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# “UNDUE HARDSHIP” AND UNINSURED AMERICANS: HOW ACCESS TO HEALTHCARE SHOULD IMPACT STUDENT-LOAN DISCHARGE IN BANKRUPTCY

Alexander Gouzoules\*

## INTRODUCTION

American student-loan debt has reached a staggering sum. Student loans rank below only housing as the second-largest form of household debt, with \$1.4 trillion outstanding.<sup>1</sup> From 1990 to 2016, average college tuition rose by 57% at private universities and 93% at public ones, an increase both enabled by and contributing to the growth of student borrowing.<sup>2</sup> Debtors with student loans are forced to accept jobs more quickly than their debt-free peers and thus earn less than those peers for years following graduation.<sup>3</sup> These loans affect all borrowers but create a disparate burden on minority and first-generation college students, who rely on them to finance their education, cite them as a primary reason for dropping out, and fall behind on payments at disproportionate rates.<sup>4</sup> Default rates are high: federal loans taken out in 2009 had reached a three-year default rate exceeding 13% by 2013.<sup>5</sup> These dire statistics are likely to worsen as the economic impacts of the ongoing COVID-19 pandemic are fully realized. Echoing prescient concerns expressed by Rep. William D. Ford upon passage of the Higher Education Act of 1965, some commentators have worried that the increase in student-loan borrowing has created an “Indentured Generation.”<sup>6</sup>

Exacerbating the burden imposed by student loans is a widespread belief—technically incorrect but largely borne out in practice—that such debt is “not dischargeable in bankruptcy.”<sup>7</sup> In a typical voluntary bankruptcy proceeding

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<sup>1</sup> See Judith Scott-Clayton, *The Looming Student Loan Crisis Is Worse Than We Thought*, 2 BROOKINGS INST.: EVID. SPEAKS REP. 1, 3 (2018).

<sup>2</sup> Fenaba R. Addo, Jason N. Houle & Daniel Simon, *Young, Black, and (Still) in the Red: Parental Wealth, Race, and Student Loan Debt*, 8 RACE & SOC. PROBS. 64, 64 (2016).

<sup>3</sup> Holger M. Mueller & Constantine Yannelis, *The Rise in Student Loan Defaults*, 131 J. FIN. ECON. 1, 1 n.1 (2019) (finding that student-loan borrowers spend 8.3% less time on their post-graduation job search and earn 4.2% less annually in their first ten years after graduation).

<sup>4</sup> See Addo et al., *supra* note 2, at 65; BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2017 45 (2018).

<sup>5</sup> Joseph E. Stiglitz, *Student Debt and the Crushing of the American Dream*, N.Y. TIMES (May 12, 2013), <https://opinionator.blogs.nytimes.com/2013/05/12/student-debt-and-the-crushing-of-the-american-dream/>; see also Robert C. Cloud & Richard Fossey, *Facing the Student-Debt Crisis, Restoring the Integrity of the Federal Student Loan Program*, 40 J.C. & U.L. 467, 469 (2014) (“Student-loan default rates have gone up relentlessly in recent years.”).

<sup>6</sup> Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 330 (2013).

<sup>7</sup> E.g., Mueller & Yannelis, *supra* note 3, at 1. See also *Rosenberg v. N.Y. State Higher Educ. Servs. Corp.*, 610 B.R. 454, 459 (Bankr. S.D.N.Y. 2020) (“[M]ost people (bankruptcy professionals as well as lay individuals) believe it impossible to discharge student loans.”).

under Chapter 7 of the Bankruptcy Code, a financially troubled debtor petitions for bankruptcy and notifies their unsecured creditors, who may then choose to participate in a liquidation of the debtor's nonexempt assets.<sup>8</sup> A bankruptcy court will then issue a discharge order releasing the debtor from liability for any discharged debt and enjoining "creditors from attempting to collect or to recover the debt."<sup>9</sup> Alternatively, in a Chapter 13 proceeding, a debtor agrees to a plan calling for a series of reduced payments to a bankruptcy trustee, and after the debtor has made all plan repayments, their remaining debts are discharged.<sup>10</sup> Under either chapter, the discharge order ultimately provides the debtor with a "fresh start."<sup>11</sup>

The Bankruptcy Code, however, includes a catch. Unlike virtually all other forms of unsecured debt, student loans are presumptively not included in a discharge order.<sup>12</sup> While a petitioner will be relieved of, among other things, consumer debt, medical debt, tort liability, and mortgages, 11 U.S.C. § 523(a) sets the default rule that student-loan debt will remain in place.<sup>13</sup> To overcome this presumption, a debtor must initiate an adversary proceeding, a separate and more formal lawsuit in conjunction with the bankruptcy proceeding,<sup>14</sup> against any student-loan creditors to establish that "excepting [their student loans] from discharge . . . would impose undue hardship on the debtor and the debtor's dependents."<sup>15</sup> Unless the debtor "affirmatively secures a hardship determination" during this proceeding, "the discharge order will not include a student loan debt."<sup>16</sup>

When Congress created this special hurdle for student debtors, it was motivated by a wave of sensationalized media reports claiming that student borrowers were defrauding taxpayers by opportunistically discharging loans in bankruptcy before embarking on lucrative careers as doctors and lawyers.<sup>17</sup>

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<sup>8</sup> See *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447–48 (2004).

<sup>9</sup> *Id.* at 447.

<sup>10</sup> E.g., Daniel A. Austin, *Student Loan Debt in Bankruptcy: An Empirical Assessment*, 48 SUFF. U. L. REV. 577, 578 (2015).

<sup>11</sup> *Hood*, 451 U.S. at 447.

<sup>12</sup> 11 U.S.C. § 523(a)(8) (2012).

<sup>13</sup> Alexei Alexandrov & Dalié Jiménez, *Lessons from Bankruptcy Reform in the Private Student Loan Market*, 11 HARV. L. & POL. REV. 175, 177 (2017).

<sup>14</sup> See generally FED. R. BANKR. P. 7001.

<sup>15</sup> 11 U.S.C. § 523(a)(8); see also § 1328(a)(2) (providing that § 523(a)(8) is applicable in a Chapter 13 proceeding, as well as in a Chapter 7 proceeding).

<sup>16</sup> *Hood*, 541 U.S. at 450.

<sup>17</sup> Aaron N. Taylor, *Undo Undue Hardship: An Objective Approach to Discharging Federal Student Loans in Bankruptcy*, 38 J. LEGIS. 185, 188 (2012); see also *In re Cox*, 338 F.3d 1238, 1242 (11th Cir. 2003) (referencing "Congress's intent to make it harder for a student to shift his debt responsibility onto the taxpayer").

Those stories were later proven to have no empirical basis,<sup>18</sup> but rather than revising the presumption against the discharge of federal student loans in § 523(a), Congress *extended* the presumption to cover purely private loans with no connection to the public fisc.<sup>19</sup> These private student-loan creditors are largely unregulated and originate tens of billions of dollars of loans.<sup>20</sup> Even those who defend § 523(a) as a means of conserving federal resources have questioned its special treatment for private lenders.<sup>21</sup>

But despite the lack of a coherent principle underlying the law,<sup>22</sup> we appear to be stuck with the rule that *all* student loans are only dischargeable upon a showing of undue hardship in an adversary proceeding, at least for the near future.<sup>23</sup> To discharge such loans, bankrupt debtors must incur additional legal fees by initiating an adversary proceeding and attempting to demonstrate that application of § 523(a)'s presumption against the discharge of student debt would impose an “undue hardship” upon them.<sup>24</sup> Only a tiny fraction of bankrupt student debtors are able to do so.<sup>25</sup> Those who make the attempt but fail are left with their student debt intact and substantial litigation expenses to pay.<sup>26</sup> Moreover, even when a debtor successfully convinces a bankruptcy court that their material condition is so dire that their loans should be discharged, student-loan companies frequently appeal adverse judgments, further increasing a debtor's litigation costs and delaying any “fresh start” that could be provided by bankruptcy.<sup>27</sup>

Most bankruptcy courts that have analyzed whether repayment of student loans would create an “undue hardship” have looked in part to whether a

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<sup>18</sup> *Id.*

<sup>19</sup> § 523(a)(8)(B) (as revised 2005).

<sup>20</sup> Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 181 (2009).

<sup>21</sup> *E.g.*, Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 524 n.92 (2012) (“Since taxpayers are not footing the bill for private loan defaults, it makes little sense to grant them special status.”).

<sup>22</sup> For an attempt to identify such a principle, see John A.E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44 CAN. BUS. L.J. 245, 246 (2007).

<sup>23</sup> See Kyle L. Grant, *Student Loans in Bankruptcy and the “Undue Hardship” Exception: Who Should Foot the Bill?*, 2011 B.Y.U. L. REV. 819, 828 (2011) (“Congress shows little sign that it has any intention of repealing the ‘undue hardship’ exception in spite of strong opposition.”).

<sup>24</sup> Pardo & Lacey, *supra* note 20, at 191.

<sup>25</sup> Only 0.1% of student-loan debtors in bankruptcy even attempt to discharge their student-loan debt. See Iuliano, *supra* note 21, at 525.

<sup>26</sup> Pardo & Lacey, *supra* note 20, at 191.

<sup>27</sup> See *infra* note 54 (collecting cases where student loan creditor appealed bankruptcy court's finding of “undue hardship” first to district court and then to circuit court of appeals).

debtor's standard of living is sufficiently "minimal."<sup>28</sup> But few agree on exactly how to evaluate a debtor's material condition, and courts have split on the significance of a debtor's health insurance status. Some have held that health insurance coverage is necessary to maintain a minimal standard of living, and an undue hardship thus exists where student-loan debt repayment forecloses on the possibility of acquiring health insurance.<sup>29</sup> Other courts, however, have held that even debtors who could not afford health insurance were not living under sufficiently minimal conditions to warrant student-loan discharge.<sup>30</sup>

This Essay contends that debtors without access to healthcare necessarily face an undue hardship warranting bankruptcy discharge of their student loans. Part II reviews the literature on student-loan debt and bankruptcy. Part III examines how courts have evaluated "undue hardship," particularly in circumstances where a debtor lacked health insurance. Part IV analyzes the state of American healthcare law after the passage of the Patient Protection and Affordable Care Act of 2010, which expressed Congress's judgment that all Americans should purchase minimum essential health coverage. Part V provides an initial analysis of how the ongoing COVID-19 pandemic will likely worsen the crisis facing student borrowers without access to healthcare, dramatically increasing the need for reform in this area. I conclude by arguing that any student-loan debtor without access to basic healthcare necessarily suffers an undue hardship and should be entitled to a discharge of student loans in a bankruptcy proceeding.

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<sup>28</sup> *Brunner v. N.Y. Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).

<sup>29</sup> *E.g.*, *Schuckman v. U.S. Dep't of Educ. (In re Schuckman)*, No. 17-10834, Adv. No. 17-5130, 2019 Bankr. LEXIS 1615 at \*15–16 (Bankr. D. Kan. May 28, 2019) (stating that for a minimal standard of living, "people must have health insurance or have the ability to pay for medical and dental expenses when they arise"); *Armesto v. N.Y. State Higher Educ. Servs. Corp. (In re Armesto)*, 298 B.R. 45, 47–48 (Bankr. W.D.N.Y. 2003) ("Here, the debtor cannot afford medical insurance, and despite health problems, has not visited a physician during the last three or four years. With respect to the first prong of the *Brunner* standard, therefore, the court is satisfied that [the debtor] cannot presently maintain a minimal standard of living, even without any payment on account of her student loan.").

<sup>30</sup> *E.g.*, *Flickinger-Luther v. ECMC (In re Flickinger-Luther)*, 462 B.R. 157, 165 (W.D. Penn. 2012) (rejecting debtor's argument that repayment of their student loans would preclude the purchase of health insurance as an "extraneous . . . concern"); *In re Berryhill*, No. 10-8006, 2011 WL 3861598 at \*4 (C.D. Cal. Aug. 31, 2011) (debtor without health insurance did not establish undue hardship); *Nelson v. Credit Mgmt. Corp. (In re Nelson)*, 404 B.R. 892, 893–96 (Bankr. E.D. Wis. 2009) (debtors without health insurance "are suffering hardship, [but] their circumstances do not rise to the level of 'undue' hardship"); *Kopf v. United States Dep't of Educ. (In re Kopf)*, 245 B.R. 731, 747 (Bankr. D. Maine 2000) (debtor without health insurance nonetheless "holds a surplus from which a meaningful monthly payment may be made").

## I. LITERATURE REVIEW

Many commentators have argued that outstanding student-loan debt in the United States represents a national crisis that must be addressed.<sup>31</sup> This Essay will contribute to this literature, because scholars have not focused specifically on whether courts should take a lack of health insurance into account when making an undue hardship determination.<sup>32</sup>

A general consensus in the existing literature concludes that the Bankruptcy Code's special barriers against student-loan discharge are overly harsh and lack a principled theoretical basis.<sup>33</sup> Leading articles articulating this view are Professor Daniel Austin's *The Indentured Generation: Bankruptcy and Student Loan Debt* and Professor Aaron Taylor's, *Undo Undue Hardship: An Objective Approach to Discharging Federal Student Loans in Bankruptcy*.<sup>34</sup> Professor John Pottow has discussed and evaluated theories that explain and underlie the Bankruptcy Code's special treatment of student loans.<sup>35</sup>

Daniel Austin and Jason Iuliano have separately conducted empirical studies of the bankruptcy system's treatment of student loans. Both found that only a minute fraction of bankruptcy filers with student loans even attempted to discharge them through an "undue hardship" adversary proceeding.<sup>36</sup> Specifically, Iuliano determined that only 0.1% of filers in his 2012 sample did

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<sup>31</sup> *E.g.*, Abbye Atkinson, *Race, Educational Loans & Bankruptcy*, 16 MICH. J. RACE & L. 1, 4 (2010) (exploring impact of federal student-loan policies on African Americans); Cloud & Fossey, *supra* note 5, at 493–98; Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 CAL. L. REV. 1561, 1561 (2015) (characterizing student loans as a means to transfer risk to individuals and arguing that current regime does not allocate risk in an optimal fashion).

<sup>32</sup> Iuliano's analysis found that courts are more likely to relieve a filer of student-loan debt where that filer has an ongoing medical hardship. Iuliano, *supra* note 21. Additionally, studies have determined that student-loan debt is associated with negative mental health outcomes. *See* 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, 85 (2015).

<sup>33</sup> For arguments that § 523(a) is overly harsh, see Austin, *The Indentured Generation*, *supra* note 6, at 331; Brendan Baker, *Deeper Debt, Denial of Discharge: The Harsh Treatment of Student Loan Debt in Bankruptcy, Recent Developments, and Proposed Reforms*, 14 U. PA. J. BUS. L. 1213, 1230–32 (2012) (arguing that student loans are not "fundamentally different from other types of loans that can be discharged"); Taylor, *supra* note 17, at 190. For an argument in favor of the current statute, see Grant, *supra* note 23, at 828. An argument in favor of exempting student loans from discharge entirely can be found in Janice E. Kosel, *Running the Gauntlet of "Undue Hardship"—The Discharge of Student Loans in Bankruptcy*, 11 GOLDEN GATE U. L. REV. 457, 459 (1981). Kosel's work, however, predates both the contemporary expansion of student borrowing and Congress's expansion of the student-loan anti-discharge presumption to cover private loans in 2005.

<sup>34</sup> Austin, *The Indentured Generation*, *supra* note 6, at 331; Taylor, *Undo Undue Hardship*, *supra* note 17, at 190.

<sup>35</sup> Pottow, *supra* note 22, at 246.

<sup>36</sup> Austin, *supra* note 10, at 582; Iuliano, *supra* note 21, at 505.

so, and Austin found only three such proceedings in his 2015 sample of 914 bankruptcy cases.<sup>37</sup> Another empirical analysis of “undue hardship” adversary proceedings was conducted by Professors Rafael Pardo and Michelle Lacey, who found that “factors unrelated to the command of the law (e.g., the identity of the judge assigned to the debtor’s adversary proceeding), rather than factors deemed relevant by the legal doctrine (e.g., the debtor’s income and expenses), account for the substantive outcomes we have studied.”<sup>38</sup> Alexei Alexandrov and Dalié Jiménez used empirical data to analyze whether Congress’s 2005 extension of special protections to private student lenders benefited debtors by resulting in lower interest rates; they found no evidence of “lenders passing through the expected savings of the law change to students through lower interest rates.”<sup>39</sup>

## II. JUDICIAL APPLICATION OF THE “UNDUE HARDSHIP” TEST

Congress did not define “undue hardship,” leaving the unenviable task of interpreting the term and articulating a precise standard to the courts.<sup>40</sup> While some judges have construed “undue hardship” according to “the plain, ordinary meaning of those words,”<sup>41</sup> others have supplanted the statutory phrase with more draconian formulations. The Ninth Circuit, for example, asked whether it would be “unconscionable to require the debtor to take steps to earn more income or reduce her expenses,”<sup>42</sup> even though “unconscionable” presents a seemingly higher bar than a plain reading of “undue hardship.” Another line of cases infamously demands that a debtor demonstrate a “certainty of hopelessness” before § 523(a)’s presumption could be overcome.<sup>43</sup> As the Bankruptcy Court for the Southern District of New York recently explained, “retributive dicta” in student loan cases “have become a quasi-standard of mythic proportions so much that most people (bankruptcy professionals as well as lay individuals) believe it impossible to discharge student loans.”<sup>44</sup>

Most jurisdictions have adopted the three-part test set forth in *Brunner v. New York Higher Education Services Corp.*, asking (1) whether the debtor can

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<sup>37</sup> Austin, *supra* note 10, at 582; Iuliano, *supra* note 21, at 505.

<sup>38</sup> Pardo & Lacey, *supra* note 20, at 193–194.

<sup>39</sup> Alexandrov & Jiménez, *supra* note 13, at 221.

<sup>40</sup> Taylor, *supra* note 17, at 187.

<sup>41</sup> Skaggs v. Great Lakes Higher Educ. Corp. (*In re Skaggs*), 196 B.R. 865, 867 (Bankr. W. D. Okla. 1996).

<sup>42</sup> *In re Birrane*, 287 B.R. 490, 495 (B.A.P. 9th Cir. 2002).

<sup>43</sup> *E.g.*, *In re Briscoe*, 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981).

<sup>44</sup> *Rosenberg v. N.Y. State Higher Educ. Servs. Corp.*, 610 B.R. 454, 459 (Bankr. S.D.N.Y. 2020).

maintain, “based on current income and expenses, a ‘minimal’ standard of living for herself and her dependents if forced to repay the loans,” (2) whether that state of affairs “is likely to persist for a significant portion of the repayment period of the student loans,” and (3) whether the debtor has made good faith efforts to repay the loans.<sup>45</sup> While the *Brunner* test offers a marginally more precise framework than, for example, a totality-of-the-circumstances analysis,<sup>46</sup> courts are still left to determine, with little guidance, whether a debtor can maintain a “minimal standard of living.” This language is not necessarily more informative than the statutory language of “undue hardship,” and, depending on how a court defines “minimal,” it may even produce more severe consequences for debtors. Thus, in *Kreiger v. Education Credit Management Corp.*, Judge Easterbrook of the Seventh Circuit warned that, where a judicial test such as the one articulated in *Brunner* seemingly leads to a harsher result than the statutory language of “undue hardship,” it is “important not to allow judicial glosses . . . to supersede the statute itself.”<sup>47</sup>

Courts’ interpretations of *Brunner*’s “minimal standard of living” prong can be erratic and punitive. Many judges have faulted debtors, or even their spouses, for not taking hypothetical second jobs, assuming such jobs would be available and could provide additional income.<sup>48</sup> In one case, the court found that a debtor was:

living with her mother, age 75, in a rural community where few jobs are available; mother and daughter between them have only a few hundred dollars (from governmental programs) every month. She is too poor to move in search of better employment prospects elsewhere, and her car, which is more than a decade old, needs repairs. She lacks

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<sup>45</sup> 831 F.2d 395, 396 (2d Cir. 1987). The test has been widely adopted outside of the Second Circuit. *See, e.g.,* Olyer v. Educ. Credit Mgmt. Corp., 397 F.3d 382, 385 (6th Cir. 2005); Dep’t of Educ. v. Gerhardt, 348 F.3d 89, 91–92 (5th Cir. 2003); Hernar Ins. Corp. v. Cox, 338 F.3d 1238, 1240 (11th Cir. 2003); Ekenasi v. Educ. Res. Inst., 325 F.3d 541, 546 (4th Cir. 2003); Goulet v. Educ. Credit Mgmt. Corp., 284 F.3d 773, 777 (7th Cir. 2002); Brightful v. Pa. Higher Educ. Assistance Agency, 267 F.3d 324, 327 (3d Cir. 2001); Educ. Credit Mgmt. Corp. v. Rhodes, 464 B.R. 918, 922 (W.D. Wash. 2012).

<sup>46</sup> Compare *Brunner*, 831 F.2d at 396, with Kopf v. U.S. Dep’t of Educ. (*In re Kopf*), 245 B.R. 731, 739, 741 (D. Maine 2000) (applying totality-of-the-circumstances test).

<sup>47</sup> *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 884 (7th Cir. 2013).

<sup>48</sup> One court faulted a cellist at the Louisiana Philharmonic Orchestra for failing to take additional work at “night school teaching jobs” or “as a music store clerk,” citing no evidence that such jobs were even available in the area or that they would not conflict with his work in the orchestra. Dep’t of Educ. v. Gerhardt, 348 F.3d 89, 92 (5th Cir. 2003). Another court noted that the debtor’s wife “has the potential to work more but chooses not to because she prefers to stay at home with their daughter.” Hedlund v. Educ. Res. Inst. Inc., 468 B.R. 901, 905–06 (D. Or. 2012).

Internet access, which coupled with the lack of transportation hampers a search for work.<sup>49</sup>

Applying the *Brunner* test as interpreted by the Seventh Circuit, a bankruptcy judge found that this debtor's condition warranted discharge under the "undue hardship" standard.<sup>50</sup> But her creditor, Education Credit Management Corp., appealed to district court, arguing that, notwithstanding the 200 unsuccessful job applications she had submitted, she should have "search[ed] harder for work."<sup>51</sup> The district court agreed and reversed the bankruptcy court's judgment, forcing her to appeal to the U.S. Court of Appeals for the Seventh Circuit, which in turn restored the bankruptcy court's ruling.<sup>52</sup>

From a certain point of view, this debtor could be characterized as lucky: Her loans were ultimately discharged, placing her in the select group of fewer than 0.1% of bankruptcy filers with student debt who are relieved of such loans.<sup>53</sup> But her odyssey in the courts shows that different judges reach different results under *Brunner*, even when analyzing the same debtor—in this case a woman in a near-Dickensian level of poverty who had engaged in a diligent search for work. This outcome is all the more likely when a student-loan corporation with deep pockets is willing to pursue extensive litigation and multiple appeals, as is frequently the case.<sup>54</sup>

A debtor's health is often an important factor in these cases. Jason Iuliano found a statistically significant association between a debtor claiming a "medical

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<sup>49</sup> *Krieger*, 713 F.3d at 883.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Iuliano, *supra* note 21, at 499.

<sup>54</sup> *See, e.g.*, *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 266–68 (2010) (involving a case where student-loan creditor appealed bankruptcy court judgment to district court, debtor appealed district court judgment to circuit court of appeals, and creditor then petitioned for and was granted certiorari by U.S. Supreme Court); *Krieger*, 713 F.3d at 883 (involving a case where creditor appealed bankruptcy judge's determination that loans could be discharged where the debtor "is living with her mother, age 75 . . . [and] mother and daughter between them have only a few hundred dollars (from governmental programs) every month"); *Buziou v. Pa. Higher Educ. Assistance Agency (In re Buziou)*, No. 02-1583, 2002 U.S. App. LEXIS 25127, at \*1–3 (3d Cir. Nov. 13, 2002) (involving a case where after bankruptcy court discharge student loan debt upon "undue hardship" finding, creditor appealed first to district court and then to circuit court of appeals); *Brightful v. Pa. Higher Educ. Assistance Agency (In re Brightful)*, 267 F.3d 324, 325–26 (3d Cir. 2001) (involving a case where student loan corporation appealed bankruptcy court's finding of undue hardship to district court, which affirmed, then to circuit court of appeals, which reversed); *Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 434–35 (6th Cir. 1998) (involving a case where after bankruptcy court found of undue hardship, student-loan corporation appealed to district court, which remanded for further fact finding, appealed a second time to district court, which affirmed the bankruptcy court, and then appealed to the circuit court of appeals, which reversed).

hardship” and receiving a student-loan discharge.<sup>55</sup> Whereas 73% of debtors without a medical hardship failed to receive a discharge when they sought one, only 48% of debtors with a medical hardship failed to do so.<sup>56</sup> This makes sense: Medical hardships such as chronic illnesses have been shown to reduce vocational and educational outcomes as well as income,<sup>57</sup> in turn making student-loan repayment more burdensome. However, debtors who may not currently suffer from a diagnosed medical hardship, but who find themselves unable to purchase health insurance, receive mixed treatment from courts.<sup>58</sup>

Some judges have held that health insurance is a necessary component of a “minimal standard of living.”<sup>59</sup> For example, a debtor with over \$149,000 in student loans and no health or dental insurance, and who could not afford dentures or replacements after her “teeth [had] disintegrated,” was adjudicated to be living below a minimal standard—although her creditors disputed the issue, arguing that she could still “maintain a minimal standard of living and repay the loan.”<sup>60</sup> Several courts, however, have reached a contrary result, holding that debtors without health insurance did not suffer an “undue hardship” so as to warrant discharge.<sup>61</sup> I describe three categories of such decisions below.

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<sup>55</sup> Iuliano, *supra* note 21, at 518–19 (showing medical hardship is a strong predictor of discharge (p=.0002)).

<sup>56</sup> *Id.*

<sup>57</sup> See Gary R. Maslow et al., *Growing Up With a Chronic Illness: Social Success, Educational/Vocational Distress*, 49 J. ADOLESCENT HEALTH 206, 210–11 (2011) (finding respondents with childhood chronic illness to have lower odds of graduating college and being employed, higher odds of receiving public assistance, and lower mean income compared to respondents without childhood chronic illness); Kevin T. Stroupe et al., *Chronic Illness and Health Insurance-Related Job Lock*, 20 J. POL. ANALYSIS & MGMT. 525, 525–30 (2001) (finding workers with chronic illnesses who depend on their employers for health insurance enjoy significantly reduced job mobility).

<sup>58</sup> See cases cited *infra* notes 59–61.

<sup>59</sup> *E.g.*, *Schuckman v. U.S. Dep’t of Educ. (In re Schuckman)*, No. 17-10834, Adv. No. 17-5130, 2019 Bankr. LEXIS 1615, at \*15–16 (Bankr. D. Kan. May 28, 2019) (citing *Ivory v. United States (In re Ivory)*, 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001)) (asserting that for minimal standard of living, “people must have health insurance or have the ability to pay for medical and dental expenses when they arise”).

<sup>60</sup> See *Jolie v. U.S. Dep’t of Educ. (In re Jolie)*, No. 12-61188-7, Adv. No. 13-00009, 2014 Bankr. LEXIS 911, at \*4–\*6, \*19 (Bankr. D. Mont. Mar. 10, 2014).

<sup>61</sup> *Flickinger-Luther v. ECMC (In re Flickinger-Luther)*, 462 B.R. 157, 165 (Bankr. W.D. Pa. 2012) (citing *Pa. Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 306 (3d Cir. 1995)) (rejecting debtor’s argument that repayment of their student loans would preclude the purchase of health insurance as an “extraneous . . . concern”); *In re Berryhill*, No. CV 10-8006-VBF, 2011 U.S. Dist. LEXIS 97954, at \*7–9 (C.D. Cal. Aug. 31, 2011) (finding that a debtor without health insurance did not establish undue hardship); *Nelsen v. Educ. Credit Mgmt. Corp. (In re Nelseon)*, 404 B.R. 892, 893–96 (Bankr. E.D. Wis. 2009) (finding that debtors without health insurance “are suffering hardship, [but] their circumstances do not rise to the level of ‘undue’ hardship”); *Kopf v. U.S. Dep’t of Educ. (In re Kopf)*, 245 B.R. 731, 746–47 (Bankr. D. Me. 2000) (finding that a debtor without health insurance nonetheless “holds a surplus from which a meaningful monthly payment may be made”).

First, in some decisions where student-loan debtors lacked health insurance, courts nevertheless found that they did not fall below a “minimal living standard” under the *Brunner* test.<sup>62</sup> For example, an underemployed and uninsured debtor with serious health issues sought to discharge over \$227,000 in student-loan debt.<sup>63</sup> While the bankruptcy court conceded that she “lives under very difficult and uncomfortable conditions,” it nonetheless found that she failed to prove that she could not maintain a minimal standard of living without discharge.<sup>64</sup> The court’s reasoning was primarily based on her eligibility to participate in an “income-contingent repayment plan,”<sup>65</sup> although many other courts have reasoned that such plans should not be viewed as a substitute for bankruptcy discharge.<sup>66</sup>

In a second category of these decisions, courts accepted that particular debtors without health coverage did not currently maintain a “minimal standard of living” under the first *Brunner* prong but held that those debtors failed to establish that their condition would persist under the second prong.<sup>67</sup> For example, a forty-three-year-old debtor with over \$67,000 in student loan debt (who depended on her parents for food, had an ongoing medical condition, and had been unable to find work apart from “odd jobs for other people”) argued that “requiring her to repay student loan obligations . . . would constitute an undue hardship because she would not be able to afford health insurance.”<sup>68</sup> Noting that she was “well educated” and “able-bodied,” the court held that it could not consider factors apart from *Brunner*, including health-coverage status.<sup>69</sup> It

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<sup>62</sup> E.g., *Greene v. U.S. Dep’t of Educ. (In re Greene)*, 484 B.R. 98, 120 (Bankr. E.D. Va. 2012); *Gill v. Nelnet Loan Servs. (In re Gill)*, 326 B.R. 611, 617, 637 (Bankr. E.D. Va. 2005).

<sup>63</sup> *Greene*, 484 B.R. at 104.

<sup>64</sup> *Id.* at 120–31.

<sup>65</sup> *Id.*

<sup>66</sup> See, e.g., *Coco v. N.J. Higher Educ. Student Assistance (In re Coco)*, 335 F. App’x 224, 228 (3d Cir. 2009) (citing *Educ. Credit Mgmt. Corp. v. Mosley (In re Mosley)*, 494 F.3d 1320, 1327 (11th Cir. 2007)) (finding that because an income-contingent repayment plan can result in tax liability, “participation in the ICRP could ultimately result in her simply trading a student loan debt for an IRS debt”); see also *Rosenberg v. N.Y. State Higher Educ. Servs. Corp. (In re Rosenberg)*, No. 18-35379, Adv. No. 18-09023, 2020 Bankr. LEXIS 73 at \*10 (Bankr. S.D.N.Y. Jan. 7, 2020) (citing *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016)) (refusing to consider a hypothetical repayment plan because it was “not before the court”). A loan in an ICRP is also categorically different than a loan discharged in bankruptcy because a non-discharged loan may be collected through offset Social Security benefits. See *Lockhart v. United States*, 546 U.S. 142, 143–45 (2005).

<sup>67</sup> E.g., *Flickinger-Luther v. ECMC (In re Flickinger-Luther)*, 462 B.R. 157, 163 (Bankr. W.D. Pa. 2012); see also *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 400–01 (4th Cir. 2005) (declining to decide the issue on the first prong but determining that debtor without health insurance failed to satisfy the second prong because debtor did not show that her condition was “likely to persist”).

<sup>68</sup> *Flickinger-Luther*, 462 B.R. at 160–65.

<sup>69</sup> *Id.* at 162, 165.

proceeded to find that she failed the second *Brunner* prong because she could not establish that her unemployment was “likely to persist” into the future.<sup>70</sup>

Finally, in the minority of jurisdictions that have not adopted the *Brunner* test, some courts applying a totality-of-the-circumstances analysis have not found an “undue hardship” where a debtor lacked access to health insurance.<sup>71</sup> Thus, a debtor with no health insurance and “substantial medical bills [but] no evidence of ongoing health problems,” was denied discharge of over \$18,000 in student-loan debt under a totality-of-the-circumstances test.<sup>72</sup> The bankruptcy court explained that, though it was a “close call” and “her lifestyle is hardly opulent,” her budget was such that she would not face undue hardship were her loans to survive bankruptcy.<sup>73</sup>

These three categories of decisions demonstrate the uncertain calculus facing an uninsured debtor who is considering initiating an adversary proceeding to seek discharge of student-loan debt. While a sympathetic court may weigh their health-insurance status in their favor, an unsympathetic judge may rule against them on either the first or second prongs of the *Brunner* test, or under a totality-of-the-circumstances test.

### III. HEALTHCARE AND UNDUE HARDSHIP

The seminal event in the recent history of American healthcare law was the passage of the Patient Protection and Affordable Care Act of 2010 (the “ACA”).<sup>74</sup> The ACA expanded the Medicaid program, which resulted in 13 million previously uninsured Americans receiving coverage.<sup>75</sup> It also established the “individual mandate,” which obliged most Americans to “maintain minimum essential” health insurance coverage.<sup>76</sup> Those who do not already receive coverage from a third party, such as an employer, are required

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<sup>70</sup> *Id.* at 163.

<sup>71</sup> *See, e.g.*, *Kopf v. U.S. Dep’t of Educ. (In re Kopf)*, 245 B.R. 731, 733, 745–47 (Bankr. D. Me. 2000); *In re Coleman*, 98 B.R. 443, 445, 451, 455 (Bankr. S.D. Ind. 1989).

<sup>72</sup> *Kopf*, 245 B.R. at 733, 745–47 (Bankr. D. Me. 2000).

<sup>73</sup> *Id.* at 747.

<sup>74</sup> Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2012).

<sup>75</sup> 42 U.S.C. § 1396a(a)(10)(A)(i); *see* Adam Gaffney & Danny McCormick, *The Affordable Care Act: Implications for Health-care Equity*, 389 LANCET 1442, 1445 (2017) (“Of the 22 million who gained insurance as a result of the ACA, 13 million were insured through Medicaid.”). The majority of the gains created by the act resulted from the Medicaid expansion. *Id.* However, as of 2017, nineteen states had opted out of the Medicaid expansion. *Id.* at 1446.

<sup>76</sup> 26 U.S.C. § 5000A(a) (2012); *see also* Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 539 (2012).

to buy health insurance on private markets.<sup>77</sup> The ACA also prohibited the longstanding practice of private insurance companies effectively denying coverage to individuals with preexisting conditions or health issues.<sup>78</sup>

The ACA was quickly challenged in court. In *National Federation of Independent Business v. Sebelius* (“*NFIB*”), the Supreme Court held that, while the Commerce Clause did not empower Congress to require people to purchase plans in the private health-insurance market, the mandate was nonetheless constitutionally permissible as a tax imposed on those who opt to forgo health insurance coverage.<sup>79</sup> The creation of the individual mandate demonstrates that Congress and the President sought to remedy many Americans’ lack of access to healthcare.<sup>80</sup> In Justice Ginsburg’s concurrence to *NFIB*, she explained the necessity of health insurance in modern American life:

Unlike the market for almost any other product or service, the market for medical care is one in which all individuals inevitably participate . . . . In 2010, on average, an individual in the United States incurred over \$7,000 in health-care expenses. Over a lifetime, costs mount to hundreds of thousands of dollars. When a person requires nonroutine care, the cost will generally exceed what he or she can afford to pay. A single hospital stay, for instance, typically costs upwards of \$10,000. Not all U.S. residents, however, have health insurance. In 2009, approximately 50 million people were uninsured, either by choice or, more likely, because they could not afford private insurance and did not qualify for government aid . . . . Over 60% of those without insurance visit a doctor’s office or emergency room in a given year.<sup>81</sup>

As Justice Ginsburg described, insurance provides a guarantee that, when prohibitively expensive medical issues inevitably arise, treatment and medicine can be obtained. Moreover, the absence of health insurance, and the resulting stress, takes a measurable toll on human health: Uninsured status is associated with increased mortality, depressive symptoms, adverse cardiovascular outcomes, and poor overall health.<sup>82</sup>

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<sup>77</sup> See *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 539.

<sup>78</sup> See *id.* at 547–48; see also 42 U.S.C. §§ 300gg–300gg-4 (2012) (prohibiting, when considering all provisions together, insurance companies from denying coverage to individuals with preexisting conditions).

<sup>79</sup> See *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 575.

<sup>80</sup> See *id.* at 592 (Ginsburg, J., concurring) (“The large number of individuals without health insurance, Congress found, heavily burdens the national health-care market.”).

<sup>81</sup> *Id.* at 590–92 (Ginsburg, J., concurring) (citations omitted).

<sup>82</sup> See Gaffney & McCormick, *supra* note 75, at 1444.

The design of the ACA was hotly debated. Its critics on the left have argued that superior results could be achieved more efficiently through a public system (such as a universal Medicare program).<sup>83</sup> Its critics on the right, meanwhile, argued that the law was a failure and that alternative reforms could achieve superior results.<sup>84</sup> But these debates have generally focused on the ACA's means rather than its goals.<sup>85</sup> As the ACA's subsequent history shows, Congress's judgment about the centrality of health coverage to American life has rarely been subject to serious attack.

The *NFIB* decision did not prove to be the final word on the ACA. Many legislative and judicial battles over the ACA took place between 2010 and 2017, including several failed "bills to repeal, defund, delay, or amend" the ACA,<sup>86</sup> battles over religious accommodations for organizations that object to birth-control coverage,<sup>87</sup> and additional lawsuits,<sup>88</sup> including at least one significant legal challenge to the ACA that will be reviewed by the Supreme Court after publication of this Essay.<sup>89</sup> But significantly, most political opposition to the ACA did not challenge Congress's judgment about the necessity of health coverage.

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<sup>83</sup> Groups such as the American College of Physicians and the nation's largest nurses' union have called for "a single payer or public option model." See Robert Doherty et al., *Envisioning a Better U.S. Health Care System for All: A Call to Action by the American College of Physicians*, 172 *ANNALS INTERNAL MED.* S3, S4 (2020); Gaffney & McCormick, *supra* note 75, at 1450. Justice Ginsburg noted the constitutionality of such a hypothetical system in her concurrence to *NFIB*, (joined by Justices Sotomayor, Breyer, and Kagan): with "the Social Security Act, Congress installed a federal system to provide monthly benefits to retired wage earners and, eventually, to their survivors. Beyond question, Congress could have adopted a similar scheme for health care. Congress chose, instead, to preserve a central role for private insurers and state governments." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 589 (Ginsburg, J., concurring).

<sup>84</sup> See Robert Costa & Amy Goldstein, *Trump Vows 'Insurance for Everybody' in Obamacare Replacement Plan*, WASH. POST (Jan. 15, 2017), [https://www.washingtonpost.com/politics/trump-vows-insurance-for-everybody-in-obamacare-replacement-plan/2017/01/15/5f2b1e18-db5d-11e6-ad42-f3375f271c9c\\_story.html](https://www.washingtonpost.com/politics/trump-vows-insurance-for-everybody-in-obamacare-replacement-plan/2017/01/15/5f2b1e18-db5d-11e6-ad42-f3375f271c9c_story.html); see also *Examining Obamacare Transparency Failures: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. 38 (2014) (statement of Rep. John Mica) ("We have over 40 million people without health insurance. This isn't a success in my estimation.").

<sup>85</sup> See *supra* notes 83–84 and accompanying text.

<sup>86</sup> *Texas v. United States*, 945 F.3d 355, 371 (5th Cir. 2019), *cert granted sub nom.* *California v. Texas*, No. 19-840 (Mar. 2, 2020).

<sup>87</sup> *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 688–90 (2014) ("We must decide in these cases whether the Religious Freedom Restoration Act of 1993 . . . permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners.").

<sup>88</sup> See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015) (analyzing a challenge of the IRS rule requiring petitioners to either buy health insurance or make a payment to the IRS).

<sup>89</sup> *Texas*, 945 F.3d at 355.

After he succeeded Obama, President Trump stated that, in place of the ACA, “[w]e’re going to have insurance for everybody . . . . There was a philosophy in some circles that if you can’t pay for it, don’t get it. That’s not going to happen with us.”<sup>90</sup> A subsequent, unsuccessful attempt by a Republican-controlled House to replace the ACA, spearheaded by then-Speaker Paul Ryan, planned to keep significant parts of its structure intact, including its provisions attempting to offset the cost of private health insurance premiums for those ineligible for employer-sponsored coverage.<sup>91</sup> A Republican-controlled Congress did enact a law in 2017 that reduced the individual-mandate penalty to \$0, but it did so on the understanding, expressed by numerous lawmakers, that the ACA’s other provisions would remain in effect.<sup>92</sup> During his campaign for reelection in 2020, Trump stated that “your healthcare, that I have now brought to the best place in many years, will become the best ever, by far. I will always protect your Pre-Existing Conditions.”<sup>93</sup>

Regardless of whether Congress ultimately designs a healthcare system that leads to genuinely universal coverage, the ACA and the subsequent efforts to reform or replace it demonstrate a consensus that access to healthcare is essential to maintaining a minimal standard of living. Even its fiercest critics, including President Trump, have reiterated rather than repudiated that goal.<sup>94</sup> And even though the tax penalty for violating the mandate has been effectively nullified, as a formal matter Americans are still *required* to purchase health insurance.<sup>95</sup>

There should be no illusions that the minimum essential coverage provided by the ACA is luxurious. The average annual deductible for a single-coverage “Bronze” plan in 2017 was \$5,731, compared to \$958 for an employer-sponsored “PPO” plan, and patients who required expensive medication such as retrovirals for HIV paid, on average, \$4,892 out of pocket each year for such drugs.<sup>96</sup> In one student-loan adversary proceeding, a debtor who was covered by

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<sup>90</sup> See Robert Costa & Amy Goldstein, *supra* note 84.

<sup>91</sup> Gaffney & McCormick, *supra* note 75, at 1449.

<sup>92</sup> *E.g.*, 163 Cong. Rec. S7672 (daily ed. Dec. 1, 2017) (statement of Sen. Toomey) (asserting that the bill does not “change anything except one thing”); 163 Cong. Rec. S7666 (daily ed. Dec. 1, 2017) (statement of Sen. Scott) (asserting that the bill will “take nothing at all away from anyone who needs a subsidy, [or] anyone who wants to continue their coverage”); see also CONG. BUDGET OFFICE, REPEALING THE INDIVIDUAL HEALTH INSURANCE MANDATE: AN UPDATED ESTIMATE 1 (2017).

<sup>93</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 13, 2020, 8:39 AM), <https://twitter.com/realDonaldTrump/status/1216716358676860928>.

<sup>94</sup> See *supra* notes 90–93 and accompanying text.

<sup>95</sup> See *Texas*, 945 F.3d at 371–72 (“The individual mandate is still ‘on the books’ of the U.S. Code and still consists of the three fundamental components it always featured.”).

<sup>96</sup> Gaffney & McCormick, *supra* note 75, at 1446–47.

her husband's health insurance plan nonetheless paid \$480 per month in medical expenses and \$120 per month in drug expenses out of pocket, against a monthly income of \$1,366 per month.<sup>97</sup> This level of coverage allows for—at best—a minimal standard of living.

Yet many are nonetheless unable to afford even minimum insurance, for a variety of reasons. Recall the debtor discussed above who lost her teeth, facing over \$149,000 in student-loan debt with no ability to afford a visit to a dentist.<sup>98</sup> As the court in her bankruptcy filing explained, she “has visited the website [www.healthcare.gov](http://www.healthcare.gov) to see if she qualifies for subsidies under the Affordable Care Act. However, she testified that she is confused.” The court explained further that “[s]he believes she may qualify for a monthly subsidy of more than \$500, but does not know if her son . . . would be covered or if she would have to pay a premium.”<sup>99</sup> Some of those most in need of financial relief, including by way of bankruptcy discharge, have yet to benefit from healthcare reform. These debtors, who are unable to obtain a coverage status that Congress has deemed to be essential,<sup>100</sup> should be entitled to an “undue hardship” discharge when their lack of coverage is related to outstanding student-loan debt.

#### IV. COVID-19 WILL ONLY EXACERBATE THE HARDSHIPS FACED BY UNINSURED DEBTORS

This Essay was largely drafted before, but will be published during, the COVID-19 pandemic. The final course that this crisis will take, its impact on society, and the number of lives that will be lost remain far from clear as of this writing. But the pandemic will create a massive strain on the U.S. healthcare system,<sup>101</sup> which will likely drive increased costs for future healthcare consumers.<sup>102</sup> Absent large-scale intervention, these increased costs may place healthcare coverage out of reach for an even greater number of Americans.

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<sup>97</sup> Congdon v. Educ. Credit Mgmt. Corp. (*In re Congdon*), 365 B.R. 433, 436 (Bankr. D. Vt. 2007).

<sup>98</sup> Jolie v. U.S. Dep't of Educ. (*In re Jolie*), No. 12-61188-7, Adv. No. 13-00009, 2014 Bankr. LEXIS 911, at \*4–\*6 (Bankr. D. Mont. Mar. 10, 2014).

<sup>99</sup> *Id.* at \*5 n.4.

<sup>100</sup> See *supra* note 80 and accompanying text.

<sup>101</sup> See, e.g., Neil M. Ferguson et al., *Impact of Non-pharmaceutical Interventions (NPIs) to Reduce COVID-19 Mortality and Healthcare Demand*, IMPERIAL COL. COVID-19 RESPONSE TEAM 8 (Mar. 16, 2020), <https://doi.org/10.25561/77482> (predicting that even an “optimal” mitigation strategy would result in an “8-fold higher peak demand on critical care beds over and above the available surge capacity in . . . the US”).

<sup>102</sup> Past pandemics of similar scope have had extremely long-lasting impacts. See, e.g., Douglas Almond, *Is the 1918 Influenza Pandemic Over? Long-Term Effects of in Utero Exposure in the Post-1940 U.S. Population*, 114 J. POL. ECON. 672, 672–75 (2006) (examining persistent negative health impacts experienced by cohorts in utero during the 1918 influenza pandemic).

Furthermore, while the Department of Education has temporarily waived interest payments for federally held student loans,<sup>103</sup> these short-term relief measures do not apply to private loans. Moreover, it is now estimated that the ongoing partial shutdown of the U.S. economy in response to the pandemic will lead to an unprecedented increase in unemployment.<sup>104</sup> This will necessarily drive many more debtors into bankruptcy, exacerbating the burdens imposed by the student-loan discharge carve out. And in a nation where employer-sponsored health insurance remains the norm, a spike in unemployment will push more of these debtors into the ranks of the uninsured.

While none of these recent and disturbing developments alter the legal analysis of this Essay, they make it all the more critical for courts to urgently reexamine their analysis of “undue hardship” where a student-loan debtor lacks access to healthcare. The bankruptcy courts may not be on the front lines of a pandemic response, but they could nonetheless play a significant role in mitigating some of the economic harms the crisis will inflict on economically vulnerable populations.

#### V. A LACK OF HEALTH INSURANCE IS UNDUE HARDSHIP

Bankruptcy laws inherently impact a financially struggling population. Unfortunately, for those within this population, healthcare often remains out of reach. Healthcare reform notwithstanding, among American non-elderly adults, around 25% of the poor and 24% of the near-poor lack any health insurance.<sup>105</sup> As many as 44.8% of low-income non-elderly adults had unmet medical needs owing to cost in 2015.<sup>106</sup> Moreover, an ever-expanding number of workers at “gig-economy” corporations are classified as independent contractors rather than employees, rendering them ineligible for employer-sponsored healthcare benefits<sup>107</sup> and forced to depend on more expensive marketplace plans.<sup>108</sup>

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<sup>103</sup> See *President Trump Announces More Actions to Confront Global Pandemic* (Mar. 20, 2020), <https://www.whitehouse.gov/articles/president-trump-actions-to-confront-pandemic/>.

<sup>104</sup> See Steve Matthews, *U.S. Jobless Rate May Soar to 30%, Fed's Bullard Says*, BLOOMBERG NEWS (Mar. 22, 2020); Jim Zarroli & Avie Schneider, *3.3 Million File for Unemployment Claims, Shattering Records*, N.P.R. (Mar. 26, 2020) (noting an increase in unemployment claims from 282,000 to 3.28 million over the course of one week).

<sup>105</sup> Gaffney & McCormick, *supra* note 75, at 1445.

<sup>106</sup> *Id.*

<sup>107</sup> See Scott Rodd, *Uber, Lyft, Postmates Refuse to Comply with California Gig Economy Law*, NPR (Jan. 4, 2020, 6:01 AM), <https://www.npr.org/2020/01/04/793142903/as-california-tries-to-make-contract-workers-employees-industries-push-back>.

<sup>108</sup> Gaffney & McCormick, *supra* note 75, at 1448 (“Cost sharing in marketplace plans is generally higher than in employer-sponsored plans.”).

American's uninsured population remains large, at a time when rising college tuition,<sup>109</sup> ballooning student borrowing,<sup>110</sup> and wage stagnation<sup>111</sup> all continue to push young Americans toward financial struggles. These longstanding trends now stand to be greatly exacerbated by a global pandemic and resulting economic disruption.

Some bankruptcy courts have recognized the necessity of health insurance for student-loan debtors, at least in context of the first prong of *Brunner*.<sup>112</sup> The Bankruptcy Court for the Western District of New York, for example, held clearly that, in “the view of this court, a minimal standard of living would incorporate the procurement of basic health insurance.”<sup>113</sup> However, despite Congress's determination that all Americans must obtain “minimum essential” health insurance, many debtors who cannot afford to do so while repaying student loans are nevertheless unable to convince a court that they are suffering an “undue hardship.”<sup>114</sup> This is a perverse result that should be reversed.

One culprit is an overly narrow interpretation of the *Brunner* test applied by many courts. At a minimum, a court should find that the standard of living of any uninsured filer falls below the “minimal” threshold set forth by the first *Brunner* prong. But a larger problem is that, even when the first prong is satisfied, an uninsured filer may nevertheless fail to convince a court that their below-minimal standard of living is likely to persist under the second prong.<sup>115</sup>

This is problematic. Those who can demonstrate an ongoing medical hardship, such as a chronic illness, are more likely to also successfully demonstrate that their financial troubles will persist under the second *Brunner*

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<sup>109</sup> Addo, Houle & Simon, *supra* note 2, at 64.

<sup>110</sup> Scott-Clayton, *supra* note 1.

<sup>111</sup> From 1947 through 1979, earnings for the bottom 90% of U.S. workers increased, on average, by 2% annually, but since 1979 have increased by only, on average, 0.5% annually. See Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014*, 83 AM. SOC. REV. 213, 214 (2018).

<sup>112</sup> See, e.g., *Armesto v. N.Y. State Higher Educ. Servs. Corp. (In re Armesto)*, 298 B.R. 45, 47 (Bankr. W.D.N.Y. 2003) (citing *Brunner v. N.Y. State Higher Educ. Servs.*, 831 F.2d 395 (1987)).

<sup>113</sup> *Armesto*, 298 B.R. at 47.

<sup>114</sup> See *supra* Part III.

<sup>115</sup> E.g., *Flickinger-Luther v. Educ. Credit Mgmt. Corp. (In re Flickinger-Luther)*, 462 B.R. 157, 160–64 (Bankr. W.D. Pa. 2012). See also *Congdon v. Educ. Credit Mgmt. Corp. (In re Congdon)*, 365 B.R. 433, 438 (Bankr. D. Vt. 2007) (“Although the Plaintiff . . . has testified persuasively that she has significant and debilitating emotional disorders that impede her ability to obtain employment, she has not established that her future prospects are hopeless or that her inability to repay her student loan debt will continue over an extended period of time.”).

prong.<sup>116</sup> But diagnosis of a medical hardship typically requires access to medical specialists, and bankruptcy courts have held that a debtor's own "testimony about the state of her health . . . has only limited value" if it is not "corroborated by some evidence that supports the debtor's position."<sup>117</sup> This poses a Catch-22 for uninsured debtors, who may not be able to afford to see the specialists they need to obtain an admissible diagnosis and convince a court of their condition.

For example, in one case an uninsured debtor asserted that she had anxiety disorder resulting from a sexual assault, but she was unable to locate any medical records from the last time she had received treatment—years before the proceeding—and "[n]o medical records of any kind were exhibited at trial."<sup>118</sup> She failed to obtain a discharge.<sup>119</sup> Lack of insurance, and the resulting inability to obtain an admissible medical diagnosis, can thus put debtors at an evidentiary disadvantage when trying to meet their burdens under *Brunner*.

In addition to this evidentiary disadvantage, an uninsured debtor is more likely to continue struggling financially, as uninsured populations with unmet medical needs have poorer overall mental and physical health outcomes, which in turn impact a debtor's future ability to repay loans.<sup>120</sup> These effects may even be compounded by the negative mental health outcomes that have been observed in populations with significant student debt.<sup>121</sup> This provides further reason to hold that uninsured status is an undue hardship.

Perhaps the best way to solve this problem is to recognize that *Brunner* is simply a "judicial gloss" on the statutory language of "undue hardship."<sup>122</sup> It was formulated not to restrict the operation of the underlying statute but instead to elucidate it. Courts would reach better results were *Brunner* to be restricted to situations where the debtor's situation is sufficiently ambiguous to preclude a court from determining "undue hardship" based on the plain text of the statute. In contrast, where the debtor's hardship is unambiguous, courts should rule without resorting to a judicially created multi-part test. As I have argued above, where a debtor cannot maintain the basic healthcare that Congress has

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<sup>116</sup> Iuliano, *supra* note 21, at 518–20.

<sup>117</sup> *Congdon*, 365 B.R. at 438–39 (citing *Lowe v. Educ. Credit Mgmt. Corp. (In re Lowe)*, 321 B.R. 852, 859 (Bankr. N.D. Ohio 2004)).

<sup>118</sup> *In re Greene*, 484 B.R. 98, 105 (Bankr. E.D. Va. 2012).

<sup>119</sup> *Id.* at 134.

<sup>120</sup> See Gaffney & McCormick, *supra* note 75, at 1445.

<sup>121</sup> See Walsemann, Gee & Gentile, *supra* note 32 at 85.

<sup>122</sup> See *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 884 (7th Cir. 2013).

determined all Americans should have, undue hardship is unambiguous, and the resulting discharge should be automatic.

An inevitable objection to this proposal will be the prospect of student-loan debtors opting to temporarily forgo health insurance as a choice, for the sole purpose of discharging debt in a bankruptcy proceeding.<sup>123</sup> To be sure, no debtor should be permitted to defraud lenders by intentionally foregoing coverage for the purpose of a bankruptcy petition, all the while planning to restore coverage once a discharge is granted. But there is no need for courts to address this concern by insisting on a draconian “undue hardship” analysis. Chapter 13 already specifies that a plan should be confirmed only if a filer has acted in good faith,<sup>124</sup> and Chapter 7 already provides that a court may dismiss any case on a finding that “granting of relief would be an abuse of the provisions of this chapter.”<sup>125</sup> The hypothetical fraudulent petitioner, such as a professional school graduate who petitions for bankruptcy despite strong employment prospects,<sup>126</sup> is already barred from obtaining a discharge by these independent provisions. The test for “undue hardship” should thus be formulated to address debtors acting in good faith, not bad-faith actors whose petitions should already be rejected on other grounds.

Similar reasoning guided the Supreme Court in *United Student Aid Funds v. Espinosa*,<sup>127</sup> when a student loan creditor argued that failing to reverse a discharge for a debtor who had not followed the proper procedure under Chapter 13 would “encourage unscrupulous debtors to abuse the Chapter 13 process.”<sup>128</sup> Writing for a unanimous Court, Justice Thomas explained that:

We acknowledge the potential for bad-faith litigation tactics. But . . . debtors and their attorneys face penalties under various provisions for engaging in improper conduct in bankruptcy proceedings. The specter of such penalties should deter bad-faith attempts to discharge student loan debt . . . . And to the extent existing sanctions prove inadequate to the task, Congress may enact additional

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<sup>123</sup> E.g., Adam J. Williams, *Fixing the “Undue Hardship” Hardship: Solutions for the Problem of Discharging Education Loans Through Bankruptcy*, 70 U. PITT. L. REV. 217, 217 (2008) (posing hypothetical of a law school graduate petitioning for bankruptcy while studying for the bar in order to obtain a discharge before embarking on a lucrative career).

<sup>124</sup> 11 U.S.C. § 1325(a)(3) (2012).

<sup>125</sup> 11 U.S.C. § 707(b)(1) (2012).

<sup>126</sup> See *supra* note 123 and accompanying text.

<sup>127</sup> 559 U.S. 260 (2010).

<sup>128</sup> *Id.* at 1381–82.

provisions to address [those] difficulties.<sup>129</sup>

The same reasoning should address any concerns about bad-faith debtors manipulating their insurance status to establish “undue hardship” for the purpose of obtaining a discharge.

Nor must we fear the societal impact of marginally expanding the extremely narrow pathway through which student-loan debtors may obtain relief. It is worth reiterating that all other forms of unsecured debt, such as consumer debt, may be discharged without any adversary proceeding at all,<sup>130</sup> meaning a relaxation of the “undue hardship” analysis that incorporates consideration of health-insurance status will still leave student-loan lenders in a privileged situation relative to similarly situated creditors.<sup>131</sup> And we need not fear that a limited increase in the number of student-loan discharges will harm future borrowers by driving up interest rates, as an empirical analysis found no evidence that private student-loan lenders had passed on any savings afforded them by their special treatment under § 523(a) to borrowers in the form of lower interest rates.<sup>132</sup> Finally, those whose student loans have been discharged in bankruptcy still face challenges in obtaining credit and professional licenses, which provides a further check on the possibility of successful professionals opportunistically discharging loans through bankruptcy.<sup>133</sup>

Americans face a crisis of student-loan debt and a crisis of healthcare access. This is a harsh reality, and one that cannot be addressed primarily through the Bankruptcy Code. But bankruptcy can, and should, provide a fresh start to uninsured debtors who struggle with student-loan repayments. Those debtors whose outstanding student-loan debt prevents them from obtaining the minimum essential health coverage that Congress intended them to have are suffering what should be considered an “undue hardship.” Reevaluating judicial interpretations of that standard to incorporate an analysis of health coverage would be a good place to start in our efforts to address the crisis of student debt.

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<sup>129</sup> *Id.* (citation omitted).

<sup>130</sup> See Alexandrov & Jiménez, *supra* note 13.

<sup>131</sup> *Cf.* Baker, *supra* note 33, at 1232 (“[T]here is no evidence that educational loans are fundamentally different from other types of loans that can be discharged.”).

<sup>132</sup> See Alexandrov & Jiménez, *supra* note 39.

<sup>133</sup> See, e.g., *In re G.W.L.*, 364 So. 2d 454 (Fla. 1978) (withholding bar admission to applicant who had discharged student loans).