COMMENT

Putting an End to Judicial Lawmaking: Abolishing the Undue Hardship Exception for Student Loans in Bankruptcy

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INTRODUCTION

Imagine two recent college graduates, Brandon and Alicia.[1] Both are having a hard time making ends meet and are on the verge of filing for bankruptcy.[2] Brandon charged $5,000 on his credit card to pay for part of his college tuition.[3] Alicia took out a $5,000 student loan to pay for a portion of her tuition.[4] Filing for bankruptcy allows Brandon to receive a discharge of indebtedness, relieving him of his credit card debt.[5] Alicia, however, cannot discharge her student loan debt unless she qualifies under a narrow exception in the Bankruptcy Code.[6] The exception allows Alicia to discharge her debt if paying back the student loan poses an undue hardship.[7] Unfortunately for Alicia, predicting whether her situation falls within the exception often depends upon which bankruptcy judge handles her case.[8]

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[1] This is a hypothetical based on the realities of the current bankruptcy system.

[2] *See generally Senate Passes Overhaul of Bankruptcy Laws*, REUTERS, Feb. 2, 2000, *available in* LEXIS, News Library, Reuters File [hereinafter *Senate Overhaul*] (stating that United States has seen explosion in personal bankruptcies in recent years, with filings reaching record 1.4 million in 1998).

[3] *See generally* Arlene Levinson, *College Tuition Slows its Climb While Loans Hit Record High*, S.F. CHRON., Oct. 5, 1999, at 17 (stating that average undergraduate at four-year public school in her home state pays $3,356 yearly).

[4] *See generally* Levinson, *supra* note 3, at 17 (stating that there was record $64 billion in financial aid for 1998-99, mostly in form of student loans).

[5] 11 U.S.C. § 727(10)(b) (1994 & Supp. V 1999) (providing that discharge excuses debtor from all debts that arose before date of order for relief).

[6] *Id.* § 523(a)(8) (1994 & Supp. V 1999) (providing exception to non-dischargeability). Section 523(a)(8) provides:

> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge any individual debtor from any debt for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for any obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

Id.

[7] *Id.* (stating that student loan debt is non-dischargeable unless it poses undue hardship); *see also* Brunner v. New York State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 753 (S.D.N.Y 1985) (explaining that § 523(a)(8) allows certain debtors to discharge their student loans); Thomsen v. Department of Educ., 234 B.R. 506, 510 (Bankr. D. Mont. 1999) (stating that undue hardship is grounds for discharge).

[8] *See* Andresen v. Nebraska Student Loan Program (*In re* Andresen), Inc., 232 B.R. 127, 129 (B.A.P. 8th Cir. 1999) (stating that courts treat debtors with student loans disparately); *Thomsen*, 234 B.R. at 510-511 (discussing disparity in treatment of student loan debtors); Fox v. Pennsylvania Higher Educ. Assistance Agency (*In re* Fox), 163 B.R. 975, 979 (Bankr. M.D.

This Comment examines the undue hardship exception to the non-dischargeability of student loans in bankruptcy and argues for its repeal. Part I explains the United States bankruptcy and student loan systems and discusses how Congress and courts have treated student loans in bankruptcy. Part II examines the split between the Sixth and Ninth Circuits over whether courts have the authority to grant debtors partial discharges of their student loan debt. Part II argues that partial discharges, symptoms of the unworkable undue hardship exception, are contrary to the bankruptcy statute's plain language and legislative intent. Part III discusses how the disparate treatment of debtors under the undue hardship exception undermines the uniformity and efficiency of this area of bankruptcy law. Part III also argues that the undue hardship exception's inherent ambiguity allows judges to act as social workers, instead of judicial officers. Finally, Part III proposes that Congress replace the undue hardship exception with a bright-line rule that precludes judicial discharges of student loans in bankruptcy.

I. STUDENT LOANS IN BANKRUPTCY AND THE UNDUE HARDSHIP EXCEPTION

Bankruptcy provides a mechanism for individuals burdened by debt to discharge their debts.[9] Congress, however, has made student loans non-dischargeable in bankruptcy, except for a narrow exception – the undue hardship exception.[10] Congress designed this exception to protect the integrity of the federal student loan program.[11] Congress gave the

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Pa. 1993) (noting that courts have struggled to lend objectivity to undue hardship analysis); Robert F. Salvin, *Student Loans, Bankruptcy and the Fresh Start Policy: Must Debtors be Impoverished to Discharge Educational Loans?*, 71 TUL. L. REV. 139, 149 (1996) (stating there are as many tests for undue hardship as there are bankruptcy courts).

[9] 11 U.S.C. § 727(10)(b) (providing general discharge of debt); Green v. Sallie Mae Servicing Corp. (*In re* Green), 238 B.R. 727, 732 (Bankr. N.D. Ohio 1999) (stating that Congress promulgated bankruptcy laws on basis of providing fresh start to honest but unfortunate debtors and that Congress effectuated goal with presumption that all debts are dischargeable); DOUGLAS BAIRD, THE ELEMENTS OF BANKRUPTCY 31-32 (Foundation Press rev. ed. 1993) (examining relief bankruptcy provides debtors).

[10] 11 U.S.C. § 727(10)(b).

[11] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2590 (codified as amended at 11 U.S.C. § 523(a)(8) (1994)) (providing undue hardship exception); H.R. REP. NO. 595, at 132 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6093 (stating that Congress passed § 523(a)(8) to preserve higher education funds); *see also Brunner*, 46 B.R. at 753-754 (examining congressional intent of § 523(a)(8)).

judiciary the unenviable task of interpreting the undue hardship exception.[12] Consequently, courts have had difficulty reconciling the undue hardship exception with the policy goals of bankruptcy.[13]

A. Basics of Bankruptcy and the Fresh Start Policy

The United States Constitution provides that Congress has the exclusive power to establish bankruptcy laws.[14] The Bankruptcy Act of 1898 constituted the first permanent bankruptcy legislation in the United States.[15] Since the Act's passage, two overriding public policy objectives have dominated the bankruptcy laws.[16] First, bankruptcy provides a mechanism where creditors collect debtors' liabilities by dividing debtors' possessions.[17] Second, debtors receive relief from creditors and

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[12] 11 U.S.C. § 523(a)(8) (providing no express definition of undue hardship); Taylor v. United Student Aid Funds Inc. (*In re* Taylor), 223 B.R. 747, 754 (B.A.P. 9th Cir. 1998) (stating that Congress did not define undue hardship when it enacted § 523(a)(8)); *Brunner*, 46 B.R. at 753 (showing that Congress entrusted judiciary with defining undue hardship exception).

[13] *See Brunner*, 46 B.R. at 753 (stating that Congress does not provide explicit instructions of how § 523(a)(8) meshes with fresh start policy and that there has been proliferation of decisions in bankruptcy courts); Lohman v. Connecticut Student Loan Found. (*In re* Lohman), 79 B.R. 576, 580 (Bankr. D. Vt. 1987) (explaining that it is hard to reconcile undue hardship and fresh start spirit of bankruptcy); *see also* 11 U.S.C. § 523(a)(8) (providing undue hardship exception); Salinas v. United Student Aid Funds, Inc. (*In re* Salinas), 240 B.R. 305, 312 (Bankr. W.D. Wis. 1999) (stating that courts have long struggled to fashion an appropriate definition of undue hardship); Salvin, *supra* note 8, at 149 (examining courts difficulties in applying undue hardship exception within fresh start framework).

[14] U.S. CONST., art. 1, § 8, cl. 4 (stating that bankruptcy is exclusive domain of federal government). Congress took the additional step of providing for a separate judiciary to administer the bankruptcy laws. *See* 28 U.S.C. § 151 (1994 & Supp. V 1999) (providing for bankruptcy courts). Bankruptcy courts are adjuncts of the federal district courts in which they sit. *See id.* (providing that bankruptcy courts answer to district court in which they sit). District judges routinely refer bankruptcy matters to the bankruptcy courts but they have the power to withdraw the reference. *See id.*; *see also* BAIRD, *supra* note 9, at 22-26 (explaining role of district courts).

[15] Bankruptcy Act of 1898, ch. 541, 30 Stat. 541 (1898) (repealed in 1978); *see also* JOHN D. AYER, BANKRUPTCY: A BUSINESS PLANNING APPROACH 54-55 (4th ed. 1999) (1984) (stating that general off-the-rack discharge gets place on menu in 1898); see also BAIRD, *supra* note 9, at 4, 28-36 (examining history of bankruptcy legislation).

[16] *See* AYER, *supra* note 15, at 36 (explaining public policy objectives present since Congress passed 1898 Act); BAIRD, *supra* note 9, at 13 (discussing bankruptcy policy objections since passage of 1898 Act).

[17] *See* AYER, *supra* note 15, at 53-54, 59-63 (stating that bankruptcy was initially creditors' remedy); BAIRD, *supra* note 9, at 29 (explaining that bankruptcy has historically been creditors' remedy); Interview with John D. Ayer, Professor of Law, University of California, Davis, in Davis, Cal. (Aug. 24, 2000) (notes on file with author) (stating that original goal of bankruptcy was to provide forum for creditors to divide debtors'

obtain a fresh start in life unhampered by the pressure and discouragement of unbearable pre-existing debts.[18]

Today, a debtor typically has two alternatives to obtain a fresh start in bankruptcy, under either Chapters 7 or 13 of the Bankruptcy Code.[19] Under Chapter 13, the debtor provides the court with a debt repayment plan.[20] This allows debtors to retain all of their property and pay part of their outstanding debt monthly over a period of three years based on a court-approved plan.[21] After the debtor satisfies all of the plan's requirements, the court discharges the debtor's remaining liabilities.[22] Alternatively, under Chapter 7, the debtor turns over non-exempt assets to a trustee.[23] The trustee sells the assets and distributes the proceeds

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possessions).

[18] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (stating that bankruptcy should provide debtor with fresh start); Green v. Sallie Mae Servicing Corp. (*In re* Green), 238 B.R. 727, 732 (Bankr. N.D. Ohio 1999) (stating that Congress promulgated bankruptcy laws on basis of providing fresh start to honest but unfortunate debtors and that Congress effectuated goal with presumption that all debts are dischargeable). *See generally* AYER, *supra* note 15, at 54, 62-63 (stating that providing fresh start is second goal of bankruptcy); BAIRD, *supra* note 9, at 31-36 (explaining policy goals of bankruptcy).

[19] 11 U.S.C. § 109 (1994 & Supp. V 1999) (listing requirements to qualify for bankruptcy relief); *id.* §§ 701-728 (1994 & Supp. V 1999) (providing Chapter 7 relief); *id.* §§ 1301-1327 (1994 & Supp. V 1999) (providing Chapter 13 relief); *see also* BAIRD, *supra* note 9, at 14 (stating that consumer debtors generally use Chapter 7 and 13). Relief is theoretically available in Chapter 11 but rarely used by consumer debtors. 11 U.S.C. §§ 1101-1174 (1994 & Supp. V 1999) (providing Chapter 11 relief).

[20] 11 U.S.C. §§ 1301-1327 (providing debt repayment plan for qualified debtors); *see also* AYER, *supra* note 15, at 66, 460 (stating that most debtors prefer Chapter 7 because of automatic discharge); BAIRD, *supra* note 9, at 39 (stating that in Chapter 13 debtor must propose debt repayment plan).

[21] 11 U.S.C. §§ 1301-1327 (providing three-year repayment plan); *see also* AYER, *supra* note 15, at 74, 460-69 (stating that debtor receives superdischarge after three-year repayment plan); BAIRD, *supra* note 9, at 39, 55 (noting that debtors make monthly payments to trustee who distributes proceeds to creditors). Instead of receiving a discharge of their debt in Chapter 7, Chapter 13 debtors must come up with a repayment plan over three years. 11 U.S.C. § 1321 (providing that debtor creates three-year repayment plan). Debtors' repayment plans do not have to pay back their creditors in full but the debtors must contribute their disposable income to the plan. *See id.; see also* BAIRD, *supra* note 9, at 15 (showing that most creditors do not receive full compensation in Chapter 13 plans).

[22] 11 U.S.C. § 1328 (1994 & Supp. V 1999)

[23] *See id.* § 323 (1994 & Supp. V 1999) (stating that trustee administers bankruptcy estate); *see also* AYER, *supra* note 15, at 56, 386 (stating that debtor surrenders control of assets to trustee); BAIRD, *supra* note 9, at 14 (stating that debtor must hand non-exempt assets over to trustee); Salvin, *supra* note 8, at 140 n.1 (explaining basic types of bankruptcy). The Bankruptcy Code allows debtors to keep certain items despite filing for bankruptcy. *See* 11 U.S.C. §§ 701-728 (providing that debtors keep exempt assets). These exempt items are not subject to the trustee's control and disposition. *See id. See generally* AYER, *supra* note 15, at 441 (noting that states have different exemptions).

from the sale to creditors, who have filed claims against the estate.[24] Following the asset distribution, the court discharges all of the debtor's remaining debt.[25]

Under Chapter 7, debtors can generally discharge their debts in bankruptcy.[26] Section 523 of the Bankruptcy Code constitutes a limitation on this general rule.[27] Section 523 provides that debtors cannot discharge certain debts in bankruptcy, such as taxes, child support, and alimony.[28] Adhering to section 523's general limitations, section 523(a)(8) prohibits a debtor from receiving a student loan discharge unless the debtor demonstrates that repaying the debt poses an undue hardship on the debtor and his or her dependents.[29] Congress enacted section 523(a)(8) in response to perceived abuses in the federal government's student loan program.[30]

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[24] 11 U.S.C. § 323 (stating that trustee distributes assets to creditors); *see also* AYER, *supra* note 15, at 56 (noting that trustee satisfies creditors); BAIRD, *supra* note 9, at 15-16 (stating that creditors get paid from proceeds of trustee's sale).

[25] 11 U.S.C. § 727(10)(b) (stating that discharge relieves debtor of pre-petition debt); *see also* AYER, *supra* note 15, at 56 (stating that debtor can receive discharge of pre-petition debt); BAIRD, *supra* note 9, at 15 (stating that discharge order relieves debtor of pre-petition debt).

[26] 11 U.S.C. § 727(10)(b) (providing discharge of pre-petition debts except § 523 debts); *see also* Green v. Sallie Mae Servicing Corp. (*In re* Green), 238 B.R. 727, 732 (Bankr. N.D. Ohio 1999) (stating that presumption exist that all debts are dischargeable); Salvin, *supra* note 8, at 140-42 (stating that Code provides for discharge of most indebtedness without inquiry into debtor's ability to make repayment).

[27] 11 U.S.C. § 523 (1994 & Supp. V 1999) (providing exceptions from discharge); AYER, *supra* note 15, at 74 (stating that § 523 represents independent policy judgments creating non-dischargeable debts); BAIRD, *supra* note 9, at 51-52; see *also Green*, 238 B.R. at 732 (stating that Congress excluded some debts from umbrella of bankruptcy discharge).

[28] 11 U.S.C. § 523(a)(1), (3), (5).

[29] *See id.* § 523(a)(8) (providing non-dischargeability absent showing of undue hardship); *see also* Cara A. Morea, Note, *Student Loan Discharge in Bankruptcy—It is Time for a Unified Equitable Approach*, 7 AM. BANKR. INST. L. REV. 193, 193 (1999) (stating that student loan debt is afforded its own standard of dischargeability); Salvin, *supra* note 8, at 141-42 (stating that student loans are generally non-dischargeable). Debtors have the burden of showing that their student loans pose an undue hardship. *See* Lohman v. Connecticut Student Loan Found. (*In re* Lohman), 79 B.R. 576, 578 (Bankr. D. Vt. 1987) (stating that debtor has burden of proof by fair preponderance of evidence that debtor would suffer undue hardship if court excepted loan from discharge).

[30] H.R. REP. NO. 595, at 132 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6093 (explaining purpose of legislation is to prevent abuse of student loan program); *see also* Pelkowski v. Ohio Student Loan Comm'n (*In re* Pelkowski), 990 F.2d 737, 742 (3d Cir. 1993) (stating that in early 1970s legislators and public were concerned about perceived rise in bankruptcy filings by students on brink of lucrative careers); Brunner v. New York State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 754 (S.D.N.Y 1985) (noting that Congress passed § 523(a)(8) to protect student loan program).

B. The Federal Government's Student Loan Program

Congress made the first federally sponsored student loans available in 1958 through the National Defense Education Act ("NDEA").[31] Congress followed the NDEA with the Guaranteed Student Loan Program ("GSLP"), established as part of the comprehensive Higher Education Act of 1965.[32] Congress designed the GSLP to ensure that students attending colleges would have reasonable access to low interest loans.[33] Congress based the program on the principle that the lack of financial resources should not prevent any student from obtaining a post-secondary education.[34] These student loans, collectively called Stafford Loans, are available for students today.[35]

Currently, students can obtain Stafford loans through a number of eligible lenders.[36] These lenders often sell the loans to specialized student loan lenders, such as the Student Loan Marketing Association ("Sallie Mae"), who, in turn, contract with state guarantee agencies to service the loans.[37] If the loan goes into default, Sallie Mae turns the loan over to the agency for collection.[38] The United States Government typically insures one hundred percent of a guaranty company's losses.[39]

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[31] National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (codified as amended in scattered sections of 20 U.S.C.); *see also* Salvin, *supra* note 8, at 144-45 (stating that NDEA established structure for educational institutions to make loans to students).

[32] *See* Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended in scattered sections of 20 U.S.C.); Salinas v. United Student Aid Funds, Inc. (*In re* Salinas), 240 B.R. 305, 310 (W.D. Wis. 1999) (stating that 1965 Act created first guaranteed student loan program); Salvin, *supra* note 8, at 144-45 (discussing 1965 Act).

[33] *See* Higher Education Act, 79 Stat. at 1219 (stating that purpose of legislation is to allow greater student access to higher education).

[34] *See id.* (providing resources to eligible students).

[35] *See* 20 U.S.C. § 1071 (1994 & Supp. V 1999) (providing for Stafford Loan Program). The federal government pays accruing interest on subsidized loans while the student attends college or graduate school; interest accrues on unsubsidized loans while the student attends school. *Id.* (providing subsidized and unsubsidized Stafford loans).

[36] *See* JONATHAN SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 290 (3d ed. 1991) (explaining that eligible lenders include banks, credit unions, and savings and loan institutions); *see also* 20 U.S.C. § 1071 (providing Stafford Loan program); Morea, *supra* note 29, at 206 (discussing student loan program).

[37] *See* SHELDON, *supra* note 36, at 291 (explaining Sallie Mae's position in lending community); *see also* Morea, *supra* note 29, at 206 (stating that Sallie Mae is primary specialized student loan lender).

[38] *See* SHELDON, *supra* note 36, at 291 (explaining state guarantee system). If the borrower fails to make repayments because of death or disability, or is relieved of the obligation to pay through discharge in bankruptcy, the lender is entitled to repayment from the federal government. *See* 20 U.S.C. § 1071 (providing repayment conditions).

[39] *See* 20 U.S.C. § 1071 (providing government repayment); *see also* SHELDON, *supra* note 36, at 291 (explaining burden government bears); Morea, *supra* note 29, at 206 (stating that

The GSLP helps fund students' educational expenses at all types of institutions, from Ivy League colleges to vocational schools.[40] To facilitate repayment, the program has forbearance and deferment features for borrowers unable to meet their payment obligations.[41] The program also offers flexible repayment plans, including an income contingent repayment plan ("ICRP"), which bases borrowers' monthly payments on their financial condition.[42] Such repayment features were unnecessary before the 1970s, however, because debtors could discharge their student loan debt in bankruptcy.[43]

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government bears loss of bad loans); Salvin, *supra* note 8, at 144-45 (explaining that government protects lenders through guarantee agencies). The federal government started a direct loan program in 1983 to lower the profits of lending agencies. *See* 20 U.S.C. §§ 1087(a)-1087(h) (1994) (providing for direct loan program). These loans go directly from the federal government to the school or student. *See id.* Direct loans now make up thirty-six percent of federal student loans. *See Administration's Proposals for Higher Education Act Reauthorization: Hearing of the Committee on Labor and Human Resources of the United States Senate*, 105th Cong. 34 (1997) (prepared statement of Department of Education Secretary Riley).

[40] *See* 20 U.S.C. § 1071 (providing loan program); *see also* Salvin, *supra* note 8, at 145 (noting that federal loan program offers loans to variety of schools).

[41] 20 U.S.C. § 1078(m) (1994 & Supp. V 1999) (providing deferments and forbearances); *see also Repayment Options*, Department of Education Student Loan Web Site (visited January 21, 2000) <http://www.ed.gov/DirectLoan/consolid.html> (on file with author) (stating that deferments and forbearances provide relief to strapped borrowers).

[42] 34 C.F.R. § 685.209 (1999) (providing repayment plans). The Department of Education has four repayment options. *Id.* (describing repayment options). First, in standard repayment, borrowers make a fixed payment of at least fifty dollars a month for up to ten years. *Id.* The shorter the repayment period, the lower the total interest expense for the borrower. *Id.* Second, in extended repayment, borrowers must make minimum monthly payments of fifty dollars but can take from twelve to thirty years to repay their loans. *Id.* Third, in graduated repayment, payments start out at one level, then increase every two years. *Id.* The repayment period varies from twelve to thirty years and depends upon borrowers' total loan amount. *Id.* Fourth, income contingent repayment bases borrowers' monthly payment on borrowers' annual adjusted gross income, as reported on their federal tax return, and the total amount of their student loans. *Id.*

[43] Pelkowski v. Ohio Student Loan Comm'n (*In re* Pelkowski), 990 F.2d 737, 740 (3d Cir. 1993) (stating that debtors could fully discharge their student loans before Education Amendments of 1976); Salinas v. United Student Aid Funds, Inc. (*In re* Salinas), 240 B.R. 305, 310 (W.D. Wis. 1999) (stating that under provisions of Bankruptcy Act of 1898, there was no exception from discharge); Lohman v. Connecticut Student Loan Found. (*In re* Lohman), 79 B.R. 576, 580 (Bankr. D. Vt. 1987) (stating that prior to 1976 courts presumed student loans discharged); Darrell Dunham & Ronald A. Buch, *Educational Debts Under the Bankruptcy Code*, 22 MEM. ST. U. L. REV. 679, 680-81 (1992) (stating that under previous bankruptcy laws, courts discharged student loans).

C. Discharging Student Loans in Bankruptcy

Congress's treatment of student loans in bankruptcy changed dramatically in the 1970s.[44] In the early 1970s, the public perceived that students were abusing the student loan program by filing for bankruptcy shortly after graduation to discharge their loans.[45] There were a small number of high profile cases, involving doctors, lawyers, and other professionals who used the bankruptcy laws to avoid their loan obligations. This ignited the public's furor and spurred Congress into action.[46]

The Bankruptcy Commission, established by Congress in 1970 to evaluate and propose revisions to the bankruptcy laws, initiated the reform movement to stop the abuse of the student loan program.[47] In 1973, the Commission submitted its report to Congress.[48] The

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[44] *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2591 (codified as amended at 11 U.S.C. § 523(a)(8) (1994 & Supp. V 1999)) (providing non-dischargeability of student loans); Education Amendments of 1976, Pub. L. No. 94-482, 90 Stat. 2081 (codified as amended in scattered sections of 20 U.S.C.) (providing non-dischargeability of student loans); *see also Pelkowski*, 990 F.2d at 742 (noting that Congress changed laws regarding student loans in 1970s); Salvin, *supra* note 8, at 147 (noting dramatic change in bankruptcy laws in 1970s).

[45] *See Pelkowski*, 990 F.2d at 742 (stating that in early 1970s, legislators and public were concerned about perceived rise in bankruptcy filings by students on brink of lucrative careers); Brunner v. New York State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 754-55 (S.D.N.Y 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (stating that reason for undue hardship provision was rising incidence of bankruptcies by former students motivated primarily to avoid payment of educational debts); *see also* Salvin, *supra* note 8, at 145-46 (stating that media publicized stories of bankruptcy abuse).

[46] *See Time of Reckoning for Student Deadbeats*, U.S. NEWS & WORLD REP., July 18, 1977, at 21 (discussing alarming trend of student loan debt discharge by professionals); *Study Now, Pay Never*, NEWSWEEK, Mar. 7, 1977, at 95 (discussing flaw in bankruptcy laws, which allow professionals to abuse loan program); *see also* Andresen v. Nebraska Student Loan Program, Inc. (*In re* Andresen), 232 B.R. 127, 130 (B.A.P. 8th Cir. 1999) (stating that Congress excepted student loans from discharge to close loophole in student loan program); Salvin, *supra* note 8, at 145-46 (noting that some recent graduates from prestigious universities filed bankruptcy to discharge student loans).

[47] *See* S. REP. NO. 989, at 1-2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5787-88 (explaining Commission's purpose); *see also Lohman*, 79 B.R. at 580 (stating that Congress established Commission to make recommendations for Bankruptcy Code revisions); Salvin, *supra* note 8, at 146 (stating that Commission was first manifestation of movement to limit dischargeability of student loans). Congress formed the Commission to evaluate the nation's bankruptcy laws in light of modern commercial and consumer financial practices. *See* S. REP. NO. 989, at 2 (describing Commission's job).

[48] *See* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. I, at 140 (1973) [hereinafter BANKRUPTCY REPORT]; *see also* Andrews v. South Dakota Student Loan Assistance Corp. (*In re* Andrews), 661 F.2d 702, 704 (8th Cir. 1981) (stating that Commission recommended that Congress make student loans non-dischargeable until debtor demonstrated inability to earn sufficient income and repay

Commission warned that dishonest students could jeopardize the viability and integrity of the student loan program by filing for bankruptcy shortly after graduation solely to discharge their student loans.[49]

Based on this evaluation, the Commission proposed that Congress make student loans non-dischargeable except in two situations.[50] First, the Committee proposed that Congress make a debtor's student loans dischargeable if repayment became due at least five years before the debtor filed for bankruptcy.[51] Second, the Committee recommended that Congress make a debtor's student loans dischargeable regardless of how long the debtor's loan were in repayment if repayment imposed an undue hardship.[52] The Commission then prescribed a test to determine if an undue hardship existed.[53] Under the Commission's recommendation, repayment posed an undue hardship if the debtor could not maintain a minimal standard of living and pay the student loan debt.[54]

In 1976, Congress adopted the Commission's recommendations in the Education Amendments of 1976.[55] The amendments made student loans

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educational debt); Salvin, *supra* note 8, at 146 (stating that Commission submitted report to Congress containing its findings, along with model bankruptcy statute).

[49] *See* BANKRUPTCY REPORT, *supra* note 48, at 141 (warning that student loan program's integrity was at stake); *see also Brunner*, 46 B.R. at 754 (noting that Commission argued that rising incidence of student loan discharges harmed student loan program); Salvin, *supra* note 8, at 146 (stating that Commission found abusive discharge of student loans reprehensible).

[50] *See* BANKRUPTCY REPORT, *supra* note 48, at 141 (proposing five-year repayment and undue hardship exceptions); *see also Brunner*, 46 B.R. at 754 (stating that Commission laid out two exceptions to general rule of non-dischargeability); Salvin, *supra* note 8, at 146 (discussing two exceptions to non-dischargeability).

[51] *See* BANKRUPTCY REPORT, *supra* note 48, at 141 (proposing five-year exception to non-dischargeability); *see also Brunner*, 46 B.R. at 754 (discussing legislative history of § 523(a)(8)); Salvin, *supra* note 8, at 146 (examining Commission's recommendations).

[52] BANKRUPTCY REPORT, *supra* note 48, at 141 (proposing undue hardship exception); *see also Brunner*, 46 B.R. at 754 (noting Commission's exceptions); Salvin, *supra* note 8, at 146 (addressing legislative history of § 523(a)(8)).

[53] BANKRUPTCY REPORT, *supra* note 48, at 141 (laying out test for undue hardship); *see also Andrews*, 661 F.2d at 704 (analyzing Commission's test); *Brunner*, 46 B.R. at 754 (discussing Commission's test); Salvin, *supra* note 8, at 146-47 (examining Commission's recommendations).

[54] BANKRUPTCY REPORT, *supra* note 48, at 141 (stating undue hardship present if debtor cannot maintain minimal standard of living and repay student loans); *see also Andrews*, 661 F.2d at 704 (analyzing Commission's test); *Brunner*, 46 B.R. at 754; Salvin, *supra* note 8, at 146-47 (discussing Commission's solution).

[55] *See* Education Amendments of 1976, Pub. L. No. 94-482, 90 Stat. 2081 (codified as amended in scattered sections of 20 U.S.C.) (providing five-year and undue hardship exceptions to non-discharge); *see also Brunner*, 46 B.R. at 753-54 (noting that Congress adopted Commission's recommendations); Salvin, *supra* note 8, at 147 (discussing

non-dischargeable except for cases involving the five-year or undue hardship exceptions.[56] In 1978, however, Congress revised the bankruptcy laws and re-examined the issue of the dischargeability of student loans.[57]

In correspondence with the Education Amendments of 1976, Congress considered adding section 523(a)(8) to the new Bankruptcy Code.[58] Section 523(a)(8) aimed at preventing student debtors from abusing the loan program through bankruptcy manipulation.[59] The House Judiciary Committee opposed the passage of section 523(a)(8) on the grounds that Congress had not adequately documented abuse of the student loan program and that bankruptcy should not treat student loan debt differently from other dischargeable debt.[60] Notwithstanding the House Judiciary Committee's opposition to section 523(a)(8), Congress passed the section.[61]

Section 523(a)(8) excluded student loan debt from discharge, thereby closing a potential bankruptcy loophole in the student loan program.[62]

Congress's response to Commission's findings).

[56] *See* Education Amendments, 90 Stat. at 2081 (providing five- year and undue hardship exceptions to non-discharge); *see also* Morea, *supra* note 29, at 196 (stating that Congress included Commission's draft provisions in Bankruptcy Reform Act); Salvin, *supra* note 8, at 147 (stating that Congress enacted law similar to Commission's recommendations).

[57] *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2591 (codified as amended at 11 U.S.C. § 523(a)(8) (1994)); H.R. REP. NO. 595, at 132 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6093 (describing enactment of § 493(a) of Higher Education Act of 1976 and Congress's continued study of student loan cases); *see also* Salvin, *supra* note 8, at 146-48 (discussing bankruptcy reform movement).

[58] *See* Bankruptcy Reform Act, 92 Stat. at 2591.

[59] *See id.*

[60] *See id.* (providing for non-dischargeability of student loans with two exceptions); H.R. REP. NO. 595, at 132, 158 (discussing student loan non-dischargeability); *see also* Pelkowski v. Ohio Student Loan Comm'n (*In re* Pelkowski), 990 F.2d 737, 742 (3d Cir. 1993) (stating that House Judiciary Committee opposed treating educational loan debt and student debtors differently from other debt and debtors). The initial House bill deleted any reference to student loans while the Senate bill included language similar to that present in the final bill. *Compare* H.R. REP. NO. 595, at 134, *with* S. REP. NO. 989, at 79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5865. The final compromise bill accepted the Senate's language. *Compare* Bankruptcy Reform Act, 92 Stat. at 2591 (providing five-year and undue hardship exceptions), *with* S. REP. NO. 989, at 79 (providing five-year and undue hardship exceptions). The phrase "undue hardship" was lifted verbatim from the draft bill proposed by the Commission. *Compare* Bankruptcy Reform Act, 92 Stat. at 2591 (providing five-year and undue hardship exceptions), *with* BANKRUPTCY REPORT, *supra* note 48, at 141 (providing five-year and undue hardship exceptions).

[61] Bankruptcy Reform Act, 92 Stat. at 2591 (providing for non-dischargeability of student loans except for five-year rule and undue hardship).

[62] *See* H.R. REP. NO. 595, at 132, 158 (noting loophole in present system); 124 CONG.

Congress wanted to save the student loan program from debtor misuse and prohibit undeserving student borrowers from exploiting the bankruptcy process.[63] Accordingly, Congress barred student loans from discharge except in the two narrow instances originally proposed by the Commission and adopted in the Education Amendments of 1976.[64] Indeed, section 523(a)(8) permitted the discharge of student loans only in the unique cases involving the five-year or undue hardship exceptions.[65]

Subsequently, Congress further restricted the narrow instances in which debtors could discharge their student loan debt in its continued effort to curb debtor abuse and maintain the integrity of the loan program.[66] In 1990, Congress amended the Bankruptcy Code to make section 523(a)(8) applicable to cases filed in Chapter 13 cases, in addition to Chapter 7 cases.[67] Before the amendment, Chapter 13 debtors treated student loans as regular dischargeable debt in their repayment plans.[68]

Additionally, Congress narrowed the five-year exception by lengthening the period of repayment required before the allowance of a discharge from five to seven years.[69] Eventually, in October 1998,

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REC. 1791-92 (discussing reasons for changing bankruptcy laws); *see also Pelkowski*, 990 F.2d at 743 (stating that Congress enacted § 523(a)(8) to prevent abuses in and protect solvency of educational loan programs); *Andresen*, 232 B.R. at 130 (noting that Congress sought to close loophole in loan program).

[63] *See* H.R. REP. NO. 595, at 137, 158 (stating need to protect system from undeserving debtors); 124 CONG. REC. 1791-92 (explaining need to protect loan system); *see also Pelkowski*, 990 F.2d at 743 (stating that twins goals of § 523(a)(8) were rescuing student loan program from fiscal doom and preventing abuse of bankruptcy process by undeserving debtors); Dull v. Ohio Student Loan Comm'n (*In re* Dull), 144 B.R. 370, 372 (Bankr. N.D. Ohio 1992) (stating that Congress wanted to limit circumstances under which student loan obligations can be discharged to help preserve financial integrity of student loan system).

[64] *Compare* Bankruptcy Reform Act, 92 Stat. at 2591 (providing for non-dischargeability of student loans except for five-year rule and undue hardship), *with* Education Amendments, 90 Stat. at 2081 (providing for non-dischargeability of student loans except for five-year rule and undue hardship); *see also* H.R. REP. NO. 595, at 137 (arguing for adopting Commission's recommendations).

[65] Bankruptcy Reform Act, 92 Stat, at 2591.

[66] *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3007(b), 104 Stat. 1388 (codified at 11 U.S.C. § 1328(a)) (stating that § 523(a)(8) applies to Chapter 13 cases); *see also Pelkowski*, 990 F.2d at 743 (noting that discharge of educational loan debt is more difficult for debtors because of several statutory amendments); Salvin, *supra* note 8, at 148 (stating that Congress has narrowed exceptions to non-discharge).

[67] *See* Omnibus Budget Reconciliation Act § 3007(b) (applying § 523(a)(8) to Chapter 13 cases); *see also* Salvin, *supra* note 8, at 148 (stating that, before 1990, restriction did not apply to cases filed in Chapter 13).

[68] *See* Salvin, *supra* note 8, at 147-48 (noting that Chapter 13 debtors received superdischarge of student loans before change in law).

[69] Crime Control Act of 1990, Pub. L. No. 101-647, § 3621, 104 Stat. 4789, 4964-65 (codified as amended at 11 U.S.C. § 523(a)(8)) (lengthening repayment period for discharge

Congress completely eliminated the seven-year exception.[70] Today, student loans are only dischargeable if the debtor can demonstrate that repaying the debt subjects the debtor to an undue hardship.[71] Undue hardship, however, is difficult for debtors to establish because, in the absence of Congressional guidance, the judiciary has strictly interpreted the exception.[72]

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to seven years); *see also* Andresen v. Nebraska Student Loan Program (*In re* Andresen), Inc., 232 B.R. 127, 129 (B.A.P. 8th Cir. 1999) (noting that § 523(a)(8) originally allowed debtors to discharge student loans without demonstrating undue hardship as long as period of five years following first loan due date had expired).

[70] *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1837 (1998) (codified as amended at 11 U.S.C. § 523(a)(8)) (eliminating seven-year repayment exception); *see also Andresen*, 232 B.R. at 129 n.5 (stating that new version of statute became effective October 7, 1998); Brown v. Sallie Mae Servicing Corp., 227 B.R. 540, 542 n.1 (Bankr. S.D. Cal. 1998) (stating that change in statute applies only in bankruptcy cases filed on or after October 7, 1998); Morea, *supra* note 29, at 193 n.2 (stating that Congress abolished seven-year rule for automatic discharge).

[71] 11 U.S.C. § 523(a)(8) (1994 & Supp. V 1999) (stating that student loan debt is non-dischargeable absent showing of undue hardship); *see also Andresen*, 232 B.R. at 129 n.5 (noting that undue hardship is now only basis for discharge of student loans); Morea, *supra* note 29, at 194 (stating that undue hardship is only alternative for student loan debt discharge); *see also* Kapinos v. Graduate Loan Ctr. (*In re* Kapinos), 243 B.R. 271, 276 (Bankr. W.D. Va. 2000) (discussing congressional limitation of discharge and noting pattern shows obvious congressional tendency to tighten gaps through which student could avoid loan repayment); Douglass v. Great Lakes Higher Educ. Servicing Corp. (*In re* Douglas), 237 B.R. 652, 653 (Bankr. N.D. Ohio 1999) (noting that Congress has intentionally and progressively made it more difficult for courts to discharge student loan obligations).

[72] *See* Pena v. United Student Aid Funds, Inc. (*In re* Pena), 207 B.R. 919, 921 (B.A.P. 9th Circuit 1997) (narrowly construing undue hardship exception); Brunner v. New York State Higher Educ. Servs. Corp.(*In re* Brunner), 46 B.R. 752, 753 (S.D.N.Y 1985) (stating that garden-variety hardship does not satisfy exception); Thomsen v. Department of Educ. (*In re* Thomsen), 234 B.R. 506, 510 (Bankr. D. Mont. 1999) (stating that Congress intended courts to interpret undue hardship strictly); *see also* 11 U.S.C. § 523(a)(8).

D. The Undue Hardship Exception

Congress did not define undue hardship, leaving the courts to determine its meaning.[73] Consequently, courts have developed a number of tests to determine whether requiring debtors to pay their student loans constitutes an undue hardship.[74] Despite the variety of tests that courts apply across the nation, at least one unifying characteristic prevails among the courts.[75] Courts generally agree that undue hardship means more than just temporary financial adversity.[76]

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[73] 11 U.S.C. § 523(a)(8) (providing undue hardship exception but not defining its meaning); *see also Andresen*, 232 B.R. at 137 (noting that undue hardship is not defined in Bankruptcy Code); Taylor v. United Student Aid Funds Inc. (*In re* Taylor), 223 B.R. 747, 754 (B.A.P. 9th Cir. 1998) (stating that Congress did not define undue hardship when it enacted § 523(a)(8)); *Pena*, 207 B.R. at 920 (stating that Code, legislative history, and case law provide no clear definition of undue hardship); *Brunner*, 46 B.R. at 753 (stating that undue hardship is undefined in Bankruptcy Code); *Kapinos*, 243 B.R. at 274 (stating that Congress preferred leaving construction of undue hardship to courts); *Brown*, 227 B.R. at 542 (stating that case law has developed definitions of undue hardship); Morea, *supra* note 29, at 194 (stating that judicial interpretation helped define exception); Salvin, *supra* note 8, at 149 (stating that courts have defined parameters of undue hardship).

[74] *See* Andrews v. South Dakota Student Loan Assistance Corp. (*In re* Andrews), 661 F.2d 702, 702-05 (8th Cir. 1981) (determining undue hardship based on totality of circumstances, including ability to repay and maintain minimal standard of living); *Brunner*, 46 B.R. at 756 (laying out undue hardship test based upon current ability to repay loans, likelihood of repayment over course of loan, and good faith); Bryant v. Pennsylvania Higher Educ. Assistance Agency (*In re* Bryant), 72 B.R. 913, 916-17 (Bankr. E.D. Pa. 1987) (using Federal Poverty Guidelines to determine dischargeability); Pennsylvania Higher Educ. Assistance Agency v. Johnson, 5 B.R. 532 (Bankr. E.D. Pa. 1979) (using current ability to pay, likelihood of repayment, good faith and utility of education in determining undue hardship); *see also* Cheesman v. Tennessee Student Assistance Corp., 25 F.3d 356, 359 (6th Cir. 1994) (stating that courts have used number of tests in determining what constitutes undue hardship); *Andresen*, 232 B.R. at 137 (stating that courts have developed many undue hardship tests over last two decades); Morea, *supra* note 29, at 197 (stating that there are numerous undue hardship tests).

[75] *See* Tennessee Student Assistance Corp. v. Hornsby (*In re* Hornsby), 144 F.3d 433, 437 (6th Cir. 1998) (noting that courts universally require more for undue hardship than temporary financial adversity and typically less than utter hopelessness); *Brunner*, 46 B.R. at 753 (noting that existence of adjective undue indicates that Congress viewed garden-variety hardship as insufficient excuse for discharge of student loans); *Douglass*, 237 B.R. at 654 (noting that courts universally agree that ordinary hardship does not satisfying exception); *see also* Salvin, *supra* note 8, at 150 (arguing that there is at least one unifying theme despite variety of tests).

[76] *See Hornsby*, 144 F.3d at 437 (noting that courts do not grant debtors with temporary difficulties discharges); *Brunner*, 46 B.R. at 753 (stating that courts agree that undue hardship means more than temporary financial problems); *Douglass*, 237 B.R. at 654 (stating that courts should not consider term undue hardship cavalierly because not just any hardship qualifies); *see also* Salvin, *supra* note 8, at 150 (stating that temporary inability to pay does not satisfy undue hardship).

1. The *Brunner* Test

The *Brunner* test is one of the most frequently used tests courts apply to determine whether a debtor's student loan debt poses an undue hardship.[77] A district court in the Second Circuit formulated the *Brunner* test in *Brunner v. New York State Higher Educ. Servs. Corp.*[78] The debtor, Marie Brunner, owed $9,000 in student loan debt for her undergraduate and graduate education.[79] Nine months after receiving her graduate degree Brunner filed for bankruptcy.[80]

To determine whether Brunner could discharge her student loans, the district court examined the meaning of undue hardship.[81] The court explained that debtors could normally get their pre-petition debts discharged in bankruptcy and thereby receive a fresh start.[82] However, the court maintained that section 523(a)(8) represented Congress's objective to override the normal fresh start goal of bankruptcy.[83] By enacting section 523(a)(8), Congress did not intend to relieve debtors from their student loan obligations unless exceptional circumstances existed.[84]

The district court also articulated the public policy behind treating student loans differently than other debts.[85] The court acknowledged that student loans differ from other debts because the guaranteed student loan program offers loans almost without regard to credit worthiness.[86] Indeed, those who ordinarily cannot receive loans can

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[77] *Andresen*, 232 B.R. at 137 (stating that *Brunner* test is popular undue hardship test); Lehman v. New York Higher Educ. Servs. Corp. (*In re* Lehman), 226 B.R. 805, 809 (Bankr. D. Vt. 1998) (stating that most Courts of Appeals follow *Brunner* test); Ammirati v. Nellie Mae, Inc. (*In re* Ammirati), 187 B.R. 902, 905 (Bankr. D.S.C. 1995) (noting that national trend is toward adoption of *Brunner* standard); *see also Brunner*, 46 B.R. at 756 (establishing *Brunner* test).

[78] 831 F.2d 395, 396 (2d Cir. 1987), *aff'g*, 46 B.R. 752, 756 (S.D.N.Y 1985) (adopting *Brunner* test in Second Circuit).

[79] *See Brunner*, 46 B.R. at 753 (stating that debtor received Bachelor of Arts degree in 1979 and Master's degree in Social Work in 1982).

[80] *Id.* (stating that debtor filed adversary action seeking student loan discharge nine months after receiving her Master's degree).

[81] *See id.* at 753-55 (noting that garden-variety hardship is insufficient but statute gives no hint of phrase's intended meaning).

[82] *See id.*

[83] *See id.* at 756 (stating that Congress decided to override fresh start goal of bankruptcy with § 523(a)(8)).

[84] *See id.* (stating that student loan debtors stripped of refuge of bankruptcy in all but extreme circumstances).

[85] *See id.* (stating that strict non-discharge serves purpose of ensuring vitality of guaranteed student loan program).

[86] *See id.* (explaining difference between student loans and ordinary loans). The court

obtain government guaranteed student loans.[87] In exchange, the government exacts a quid pro quo.[88] Namely, students commit to repayment in exchange for their loans, regardless of their subsequent economic circumstances.[89] As the court noted, each student must decide individually whether the risks of future hardship outweigh the potential benefits of a deferred-payment education.[90]

Based on the above public policy, the district court articulated a three-prong test to determine whether a debtor's situation satisfied the undue hardship exception.[91] Under the *Brunner* test, a debtor meets the undue hardship exception if the debtor satisfies all three criteria.[92] First, the debtor must be unable to maintain a minimal standard of living if forced to repay the loans.[93] Second, the circumstances must indicate that the debtor's state of affairs will likely persist for a significant portion of the repayment period.[94] Finally, the debtor must have made a good faith effort to repay the loans.[95]

Applying this test to Brunner's situation, the district court found that she did not satisfy two prongs of the test and denied her a discharge.[96] Brunner satisfied the first prong because her student loans comprised eighty percent of her debt and she collected public assistance.[97] Brunner

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explained that the government is unable to behave like ordinary commercial lenders. *See id.* Commercial lenders may deny as well as grant credit and can adjust interest rates according to the likelihood of repayment after investigating the borrower's financial status and prospects. *See id.* The court characterized the student loan program as government largesse, which commits students to repayment regardless of subsequent economic circumstances. *See id.*

[87] *See id.* (stating that ordinary lenders would not lend to students without student loan program).

[88] *See id.* (explaining tit for tat relationship between government and borrower).

[89] *See id.* (describing strict bargain between lender and borrower).

[90] *See id.* (stating that individual is rational actor who must decide whether benefit of education outweighs weight of loan repayment).

[91] *See id.* (laying out three-prong test for determining undue hardship).

[92] *See id.*; *see also* Lehman v. New York Higher Educ. Servs. Corp. (*In re* Leman), 226 B.R. 805, 808 (Bankr. D. Vt. 1998) (stating that, under *Brunner* test, debtor must establish each prong of test).

[93] *See Brunner*, 46 B.R. at 754-56 (noting that most courts agree that debtor must at least satisfy minimal standard of living test before court will grant discharge).

[94] *See id.* at 754-56 (stating that debtor must show not only current inability to pay but additional circumstances strongly suggesting situation will extend for significant portion of repayment period).

[95] *See id.* at 755-56 (discussing requirement of good faith).

[96] *See id.* at 757-58 (stating that debtor failed to show her circumstances were likely to continue and that she acted in good faith).

[97] *See id.* at 757 (noting that debtor's rent was $200 per month and she received approximately $258 in public assistance).

did not satisfy the second prong, however, because her current financial difficulties would probably not persist considering she had no dependents and possessed employable job skills.[98] Finally, Brunner did not satisfy the third prong because she did not make a good faith effort to repay her loans by filing for bankruptcy one month after her first loan payment became due.[99] The Second Circuit affirmed the district court's decision on appeal.[100] The *Brunner* test eventually became the main test courts use to determine undue hardship.[101]

2. A Recent Application of the *Brunner* Test

A California bankruptcy court recently utilized the *Brunner* test in *Brown v. Sallie Mae Servicing Corp.*[102] The debtor, Jeremiah Brown, was a thirty-eight year old Marine with twenty years of military experience.[103] Brown and his wife had one child, with another on the way.[104] Brown had over $90,000 in student loan debt that he had accumulated earning a Bachelor of Science degree in financial management and attending law school for four years.[105]

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[98] *See id.* at 757-758. The court stated that although Brunner was not likely to find a job in her chosen field of work in the near future she was healthy, intelligent, and well-educated. *See id.* Additionally, the court found that Brunner presented no evidence indicating a total foreclosure of job prospects in her area of training. *See id.*

[99] *See id.* at 758 (stating that debtor made no attempt to repay her loans, nor requested deferment or forbearance).

[100] *See* Brunner v. New York State Higher Educ. Servs. Corp. (*In re* Brunner), 831 F.2d 395, 396 (2d Cir. 1987) (adopting *Brunner* test in Second Circuit), *aff'g* 46 B.R. 752, 756 (S.D.N.Y 1985).

[101] *See* Pennsylvania Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298 (3d Cir. 1995) (adopting *Brunner* test); *In re* Roberson, 999 F.2d 1132 (7th Cir. 1993) (adopting *Brunner* test); Pena v. United Student Aid Funds, Inc. (*In re* Pena), 207 B.R. 919, 922-23 (B.A.P. 9th Cir. 1997) (utilizing *Brunner* test); *see also* Brown v. Sallie Mae Servicing Corp. (*In re* Brown), 227 B.R. 540, 543 (Bankr. S.D. Cal. 1998) (noting that Ninth Circuit recently adopted *Brunner* standard); Shankwiler v. National Student Loan Mktg. (*In re* Shankwiler), 208 B.R. 701, 704-705 (Bankr. C.D. Cal. 1997) (stating that majority of courts have adopted *Brunner* test).

[102] *Brown*, 227 B.R. at 543-47 (applying three-prong *Brunner* test); *see also Brunner*, 46 B.R. at 756 (laying out undue hardship test).

[103] *See Brown*, 227 B.R. at 542.

[104] *See id.*

[105] *See id.* at 542, 545. Brown pursued his higher education on a part-time basis. *See id.* at 542. In 1992, he received a Bachelor of Science degree in financial management. *See id.* Brown then enrolled in the University of San Diego Law School's full-time night program in 1993. *See id.* His commitment to the Marines interrupted his studies and after four years of pursuing his law degree the school told him to leave. *See id.* Several months after the school disenrolled him, his educational loans became due. *See id.* He requested two forbearances from the student loan servicing agents. *See id.* He did not make any

The *Brown* court applied the *Brunner* test to determine whether repayment posed an undue hardship.[106] The court found that Brown satisfied the first prong of the test because his $334 of net income per month prevented him from maintaining a minimal standard of living while paying off his loans.[107] Brown also satisfied the second prong of the *Brunner* test because his circumstances were unlikely to change.[108] Moreover, the court determined that Brown did not have to seek additional employment or change careers to generate more income to pay his student loans.[109] Although Brown had not made any payments on his student loan debt, the court found that his loan forbearances satisfied the good faith prong.[110] According to the court, Brown satisfied the good faith prong, in part, because he convinced the court that he was an honest person on the witness stand.[111]

Concluding that Brown satisfied the three-prong *Brunner* test, the court discharged his over $90,000 student loan debt.[112] The court noted that granting a partial discharge, which relieves a portion of the debtor's student loan debt, was the preferable solution, satisfying both the debtor and creditor.[113] Nevertheless, the court recognized that the Ninth Circuit

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payments on his student loans. *See id.*

[106] *See id.* at 543-47. (stating that Ninth Circuit follows *Brunner* test); *see also Brunner*, 46 B.R. at 756 (laying out *Brunner* test).

[107] *See Brown*, 227 B.R. at 545; *see also Brunner*, 46 B.R. at 756 (laying out *Brunner* test). The court determined that Brown had a gross monthly income of $1789 and monthly expenses of $1455, leaving a net income of $334. *See Brown*, 227 B.R. at 543-45. The court determined that Brown's Individual Retirement Account ("IRA") was not an allowable expense because he was young and had plenty of time to put money away for retirement. *See id.* at 543. His loans totaled $96,628.08. *See id.* at 545. The court concluded that it would take him over twenty-four years to pay back his student loans if he paid $334 a month. *See id.*

[108] *See Brown*, 227 B.R. at 545-46; *see also Brunner*, 46 B.R. at 756 (laying out *Brunner* test).

[109] *See Brown*, 227 B.R. at 545-46. The court stated that it was not practical for Brown to obtain a part-time job in addition to his military career. *See id.* The court concluded that Brown should stay in the military because he had no experience in financial management and there was no market for his legal skills. *See id.* Additionally, the court stated that Brown's wife did not have to work because the costs of child care outweighed the financial benefits of working a minimum wage job. *See id.* at 546.

[110] *See id.* at 546-47 (finding forbearances sufficient good faith); *see also Brunner*, 46 B.R. at 756 (laying out *Brunner* test).

[111] *See Brown*, 227 B.R. at 546-47 (stating that failing to make even minimal payments on student loans does not prevent finding of good faith where debtor never had resources to make payments).

[112] *See id.* at 547-48 (discharging debtor's student loans because to do otherwise would truly impose undue hardship); *see also Brunner*, 46 B.R. at 756 (laying out *Brunner* test).

[113] *See Brown*, 227 B.R. at 547-48.

prohibited partial discharges.[114] The *Brown* court's frustration with its inability to grant a partial discharge highlights a larger problem that has divided two United States Circuit Courts.[115]

II. THE SIXTH AND NINTH CIRCUIT SPLIT OVER PARTIAL DISCHARGES

The Sixth and Ninth Circuits disagree over whether courts can grant partial discharges of student loans rather than require full repayment or discharge.[116] The Sixth Circuit holds that courts can grant partial discharges through their equitable powers. In contrast, the Ninth Circuit holds that Bankruptcy Code section 523(a)(8) prohibits partial discharges of student loans.[117]

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[114] *See Brown*, 227 B.R. at 547 (stating that this is classic situation in which court should order partial discharge but that Ninth Circuit does not allow it).

[115] *See* Tennessee Student Assistance Corp. v. Hornsby (*In re* Hornsby), 144 F.3d 433, 440 (6th Cir. 1998) (recognizing that courts differ over propriety of partial discharges); United Student Aid Funds Inc. v. Taylor (*In re* Taylor), 223 B.R. 747, 753-54 (B.A.P. 9th Cir. 1998) (recognizing split in courts over allowance of partial discharges; *see also* Grigas v. Sallie Mae Servicing Corp. (*In re* Grigas), 252 B.R. 866, 871 (criticizing Ninth Circuit's approach); Kapinos v. Graduate Loan Ctr. (*In re* Kapinos), 243 B.R. 271, 275 (Bankr. W.D. Va. 2000) (stating that majority of courts permit partial discharges); Morea, *supra* note 29, at 194 (stating that courts differ over whether there should be all or nothing approach to discharging student loans); *Exceptions to Discharge: Individual Loans, Not Aggregate, Reviewed For Section 523(a)(8) Undue Hardship Discharge*, BNA BANKR. L. DAILY, Apr. 28, 1999, at D4 [hereinafter *Exceptions to Discharge*] (stating that courts are split over whether courts may partially discharge debtors' student loans).

[116] *Compare Hornsby*, 144 F.3d at 440 (allowing partial discharge of student loans), *with Taylor*, 223 B.R. at 755 (stating that § 523(a)(8) does not provide for partial discharge of student loans). *See generally* Andresen v. Nebraska Student Loan Program, Inc. (*In re* Andresen), 232 B.R. 127, 129 (B.A.P. 8th Cir. 1999) (acknowledging split in circuits regarding whether courts may partially discharge debtors' student loans); Morea, *supra* note 29, at 199 (stating that Sixth and Ninth Circuits stand apart with vastly different views).

[117] *Compare Hornsby*, 144 F.3d at 439-40 (granting partial discharge via equitable powers), *with Taylor*, 223 B.R. at 753 (stating that Bankruptcy Code does not provide for partial discharges). *See generally Brown*, 227 B.R. at 547 (stating that Ninth Circuit holds that partial discharges are contrary to plain language of statute); Morea, *supra* note 29, at 202-03 (stating that Ninth Circuit admonished bankruptcy court for granting partial discharge).

A. The Sixth Circuit's Allowance of Partial Discharges

The Sixth Circuit adopted a favorable ruling for student loan debtors by allowing partial discharges.[118] In *Tennessee Student Assistance Corp. v. Hornsby*,[119] the debtors, Steven and Teresa Hornsby, a married couple with three young children, filed for Chapter 7 bankruptcy.[120] The Hornsbys later filed a complaint to discharge approximately $30,000 in student loan debt.[121] The bankruptcy court found that the Hornsbys satisfied the *Brunner* test and discharged their student loan debt.[122] The district court affirmed the bankruptcy court's decision on appeal.[123] The state guarantee agency, holding the Hornsby's student loans, appealed to the Sixth Circuit, arguing that the Hornsby's financial situation did not entitle them to a discharge.[124]

The Sixth Circuit reversed, refusing to grant the debtors a full discharge but remanding the case to the district court to grant the Hornsbys a partial discharge of their student loan debt.[125] The court stated that the Hornsbys did not satisfy the *Brunner* test because the family had a monthly income surplus of approximately $200 to $280 dollars.[126] The Sixth Circuit also questioned whether the Hornsby's minimal living expenses should include an expensive long distance telephone bill and a monthly cigarette allowance.[127]

Despite the Hornsby's failure to satisfy the *Brunner* test, the Sixth Circuit concluded that the district court could award the Hornsby's a

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[118] *See Hornsby*, 144 F.3d at 440 (allowing partial discharges of student loans to reduce debtor's loan obligation); *see also* Morea, *supra* note 29, at 199-200 (noting that Sixth Circuit's allowance of partial discharges helps debtors); *Exceptions to Discharge*, *supra* note 115, at D4. (discussing partial discharges).

[119] 144 F.3d at 433.

[120] *See id.* at 435. The Hornsbys were college students from 1987 until 1992, during which time they received fourteen student loans. *See id.* They attended a number of small Tennessee state colleges, studying business and computers but neither graduated. *See id.*

[121] *See id.* (describing debtor's litigation strategy).

[122] *See id.* at 437-38 (applying *Brunner* test to Hornsby's situation); *see also* Brunner v. New York State Higher Educ. Servs. Corp., 46 B.R. 752, 756 (S.D.N.Y 1985) (laying out *Brunner* test).

[123] *See Hornsby*, 144 F.3d at 435-36 (describing procedural history).

[124] *See id.* at 436 (stating that state guarantee argued that debtors had sufficient disposable income to pay back student loans).

[125] *See id.* at 437-38 (explaining that district court misapplied *Brunner* test); *see also Brunner*, 46 B.R. at 756 (laying out *Brunner* test).

[126] *See Hornsby*, 144 F.3d at 437-38 (stating that bankruptcy court erred in finding undue hardship because of monthly surplus and lack of good faith); *see also Brunner*, 46 B.R. at 756 (laying out *Brunner* test).

[127] *See Hornsby*, 144 F.3d at 438 (criticizing bankruptcy court for not questioning exorbitant bill for long distance telephone service and $100 monthly cigarette allowance).

partial discharge of their student loan debt.[128] The court stated that section 105(a) of the Bankruptcy Code gives courts the equitable power to issue any judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Act consistent with the Act.[129] Finding no language in section 523(a)(8) expressly disallowing partial discharges, the Sixth Circuit held that courts could partially discharge student loan debt.[130]

The Sixth Circuit argued that courts should give debtors the benefit of a fresh start by partially discharging their student loans.[131] The court reasoned that partial discharges are fair because they strike a balance between giving debtors a fresh start and partially satisfying creditors.[132] In contrast, the strict *Brunner* test compels courts to maintain the entire loan or to create a fiction and determine that the debtor would suffer an undue hardship.[133] According to the Sixth Circuit, maintaining the entire loan is unfair to the debtor because the debtor does not get a fresh start.[134] Similarly, discharging the entire loan is unfair to the creditor if the debtor has the ability to partially pay back the loan.[135] Based on these

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[128] *See id.* at 438-39; *see also* 11 U.S.C. § 105(a) (1994 & Supp. V 1999) (providing judges with power to issue any judgment necessary to carry out Bankruptcy Code).

[129] *See Hornsby*, 144 F.3d at 440 (discussing court equitable powers conferred by § 105(a)); *see also* 11 U.S.C. § 105(a) (providing equitable powers).

[130] *See Hornsby*, 144 F.3d at 440 (concluding that courts have power to grant partial discharges); *see also* 11 U.S.C. § 523(a)(8) (1994 & Supp. V 1999) (providing undue hardship exception).

[131] *See Hornsby*, 144 F.3d at 440 (discussing public policy reasons for granting partial discharges).

[132] *See id.* (stating that all or nothing rule forces courts to chose between debtors or creditors); *see also* Andresen v. Nebraska Student Loan Program (*In re* Andresen), Inc., 232 B.R. 127, 130-31 (B.A.P. 8th Cir. 1999) (stating that some courts hold that partial discharge of student loans protects honest but unfortunate debtors while maintaining solvency of student loan system); Rivers v. United Student Aid Funds, Inc. (*In re* Rivers), 213 B.R. 616, 619 (Bankr. S.D. Ga. 1997) (stating that failure to allow partial discharge of student loans causes inequitable results); Morea, *supra* note 29, at 201-02 (arguing that Sixth Circuit's approach strikes proper balance between relieving debtors and satisfying creditors).

[133] *See Hornsby*, 144 F.3d at 438-40 (implying that *Brunner* test is too strict); *see also* Brunner v. New York State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 756 (S.D.N.Y 1985) (laying out *Brunner* test). *See generally Rivers*, 213 B.R. at 619 (stating that courts should fashion equitable remedies instead of viewing situation as all or nothing proposition); Morea, *supra* note 29, at 201-02 (noting that *Brunner* test forces courts to reward debtor or creditor).

[134] *See Hornsby*, 144 F.3d. at 438-40 (stating that bankruptcy should provide debtors with fresh start).

[135] *See id.* (stating that all or nothing proposition thwarts purpose of code); *see also Rivers*, 213 B.R. at 619 (stating that fairness dictates that courts grant partial discharges); Morea, *supra* note 29, at 201-02 (arguing for equitable unified approach allowing partial discharges).

fairness considerations, the Sixth Circuit concluded that partial discharges strike the appropriate balance by accommodating both parties' interests.[136] Not all circuits, however, follow the Sixth Circuit's approach.[137]

B. The Ninth Circuit's All or Nothing Rule

Unlike the Sixth Circuit, the Ninth Circuit holds that the undue hardship determination is an all or nothing proposition.[138] In *Taylor v. United Student Aid Funds Inc.*,[139] the debtor, Christopher Taylor, filed for Chapter 13 bankruptcy.[140] Thereafter, Taylor filed a complaint to have the bankruptcy court discharge his approximately $80,000 student loan debt.[141] The bankruptcy court granted Taylor a partial discharge based on a seven-year repayment plan.[142] The court discharged sixty-seven percent of one of Taylor's loans and seventy percent of another.[143] The state guarantee agency holding Taylor's student loans appealed to the Ninth Circuit Bankruptcy Appellate Panel ("BAP").[144]

The Ninth Circuit BAP reversed, holding that partial discharges are contrary to both the plain language and congressional intent of section 523(a)(8).[145] The court began its analysis by noting that the Bankruptcy

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[136] *See Hornsby*, 144 F.3d at 438-40 (stating that partial discharges accommodate debtors and creditors); *see also Rivers*, 213 B.R. at 619 (criticizing all or nothing rule for failing to balance parties' interests); Morea, *supra* note 29, at 201-02 (stating that partial discharges partially satisfy creditors and debtors).

[137] *See* Taylor v. United Student Aid Funds Inc. (*In re* Taylor), 223 B.R. 747, 753 (B.A.P. 9th Cir. 1998) (disallowing partial discharges); Skaggs v. Great Lakes Higher Educ. Corp. (*In re* Skaggs), 196 B.R. 865, 866-67 (Bankr. W.D. Okla. 1996) (criticizing allowance of partial discharges); Hawkins v. Buena Vista College (*In re* Hawkins), 187 B.R. 294, 301 (Bankr. N.D. Iowa 1995) (stating that partial discharges circumvent clear language of Code). *See generally Andresen*, 232 B.R. at 129 (noting that there is split over whether courts may partially discharge debtors' student loans or whether courts are restricted to all or nothing approach).

[138] *See Taylor*, 223 B.R. at 753 (holding that § 523(a)(8) does not authorize partial discharges).

[139] *Id.* at 747.

[140] *See id.* at 749 (describing debtor's background).

[141] *See id.* at 749-50 (stating that debtor filed petition to discharge $50,440.90 owed to one lender and $35,748.88 owed to another). The debtor obtained the student loans to attend Emery Riddle University. *See id.* at 749.

[142] *See id.* at 750 (describing bankruptcy court's decision).

[143] *See id.* (describing bankruptcy court's discharge of over sixty percent of debtor's total loan obligation).

[144] *See id.* (discussing procedural history).

[145] *See id.* at 753 (concluding that Bankruptcy Code does not authorize partial discharge of student loans because plain language of § 523(a)(8) implies that only entire debt can be

Code does not explicitly provide for partial discharges.[146] The court then analyzed the plain language of section 523(a)(8).[147] Section 523(a)(8) provides that a court can discharge a debtor's student loan debt if excluding such debt from discharge imposes an undue hardship on the debtor and the debtor's dependents.[148] The Bankruptcy Code defines debt as liability on a claim.[149] According to the court, liability on a claim encompasses the entire liability, not merely a portion of the debt or selected terms of repayment.[150] Thus, the court concluded that the plain language of section 523(a)(8) required a discharge or non-discharge of the entire debt.[151]

Using the rules of statutory construction, the Ninth Circuit BAP also determined that partial discharges are contrary to Congress's intent.[152] The court stated that Congress could have explicitly allowed a discharge to the extent that such student loan debt would pose an undue hardship.[153] In fact, Congress specifically provided for such a partial discharge in three other subdivisions of the dischargeability statutes.[154]

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discharged); *see also* 11 U.S.C. § 523(a)(8) (1994 & Supp. V 1999) (providing undue hardship exception). *See generally* Morea, *supra* note 29, at 202-03 (stating that *Taylor* court held that plain language of statute asserts that entire student loan is either dischargeable, upon finding of undue hardship, or non-dischargeable).

[146] *See Taylor*, 223 B.R. at 752-53 (discussing Bankruptcy Code in general); *see also* 11 U.S.C. §§ 101-1330 (1994 & Supp. V 1999) (providing for Bankruptcy Code).

[147] *See Taylor*, 223 B.R. at 752-53 (reviewing statutory language); *see also* 11 U.S.C. § 523(a)(8) (providing undue hardship exception).

[148] *See Taylor*, 223 B.R. at 752-53 (analyzing § 523(a)(8)); *see also* 11 U.S.C. § 523(a)(8) (providing undue hardship exception).

[149] *See Taylor*, 223 B.R. at 752-53 (reviewing § 101(12)); *see also* 11 U.S.C. § 101(12) (defining debt). *See generally* Andresen v. Nebraska Student Loan Program, Inc. (*In re* Andresen), 232 B.R. 127, 134 (B.A.P. 8th Cir. 1999) (quoting Skaggs v. Great Lakes Higher Educ. Corp. (*In re* Skaggs), 196 B.R. 865, 866 (Bankr. W.D. Okla. 1996)) (stating that Bankruptcy Code defines debt as liability on claim).

[150] *See Taylor*, 223 B.R. at 752 (reviewing § 101(12)); 11 U.S.C. § 101(12) (defining debt as liability on claim); *Andresen*, 232 B.R. at 134 (quoting *Skaggs*, 196 B.R. at 866) (stating that liability on claim includes entire liability).

[151] *See Taylor*, 223 B.R. at 753 (concluding that plain language of statute does not provide for partial discharges); *see also* 11 U.S.C. § 523(a)(8) (providing undue hardship exception).

[152] *See Taylor*, 223 B.R. at 753 (citing Bates v. United States, 522 U.S. 23, 29-30 (1997) (stating that where Congress has failed to include language in statute, it is presumed to be intentional when phrase is used elsewhere in Code)).

[153] *See id.* (discussing rules of statutory construction).

[154] *See id.* at n.11. Sections 523(a)(2), (5) and (7) provide:

> A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor for any debt—. . . .

As the court explained, the rules of statutory construction dictate that when Congress uses a phrase elsewhere in a statute, Congress intentionally excluded the phrase if it is not included in the specific part of the statute at issue.[155] Thus, by not providing for a discharge to the extent such student debt would pose an undue hardship, Congress intentionally excluded the partial discharge of student loans.[156]

In *Taylor*, the Ninth Circuit BAP also criticized the Sixth Circuit's practice of granting partial discharges of student loans.[157] The court noted that the Sixth Circuit did not address the plain language of section 523(a)(8).[158] Additionally, the court argued that the Sixth Circuit had no

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> (2) for money, property, services, or an extension, renewal, or refinancing of credit, *to the extent* obtained, by—
>
> (A) false pretenses, a false representation, or actual fraud . . . .
>
> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record . . . but not *to the extent that*—
>
> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise . . .; or
>
> (B) such debt includes a liability designated as alimony, maintenance, or support;
>
> (7) *to the extent* such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensated for actual pecuniary loss, other than a tax penalty—

11 U.S.C. § 523(a)(2), (5), (7) (1994 & Supp. V 1999) (*emphasis added*). *See generally Andresen*, 232 B.R. at 133-34 (citing Hawkins v. Buena Vista College (*In re* Hawkins), 187 B.R. 294, 301 (Bankr. N.D. Iowa 1995)) (stating that Congress used phrase "to the extent" numerous times in Bankruptcy Code, including three other subdivisions of dischargeability statute).

[155] *See Taylor*, 223 B.R. at 753 (citing *Bates*, 522 U.S. at 29-30 (1997) (stating well-known canon of statutory construction that Congress's failure to include language is presumed intentional where it has used language elsewhere in statute)). *But see* Kapinos v. Graduate Loan Ctr. (*In re* Kapinos), 243 B.R. 271, 275-76 (Bankr. W.D. Va. 2000) (stating that plain language argument is unpersuasive because language serves different purpose, categories rather than amount of debt, in other sections).

[156] *See Taylor*, 223 B.R. at 753 (relying upon *Bates*, 522 U.S. at 29-30 (stating that where Congress has failed to include language in statutes, it is presumed to be intentional when phrase is used elsewhere in Code)); *see also Andresen*, 232 B.R. at 130, 134 (stating that rules of statutory interpretation indicate Congress intended to exclude partial discharges).

[157] *See Taylor*, 223 B.R. at 754 (examining Sixth Circuit's rationale for allowing partial discharges); *see also* Tennessee Student Assistance Corp. v. Hornsby (*In re* Hornsby), 144 F.3d 433, 440 (6th Cir. 1998) (granting partial discharges).

[158] *See Taylor*, 223 B.R. at 753 n.13 (criticizing Sixth Circuit for failing to follow rules of

authority to exercise its equitable powers to grant partial discharges because it is improper for courts to use their equitable powers to trump statutory limitations.[159] The Ninth Circuit concluded that Congress should amend the statute to provide for partial discharges if it does not like the all or nothing result provided by the statute's plain language.[160]

C. Partial Discharges Are Contrary to the Plain Language and Congressional Intent of Section 523(a)(8)

Justifying the partial discharge of student loan debt through the equitable powers conferred by section 105(a) of the Bankruptcy Code is improper because courts cannot exercise equitable powers in the face of an unambiguous statute. According to the Supreme Court, equitable powers cannot override a specific statutory provision of the Bankruptcy Code.[161] In this case, where the statutory language is clear and unambiguous, courts have no discretion to read additional language into the statute.[162] Thus, courts cannot use the equitable powers conferred by section 105(a) to circumvent the clear language of section 523(a)(8).[163] Therefore, the Sixth Circuit erred by ignoring the clear rules of statutory construction by exercising its equitable powers in the face of an unambiguous statute.[164]

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statutory construction); *see also Hornsby*, 144 F.3d at 440 (granting partial discharges).

[159] *See Taylor*, 223 B.R. at 754 (criticizing Sixth' Circuit's use of equitable powers in face of unambiguous statute); *see also Hornsby*, 144 F.3d at 440 (granting partial discharges).

[160] *See Taylor*, 223 B.R. at 754 (suggesting that Congress, not courts, should provide for partial discharges); *see also* 11 U.S.C. § 523(a)(8) (1994 & Supp. V 1999) (providing undue hardship exception).

[161] *See* Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988) (stating that whatever equitable powers remain bankruptcy courts must and can only exercise them within confines of Bankruptcy Code); *see also* Johnson v. First Nat'l Bank of Montevideo, 719 F.2d 270, 273 (8th Cir. 1983) (stating that Supreme Court holds that equitable powers may only be exercised in consistent manner with provisions of Bankruptcy Code); *Andresen*, 232 B.R. at 131 (stating that Supreme Court holds that bankruptcy courts can only exercise equitable powers within confines of Bankruptcy Code).

[162] *See Norwest Bank Worthington*, 485 U.S. at 206 (stating that courts may not alter unambiguous statute); *Andresen*, 232 B.R. at 134 (stating that judges must enforce statute where language is clear); *Skaggs*, 196 B.R. at 866-67 (stating that plain language of statute limits courts' discretion).

[163] *See Norwest Bank Worthington*, 485 U.S. at 206 (stating that courts must enforce unambiguous language); *Andresen*, 232 B.R. at 134 (stating that equitable powers do not arise where statutory language is clear); *Taylor*, 223 B.R. at 754 (stating that courts cannot use § 105(a) to circumvent clear and unambiguous language of § 523(a)(8)); *Skaggs*, 196 B.R. at 866-67 (stating that courts must enforce statutory language); *see also* 11 U.S.C. § 105(a), 523(a)(8) (1994 & Supp. V 1999).

[164] *Compare Hornsby*, 144 F.3d at 433-40 (making no mention of rules of statutory construction), *with Norwest Bank Worthington*, 485 U.S. at 206 (stating courts cannot use

Partial discharges present a clear case of judicial lawmaking.[165] Congress, not the judiciary, must respond to any perceived public policy problem if the application of statutory provisions causes unwelcome or arbitrary results.[166] While allowing partial discharges may appear fair, they constitute judicial lawmaking and add to the uncertainty in this area of bankruptcy law.[167] Unlike the Sixth Circuit, the Ninth Circuit correctly fulfilled its judicial role by applying the statute as Congress wrote it.[168]

Furthermore, partial discharges are contrary to the congressional intent of the statute. Congress's main goals in enacting section 523(a)(8) were to maintain the financial integrity of the student loan program and curb debtor abuse of the program.[169] Congress was concerned that allowing debtors to discharge their student loan debts in bankruptcy

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equitable powers where statute is clear). *See generally Johnson*, 719 F.2d at 273 (8th Cir. 1983) (stating that bankruptcy courts' broad equitable powers may only be exercised in manner which is consistent with provisions of Code); *Andresen*, 232 B.R. at 131 (stating that bankruptcy courts can only exercise equitable powers within confines of Bankruptcy Code); *Taylor*, 223 B.R. at 754 (stating that courts cannot use equitable powers to displace clear statutory language).

[165] *See Andresen*, 232 B.R. at 136 (stating that partial discharges constitute judicial tinkering which causes unpredictability and lack of uniformity); *Taylor*, 223 B.R. at 753-754 (stating that Congress, not bankruptcy courts, should determine whether to allow for partial discharges of student loans); *Skaggs*, 196 B.R. at 867 (stating that courts are not granted power to remedy perceived defects in legislation by failure of Congress to legislate precisely or equitably); Hawkins v. Buena Vista College (*In re* Hawkins), 187 B.R. 294, 301 (Bankr. N.D. Iowa 1995) (stating that rewriting loan would effectively convert case to reorganization case without procedural and substantive safeguards provided in Chapter 13); *see also Hornsby*, 144 F.3d at 433-40 (granting partial discharge via equitable powers). *See generally* Salvin, *supra* note 8, at 170-71 (stating that courts fill empty undue hardship vessel with whatever policy objectives they deem appropriate).

[166] *See* Bates v. United States, 522 U.S. 23, 32-33 (1997) (indicating that Congress, not courts, must respond to statutes that lead to arbitrary results); *Taylor*, 223 B.R. at 754 (stating that courts cannot override statutory provisions); *Skaggs*, 196 B.R. at 867 (stating that Congress should deal with any perceived bad policy).

[167] *See Andresen*, 232 B.R. at 136 (stating that partial discharges illustrate unpredictability and lack of uniformity in this area of law); *Taylor*, 223 B.R. at 753 n.13 (stating that partial discharges may provide for more equitable result but that Congress did not provide for them); *Skaggs*, 196 B.R. at 867 (stating that partial discharges constitute judicial lawmaking).

[168] *See Taylor*, 223 B.R. at 754 (analyzing statutory language and then stating that language does not provide for partial discharge); *see also* 11 U.S.C. § 523(a)(8) (providing undue hardship exception).

[169] *See* H.R. REP. NO. 595, at 132 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6093 (stating need to protect loan system's integrity); *see also* Pelkowski v. Ohio Student Loan Comm'n (*In re* Pelkowski), 990 F.2d 737, 743 (3d Cir. 1993) (stating goal of § 523(a)(8) was saving student loan program from insolvency); Dull v. Ohio Student Loan Comm'n (*In re* Dull), 144 B.R. 370, 372 (Bankr. N.D. Ohio 1992) (stating that Congress wanted to preserve financial integrity of student loan system).

would exhaust government funds and thereby limit the public's access to higher education.[170] By limiting debtors' ability to discharge their student loans, Congress hoped to maintain the solvency of the lending program and promote access to higher education.[171] Congress designed the undue hardship exception, therefore, for those who were truly unable to repay their student loans.[172]

Partial discharges may also encourage debtor abuse by circumventing the other congressional objective of section 523(a)(8).[173] Congress was concerned that dishonest students would jeopardize the integrity of the student loan program by filing for bankruptcy shortly after graduation solely to discharge their student loans.[174] If courts allow partial discharges, students may file bankruptcy shortly after graduation to have their loan obligations partially discharged.[175] Allowing judges to discharge a portion of the student loan debt of able debtors undermines

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[170] *See* H.R. REP. NO. 595, at 133, *reprinted in* 1978 U.S.C.C.A.N. at 6094 (stating that dishonest debtors may cripple student loan program); *see also Pelkowski*, 990 F.2d at 743 (describing congressional purpose of § 523(a)(8)); *In re* Dull, 144 B.R. at 372 (stating that Congress passed student loan exception to discourage debtor dishonesty). Concerns over the student loan system's viability are present today. *See* NAT'L BANKR. REV. COMM'N: THE NEXT TWENTY YEARS: FINAL REPORT, 1.4.5, chapter 5 (1997) [hereinafter COMMISSION REPORT] (noting that solvency of student loan program is concern today). U.S. Secretary of Education Richard W. Riley stated that the goals of the student loan system are safeguarding tax dollars while helping people go to school. *See Statement of U.S. Secretary of Education Richard W. Riley Regarding Student Loan Default Rates*, Oct. 5, 1999, Department of Education Student Loan Web Site (visited January 21, 2000) <http://www.ed.gov/PressReleases/10-1999/rileyregards.html> (on file with author). The dissent of the National Bankruptcy Review Commission stated that non-dischargeability of student loans is necessary for the continued viability of the guaranteed student loan program. *See* COMMISSION REPORT, *supra* note 179, at chapter 5. The dissent stated that non-dischargeability prevents debtor abuse by safeguarding the financial integrity of governmental entities. *See id.* Non-dischargeability helps maintain the solvency of the educational lending program, thereby enlarging the public's access to higher education. *See id.*

[171] *See* H.R. REP. NO. 595, at 133-34, *reprinted in* 1978 U.S.C.C.A.N at 6094-95 (stating that twin goals of legislation are protecting solvency of loan program and preventing debtor dishonesty); *see also Pelkowski*, 990 F.2d at 743 (examining congressional reasons for § 523(a)(8)); *In re* Dull, 144 B.R. at 372 (noting Congress excepted student loans from discharge to protect solvency of student loan program).

[172] *See* H.R. REP. NO. 595, at 136, *reprinted in* 1978 U.S.C.C.A.N at 6097 (stating that able debtors should not discharge their loans); *see also Pelkowski*, 990 F.2d at 743-44 (stating that financial integrity of loan program outweighs debtors' fresh start); *In re* Dull, 144 B.R. at 372 (stating that ordinary hardship is not sufficient for discharge).

[173] H.R. REP. NO. 595, at 136, *reprinted in* 1978 U.S.C.C.A.N at 6097.

[174] *Id.*

[175] *Id.*

the integrity of the student loan program.[176] Therefore, the Sixth Circuit's policy argument that courts should give debtors the benefit of a fresh start by granting partial discharges is contrary to the congressional intent of the statute.[177]

Additionally, expanding debtors' fresh starts through partial discharges is contrary to the clear congressional trend towards non-dischargeability in bankruptcy.[178] Since 1978, Congress has gradually tightened the ability of students to discharge their student loan debts.[179] The tightening culminated in 1998 when Congress eliminated the seven-year discharge rule, leaving undue hardship as the only means to discharge student loans.[180]

Moreover, Congress recently began a major overhaul of the bankruptcy system by passing legislation that makes it harder for individuals to discharge their debts.[181] Debtors will no longer receive

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[176] *Compare, e.g.*, Tennessee Student Assistance Corp. v. Hornsby (*In re* Hornsby), 144 F.3d 433, 440 (6th Cir. 1998) (granting partial discharge to debtors despite monthly disposable income of approximately $280 to further fresh start), *with* H.R. REP. NO. 595, at 136, *reprinted in* 1978 U.S.C.C.A.N. at 6095 (stating that able debtors should not discharge their loans). *See generally Pelkowski*, 990 F.2d at 743-44 (stating that financial integrity of loan program outweighs debtors' fresh start).

[177] *Compare Hornsby*, 144 F.3d at 440 (arguing that courts should give debtors fresh start by granting partial discharges of their student loans), *with* H.R. REP. NO. 595, at 132 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6093 (stating that purpose of § 523(a)(8) is to maintain solvency of student loan program).

[178] See Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1837 (1998) (codified as amended at 11 U.S.C. § 523(a)(8)) (striking seven-year repayment exception); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3007(b), 104 Stat. 1388 (codified at 11 U.S.C. § 1328(a)) (stating that § 523(a)(8) applies to Chapter 13 cases); *see also* Kapinos v. Graduate Loan Ctr. (*In re* Kapinos), 243 B.R. 273, 276 (Bankr. W.D. Va. 2000) (discussing congressional limitation of discharge and noting pattern shows obvious congressional tendency to tighten gaps through which students could avoid loan repayment); Richard E. Coulson & Alvin C. Harrell, *Consumer Bankruptcy Developments*, 54 BUS. LAW. 1433, 1445 (1999) (stating that Congress has tightened debtors' ability to discharge their debts).

[179] *See* Higher Education Amendments, 112 Stat. at 1837 (eliminating seven-year rule); Omnibus Budget Reconciliation Act § 3007(b) (applying § 523(a)(8) to Chapter 13 cases); *see also Kapinos*, 243 B.R. at 276 (noting trend toward no exceptions to non-dischargeability); Coulson & Harrell, *supra* note 187, at 1445 (noting congressional trend toward non-dischargeability).

[180] *See* Higher Education Amendments, 112 Stat. at 1837 (striking seven-year repayment exception); *see also Kapinos*, 243 B.R. at 276 (noting that undue hardship is now only means to discharge student loans); Douglass v. Great Lakes Higher Educ. Servicing Corp. (*In re* Douglas), 237 B.R. 652, 653 (Bankr. N.D. Ohio 1999) (noting that historically Congress has intentionally and progressively made it more difficult for debtors to discharge their student loan obligations in bankruptcy).

[181] S. Res. 625, 107th Cong. (2000) (enacted, now in joint committee, providing for means-based bankruptcy system); H.R. Res. 833, 106th Cong. (1999) (enacted, now in joint

automatic discharges.[182] The new legislation subjects debtors to a means test to determine how much relief they need.[183] Debtors with ample surplus income will make monthly payments to reduce their debt.[184] Thus, the congressional trend indicates that Congress does not want courts to expand a debtor's fresh start by discharging previously non-dischargeable debt through partial discharges.[185] Accordingly, the Sixth Circuit incorrectly disregarded the congressional intent of section 523(a)(8) and its clear trend towards non-dischargeability by allowing partial discharges.[186]

Despite the negative effect partial discharges may have on the student loan program, some legal commentators argue that Congress should not treat student loans differently from any other dischargeable debt.[187] They question why student loan lenders share the same treatment with victims of fraud or marital dependents.[188] For instance, the National

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committee, providing for means-based bankruptcy system); *see also Senate Overhaul*, *supra* note 2 (stating that Congress recently passed legislation to overhaul bankruptcy system); Donald L. Barlett & James B. Steele, *Soaked by Congress*, TIME, May 15, 2000, at 66 [hereinafter *Soaked by Congress*] (explaining means test).

[182] *See* S. Res. 625 (eliminating automatic discharge); H.R. Res. 833 (eliminating automatic discharge); *see also Senate Overhaul*, *supra* note 2 (stating that automatic discharge is no longer available).

[183] *See* S. Res. 625 (providing means-based test); H.R. Res. 833 (providing means-based test); *see also Senate Overhaul*, *supra* note 2 (stating that means test replaces Chapter 7 automatic discharge).

[184] *See* S. Res. 625 (providing repayment plan for able debtors); H.R. Res. 833 (providing repayment plan for able debtors); *see also Senate Overhaul*, *supra* note 2 (stating that bankruptcy laws will no longer allow able debtors discharge relief).

[185] *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. at 1837 (1998) (codified as amended at 11 U.S.C. § 523(a)(8) (striking seven-year repayment exception); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3007(b), 104 Stat. 1388 (codified at 11 U.S.C. § 1328(a)) (applying non-dischargeability rules to Chapter 13 cases); S. Res. 625 (providing repayment plan for able debtors); H.R. Res. 833 (providing repayment plan for able debtors; *see also Douglass*, 237 B.R. at 654 (noting that Congress has made it more difficult for debtors to discharge student loan obligations in bankruptcy).

[186] *Compare* Tennessee Student Assistance Corp. v. Hornsby (*In re* Hornsby), 144 F.3d 433, 440 (6th Cir. 1998) (granting partial discharge), *with* S. Res. 625 (tightening fresh start requirements), *and* H.R. Res. 833 (eliminating automatic discharge), *and* H.R. REP. NO. 595, at 132-33 (1978), *reprinted in* 1978 U.S.C.C.A.N. at 6093-94 (stating that purpose of § 523(a)(8) is to maintain solvency of student loan program).

[187] *See* COMMISSION REPORT, *supra* note 179, at 1.4.5 (arguing that Congress should repeal § 523(a)(8) to make student loans dischargeable); Coulson & Harrell, *supra* note 187, at 1444 (arguing that student loans are no different from other dischargeable debt); *see also* Morea, *supra* note 29, at 196-97 (noting that Bankruptcy Review Commission recommends repealing § 523(a)(8)).

[188] *See* COMMISSION REPORT, *supra* note 179, at 1.4.5 (stating that fraud and child support are more important than collecting student loan debt); Coulson & Harrell, *supra* note 187, at 1444 (questioning why student loans are generally non-dischargeable and suggesting as an

Bankruptcy Review Commission recently argued that Congress should repeal section 523(a)(8), thereby making student loan debt dischargeable.[189] The Commission argued that Congress should not place student loans in the same class as taxes, fraud, and drunk driving.[190] The Commission noted that students are not criminals and debts owed to the United States are no more sacred than other obligations.[191]

Nevertheless, the *Brunner* court's articulation of the public policy reasons why bankruptcy should treat student loans different than other loans remains applicable today.[192] The guaranteed student loan program offers loans almost without regard to credit worthiness, thereby allowing those who ordinarily would not receive loans to receive government guaranteed student loans.[193] Although the student has no collateral to justify the loan, the loan represents an investment in the borrower's future ability to generate income.[194]

Based on the above, the Ninth Circuit's all or nothing rule prohibiting partial discharges is the correct statutory interpretation of section 523(a)(8).[195] Furthermore, it conforms with Congress's intent of

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alternative solution increasing rigor in underwriting system).

[189] *See* COMMISSION REPORT, *supra* note 179, at 1.4.5 (releasing report calling for dischargeability of student loan debt in 1997); *see also* Coulson & Harrell, *supra* note 187, at 1444 (noting that Commission recommends dischargeable student loan system).

[190] *See* COMMISSION REPORT, *supra* note 179, at 1.4.5 (arguing that reasons for initial exception are no longer applicable).

[191] *See id.* (stating that student loan debt is no more holy than other debts).

[192] *See* Brunner v. New York State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 756 (S.D.N.Y 1985) (stating that student loans deserve greater protection because of nature of student loans); H.R. REP. NO. 595, at 156-67 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6117-18 (stating that student loan is fundamental different type of obligation); COMMISSION REPORT, *supra* note 179, at chapter 5 (dissent) (arguing that nature of student loan debt necessitates special treatment); *see also* Morea, *supra* note 29, at 196-97 (stating that lenders distribute student loans more liberally than other types of credit and it is therefore contended that they deserve added protection).

[193] *See* 20 U.S.C. § 1071 (1994 & Supp. V 1999) (providing for Stafford Loan Program); COMMISSION REPORT, *supra* note 179, at chapter 5 (stating that student loan program offers loans contrary to general lending practices). *See generally Brunner*, 46 B.R. at 756 (stating that government gives loans to individuals who ordinarily could not receive loans).

[194] *See* COMMISSION REPORT, *supra* note 179, at chapter 5 (stating that lenders grant student loans counting on borrower's ability to utilize education). *See generally Brunner*, 46 B.R. at 756 (stating that lender expects borrower to use educational training to pay back loan). College Board President Gaston Capteron stated that a four-year college degree doubles the earnings of a high school graduate. *See* Levinson, *supra* note 3, at 17. He stated that the average high school graduate earns $30,000 a year while the average college graduate earns $60,000 a year. *See id.* He noted that this $30,000 difference over a 40-year career equals $1.2 million. *See id.*

[195] *See* text *supra* part II.

protecting the integrity of the student loan program.[196] The Sixth Circuit's allowance of partial discharges circumvents the clear language and congressional intent of section 523(a)(8).[197] The Sixth Circuit's desire to give student loan debtors a fresh start via partial discharges is misplaced because it neglects the special nature of student loan debt and the clear congressional trend towards tightening debtors' ability to discharge their debts.[198] Therefore, courts should follow the Ninth Circuit's approach and refuse to grant partial discharges.[199]

The current split between the Sixth and Ninth Circuits over partial discharges illustrates the problems with the undue hardship exception.[200] Even if all the circuits applied the Ninth Circuit's all or nothing rule, courts would still reach disparate results because of the ambiguous and

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[196] *Compare* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (stating that courts should enforce statute's plain language), *and* H.R. REP. NO. 595, at 133-34 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6094-95 (stating need to protect loan system's integrity), *with Taylor*, 223 B.R. at 753 (holding that partial discharges violate clear language of statute and undermine Congress's intent). *See generally* 11 U.S.C. § 523(a)(8) (1994 & Supp. V 1999) (providing undue hardship exception).

[197] *Compare* Tennessee Student Assistance Corp. v. Hornsby (*In re* Hornsby), 144 F.3d 433, 440 (6th Cir. 1998) (granting partial discharge), *with* Bates v. United States, 522 U.S. 23, 29-30 (1997) (stating that where Congress has failed to include language in statutes, it is presumed to be intentional when phrase is used elsewhere in Code), *and Taylor*, 223 B.R. at 752-54 (holding that Bankruptcy Code does not provide for partial discharges), *and* H.R. REP. NO. 595, at 133-34, *reprinted in* 1978 U.S.C.C.A.N. at 6094-95 (discussing necessity of preserving financial integrity of student loan system by closing loopholes). *See generally* 11 U.S.C. § 523(a)(8); Pelkowski v. Ohio Student Loan Comm'n (*In re* Pelkowski), 990 F.2d 737, 745 (3d Cir. 1993) (stating that where Congress has revealed intent to limit discharge of student loans courts can construe provision no more narrowly than language and legislative history allows).

[198] *Compare Hornsby*, 144 F.3d at 440 (stating that partial discharges further debtors' fresh start), *with Brunner*, 46 B.R. at 756 (explaining special nature of student loan debt), *and* S. Res. 625, 107th Cong. (2000) (eliminating automatic discharge), *and* H.R. Res. 833, 106th Cong. (1999) (providing for means-based bankruptcy system).

[199] *See Taylor*, 223 B.R. at 752 (stating that entire loan is either non-dischargeable or dischargeable on basis of undue hardship); Andresen v. Nebraska Student Loan Program, Inc. (*In re* Andresen), 232 B.R. 127, 129 (B.A.P. 8th Cir. 1999) (stating that dischargeability is arguably an all or nothing proposition); Brown v. Sallie Mae Servicing Corp. (*In re* Brown), 227 B.R. 540, 547 (Bankr. S.D. Cal. 1998) (stating that partial discharges are not appropriate because Congress failed to specify discharge "to the extent" that debt will cause undue hardship); Hawkins v. Buena Vista College (*In re* Hawkins), 187 B.R. 294, 300-01 (Bankr. N.D. Iowa 1995) (stating that § 523(a)(8) does not authorize courts to fashion partial discharges).

[200] *Compare Hornsby*, 144 F.3d at 440 (granting partial discharge without addressing statute's plain language or Congress's intent), *with Taylor*, 223 B.R. at 755 (reversing bankruptcy court's decision because partial discharges are contrary to plain language and congressional intent of statute). *See generally* 11 U.S.C. § 523(a)(8) (providing undue hardship exception).

undefined undue hardship exception.[201] Indeed, courts have reached inconsistent results when interpreting its meaning.[202] The current split over partial discharges is a symptom of a larger problem: namely, the undue hardship exception is simply unworkable.[203] Correctly resolving the circuit split over partial discharges is not possible without addressing the problematic undue hardship exception.[204]

III. CONGRESS SHOULD AMEND SECTION 523(A)(8) TO PROVIDE FOR THE NON-DISCHARGEABILITY OF STUDENT LOANS IN BANKRUPTCY BECAUSE THE UNDUE HARDSHIP EXCEPTION IS UNWORKABLE

The undue hardship exception constitutes an unworkable approach to handling student loan debt in bankruptcy.[205] First, courts applying the same undue hardship test reach inconsistent results, thereby undermining the uniformity and efficiency of bankruptcy law in this area.[206] Second, the undue hardship exception's inherent ambiguity permits judges to depart inappropriately from their role as judicial

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[201] *Compare, e.g., Brunner*, 46 B.R. at 757-58 (applying all or nothing rule and refusing to grant debtor with no disposable income discharge), *with Brown*, 227 B.R. at 543, 548 (applying all or nothing rule and granting debtor with over $330 of disposable income discharge). *See generally* 11 U.S.C. § 523(a)(8) (providing undue hardship exception).

[202] *See* 11 U.S.C. § 523(a)(8) (providing undue hardship exception but not defining its meaning); *see also Andresen*, 232 B.R. at 137 (noting that undue hardship is not defined in Bankruptcy Code); *Taylor*, 223 B.R. at 754 (stating that Congress did not define undue hardship when it enacted § 523(a)(8) thereby leaving courts to determine its meaning). *Compare, e.g., Brunner*, 46 B.R. at 757-58 (denying discharge to debtor who made no payments on her loan because she may have successful career), *with Brown*, 227 B.R. at 543, 548 (granting discharge to debtor who made no payments on his loan and not requiring debtor to seek higher paying career despite eight years of higher education).

[203] *See* 11 U.S.C. § 523(a)(8) (providing undue hardship exception); *Hornsby*, 144 F.3d at 440 (granting partial discharge); *Taylor*, 223 B.R. at 753 (holding that partial discharges are not provided by statute). *See generally* COMMISSION REPORT, *supra* note 179, at 1.4.5 (arguing that Congress should eliminate confusing undue hardship exception).

[204] *See* 11 U.S.C. § 523(a)(8) (providing undue hardship exception); *Hornsby*, 144 F.3d at 440 (granting partial discharge); *Taylor*, 223 B.R. at 753 (holding that statute does not provide for partial discharges). *See generally* COMMISSION REPORT, *supra* note 179, at 1.4.5 (arguing that undue hardship exception is unworkable); Coulson & Harrell, *supra* note 187, at 1445 (arguing that there is no certainty in area of undue hardship).

[205] *See* COMMISSION REPORT, *supra* note 179, at 1.4.5 (stating that undue hardship exception leads to unacceptable diversity of results); Coulson & Harrell, *supra* note 187, at 1445 (arguing that undue hardship exception leads to unacceptable results).

[206] *Compare, e.g., Brunner*, 46 B.R. at 757-58 (holding debtor's student loans non-dischargeable because debtor failed to make single payment on loan and had successful future ahead), *with Brown*, 227 B.R. at 543, 548 (holding debtor's student loans dischargeable despite failure to make single payment or maximize income). *See generally* COMMISSION REPORT, *supra* note 179, at 1.4.5 (stating that bankruptcy system should treat debtors uniformly to avoid inconsistent results).

officers to act as social workers.[207] Replacing the undue hardship exception with a bright-line rule of non-dischargeability coupled with the Department of Education's Income Contingent Repayment Plan will bring uniformity and efficiency to this area of bankruptcy law while adequately balancing the needs of debtors, creditors, and the federal student loan program.[208]

A. Contrary Interpretations of Undue Hardship Cause Disparity and Inefficiency

The undue hardship exception is unworkable because courts reach inconsistent results when they apply the exception.[209] Section 523(a)(8) provides that courts will discharge student loans if excluding such debt from discharge imposes an undue hardship on the debtor and the debtor's dependents.[210] Inconsistent judicial determinations of undue hardship undermine the uniformity and efficiency of bankruptcy law.[211]

Comparing the *Brunner* case with the *Brown* case illustrates the inconsistent treatment of debtors under the *Brunner* test.[212] The *Brunner* court denied Brunner a discharge because the court held that she had a successful future ahead of her.[213] In addition, the court held that Brunner had not acted in good faith by failing to make any payments on her student loan debt.[214] In contrast, the *Brown* court granted Brown a

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[207] *See* Coulson & Harrell, *supra* note 187, at 1445 (noting that virtually standardless job of lifestyle determinations is forced on bankruptcy judges); Salvin, *supra* note 8, at 150 (indicating that judges act as administrative officers when they adjudicate § 523(a)(8) claims); Interview with John D. Ayer, *supra* note 17 (stating that undue hardship exception imposes subjective decision-making on judges).

[208] *See* COMMISSION REPORT, *supra* note 179, at 1.4.5 (stating that bright-line rule will bring uniformity and consistency); Coulson & Harrell, *supra* note 187, at 1445 (stating that undue hardship standard lacks uniformity and consistency); *infra* text accompanying note 298 (proposing model solution); 34 C.F.R. § 685.209 (1999) (providing ICRP plan).

[209] *Compare, e.g.*, *Brunner*, 46 B.R. at 758 (holding loan non-dischargeable because debtor failed to make single payment), *with Hornsby*, 144 F.3d at 440 (granting partial discharge despite monthly surplus of approximately $280), and *Brown*, 227 B.R. at 547-48 (holding loan dischargeable despite monthly surplus of $330 and failure to make single payment).

[210] 11 U.S.C. § 523(a)(8) (1994 & Supp. V 1999) (providing undue hardship exception).

[211] *See* COMMISSION REPORT, *supra* note 179, at 1.4.5 (stating that bankruptcy law should treat debtors uniformly); Coulson & Harrell, *supra* note 187, at 1445 (stating current system is inconsistent and inefficient).

[212] *Compare Brunner*, 46 B.R. at 757 (holding debtor's student loans non-dischargeable because debtor failed to make single payment and may have bright future), *with Brown*, 227 B.R. at 547 (holding debtor's student loans dischargeable despite income surplus and potential for success).

[213] *Brunner*, 46 B.R. at 757-58 (describing debtor's career prospects).

[214] *Id.* at 755 (discussing whether Brunner satisfied good faith prong).

discharge even though he did not use his educational training to find a higher paying job or make any payments on his student loan debt before seeking a discharge of the debt in bankruptcy.[215]

The *Brown* and *Brunner* courts' application of the minimal expenses and repayment prong is inconsistent.[216] Both courts found that the debtors could not meet their minimal expenses and pay back their loans.[217] Nevertheless, these determinations are inconsistent because Brown had a surplus of $334 a month to pay his loan debt and received a discharge, while Brunner had little if any surplus but did not receive a discharge.[218] Brown could have paid some of his loan debt every month.[219] The *Brown* court, however, found that his minimal expenses exceeded his ability to pay.[220]

The *Brown* and *Brunner* courts also reached inconsistent results in applying the second prong of the *Brunner* test.[221] Brown had marketable job skills with a potential to make more money given his background in finance, law, and the military.[222] Additionally, Brown had the advantage of having his wife available to contribute to meet the family's expenses.[223] Despite Brown's potential for success, the *Brown* court found that he had no obligation to work more hours or find a higher paying job.[224] The court held that his financial situation was likely to continue, thereby satisfying the second prong.[225]

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[215] *Brown*, 227 B.R. at 545-46 (stating that debtor did not have to find part-time work or enter more lucrative field).

[216] *Compare Brunner*, 46 B.R. at 757-58 (holding that debtor could not meet monthly expenses and still repay loan), *with Brown*, 227 B.R. at 545-46 (holding that debtor satisfied first prong despite monthly surplus).

[217] *Brunner*, 46 B.R. at 757-58 (holding that debtor satisfied first prong because she had little disposable income); *Brown*, 227 B.R. at 545-46 (holding that despite monthly surplus debtor satisfied first prong).

[218] *Compare Brunner*, 46 B.R. at 757 (stating that debtor could barely meet her monthly expenses), *with Brown*, 227 B.R. at 544-45 (stating that Brown had monthly surplus in excess of $300).

[219] *Brown*, 227 B.R. at 544-45 (noting that Brown could made over $300 monthly payment to student loan lender).

[220] *Id.* at 544-45 (finding that Brown should not pay loan despite monthly surplus).

[221] *Compare Brunner*, 46 B.R. at 757 (stating that debtor's situation was likely to change because of degree), *with Brown*, 227 B.R. at 544-45 (stating that debtor's situation was likely to continue and that debtor had no obligation to find utilize degree).

[222] *Brown*, 227 B.R. at 544-45 (noting that Brown had over eight years of higher education).

[223] *Id.* at 545-46 (describing Brown's family).

[224] *Id.* at 546 (discussing Brown's obligation to find other work).

[225] *Id.* (stating that Brown had no obligation to find higher paying job and his situation was not likely to improve in future).

In contrast, Brunner, a recent college graduate who suffered from depression and collected public assistance, had just entered the low paying field of social work.[226] The *Brunner* court found that she had marketable skills and the potential to pay off her loans.[227] Nonetheless, the *Brunner* court held that she did not satisfy the second prong because her circumstances were likely to change.[228] This conclusion is clearly inconsistent with the reasoning in *Brown*, where the court looked solely at the debtor's current employment status without imputing a likelihood of changed circumstances based on educational training.[229]

The *Brown* court's application of the good faith prong is also inconsistent with *Brunner*.[230] The *Brunner* court held that the debtor did not act in good faith because she failed to make a single payment and filed for bankruptcy when her debt became due.[231] Like Brunner, Brown never made a single payment on his student loans.[232] The *Brown* court found, however, that Brown satisfied the good faith prong because he asked for forbearances.[233] This artificial distinction hardly seems sufficient to change the outcome, yet it constitutes the main difference between the two cases.[234] Distinguishing the two cases based solely on Brunner's failure to seek a forbearance is unfair because Brunner could have easily qualified for a forbearance.[235] Under the *Brown* court's reasoning, Brunner would have received a discharge after satisfying this insignificant procedural requirement.[236] These inconsistent outcomes,

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[226] *Brunner*, 46 B.R. at 756 (stating that Brunner recently received Master's degree in social work).

[227] *Id.* at 758.

[228] *Id.* (stating that debtor's circumstances were likely to change despite poor job market).

[229] *Compare id.* at 757 (stating that debtor had obligation to use her degree), *with Brown*, 227 B.R. at 544-45 (stating that debtor had no obligation to find higher paying job despite over $90,000 in student loan debt.)

[230] *Compare Brunner*, 46 B.R. at 758 (stating that debtor failed good faith prong because she failed to make single payment on her debt), *with Brown*, 227 B.R. at 546-47 (stating that debtor satisfied good faith despite failing to make any payments on debt).

[231] *See Brunner* 46 B.R. at 753 (stating that debtor filed for bankruptcy seven months after her loans became due).

[232] *Id.* (stating that debtor made no payments on student loans); *Brown*, 227 B.R. at 546 (stating that debtor made no payments on loans).

[233] *Brown*, 227 B.R. at 547 (stating that forbearances satisfied good faith prong).

[234] *Compare Brunner*, 46 B.R. at 758 (stating that debtor did not seek forbearance option), *with Brown*, 227 B.R. at 547 (stating that forbearances demonstrate good faith).

[235] *See Brunner*, 46 B.R. at 757 (stating that debtors can obtain forbearances as matter of right for two years).

[236] *See Brown*, 227 B.R. at 547 (stating that receiving forbearances satisfied good faith prong).

based on the same undue hardship test, demonstrate the lack of uniformity by courts in determining undue hardship.[237]

Other judicial determinations of the dischargeability of student loans have differed significantly, further undermining the goals of uniformity and efficiency in this area of bankruptcy law.[238] For instance, courts use different undue hardship tests.[239] Additionally, as discussed earlier, some courts allow partial discharges and other payment modifications.[240] Finally, some courts apply the undue hardship exception to loans individually instead of in the aggregate.[241] Divergent court treatment of student loans in bankruptcy violates the goal of uniformity and efficiency in the law.[242]

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[237] *Compare, e.g., Brunner*, 46 B.R. at 758 (denying discharge on grounds that debtor had bright future and failed to make any payments), *with Brown*, 227 B.R. at 547-48 (granting discharge despite potential for success and failure to make any payments).

[238] *See, e.g.*, Tennessee Student Assistance Corp. v. Hornsby (*In re* Hornsby), 144 F.3d 433, 440 (6th Cir. 1998) (allowing partial discharges); Andresen v. Nebraska Student Loan Program, Inc. (*In re* Andresen), 232 B.R. 127, 140 (B.A.P. 8th Cir. 1999) (applying *Brunner* test to individual student loans); *Brunner*, 46 B.R. at 756 (applying undue hardship test to student loans in aggregate); *see also* COMMISSION REPORT, *supra* note 179, at 1.4.5 (stating that bankruptcy courts have applied undue hardship exception unevenly); Morea, *supra* note 29, at 194, 199 (noting lack of uniformity concerning allowance of partial discharges); Salvin, *supra* note 8, at 170-71 (stating that courts disagree as to degree of hardship required); *Exceptions to Discharge*, *supra* note 115, at D4 (noting wide disparity among treatments of student loans).

[239] *See* Andrews v. South Dakota Student Loan Assistance Corp. (*In re* Andrews), 661 F.2d 702, 702-05 (8th Cir. 1981) (using totality of circumstances test); *Brunner*, 46 B.R. at 756 (using *Brunner* test); Bryant v. Pennsylvania Higher Educ. Assistance Agency (*In re* Bryant), 72 B.R. 913, 916-17 (Bankr. E.D. Pa. 1987) (using federal poverty guidelines to determine dischargeability); Pennsylvania Higher Educ. Assistance Agency v. Johnson (*In re* Johnson), 5 B.R. 532 (Bankr. E.D. Pa. 1979) (using *Johnson* test); *see also Andresen*, 232 B.R. at 137 (stating that courts have developed many undue hardship tests over last two decades); Taylor v. United Student Aid Funds Inc. (*In re* Taylor), 223 B.R. 747, 754 (B.A.P. 9th Cir. 1998) (stating that there are different tests to determine whether debtors satisfy undue hardship exception).

[240] *See Hornsby*, 144 F.3d at 440 (allowing partial discharges); Rivers v. United Student Aid Funds, Inc. (*In re* Rivers), 213 B.R. 616, 621 (Bankr. S.D. Ga. 1997) (granting partial discharge); *see also Andresen*, 232 B.R. at 129-31 (noting that many bankruptcy courts allow partial discharges or other modifications to loan terms); *Taylor*, 223 B.R. at 753-54 (recognizing split in courts over allowance of partial discharges).

[241] *See Andresen*, 232 B.R. at 128 (concluding that § 523(a)(8) applies to each student loan individually and not to aggregate obligation of student loan debt); Hinkle v. Wheaton College (*In re* Hinkle), 200 B.R. 690, 693 (Bankr. W.D. Wash. 1996) (stating that bankruptcy courts can treat each loan separately for purposes of discharge); *see also Exceptions to Discharge*, *supra* note 115, at D4. (stating that *Andresen* court applied § 523(a)(8) to student loans individually and not in aggregate).

[242] *See, e.g., Hornsby*, 144 F.3d at 440 (allowing partial discharges in Sixth Circuit); *Andresen*, 232 B.R. at 129 (applying *Brunner* test to individual student loans in Eighth Circuit); *Rivers*, 213 B.R. at 619 (granting partial discharge in Southern District Bankruptcy

The goal of uniformity in the law requires the consistent treatment of debtors in this area of bankruptcy.[243] Thus, bankruptcy law should treat two similarly situated debtors uniformly.[244] Courts should not treat debtors differently depending upon what circuit they reside in or which bankruptcy judge handles their case.[245] Lack of uniformity encourages forum shopping and contributes to the public's loss of faith in the bankruptcy laws because of their arbitrary nature.[246]

The undue hardship exception is also inefficient.[247] Attorneys find it difficult to predict whether their clients' situations fit within the exception because of inconsistent judicial determinations of undue hardship.[248] This uncertainty results in a large amount of litigation because attorneys can never be sure whether courts will discharge their clients' student loans.[249] Moreover, undue hardship litigation ties up

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Court of Georgia); *Brunner*, 46 B.R. at 756-58 (applying undue hardship test to student loans in aggregate in Second Circuit); *see also* Salvin, *supra* note 8, at 149 (noting that each bankruptcy court has its own interpretation of undue hardship).

[243] *See Andresen*, 232 B.R. at 129 (stating that there is wide disparity among treatment of student loans by courts and that courts should avoid unpredictable and dissimilar outcomes); COMMISSION REPORT, *supra* note 179, at 1.4.5 (stating that bankruptcy courts need to have uniform approach to student loan debt); *see also* Morea, *supra* note 29, at 194 (arguing for unified equitable approach).

[244] *See Andresen*, 232 B.R. at 136 (stating that bankruptcy courts should avoid disparity and arbitrary decisions); COMMISSION REPORT, *supra* note 179, at 1.4.5 (stating that bankruptcy laws should treat debtors uniformly); Morea, *supra* note 29, at 194 (stating that goal of uniformity of law dictates that there be uniformity in this area of bankruptcy).

[245] *See Andresen*, 232 B.R. at 136 (stating that courts should treat debtors consistently); COMMISSION REPORT, *supra* note 179, at 1.4.5 (stating that courts should treat similarly situated debtors uniformly); Morea, *supra* note 29, at 194 (stating that bankruptcy law needs unified approach).

[246] *See* H.R. REP. NO. 595, at 155 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6116 (stating that undue hardship standard may encourage forum shopping); COMMISSION REPORT, *supra* note 179, at 1.4.5, chapter 5 (stating that lack of uniformity may lead to forum shopping); Coulson & Harrell, *supra* note 187, at 1445 (noting that arbitrary nature of undue hardship exception leaves debtors confused).

[247] *See* COMMISSION REPORT, *supra* note 179, at 1.4.5 (explaining that bright-line rule will eliminate lengthy court determinations of undue hardship and eliminate confusion and non-uniformity of decisions); Coulson & Harrell, *supra* note 187, at 1445 (noting that undue hardship exception is inefficient).

[248] *See* COMMISSION REPORT, *supra* note 179, at 1.4.5 (stating that bright-line rule will lead to greater certainty for attorneys); Coulson & Harrell, *supra* note 187, at 1445 (noting that attorneys find it difficult to advise their clients on whether courts may discharge their loans).

[249] *See* COMMISSION REPORT, *supra* note 179, at 1.4.5 (stating that bright-line rule will reduce litigation in this area of bankruptcy); Coulson & Harrell, *supra* note 187, at 1443 (noting that student loans continue to generate litigation as student loan debt continues to rise with cost of higher education).

judicial resources because judges have to analyze the undue hardship factors.[250] Even if a court discharges a particular debtor's student loans, attorneys cannot advise their clients definitively regarding the dischargeability of student loans because of the subjective nature of the exception.[251]

While opponents agree that a bright-line discharge or non-discharge rule will provide uniformity and efficiency, they argue that making student loans non-dischargeable will hurt debtors who currently meet the undue hardship exception.[252] These commentators contend that without the protection of the undue hardship exception, student loan debt will oppress hardship debtors, thereby ruining their fresh start.[253] Under a non-discharge rule, however, outstanding student loan debt would not truly harm debtors.[254]

The Department of Education's Income Contingent Repayment Plan adequately addresses the needs of debtors burdened by non-dischargeable student loan debt.[255] The ICRP bases a debtor's monthly

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[250] *See* COMMISSION REPORT, *supra* note 179, at 1.4.5 (noting that bright-line rule would free up judicial resources); Coulson & Harrell, *supra* note 187, at 1445 (stating that judges have to apply standardless standard).

[251] *See* COMMISSION REPORT, *supra* note 179, at 1.4.5 (noting that bright-line rule would end guess-work); Coulson & Harrell, *supra* note 187, at 1445 (stating that it is difficult to make any generalizations in this area of law).

[252] *See* COMMISSION REPORT, *supra* note 179, at 1.4.5 (advocating bright-line dischargeable rule to treat student loan debt like other debt); *see also* Morea, *supra* note 29, at 201-202 (stating that partial discharges are necessary to guard against all or nothing approach); Salvin, *supra* note 8, at 170 (arguing that student loan discharge helps debtors with exceptional circumstances).

[253] *See* COMMISSION REPORT, *supra* note 179, at 1.4.5 (arguing that excepting student loan debt from discharge prevents fresh start); *see also* Morea, *supra* note 29, at 205 (stating that unified partial discharge approach furthers fresh start policy); Salvin, *supra* note 8, at 173 (stating that courts need discretion to help exceptional debtors receive fresh starts).

[254] *See* 34 C.F.R. § 685.209 (1999) (providing for income contingent repayment plan); *see also* Chambers v. National Payment Ctr. (*In re* Chambers), 239 B.R. 767, 770 (Bankr. N.D. Ohio 1999) (stating that income contingent repayment plan requires debtors to pay what they can afford); *Exit Counseling Guide for Borrowers*, Department of Education Student Loan Web Site (visited 1/21/2000)www.ed.gov/DirectLoan/pubs/exitborr/exb7.html (on file with author) [hereinafter *Exit Counseling Guide*] (stating that income contingent repayment plan gives borrowers flexibility to meet their student loan obligations).

[255] *See* 34 C.F.R. § 685.209 (1999) (providing for income contingent repayment plan); *see also Chambers*, 239 B.R. at 770 (noting availability of ICRP as alternative to discharge); Douglass v. Great Lakes Higher Educ. Servicing Corp. (*In re* Douglass), 237 B.R. 652, 657 (Bankr. N.D. Ohio 1999) (noting Department of Education repayment plan); Morea, *supra* note 29, at 207 (noting that Department of Education repayment plan allows debtors to pay student loan as percentage of income, thereby, making debt manageable and reducing defaults); *Exit Counseling Guide*, *supra* note 263 (stating that ICRP helps prevent undue financial hardship). *But see* Kopf v. Department of Education (*In re* Kopf), 245 B.R. 731, 732-

student loan payment on the debtor's income, the total amount of loans borrowed, and the Federal Poverty Guidelines.[256] As the debtor's income rises or falls each year, the Department of Education adjusts monthly payments accordingly.[257] Under the ICRP, debtors who do not have the ability to pay their student loans will not have to pay.[258] However, debtors who eventually have the ability to pay must repay their student loans.[259] Moreover, the Federal Poverty Guidelines provide an objective criterion for evaluating a debtor's minimal monthly expenses.[260]

Under the ICRP, debtors have up to twenty-five years to repay their loans.[261] After twenty-five years, the government discharges any unpaid

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74 (Bankr. D. Me. 2000) (evaluating undue hardship calculus despite ICRP); Thomsen v. Department of Educ. (*In re* Thomsen), 234 B.R. 506, 509-10 (Bankr. D. Mont. 1999) (warning that even if debtor never has to pay, government treats loans discharged after twenty-five years as taxable income, thereby trading one non-dischargeable debt for another). The ICRP became effective July 1, 1996. *See* 34 C.F.R. § 685.209. To be considered for the ICRP, a borrower must give written authorization for the IRS to release certain tax account information to the government for a period of five years. *See id.*

[256] *See* 34 C.F.R. § 685.209 (stating that monthly payments will not exceed twenty percent of debtor's disposable income); *see also Exit Counseling Guide, supra* note 263 (stating that borrower's monthly payment is based upon his annual adjusted gross income ("AGI"), as reported on his federal tax return and total amount of his student loans).

[257] *See* 34 C.F.R. § 685.209 (1999) (providing for monthly repayment plan); *see also Exit Counseling Guide, supra* note 263 (stating that each year Department of Education recalculates borrower's monthly payment based upon borrower's financial condition). The borrower's monthly payment will not exceed twenty percent of the borrower's discretionary income. *See* 34 C.F.R. § 685.209(a)(2). Discretionary income equals the borrower's AGI minus the poverty level for the borrower's family size, as determined by the U.S. Department of Health and Human Services. *See* 34 C.F.R. § 685.209(a)(3). For example, a borrower, with the family size of one and AGI of $15,000, repaying $15,000 in Stafford Loans, has a beginning monthly payment of $105 a month. *See id.*; *Exit Counseling Guide, supra* note 263 (providing examples).

[258] *See* 34 C.F.R. § 685.209 (providing formula to calculate payments); *see also Thomsen*, 234 B.R. at 509-10 (stating that debtor had annual income of $15,984, debt of $20,765.13 and three dependents, ICRP monthly payment was zero dollars); *Exit Counseling Guide, supra* note 263 (stating that ICRP gives borrowers flexibility to meet their student loan obligations without causing undue financial hardship). Where the borrower believes that special circumstances warrant an adjustment to the borrower's repayment obligations despite the ICRP formula, the borrower may contact the Secretary of Education and obtain the Secretary's determination as to whether an adjustment is appropriate. *See* 34 C.F.R. § 685.209; *see also Chambers*, 239 B.R. at 770 (noting that Department of Education may offer relief under ICRP).

[259] *See* 34 C.F.R. § 685.209 (providing formula for calculating monthly payments); *see also Chambers*, 239 B.R. at 770 (noting that debtor had ability within foreseeable future to make some repayment on loan); *Exit Counseling Guide, supra* note 263 (stating that borrower's monthly payment depends upon ability to pay).

[260] *See* U.S. DEPT. OF HEALTH & HUMAN SERVICES, HHS POVERTY GUIDELINES (1999).

[261] *See* 34 C.F.R. § 685.209(a)(4)(iv) (providing discharge after twenty-five years); *see also Exit Counseling Guide, supra* note 263 (stating that maximum repayment period is twenty-

amount.[262] This outcome represents a sound policy that balances the debtor's fresh start with maintaining the integrity of the student loan program.[263]

B. The Undue Hardship Exception Allows Judges to Act as Social Workers Rather than as Judicial Officers

The undue hardship exception is unworkable because it gives judges too much discretion, allowing them to make subjective value choices when applying the exception.[264] Under most undue hardship tests, judges determine what constitutes a debtor's minimal expenses, whether a debtor will be financially impaired in the future, and what constitutes a good faith effort of repayment.[265] A lack of Congressional guidance gives judges unbridled discretion to factor their personal values and sensitivities into these determinations.[266] Consequently, judges treat similarly situated debtors differently, thereby undermining the goal of

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five years).

[262] *See* 34 C.F.R. § 685.209(a)(4)(iv) (providing for automatic discharge); *see also Exit Counseling Guide*, *supra* note 263 (stating that after twenty-five years government discharges unpaid portion, but noting that under current law borrowers have to pay taxes on amount discharged).

[263] *Compare* 34 C.F.R. § 685.209 (providing ICRP), *with* H.R. REP. NO. 95-595, at 132 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6093 (stating that purpose of § 523(a)(8) is to ensure that able debtors pay back their student loans). *See generally Chambers*, 239 B.R. at 770 (noting that debtor who had ability to pay should pay back student loan through ICRP); Morea, *supra* note 29, at 205-07 (noting that Department of Education's repayment plan gives debtors relief from unbearable debt).

[264] *See* Coulson & Harrell, *supra* note 187, at 1445 (criticizing courts for making subjective value determinations); Salvin, *supra* note 8, at 149 (stating that courts subjectively define undue hardship on case-by-case basis); *see also, e.g.*, Lehman v. New York Higher Educ. Servs. Corp. (*In re* Lehman), 226 B.R. 805, 808 (Bankr. D. Vt. 1998) (stating that debtor needs to bend life's clay head on in order to live).

[265] *See* Andrews v. South Dakota Student Loan Assistance Corp. (*In re* Andrews), 661 F.2d 702, 702-05 (8th Cir. 1981) (determining undue hardship based on totality of circumstances, including ability to repay and maintain minimal standard of living); Brunner v. New York State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 756 (S.D.N.Y 1985) (stating that *Brunner* test requires courts to determine debtor's minimal monthly expenses, likelihood of future repayment, and good faith); Pennsylvania Higher Educ. Assistance Agency v. Johnson (*In re* Johnson), 5 B.R. 532, 535 (Bankr. E.D. Pa. 1979) (stating that *Johnson* test requires courts to determine debtor's monthly budget, ability to repay student loan, and good faith).

[266] *See* Coulson & Harrell, *supra* note 187, at 1445 (noting that undue hardship exception is subjective and virtually standardless job of lifestyle determination forced on bankruptcy judges, creating uncertain tests which many consumer debtors and creditors must satisfy at their hazard); Salvin, *supra* note 8, at 149 (stating that judges determine undue hardship through intuitive sense of fairness); Interview of John D. Ayer, *supra* note 17 (stating that judges treat student loan debtors quite differently based upon subjective preferences).

uniformity.[267] The executive branch is better equipped to make such determinations through the Department of Education, primed with comprehensive, uniform guidelines, such as the Federal Poverty Guidelines.[268]

When applying the undue hardship exception, judges must act as social workers when determining a debtor's minimal standard of living, future prospects, and good faith.[269] The case law is replete with examples of courts struggling with these subjective issues and arbitrarily determining what constitutes undue hardship.[270] For example, in *Brown*, the court made a rather haphazard determination that the debtor's Individual Retirement Account ("IRA") was not an allowable expense because he was young and had plenty of time to put money away for retirement.[271] Similarly, the *Brown* court found that the debtor satisfied the good faith requirement simply because his sincerity on the witness stand convinced the court that he was an honest person.[272]

An additional example of a court struggling to determine these subjective issues occurred in *Hornsby*, where the court considered the debtor's cigarette allowance and long distance telephone bills exorbitant monthly expenses.[273] Another court has considered whether cable

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[267] *Compare, e.g., Brunner*, 46 B.R. at 758 (refusing to grant debtor discharge because she had potential for success and filed for bankruptcy too soon after graduating from college), *with* Brown v. Sallie Mae Servicing Corp. (*In re* Brown), 227 B.R. 540, 547 (Bankr. S.D. Cal. 1998) (granting debtor discharge despite monthly income surplus and failure to make any payments on loan debt). *See generally* Coulson & Harrell, *supra* note 187, at 1445 (stating that application of undue hardship exception is far from uniform).

[268] *See* Coulson & Harrell, *supra* note 187, at 1445 (noting that executive branch should administer law); *see also, e.g.*, 34 C.F.R. § 685.209 (providing Department of Education's income contingent repayment plan using Federal Poverty Guidelines to determine monthly payment).

[269] *See* Coulson & Harrell, *supra* note 187 at 1445 (stating that current undue hardship standard is manifestation of administrative state); Interview of John D. Ayer, *supra* note 17 (stating that bankruptcy judges may act more like social workers than court officers when they determine debtors' allowable monthly expenses).

[270] *See, e.g.*, Tennessee Student Assistance Corp. v. Hornsby (*In re* Hornsby), 144 F.3d 433, 438-39 (6th Cir. 1998) (deciding whether cigarettes are allowable monthly expenses); Green v. Sallie Mae Servicing Corp. (*In re* Green), 238 B.R. 727, 737 (Bankr. N.D. Ohio 1999) (determining whether bi-polar disease entitles debtor to discharge); Thomsen v. Department of Educ. (*In re* Thomsen), 234 B.R. 506, 508-09 (Bankr. D. Mont. 1999) (calculating debtor's monthly living expenses); *Brown*, 227 B.R. at 543 (considering debtor's credibility in discharge determination). *See generally* Salvin, *supra* note 8, at 150-51 (noting that it is hard to find consistency in courts' determination of undue hardship).

[271] *See Brown*, 227 B.R. at 543 (stating that court felt that IRA was surplus expense).

[272] *See id.* at 546-47 (stating that Brown's testimony on witness stand convinced court that he was good person deserving of discharge).

[273] *See Hornsby*, 144 F.3d at 438 (stating that trial court erred in allowing debtor's exorbitant long distance bill and cigarette allowance as monthly expenses); *see also* Coulson

television and newspapers were minimal monthly living expenses.[274] Still, other courts have rewarded debtors with a discharge of their student loans where the debtor suffered from bi-polar disorder, or where the debtor successfully completed a drug dependency program.[275] Thus, the availability of a discharge of student loan debt often rests on judges' subjective values of what constitutes undue hardship with a result, which is often arbitrary, unpredictable, or haphazard.[276]

Despite the best efforts of courts to lend objectivity to the term undue hardship, hardship remains a subjective characteristic personal to the individual debtor.[277] As long as an undue hardship exception exists, courts will disagree over the degree of hardship required to satisfy the exception.[278] As one legal commentator noted, undue hardship is an empty vessel that courts can fill with whatever policy objectives they deem appropriate.[279]

Some legal commentators argue that the judicial administration of the undue hardship exception is acceptable because it parallels judicial activity in Chapter 13 cases.[280] In Chapter 13, debtors have to devote all

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& Harrell, *supra* note 187, at 1445 (criticizing *Hornsby* court for questioning monthly cigarette allowance and seeing this as manifestation of administrative state and not rule of law, highlighting deficiencies in current Bankruptcy Code).

[274] *See Thomsen*, 234 B.R. at 509 (analyzing whether court should include debtor's newspaper and cable television expenses in allowable monthly expenses).

[275] *See* Green v. Salliemae Servicing Corp., 238 B.R. 727, 737 (Bankr. N.D. Ohio 1999) (granting debtor discharge because of her mental condition); Williams v. Illinois Student Assistance Comm'n (*In re* Williams), No. 99-10899DWS, 1999 WL 1134772, at *3 (Bankr. E.D. Pa. 1999) (stating that debtor accomplished personal fresh start in ridding herself of drug dependency and court will validate that effort by discharging her student loans).

[276] *See* Coulson & Harrell, *supra* note 187, at 1445 (arguing that undue hardship is standardless standard where judges interpose their values); Salvin, *supra* note 8, at 149 (stating that undue hardship is not objective standard).

[277] *See* Fox v. Pennsylvania Higher Educ. Assistance Agency (*In re* Fox), 163 B.R. 975, 977 (Bankr. M.D. Pa. 1993) (noting that courts have struggled to lend objectivity to undue hardship analysis); Coulson & Harrell, *supra* note 187, at 1445 (noting that there is no certainty interpreting undue hardship standard).

[278] *See Fox*, 163 B.R. at 977 (stating that undue hardship analysis is subjective); Coulson & Harrell, *supra* note 187, at 1445 (discussing lack of uniformity by courts interpreting undue hardship); Salvin, *supra* note 8, at 150-51 (stating that courts disagree over amount of hardship required to satisfy exception).

[279] *See* Salvin, *supra* note 8, at 149 (stating that undue hardship is malleable for judicial policy considerations).

[280] *See* Salvin, *supra* note 8, at 165 (stating that bankruptcy judges perform administration tasks in Chapter 13); *see also* 11 U.S.C. §§ 1301-1327 (1994 & Supp. V 1999) (providing Chapter 13 plan); Interview of John D. Ayer, *supra* note 17, (noting that courts perform routine administrative functions in Chapter 13); Coulson & Harrell, *supra* note 187, at 1445 (stating that judges act as social workers administering undue hardship exception).

of their disposable income to their repayment plans.[281] Judges calculate disposable income based on what income is not reasonably necessary to support debtors and their dependents.[282] Since judges make these subjective determinations in Chapter 13, some commentators argue that judges have the ability to make undue hardship determinations.[283]

The peculiarities of Chapter 13 may force judges to make subjective determinations, but courts should not expand this practice into other areas of bankruptcy.[284] The functions of courts are not to dictate choices of life style or micro-manage the budgeting of family expenses.[285] Judges are ill equipped to review personal decisions, like whether a family needs one car or two, or whether a debtor should relocate in search of a higher paying job.[286] Instead, the executive branch rather than the judicial branch should administer the law through an administrative agency such as the Department of Education.[287]

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[281] *See* 11 U.S.C. §§ 1301-1327 (providing three-year repayment plan); *see also* Salvin, *supra* note 8, at 165 (stating that court will not approve plan unless debtor devotes all of his disposable income). *See generally* AYER, *supra* note 15, at 460 (explaining Chapter 13 procedure).

[282] *See* 11 U.S.C. §§ 1301-1327 (providing for Chapter 13 repayment plans); *see also* Salvin, *supra* note 8, at 166-67 (explaining that judges determine allowable monthly expenses). *See generally* BAIRD, *supra* note 9, at 54-55, (stating that creditors can object to plan confirmation when debtors do not contribute all of their disposable income to plan).

[283] *See* Salvin, *supra* note 8, at 166 (stating that judges do similar tasks in Chapter 13); Interview of John D. Ayer, *supra* note 17 (stating that Chapter 13 work is similar to determining undue hardship); *see also* Coulson & Harrell, *supra* note 187, at 1445 (stating that judges act as social workers administering undue hardship exception).

[284] *See* Coulson & Harrell, *supra* note 187, at 1445 (stating that judges should interpret law, not administer it); Interview of John D. Ayer, *supra* note 17 (stating that peculiarities of Chapter 13 do not necessitate its expansion into other areas of bankruptcy law); *see also* 11 U.S.C. §§ 1301-1327 (providing for Chapter 13 repayment plans).

[285] *See* Coulson & Harrell, *supra* note 187, at 1445 (stating that judges should not be determining whether cigarette allowance is allowable monthly expense); *see also* Interview of John D. Ayer, *supra* note 17 (noting that courts currently play role of debt counseling service).

[286] *See* Coulson & Harrell, *supra* note 187, at 1445 (stating that courts enter quagmire when they start dictating life style choices); *see also* Salvin, *supra* note 8, at 164-65 (inferring that courts receive no formal training for debt counseling function).

[287] *See* Coulson & Harrell, *supra* note 187, at 1445 (stating that administrative agency rather than courts should determine undue hardship); *see also* 34 C.F.R. § 685.209 (1999) (providing ICRP using Federal Poverty Guidelines to determine loan monthly payment); Interview of John D. Ayer, *supra* note 17 (stating that administrative agency may have expertise to bring uniformity to undue hardship exception).

C. Model Solution: Non-Dischargeable Rule and Income Contingent Repayment

Instead of allowing courts to violate the clear language of section 523(a)(8) and engage in judicial lawmaking by granting partial discharges, Congress should amend section 523(a)(8) to provide for the non-dischargeability of student loans.[288] The amended section 523(a)(8) should read as follows: A discharge under this title does not discharge an individual debtor from any debt for any educational loan made, insured or guaranteed by a governmental unit.[289] This bright-line rule will provide uniformity and efficiency, creating a self-executing system of non-dischargeability.[290] Instead of judges subjectively determining what constitutes an undue hardship, student loans would automatically remain non-dischargeable.[291] Moreover, a non-discharge rule would maintain the integrity of the student loan program.[292] Additionally, the Department of Education has an adequate repayment system in place to address the needs of discharged debtors burdened by non-dischargeable student debt with one caveat.[293] Currently, the interest on student loans

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[288] *See* Andresen v. Nebraska Student Loan Program, Inc. (*In re* Andresen), 232 B.R. 127, 131-32 (B.A.P. 8th Cir. 1999) (stating that partial discharges present clear example of judicial lawmaking); Skaggs v. Great Lakes Higher Educ. Corp. (*In re* Skaggs), 196 B.R. 865, 867 (Bankr. W.D. Okla. 1996) (stating that court should interpret plain language of statute rather than relying on subjective beliefs); *see also* 11 U.S.C. § 523(a)(8) (1994 & Supp. V 1999) (providing undue hardship exception).

[289] *See* 11 U.S.C. § 523 (a)(8) (amended statute would strike undue hardship exception). This proposed amended statute would apply to Chapter 7, 11, 12, and 13 cases.

[290] *See* COMMISSION REPORT, *supra* note 179, at 1.4.5 (stating that bright-line rule provides uniformity and efficiency); *see also* Coulson & Harrell, *supra* note 187, at 1445 (noting disparity and inefficiency plagues undue hardship exception).

[291] *See* Coulson & Harrell, *supra* note 187, at 1445 (stating that administrative agencies are better equipped than courts to deal with peculiarities of student loan debtors); Interview of John D. Ayer, *supra* note 17 (noting that judges act like social workers when they interpret the undue hardship exception). The non-dischargeability of student loans comports with other provisions in Section 523. *See* 11 U.S.C. § 523(a)(1), (5). Section 523(a)(1) provides for the non-dischargeability of taxes and Section 523(a)(5) provides for the non-dischargeability of child support and alimony. *See id.*

[292] *See* H.R. REP. NO. 595, at 132 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6093 (stating purpose of § 523(a)(8) is to maintain integrity of student loan system). *See generally Andresen*, 232 B.R. at 137 (stating that Congress excepted loans from discharge to protect solvency of student loan program).

[293] *See* 34 C.F.R. § 685.209 (1999) (providing for income contingent repayment plan); *see also* Douglass v. Great Lakes Higher Educ. Servicing Corp. (*In re* Douglass), 237 B.R. 652, 657 (Bankr. N.D. Ohio 1999) (noting Department of Education repayment plan as alternative to discharge); Thomsen v. Department of Educ. (*In re* Thomsen), 234 B.R. 506, 509-10 (Bankr. D. Mont. 1999) (discussing ICRP as alternative to undue hardship discharge).

continues to accrue when a student uses the ICRP and any unpaid loan debt is treated as taxable income when it is eventually discharged.[294] The Department of Education should promulgate regulations that toll the interest on student loans where students are using the ICRP and make dischargeable debt non-taxable to fully address the needs of burdened debtors.[295]

The application of a non-discharge rule and the ICRP to the *Brown* case illustrates why this represents a viable solution to the unworkable undue hardship exception.[296] Instead of allowing a court to stretch the definition of undue hardship and grant Brown a discharge, the proposed law would make Brown's debt non-dischargeable.[297] There are several practical benefits that follow from this result. First, the *Brown* court could not reach a determination of undue hardship at odds with other courts because courts would no longer determine undue hardship.[298] Second, the *Brown* court could not contemplate granting a partial discharge in violation of the plain language and congressional intent of the statute because the proposed statute would make all student loans non-dischargeable.[299] Third, the *Brown* court would not make subjective decisions like whether the debtor's IRA was an allowable monthly expense.[300] Indeed, judges would not make these decisions under a non-discharge rule.[301]

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[294] *See* C.F.R. § 685.209 (1999).

[295] *Compare* C.R.R. § 685.209 (noting tax treatment of ICRP), *with supra* text accompanying note 298 (providing bright-line rule)

[296] *Compare* 34 C.F.R. § 685.209 (providing ICRP), *and supra* text accompanying note 298 (providing non-discharge rule), *with* Brown v. Sallie Mae Servicing Corp. (*In re* Brown), 227 B.R. 540, 547 (Bankr. S.D. Cal. 1998) (discharging student loan despite $334 monthly surplus).

[297] *Compare Brown*, 227 B.R. at 547 (granting Brown discharge despite monthly surplus), *with supra* text accompanying note 298 (proposing amending § 523(a)(8) to make student loans non-dischargeable).

[298] *Compare* Brunner v. New York State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 758 (S.D.N.Y 1985) (denying discharge because debtor failed to make monthly payment and had bright future), *and Brown*, 227 B.R. at 547 (granting discharge despite failure to make monthly payment and monthly surplus), *with supra* text accompanying note 298 (proposing amending § 523(a)(8) to make student loans non-dischargeable).

[299] *Compare Brown*, 227 B.R. at 547 (contemplating granting debtor partial discharge), *with supra* text accompanying note 298 (proposing amending § 523(a)(8) to make student loans non-dischargeable).

[300] *Brown*, 227 B.R. at 543.

[301] *Compare Brown*, 227 B.R. at 543 (refusing to allow debtor's IRA as minimal expense), *with supra* text accompanying note 298 (proposing amending § 523(a)(8) to make student loans non-dischargeable).

Non-dischargeability also furthers the policy goals of uniformity and efficiency.[302] No matter which circuit court or bankruptcy judge hears the case, courts would treat all debtors with student loans in bankruptcy uniformly.[303] Thus, courts would treat debtors like Brown and Brunner alike.[304] Non-dischargeability also furthers efficiency because judges would not have to spend time analyzing whether a debtor's situation met the undue hardship exception.[305] Instead, the court would simply declare that the student loans are non-dischargeable.[306] Additionally, under a non-discharge rule, attorneys could better advise their clients about student loan debt.[307] Thus, under a non-discharge rule, the *Brown* court could focus its energy on other bankruptcy issues and the parties' attorneys could give clear advice to their clients regarding student loans.

Additionally, a non-discharge rule and the ICRP will maintain the integrity of the student loan program by making able debtors pay back at least a portion of their student loans, thereby keeping loan funds available to future students.[308] Under an ICRP, a portion of Brown's monthly disposable income would go towards paying his student loans.[309] Brown would pay no more than $150 a month on his loans in his current financial situation.[310] However, if his financial situation

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[302] *Compare* COMMISSION REPORT, *supra* note 179, at 1.4.5 (stating that bright-line rule provides uniformity and efficiency), *with supra* text accompanying note 298 (proposing bright-line non-discharge rule).

[303] See COMMISSION REPORT, *supra* note 179, at 1.4.5. (stating that bright-line rule would treat debtors uniformly).

[304] *Compare* Brunner v. New York State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 758 (S.D.N.Y 1985) (denying discharge because of bright future), *and Brown*, 227 B.R. at 547 (granting discharge despite monthly surplus), *with* COMMISSION REPORT, *supra* note 179, at 1.4.5. (stating bright-line rule will bring uniformity in this area of bankruptcy law), *and supra* text accompanying note 298 (providing bright-line solution).

[305] *Compare* COMMISSION REPORT, *supra* note 179, at 1.4.5, chapter 5 (stating that bright-line rule will lead to greater efficiency), *with supra* text accompanying note 298 (providing bright-line solution).

[306] See *supra* text accompanying note 298 (providing non-discharge model rule).

[307] *Compare* COMMISSION REPORT, *supra* note 179, at 1.4.5. (noting bright-line rule will reduce judicial work in this area), *with supra* text accompanying note 298 (providing non-discharge rule).

[308] *Compare* 34 C.F.R. § 685.209 (1999) (providing ICRP), *and supra* text accompanying note 298 (providing non-discharge rule), *with* H.R. REP. NO. 595, at 132 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6093 (stating that purpose of § 523(a)(8) is to ensure that able debtors pay back their student loans).

[309] *Compare* 34 C.F.R. § 685.209 (providing monthly repayment plan), *with Brown*, 227 B.R. at 544 (stating debtor had over $300 in disposable monthly income).

[310] *Compare* 34 C.F.R. § 685.209 (stating that payment is no more than 20 percent of borrower's discretionary income), *with Brown*, 227 B.R. at 545 (stating that Brown has ability to make monthly payment of approximately $330).

improved or worsened, his monthly payments would reflect his current situation.[311] After twenty-five years, the Department of Education would discharge Brown's debt, releasing him of any repayment obligations.[312] In sum, a non-discharge rule coupled with the ICRP will bring uniformity, efficiency and integrity to the student loan program.[313]

CONCLUSION

Debtors filing for bankruptcy can currently only discharge their student loan debt if repayment poses an undue hardship.[314] The undue hardship exception is unworkable because it allows judges to determine subjectively whether debtors can repay their student loans.[315] Disparate judicial values have created inconsistent determinations of what constitutes undue hardship.[316] The Sixth Circuit has even ignored the plain language and congressional intent of the statute to allow partial discharges.[317] Therefore, Congress should amend section 523(a)(8) of the Bankruptcy Code to make student loans non-dischargeable.[318] A non-discharge rule coupled with the Department of Education's income contingent repayment plan will preserve the integrity of the student loan

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[311] *See* 34 C.F.R. § 685.209 (stating that Department of Education adjusts monthly payments as debtor's income rises or falls each year).

[312] *See id.* (providing discharge after twenty-five years of repayment).

[313] *Compare id.* (providing ICRP), *and supra* text accompanying note 298 (providing non-dischargeability), *with* Pelkowski v. Ohio Student Loan Comm'n (*In re* Pelkowski), 990 F.2d 737, 743 (3d Cir. 1993) (stating that Congress enacted § 523(a)(8) to prevent abuses in and protect solvency of educational loan programs), *and* COMMISSION REPORT, *supra* note 179, at 1.4.5, chapter 5 (stating that bright-line rule provides uniformity and efficiency).

[314] *See* 11 U.S.C. § 523(a)(8) (1994 & Supp. V 1999) (providing undue hardship as only exception to non-dischargeability).

[315] *See* Coulson & Harrell, *supra* note 187, at 1445 (criticizing courts for making subjective value decisions); Salvin, *supra* note 8, at 170 (stating that undue hardship is empty vessel).

[316] *Compare, e.g.*, Brunner v. New York State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 758 (S.D.N.Y 1985) (holding debtor's student loans non-dischargeable because debtor failed to make single payment on loan and had successful future ahead), *with Brown*, 227 B.R. at 547 (holding debtor's student loans dischargeable despite failure to make single payment or maximize income). *See generally* Coulson & Harrell, *supra* note 187, at 1445 (stating that judges act inconsistently in this area of bankruptcy).

[317] *See* Andresen v. Nebraska Student Loan Program, Inc. (*In re* Andresen), 232 B.R. 127, 132 (B.A.P. 8th Cir. 1999) (explaining unstable authority partial discharges rest upon); Taylor v. United Student Aid Funds Inc. (*In re* Taylor), 223 B.R. 747, 754 (B.A.P. 9th Cir. 1998) (holding that Bankruptcy Code does not provide for partial discharges); *see also* Tennessee Student Assistance Corp. v. Hornsby (*In re* Hornsby), 144 F.3d 433, 440 (6th Cir. 1998) (allowing partial discharges).

[318] *See supra* text accompanying note 298 (proposing new statutory language).

program, while providing debtors with uniform bankruptcy relief.[319]

Applying this model solution to Brandon and Alicia, Congress's recent tightening of the bankruptcy laws indicates that it may not be as easy for Brandon to discharge his credit card debt in the future.[320] Under a non-discharge system, Alicia would not be able discharge her student loan debt in bankruptcy, but she will only have to pay what she can afford through an ICRP.[321] This outcome represents a sound policy that maintains the integrity of the student loan program without harming those, like Alicia, with current financial troubles.[322]

Robert B. Milligan[*]

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[319] *Compare* 34 C.F.R. § 685.209 (1999) (providing for ICRP), *and supra* text accompanying note 298 (proposing non-discharge rule), *with* H.R. REP. NO. 595, at 132 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6093 (stating that purpose of § 523(a)(8) is to ensure that able debtors pay back their student loans), *and* COMMISSION REPORT, *supra* note 179, at 1.4.5. (stating that bright-line rule will bring uniformity and consistency).

[320] *See* S. Res. 625, 107th Cong. (2000) (enacted, now in joint committee, providing for means-based bankruptcy system); H.R. Res. 833, 106th Cong. (1999) (enacted, now in joint committee, providing for means-based bankruptcy system); *see also Senate Overhaul*, *supra* note 2 (stating that Congress moved toward means-based bankruptcy system with recent legislation, thereby eliminating automatic discharge in some situations); *Soaked by Congress*, *supra* note 190, at 66 (explaining new legislation's impact on debtors); *A Gift for the Credit Card Industry*, N.Y. TIMES, May 30, 2000, at A22 (criticizing new bankruptcy legislation as product of credit card industry's pressure).

[321] See 34 C.F.R. § 685.209 (providing ICRP); *supra* text accompanying note 298 (providing bright-line non-discharge rule).

[322] *See* 34 C.F.R. § 685.209 (providing ICRP); *supra* text accompanying note 298 (providing bright-line non-discharge rule).

[*] I would like to dedicate this piece to my mother Phyllis Milligan and my father Robert L. Milligan (d. 1998). I would also like to thank John D. Ayer, Professor of Law, University of California, Davis, Andrea Graham, Brandon McKelvey, Jason Nelson, Chad Firetag, and John Diana, whose advice made this Comment possible.

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