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Undue Mental Hardship: A Case for Standardized Treatment of Mental Health Issues in Student Loan Discharge Proceedings

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Undue Mental Hardship: A Case for Standardized Treatment of Mental Health Issues in Student Loan Discharge Proceedings

*Abigail Stone**

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INTRODUCTION

Student loans have been a hot button topic for the last several years and especially in recent months since the announcement of President Biden's student loan forgiveness plan. Regardless of one's opinion of the President's plan, the reality is that this one-time forgiveness plan will not solve the student debt crisis for future borrowers. The bankruptcy system, however, still offers a potential relief option for student loan debtors. In the spirit of the Bankruptcy Code—that is, to provide relief to honest but unfortunate debtors¹—I argue that bankruptcy courts should consider mental health as part of undue hardship analyses under Bankruptcy Code § 523(a)(8). This powerful and important step would provide relief to a group of particularly vulnerable debtors.

The compounding effect of student loans and mental health plays out uniquely in the bankruptcy system. Student loans are one of the few unsecured consumer debts that are typically not dischargeable in a bankruptcy.² A debtor is only permitted to discharge their student loan debt if the debtor can show that paying the debt would cause “undue hardship.”³ However, courts disagree on what exactly constitutes “undue hardship” and on how mental health issues should be factored into that analysis.⁴ Recent scholarship has highlighted that student loan debt not only exacerbates existing mental health issues for debtors, but it can also be the inciting cause of mental health issues for some debtors.⁵ However, not all U.S. courts have acknowledged or implemented this research when evaluating undue hardship.

As more and more Americans struggle with growing student debt and worsening mental health issues, it is time for bankruptcy courts to standardize their treatment of mental health concerns in the context of student loan discharge. This Note advocates for

1. See *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (“The principal purpose of the Bankruptcy Code is to grant a ‘fresh start’ to the ‘honest but unfortunate debtor.’”) (quoting *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991)).

2. See 11 U.S.C. § 523(a) for a list of debts that are not dischargeable for individual debtors, including most student loans.

3. 11 U.S.C. § 523(a)(8).

4. See discussion *infra* at Section I.B.1.

5. See discussion *infra* at Section II.B.

adjusting bankruptcy proceedings so that the mental health of debtors can be specifically and consistently addressed in bankruptcy discharge proceedings involving student loans.

Part I of this Note provides an overview of the history of student loan discharge in the bankruptcy system. It also reviews the different tests courts use for undue hardship and how often courts actually discharge student loan debt. Part II reviews the growing mental health crisis in the United States and how student loan debt causes and exacerbates mental health issues. Part II also discusses how some courts have started to account for mental health concerns in their undue hardship analyses. Finally, Part III suggests three specific steps that courts should take to protect student debtors with mental health issues: 1) all courts should take the effect of the debt on the debtor's mental health into account when evaluating undue hardship; 2) courts and communities should create programs to provide mental health witnesses to indigent debtors; and 3) courts should offer partial discharge to debtors with less severe mental health issues. By taking these steps, courts will help give debtors a fresh start by removing the shadow of student debt that can loom over debtors even after bankruptcy. These steps will also allow debtors, freed from the stress and mental shackles of their student loans, to better contribute to the economy, their families, and their communities.

I. BACKGROUND

A. Goals of the Bankruptcy System and a History of Student Loan Discharge

The bankruptcy system is defined by competing goals and interests. First, the bankruptcy system is designed to be one of efficiency and value preservation.⁶ Second, the system also “aims to give honest debtors a ‘fresh start’ – that is, to grant debtors relief from debts they cannot repay.”⁷ Finally, the system seeks to

6. ELIZABETH WARREN, JAY LAWRENCE WESTBROOK, JOEL M. WESTBROOK, KATHERINE PORTER & JOHN A.E. POTTOW, *THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS* 7–8 (8th ed. 2021).

7. KEVIN M. LEWIS, CONG. RSCH. SERV., LSB10192, *HOW HARD SHOULD IT BE TO DISCHARGE A STUDENT LOAN IN BANKRUPTCY?* 1 (Aug. 27, 2018).

preserve justice by giving creditors some means of recourse.⁸ These policy concerns play a unique role in the context of student loans—namely, there is a need to balance the “goal of providing debtors in dire financial straits with a ‘fresh start’” with the “countervailing goals ‘of preventing abuse of the student loan program’ and ‘protect[ing] student loan programs and their participants.’”⁹ Thus, in a system that seeks efficiency, justice, and mercy, it is important to take a holistic perspective when seeking to implement policy changes that will affect so many different groups. The needs of suffering debtors cannot eclipse the interest of lenders, and lenders should not be able to silence the concerns of debtors.

To fully understand the current state of student loans in the United States, it is important to understand the history and evolution of how student loans are treated in bankruptcy. Before the year 1976, student loans were completely dischargeable in consumer bankruptcy proceedings.¹⁰ However, this changed in the wake of largely “sensationalized media reports claiming that student borrowers were defrauding taxpayers” by getting valuable degrees, then discharging their debts right after graduation when they had few assets to lose but a lifetime to benefit from their education.¹¹ Congressional members voiced further concerns about discharge abuse of student loans, stating that, unlike consumer goods, there was “no comparable way to repossess someone’s education” and that discharge would take funds away from future borrowers.¹² However, a 1976 congressional report revealed that,

8. See *id.* at 2 (“Beyond merely seeking to provide relief to debtors, bankruptcy law also seeks to promote countervailing interests, such as maximizing total creditor return.”).

9. KEVIN M. LEWIS, CONG. RSCH. SERV., R45113, *BANKRUPTCY AND STUDENT LOANS* 1 (July 18, 2019).

10. Stanley Tate, *When Did Student Loans Become Nondischargeable in Bankruptcy?*, TATE LAW (last updated Dec. 19, 2022), <https://www.tateesq.com/learn/student-loan-bankruptcy-law-history>.

11. Alexander Gouzoules, “*Undue Hardship*” and *Uninsured Americans: How Access to Healthcare Should Impact Student-Loan Discharge in Bankruptcy*, 69 EMORY L.J. 2019, 2020 (2020). For an example of one such media report, see *Many Students Avoiding Payment of Loans by Filing for Bankruptcy*, N.Y. TIMES (Nov. 21, 1976), <https://www.nytimes.com/1976/11/21/archives/many-students-avoiding-payment-of-loans-by-filing-for-bankruptcy.html> (reporting that students felt “no stigma” discharging their debts through bankruptcy right after graduation and that “public . . . resentment appear[ed] to be rising” against these students). *But see* Gouzoules, *supra* note 11, at 2021 (“[These] stories were later proven to have no empirical basis[.]”).

12. LEWIS, *supra* note 7, at 2.

while 18% of educational loans were in default at that time, less than 1% were actually being discharged in bankruptcy.¹³

Despite a lack of evidence that the discharge of student loans was being abused, in 1976, Congress amended the Higher Education Act of 1965 and made student loans nondischargeable unless more than five years had passed since the debtor had entered repayment.¹⁴ Alternatively, debtors could also get a discharge before the five year mark if continuing to pay the loan would cause the debtor and their dependents “undue hardship.”¹⁵ In 1984, these discharge limits were extended to apply to “private loans backed by non-profit institutions as well as government loans.”¹⁶ In 1990, the period of repayment before which a discharge could be granted was extended from five years to seven.¹⁷ Finally, in 1998, the seven year option was eliminated completely, leaving the “undue hardship” requirement as the only exception to the nondischargeability of student loan debt.¹⁸ In 2005, these standards were again extended, this time applying nondischargeability to “all qualified education loans, including most private loans[.]”¹⁹ This history shows a pattern of consistently limiting the options for discharging student loans in bankruptcy. As the law now stands, “[a] discharge [in bankruptcy] . . . does not discharge an individual from any debt . . . for an educational benefit overpayment or loan . . . unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor’s dependents.”²⁰

13. Richard Pallardy, *History of Student Loans: Bankruptcy Discharge*, SAVING FOR COLLEGE (Mar. 18, 2021), <https://www.savingforcollege.com/article/history-of-student-loans-bankruptcy-discharge> (citing H.R. REP. NO., 77-83 (1977)).

14. Tate, *supra* note 10.

15. *Id.*

16. Pallardy, *supra* note 13.

17. *Id.*

18. *Id.*

19. *Id.*

20. 11 U.S.C. § 523(a)(8). The statute in full states:

(a) A discharge under section 727, 1141, 1192 [1] 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt – ****

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

Thus, a student debtor's only hope for discharge relief hinges on a finding of "undue hardship," a standard that has never been defined by Congress and which courts have disagreed about for years.²¹ Two competing interpretations of undue hardship have emerged in the courts—the *Brunner* test and the totality of the circumstances test—but courts still disagree on how to apply these tests and their factors.

1. The Brunner Test

In 1987, the Second Circuit Court of Appeals established what has become the most common undue hardship test in *Brunner v. New York State Higher Education Services Corp.* The *Brunner* test consists of three prongs, and to qualify for an undue hardship discharge, the debtor must show:

1. "that the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans;"
2. "that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and"
3. "that the debtor has made good faith efforts to repay the loans."²²

Currently, the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits, as well as the U.S. Bankruptcy Court for the District of Columbia, all use the *Brunner* test.²³

(A)

(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

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

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual.

21. See *Speer v. Educ. Credit Mgmt. Corp.* (*In re Speer*), 272 B.R. 186, 191 (Bankr. W.D. Tex. 2001) ("[T]he application of this standard requires each court to apply its own intuitive sense of what 'undue hardship' means on a case by case basis. With so many Solomons hearing the cases, it is no wonder the results have varied.").

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

23. LEWIS, *supra* note 9, at 10.

However, “each factor has resulted in various subsidiary splits in the courts with respect to a host of issues.”²⁴ For example, a key divergence exists in the interpretation of the second *Brunner* prong. Most courts that use the *Brunner* test require the debtor to show that “the inability to pay must be ‘likely to continue for a significant time,’ such that there is a ‘certainty of hopelessness’ that the debtor will be able to repay the loans within the repayment period. . . .”²⁵ On the other hand, some courts vehemently reject this “certainty of hopelessness” requirement and instead take “a realistic look . . . into [the] debtor’s circumstances and the debtor’s ability to provide for adequate shelter, nutrition, healthcare, and the like” in determining whether the debtor’s inability to make payments will persist for the majority of the repayment period.²⁶

2. Totality of the Circumstances Test

The Eighth Circuit and, to some extent, the First Circuit Court of Appeals interpret the meaning of “undue hardship” under a totality of the circumstances test.²⁷ When evaluating undue hardship, the Eighth Circuit considers “the debtor’s past, present, and reasonably reliable future financial resources; . . . the debtor’s and her dependent’s reasonable necessary living expenses; and . . . any other relevant facts and circumstances,”²⁸ which can include a wide range of factors and circumstances that would make a student loan debt exceedingly burdensome to repay.

24. *Id.* at 11. Courts disagree on many aspects, including “the legal standard the debtor must satisfy to prove that his inability to repay the student loans will likely persist into the future;” “whether a debtor who claims that a medical condition prevents him from repaying his student loans must introduce corroborating medical evidence to support his claim;” “whether the ‘additional circumstances’ mentioned in *Brunner*’s second prong must predate the issuance of the loan;” and others. *Id.*

25. *Educ. Credit Mgmt. Corp. v. Mosley (In re Mosley)*, 494 F.3d 1320, 1326 (11th Cir. 2007) (internal citations omitted).

26. *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1310 (10th Cir. 2004); see also LEWIS, *supra* note 9, at 18 (quoting a judge who stated that if he was required to enforce a “certainty of hopelessness” standard against student debtors, he would retire because “there would be no way to reconcile such a command with the notion of a ‘fresh start’ for honest debtors.”).

27. LEWIS, *supra* note 9, at 29. The First Circuit has “explicitly declined to adopt any specific test for evaluating undue hardship[;]” however, various courts within the First Circuit, including the U.S. Bankruptcy Appellate Panel (BAP) for the First Circuit, have “rejected the *Brunner* test in favor of the totality-of-the-circumstances test.” *Id.*

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

In summary, the totality of the circumstances test generally tends to be more flexible than the *Brunner* test and, according to some scholars, student loan discharges are thus easier to obtain in a totality jurisdiction than in a *Brunner* jurisdiction.²⁹

B. Current State of Student Loan Discharge

A brief summary of the magnitude of the current student loan debt crisis helps justify the need for standardized reform of mental health treatment in the bankruptcy system. Currently, “[s]ome 44 million Americans collectively hold over \$1.6 trillion in student debt.”³⁰ The average American with student loan debt has a balance of \$37,000,³¹ and “more than 30% of student loan borrowers are in default, late[,] or have stopped making payments six years after graduation.”³² Furthermore, almost half of people who took out student loans from 2010 to 2012 have not even started to pay down the principal.³³ These numbers are so bleak that some are comparing the burgeoning student loan debt crisis to the housing bubble crisis of 2008.³⁴

Why has student loan debt become so expensive and pervasive that it is being dubbed a crisis? Scholars offer different explanations. One explanation is that student loans and tuition costs are not as heavily subsidized by taxpayer money today as they were pre-1980.³⁵ As one scholar explained,

A generation ago, there was a system that helped you not take on the risk yourself to pay for college education, but society took on

29. LEWIS, *supra* note 9, at 31 (citing Aaron N. Taylor & Daniel J. Sheffner, *Oh, What a Relief It (Sometimes) Is: An Analysis of Chapter 7 Bankruptcy Petitions to Discharge Student Loans*, 27 STAN. L. & POL’Y REV. 295, 319, 331 (2016)).

30. Abigail Johnson Hess, *How Student Debt Became a \$1.6 Trillion Crisis*, CNBC (June 12, 2020, 11:33 AM), <https://www.cnbc.com/2020/06/12/how-student-debt-became-a-1point6-trillion-crisis.html>.

31. Jason Iuliano, *The Student Loan Bankruptcy Gap*, 70 DUKE L.J. 497, 533 (2020).

32. Hess, *supra* note 30.

33. Samantha L. Bailey & Christopher J. Ryan Jr., *The Next “Big Short”: COVID-19, Student Loan Discharge in Bankruptcy, and the SLABS Market*, 73 SMU L. REV. 809, 819 (2020).

34. *See generally id.* But see Iuliano, *supra* note 31, at 530–32. Iuliano argues that a “big-C” crisis from student loan debt is unlikely because the total student loan debt in the U.S. currently (about \$1.6 trillion) is much less than the \$9.3 trillion of mortgage debt in 2008; furthermore, most student debts are federally guaranteed while the mortgages in 2008 were not. *Id.*

35. Hess, *supra* note 30.

the risk for you by making tuition cheap and allowing you to benefit from that experience and then pay it back in the form of higher tax revenue. We've shifted the risk from society directly to the student.³⁶

A second explanation is that more people are going to college, with many students attending more expensive for-profit institutions.³⁷ Another possible explanation is the privatization of student loan lending. Student loan lending is no longer just a federal program but has instead become a major for-profit business industry.³⁸ Thus, students have more options from which they can get loans easily and with less oversight or regulation.³⁹

The discharge numbers are similarly bleak. Only 0.1 percent of student loan debtors get their student loans discharged each year, and the vast majority of them do not even attempt to get their debts discharged.⁴⁰ Thus, student loan debt in the United States is affecting more people than ever with fewer options for relief than in the past.

II. THE INTERACTIONS BETWEEN MENTAL HEALTH AND STUDENT LOAN DEBT

A. A Second Crisis: Mental Health in the United States

While many scholars and politicians are bringing attention to the student loan crisis, another crisis looms concomitant over the American populace—namely, the mental health crisis. One in five Americans “will experience a mental illness in a given year” and one in twenty-five Americans “lives with a serious mental illness,

36. *Id.*

37. *Id.* (“From 2000 to 2010, enrollment in private for-profit institutions increased by 329%.”).

38. See Ben Kaufman, *Private Student Loans: New Report Sheds Light on the Need for Borrower Protection in an Opaque \$130 Billion Market*, STUDENT BORROWER PROT. CTR. (Apr. 30, 2020), <https://protectborrowers.org/130-billion-psl-market/> (“Over the past decade, the amount of outstanding private student loans grew 71 percent. The market now stands at nearly \$130 billion, surpassing the payday loan market in size.”).

39. See Delece Smith-Barrow, *More Students Are Taking Out Private Loans as College Costs Rise*, HECHINGER REP. (May 8, 2020), <https://hechingerreport.org/more-students-are-taking-out-private-loans-as-college-costs-rise/> (“Private student loans can have interest rates as high as 14 percent, and because they are private, there is little to no oversight of the industry by the government.”).

40. See Iuliano, *supra* note 31, at 498, 523 (citing a survey of student loan debtors in bankruptcy in 2017 and noting that, out of the 241,000 student loan debtors in bankruptcy, only 447 filed student loan discharge requests).

such as schizophrenia, bipolar disorder, or major depression.”⁴¹ With the recent COVID-19 pandemic exacerbating an already high rate of mental health issues in the United States, policy makers have also begun to raise warnings about the dangerous and pervasive mental health crisis.⁴² Even in 2019, before the global pandemic, Americans collectively spent more than \$225 billion on mental health, and there has been a more than 50% increase in mental health spending in the last decade.⁴³ Even with these efforts, there are many who worry that the current presidential administration is not focusing enough on the mental health needs of Americans.⁴⁴ Mental health issues also have a large effect on an individual’s economic productivity; those with mental health issues are six times more likely to report diminished productivity at work compared to their peers with stable mental health.⁴⁵ This results in a steep economic loss; for example, during the years 2001 to 2003, “serious mental illness [was] associated with an annual loss in earnings totaling \$193.2 billion” in the United States.⁴⁶ Those with mental health issues often have higher levels of absenteeism from work, with “absence rates that are approximately five percent higher” than their mentally healthy counterparts.⁴⁷

While certain mental illnesses, such as anxiety and depression, can often be treated with medications, they can still have an impact on a debtor’s ability to work, be productive, earn money,

41. *Mental Health*, CDC (June 28, 2021), <https://www.cdc.gov/mentalhealth/learn/index.htm>.

42. William Wan, *Pandemic Relief Bill Delivers \$4.25 Billion for Mental Health Services*, WASH. POST (Dec. 21, 2020, 7:28 PM), <https://www.washingtonpost.com/health/2020/12/21/mental-health-services-get-billions-relief-bill/>. During the COVID-19 pandemic, 43 percent of Americans showed signs of clinical anxiety or depression, up from 11 percent in 2019 before the pandemic. *Id.*

43. Open Minds, *2019 U.S. Mental Health Spending Topped \$225 Billion, With Per Capita Spending Ranging From \$37 In Florida to \$375 In Maine - OPEN MINDS Releases New Analysis*, PR NEWSWIRE (May 13, 2020, 10:27 AM), <https://www.prnewswire.com/news-releases/2019-us-mental-health-spending-topped-225-billion-with-per-capita-spending-ranging-from-37-in-florida-to-375-in-maine--open-minds-releases-new-analysis-301058381.html>.

44. Wan, *supra* note 42.

45. Melisa Bubonya, Deborah A. Cobb-Clark & Mark Wooden, *Mental Health and Productivity at Work: Does What You Do Matter?*, 46 LAB. ECON. 150, 150, 161 (June 2017).

46. *Id.* at 150.

47. *Id.*

and repay loans.⁴⁸ Additionally, approximately 30% of those who suffer from major depressive disorder have what is known as treatment-resistant depression (TRD), which means that their symptoms cannot be adequately treated with medication.⁴⁹ TRD is also associated with “disproportionate health care costs and unemployment.”⁵⁰ Thus, “[t]he toll that mental illness takes on worker productivity results in substantial economic costs for firms, employees, and society more generally.”⁵¹

B. The Personal and Societal Costs of Student Loan Debt

Recent studies have shown that mental health issues and student debt are largely intertwined in the United States; therefore, the interaction between the two must be considered when making further policy decisions about student loan debt and discharge. Various empirical studies have shown that student debt is a major contributing factor and even cause of mental health issues and illnesses, regardless of one’s income level.⁵² Specifically, studies indicate that student loan debt can lead to depression, anxiety, substance abuse, suicidal ideations, sleeplessness, obsessions, and more.⁵³ From an anecdotal perspective, various student loan

48. See Pim Cuijpers, Argyris Stringaris & Miranda Wolpert, *Treatment Outcomes for Depression: Challenges and Opportunities*, 7 THE LANCET 925, 926 (Feb. 17, 2020) (reporting that “25–40% of patients who recover after treatment will have another depressive episode within 2 years, 60% after 5 years, and 85% after 15 years.”).

49. Maryia Zhdanova, Dominic Pilon, Isabelle Ghelerter, Wing Chow, Kruti Joshi, Patrick Lefebvre & John J. Sheehan, *The Prevalence and National Burden of Treatment-Resistant Depression and Major Depressive Disorder in the United States*, J. CLINICAL PSYCHIATRY, Mar.–Apr. 2021, at 1, 1.

50. *Id.*

51. Bubonya, Cobb-Clark & Wooden, *supra* note 45, at 161.

52. See Taneasha White, *For Many Borrowers, Student Loans Are a Mental Health Crisis*, VERYWELL MIND (Dec. 28, 2020), <https://www.verywellmind.com/student-loans-are-a-mental-health-crisis-5093360>; Katheryn E. Hancock, *A Certainty of Hopelessness: Debt, Depression, and the Discharge of Student Loans Under the Bankruptcy Code*, 33 L. PSYCH. REV. 151, 160 (2009) (noting “the mere fact that being in debt and going bankrupt can lead to depression and anxiety.”); Katrina M. Walsemann, Gilbert C. Gee & Danielle Gentile, *Sick of Our Loans: Student Borrowing and the Mental Health of Young Adults in the United States*, 124 SOC. SCI. & MED. 85, 92 (2014) (“[S]tudent loans are associated with poorer psychological functioning while enrolled in school as well as in early adulthood . . .”).

53. See, e.g., Stacey Sever, *Student Loans & Mental Health: A Hidden Crisis*, 70 ALASKA NURSE, no. 3, 2019, at 12, 12 (“[A]round one third of student debt holders physically lose sleep over their debt while half reported developing depression or anxiety Recent

debtors have described the mental effects of their loans in very evocative terms, such as “a monster on your back,” “long term slow-burn anxiety,” or a “constant weight.”⁵⁴ Additionally, many student loan debtors forego health insurance and healthcare so they can make their student loan payments, which means that there is a lack of access to mental health resources for these debtors, and thus, little help for their conditions.⁵⁵

Not only do student loans cause mental health issues for debtors, but the burden of student loans “has enormous implications for individual borrowers, their families, society, and the economy.”⁵⁶ Because of the crushing burden of student loan debt, debtors are postponing having children, buying homes, and investing in the larger economy.⁵⁷ Thus, student loan debt creates “a heavy weight on economic growth.”⁵⁸ Furthermore, public interests sectors are struggling to hire employees because debtors are taking higher-paying jobs so they can keep up on their student loan payments.⁵⁹ According to a recently published media poll, 44% of young borrowers say they “regret ever taking out loans to go to college in the first place.”⁶⁰

Thus, while there are governmental interests in students repaying their loans, there are also major economic and societal drains from student loans and the accompanying mental health concerns that cost the United States billions of dollars each year. Hence, there is a strong argument that the government should be

surveys [also] indicate that suicidal ideations and unhealthy coping strategies, such as alcohol and drug use, are not uncommon.”); see also Jinhee Kim & Swarn Chatterjee, *Student Loans, Health, and Life Satisfaction of US Households: Evidence from a Panel Study*, 40 J. FAM. & ECON. ISSUES 36, 37 (“[M]ore severe debts are associated with worse health outcomes, such as depression, anxiety, suicide or attempted suicide, problem drinking, substance abuse and other psychotic disorders[.]”).

54. Nicole Karlis, *Student Debt Is Causing a Mental Health Crisis. Forgiving It Would Ease Distress for Millions*, SALON (Feb. 22, 2021), <https://www.salon.com/2021/02/22/student-debt-is-causing-a-mental-health-crisis-forgiving-it-would-ease-distress-for-millions/>.

55. NewsRx, *University of Lincoln Reports Findings in Mental Health Diseases and Conditions (Falling Behind: The Role of Student Loans on Foregoing Healthcare)*, EDUC. LETTER (Oct. 6, 2021), <https://global-factiva-com.erl.lib.byu.edu/ga/default.aspx>.

56. Kim & Chatterjee, *supra* note 53, at 37.

57. White, *supra* note 52.

58. Iuliano, *supra* note 31, at 532.

59. John Patrick Hunt, *Tempering Bankruptcy Nondischargeability to Promote the Purposes of Student Loans*, 72 SMU L. REV. 725, 749 (2019).

60. *Id.* at 758.

concerned about the effects of student loans, not just the lost revenue from student loan discharge.⁶¹

*C. The Interplay of Undue Hardship and Mental Health in the
Bankruptcy System*

These studies on the interplay between mental health and student loan debt suggest that mental health is something that bankruptcy courts should explicitly consider when conducting their undue hardship analyses. While most courts do consider very serious mental health issues in their undue hardship analyses, the way in which courts weigh mental health in their analyses varies from court to court. This section will give a brief overview of the current ways that courts choose to factor mental health issues into their undue hardship analyses. It begins with courts that have taken a more pioneering approach to mental health issues, then concludes with courts that still choose to view mental health issues through a strict, narrow lens.

1. A Pioneering Approach: Brunner Jurisdictions

Some courts that apply the *Brunner* test have begun to give more weight to the effects of student loans on mental health in their undue hardship analyses. One of the leading examples of this new practice came in 2006 in *ECMC v. Renville*.⁶² Roger Renville suffered from post-traumatic stress disorder, ADHD, substance abuse, major depressive disorder, and suicidal ideation.⁶³ Renville had a job and worked many overtime hours to try to make his student loan and medical payments; however, he argued that his “serious mental illness [was] exacerbated by the stress corollary to his student loan debt and consequently jeopardize[d] his ability to hold any job whatsoever.”⁶⁴ The court chose to give Renville’s psychological issues “controlling weight” when applying the *Brunner* test.⁶⁵ In evaluating the first prong of the test—whether

61. Hancock, *supra* note 52, at 165–66 (“Of course, the government has a financial interest in the repayment of student loans and thus favors a strict standard. Even so, the government also has a strong interest in the mental health and well-being of its citizens . . .”).

62. *ECMC v. Renville (In re Renville)*, No. CV-06-5-BU-RFC, 2006 U.S. Dist. LEXIS 81217 (D. Mont. Nov. 3, 2006).

63. *Id.* at *2–3.

64. *Id.* at *16.

65. *Id.* at *11.

Renville could maintain a minimum standard of living while still paying his student debts – the court opined: “[I]t is apparent that if Renville’s very ability to hold down a job or function as a normal human being is in peril due to stress caused by the loan debt, he would have no ability to maintain a minimal standard of living if forced to repay the loans.”⁶⁶ Thus, the court agreed that the first prong of the *Brunner* test was satisfied.⁶⁷

The court went on to agree that Renville and his expert witness, Dr. Braun, had sufficiently shown that Renville’s mental health issues would not likely abate in the near future and that Renville had demonstrated a good faith effort to repay the debts.⁶⁸ For these reasons, the court ruled that Renville’s debt was dischargeable under the *Brunner* Test because of undue hardship.⁶⁹ As part of its holding, the court made an important note about the role of mental health in undue hardship: “This Court takes the medical condition of mental illness very seriously. Indeed, severe depression can be every bit as debilitating and life threatening as any physical condition, especially if the patient is not currently receiving needed treatment.”⁷⁰ This case was a huge step towards courts recognizing not only the strain of mental health on a debtor, but the impact that the student debt itself has on the debtor’s mental health.

Other courts in *Brunner* jurisdictions have followed in the footsteps of *Renville* by weighing the effect of student loan debt on a debtor’s mental health. In another key ruling, a bankruptcy court in Georgia ruled that even a zero-dollar repayment plan under a “Revised Pay as You Earn” (REPAYE) student loan repayment plan would still put an undue burden on the debtor and her mental health.⁷¹ Risa Hill, the debtor, suffered from severe bipolar disorder and PTSD, which prevented her from holding a job; instead, she survived on Social Security Disability Insurance benefits.⁷² When Hill filed for bankruptcy, the student loan lender argued that, rather than having her debts discharged, Hill should instead enter a REPAYE program, under which she would not have to pay

66. *Id.* at *16.

67. *Id.*

68. *Id.* at *22–24.

69. *Id.* at *24.

70. *Id.* at *16.

71. *Hill v. Educ. Credit Mgmt. Corp. (In re Hill)*, 598 B.R. 907 (Bankr. N.D. Ga. 2019).

72. *Id.* at 913.

anything and could maintain a minimum standard of living.⁷³ However, the court disagreed; it held that Hill's eligibility for a zero-payment plan was further evidence of her inability to maintain a minimum standard of living while paying her student debts.⁷⁴ The court also recognized that the ongoing administrative stresses of having a REPAYE plan would be a drain on Hill's mental health.⁷⁵ Turning to the remaining *Brunner* prongs, the court also agreed that Hill's conditions would be ongoing and that she had done her best to pay the debts.⁷⁶ Thus, some *Brunner* courts are starting to recognize that even a zero-payment student debt plan can have harmful effects on a debtor's mental health.

2. Pioneering Approaches in Totality Jurisdictions

In totality jurisdictions, the groundbreaking case for considering the effects of mental health in undue hardship analyses came in 2005 in the Eighth Circuit Court of Appeals.⁷⁷ Laura Reynolds, the debtor, suffered from major depressive disorder, anxiety disorder, panic disorder, and a personality disorder.⁷⁸ Although she had graduated from law school and passed the bar, she was unable to find work as a lawyer.⁷⁹ Instead, she worked as a secretary while her husband worked as a bus driver.⁸⁰ Although Reynolds and her husband had \$700 a month in discretionary income after paying for all their necessities, the court found that there was "an important countervailing circumstance—that the existence of the debts was injurious to Reynolds's fragile mental health."⁸¹ Reynolds's expert medical witness testified that "Reynolds's student loans caused her stress, and that stress 'can make it more difficult for an individual to respond to treatment for a mood disorder.'"⁸²

73. *Id.* at 917.

74. *Id.*

75. *Id.* at 918 (noting that administrative compliance with a REPAYE plan, such as keeping up with paperwork, is a "great burden" for individuals like Hill).

76. *Id.* at 922.

77. Reynolds v. Pa. Higher Educ. Assistance Agency (*In re Reynolds*), 425 F.3d 526 (8th Cir. 2005).

78. *Id.* at 528.

79. *Id.*

80. *Id.* at 530.

81. *Id.* at 530.

82. *Id.* at 528.

Ultimately, the court ruled that, given the totality of the circumstances, requiring Reynolds to pay her student debts would be an undue hardship.⁸³ The court stated, “[P]reserving the Debtor’s liability for even a portion of her education loan burden would impose a hardship on her. . . . [U]nder the totality of her circumstances, the hardship would be ‘undue.’”⁸⁴ The court found that Reynolds’s mental health had impacted her earning potential and that the stress from her student loan debt was “likely to affect Reynolds’s mental health adversely, causing an even greater decline in her earnings.”⁸⁵ Thus, granting her a discharge would help preserve her earning potential and her ability to contribute to the economy. In handing down this decision, the Eighth Circuit recognized the important principle that “a debtor’s health and financial position are inextricably intertwined.”⁸⁶

In another totality jurisdiction case, a court again held that even though the debtor was gainfully employed and making a decent salary, her mental health interests weighed heavily enough to find an undue hardship in her favor.⁸⁷ Alane Taratuska, the debtor, suffered from PTSD, major depressive disorder, generalized anxiety disorder, psychotic episodes, and a host of physical ailments as well.⁸⁸ She had a master’s degree in neuroscience and was employed as an assistant scientist making about \$69,000 a year.⁸⁹ She had no family or dependents to support.⁹⁰ However, the debtor averred that she was able to keep her job and “achieve this level of functionality only with intensive psychotherapy.”⁹¹ Specifically, the debtor paid \$3,000 a month out of pocket for medical, dental, and therapy services.⁹² These payments, combined with her modest living expenses, completely depleted her take-home pay, leaving nothing left over for student loan repayments.⁹³

83. *Id.* at 534.

84. *Id.* at 530–31.

85. *Id.* at 533 n.6.

86. *Id.* at 532.

87. *Taratuska v. Educ. Res. Inst., Inc. (In re Taratuska)*, Ch. 7 Case No. 01-10361-FJB, Adv. No. 05-1653, 2010 Bankr. LEXIS 409 (Bankr. E.D. Mass. Feb. 12, 2010).

88. *Id.* at *7.

89. *Id.* at *5, *9.

90. *Id.* at *5.

91. *Id.* at *12.

92. *Id.* at *10.

93. *Id.* at *11.

Although the lenders claimed that Taratuska could still enter into an alternative repayment program, the court found that the debtor met the undue hardship standard and qualified for discharge.⁹⁴ Explaining its decision, the court stated, “[a]s in *Reynolds*, the existence of the student loan debt in itself creates an undue psychiatric hardship for the debtor” and “has serious consequences on her mental health and ability to function.”⁹⁵ Thus, the court found that these circumstances “[rose] to the level of severity required to constitute an undue hardship.”⁹⁶

3. Courts That Take a Less Pioneering Approach to Mental Health Issues

These above-mentioned cases illustrate that in both *Brunner* and totality jurisdictions, courts are beginning to recognize and weigh the very real impact of student loan debt on a debtor’s mental health. However, I argue that these changes have not come far enough because not all courts consider or give mental health the same weight in their analyses.

Katherine Hancock has pointed out many issues that still exist in the courts when it comes to mental health and the discharge of student loans. For instance, “many debtors with severe mental problems have been denied discharge due to lack of evidence” that their conditions will “persist for a significant portion of the repayment period.”⁹⁷ This is often because debtors do not have the money to pay for an expert medical witness to help them prove their case.⁹⁸ Some courts require an expert witness “when mental health is at issue in bankruptcy cases,” while others are

94. *Id.* at *22.

95. *Id.* at *21–22.

96. *Id.* at *22.

97. Hancock, *supra* note 52, at 155 (quoting *Brunner v. N.Y. State Higher Educ. Serv. Corp.* (*In re Brunner*), 46 B.R. 752, 756 (S.D.N.Y. 1985)); *see also* *Nash v. Conn. Student Loan Found.* (*In re Nash*), 446 F.3d 188 (1st Cir. 2006) (holding that a debtor with bipolar disorder did not qualify for discharge because she had not called any doctors to testify about her future inability to work); *Thompson v. N.M. Student Loan Guar. Corp.* (*In re Thompson*), 329 B.R. 145 (Bankr. E.D. Va. 2005).

98. Hancock, *supra* note 52, at 159 (“[M]any debtors cannot even afford to treat their mental conditions adequately, let alone pay for expert witnesses.”).

more willing to take the testimony of the debtor alone in making their decision.⁹⁹

Furthermore, not all courts take the same approach to zero-payment or minimum repayment plans as did the court in *Hill*. Some courts still hold that “the ability to consolidate loans over a long period of time with low payments prevents debtors from showing a certainty of hopelessness” even though there are still accompanying mental health strains and tax implications from these plans.¹⁰⁰

Additionally, researchers have identified a trend that “[t]ypically, courts do not deem depression alone sufficient to discharge loans; they see it as treatable and not sufficiently affecting future employment prospects or the ability to repay loans.”¹⁰¹ Based on a survey of various bankruptcy cases, debtors with bipolar disorder, OCD, schizoaffective disorder, mood disorder, PTSD, and personality disorders were more likely to have their debts discharged, presumably because debtors with these conditions are generally more likely to seek treatment and to have an expert who can testify on their behalf of the debilitating effects of the illness.¹⁰² Thus, debtors with depression often have a harder time getting their student loans discharged.

Another crucial issue is that not all courts have joined the Eighth Circuit in weighing the “effect of the debt . . . on the debtor’s

99. *Id.* (quoting one judge who did not require an expert witness because “there is never an objection to the [c]ourt’s taking judicial notice of the limitations imposed by a disabling impairment, even if a debtor’s disease is of the brain rather than of muscle or bone.”). *But see* *Kelsey v. Great Lakes Higher Educ. Corp.* (*In re Kelsey*), 287 B.R. 132, 143 (Bankr. D. Vt. 2001) (“[T]his Court closely scrutinizes claims for undue hardship based upon psychological or emotional disability due to the susceptibility of such claims to fabrication, exaggeration and fraud. Well qualified and substantial expert testimony is essential.”).

100. *Hancock, supra* note 52, at 158; *see also* *Archibald v. United Student Aid Funds* (*In re Archibald*), 280 B.R. 222, 229 (Bankr. S.D. Ind. 2002) (“[Debtor] failed to avail herself of the various repayment programs available. These programs offer reduced payments over an extended period of time, with a forgiveness of the remaining debt at the expiration of the payment period.”).

101. *Hancock, supra* note 52, at 162; *see also, e.g.,* *Kitterman v. Sallie Mae Servicing, L.P.* (*In re Kitterman*), 349 B.R. 775, 779 (Bankr. W.D. Ky. 2006) (holding that depression and fainting spells were not enough to interfere with debtor’s ability to “succeed in school or maintain employment”); *McClain v. Am. Student Assistance* (*In re McClain*), 272 B.R. 42 (Bankr. D. N.H. 2002) (denying discharge to debtor with depression because he had been steadily employed, there was no indication that his condition would continue to deteriorate, and his doctor testified that “depression is often treatable”).

102. *Hancock, supra* note 52, at 162.

mental health.”¹⁰³ Debtors with financial circumstances arguably more “hopeless” than those in *Reynolds* or *Renville* have not been granted a discharge in cases where courts have declined to factor in the effect of the debt on the debtor’s mental health.¹⁰⁴ Thus, debtors in different jurisdictions may get vastly different outcomes even if they have the same type of mental illness or same amount of student debt.

III. THE ARGUMENT FOR A STANDARDIZED APPROACH TO APPLYING UNDUE HARDSHIP

I argue that the Supreme Court, Congress, and lower courts need to take specific actions to standardize how mental health is factored into the undue hardship analysis. Specifically, my recommendations are as follows: 1) all courts should take the effect of student loan debt on the debtor’s mental health into account; 2) communities and courts should create programs to provide expert mental health witnesses to indigent debtors; and 3) courts should grant partial discharge of student debts to debtors with less severe mental health issues.

A. Policy Rationales

1. Bankruptcy and Student Loan Program Objectives

One of the key policies and purposes of the bankruptcy system is to provide “honest but unfortunate” debtors with a fresh start.¹⁰⁵ Taking a consistent approach to mental health issues when discharging student loan debt fits within this policy objective. First, many student loan debtors took on their debts honestly and in good faith. It is important to remember that many student loan debtors take on or accrue their student loan debt at an early age, perhaps

103. *Id.* at 163.

104. Compare *Velarde v. Educ. Credit Mgmt. Corp.* (*In re Velarde*), No. 08-15794-SSM, 2009 Bankr. LEXIS 2403, at *14 (Bankr. E.D. Va. Aug. 23, 2009) (declining to give debtor discharge of student loan debt despite her difficulty finding and keeping a job due to multiple mental health hospitalizations because she had a monthly budget surplus of \$213) with *Reynolds v. Pa. Higher Educ. Assistance Agency* (*In re Reynolds*), 425 F.3d 526, n.6 (8th Cir. 2005) (granting student loan discharge to debtor who was employed and had a monthly surplus of \$700).

105. See discussion *supra* Section I.A.

even before their brains have fully finished developing.¹⁰⁶ These young people often do not fully grasp the implications of the debt they are taking on.¹⁰⁷ Instead, in the words of radio host and financial expert Dave Ramsey and author Anthony O'Neal, students are frequently told that the only way to succeed in life is to go to college, so they take a "teenager's approach to an adult decision" and go into massive amounts of student debt.¹⁰⁸ These honest but unfortunate teens then become adults laden with crushing student debt and stricken with the accompanying mental stresses and issues that come from this debt. As mentioned previously, the fears about students abusing the bankruptcy system and discharging debts immediately after graduation were almost completely unfounded.¹⁰⁹ Thus, it is fair to say that most debtors struggling with student loans and mental health are "honest" debtors who were trying to invest in their futures.

These debtors are also "unfortunate" in the mental health hand they are dealt. While personal choices can certainly exacerbate mental health issues, these issues are often outside of an individual's control.¹¹⁰ Factors that contribute to mental health issues include adverse life experiences, chronic medical conditions, biological

106. Anthony Cilluffo, *5 Facts About Student Loans*, PEW RSCH. CTR. (Aug. 13, 2019), <https://www.pewresearch.org/fact-tank/2019/08/13/facts-about-student-loans> ("Among adults ages 18 to 29, 34% say they have outstanding student loans for their own education."). An individual's brain does not finish developing and maturing until he or she is in their mid-to-late 20s. *The Teen Brain: 7 Things to Know*, NIH, <https://www.nimh.nih.gov/health/publications/the-teen-brain-7-things-to-know> (last visited Mar. 13, 2023).

107. See Elizabeth J. Akers & Matthew M. Chingos, *Are College Students Borrowing Blindly?*, BROWN CTR. ON EDUC. POL'Y (Dec. 2014), https://www.brookings.edu/wp-content/uploads/2016/06/are-college-students-borrowing-blindly_dec-2014.pdf. Based on a survey data of undergraduate students, researchers found that many students were unable to accurately say how much their first year of college cost or how much student loan debt they currently had. *Id.* at 4–5. The study concluded that "[a] substantial number of students have a woefully inaccurate perception of their level of borrowing." *Id.* at 6. This is especially harmful because "[w]ithout knowledge of their financial circumstances, a student with a large sum of debt might be unprepared to compete for the jobs that would pay generously enough to allow them to repay their debt without having to enter an income-based repayment program." *Id.* at 10.

108. BORROWED FUTURE (Ramsey Solutions 2021). In this documentary produced by financial guru Dave Ramsey, Ramsey and author Anthony O'Neal comment on the consequences when teenagers take on massive amounts of student debt without considering the implications of such a decision.

109. See discussion *supra* Section I.B.

110. *Mental Health*, *supra* note 41.

factors, chemical imbalances in the brain, and isolation.¹¹¹ These factors are not things that debtors can typically control. Thus, many debtors with mental health issues fit the description of an honest but unfortunate debtor.

Second, discharging the student loan debt of debtors with mental health issues also aligns with the bankruptcy goal of efficiency. As outlined in *Reynolds*, *Renville*, and *Taratuska*, some debtors' mental health issues are caused or exacerbated by their student loans.¹¹² If these debtors can get their loans discharged, it is likely that their productivity and ability to work and contribute to society will increase.¹¹³ As mentioned above, debtors with mental health issues are less productive at work, can be a drain on the economy, and often cannot get the treatment they need to improve their mental health.¹¹⁴ If these debtors were given a discharge from their student debts, some debtors would be able to contribute more to society and to their communities, much like the debtors in *Taratuska* and *Reynolds*.¹¹⁵

A recent study highlighted the benefits that come to those who are freed from the mental burdens of their student loans. The study followed two groups of student loan borrowers that were in default on their student loans; one group of borrowers had their student loans forgiven, and another group of borrowers still carried their student loan debt.¹¹⁶ The study found that those whose student loan debt was forgiven experienced a variety of benefits: they were more likely to change jobs and land higher-paying positions; they were better able to manage their finances; they were less likely to default on other loans; and they contributed more to the economy.¹¹⁷ These benefits were not seen in the other group that did not have their debts forgiven.¹¹⁸

111. *Id.*

112. See discussion *supra* Sections II.C.1, C.2.

113. See, e.g., *Reynolds v. Pa. Higher Educ. Assistance Agency (In re Reynolds)*, 425 F.3d 526, 534 n.6 (8th Cir. 2005) (finding that stress from debtor's student loan debt was "likely to affect Reynolds's mental health adversely, causing an even greater decline in her earnings.").

114. NewsRx, *supra* note 55; see also discussion *supra* Section II.A.

115. See discussion *supra* Section II.C.2.

116. Marco Di Maggio, Ankit Kalda & Vincent Yao, *Second Chance: Life Without Student Debt 2* (Nat'l Bureau of Econ. Rsch., Working Paper No. w25810, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3376245.

117. *Id.* at 31–32.

118. *Id.* at 16–21.

Not only would a more standardized, less rigorous undue hardship standard for those with mental health issues align with the goals of the bankruptcy system, but it would also be in line with the larger goals of the U.S. student loan system in general. Professor John Patrick Hunt has derived four distinct purposes “that Congress has sought to achieve through decades of student loan legislation” – namely, “providing equal access to higher education; creating an educated population for the country’s benefit; minimizing the distorting effect of debt on career choice; and . . . *providing a benefit to students rather than harming them.*”¹¹⁹ This last element is key. In reviewing the legislative history and political commentary about the student loan system, Professor Hunt noted that “members of Congress, as well as . . . administration officials, treated student loans as straightforward vehicles for aid to students,” not as “a risky bet that may leave them worse off.”¹²⁰ While Congress was certainly cognizant of the importance of getting student loans paid off, “the legislative history reveals no expression of intention that loans be an instrument of harm to even a minority of borrowers.”¹²¹ Even today, the “About Us” website for the Federal Student Aid program uses words like “benefit” and “help” when describing its services.¹²² Even the name of the organization itself implies a benefit rather than a risk through the use of the word “aid” in its name.

However, current conditions make it clear that “[s]tudent loans have made some borrowers worse off, harming rather than helping them.”¹²³ With more than 30% of student loan borrowers in default,¹²⁴ and with an estimated 54% of student loan borrowers suffering from some mental health issues that were brought on by their student debt,¹²⁵ it is clear that the objectives of the student loan program are not serving their purpose as originally intended.

119. Hunt, *supra* note 59, at 728 (emphasis added) (citing various congressional records that all speak about student loans as a means to help debtors, never as a risk or a burden on them).

120. *Id.* at 741.

121. *Id.*

122. *About Us*, FEDERAL STUDENT AID, <https://studentaid.gov/about> (last visited Mar. 13, 2023).

123. Hunt, *supra* note 59, at 729.

124. Hess, *supra* note 30.

125. *The Financial and Mental Cost of the United States’ Higher Education Issues*, ELVTR, <https://elvtr.com/blog/a-failing-system-the-financial-and-mental-cost-of-the-united-states-higher-education-issues> (last visited Mar. 13, 2023).

Thus, “the discharge of at least some educational loans would advance the purposes of the student-loan programs,” and denying discharge to students who were harmed rather than helped by their loans “frustrates Congress’s purpose in creating the student-loan programs.”¹²⁶ If certain borrowers are being mentally affected by their debt to the point that they are unable to work and contribute to the nation and their communities, the goals of the student loan program are not being achieved.

2. Dictionary-Based Argument

The original meaning of the statutory text in the Bankruptcy Code also favors the lessening of burdens for student debtors facing mental health challenges. A dictionary from the 1970s defines “undue” as “excessive, immoderate, or unwarranted,” and “hardship” as “suffering” or “privation.”¹²⁷ Thus, “the most precise definition of ‘undue hardship’ in the 1970s would be *immoderate or unwarranted privation or suffering*.”¹²⁸ Many debtors with mental health issues are experiencing what could arguably be called “immoderate suffering.” For example, “[a] 2021 mental health survey of over 2,300 high debt student loan borrowers found that 1 in 14 respondents experienced suicidal ideation at some point during their repayment journey.”¹²⁹ Additionally, student loan debt seems to cause suffering unique and different from other types of debt. According to one survey, “of borrowers with \$5,000 or more of debt, 42% said their student loan debt triggers high levels of both mental and emotional stress—*more so than other types of debt*.”¹³⁰ The word “suffering” also seems like an accurate description of the experiences of many debtors. As discussed in Part II, debtors use very evocative words to describe the effects that

126. Hunt, *supra* note 59, at 771, 778.

127. Alan M. Ahart, *How the Courts Have Gone Astray in Refusing to Discharge Student Loans: The Folly of Brunner, of Rewriting Repayment Terms, of Issuing Partial Discharges and of Considering Income-Based Repayment Plans*, 95 AM. BANKR. L.J. 53, 74 (2021) (citing Webster’s Third New International Dictionary (1966)).

128. *Id.*

129. Melanie Lockert, *Survey: 1 in 14 High-Debt Borrowers Had Suicidal Ideation Due to Student Loans*, STUDENT LOAN PLANNER (Nov. 1, 2021), <https://www.studentloanplanner.com/mental-health-awareness-survey/>.

130. *Student Loan Debt and Mental Health*, PRUDENTIAL (June 9, 2021), <https://www.prudential.com/corporate-insights/student-loan-debt-and-mental-health> (emphasis added).

student debts have on their mental health.¹³¹ They also use equally emotional words to describe the relief that comes from the forgiveness of their loans: debtors have described weeping in relief and being “ecstatic.”¹³² If these debtors could get even some measure of relief from a discharge of their student loans, this seems like a step that should be taken to help lessen their suffering. Yet, according to Hancock, there are many debtors who are suffering severely from their mental health yet still cannot get a discharge of their student loans.¹³³ Thus, a less rigorous, more lenient approach to giving discharge to those with mental health issues would also be warranted given the original meaning of the statutory text written by Congress in 1976.¹³⁴

B. Recommendations

Given that there are multiple policy arguments in favor of giving more discharges to student loan debtors suffering from mental health issues, I propose that the following steps should be taken to help bring about these changes. First, all courts should take into account the effect of the student loan debt on the debtor’s mental health. Second, courts and communities should try to create programs to provide expert mental health witnesses to indigent debtors. Third, courts should allow partial discharge of student loan debt to those debtors whose mental health issues might not reach a high a level of severity.

1. Mandatory Consideration of Debtor’s Mental Health

First, when weighing the undue hardship of a student loan on a debtor with mental health issues, all courts should adopt the position of the Eighth Circuit and “should examine the effect of a

131. See discussion *supra* Section II.B.

132. Annie Nova, *Advice from Some of the First Public Servants to Have Their Student Loans Forgiven*, CNBC (Nov. 16, 2018), <https://www.cnbc.com/2018/11/16/people-whove-had-their-student-debt-forgiven-give-their-advice.html>.

133. Hancock, *supra* note 52, at 163.

134. For additional policy reasons for relaxing discharge restrictions on student loans, see Iuliano, *supra* note 31, at 519 (noting the unequal power balance between lenders, who are repeat players in the court system, and indigent debtors who likely have little experience with the legal system); see also Ahart, *supra* note 127, at 60 (calling the *Brunner* test “obsolete” because it was decided when there was still an option to discharge student debts after a set number of years; such an option is no longer available to debtors).

debt on the health and well-being of a debtor separately from its effect on future employment and income opportunities.”¹³⁵ Judicial precedent in *Reynolds* and *Renville* shows that this can be done both under a *Brunner* analysis and a totality of the circumstances analysis.¹³⁶ Thus, the stage is set for this change to be made. Some courts have started making this change and incorporating “[n]on-economic factors such as the effect of student loans on the debtor’s mental health” into their undue hardship analyses.¹³⁷ However, this adoption has not been universal.¹³⁸ The best way for systematic, nation-wide change to come about would be for the Supreme Court to grant certiorari in a student debt bankruptcy case and establish that mental health effects should be a permanent part of the undue hardship consideration. This would create more consistent outcomes for debtors across the country and help people make more informed decisions about whether discharge is a possibility for them. Although the Supreme Court has declined to clarify the undue hardship test in the past, the growing crises of student debt and mental health, as well as the circuit splits on the issue of undue hardship, make this a prime issue for the Court to address.¹³⁹ The additional twist of the effect of the global COVID-19 pandemic on both student loan borrowers and on mental health issues makes the argument for Supreme Court review even stronger.

Another option, should the Supreme Court not choose to step in, is for the Department of Justice to change its approach in handling student loan discharge for debtors with mental health issues. The Department of Justice, in conjunction with the Department of Education, recently announced a “new process” for handling the

135. *Brooks v. Educ. Credit Mgmt. Corp.* (*In re Brooks*), 406 B.R. 382, 391 (Bankr. D. Minn. 2009).

136. See discussion *supra* Sections II.C.1, C.2.

137. *Halverson v. U.S. Dep’t of Educ.* (*In re Halverson*), 401 B.R. 378, 388 (Bankr. D. Minn. 2009) (Citing *Reynolds*, the court in this case considered the stress and marital strain that the debtor was experiencing because of his student debts and granted him a discharge.). See also *In re Brooks*, 406 B.R. at 396 (finding that the “stress of the loan [would] negatively affect” the debtor’s mental health, causing “real and meaningful ongoing detriment”).

138. See, e.g., *Velarde v. Educ. Credit Mgmt. Corp.* (*In re Velarde*), No. 08-15794-SSM, 2009 Bankr. LEXIS 2403 (Bankr. E.D. Va. Aug. 23, 2009).

139. LEWIS, *supra* note 9, at 10 (“[T]he U.S. Supreme Court has not yet directly opined on the meaning of ‘undue hardship,’ and the Court recently denied *certiorari* in a case that presented the Court with the opportunity to further interpret that term.”) (referencing *Tetzlaff v. Educ. Credit Mgmt. Corp.*, 577 U.S. 1063 S. Ct. 803 (2016)).

discharge of student loan debt in bankruptcy.¹⁴⁰ In this new process, debtors fill out an attestation form summarizing their financial status and why repaying their student debts would be an undue hardship.¹⁴¹ After the attestation form has been completed, “The Justice Department, in consultation with the Department of Education, will review the information provided, apply the factors that courts consider relevant to the undue-hardship inquiry, and determine whether to recommend discharge.”¹⁴² The purpose of this new process is to create more uniform outcomes in student debt discharge and to simplify the discharge process for debtors.¹⁴³ While encouraging, neither the new attestation form nor the guidelines published by the Department of Justice make specific mention of mental health issues.¹⁴⁴ In the future, it would be very helpful if the new attestation form were edited to include a section specifically for a debtor’s mental health.

2. *Expert Witnesses for Indigent Debtors*

My second recommendation is that courts should work with local mental health providers to help provide indigent debtors with mental health experts who can testify on their behalf. While some courts, including the Sixth and Eleventh Circuits, will discharge student debts in some cases even without expert medical testimony, not all courts are ready to do so.¹⁴⁵ Indeed, “[t]he majority view on

140. *Justice Department and Department of Education Announce a Fairer and More Accessible Bankruptcy Discharge Process for Student Loan Borrowers*, DEPT. OF JUST. (Nov. 17, 2022), <https://www.justice.gov/opa/pr/justice-department-and-department-education-announce-fairer-and-more-accessible-bankruptcy> [hereinafter *Fairer and More Accessible Discharge*].

141. *At a Glance: Department of Justice’s New Process for Student Loan Bankruptcy Discharge Cases*, <https://www.justice.gov/civil/page/file/1552676/download>.

142. *Id.*

143. See *Fairer and More Accessible Discharge*, *supra* note 138 (“By simplifying the process and establishing clear standards, the agencies hope to significantly reduce the burden on borrowers and government attorneys, provide a clear path for borrowers to seek discharges and add safeguards to promote consistency and predictability.”).

144. GUIDANCE FOR DEPARTMENT ATTORNEYS REGARDING STUDENT LOAN BANKRUPTCY LITIGATION (Nov. 17, 2022), <https://www.justice.gov/civil/page/file/1552681/download>; ATTESTATION FORM (Jan. 2023), <https://www.justice.gov/civil/page/file/1552666/download>.

145. *Educ. Credit Mgmt. Corp. v. Mosley (In re Mosley)*, 494 F.3d 1320, 1325 (11th Cir. 2007) (“The court reasoned that requiring corroborating evidence when the debtor cannot afford expert testimony or documentation ‘imposes an unnecessary and undue burden on [the debtor] in establishing his burden of proof.’”) (quoting *Barrett v. Educ. Credit Mgmt. Corp.*, 487 F.3d 353, 360 (6th Cir. 2007)).

the subject [in the courts] is that some evidence is necessary to corroborate the debtor's testimony in order to make a finding" on things like mental illness.¹⁴⁶ Additionally, "most judges are lay persons, and require some medical evidence to determine the nature, extent and likely duration of a disability."¹⁴⁷ Providing a system that gives debtors access to mental health professionals would balance the needs of debtors with the interests of judges and the courts.

Some courts have already begun to establish such systems. For example, the Eastern District of North Carolina has created one such program called The Mental Health Project.¹⁴⁸ The court is working with the North Carolina Society of Clinical Social Workers to "offer debtors an evaluation by a mental health professional at a discounted or pro bono rate."¹⁴⁹ These professionals provide debtors with a "written report that may be submitted to the court," and some professionals can choose to testify before the court on a case-by-case basis.¹⁵⁰ These written reports address various things that would be important to the debtor's case, such as "whether the debtor can maintain a job, whether the condition is treatable, and the likelihood that the debtor will comply with treatment recommendations."¹⁵¹ Programs such as this would help debtors who could not afford to hire a mental health expert to testify at their trial to at least get a written document to help support their own testimony. This would also help judges make more informed decisions. Finally, this would provide a good balance between believing the testimony of debtors and recognizing that some debtors might exaggerate or make up stories of mental illness to try and get a discharge. A written document from a mental health

146. *Burton v. Educ. Credit Mgmt. Corp.* (*In re Burton*), 339 B.R. 856, 878 n.38 (Bankr. E.D. Va. 2006).

147. *Hancock*, *supra* note 52, at 159 (quoting *Norasteh v. Boston Univ.*, 311 B.R. 671, 678 (Bankr. S.D.N.Y. 2004)).

148. *Mental Health Project*, U.S. BANKR. CT. E.D.N.C., <https://www.nceb.uscourts.gov/mental-health-project> (last visited Mar. 12, 2023).

149. A. Thomas Small, *Mental Illness and Bankruptcy*, N.C. STATE B.J., Fall 2002, at 28.

150. *Id.*

151. *Id.* The North Carolina Eastern Bankruptcy Court has since implemented this program and debtors have utilized it in their cases. See *Richardson v. N.C. State Educ. Assistance Auth.* (*In re Richardson*), Nos. 07-01504-5-ATS, S-07-00096-5-AP, 2008 WL 3911075, at *3 n.3 (Bankr. E.D.N.C. Aug. 14, 2008) ("This court has established a pro bono panel of mental health experts who are available, at no cost to debtors, on application, to evaluate debtors and provide testimony on these issues for the court's consideration.").

expert would provide credibility to the debtor's testimony without the additional charges of getting an expert to testify in court.

3. *Partial Discharge*

The amount of debt that a student debtor carries can have a direct effect on the severity of their mental health issues.¹⁵² Thus, providing a partial discharge to those debtors who suffer from less severe mental health issues would give creditors some recourse while also lessening the financial and mental burden on debtors.

Courts are divided on "whether a bankruptcy court possesses the authority to discharge only a portion of a student loan while declaring the remainder of the loan nondischargeable."¹⁵³ Some courts say that the statutory language gives no authority to grant partial discharge, and that to do so would create "unpredictability, lack of uniformity of outcomes, and potential inequities" due to the subjectiveness of the analysis.¹⁵⁴ Other courts allow for partial discharge if the debtor can satisfy the undue hardship standard for the part of the loan that is going to be discharged.¹⁵⁵ For example, "[t]he Sixth Circuit Court of Appeals . . . has held that a court may grant a partial discharge of student loan debt if the debtor satisfies each prong of the *Brunner* test."¹⁵⁶ The Tenth Circuit has also come to this conclusion.¹⁵⁷

I argue, like the Tenth and Sixth Circuit Courts, that the power to grant a partial discharge is allowable under the Bankruptcy Code. Under the equitable powers of § 105(a) of the Bankruptcy Code, a court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."¹⁵⁸ Section 523 of the Bankruptcy Code clearly states that

152. Kim & Chatterjee, *supra* note 53, at 37 ("[M]ore severe debts are associated with worse health outcomes . . .").

153. LEWIS, *supra* note 9, at 31.

154. *Id.* at 32 (quoting *Conway v. Nat'l Collegiate Tr. (In re Conway)*, 495 B.R. 416, 423 (B.A.P. 8th Cir. 2013)); *see also* Ahart, *supra* note 127, at 65 (arguing that partial discharge is not allowed by 11 U.S.C. § 523(a)(8)).

155. LEWIS, *supra* note 9, at 32.

156. *Nixon v. Key Educ. Resources (In re Nixon)*, 453 B.R. 311, 315 (Bankr. S.D. Ohio 2011) (citing *Miller v. Penn. Higher Educ. Assistance Agency (In re Miller)*, 377 F.3d 616, 624 (6th Cir. 2004)).

157. *See Alderete v. Educ. Credit Mgmt. Corp. (In re Alderete)*, 412 F.3d 1200 (10th Cir. 2005).

158. 11 U.S.C. § 105(a).

undue hardship makes discharge of a debt permissible.¹⁵⁹ Thus, under the broad powers of § 105(a), a bankruptcy court should have the power to grant a partial discharge if the portion of the student debt being discharged “satisfies the requirements under § 523(a)(8).”¹⁶⁰ According to one court, “the partial dischargeability or other modification of a student loan debt accomplishes Congress’ purpose of providing debtors with a ‘fresh start’ while maximizing the repayment of the debt.”¹⁶¹ Thus, partial discharge is justified by the text and purposes of the Bankruptcy Code.

This type of partial discharge could be very beneficial for mental health sufferers who are able to maintain employment despite their mental health challenges. For example, in *Nixon v. Key Education Resources*, the debtor, Elisabeth Nixon, had been diagnosed with bipolar disorder and was on the highest dose of medication available to her.¹⁶² Although she had obtained a PhD, her PhD had been revoked due to inadvertent plagiarism, likely caused by her mental disorientation.¹⁶³ Ultimately, the court granted Nixon and her husband a partial discharge of their student loan debts, which presumably lifted a great burden off of Nixon’s shoulders and allowed her to focus on obtaining a job to pay off the remaining amount of the loan.¹⁶⁴

I think partial discharge would provide an excellent way to balance the needs of those debtors who have less severe mental health issues with the needs of creditors and fairness in repayment. As mentioned previously, courts are often hesitant to grant discharge to debtors who only suffer from depression because courts view depression as treatable and not as severe as other mental illnesses.¹⁶⁵ However, treatment and medication do not guarantee that a mental illness will be cured.¹⁶⁶ A partial discharge

159. 11 U.S.C. § 523(a)(8).

160. *In re Alderete*, 412 F.3d at 1207 (quoting *In re Saxman*, 325 F.3d 1168, 1175 (9th Cir. 2003)); see also *Mosko v. Am. Educ. Serv. (In re Mosko)*, Nos. 04-52834, 04-6077, 2005 Bankr. LEXIS 1902, at *25-27 (Bankr. M.D.N.C. Sept. 29, 2005).

161. *Educ. Credit Mgmt. Corp. v. Jones*, No. CIV.A. 3:99CV258., 1999 U.S. Dist. LEXIS 23089, at *8 (E.D. Va. July 14, 1999).

162. *Nixon v. Key Educ. Resources (In re Nixon)*, 453 B.R. 311, 318 (Bankr. S.D. Ohio 2011).

163. *Id.* at 320.

164. *Id.* at 336.

165. *Hancock*, *supra* note 52, at 162. See also discussion *supra* Section II.C.3.

166. See discussion *supra* Section II.A about treatment-resistant depression and the reoccurrence of mental health challenges even for those receiving treatment.

would be ideal for such debtors who might be able to hold a job and pay some of their debt but who would still benefit mentally and emotionally if at least part of their debt was discharged. Additionally, a partial discharge helps strike a balance by giving creditors at least some amount of repayment rather than discharging the entire loan amount.

4. Why These Recommendations Will not Cause Upheavals in the Bankruptcy Courts

Some might oppose these changes because they think debtors will fabricate mental health issues to get debts discharged,¹⁶⁷ or because student loan lenders will be unduly harmed.¹⁶⁸ | However, neither of these concerns will be realized by implementing these changes.

First, any danger of debtors faking or fabricating mental health issues just to get a discharge will be mitigated by having pro bono mental health providers to help corroborate debtor statements. While some courts already feel comfortable gauging for themselves the veracity of debtors' mental health claims without expert support, other courts can rely on the advice of experts. Courts can also give themselves greater confidence in the advice of these experts by making the experts "witnesses for the court, rather than . . . an expert for the debtor" like the bankruptcy court in North Carolina has done.¹⁶⁹ In the event that some debtors do try to abuse the system, these experts will provide a safeguard for both courts and judges.

Second, lenders will not be unduly harmed by these changes because lenders already have a significant advantage in the bankruptcy system; if nothing else, these changes will help balance

167. See, e.g., *Burton v. Educ. Credit Mgmt. Corp.* (*In re Burton*), 339 B.R. 856, 874–75 (Bankr. E.D. Va. 2006) (stating that claims of psychological or emotional disability must be subject to close scrutiny "due to the susceptibility of such claims to fabrication, exaggeration and fraud"); *Chasser v. United Student Aid Funds* (*In re Chasser*), 391 B.R. 482, 490 (Bankr. M.D. Fla. 2008) (same); *Congdon v. Educ. Credit Mgmt. Corp.* (*In re Congdon*), 365 B.R. 433, 437 (Bankr. D. Vt. 2007) (same).

168. See, e.g., Brett Holzhauser, *Four Million Borrowers Are Now Being Excluded from Student Loan Forgiveness – Here's Who Is Being Removed and What You Can Do*, CNBC (Sept. 29, 2022), <https://www.cnbc.com/select/millions-are-being-excluded-from-student-loan-forgiveness/> (noting that if/when student loans are forgiven, banks that service those loans lose out on income; this same argument can apply to discharge of student loan debt as well).

169. *Mental Health Project*, *supra* note 148.

the scales between debtors and lenders, not harm lenders. Student loan lenders are “repeat players” in the court system with abundant resources, experience, and sophistication.¹⁷⁰ According to one scholar, these lenders have “adopted a case-selection strategy that distorts precedent and masks the true likelihood of obtaining a student loan discharge.”¹⁷¹ As repeat players in the court system, these lenders have decided that, in order to create a judicial precedent that is beneficial to them, they will settle and take the loss in any student loan discharge cases that look bad for them.¹⁷² They will only choose to fight the cases that they think they have a good chance of winning, thus creating judicial precedent that is vastly skewed in the creditors’ favor.¹⁷³ In other words, “creditors have abused their status as repeat players to develop precedent that is legally indefensible, then used this precedent to cultivate the myth of nondischargeability.”¹⁷⁴ Thus, when a desperate individual with limited resources and significant mental health issues goes “up to bat” against such a sophisticated repeat player, it seems justified that the courts would weigh the interests of the debtor more heavily than those of the well-funded lender.¹⁷⁵

CONCLUSION

There is no doubt that, in a perfect world, we would want student debtors to pay back their student loan debts and uphold their contracts. However, mental health and personal struggles inevitably create wrinkles in these ideal plans. There is a strong need to balance the interest of repaying creditors with the burdens that mental health issues create in our society. Bankruptcy courts can help strike a better balance between these two concerns by implementing consistent evaluation of mental health issues, providing mental health expert testimony for debtors, and allowing partial discharge for some debtors. The “certainty of hopelessness” standard should not be made so strict that hopelessness causes

170. Iuliano, *supra* note 31, at 519.

171. *Id.* at 499.

172. *Id.* at 519.

173. *Id.* at 519–20.

174. *Id.* at 536.

175. See Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493, 493–94 (2010) (noting that courts are increasingly mentioning and considering the sophistication of parties when ruling in contractual matters).

irreversible harm to people, families, communities, and the nation. Giving more leeway and grace to student debtors with mental health issues in bankruptcy discharge will help reduce the mental stress on debtors, and without these mental shackles, they will be able to become more productive members of their communities and of society.