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Student Loan Discharge: Reevaluating Undue Hardship Under a Presumption of Consistent Usage

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STUDENT LOAN DISCHARGE: REEVALUATING UNDUE HARDSHIP UNDER A PRESUMPTION OF CONSISTENT USAGE

ABSTRACT

An increasing number of Americans are suffering from financial distress caused by educational debt. Some of those individuals seek relief from that distress through the bankruptcy system, where they must establish that repaying their educational debt would impose an undue hardship in order to obtain a discharge of such debt. The focus of this Comment is § 523(a)(8) of the U.S. Bankruptcy Code, which sets forth educational debt as an exception to bankruptcy discharge unless the repayment of student loan obligations imposes an "undue hardship." In drafting this section, Congress did not define the term "undue hardship," thereby empowering the courts to determine what constitutes undue hardship and the circumstances that deserve forgiveness of educational debt. As a result, courts have developed a variety of tests to provide a framework for determining whether a debt should be dischargeable.

Congress's decision to condition the relief of educational loans on the application of a vague and indeterminate standard has proved to be problematic for various reasons. One solution, not yet discussed by courts and commentators, is to look to other federal statutes and regulations implementing the undue hardship standard to evaluate the application of the standard and consider how those applications can inform the undue hardship analysis in the bankruptcy context.

By evaluating the undue hardship standard in the context of public benefits, employment discrimination, financial aid eligibility, tax payment extensions, and discovery in civil procedure, this Comment supports the conclusion that the primary inquiry into a debtor's undue hardship claim must focus on the debtor's current financial circumstances without undue regard to pre-bankruptcy conduct or assurance of persisting financial distress. Any definition Congress provides to "undue hardship" in § 523(a)(8) of the Bankruptcy Code should include factors that evaluate the future livelihood of the debtor if she is denied bankruptcy relief based on the debtor's current financial circumstances.

INTRODUCTION

Student loan debt in the United States has been on a continual rise becoming the second highest consumer debt category with more than forty-four million

borrowers holding over one and a half trillion dollars in student loan debt.[1] This figure represents more than two and a half times the amount of student loan debt owed just a decade earlier.[2] These are the statistics driving the literature describing the student loan debt crisis, a crisis driven by rising tuition rates that exceed student financial aid and family income necessary to cover educational costs, forcing students to rely on student loans to finance higher education.[3] Educational loan borrowers have increasingly found themselves unable to repay their student loans as indicated by student loan default rates, resulting in negative effects to an individual's financial well-being and leading to financial distress.[4]

While there are many potential solutions to the rising costs of tuition and resulting dependency on student loans, this Comment views bankruptcy as one solution to the financial distress that students with burdensome student loans face because of the policy objectives driving bankruptcy law. Bankruptcy law is a statutory mechanism for individuals and entities burdened by financial obligations to discharge their debts.[5] Two main public policy objectives govern the purpose behind bankruptcy law. First, bankruptcy provides a mechanism for creditor repayment through a liquidation process or through a repayment plan.[6] Second, debtors receive relief from creditors and obtain a fresh financial start that is unburdened by the pressure and struggles of onerous pre-existing debts.[7]

The focus of my Comment is § 523(a)(8) of the U.S. Bankruptcy Code, which determines a debtor's ability to discharge student loan debt if the repayment of student loan obligations imposes an "undue hardship."[8] My Comment examines the impact of Congress's decision to delegate the task of interpreting the undue hardship exception to the judiciary and argues that the statutory interpretation tool of consistent usage provides a viable means for

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[1] Zack Friedman, *Have Student Loans Caused A Drop In Home Ownership?*, FORBES, https://www.forbes.com/sites/zackfriedman/2019/01/18/student-loans-home-ownership/#28d2596c3d22 (Jan. 18, 2019, 8:32 AM).

[2] Anthony Cilluffo, *5 Facts About Student Loans*, Pew Research Center (Aug. 24, 2017), http://www.pewresearch.org/fact-tank/2017/08/24/5-facts-about-student-loans/.

[3] Danielle Douglas-Gabriel, *College Costs Rising Faster than Financial Aid*, *Report Says*, WASHINGTON POST (Oct. 26, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/10/26/college-costs-rising-faster-than-financial-aid-report-says/?utm_term=.5904ff3b13a4.

[4] Press Release, U.S. Department of Education Releases National Student Loan FY 2014 Cohort Default Rate (Sept. 27, 2017); *see also* William Elliott & Melinda Lewis, *Student Debt Effects on Financial Well-Being: Research and Policy Implications*, 29 J. ECON. SURVS. 614, 624 (2015).

[5] Robert B. Milligan, *Putting an End to Judicial Lawmaking: Abolishing the Undue Hardship Exception for Student Loans in Bankruptcy*, 34 U.C. DAVIS L. REV. 221, 224 (2000).

[6] *See id.* at 225.

[7] *Id.* at 225–26.

[8] 11 U.S.C. § 523(a)(8) (2018).

reinterpreting the phrase "undue hardship" to create a consistent and fair standard to help courts determine whether a student debtor's circumstance constitutes undue hardship that necessitates discharge of the educational debt. My research involves researching relevant federal statutes and regulations to determine how the phrase "undue hardship" is interpreted and applied to determine whether that definition and application can inform courts on how the standard may be used in the context of student loan discharge proceedings to create consistent treatment of student-loan debtors.

First, this Comment provides background on the evolution of student loan programs and the bankruptcy system. Next, this Comment provides the legal doctrine behind tools of statutory construction, including the presumption of consistent usage, that I use to support the concept of looking across federal laws to discern common threads among the way undue hardship is interpreted and applied to help inform the use of the standard in the bankruptcy context. My Comment then analyzes the various federal provisions using the undue hardship standard by describing the provisions, analyzing case law decisions interpreting the standard, and discerning key points that can be used to inform the use of the standard in determining whether student loans may be discharged in bankruptcy. Finally, this Comment proposes some important policy considerations that support the idea that the undue hardship standard in the bankruptcy context needs to be reevaluated by circuit courts that are continually faced with the decision of what constitutes an undue hardship to warrant the discharge of student loan debt.

I. BACKGROUND

Student loan programs were originally intended as a program of last resort for college students seeking to finance their education, and only the most needy students qualified for a loan.[9] The purpose surrounding the creation of the first student loan programs, around the time of Lyndon Johnson's "war on poverty," was to reduce financial barriers and overcome the equalities of opportunity among potential college enrollees.[10] The result was widespread demand for additional student financial aid, which Congress responded to by enacting the Middle Income Student Assistance Act, which made federal student loans available to students with less regard to need.[11] Among other expansions of

[9] Roger Roots, *The Student Loan Debt Crisis: A Lesson in Unintended Consequences*, 29 SW. U. L. REV. 501, 504 (2000).

[10] *Id.* at 505.

[11] *Id.*

student financial aid programs and policy, student borrowing rates increased drastically. The evolution of student loan programs and the impact that it had on cost and accessibility of higher education is responsible for creating the so-called "Indentured Generation" of student borrowers, a nickname that scholars have given students that will likely be burdened with student loan debt for much of their lives.[12]

Around the same time Congress was expanding the student loan program, Congress also began the process of ending the opportunity to discharge student loan debt through bankruptcy due to fears of bankruptcy abuse by student debtors.[13] Prior to the current Bankruptcy Code, student loans were not treated differently from any other dischargeable debt. The practice changed with the passage of the Education Amendments Act of 1976, which prohibited discharge of student loans in bankruptcy for the first five years of loan repayment unless the debtor could establish undue hardship.[14] The 1978 Bankruptcy Code endorsed the five-year bar against discharge of student debt.[15] In 1990, the student loan discharge exception was extended to seven years. [16] Then, in 1998, the Code was amended so that federally guaranteed student loans could not be discharged unless the debtor could prove undue hardship.[17] With this historical context in mind, tension continues to exist between federal student aid programs that encourage students to borrow to access to higher education, and federal bankruptcy law that characterize educational debts as an exception to the general rule that discharge forgives pre-bankruptcy debts, unless the educational debts impose undue hardship.

Under the current provision governing the discharge of educational loans, a debtor availing herself of the bankruptcy system must establish that repaying her educational debt would impose an undue hardship in order to obtain a discharge of such debt.[18] An important consideration by a student loan borrower who wishes to discharge pre-bankruptcy educational debts is what she must show to make a claim of undue hardship. The relevant provision, however, does not provide a definition or standard to explain what constitutes an "undue hardship" that warrants discharge of educational loans.[19] The legislative history of the

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[12] Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 330–31 (2013).

[13] Roots, *supra* note 9, at 512.

[14] Austin, *supra* note 12, at 363.

[15] *Id.*

[16] *Id.* at 363–64.

[17] *Id.* at 364.

[18] 11 U.S.C. § 523(a)(8).

[19] *Id.* § 523(a)(8).

section also fails to precisely specify how courts should determine whether a debtor qualifies for a discharge based on an undue hardship.[20] The task of interpreting undue hardship and establishing the conditions that warrant the discharge of educational loans has consequently fallen to the federal judiciary. As a result, courts have developed a variety of tests to provide a framework for determining whether an individual's educational debt may be discharged.[21] Amidst these varying tests, courts have disagreed regarding the threshold for when an education loan obligation is an undue hardship and what exactly what a debtor must prove in order to discharge a student loan on undue hardship grounds.[22]

The vast majority of courts, including nine of the country's thirteen federal circuit courts, have interpreted "undue hardship" to require the debtor to prove three things:

> (1) the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for himself and his dependents if forced to repay the loans; (2) additional circumstances exist indicating that the debtor's inability to pay is likely to persist for a significant portion of the repayment period of the student loans; and (3) the debtor has made good faith efforts to repay the loans.[23]

The debtor must prove each of these elements by a preponderance of the evidence.[24] This standard is commonly referred to as the "*Brunner* test" after the case in which the standard first originated. The *Brunner* test is considered highly fact-intensive, and not all courts apply the standard the same way.[25] For

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[20] Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 487, 419–28 (2005).

[21] *See* Johnson v. Pennsylvania Higher Educ. Assistance Agency (*In re* Johnson), 1979 U.S. Dist. LEXIS 11428 (Bankr. E.D. Pa. June 27, 1979), Brunner v. N.Y. State Higher Educ. Services Corp. (*In re* Brunner), 46 B.R. 752 (1985), Bryant v. Pennsylvania Higher Educ. Assistance Agency (*In re* Bryant), 72 B.R. 913 (Bankr. E.D. Pa. 1987), Simons v. Higher Educ. Assistance Found. (*In re* Simons), 119 B.R. 589, 592–93 (Bankr. S.D. Ohio 1990) (taking a totality-of-the-circumstances-approach); *see also* Robert F. Salvin, *Student Loans, Bankruptcy and the Fresh Start Policy: Must Debtors be Impoverished to Discharge Educational Loans?*, 71 TUL. L. REV. 139, 149 (1996) (stating there are as many tests for undue hardship as there are bankruptcy courts).

[22] Kevin Lewis, *Bankruptcy and Student Loans*, CONGRESSIONAL RESEARCH SERVICE REPORT 1 (Feb. 22, 2018).

[23] Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d at 396.

[24] Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 358–59 (6th Cir. 2007); Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320, 1324 (11th Cir. 2007).

[25] Educ. Credit Mgmt. Corp. v. Buchanan, 276 B.R. 744, 752 (N.D. W. Va. 2002); *see* Hicks v. Educ. Credit Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 30 (Bankr. D. Mass. 2005) (arguing that even though "both the Tenth and Eleventh Circuits" have purportedly "adopted identical versions of the Brunner test," "the Brunner test as adopted by the Eleventh Circuit does not include the same considerations as the Brunner test adopted by the Tenth Circuit").

example, many courts find that hardship must go beyond the ordinary hardship of a debtor in bankruptcy.[26] Many courts focus on the predicted length of the hardship.[27] Others have held that hardship must be truly severe and prolonged to warrant discharge.[28] There are courts, however, that view the requisite hardship in a less demanding sense. Two have recently concluded that the hardship inquiry is whether the debtor has adequate resources to repay the loan and maintain a minimum standard of living.[29] What results from the *Brunner* test, and many others used to determine what constitutes an "undue hardship," is variance in the extent of the hardship required to obtain relief.

Congress's decision to condition educational loan relief on the application of a vague and indeterminate standard has proven to be problematic for many reasons. It is recognized that there is "a troubling disconnect between the

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[26] Kopf v. U.S. Dep't of Educ., 245 B.R. 731, 743 (2000) (citing United Student Aid Funds v. Pena (*In re* Pena), 155 F.3d 1108, 1111 (9th Cir. 1998)) ("garden variety" hardship not enough); Law v. Educ. Res. Inst. (*In re* Law), 159 B.R. 287, 291 (Bankr. D.S.D. 1993) ("Despite its discretionary nature, the interpretation [of undue hardship under a totality of the circumstances approach] does, nonetheless, contemplate the existence of unique and extraordinary circumstances, for the fact that repayment would merely impose a hardship is insufficient"); Ford v. Tenn. Student Assistance Corp. (*In re* Ford), 151 B.R. 135, 138–40 (M.D. Tenn. 1993) ("describing standards of hardship that go beyond "mere financial hardship or present financial adversity"); *In re* Lohman, 79 B.R. 576, 584 (D. Vt. 1987) (debtor's circumstances must be "exceptional and extreme").

[27] Kopf v. U.S. Dep't of Educ., 245 B.R. at 743 (citing Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 ("Requiring evidence not only of current inability to pay but also of additional, exceptional circumstances, strongly suggestive of continuing inability to repay over an extended period of time, more reliably guarantees that the hardship presented is 'undue.'"); *accord* Barrows v. Ill. Student Assistance Comm'n (*In re* Bush Barrows), 182 B.R. 640, 648 (Bankr. D.N.H. 1994); *see also* Dresser v. Univ. of Me. (*In re* Dresser), 33 B.R. 63, 65 (Bankr. D. Me. 1983) (debtor must demonstrate that for the foreseeable future it would be impossible for him to generate enough income to "pay off" the loan and maintain his household "above the poverty level").

[28] Kopf v. U.S. Dep't of Educ., 245 B.R. at 743 (citing Wetzel v. New York State Higher Educ. Servs. Corp. (*In re* Wetzel), 213 B.R. 220, 225 (Bankr. N.D.N.Y. 1996) ("There must be an extraordinary situation with a certainty of hopelessness as to any possibility of repayment for the indefinite future. Mere inconvenience, austere budget, financial difficulty and inadequate present employment are not grounds for discharging educational debts [for undue hardship]"); *In re* Mathews, 166 B.R. at 943, 945 (Bankr. D. Kan. 1994) (by using "undue" as a modifier, Congress "meant that ordinary 'garden variety' hardship would not suffice," the debtor "must show that the combination of the low income and exceptional circumstances is so severe and oppressive that there is no way that the debtor will ever be able to repay the debt and maintain a minimal standard of living"); *In re* Rappaport, 16 B.R. 615, 617 (Bankr. D.N.J.) (requiring "total incapacity now and in the future to pay one's debts for reasons not within the control of the individual debtor"). *See also* Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 305–06 (3rd Cir. 1995) (debtor entitled to live in something more than "abject poverty," must show "she could not maintain a minimal standard of living if forced to repay her loans" which is a showing of something more than "tight finances")).

[29] Kopf v. U.S. Dep't of Educ., 245 B.R. at 744 (citing Peel v. Salliemae Servicing-Heal Loan (*In re* Peel), 240 B.R. 387, 394–95 (1999)); Salinas v. United Student Aid Funds, Inc. (*In re* Salinas), 240 B.R. 305, 313 (lamenting that too many courts "discuss 'undue hardship' in the most stringent of terms, focusing not upon whether the debtor possesses an 'adequate' income but rather whether the debtor is scraping by on a 'minimal' standard of living); *see also* Doherty v. United States Aid Funds, Inc. (*In re* Doherty), 219 B.R. 665, 671 (Bankr. W.D.N.Y. 1998) (arguing that *In re* Brunner does not require a "certainty of hopelessness" standard, basing its finding on "the most probable near-future for a debtor").

original purpose of the student-loan program to democratize American higher education and the fiscal policies that are necessary to ensure program solvency and protect borrowers from enslaving debt and inevitable default."[30] The undue hardship standard in the exceptions to discharge provision of the Bankruptcy Code has also been deemed "unworkable" because of how inconsistent results are when judges apply the exception.[31] Inconsistent judicial determinations of undue hardship are problematic because of the way they undermine the uniformity and efficiency of bankruptcy law.[32] Accordingly, there is a pressing need for a reevaluation of the standard courts use to determine the dischargeability of student loans in bankruptcy.

Two issues tend to arise in the debate over providing debt forgiveness relief in general to individuals: (1) the ability of a debtor to repay her pre-bankruptcy debts due to the concern that bankruptcy should be limited from those with a means to repay and (2) the causes of the debtor's financial situation that resulted in the debtor filing for bankruptcy due to concern that the debtor's situation stems from irresponsible conduct instead of true misfortune.[33] Scholarly research and case law provide evidence that courts have focused on the latter issue in conducting their undue hardship determinations, which has resulted in a focus on the cause of the financial hardship instead of the effect that declaring the debt nondischargeable would have on the debtor.[34] This Comment adopts the argument advanced by Professor Rafael Pardo and Professor Michelle Lacey that the undue hardship inquiry in the bankruptcy context should be confined to an inquiry into a debtor's ability to repay educational debt without reference to the debtor's prebankruptcy conduct, as such consideration of such conduct is unnecessary to the discharge analysis.[35] This Comment expands on this argument by looking to other federal law implementing the undue hardship standard to discern a more coherent approach to interpreting and applying undue hardship for purposes of determining whether educational debt ought to be deemed dischargeable in bankruptcy. The phrase "undue hardship" does not represent a complete gray area in the law without any guideposts about how to rule. Determining the proper statutory construction of the phrase "undue hardship" is a necessary step in determining the meaning of undue hardship that

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[30] 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, 496 (2014).

[31] Milligan, *supra* note 5, at 254.

[32] *Id.* at 258 n. 244 (2000) (citing NAT'L BANKR. REV. COMM'N: THE NEXT TWENTY YEARS: FINAL REPORT, 1.4.5, chapter 5 (1997) (stating that bankruptcy law should treat debtors uniformly)).

[33] Pardo & Lacey, *supra* note 20, at 510.

[34] *Id.*

[35] *Id.*

reflects congressional intent and continuity in the law of the undue hardship standard that courts should recognize and use in the discharge of student loan debt.[36]

II. STATUTORY INTERPRETATION DOCTRINE

"Undue hardship" is a widely used and accepted phrase in a variety of federal laws. Determining the proper statutory meaning of the phrase "undue hardship" as used in the Bankruptcy Code can be aided by the use of various tools and methods of statutory interpretation to analyze and synthesize the various other federal provisions using the phrase "undue hardship." Both judges and scholars have developed an arsenal of interpretative techniques designed to extract the functional meaning from ambiguous statutory text and conflicting legislative history. By using these interpretative techniques, judges faced with the challenge of construing legislative text and history can render consistent interpretations.[37]

Statutory interpretation begins with an unclear or ambiguous term or phrase as determined by statutory construction.[38] It is a well known rule that courts cannot interpret a statute that is clear and unambiguous.[39] Ambiguity arises when "a statute is capable of being understood by reasonably well-informed persons in two or more different senses."[40] Once deemed ambiguous, formal legal analysis views ambiguity as an opportunity to problem solve rather than an opportunity to exploit.[41] When encountering ambiguity, a cardinal rule of construction is that the "whole statute should be drawn upon as necessary, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purpose."[42] This rule was articulated by Justice Scalia in *United Savings Association v. Timbers*:

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[36] *See generally* Brief of Amici Curiae National Consumer Law Center And National Association Of Consumer Bankruptcy Attorneys, Murphy v. U.S. Dept. of Education, No. 14-1691 (1st Cir. Oct. 25, 2016).

[37] Joseph A. Grundfest & A.C. Pritchard, *Statutes With Multiple Personality Disorders: The Value Of Ambiguity In Statutory Design And Interpretation*, 54 STAN. L. REV. 627, 628 (2002).

[38] Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."); Conn. Nat. Bank v. Germain, 503 U.S. 249, 253–54 (1992) ("In interpreting a statute a court should always turn to one cardinal canon before all others. . . . Courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

[39] Conn. Nat. Bank v. Germain, 503 U.S. at 254 ("when the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'").

[40] *In re* Geneva Steel Co., 281 F.3d 1173, 1178 (10th Cir. 2002).

[41] Grundfest & Pritchard, *supra* note 37, at 642.

[42] Larry Eig, Statutory Interpretation: General Principles and Recent Trends, Congressional Research Service, at 4 (2011); *see also* United Savings Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371

> Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.[43]

When a statute is deemed ambiguous and interpretation of the statute is necessary beyond any finding of a "plain or ordinary meaning," the intent of the legislature must be examined and consulted, and the statute must be construed accordingly. Legislative history can provide guidance for determining the legislature's intent and therefore the meaning of ambiguous language in a statute.[44] The idea of focusing on the meaning that the legislature intended to give the statute is often referred to as intentionalism and is touted as "facilitating healthy interbranch relations" by promoting commonality between the legislature and the judiciary.[45] Legislative history, however, is not always conclusive.

In the event that history lacks indication of Congress's intended interpretation of an ambiguous term, there are a series of canons of interpretation that can be used throughout the process to help justify and provide support for a particular interpretation of a statute.[46] These statutory interpretation tools serve as "rules of thumb or presumptions" that help uncover substantive meaning from, for example, the language, context, structure, and subject matter of a statute.[47] While Black's Law Dictionary does not treat canons as common law, stating that canons are treated "as mere as customs not having the force of law," these customs have had a substantial influence in ascertaining what the drafters of a statute meant.[48]

Canons important to this Comment include the "whole act rule" which provides that the entirety of a document (in this case, the Bankruptcy Code) provides context for each of its parts. Therefore, this canon establishes that when construing a statute, the text of the entire statute as a whole must be considered,

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(1988); Green v. Bock Laundry Machine Co., 490 U.S. 504, 528 (1990) (Scalia, J., concurring) (discussing how courts also may look to the broader body of law into which the enactment fits).

43 United Savings Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988).

44 *A Guide To Reading, Interpreting And Applying Statutes*, WRITING CTR. AT GEO. U.L. CTR., at 9, https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/A-Guide-to-Reading-Interpreting-and-Applying-Statutes.pdf.

45 *Id.*

46 *See generally id*.

47 Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 344 (2010).

48 *Id.* at 345.

which is important when the ambiguous term or phrase one is trying to understand is also used elsewhere in the statute.[49] Another important canon includes the presumption of consistent usage, which presumes that a word or phrase has the same meaning throughout a text. This canon is also referred to as *in pari materia* and allows a court to assume that when two statutes use the same vocabulary to discuss the same or similar subject matter, the legislature intended the terms to have the same meaning.[50] These canons operate on the presumption that legislative bodies use the same term consistently. Additionally, the related-statutes canon purports that statutes dealing with the same subject are to be interpreted together, as though they were on law.[51] In certain areas, interpretations are recognized to cut across statutes. Another similar canon of construction, the common law of extrinsic sources, permits interpreters to look for meaning beyond a code's text.[52] This canon embraces the idea of "continuity in law" and looking to sources outside the statute at issue to help discern meaning or intent.[53] With this brief foundation, I will now turn to an analysis of the phrase "undue hardship" as used across the federal code using the principles and canons discussed in this section to clarify the meaning of 11 U.S.C. § 523(a)(8) for determining whether a debtor's economic status meets a threshold that supports a discharge of burdensome student loan debt.

III. UNDUE HARDSHIP ANALYSIS

The undue hardship standard as interpreted by a majority of the circuit courts includes, in part, an inquiry into whether a debtor will maintain a future inability to repay the student loan and has made good faith efforts to repay the loan in order to receive a discharge of student loan debt.[54] Judges tend to measure a debtor's good faith by her "efforts to obtain employment, maximize income, and minimize expenses."[55] Additionally, some courts consider whether the debtor has participated in alternative loan repayment options.[56] Regardless, all of these measurements of good faith effort focus on the debtor's prebankruptcy conduct, which essentially leads to an inquiry into why the debtor is in financial distress

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[49] *See* Hernandez v. Kalinowski, 146 F.3d 196, 200 (3rd Cir. 1998).

[50] Scott, *supra* note 47, at 376.

[51] *See* Larry Eig, CONG. RESEARCH SERV., 97-589, General Principles and Recent Trends 15 (2014).

[52] Larry Eig, CONG. RESEARCH SERV., 97-589, General Principles and Recent Trends (2011).

[53] *Id*.

[54] Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2nd Cir. 1987); Roe v. Law Unit (*In re* Roe), 226 B.R. 258, 274 (N.D. Ala. 1998) (finding that the debtor did not establish sufficient good faith in claiming undue hardship under the Johnson test).

[55] Austin, *supra* note 12, at 379.

[56] *Id.*

and how their prebankruptcy conduct contributed to their current financial state. Congress, however, has clearly indicated elsewhere in the federal code that it knows how to incorporate good faith, or an inquiry into an individual's conduct, as a condition that is separate and distinct from the condition of undue hardship for purposes of determining whether an undue hardship exists.[57] Accordingly, the interpretation of undue hardship used by a majority of the circuit courts in bankruptcy proceedings means that courts interpret the phrase "undue hardship" differently for purposes of evaluating the dischargeability of educational loans compared to how the standard is used and analyzed throughout other provisions of the U.S. Code. This interpretation is a direct contradiction to the well-established canon of the presumption of consistent usage, which suggests that a word or phrase is presumed to bear the same meaning throughout a text.[58] My analysis will now look to the other uses of the undue hardship standard in the Bankruptcy Code and the U.S. Code to establish that an undue hardship inquiry should focus on the effect that the claimed hardship is having on the individual based on the individual's current circumstances and the implications for an individual if their claim for relief based on the undue hardship is rejected.

A. Reaffirmation Agreements in the Bankruptcy Code

In the Bankruptcy Code, the use of the undue hardship standard in the reaffirmation agreement provision suggests that the undue hardship analysis should primarily focus on the current financial circumstances of a debtor. As acknowledged by scholars, the reaffirmation agreement provision is the only other place undue hardship appears in the Bankruptcy Code besides in the educational loan context.[59] Under 11 U.S.C. § 524, the provision governing reaffirmation agreements, an agreement that makes the debtor legally bound to repay a debt that would otherwise be discharged is enforceable only if a variety of requirements meant to safeguard the debtor's fresh start are all satisfied.[60]

Among these requirements includes language that the agreement must "not impose an undue hardship on the debtor or a dependent of the debtor."[61] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)

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[57] Brief for Professor Rafael Pardo as Amicus Curiae, p., Murphy v. U.S. Dept. of Educ., No. 14-1691 (1st Cir. Oct. 25, 2016).

[58] *See A Guide To Reading, Interpreting And Applying Statutes*, *supra* note 44; Scott, *supra* note 47, at 376.

[59] *See* Brief for Professor Rafael Pardo as Amicus Curiae, p. 11–13, Murphy v. U.S. Dept. of Educ., No. 14-1691 (1st Cir. Oct. 25, 2016).

[60] 11 U.S.C. § 524(m)(1).

[61] *Id.*

clarified the "undue hardship" standard in the reaffirmation agreement context by providing that a presumption of undue hardship arises in the reaffirmation context if the debtor's disposable income, measured by income level minus expenses, is not enough to make the payments as required in the reaffirmation agreement.[62] If the presumption arises, it can be rebutted only if the debtor is able to identify additional funding that will allow him or her to make the scheduled payments per the agreement.[63] Accordingly, the provision focuses on the debtor's ability to repay a debt determined by the debtor's disposable income, which ultimately measures the effect that the reaffirmation agreement would have on the future livelihood of the debtor.

While the Bankruptcy Code itself sheds some light on what the undue hardship standard means, it is worth looking beyond it to other provisions of federal code that apply the undue hardship standard to discern a more coherent approach to interpreting and applying the standard for purposes of § 523(a)(8) in the Bankruptcy Code. By analyzing the undue hardship standard in the context of public safety benefits, employment discrimination, student financial aid eligibility, tax payment extensions, social security benefits, and discovery in civil litigation, common threads exist that suggest that an evaluation of good faith or conduct in general in an undue hardship analysis is misguided. In fact, other federal law provides strong support for the conclusion that Congress intended undue hardship to focus on the impact or affect an alleged hardship is having on an individual rather than evaluating the cause of the hardship, whether an individual has made a good faith effort to avoid their hardship, and whether the hardship will persist.

B. Public Safety Officer Death Benefits

When it comes to considering an individual's conduct for purposes of granting relief, Congress has clearly indicated in federal law that it knows how to expressly incorporate good faith as a condition that is separate and distinct from the condition of undue hardship for purposes of granting relief.[64] A prime example of this is found in the Public Safety Officers' Benefits Act, which established a program to provide death benefits or disability benefits to certain public safety officers whose death or disability occurred in the line of duty.[65] The provision, 34 U.S.C. § 10281(m), which contains the phrase undue

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[62] *Id.*

[63] *Id.*

[64] *See* Brief for Professor Rafael Pardo as Amicus Curiae, p. 11–13, Murphy v. U.S. Dept. of Educ., No. 14-1691 (1st Cir. Oct. 25, 2016).

[65] 34 U.S.C. § 10281(m).

hardship, concerns collection actions of benefits that are disbursed pursuant to a statute enacted retroactively or in error, and reads in whole as follows: "The Bureau may suspend or end collection action on an amount disbursed pursuant to a statute enacted retroactively or otherwise disbursed in error under subsection (a) or (c) of this section, where such collection would be impractical, or would cause undue hardship to a debtor who acted in good faith."[66] In other words, an undue hardship serves as a defense against collection actions for benefits disbursed in error or benefits disbursed under a statute enacted retroactively.

Undue hardship in this context has not been interpreted in case law, regulations, or guidance policy, but is worth noting due to the construction of the statute. The fact that Congress placed "undue hardship" in conjunction with the clause "acted in good faith" in the same provision suggests that when Congress uses on the term "undue hardship," it should not include a good faith requirement. This conclusion is supported by the rule against surplusage, which is a presumption that the legislature put every word in the statute for a reason. The rule against surplusage is regarded as "a cardinal principle of statutory construction" and stands for the proposition that "a statue ought, upon the whole, to be construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[67] In other words, a statute should not be interpreted in a way that renders a word or phrase superfluous when such an interpretation can be avoided.[68] If the undue hardship standard were to include an inquiry into good faith, the latter half of § 10281(m) using the clause "acted in good faith" would be insignificant, if not wholly superfluous, since the undue hardship analysis would already include an inquiry into the good faith of the debtor. The Supreme Court has made clear, it is "reluctant to treat statutory terms as surplusage" in any setting."[69] This example of statutory construction that makes an express distinction between undue hardship and good faith provides strong support for the conclusion that a definition for undue hardship in the bankruptcy context should not include factors that evaluate good faith efforts or debtor's pre-bankruptcy conduct.

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66 *Id.*

67 Duncan v. Walker, 533 U.S. 167, 174 (2001).

68 United States v. e-Gold, Ltd., 550 F. Supp. 2d 82, 93 (D.D.C. 2008).

69 Duncan v. Walker, 533 U.S. at 174; *see* Babbitt v. Sweet Home Chapter, Communities for Great Ore., 515 U.S. 687, 698 (1995); *see also* Ratzlaf v. United States, 510 U.S. 135, 140 (1994) ("judges should hesitate to treat statutory terms as surplusage in any setting).

C. Employment Discrimination

The application of the undue hardship standard as a defense for an employer who cannot make accommodations for an employee also supports the conclusion that an undue hardship analysis should focus on an individual's current circumstances. An analysis of how the undue hardship standard is interpreted and applied in the employment discrimination context shows that an undue hardship analysis is distinct from an analysis evaluating good faith or persisting financial hardship. Out of all the provisions undue hardship is used in federal law, both Congress and the Supreme Court have been most generous in shedding some light on what the undue hardship standard means in the context of the Americans with Disabilities Act (ADA). The undue hardship standard is included in the ADA as a defense against accommodating an employee's disability.[70] Specifically, the statute provides that discriminating:

> against a qualified individual on the basis of disability includes not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.[71]

The regulation implementing the law further clarifies the undue hardship standard as used in this employment context by providing a definition to undue hardship. According to 29 CFR 1630.2, "undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in . . . this section."[72]

In determining whether an accommodation would impose an undue hardship on a covered entity, a summary of the factors laid out in the regulation include the nature and net cost of the accommodation, overall financial resources of the facility and effect on expenses and resources, the overall financial resources of the covered entity, the type of operations of the covered entity, and the impact on the accommodation upon the operation of the facility, including the impact on the facility's ability to conduct business.[73] The U.S. Equal

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[70] *See* Gregory S. Crespi, *Efficiency Rejected: Evaluating Undue Hardship Claims under the Americans with Disabilities Act*, 26 TULSA L. R. 1, 2–3 (1990).

[71] 42 U.S.C § 12112.

[72] 29 CRF 1630.2.

[73] *Id.* ("In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include: (i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding; (ii) The overall financial

Employment Opportunity Commission has issued guidance that sheds further light on the standard, defining "undue hardship" to mean "significant difficulty or expense" and directs an undue hardship inquiry focus on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation.[74]

Since the undue hardship is used as a defense to accommodating an employee's disability, an employer must carry the burden of proof in showing a court that making a requested reasonable accommodation poses an undue hardship.[75] The court's inquiry into whether the defense is allowable follows this systematic analysis: If the employee establishes that a reasonable accommodation is possible, then the employer must prove that the accommodation is unreasonable and imposes an "undue hardship" on the employer.[76] It is the first part of this analysis, the establishment of a "reasonable accommodation," that sheds an important light on what the "undue hardship" analysis entails. Referred to as the "interactive process," the process of deciding whether an accommodation is reasonable includes determining: (1) whether an individual let his or her employer know that she needs an adjustment or change at work for a reason related to a medical condition, and (2) whether the employer demonstrated reasonable efforts to assist and communicate with the employee in good faith regarding the employee's needs and request.[77] A significant piece in this "interactive process" includes an evaluation and determination of employer's conduct and whether the employer made a good faith effort to

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resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources; (iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities; (iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and (v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.").

[74] The U.S. Equal Employment Opportunity Commission: EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Number 915.002 (Oct. 17, 2002).

[75] US Airways, Inc. v. Barnett, 535 U.S. 391, 400 (2002); *see also* The U.S. Equal Employment Opportunity Commission: EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Number 915.002 (Oct. 17, 2002).

[76] US Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

[77] *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (Oct. 17, 2002), https://www.eeoc.gov/policy/docs/accommodation.html#requesting; *see also* Tiffani L. McDonough, *Implementing the Interactive Process under the ADA*, ABA (Oct. 16, 2013), http://apps.americanbar.org/litigation/committees/employment/articles/fall2013-1013-implementing-interactive-process-under-ada.html.

accommodate the employee's needs.[78] While the interactive process is not expressly spelled out in statute, courts recognize that the obligation of an employer to engage in an interactive process with an employee is inherent in the statutory obligation to offer a reasonable accommodation to an otherwise qualified disabled employee.[79] Accordingly, since an evaluation of an employer's good faith effort to make an accommodation occurs during the reasonable accommodation inquiry, no evaluation of the employer's conduct occurs in the undue hardship determination. Instead, the undue hardship analysis focuses on discerning whether the accommodation discussed in the interactive process causes the employer "significant difficulty or expense" in light of the factors found in the regulation.[80]

The Supreme Court clarified and affirmed that there is a distinction in the analysis between a reasonable accommodation effort, which requires a good faith effort on the part of an employer to make an accommodation, and the undue hardship inquiry, which an employer can use as a defense to making such an accommodation, in *US Airways v. Barnett*.[81] In *Barnett*, the Court considered whether the ADA required an employer to allow an employee with a disability to be employed in a position as a reasonable accommodation when another employee was entitled to that position under the employer's seniority system.[82] U.S. Airways argued that an accommodation that required an exception to a seniority system always showed that the accommodation was not reasonable.[83] On the other hand, Barnett argued that an exception to a seniority system never showed that an accommodation was not reasonable, but it could help show that the accommodation would cause undue employer hardship, which the employer would have to show.[84] The Court debated the merits of each argument and determined that the decision depended on how the phrase reasonable accommodation was reconciled with the phrase undue hardship. In the holding, the Court determined that first an employee needed to show the accommodation

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[78] 29 C.F.R. 1630.2(o) ("To determine the appropriate reasonable accommodation it may be necessary for [the employer] to initiate an informal, interactive process with [the employee] in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."); *see also* Marcia L. DePaula, *ADA: Are You Participating In The Interactive Process In "Good Faith"?*, STEPTONE & JOHNSON PLLC (Apr. 21, 2016), http://www.steptoe-johnson.com/content/ada-are-you-participating-interactive-process-good-faith.

[79] Smith v. Midland Brake, Inc., 180 F.3d 1154, 1127 (10th Cir. 1999).

[80] *See* 29 CRF 1630.2.

[81] US Airways, Inc. v. Barnett, 535 U.S. 391 (2002) (finding that employee did not present evidence of special circumstances demonstrating reasonableness).

[82] US Airways, Inc. v. Barnett, 535 U.S. at 393–94.

[83] *Id.* at 396.

[84] *Id.*

seemed "reasonable on its face."[85] After that, the employer must show special circumstances in light of the employee's circumstances that indicate the existence of an undue hardship.[86] Justice O'Connor concurred with the distinction between the two inquires, stating that "these interpretations give appropriate meaning to both the term "reasonableness" and "undue hardship" preventing the concepts from overlapping by making reasonableness a general inquiry and undue hardship a specific inquiry."[87]

Since this decision, case law has continued to illustrate the difference between a reasonable accommodation effort and undue hardship analysis. For example, in *Ace v. Armstrong Utilities*, the court denied an employer's motion for summary judgment on a failure to accommodate a claim under the ADA.[88] In discussing the issue of the case, the court made clear that the issue was whether the employer made a good-faith effort to accommodate to the employee and expressly rejected any disputes about undue hardship given the finding that the employee's request to work in a cubicle to accommodate his mental condition would not have imposed an undue hardship on the employer.[89] The way the court distinguished these two issues in the case supports the conclusion that an evaluation into an individual's good faith efforts or conduct is a condition that is separate and distinct from the condition of undue hardship.

Another case example, *Yinger v. Postal Presort*, involved a former employee who had a heart condition that required a pacemaker who was terminated after taking leave for a procedure to replace the pacemaker's battery.[90] The employee established that he had an ADA qualified disability because his heart condition interfered with his ability to lift, stand, and walk distances.[91] The court found that the employee had a conversation with his employer that constituted an adequate request for reasonable accommodations given his heart problems.[92] The court affirmed that the conversation, referred to as the interactive process, involved an obligation by both parties to proceed in an interactive manner and engage in good faith communications to identify a reasonable accommodation.[93] Upon evaluating the conduct and good faith efforts of the employer, the court found that the employer failed to participate in an interactive process to

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85 *Id.* at 401–02.
86 *Id.* at 401–02.
87 *Id.* at 410–11 (O'Connor, J., concurring).
88 Ace v. Armstrong Utils., Inc., 2016 U.S. Dist. LEXIS 23168, at *1 (W.D. Pa., Feb. 25, 2016).
89 *Id.* at *82–83.
90 Yinger v. Postal Presort, Inc., 693 Fed. Appx. 768, 770–71 (10th Cir. 2017).
91 *Id.* at 772.
92 *Id.* at 773.
93 *Id.*

determine reasonable accommodations after an employee had made his accommodation request.[94] The court then went on to evaluate the employer's undue hardship claim, which it ultimately rejected due to inconsistent and contradictory explanations for why the employee was no longer employed at the company.[95] The fact that the court reviewed the employee's reasonable accommodation claim and the employer's undue hardship claim separately further supports the conclusion individual's good faith efforts or conduct is a condition that is separate and distinct from the condition of undue hardship. Instead, as described by the statute, evaluating whether an undue hardship exists means focusing on the current nature and resources of the employer and determining whether imposing a duty to make the accommodation will result in significant difficulty or expense.

A similar use of the phrase undue hardship is used in the Civil Rights Act as a defense for employers regarding the accommodation of an employee's religious practices. The Civil Rights Act prohibits employment discrimination based on religion, and the statute defines religion as including "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[96] The regulation implementing the law sheds light on the undue hardship standard as used in this context by providing two examples of undue hardship, including cost and a disruption to seniority rights.[97]

When it comes to cost as an undue hardship, 29 CFR 1605.2 provides that "an employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require 'more than a *de minimis* cost.'"[98] The regulation goes on to specify that "the analysis of what constitutes 'more than a *de minimis* cost' weighs the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals

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[94] *Id.* at 773–74 (10th Cir. 2017) (finding that "rather than engaging an interactive process with Yinger, the employer appears to have done just the opposite, expressly telling Postal Presort's human resources professional to stay silent and communicate nothing to Yinger regarding his leave request") (citing Midland Brake, 180 F.3d 1154, 1172 (10th Cir. 1999)); *see also* Bartee v. Michelin N. Am., Inc., 374 F.3d 906, 916 (10th Cir. 2004) (employer's failure to participate in interactive process supported failure-to-accommodate claim).

[95] Yinger v. Postal Presort, Inc., 693 Fed. Appx. at 774.

[96] 42 U.SC.S. § 2000e(j).

[97] 16 C.F.R. § 1605.2(e).

[98] *Id.* (emphasis added).

who will in fact need a particular accommodation."[99] While this is admittedly a very different standard than the definition used by the ADA, an important similarity exists: the analysis makes a distinction between a reasonable accommodation effort, which requires a good faith effort on the part of an employer to make an accommodation, and the undue hardship inquiry, which an employer can use as a defense to making said accommodation.

Once an individual provides an employer with notice of the need to accommodate a particular religious practice or belief, both the employer and the individual have an obligation to engage in an interactive process to determine whether an accommodation is possible.[100] Similar to the interactive process in the ADA context, the individual has an obligation to identify those employment practices or rules that interfere with his or her religious belief so that the employer can assess whether an accommodation is available. The "employer then has the obligation to consider, in good faith, whether an accommodation is possible and whether such accommodation poses an undue hardship to its business operations."[101]

The Supreme Court has provided some clarity to the undue hardship standard in the context of employment discrimination in *Trans World Airlines v. Hardison*, a case that involved an employee who requested Sundays off from work for religious purposes, thus overriding the seniority system the airline had for determining work schedules.[102] The employee suggested multiple accommodations in light of his observance of the Sabbath, but the options were rejected by Trans World Airlines.[103] No accommodation was reached and the employee was eventually fired for failing to report to work during his assigned shift.[104] The Court affirmed the district court finding that Trans World Airlines took appropriate action to try accommodate the employee by holding several meetings in an attempt to find a solution.[105]

The next part of the Court's analysis, however, focused on the effect that honoring the accommodations as discussed in the meeting would have on the company, including the undue hardship the company would face in light of the

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[99] *Id.* (emphasis added).

[100] *See* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 69 (1986).

[101] Peter T. Shapiro, *Examining the Duty to Provide Religious Accommodations*, LEXIS PRACTICE ADVISOR J. (Sept. 13, 2016), https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/posts/examining-the-duty-to-provide-religious-accommodations.

[102] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 64–65 (1977).

[103] *See id.* at 65.

[104] *See id.*

[105] *See id.* at 77.

accommodations that were discussed in the meetings. In other words, the court was engaging in the undue hardship inquiry separate from its evaluation of the interactive process and Trans World Airline's conduct and good faith efforts to find an accommodation to suit the employee's needs. In its undue hardship analysis, the Supreme Court found where the employer would have incurred a cost of $150.00 in premium wages for a period of three months to arrange substitutes for the employee who could not work because of his religion, a showing of undue hardship was met, and accordingly, no accommodation was required.[106] It was also in this case that the Supreme Court spelled out the threshold of an undue hardship, holding that an "undue hardship" must require an employer to bear more than a de minimis cost in accommodating the religious needs of an employee.[107] Under this approach, any accommodation that requires the employer to incur more than a slight cost would likely constitute an undue hardship based on the current nature and resources of the business and relieve the employer from making the accommodation.

Case law has continued to illustrate the difference between a reasonable accommodation effort and undue hardship analysis in the context of religious accommodation in the employment context. In another example, *Thomas v. National Association of Letter Carriers*, plaintiff was a postal employee whose religion required a day of rest on its Sabbath. However, plaintiff worked in a position in which he did not have Saturdays fixed as a day off and likely could not get the day off due to the seniority system.[108] Plaintiff was disciplined for failing to show up to work when he was scheduled on Saturdays and eventually was terminated.[109] Plaintiff sued alleging that defendant had violated Title VII of the Civil Rights Act by discriminating against him based on religion. The court affirmed the appropriate analysis by explaining that once a plaintiff establishes a prima facie case, the burden shifts to the employer to demonstrate that an accommodation would cause undue hardship to the employer, supporting the conclusion that the reasonable accommodations inquiry and undue hardship inquiries are distinct.[110] After finding that plaintiff did make a prima facie case, the court engaged in an evaluation of the employee's requested accommodations, all of which the court found would have violated the post office's shift schedule as governed by the union.[111] The then court held that the post office's actions constitute all that is reasonably required of an employer to

106 432 U.S. at 84.
107 *Id.*
108 Thomas v. National Ass'n of Letter Carriers, 225 F.3d 1149, 1153 (10th Cir. 2000).
109 *See id.* at 1153–54.
110 *See id.* at 1155–56.
111 *See id.* at 1156.

accommodate the employee's religion, citing the shift schedule violation as an undue hardship to the business.[112] As such, the post office met its burden.

In the event that an employer engages with an employee in good faith effort regarding an accommodation, but the employee rejects the reasonable accommodation, the undue hardship analysis becomes irrelevant, further demonstrating the distinct nature between an evaluation of good faith conduct and undue hardship. In *Cosme v. Henderson*, a plaintiff, also a postal office worker, accepted an employment position knowing that he would not have Saturdays fixed as a day off even though his religion required a day of rest on Saturdays, its Sabbath.[113] In focusing on the reasonable accommodation portion of the analysis, the court elaborated that a reasonable accommodation of an employee's religion is one that "eliminates the conflict between employment requirements and religious practices."[114] The court went on to say that process of finding a reasonable accommodation is intended to be an interactive process in which both the employer and employee participate.[115] If the employer shows that it made a good faith effort to accommodate the employee's religious beliefs, it has satisfied its obligations under Title VII, and the statutory inquiry ends.[116] Here, the post office had demonstrated by a preponderance of the evidence that it made good faith efforts to provide a reasonable accommodate for the employee.[117] As a result, the court found the employer's argument about undue hardship irrelevant since there is no obligation for an employer to show undue hardship when the employer has offered other reasonable accommodations but it was the employee who rejected the reasonable accommodation.[118]

Evaluating how undue hardship is applied in the employment context is valuable for understanding what an undue hardship analysis entails and how it is distinct from any good faith inquiry as suggested by the Supreme Court. The undue hardship analysis in this context contains factors intended to discern an employer's ability to make accommodations based on existing resources and nature of the business. While the thresholds for what ultimately constitutes an undue hardship vary from the ADA to the Civil Rights Act, the important point is that undue hardship analysis focuses on current circumstances and evaluates

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112 *See id*.

113 Thomas v. National Ass'n of Letter Carriers, 225 F.3d 1149.

114 Cosme v. Henderson, 2000 U.S. Dist. LEXIS 16210 (S.D.N.Y. Nov. 8, 2000) (citing Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 70 (1986)).

115 *Id.* at *2.

116 *Id.* at *15.

117 *Id.* at *16.

118 Cosme v. Henderson, 2000 U.S. Dist. LEXIS 16210.

the impact to an employer if they are required to make the requested accommodation.

D. Eligibility for Title IV Federal Student Aid

Moving beyond the enlightening use of undue hardship in the ADA and Civil Rights Act context, it is notable that the undue hardship standard is used in the Higher Education Act of 1965 in eligibility requirements for Title IV federal student aid. Here, Congress uses the undue hardship standard as a student defense for failing to make Satisfactory Academic Progress for eligibility purposes for Title IV federal student aid.[119] If a student can show that an undue hardship has caused them to fail to achieve Satisfactory Academic Progress, they can continue to receive their financial aid. According to 20 U.S.C. § 1091(c)(3), "any institution of higher education at which the student is in attendance may waive the provisions of paragraph (1) or paragraph (2) of this subsection for undue hardship based on the death of a relative of the student, the personal injury or illness of the student, or special circumstances as determined by the institution." The analysis as to whether a student can make an appeal asserting undue hardship in order to remain eligible for federal student aid begins with an inquiry of whether the student is making Satisfactory Academic Progress. With federal guidance, institutions are allowed to establish reasonable standards for measuring whether a student is making Satisfactory Academic Progress, and it is within these standards where student conduct and performance is evaluated as it relates to the student's academic progress.[120] For example, University of Virginia School of Law's Satisfactory Academic Progress Policy lays out quantitative and qualitative factors to measure student performance, such as maximum time frame to complete a course of study, credit hour completion rate, and cumulative grade point average.[121] Trinity Washington University explains that the relationship between Satisfactory Academic Progress and Financial Aid is about objective numbers, meaning the student's cumulative GPA or credit completion rate, rather than a student's "good faith effort" to do well in a course regardless of cumulative GPA.[122]

After considering student performance data to determine that a student has failed to make Satisfactory Academic Progress, an appeal can be made by the

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[119] 20 U.S.C. § 1091(c)(3).

[120] Univ. of Va. L. Sch., Satisfactory Academic Progress (SAP), https://content.law.virginia.edu/financialaid/satisfactory-academic-progress-sap (last visited Feb. 28, 2018).

[121] *Id.*

[122] Trinity Washington University, Probationary Advising, http://www.trinitydc.edu/cas-advising/files/2011/09/Early_Alert__Probationary_Advising.pptx.

student by providing a detailed explanation of the undue hardship they are facing that has affected their ability to meet Satisfactory Academic Progress standards. Section 1091(c)(3) lays out circumstances that constitute an undue hardship.[123] The appeals are then reviewed by a committee within the institution to determine whether the student's situation fits the statutorily recognized circumstances qualifying as an undue hardship. While there is no case law evaluating these committee appeal decisions interpreting "undue hardship," an evaluation of various university satisfactory academic progress policies make clear that the relevant inquiry involves evaluating the student's explanation and documentation of the circumstances surrounding their inability to maintain satisfactory progress and determining whether the circumstance fits in the statutory bases of hardship established by Congress. Many universities have tacked on an additional requirement to the appeal process requiring students to explain corrective measures they have or will take to achieve and maintain satisfactory academic progress or an explanation of what has changed in the situation that will allow the student to make satisfactory process going forward.[124] This additional requirement essentially equates to a good faith statement by the student that she will take steps to achieve satisfactory progress if given a second chance to receive financial aid, but it is important to note that this requirement of pledging future good faith effort does not exist in the statute and is viewed as a distinct inquiry from determining whether an event has occurred in a student's life that meets one of the statutory bases of undue hardship.[125] Accordingly, the undue hardship defense in this provision, as defined by Congress, only refers to an evaluation of the immediate extenuating circumstances resulting in the student's undue hardship to determine whether the student should be able to maintain their financial aid award.

E. Defense and Extension of Time for Paying Taxes

While one may think it would be particularly useful to evaluate how the undue hardship standard is used in the Internal Revenue Code given the

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123 20 U.S.C. § 1091(c)(3).

124 *See* Emory Univ., Satisfactory Academic Progress, http://studentaid.emory.edu/eligibility/sap/.index.html; Wayne State Univ., Satisfactory Academic Progress, https://wayne.edu/financial-aid/receiving/sap/; Univ. of Va. L. Sch., Satisfactory Academic Progress, https://content.law.virginia.edu/financialaid/satisfactory-academic-progress-sap.

125 *See* Univ. of Va. L. Sch., Satisfactory Academic Progress (SAP), https://content.law.virginia.edu/financialaid/satisfactory-academic-progress-sap (last visited Feb. 28, 2018); Alabama A&M Univ., Satisfactory Academic Progress and Appeal Policy, http://www.aamu.edu/Admissions/fincialaid/importantinformation/Pages/Satisfactory-Academic-Progress-Policy.aspx (last visited Feb. 1, 2018); Harv. Univ. Sch. of Public Health, Satisfactory Academic Progress Policy, https://www.hsph.harvard.edu/osfs/sap/ (last visited Feb. 28, 2018).

companionship between it and the Bankruptcy Code,[126] my analysis finds that the application of undue hardship in this context is subject to some of the same inconsistent interpretations and determinations as experienced in the Bankruptcy Code. The undue hardship standard is used in the Internal Revenue Code as a defense for failing to pay taxes on time. If a taxpayer can show that paying his or her taxes on time would have caused an undue hardship, he or she may be eligible for an extension of time to pay taxes. Specifically, 26 U.S.C. § 6161(b)(1) governs provisions allowing an extension of time for paying taxes and provides that "an extension under this paragraph may be granted only where it is shown to the satisfaction of the Secretary that payment of a deficiency upon the date fixed for the payment thereof will result in undue hardship to the taxpayer" in the case of certain taxes.[127]

26 C.F.R. 301.6651-1 governs the "additions to tax" penalties for underpayment of taxes and sets forth the "reasonable cause" requirements a taxpayer must meet to be able to avoid such penalty assessments for unpaid taxes. The relevant regulation provides that:

> a failure to pay will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship if he paid on the due date.[128]

To determine whether the taxpayer was unable to pay the tax in spite of the "exercise of ordinary business care and prudence in providing for payment of his tax liability," consideration is given to the facts and circumstances of the taxpayer's financial situation, including the amount and nature of the taxpayer's expenditures in light of the income he could, at the time of such expenditures, reasonably expect to receive prior to the date prescribed for the payment of the tax.[129]

These provisions serve as the basis of the Internal Revenue Service's Fresh Start initiative, which uses the undue hardship standard to determine the eligibility of individuals who may participate in the initiative to request an extension of time to pay their IRS tax payments and have their late payment

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[126] For example, the definition of a qualified student loan for purposes of describing a non-dischargeable student loan in the Bankruptcy Code (11 U.S.C. § 523(a)(8)(B)) expressly cross-references the Internal Revenue Code's definition of a qualified student loan (26 U.S.C. § 221(d)(1)).

[127] 26 U.S.C. § 6161(b)(1).

[128] 26 C.F.R. 301.6651-1.

[129] *Id.*

penalties waived, all with the goal of helping relieve individuals of their IRS debt.[130] The option of receiving an extension of time and having late payment penalties waived is reserved only for taxpayers who would experience "undue hardship" if forced to pay their taxes by the due date.[131] The U.S. Code further clarifies the undue hardship standard as used in tax context by defining undue hardship "as more than an inconvenience to the taxpayer" and specifying that it must appear that a "substantial financial loss" will result to the taxpayer from making payment on the due date.[132] An example of an undue hardship as provided in federal regulations includes selling property at a loss to pay taxes on the due date.[133] To participate in the IRS's fresh start initiative or general application for an extension of time for repayment of taxes due to an undue hardship, a debtor must prove that she will suffer a significant financial loss if she pays her tax on the due date.[134] This is accomplished by providing the IRS with a detailed explanation through the IRS's Application for Extension of Time for Payment of Tax Due to Undue Hardship form.[135]

To demonstrate an undue hardship that warrants an extension in time to pay taxes, it is necessary for a taxpayer to provide the IRS with certain factual information that allows the IRS to make a determination on whether an undue hardship exists and whether an extension of time to pay is warranted.[136] Without public access to IRS approvals or denials for an extension of time to pay taxes, it is impossible to know what factors the government finds significant in showing substantial financial loss that constitutes an undue hardship. In the event that IRS decisions are reviewed by the federal judiciary, the facts and circumstances that courts want to see that constitute an undue hardship to justify a time extension widely vary, similar to bankruptcy proceedings where courts

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130 USTaxCenter, IRS Options If You Cannot Pay Your Taxes, https://www.irs.com/articles/irs-options-if-you-cannot-pay-your-taxes.

131 *Id.*

132 26 U.S.C. § 6161(b)(1); *see also Application for Extension of Time for Payment of Tax Due to Undue Hardship, I. R. S. Pub. No. 1127* (Dec. 2011), https://www.irs.gov/forms-pubs/about-form-1127 (defining undue hardship as a term that "means more than an inconvenience. You must show you will have a substantial financial loss (such as selling property at a sacrifice price) if you pay your tax on the date it is due.").

133 26 C.F.R. 1.6161-1 ("It must appear that substantial financial loss, for example, loss due to the sale of property at a sacrifice price, will result to the taxpayer for making payment on the due date of the amount with respect to which the extension is desired. If a market exists, the sale of property at the current market price is not ordinarily considered as resulting in an undue hardship.").

134 *Application for Extension of Time for Payment of Tax Due to Undue Hardship*, I. R. S. Pub. No. 1127, (Dec. 2011), https://www.irs.gov/forms-pubs/about-form-1127 (last updated Jan. 29, 2019).

135 *Id.*

136 Baccei v. United States, 2008 U.S. Dist. LEXIS 50687, at *21–22 (N.D. Cal. June 26, 2008) (finding that plaintiff's request failed to provide an adequate statement of all the "facts and circumstances" explaining why a denial of the extension would result in hardship to the estate).

are determining whether an undue hardship exists for purposes of discharging education debt through bankruptcy.

For example, the type of information the court in *Baccei v. United States* recommended be in the extension request form for extension of time to pay estate taxes included the total amount of liquid assets that the plaintiff claimed would be available to pay the tax once the bank had approved the release of funds, whether any assets were available to pay some portion of the tax at the time it was due, when the plaintiff anticipated that sufficient assets would become available, and whether plaintiff had explored other means of obtaining the funds, such as selling the real property prior to the payment due date.[137] The district court that prescribed these recommendations did not go on to explain how these factors are evaluated and whether certain factors carry more or less weight than others. Despite these highly individualized factors, it is worth noting that the taxpayer's current financial circumstances are the primary inquiry and really any fact or circumstance can suffice if it shows that being forced to pay a tax on the due date would sustain a substantial financial loss.

When it comes to evaluating undue hardship for purposes of determining whether reasonable cause was exercised to justify the waiver of additions to tax for unpaid taxes, judicial review has shed more light on what constitutes an undue hardship and how a showing of undue hardship fits in the larger "reasonable cause" requirement.[138] A leading case on this topic comes from the Ninth Circuit in *Synergy Staffing v. United States*, in which the court held that "evidence of financial trouble, without more, is not enough" to establish undue hardship and that a taxpayer seeking refund of penalties must "come forward with evidence of what funds it did have on hand when taxes were due," and "produce evidence of how it spent those funds in lieu of paying its taxes."[139] Some district courts have interpreted this holding to mean that waivers of additions to tax for unpaid taxes rests on "the reasonableness of the taxpayer's decision not to pay at the time the tax was due, or, in other words, whether the taxpayer provided sufficient evidence to establish that its decision not to pay the tax because of financial difficulties was reasonable."[140]

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[137] *Id.* at *22–23.

[138] Courts are, however, still split in how they evaluate a reasonable cause that excuses penalties for nonpayment of taxes. *See* St. Paul Cathedral Sch. v. United States, 2008 U.S. Dist. LEXIS 98526, at *17–19 n.6 (E.D. Wash. Dec. 5, 2008).

[139] Babcock Ctr., Inc. v. United States, 2013 U.S. Dist. LEXIS 62741, at *22 (D.S.C. May 2, 2013) (citing Synergy Staffing, Inc. v. United States, 323 F.3d 1157, 1160 (9th Cir. 2003)).

[140] St. Paul Cathedral Sch., 2008 U.S. Dist. LEXIS 98526, at *18.

To constitute an undue hardship, the facts and circumstances a taxpayer provides usually need to show that financial ruin is on the horizon. In *In re Arthur's Industrial Maintenance*, the court found that the taxpayer carried its burden of establishing reasonable cause based on undue hardship when it decided to complete several large construction jobs instead of pay its obligations to the IRS because, if it had paid all withholding taxes when due, it would have been forced to shut down because it could not have afforded to pay for the labor and purchase the materials necessary to complete the jobs.[141] The court's analysis began with an inquiry into whether the debtor established reasonable cause for failing to timely pay and deposit his tax obligations.[142] This inquiry involves a fact intensive evaluation of the individual's reason for not paying his taxes. The court agreed with earlier precedent that a showing of undue hardship supports a finding of reasonable cause for not paying and that a taxpayer's financial difficulties may, in appropriate circumstances, constitute reasonable cause for purposes of the regulation.[143] As such, the court held that the debtor in this case clearly faced a hardship that was more than an inconvenience and that he established sufficient good faith to rebut any possible inference of willful neglect.[144] Accordingly, the debtor carried its burden of establishing reasonable cause.[145]

In another example, *In re Pool & Varga*, the court considered all facts and circumstances of the taxpayer's financial situation, including the amount and nature of the taxpayer's expenditures in light of the income he could, at the time of such expenditures, reasonably expect to receive prior to the date prescribed for the payment of the tax in order to determine whether the taxpayer was unable to pay the tax in spite of the exercise of ordinary business care and prudence in providing for payment of his tax liability.[146] According to the court, a taxpayer is considered to have exercised "ordinary business care and prudence" if she made reasonable efforts to conserve sufficient assets in marketable form to satisfy his tax liability and nevertheless was unable to pay all or a portion of the tax when it became due.[147] Here, the debtor met his burden of establishing that he had reasonable cause for not complying with the statute requiring payment of taxes, and therefore the court held that the penalty was improperly assessed. The court's rationale touched on the fact that the debtor's financial situation was such

141 *In re* Arthur's Indus. Maint., 1992 Bankr. LEXIS 2339, at *18–20 (Bankr. W.D. Va. Apr. 9, 1992).
142 *Id.* at *19–22.
143 *Id.* at *21.
144 *Id.* at *22.
145 *Id.*
146 *In re* Pool & Varga, Inc., 60 B.R. 722, 724–25 (E.D. Mich. 1986).
147 *Id.*

that his business would have been irreparably injured or terminated had it paid the taxes in full on the due date.[148] A notable feature from this discussion of the undue hardship as a defense for failure to pay taxes is that the standard is subject to some of the same inconsistent interpretations and determinations as currently experienced in the Bankruptcy Code based on the highly discretionary nature of the decision-making process set forth by the IRS. Moreover, the private and fact-intensive procedures the IRS uses to evaluate tax extensions and penalty waiver requests make it difficult to fully discern the relevant factors the agency uses to determine whether an undue hardship showing exists. Despite this, the taxpayer's current financial circumstances are the key focus and any factor the IRS evaluates is intended to discern whether the individual would have sustained a substantial financial loss had they been forced to pay their taxes on the due date. In other words, the IRS is concerned with the future livelihood of the taxpayer if she is forced to pay taxes based on current circumstances.

F. Supplemental Security Income Defense

There is one place in federal law, besides the reaffirmation agreement provision in the Bankruptcy Code, where undue hardship is defined by a bright-line test, and that test exists in the Supplemental Security Income (SSI) program and provides a defense for an individual that transferred resources for less than fair market value while they were being considered for eligibility and such a denial of eligibility causes them an undue hardship. Specifically, 42 U.S.C. 1382(b) provides that if an individual disposes of resources for less than fair market value before, on or after applying for benefits, the individual is ineligible for benefits for a certain amount of time unless that "the denial of eligibility would work an undue hardship as determined on the basis of criteria established by the Commissioner."[149] The regulation implementing the regulation states that an undue hardship exists when "[a]n individual alleges that failure to receive SSI benefits would deprive the individual of food or shelter; and the applicable Federal benefit rate (plus the federally-administered State supplementary payment level) exceeds the sum of: The individual's monthly countable and excludable income and monthly countable and excludable liquid resources."[150]

By the time an SSI applicant's undue hardship state is evaluated, the conduct that has essentially put the individual at risk for becoming ineligible for benefits has already been considered and is therefore not a part of the undue hardship

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148 *In* re Pool & Varga, Inc., 60 B.R. at 728.

149 42 U.S.C. §§ 1382b(c)(1)(A)(i); 1382b(c)(C)(iv).

150 20 C.F.R. § 416.1246.

inquiry. Instead, undue hardship is defined by a bright-line test regarding the individual's current financial condition and the impact that denying benefits will have. Undue hardship in this context is met through a two-part test. First, to show that an individual can't pay for shelter, he or she needs to show that he or she cannot afford any without an SSI check and that there is no other affordable housing available.[151] Second, the individual must also show that his or her total available funds (income and liquid resources) is less than the monthly SSI amount for their respective state.[152] This bright-line test provides clear support for the proposition that an undue hardship inquiry does not contemplate whether the cause of the hardship warrants the individual privy to supplemental security income or whether the individual's good faith (or bad faith) warrants their access to the income. Instead, the undue hardship inquiry is ascertaining the effect that withholding the supplemental security income would have on the individual. In the event that Congress or courts would adopt a bright-line test to evaluate the discharge of student loans in bankruptcy, this standard warrants close consideration in how it aligns with my proposition that courts should focus on determining the effect that declaring the debt nondischargeable would have on the debtor and using that determination as a basis for whether bankruptcy relief is justified.

G. Discovery in Litigation

The Federal Rules of Civil Procedure are a set of judicial procedures approved by Congress that govern civil proceedings in federal court. The undue hardship standard is used in the context of discovery, where each party can obtain information or evidence from the other party, and provides a defense to the discovery of certain information under the work product doctrine.[153] Under Rule 26, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative.[154] However, materials prepared in anticipation of litigation can be discovered if the party requesting the materials shows it has a "substantial need for the materials" and "cannot, without undue hardship, obtain their substantial equivalent by other means."[155]

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[151] Social Security Administration, SI 01150.126 Exceptions—Undue Hardship, https://secure.ssa.gov/poms.nsf/lnx/0501150126.

[152] *Id.*

[153] FED. R. CIV. P. 26.

[154] FED. R. CIV. P. 26.

[155] FED. R. CIV. P. 26(b)(3)(ii), 18 C.F.R. § 385.402(b); *but see* FED. R. CIV. P. 26(b)(3)(B), 18 C.F.R. § 385.402(b) ("In ordering any such discovery, the presiding officer will prevent disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney.").

When a court evaluates a request for discovery, it first has to certify that the requested document or tangible thing is ordinary work product. Then, the party seeking discovery under rule 26(b)(3) must show that he or she has "substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[156] In seeking to establish undue hardship in this context, parties have to be prepared to show they have made an effort to obtain the sought after material and that all avenue of obtaining the material have been exhausted. For example, in *Davis v. Emery Air Freight Corporation*, an employee sought documents belonging to her employer regarding an internal investigation.[157] The employer argued, however, that information sought by the plaintiff is available through depositions of the defendant's employees.[158] The court, pointing out that the record showed that the employee had only taken one deposition, held that the employee failed to demonstrate an undue hardship due to her inability to obtain the substantial equivalent of this evidence.[159] Courts also require a high level of specificity, without speculation, when it comes to making claims for undue hardship. Additionally, as a general rule, inconvenience and expense do not constitute undue hardship.[160] Other factors that courts use in determining substantial need and undue hardship include the importance of the materials to the preparation of the case, the difficulty in obtaining substantial equivalents to the desired materials, the use of the materials, the availability of alternative means of obtaining the desired information if discovery is denied, and the extent to which the asserted need is substantiated.[161]

Rule 26 in the Federal Rules of Civil Procedure represents one area in federal law in which conduct and a good faith effort appear to play an important role in the undue hardship analysis. It is important to note that the presumption of consistent usage yields to context, and there is good reason to believe that a party's conduct is very relevant in matters concerning discovery of materials used for litigation purposes and that an evaluation of individual conduct and a party's "good faith" efforts are warranted in an analysis of whether a party is truly experiencing undue hardship to warrant discovery. The work product doctrine is known as an important tool for sheltering the mental processes of an

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156 Jeff Anderson, et. al., *Special Project: The Work Product Doctrine*, 68 CORNELL L. REV. 760, 798 (1983).

157 Davis v. Emery Air Freight Corp., 212 F.R.D. 432 (2003).

158 *Id.* at 436.

159 *Id.* at 437.

160 ALI-ABA COURSE OF STUDY MATERIALS, *Civil Practice and Litigation Techniques in Federal and State Courts*, Course Number: SL081.

161 *Id.*

attorney by providing a privileged area within which he or she can analyze and prepare his client's case.[162] It is essential to the legal profession that various duties are completed with a certain degree of privacy that is free from unnecessary intrusion by opposing parties and their counsel.[163] Another purpose of the work product doctrine "is to establish a zone of privacy for strategic litigation planning and to prevent one party from piggybacking on the adversary's preparation."[164] Accordingly, a logical argument can be made that that this varying use of undue hardship exists when such important issues are at risk when it comes to disclosure of work product in the legal profession.

III. IMPLICATIONS FOR THE BANKRUPTCY CODE

Considering the substantial relief the bankruptcy system can provide to individuals with burdensome educational debt, and the problems with the current interpretation of the undue hardship which determines whether educational debt is dischargeable through bankruptcy, a reconceptualization of how the "undue hardship" standard is interpreted in 11 U.S.C. § 523(a)(8) is necessary. An important point that this reconceptualization must address is the ambiguity or vagueness that Congress left in the Bankruptcy Code when employing the "undue hardship" standard in the student loan context.

One of the most viable ways to construe "undue hardship" in the bankruptcy context is to approach the phrase with an appreciation of continuity in the law under the principles and canons discussed in this paper. Through this approach of analyzing the different uses of undue hardship as used throughout federal statutes, it is evident that the undue hardships standard concerns an individual's current circumstances, financial or otherwise, and any factors used to determine whether an undue hardship exists should focus on ascertaining facts that help inform a decision-maker about the individual's present situation. Since the assertion of an undue hardship is generally used as a defense or an exception, the undue hardship analysis should take into account the fate of an individual if he or she is denied relief through the undue hardship exception or defense.

Any definition Congress or the executive branch provides to "undue hardship" in § 523(a)(8) of the Bankruptcy Code should include factors that evaluate the future livelihood of the debtor if she is denied bankruptcy relief

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[162] Peter A. Joy & Kevin C. McMunigal, *When Does Monitoring Defendants and Their Lawyers Cross the Line*, 31 CRIM. JUST. 46, 47.

[163] United States v. DeLeon, 2017 U.S. Dist. LEXIS 35177, *188 (D.N.M. Mar. 8, 2017).

[164] United States v. Adlman, 68 F.3d 1495, 1501 (2d Cir. 1995) (purpose of doctrine is to establish ''zone of privacy'').

based on the debtor's current financial circumstances. Such a definition would not require an inquiry into a debtor's good faith efforts to repay the loan based on prebankruptcy conduct because Congress has shown that it knows how to expressly require good faith in a distinct and separate manner from undue hardship. The fact that Congress has used the clause "acted in good faith" in conjunction with "undue hardship" in the reaffirmation agreement context in the Bankruptcy Code provides strong support for the proposition that when Congress drafts a statute with the undue hardship standard, undue hardship alone does not include an inquiry into a debtor's good faith.[165] This proposition is only strengthened by the reasonable accommodation analysis used in conjunction with the undue hardship inquiry in the employment discrimination context, where a distinction was made between the two inquiries by the Supreme Court.[166]

An undue hardship definition should also emphasize the need for courts to focus on the debtor's current financial situation without undue regard to pre-bankruptcy conduct or assurance of persisting financial distress. When courts assess an employer's claim of undue hardship as a defense for making accommodations for an employee, they assess factors that relate to the nature and financial resources of an employer at the time the employee makes the accommodation request.[167] Likewise, when a university is assessing a student's eligibility for federal financial aid when the student has failed to make satisfactory academic progress, they are evaluating facts to support a finding of undue hardship related to an extenuating circumstance that has caused the student to fail to make satisfactory in a given semester.[168] When a taxpayer fails to pay their taxes on the due date, the IRS makes a primary inquiry into what resources and assets the taxpayer had available on the date the taxes were due to determine whether an undue hardship would have occurred had the taxes been paid.[169] The bright-line test for undue hardship in the context of Supplemental Security Income includes factors that ascertain an individual's total available funds for the month that undue hardship is alleged.[170] For the bankruptcy context, these definitions and applications of undue hardship underscore the importance of drafting a definition that includes factors that objectively discern

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165 11 U.S.C. § 524.

166 US Airways, Inc. v. Barnett, 535 U.S. 391, 401–02 (2002).

167 42 U.S.C. § 12111(10)(B).

168 20 U.S.C. § 1091(c)(3).

169 26 C.F.R. 301.6651-1.

170 Social Security Administration, Program Operations Manuel System, SI 01150.126 Exceptions—Undue Hardship, https://secure.ssa.gov/poms.nsf/lnx/0501150126.

debtor's current financial situation at the time of filing for bankruptcy to determine whether an undue hardship exists.

After discerning a debtor's current financial situation, courts have to ascertain whether the financial circumstances warrant discharge of student loans. To do this, any definition proposed by Congress should include factors that evaluate the future livelihood of the debtor. The thresholds for what ultimately constitute an undue hardship vary among the different applications of the standard. Nevertheless, the application of the undue hardship standard in any context includes an inquiry into the livelihood of the individual if she is denied relief through the undue hardship exception or defense. For example, when courts assess an employer's claim of undue hardship as a defense for making accommodations for an employee, a relevant factor is the impact on the facility's ability to conduct business if the court requires the accommodation to be made.[171] When courts are evaluating whether an undue hardship exists for a business that is late paying taxes, facts that show imminent financial ruin indicate undue hardship.[172] The SSI undue hardship formula also emphasizes the need for the IRS to be cognizant of the effect not receiving the benefits would have on the individual based on the formula's inquiry into whether an individual would have food or shelter without the benefits.[173] Any definition that guides the undue hardship analysis in the bankruptcy context should also account for the importance of considering the livelihood of the debtor if the court decides her educational debt is not dischargeable.

It is important to remember that the presumption of consistent usage yields to context, and that in the context of Rule 26 of the Federal Rules of Civil Procedure, there is an implied inquiry into a party's good faith effort when evaluating whether a party can obtain a substantial equivalent of the requested trial materials without undue hardship.[174] The work-product doctrine has important implications in the American litigation system, which may warrant a valid justification for using the undue hardship standard in a different way to fit the context and purpose of the rule.[175] The same justifications do not exist in the

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171 42 U.S.C. § 12111(10)(B) (2008); *see also* Gilbert v. Frank, 949F.2d 637, 643–44 (2nd Cir. 1991) (affirming the dismissal of the complaint, in part, because making the employee's requested accommodation would slow down and reduce the productivity of the operation).

172 *See In re* Arthur's Indus. Maint., 1992 Bankr. LEXIS 2339, at *18–19 (Bankr. W.D. Va. Apr. 9, 1992); *In re* Pool & Varga, Inc., 60 B.R. 722, 724–25 (E.D. Mich. 1986).

173 20 C.F.R. § 416.1246.

174 FED. R. CIV. P. 26(b)(3)(A).

175 Hickman v. Taylor, 329 U.S. 495, 511 (1947) (finding that providing materials prepared for trial to opposing counsel would result in inefficiency and unfairness, which would have a demoralizing effect on the legal profession and result in the interests of clients and the cause of justice being poorly served).

Bankruptcy Code context, however. Instead, the bankruptcy system, and the individuals it serves, would benefit from a reconceptualization of undue hardship that includes a focus on a debtor's current circumstances and considers the livelihood of the debtor if his or her debt is not discharged. Including these considerations in a definition of undue hardship in the Bankruptcy Code moves the bankruptcy system in a positive direction by focusing the court's inquiry into the circumstances that warrant an undue hardship determination. A definition that focuses a court's inquiry into what constitutes an undue hardship is an important step toward achieving consistent judicial determinations and mitigating arbitrary judicial subjectivity.

IV. POLICY REASONS FOR RECONCEPTUALIZING UNDUE HARDSHIP

Important policy reasons exist for reconceptualizing undue hardship in a way that is consistent with how the standard is used in other federal law contexts. First, since the current undue hardship test gives way to judicial subjectivity and arbitrary results, encouraging courts to focus on the effect that declaring a debt nondischargable would have on a debtor, instead of focusing on whether the cause of hardship warrants the discharge of the debt or good faith efforts or conduct a debtor did prior to bankruptcy, allows bankruptcy courts to take a more uniform approach in determining whether to discharge a debtor's student loan debt. There is a danger involved in having the meaning of undue hardship determined by the principles and standards of the judge because "uncertainty and unequal treatment of debtors" will inevitably occur.[176] While it is reasonable to allow judges to have the discretion to act on a case-by-case basis where Congress has spoken broadly or generally, such as it has in describing "undue hardship," it is problematic when "notwithstanding the guideposts left for judges to figure out the proper path of undue hardship, many have gotten it wrong."[177] In this way, it is justified to be concerned about the danger of discretion and the ability it has to "undermine the integrity of the system by producing haphazard results that have compromised the fresh start principle."[178] Cognitive science based literature supports the idea that "[i]f judges premise their decision-making on the notion that there is some objective and universal perspective, they are ignoring fundamental principles of cognition."[179] As former Associate Justice of the Supreme Court Benjamin Cardozo once wrote, "we may try to see things as

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176 Pardo & Lacey, *supra* note 20, at 520.

177 *Id.*

178 *Id.*

179 Nicole Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, 47 AKRON L. REV. 693, 694 (2014).

objectively as we please. None the less, we can never see them with any eyes except our own."[180]

Proponents of a national definition contend that the undue hardship test should focus on the debtor's actual ability to "afford to pay the debt," which is exactly what a definition that focuses on a debtor's current financial circumstances and on their future livelihood if they are not granted a discharge does. Moreover, the goal of uniformity in the law requires the consistent treatment of debtors in this area of bankruptcy. Accordingly, a definition guided by the considerations outlined in this Comment will help courts treat similarly situated debtors uniformly. This helps eliminate the current practice of treating debtors differently depending upon what circuit they reside in or which bankruptcy judge handles their case. It also avoids forum shopping problems and helps eliminate any diminishment in the public's loss of faith in the bankruptcy laws because of their arbitrary or unpredictable nature.

Second, there are significant economic reasons for allowing debtors with student loans to experience a fresh start. The costs of higher education and the associated student loan debt burdens carried by former students are "large drags on economic growth, social mobility, skills generation, and simply the well-being of vast numbers of past, current, and future students."[181] For example, financial experts note that higher education debt burdens are disqualifying a generation of young graduates from home ownership.[182] Many commentators argue that "to forgive student loan debt and return consumers debtors to normal economic life is an economic imperative."[183] Traditional bankruptcy theory supports the proposition that "society as a whole benefits by relieving the most hopeless debtors from their debt obligations."[184] By experiencing relief from debt obligations, "debtors are provided a 'fresh start' so they may resume their lives as responsible consumers and producers."[185] Accordingly, "discharge of debts in bankruptcy serves an important traditional function in the American economic order" and is considered "one of the few traditional safety nets amid an otherwise free market economy."[186]

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[180] *Id.* (citing BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13 (1921)).

[181] John Brooks, *Income-Driven Repayment and the Public Financing of Higher Education*, 104 GEO. L.J. 229, 232 (2016).

[182] Zach Friedman, *Have Student Loans Prevented you from Buying a Home?*, FORBES (Jan. 18, 2019), https://www.forbes.com/sites/zackfriedman/2019/01/18/student-loans-home-ownership/#4368aa133d22.

[183] Austin, *supra* note 12, 414.

[184] Roots, *supra* note 9, at 513.

[185] *Id.*

[186] *Id.*

There are also significant social reasons for reevaluating the undue hardship standard. There are several types of financial obligations that are excepted from discharge in bankruptcy, in which many, if not all, arise from moral culpability of the debtor. By making education debt non-dischargeable, Congress has equated student loan default with offenses like fraud, willful injury, and failure to pay child support. [187] Moreover, "[i]f a borrower incurred a student loan debt intending to not repay it, the debt would properly be non-dischargeable as a debt incurred by fraud."[188]

Last, the existing tests for undue hardship under § 523(a)(8) were developed in the context of an automatic discharge for seven-year-old student loans that could not be repaid.[189] Now that undue hardship is the only way for debtors to seek discharge of student loans, there is scholarly consensus that courts should reassess and lower that standard. Defining undue hardship with an emphasis on the debtor's current circumstances and considers the future livelihood of a debtor if he or she is denied discharge through bankruptcy is one way to update the standard by providing a realistic chance of proving undue hardship with a standard that reflects the current construction of the Bankruptcy Code and continuity in the law regarding undue hardship.

CONCLUSION

Access to higher education is largely shaped by federal law, and any actions and reforms that restrict access to higher education opportunity, or the benefits to be derived from obtaining a degree, deserve analysis and critique. This Comment is sensitive to the fact that bankruptcy should not be viewed as a means to finance higher education but takes the position that it should be an option for students burdened by cumbersome student loan amounts that are prohibiting them from enjoying the benefits of their education and contributing as productive members of society. Current interpretation and implementation of the "undue hardship" exception in the dischargeability assessment of educational debt serves as a substantial and concerning barrier for debtors that would otherwise meet eligibility requirements for bankruptcy relief.[190] By

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[187] Austin, *supra* note 12, at 410.

[188] *Id.* at 412.

[189] *See* Tara Siegel Bernard, *Judges Rebuke Limits on Wiping Out Student Loan Debt*, N.Y. TIMES (July 17, 2015), https://www.nytimes.com/2015/07/18/your-money/student-loans/judges-rebuke-limits-on-wiping-out-student-loan-debt.html.

[190] *See* Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 507 (2012) (arguing that "bleak reports" of the difficulty of student loan discharge "have produced a chilling effect that deters debtors.").

evaluating the undue hardships standard in the context of public benefits employment discrimination, financial aid eligibility, tax payment extensions, and discovery in civil procedure, this Comment supports the conclusion that the primary inquiry into a debtor's current financial circumstances without unduly regard to prebankruptcy conduct or assurance of persisting financial distress. The majority of the Circuit Courts' current application of the undue hardship standard with a three-prong test including factors of good faith efforts to repay and a future inability to repay is at conflict with other statutory definitions and interpretations of "undue hardship" across federal law, which serves as a substantial barrier to allowing student debtors the opportunity to experience a "fresh start" free from encumbering and disabling debts that bankruptcy law seeks to provide.

It is worth acknowledging the rationale behind excepting student loans from discharge through bankruptcy, and that the exception of student loans from discharge is prefaced on un-evidenced allegations of abuse and assumptions that student borrowers have bad intentions. Legislative history shows that the Bankruptcy Act Commission, established by Congress in 1970 to analyze and evaluate the then system of bankruptcy law, suggested an educational debt exception to discharge "in order to reinstate public confidence in the bankruptcy system."[191] Evidence was presented to the Commission that showed that less than one percent of federally insured student loans were discharged in bankruptcy, however the Commission still found it necessary to preempt "potential abuses."[192] After a series of amendments, educational debt was given a conditionally dischargeable status except if a showing of "undue hardship" exists.

The courts across the country must adopt a unified standard that reflects three things: (1) Congress's intent in inserting the "undue hardship" standard in the assessment of discharging educational debt, (2) the purpose of the Bankruptcy Code, and (3) the need for consistency and fairness in the court system. Research on human cognition proves that judges bring various influences, such as age, gender, generation, religion, and values with them to the decision-making process when considering this like what constitutes an undue hardship.[193] While there are many ways uniformity and consistency in the standard can be achieved, this Comment takes the position that tools of statutory interpretation provide an avenue for reconceptualizing "undue hardship" in light

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191 Pardo & Lacey, *supra* note 20, at 420.

192 *Id.*

193 Negowetti, *supra* note 179, at 722–23.

of the use in the current majority test. By reconceptualizing the standard in a way that is consistent with the use of the standard throughout other sources of federal law, my hope is that bankruptcy courts will employ a standard that recognizes the value in obtaining higher education and delivers an equal opportunity for a "fresh start" from burdensome debt obligations to those who pursue higher education.

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