-60190, Adv. 00-6055, 2001 WL 34059286 (Bankr. S.D. Ill. Feb. 28, 2001)

Meling v. United States (*In re* Meling), 263 B.R. 275 (Bankr. N.D. Iowa 2001)

Melton v. N.Y. State Higher Educ. Servs. Corp. (*In re* Melton), 187 B.R. 98 (Bankr. W.D.N.Y. 1995)

Miller v. Benton State Bank (*In re* Miller), Bankr. No. 96-11061 S, Adv. No. 96-1510, 1997 WL 160432 (Bankr. W.D. Ark. Feb. 19, 1997)

Miller v. U.S. Dep't of Educ. (*In re* Miller), 254 B.R. 200 (Bankr. N.D. Ohio 2000)

Mitcham v. U.S. Dep't of Educ. (*In re* Mitcham), 293 B.R. 138 (Bankr. N.D. Ohio 2003)

Mitchell v. U.S. Dep't of Educ. (*In re* Mitchell), 210 B.R. 105 (Bankr. N.D. Ohio 1996)

Morgan v. United States (*In re* Morgan), 247 B.R. 776 (Bankr. E.D. Ark. 2000)

Morris v. Univ. of Ark. (*In re* Morris), 277 B.R. 910 (Bankr. W.D. Ark. 2002)

Mulherin v. Sallie Mae Servicing Corp. (*In re* Mulherin), 297 B.R. 559 (Bankr. N.D. Iowa 2003)

Muto v. Sallie Mae (*In re* Muto), 216 B.R. 325 (Bankr. N.D.N.Y. 1996)

Myers v. Fifth Third Bank (*In re* Myers), 280 B.R. 416 (Bankr. S.D. Ohio 2002)

Naranjo v. Educ. Credit Mgmt. Corp. (*In re* Naranjo), 261 B.R. 248 (Bankr. E.D. Cal. 2001)

Naranjo v. Pa. Higher Educ. Assistance Agency (PHEAA) (*In re* Naranjo), No. SV 98-27249 AG, Adv. SV 99-01325 AG, 2000 WL 33155269 (Bankr. C.D. Cal. 2000)

Newlin v. Educ. Credit Mgmt. Corp. (*In re* Newlin), Case No. 01-60983, Adv. No. 02-6015, 2003 WL 1944332 (Bankr. S.D. Ill. Apr. 17, 2003)

Nys v. Cal. Student Aid Comm'n (*In re* Nys), Case No. 02-11455, Adv. No. 02-1162, 2003 WL 22888941 (Bankr. N.D. Cal. Aug. 11, 2003)

O'Flaherty v. Nellie Mae, Inc. (*In re* O'Flaherty), 204 B.R. 793 (Bankr. N.D. Ala. 1997)

O'Brien v. Household Bank FSB (*In re* O'Brien), 165 B.R. 456 (Bankr. W.D. Mo. 1994)

Oderkirk v. Nw. Educ. Loan Ass'n (*In re* Oderkirk), Case No. 94-01078, Adv. No. 94-6226, 1995 WL 241338 (Bankr. D. Idaho Apr. 13, 1995)

O'Donnell v. N.H. Higher Educ. Assistance Found. (*In re* O'Donnell), 198 B.R. 1 (Bankr. D.N.H. 1996)

Ogren v. United States (*In re* Ogren), Case No. 95-12116KC, Adv. No. 96-1018KC, 1996 WL 671356 (Bankr. N.D. Iowa Oct. 10, 1996)

Ordaz v. Ill. Student Assistance Comm'n (*In re* Ordaz), 287 B.R. 912 (Bankr. C.D. Ill. 2002)

Oswalt v. Univ. at Buffalo (*In re* Oswalt), 215 B.R. 337 (Bankr. W.D.N.Y. 1997)

Pace v. Educ. Credit Mgmt. Corp. (*In re* Pace), 288 B.R. 788 (Bankr. S.D. Ohio 2003)

Palanca v. Tex. Guaranteed Student Loan Corp. (*In re* Palanca), 219 B.R. 502 (Bankr. N.D. Ill. 1998)

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449. In the interests of full disclosure, one of us (Pardo) clerked for the Honorable Prudence Carter Beatty during the time this opinion was issued.

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