



2015

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Recommended Citation

C. R. Mullins, Dalié Jiménez, Rafael Pardo & Elaine Poon, *Consumer Bankruptcy Panel: Undue Hardship: An Analysis of Student Loan Debt Discharge in Bankruptcy*, 31 *Emory Bankr. Dev. J.* 215 (2015).
Available at: <https://scholarlycommons.law.emory.edu/ebdj/vol31/iss2/2>

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CONSUMER BANKRUPTCY PANEL
UNDUE HARDSHIP: AN ANALYSIS OF STUDENT LOAN
DEBT DISCHARGE IN BANKRUPTCY

C. Ray Mullins^{*}

Dalié Jiménez^{**}

Rafael Pardo^{***}

Elaine Poon (Moderator)^{****}

MS. GAUTAM: Good afternoon, everyone. My name is Smita Gautam, and as this's year's Executive Symposium Editor, I would like to formally welcome all of you to the *Emory Bankruptcy Developments Journal's* Twelfth Annual Symposium. Before we begin today, I want to take a moment to thank those who have been invaluable to the *Journal's* continuing success. First, thank you to our decanal advisor, Dean James Elliott, our faculty advisor, Professor Charles Shanor, and our alumni advisor, Keith Shapiro, as well as our advisory board for their continual support. Of course, a very special thanks goes out to Professor Rafael Pardo, our faculty advisor who generously donates his time to mentor our student-authors and to provide his expertise to the *Journal*, and who was also instrumental this year in forming our Consumer Panel. Thank you.

This year I would also like to extend special gratitude to the people who made sure that this show went on despite the weather. A million thanks to Dean Schapiro, Amy Tozer, Susan Clark, and Donna Nall. And of course we could not have done all of this without our operations, marketing, communications departments, as well as our events manager.

Additionally, I'd like to express my appreciation to the *Emory Bankruptcy Developments Journal* staff members who worked through the snow day yesterday—to the Editor-in-Chief, Gene Goldmintz, and the Executive Special

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Projects and Symposium Editor, Jordan Wilkinson, for their constant assistance.

Finally, thank you to everyone else who has helped the *Journal* over the years. At this time I would like to invite Dean Schapiro to the stage to say a few words.

DEAN SCHAPIRO: Thank you. Again, I'm Robert Schapiro, Dean of Emory Law School, and it's my great pleasure to welcome you here to this wonderful event in the calendar of the Law School, the Annual *Emory Bankruptcy Developments Journal* Symposium. I do want to add my thanks to some of the people who made this possible, to the sponsors of this event, to the Board of Advisors of the *Journal* and of course particularly to some of the individuals on the faculty, Professor Charles Shanor, Dean Jim Elliott, and of course Professor Rafael Pardo, as well as our alumni advisor, Keith Shapiro, who gives the support for this enterprise.

Now I will say that we think that the *Emory Bankruptcy Developments Journal* is the best bankruptcy journal in the country and it's also the only student-run bankruptcy journal in the country, which as you put those together you reach the conclusion which you could reach in other ways, which is it's because we have the best law students in the country. So I would like to give a special thanks to the students of the *Emory Bankruptcy Developments Journal* who make this possible, and particularly to the Editor-in-Chief, Gene Goldmintz, and to the Executive Symposium Editor, Smita Gautam.

Now we're very proud of our bankruptcy program here at Emory Law School. We believe it combines all that is best in a legal education. It integrates theory and practice; it brings together students, judges, practitioners and scholars; it's devoted to studying and advancing the law, to bringing about law reform. And that's really all brought together by the Symposium today where we're so honored to have our attendees and also our participants who have come from near and far, and braved the threat of bad weather, and a little bad weather along the way to be here today.

We're pleased that the topics are, as always, timely and important. We will have a Consumer Panel focused on student debt and consumer debt, a topic near and dear to our hearts. I suppose it's near because we're all still paying off our student loans, and it's dear in a way because of course Professor Pardo is the nation's leading expert on the issue of student loans in bankruptcy, and we're so pleased that he'll be able to lend his expertise to that. And of course

our Corporate Panel focusing on restructuring in light of the Affordable Care Act while there still is an Affordable Care Act. We'll see what happens at the Supreme Court about that.

We're also pleased that our panels today bring together a transactional focus, a litigation focus, and again bring together judges, practitioners, scholars and students, all of which goes to show the vibrancy of the bankruptcy bar and the pleasure it is for us at Emory Law School to be part of that through the *Emory Bankruptcy Developments Journal*. So again, welcome. We look forward to an outstanding afternoon.

MS. GAUTAM: Thank you, Dean Schapiro. At this time, I would like to take the opportunity to invite up to the stage our Consumer Panel. Today they will be discussing research related to student loan discharge, both in and outside of bankruptcy.

This morning we are privileged to have as our panel, The Honorable Ray Mullins who serves as the Chief Judge of the U.S. Bankruptcy Court for the Northern District of Georgia. Judge Mullins was appointed on February 28, 2000, by the United States Court of Appeals for the Eleventh Circuit. He is a Fellow in the American College of Bankruptcy, a member of the American Bankruptcy Institute and the Bankruptcy Section of the Atlanta Bar Association.

We also have Professor Dalié Jiménez, an Associate Professor of Law and Jeremy Bentham Scholar, at the University of Connecticut School of Law where she teaches Contracts, Bankruptcy, and Debtor Co-Debtor Law, as well as Consumer Law: Debt Collection. She is a Policy Fellow at the Deposits, Cash, Collections & Reporting Markets Group at the Consumer Financial Protection Bureau, and has served as a panelist at the CFPB's hearing on debt collection.

We also have our very own Professor Rafael Pardo, the Robert T. Thompson Professor of Law here at Emory University School of Law where he teaches Bankruptcy, Contracts, and Secured Transactions. Before entering academia, Professor Pardo worked as an associate in the Business Reorganization and Restructuring Group of Willkie Farr & Gallagher LLP in New York. He also served as a law clerk to the Honorable Prudence Carter Beatty of the U.S. Bankruptcy Court for the Southern District of New York. Professor Pardo, as was mentioned earlier, serves as the Faculty Advisor to the *Emory Bankruptcy Developments Journal*.

Moderating today's panel we have Elaine Poon, a staff attorney from the Atlanta Legal Aid Society. Prior to her work at the Legal Aid Society, she worked as an associate at Landrum & Friduss. She earned her J.D. and Human Rights certificate from Emory Law in 2007.

At this time I would like to turn it over to Ms. Elaine Poon to begin the discussion.

MS. POON: Good afternoon, and thank you, Smita, for doing such a great job of organizing us, and thank you, Emory Law, for having us. I'm really excited. Poor Professor Pardo hears me say this every single time I see him. I'm so excited to hear that students are becoming more interested and Emory Law is becoming more interested in consumer bankruptcy and in talking about debtors' rights from an individual perspective as well.

I'm just going to start off with a little story, because that's what Atlanta Legal Aid likes to do. So first of all, sometime last year—I don't know if everyone knows who's here—but Atlanta Volunteer Lawyers Foundation announced that they were discontinuing their chapter 7 pro bono program. There was either a lack of interest or for whatever reason, it meant that all of Fulton County no longer has pro bono representation for all of the low income and vulnerable clients. So what does that mean? Well, Atlanta Legal Aid doesn't really take bankruptcies as much. We do, and poor Judge Mullins has to see me once in a while, but for the most part, for example, my unit, which is the Senior Citizens Law Project, has four attorneys for all of metro Atlanta for every single senior citizen that might call in. We just don't have the bandwidth to be taking all of these bankruptcy cases.

So why does that matter and how does that relate to student loans? So a senior called actually last week—it was very timely. Just last week, and she's on only Social Security. She had a student loan debt that was accrued twenty-five years ago, and she was just told recently that they are, without any sort of pomp or circumstance: we are going to withhold 15% of your income. She's in subsidized housing and now she's behind in her rent. And if she doesn't pay her rent, she's going to lose this golden ticket of subsidized housing. These housing lists—I don't know if you all know about subsidized housing—it could be up to five years of waiting for a subsidized spot. So if she gets evicted, this is going to be a serious hardship for her.

In the past she actually did get some temporary hardship discharge and they actually undid that when she started her retirement, which is a strange

behavior, but the Department of Education is very aggressive. So the question is, well, what do we say to her? Do I say to her, well, the statute says if you can meet undue hardship, then you can escape the exception for student loan discharges? That's what the statute says. If we're going to be Justice Scalia, we're going to say, this is what the statute says. Or am I going to tell this senior citizen that you're going to have to show this judge that there is a certainty of hopelessness in your future, and that you made good faith efforts for the last twenty-five years to try to work with the Department of Education and kind of go above and beyond to apply for all of these different programs?

It's a horrible phone call for us, and we have this phone call maybe every week, another senior citizen or another bus driver who is dealing with crippling debt from the student loan world. Most of them who went to proprietary schools who never walked out with a diploma, never actually gained any skills from these "educational systems."

So I'm going to start this panel with the premise that, number one, it should not be impossible for us to get student loan discharges. And it should not be such a crippling experience for debtors. And then that is combined with the underlying understanding that when you come to bankruptcy, it's a sanctuary. You're seeking sanctuary, and likely you are already experiencing undue hardship. So this is the premise that I'm going to go with, instead of trying to start from behind and say let's argue about *Brunner*¹ extensively, etc.

So let's start. We're going to start with Professor Pardo to kind of give us some context, identify the problem. What is the scope of the problem? What are we dealing with here?

PROFESSOR PARDO: I agree with what Elaine has said in terms of thinking about the problem. There are a lot of ways you can approach the problem—the discharge of student loans in bankruptcy. And I think obviously one way you could approach the problem is to think about the substantive standard for what constitutes an undue hardship, how you go about proving your claim for relief in terms of substance. But over the years that I've studied this process, I've increasingly come to believe that more and more the process is what matters. That is, we've structured a system of relief whereby debtors have to engage in full-blown litigation to vindicate their claim. And there can be procedural barriers and other related barriers that give rise to access to justice problems.

¹ *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987).

In general when we think about debtors in bankruptcy, we're thinking about a vulnerable population, and today our panel is going to focus even more specifically on a subset of that population, self-represented debtors. And so I want to provide some background and context for the self-represented problem as it relates to undue-hardship discharge litigation.

I'm going to begin first with a brief summary and overview of the procedure and substance by which debtors can seek relief from their student loans in bankruptcy. And then from there I want to present some data from adversary proceedings filed in 2011 and 2012 where debtors sought to discharge their student loans. And the takeaway is going to be things appear to be a lot worse for self-represented debtors, perhaps then signaling again this access to justice problem that exists.

So in terms of substance, as my students well know, I like to start with the statute. So let's look at the statute. So §523(a)(8) of the Bankruptcy Code is our operative provision. If you look at subparagraphs (A) and (B), those are the subparagraphs that identify the type of debt that is excepted from discharge. It's certain types of student loans that meet the statutory criteria. But of course there's the exception to the exception and that is paragraph (8): that is if forced to repay the student loan, if doing so would impose an undue hardship, then the debt will be deemed to be dischargeable.

So in essence, this is what the structure looks like. You've got your general rule that the discharge will forgive pre-bankruptcy debts. One of the exceptions to that general rule, educational debts that meet the statutory criteria. And then of course we have an exception to the exception, educational debts that impose undue hardship.

The way that the Code is structured, we have a bifurcated burden of proof. That is the creditor bears the burden to establish that the debt falls within the type of debt excepted from discharge. And then the burden shifts to the debtor to establish that, if forced to repay the loan, it would impose an undue hardship.

Standard of proof is preponderance of the evidence, more likely than not. And so then this all goes to the question, well, what's the process by which we make these determinations? So a little bit more of a bankruptcy procedure 101. The Bankruptcy Rules indicate that a debt dischargeability determination is an adversary proceeding, and so that's how these determinations are going to take place. And even though the Bankruptcy Rules say that either the creditor or the

debtor can initiate the adversary proceeding to determine the dischargeability of a debt, empirically, the reality is that more than 90% of these are debtor-initiated.

And so then the question becomes of the debtor: if I'm going to try to make my claim of undue hardship, substantively what do I have to show? And as the Code indicates, undue hardship is the standard. The problem, of course, is Congress has not defined undue hardship, and so courts have had to come up with a variety of tests to provide a framework for determining whether a debt should be deemed dischargeable, and basically the legal landscape consists of two tests: the Second Circuit's *Brunner* test,² and the totality of the circumstances test. And so in essence this is what the tests require. If you first look at the *Brunner* test it's a three-factor test, and I'm paraphrasing here but in essence you have to establish a current inability to repay the student loan, a future inability to repay the student loan, and that you've made a good faith effort to repay the student loan. And you must under the *Brunner* test establish each factor by a preponderance of the evidence. If you fail to establish any single element your debt is deemed non-dischargeable.

In contrast we have the totality of the circumstances test. That test requires courts to consider the debtor's past, present and reasonably reliable future financial resources, a calculation of the debtor's and his dependents' reasonably necessary living expenses, and any relevant facts and circumstances surrounding each particular bankruptcy case. So if you look at the first two prongs, in essence those factors are considering both the debtor's current and future ability to repay. The third prong, any other relevant facts and circumstances, that's broad enough to encompass consideration of a debtor's good faith to repay the student loans. Jurisdictions that apply the totality of the circumstances test, they will consider a debtor's good faith. Interestingly, in the First Circuit, which has not adopted a particular test, the First Circuit Bankruptcy Appellate Panel has stated that it is up to the creditor to prove the debtor's bad faith, and upon so doing then the burden shifts to the debtor.

But no one factor is dispositive under the totality test; rather, I think of it as a Rorschach test for undue hardship. The court kind of looks at all the factors and ultimately determines, does the debtor's circumstance reach the impermissible threshold of suffering that would trigger a finding of undue hardship?

² *Id.*

So this is what the geography of undue hardship test looks like. We can see in the *Brunner* column every circuit, with the exception of the First Circuit and the Eighth Circuit and the D.C. Circuit, have adopted the *Brunner* test. The First Circuit has not selected a particular test, and so in that circuit, the bankruptcy courts are free to choose which test to apply. The District of New Hampshire has chosen to apply the *Brunner* test. And even though the D.C. Circuit hasn't weighed in, the Bankruptcy Court in the District of Columbia, that's two districts, applies the *Brunner* test. And then in contrast, the totality test, we see it's basically the Eighth Circuit and three Districts in the First Circuit.

Now let's quickly turn to some statistics that might give us a good sense of the legal landscape, and that can inform the rest of the panel discussion. I will draw your attention to the bold language and font, Preliminary Data Subject To Further Revisions and Refinement. So this is just a cut at some of the findings that I've come up with in adversary proceedings I've been recently looking at, but some of this might change, although hopefully not much.

So let me first tell you a little bit about the scope of the data set. And here I would be remiss if I didn't acknowledge the Herculean efforts of two of you, one who has graduated, Ryan Freeman, who was Class of 2014 and *Emory Bankruptcy Developments Journal* member, and Leia Clement, Class of 2015, another *Emory Bankruptcy Developments Journal* member, both of whom helped compile much of this research. So we wouldn't have this without their efforts. Thank you.

Basically what we tried to find were all undue hardship adversary proceedings that were filed in bankruptcy courts during the 2011 and 2012 calendar years. We came up with 1,432 of these. I think that this is close to being the entire universe of these determinations, but it's not. The reason is district courts, and by reference bankruptcy courts, have original but not exclusive jurisdiction over proceedings arising under the Bankruptcy Code. And so some of these discharge determinations could happen, for example, at the state court level. My intuition is there aren't a lot of those, but nonetheless there could be some. And moreover, depending on the procedural posture, it could be that the debtor is being sued in a collection action on the student loan and then the debtor alleges as an affirmative defense the bankruptcy discharge, at which point you have litigation over the undue hardship question. So it could be the case if there are some other stray proceedings that we didn't pick

up. But nonetheless, I think we've got the overwhelming majority of these proceedings.

Another thing to keep in mind, there are some proceedings in the data set that are still pending, about thirty-five. In general they're pending because either the Clerk of the Court failed to close the case, even though it seems like everything is done with the case. There are a few of the proceedings that have appeals ongoing, and then some are just languishing, some are facing a failure to prosecute and the proceeding isn't being dismissed.

And then there are seven skeletal proceedings. Those are proceedings where the information was not available online through PACER, and so unless you resorted to a courier service, which I don't have access to, then you just have to forego looking at those proceedings.

Another caveat, we can't generalize this to other periods of time, and moreover, some of the proceedings were filed in a calendar year that's subsequent to the filing year of the underlying bankruptcy case. So the Bankruptcy Rules say that you may initiate a debt dischargeability determination at any time including after you've received your discharge. And so just keep in mind that the financial circumstances of debtors at the time that they file their adversary proceedings could be very different than at the time that they filed their case.

With those caveats in mind, what do the numbers in general look like? I've broken down the filings by year: 665 in 2011, 767 in 2012. Keep in mind that's not a lot of proceedings, especially when we think of the scope or the amount of student loan debt in the system. There's over \$1 trillion of outstanding student loan debt, and we don't have a lot of these filings. And so then I've also listed the filings by circuit from high to low: Ninth Circuit with 366 at one extreme; DC Circuit with just two over a two-year period. And then on this slide, what I've done is I've just charted the filings by circuit as a percentage of the total filings. So when we see that the Ninth Circuit occupies over a quarter of the filings, and then at the other extreme we've got the DC Circuit with its two adversary proceedings.

Interestingly, since we're in the Eleventh Circuit I'll point out that the Eleventh Circuit ranks third in terms of the percentage of total adversary proceedings nationwide during this period of time.

So then the question becomes: what about the represented status of debtors? Here I've listed the breakdown. I posit you could break it down by

three categories. There are some debtors who are completely represented throughout the entire adversary proceeding. That is, they always have a lawyer. That's 65.4% of the proceedings. There are some debtors who appear during a portion of the proceeding as self-represented, but then at some point acquire an attorney. That's a very small subset of the proceedings, only 2.3%. And here the scenario is generally one of two. Either the debtor initiates the proceeding pro se and then subsequently finds an attorney that can help him or her with the litigation, or alternatively, sometimes they begin with an attorney but then there's what appear to be differences of opinion between counsel and client and then the attorney withdraws and the debtor has to go it alone.

And then, last but not least, we've got those who are completely unrepresented throughout the entire proceeding, 32.4%. That is a non-trivial number. This is a large problem. To sort of put that into perspective, consider some figures as a point of comparison in terms of self-representation rates elsewhere in bankruptcy, specifically chapter 7 cases. So in 2012, Lois Lupica from the University of Maine published a consumer bankruptcy fee study.³ She had some data in that study regarding the self-representation rate in chapter 7 cases, and it was 5.8% for cases filed from BAPCPA's enactment through 2009. I've done some work in this area as well, and I looked at all voluntary chapter 7 cases originally commenced by individual debtors in the Western District of Washington from 2008 through 2012. The self-representation rate there was 7.7%.

So these figures, 5.8% and 7.7%, pales in comparison to the self-representation rate in these undue hardship adversary proceedings. And if you stop to think about why it is that we see these differences, I would suggest it has to do with the economics of representation. That is, if you think about a chapter 7 case, a lot of these cases lend themselves to a one-size-fits-all approach to garden-variety cases with no litigable issue. That is, there isn't going to be exemption litigation. There aren't going to be discharge objections. And so the work is on the front end. That is, the attorney does the client interview, gathers the necessary information for the schedules so that the case will be processed seamlessly, there will be representation at the meeting of creditors, and then once that's all finished, the attorney's work in essence is done. And so if you find a way to keep those costs low with high volume you can make a profit and earn a living.

³ Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17 (2012).

And even for those cases that aren't garden variety and might have some litigation, the other thing attorneys can do is limited-scope representation and say, if you're going to be represented by me with something like avoiding an exemption-impairing lien, then you're going to have to pay more for that. In stark contrast with an adversary proceeding—again, think about the economics—what's being litigated is, I don't have to pay this debt back, so there's no opportunity for contingency fee. So what you're thinking about is either some lump sum payment or some hourly fee, and let's remember these are folks who are in bankruptcy because of financial distress, and the core of their lawsuit is, I can't pay back my student loan. And so that then begs the question: where are they going to come up with the resources to pay an attorney? And so if you think about the complexity of this litigation, it's not likely that many attorneys are going to want to take on this representation. There just isn't money to be made in this.

And so how do the self-representation rates look by circuit? The figures that I will now show you are those debtors who are completely unrepresented throughout the entire adversary proceeding. So over the 2011–2012 period, we see that up on the slide, hopefully you can see it, there's a horizontal red line that represents the national rate of 32.4%. What you see is that there's a range of difference in self-representation rates. Within the Ninth Circuit it's almost approaching 50%, and then here in the Eleventh Circuit we're a little bit below the national rate. And then of course in the DC Circuit there's no bar because those two proceedings involved represented debtors.

So that's the self-representation rate. What does the rate of bankruptcy relief look like in these proceedings? When I say bankruptcy relief, I mean very specifically did the debtor receive any relief by way of a bankruptcy court order? That is, is there some order entered by the court that grants the debtor some relief? And that order could be in response to a default judgment being granted in favor of the debtor. It could be a trial judgment or, what tends to be the case, it's an order that approves a settlement between the debtor and the creditor. The stipulated settlement is part of the record so you can tell what relief, if any, the debtor is getting through the settlement. And then there's an order by the bankruptcy court that approves the settlement.

So using that definition for bankruptcy relief, the national rate of relief in these proceedings is 38.3%. So less than half get some relief through a bankruptcy court order. Now, keep in mind, there are some folks who don't get bankruptcy relief but they ask for a voluntary dismissal because they seek

relief outside of bankruptcy, such as enrolling in an income-contingent repayment program or the like. But again, if we're just focusing on bankruptcy relief, we see that the rate of relief is not very robust. And again, if you think about where we are, we're in the Eleventh Circuit. The Eleventh Circuit ranks last in terms of granting relief, but I will say that the Northern District of Georgia is right there with the national rate. The rate of relief in the Northern District of Georgia during this period of time is 38.7%. Then I'd also say that Judge Mullins has been the busiest, at least in terms of his docket with these. Of the 31 filed in the Northern District of Georgia during this period of time, Judge Mullins had 25.8% of them.

In any event, what you can see is that there is some variation in the rate of relief by circuit. And then we get to the heart of the matter, which is how does the rate of relief change based on the represented status of the debtor? What you will in essence see is that the rate of relief for self-represented debtors is much lower than for represented debtors, and the difference is statistically significant. So again, the national rate during this period of time is 30.3% get some relief, so that would be our expected value for relief. That is, if we assume that there was no association between whether you're represented or not and getting relief, you would expect folks in essence to get relief 30.3% of the time. But represented debtors get relief 44% of the time in contrast to self-represented debtors who only get it 26% of the time, and that difference is statistically significant.

Now I take the point you might say, well, look, if we started controlling for other factors such as case facts, specifically facts that would be deemed relevant under the doctrine of undue hardship, then maybe this statistically significant association disappears once you start controlling for those case facts. After all, it's the facts that inform the content of the law and its application. I think that's true, but at the same time other empirical evidence suggests that this might not occur. And so I'll just briefly mention that in 2009, I did a study of undue hardship litigation over a five-year period in the Western District of Washington.⁴ And while I found during that period of time in that district that case facts did predict the percentage of debt discharged, what we also found in that study was that being represented by a highly experienced attorney was also predictive of the amount of debt you got discharged as a debtor. And importantly, when we defined a highly experienced attorney in

⁴ Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179 (2009).

that study, it meant that anyone who was not represented by a highly experienced attorney, they were either represented by an attorney with less experience or they were self-represented. And importantly, the debtors that were self-represented, their outcomes were no different than the debtors represented by the attorneys with lesser experience. And so in other words, what we basically found was that having the right type of counsel, even when controlling for case facts, can yield a statistically significant effect in terms of predicting percentage of debt discharged, and it's a stronger effect than the case facts.

So then just a couple of more things. Something that is, I think, very interesting about the data, there's no statistically significant difference on outcome based on which test you apply, whether it's the *Brunner* test or the totality of the circumstances test. And so I've broken it down in the next couple of slides based on the represented status of the debtor. So remember, the rate of relief for represented debtors is 44% in essence during this period of time. And so then if you look at the rate of relief based on which test would apply based on the debtor's jurisdiction, there's really no difference between the two jurisdictions. In essence the represented debtors are getting relief either 44% of the time or roughly 45% of the time depending on which test is applied. And then for self-represented debtors, we have the same findings. So self-represented debtors get relief 26% of the time, and then whether you do the *Brunner* test or the totality test, the same basic result.

All right. So then just two more slides. This is the rate of bankruptcy relief for self-represented debtors by circuit. So the national rate again of relief for self-represented debtors is 26%. It looks like there are differences among the circuits, and of course there are, but they're not statistically significant. So it doesn't seem that at least at the circuit-level that that accounts for differences in the rate of relief for self-represented debtors.

And then you might think about case characteristics. That is, is it that the self-represented debtors somehow have more complex cases than the represented debtors? So given that complexity, maybe that's why they have a lower rate of success. So you could come up with some rough proxies for complexity such as the number of documents filed in the adversary proceeding as well as the duration of the adversary proceeding in days. And what you find is that there's no statistically significant difference either in the number of filed documents or in the duration of these adversary proceedings when you break it down by the represented status of the debtor. So they look, these proceedings,

from a very crude approximation they don't look to be more complex one way or another depending on whether you have a represented debtor or a self-represented debtor.

So at the end of the day, I think the takeaway is self-represented debtors are not having an easy time with their undue hardship discharge litigation and they're not getting as good results as if they were to have an attorney.

Those are my remarks. Thanks.

MS. POON: So those are really upsetting statistics and that takeaway was very upsetting also. And, Judge Mullins, I'm going to turn it to you to kind of make it a little bit more upsetting by telling us what it looks like in your courtroom. It sounds like there are a good percentage of pro se litigants, and it sounds like you have a good percentage of them coming before you. I'd like you to tell us what that looks like in your courtroom.

JUDGE MULLINS: Okay. First, thank you and thanks to Emory Law for inviting me to participate again. I think I did the first *Emory Bankruptcy Developments Journal* Symposium a number of years ago, so I guess I didn't get completely run out. I got invited again. But thanks for all the hard work as the last couple of days the students have gone through all kind of roadblocks with the weather and they've really been troupers. I want to thank everybody.

The first thing, to step back just very briefly, Professor Pardo went through a lot of salient facts, but I think people need to kind of hear some numbers that, just a few to sink in. We're talking about as of a couple of months ago, more than \$1.2 trillion. There's more in consumer debt now, it's the second leading—it surpassed credit card. The only thing exceeding student loans for consumer debt is mortgages. Think about that. So also, something I didn't know until I did a little research, and this is staggering, too, with that number. The Department of Education anticipates that the federal subsidized loan activity will generate \$38.9 billion in revenue for the government in 2012, \$36.6 billion in 2013, and the federal government expects to earn 20.08% on each dollar originated. So it's a huge moneymaker for the federal government, and so that creates issues beyond me. So I just wanted to throw that out.

You have to step back, I think, in a student loan issue to kind of see where we came from. It's interesting; when I started doing some of this research I didn't realize that I received when I was in college the very first federally sponsored student loans. Anybody as old as I am that got National Defense Student Loans? There's one. Those were the first ones. Those were the first

ones from the '50s, late '50s. Now, I went in the '70s. I'm not that old. I'm old but not that old. But anyway, 5% loans, most people ten-year payout.

Now it's increasing. The more programs came on, Stafford, etc., and the availability of student loans is just tremendously exploding. Now when you look at the bankruptcy impact, before the '70s, student loans were like any other unsecured debt. You could just discharge them. So you go from that to then there was a five-year period. So if you tried to pay your loans for five years and couldn't do it, after that you could discharge them without any showing of undue hardship. Then it got stretched to seven years. Then at the same time, it used to be you could file a chapter 13, go through your plan, and then discharge your student loans. Then when they changed to seven years, chapter 13 got added, so you can't discharge it even after a 13.

So you had an explosion in the amount of debt, explosion in the number of students getting the debt, and then a tightening of how you could discharge the debt. So now what we have, as Professor Pardo pointed out, we have this undue hardship test of § 523(a)(8). So how does it kind of play out in a court?

When I looked at this, we had a case, one of the ones that I tried. Is Allison Franklin in here? Okay, she's stepped out. She was my law clerk, one of Emory Law's finest, during this time period we had a case that actually got tried, the *Mosley* case.⁵ It went up to the Eleventh Circuit that affirmed us eventually.⁶ But just want to show you how, when I really started delving into this, it was kind of an eye-opener.

It was a situation where I think you could lump it with bad facts make bad law. Because the Eleventh was a *Brunner* district. So when Keldric Mosley comes along, we have a *Brunner* case. Educational Credit Management Corp. was opposing the discharge. So if you go back to the *Brunner* test, sometimes you read these cases I think like a lot of times we have this tendency sometimes to focus on a ruling or a test that comes out and you never really go back and analyze what happened during the case, the facts of the case. So I want to contrast, this is what I had in 2007, 2006, I had Keldric Mosley and under a *Brunner* test.

Now again, the debtor has to show by a preponderance of the evidence all three: can't maintain a minimal standard of living; that condition is likely to

⁵ *Mosley v. Gen. Revenue Corp. (In re Mosley)*, 330 B.R. 832 (Bankr. N.D. Ga. 2005).

⁶ *Educ. Credit Mgmt. Corp. v. Mosley (In re Mosley)*, 494 F.3d 1320 (11th Cir. 2007).

last for a substantial portion of the repayment period. And you've got to remember most of these students loans over \$40,000, there's a 25-year repayment plan. It's a long time. And, the debtor must show good faith and effort to repay.

Some courts after *Brunner* suggested that the third prong, if Education Credit Management Corp. set in front of you an income-contingent repayment plan that suggested that your plan payments would be zero, they would argue in bankruptcy court that a debtor's failure to sign that is an automatic showing of bad faith. So you really didn't have to go through the three-prong if that argument won the day. It's not a three-factor test; it's a one-factor test. That's query one.

Then you had these judicial overlays on the period or the condition would last a substantial portion of the repayment period. There's certain glosses that came in, and one of the ones that I saw that I thought was remarkable. There were several cases that said to prove that second prong, the debtor had to show a certainty of hopelessness. A certainty of hopelessness. Could you imagine if we're in chapter 11 confirming a plan of reorganization, if we had to find a certainty of no need for further reorganization or liquidation? I mean, can you imagine? Having a debtor prove a certainty of hopelessness. They could go out and get a lottery ticket in ten years. I mean, anything could happen. But that's how some of the glosses came on. And I don't like to, on panels especially, read from a lot of case law. I'm just going to cite some language I think capsulizes language like that which made it difficult and that comes from Judge Easterbrook, who I always like to read his opinions because he's straightforward. It's the *Krieger* case. So when he's talking about this certainty of hopelessness, this is what he says:

The district judge did not doubt Krieger ha[d] paid as much as she could during the 11 years since receiving the educational loans. Instead the judge concluded that good faith entails commitment to future efforts to repay. Yet, if this is so, no educational loan *ever* could be discharged, because it is almost always possible to pay in the future should prospects improve.⁷

And this is where his language I think got particularly direct: "The statutory language is that a discharge is possible when payment would cause an 'undue hardship.' It is important not to allow judicial glosses, such as the language in

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

Roberson [certainty of hopelessness] and *Brunner*, to supersede the statute itself.”⁸

So again, it was tough enough as you went through the legislative changes of § 523(a)(8), but then when you settle into *Brunner*, if you started putting those kind of glosses on it, it makes it extremely, extremely difficult. And there are a lot of folks that will point out, for instance, that part of the problem is there’s no definition of undue hardship. I would just remind some people as they go through that, just go next door in the Bankruptcy Code to § 524, the definition of undue hardship is simply in a reaffirmation, look at the income you have currently, look at your expenses, and what is the amount of the payment. If there’s not enough income, that’s an undue hardship.

So when Congress wants to define it, they can do it and it’s right there parked next to it. So this whole notion of an undue hardship takes on this whole aura that the bankruptcy judge has to look at the set of circumstances and just think about the repayment period. So I have to make a finding that the debtor has shown that there’s a certainty of hopelessness so that I have to make a finding that not in the next five years, six years, all the way out to twenty-five that there’s no real chance they’ll pay it. That can become a pretty impossible standard.

But let’s back up and look at, okay, when I mentioned bad facts make bad law. Let’s look at Ms. Marie Brunner in 1987.⁹ These cases were almost twenty years apart, her case from my case. She incurred \$9,000. She went to undergrad and grad school. At the time she went, there was that five-year period. She could’ve tried to pay for five years and then discharged it in bankruptcy without a showing of undue hardship. She had a six-month grace period. She filed bankruptcy at the fifth month, one month before the first payment came due. No evidence of a job search, anything, and she filed a chapter 7 bankruptcy petition. Never sought a deferral. She wasn’t disabled. She wasn’t elderly. She had no dependents. That’s where the *Brunner* test came from.

Keldric Mosley shows up in my courtroom. First one in his family to attend college, Alcorn State. Joined ROTC, he was training for Desert Storm. Fell off a tank while training, wrenched his back, his ankles, just became a physical

⁸ *Id.* (citing *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993); *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987)).

⁹ *Brunner*, 831 F.2d 395.

wreck. Went in the hospital for an extended period of time, was on painkillers, started having all kind of mental problems, became depressed, was in the VA in Virginia and finally couldn't finish school, left three semesters short of getting his degree. Came back to Atlanta, was in the VA system dealing with depression, anger. He was on medicine. Frightened his mother so much that his mother committed him to a Georgia state facility. They took him out literally in a strait jacket. Left there when he got out, went to about four relatives to stay with. They were so afraid of him they told him he couldn't stay. He brought in his work history. He worked about eight or nine jobs. He couldn't do a single one. UPS, back would kill him. Take the medicine, he couldn't function. Worked at the airport, couldn't lift, left that job. Working on a garbage truck, couldn't lift a can. Wrote his Congressman, wrote the President, wrote the court. Letter after letter, and he just tried to tell everybody. Meanwhile he was always under VA care, seeing a psychologist, pain specialist, etc., this whole period of time. That's how he landed in our court, in that condition.

And Education Credit Management Corp. argued that they offered him the income-contingent repayment plan that would've required him to have a zero payment and that the fact that he didn't take that was basically prima facie evidence that he didn't exhibit good faith. So he was pro se and if Allison is here, she recalls that he probably showed up in our court, the chambers probably six or seven months. He was homeless, so when the weather was good, he'd be in a park and he'd write everything, all his pleadings on note paper, very neatly, bring them to court. And when it was raining, he did his pleadings at the Fulton County library downtown on Forsyth when it was open. So he shows up and so I have a pretrial and I think, okay, if they see his condition and they see this guy—and oh by the way his income was \$214 a month disability. That's what he was living on, \$214 a month. His student debt was \$45,000.

So we have the hearing. They don't want to settle. They wouldn't take anything. So he comes in the morning of, and I'm sitting in chambers waiting for everything to get ready. And Allison comes in, my courtroom deputy comes in and says, "Judge Mullins, there's a bunch of boxes out here." So I walk out and Keldric Mosley is standing there in a tee shirt and shorts and he's got banker's boxes. And the banker's boxes, I'm just looking at the tabs, they're all VA, there's files, there's medicine bottles, there's notes, there's prescriptions, everything. So there's nobody from the VA or anything. So we start the hearing. The lawyer for Education Credit Management Corp. does his

job. He stands up, he got—none of those could come in because he can't lay a foundation. There's no one here. I had to toss them all out. So I just basically put him on the stand, asked him some questions. And at that time, when we were looking at this, on that second prong, whether or not the conditions exist that would go on for an extended period of the repayment, the overwhelming—we couldn't find anything different when we researched it back then. The standard was, if it's medical, you had to have independent medical testimony. That was it. Well, he didn't have independent medical testimony.

So when we were doing research, I came to the conclusion that when I started digging into it, where in the world did all this come from, from a statement from undue hardship? Where'd this test come from? And you go back and there was back in the late '70s when student loans were starting to really make themselves available to almost everyone, there was a Congressional committee, and out of that committee as the loans accelerated and more banks were getting into it, this was a statement that came from one of the committees. Now those of us who led up to BAPCPA, see if this sounds familiar. This is a quote. All the student loan programs accelerated. Here's a quote. "There's fear that students might take advantage of the bankruptcy system by incurring large amounts of debt and then discharging it on the eve of a lucrative career."¹⁰ That sound familiar? Credit card debt?

So those notes kind of made it in, and that's where you start getting rid of the five-year, seven-year, relief in chapter 13. But still the heart got carved out. The thing that didn't get carved out from the beginning was undue hardship. Just that—two words. And then you have a test like this, and as Professor Pardo pointed out, there are some that argue the totality of circumstances, which is Eighth Circuit, might be a little bit more palatable. I agree with him. I don't think it's much different. I think the outcome could be just as strict because you're looking at the same kind of thing, just looking at future and so forth. So nonetheless, what I basically ruled was it could be a factual finding. There's nothing in here that I could read on this that would keep me from making a factual determination based on his testimony and his credibility on that condition. And so I had his work history that I found credible. They deposed him, so they verified all those positions. They knew every job he had,

¹⁰ Kyle L. Grant, Note & Comment, *Student Loans in Bankruptcy and the "Undue Hardship" Exception: Who Should Foot the Bill?*, 2011 B.Y.U.L. REV. 819, 825 (2011) (citing H.R. REP. NO. 95-595, at 133, reprinted in 1978 U.S.C.C.A.N. 5963, 6094).

every time he got laid off. They had it in hand because they took his deposition. They had the records.

The only thing he could take up because they were able to get rid of all the files, the paper files and folders. So I just told him, he brought his medicine bottles up: “I take this one for when I get depressed. I take this one when I get angry. If I don’t take this one for the pain, then I get angry. If I don’t do that, then I take this one. The doctors at the pain clinic told me to take this one. The VA tells me to take”—and he just had them all laid out there. And he went through his work history. No car. He hadn’t had a car in his life. He had nowhere to live. The mail was coming to his mother’s house. She’d let him pick it up, and that’s how he got the notices. And I just made a factual determination. He certainly had no minimal standard of living, paying it back, and I thought it was going to last a significant period of time, and the man tried for over five years to try to work to make a living. So I found that on the second branch you didn’t need medical testimony and it went up to the circuit and it got sustained.

And again, it’s not a situation when I go through the facts that I’m trying to urge “let’s just feel sorry for the debtor.” It’s not a pity party at all. I’m just saying that just be careful when you make it so hard, just look for corollaries. Like I say, you go to § 524, and Congress says, okay, an undue hardship in there is just a current math formula. Just look at income, expenses, from what’s left, if they could pay it you’re fine. If they can’t pay it based on this, it’s an undue hardship. They got to come in and show. But these glosses that have been put on, like certainty of hopelessness and so forth, they make it really, really hard. And this bubble is growing; debt is getting higher. I think I read somewhere tuition has risen three times the rate of inflation. So it’s not getting any better. The numbers are growing. So that’s kind of a look at it.

And from my viewpoint, in fifteen years that was the only one I actually tried that was pro se. There are a lot of them that try pro se, but a lot of them fall by the wayside. I’ll call pretrial conferences. People try to depose them, and they don’t show up for the deposition. They don’t know how to answer interrogatories, or I tell them the test. Have to reset and reset. And some of them just give up hope and they just dismiss the case, refile it, try it again, and it just peters away. So in fifteen years on the bench, that was the only one I tried from start to finish.

And I think lawyers, in talking to different folks at conferences, I think there’s a notion from some consumer lawyers that it’s almost impossible to get

relief in one of these actions. So because they're represented going into bankruptcy, most lawyers, and I certainly understand. I'm not beating up on consumer lawyers. It's a huge undertaking. But most of them carve out fees for representing them in an adversary proceeding. So they can represent them like in a chapter 7, maybe charge them \$1000. A person can afford that, but then if there is an adversary proceeding, they can't do it. They have to charge by the hour or what-have-you and those debtors simply don't have the funds to do it. And as Elaine points out, the resources from Legal Aid or wherever are just so limited. There's just not enough manpower to come in and try to help these folks. So that's kind of the view from the bench side of it.

MS. POON: Thank you, Judge Mullins. Hopefully we can get more *Mosley* cases. That's my hope. And so Dalié is going to tell us how we're going to do that.

PROFESSOR JIMÉNEZ: The cartoons will make sense in a second. It's not just for fun, although maybe I'll just include them in all my presentations.

I'm going to talk about a little piece of a really big project. I've tried to give you enough of the big project to give you perspective but then we're going to talk just about a do-it-yourself student-loan bankruptcy-discharge packet or set of materials that I'm working on with Jim Greiner at Harvard and Lois Lupica, who was already mentioned earlier at Maine Law School.

So first some context. The premise of the large project is that we'll never have enough lawyers to represent or to help low- and moderate-income people in all of their civil legal needs. We just won't. I don't have the math with me, but we've done the math and we just will not have enough lawyers for all of the needs of professional help in the legal context that low- and moderate-income people have and will have. So starting from that premise, what do we do? What kinds of solutions can we come up with?

We have this large study that hasn't started yet. We're in the middle of fundraising, if anyone wants to donate—I'm happy to take donations. It's a randomized control trial, which is the way that drugs are approved in this country, randomizing treatments of individuals in financial distress. And we're basically comparing giving those individuals a lawyer, a Legal Aid lawyer who will help them with the entire panoply of problems that are associated with their financial distress (small claims lawsuit, bankruptcy if needed, getting and correcting their credit report, some financial counseling, everything), and self-help materials that we're creating that do all of that as well. And the self-help

materials are in paper right now—so essentially we’re comparing lawyers to paper.

And the materials on paper we’re using, we’re calling them self-help materials that work in the sense that we’re trying to not just give paper, the kinds of forms and other materials that are out there right now for pro se debtors or pro se individuals in various contexts, but we’re trying to use innovations from Public Health, cognitive psychology, artificial intelligence, all sorts of literatures to attack or address rather the kind of mental and cognitive challenges that we think individuals representing themselves have. I’m going to go a little bit more into that later, but we have all these materials we’re creating. Two of the materials we’re creating in that context are a do-it-yourself no-asset chapter 7 bankruptcy, and if you’re in there and you have student loans, a student loan bankruptcy discharge. And then at the end I’m going to tell you a little bit about a study that gives us some evidence that this might actually work, at least in some context.

So two issues with self-help materials, or at least as we see them: one is the access problem. Can you find materials that are relevant to your problem if you have to be a self-represented individual? Can you find materials that cover everything about your problem? If you’re trying to discharge your student loans in bankruptcy, it’s essentially a federal lawsuit. Can you find materials that will help you and tell you about what you have to do at a deposition? How do you answer interrogatories? What are the deadlines? In a way that you, a self-represented person who may be very smart but is not a lawyer, is not a professional, can actually use them. And so the second question is deployment or usability and successful use of those materials. If you somehow had in front of you an entire manual of how to do your litigation, is that manual written in a way, presented in a way, has the right information that actually allows you to use it to go to a deposition, to know that there’s a deposition you need to go to and what that means, etc.?

So in the deployment context, we know in the last twenty years courts everywhere, bankruptcy and other courts, have been working really hard with commissions, access to justice commissions, and legal aid organizations and even the for-profit sector in creating forms and guidance to self-represented litigants, because there’s been just an explosion of the number of people who are coming to court and don’t have attorneys. And so we have this unbundling concept where we have attorneys that help for a little bit and then they give some literature on the next steps to the individual.

But we also know mostly qualitative information—but actually we’ve gotten some actual data from Professor Pardo today that it’s not always successful—that this kind of either unbundled or just self-represented litigants actually trying to make it for themselves in the legal process are not always successful. And we as part of this large study have been studying small claims courts in Massachusetts, Connecticut, and Maine, and we see day in and day out that people just crumble when they’re told to go talk to the attorney. They don’t actually have any money to pay. The attorney in the debt-collection context that we’re talking about is an attorney for a debt-buyer who doesn’t have a relationship with the individual, and the individual does not recognize that party because they weren’t a party to the contract. And if you had an attorney there, you would win 100% of the time. And that’s what’s happening in Legal Aid in Maine where the attorneys are taking these cases.

But the unrepresented person basically caves and enters into a payment plan that’s just going to extend the statute of limitations, the ability to collect. And we think they’re going to fail. We have conversations with them afterwards, and they’re not going to be able to really follow through with that payment plan.

So there have been many, many studies about how deployment is not very successful for self-represented individuals. Part of the reason is, we think, because it’s hard for people to advocate for themselves. You have to basically stand up to a lawyer who you don’t know and who seems very official and who’s been in that courtroom, knows everyone there, and tell them, “No, I can’t pay” or “No, it has to be less than that.” I have a hard time getting my students to do that for other people, and I think it’s hard. From my own experience it’s harder to advocate for yourself than it is to advocate for someone else. And they’re having to do it while they’re there, thinking: “Yeah, I didn’t pay that credit card.” “Yeah, I’m in a lot of trouble, I have no job, I have other issues going on, and I’m here trying to be a good person, etc.” And all of that is embroiled in their minds as they’re going through this process.

In the bankruptcy context, there are three ways that we’re going to try to decrease the access problem and the fact that we don’t have a lot of these coming up and the self-represented individuals who do file for the discharge actually don’t really finish or prosecute their case.

So our students, and by our students I mean students at Harvard, Maine, and University of Connecticut, about sixty of them so far for the last two and a half years, have been creating packets to, first, diagnose yourself. Should you

do debt management? Should you try and negotiate with your creditors a payment plan? Or are you still in the hole that you need to file bankruptcy? And essentially it's a test about what is your income, your assets, etc. What do you think is going to happen to you over the next year or so?

If you diagnose yourself into bankruptcy, then you'll end up in a DIY non-asset chapter 7 bankruptcy. If you have assets or if you can do a chapter 13 or you want to keep your home, etc., we sort of refer you to a lawyer because there's only so much we can—this is already hard enough to take on.

And if you have student loans in that DIY bankruptcy, we'll also have a student loan discharge. These packets are in various stages of being prepared. What we've learned from doing this so far, and we're kind of sort of in the middle of it really, is we're really noticing some systemic barriers that we think are going to affect the individuals who try to do this. So in Maine you essentially have to have, because of local rules, ability to do a three-way conference call with the Clerk and the attorney, Education Credit Management Corp. attorney or whatever, to schedule a pretrial conference. Why? I don't know. I mean, because lawyers have it and nobody thought differently. So our project is not about changing the rules. Although we are pointing this out to the court so that they're aware and so eventually that might institute some change, but we're basically noticing as we're trying to figure out how to do this some systemic barriers.

And it's helpful I think—although now I'm a little more depressed after what we heard earlier this afternoon—that Maine is the totality-of-the-circumstances jurisdiction. I'd say it's hopeful because we think it makes the materials that we're creating a little easier and that it can be a little bit fuzzier, as it were, the evidence and the information that the individual has to put forth. And also in talking to the bankruptcy judges, they're basically saying we just want to hear from the person. If they get through all the hurdles to come to the hearing and then tell us their facts, it'll be fine is what they—like we'll do the right thing. But they have to get there, and those hurdles are substantial.

But then we have this larger problem of, even if you have all these materials, how do we create them so that they actually are deployable? And our hypothesis on deployment on usability of the materials is that lay consumers, nonprofessionals, will have trouble deploying professional, legal knowledge as a result of cognitive, emotional, behavioral, and psychological challenges. And we think this is true in almost all contexts, although in the financial distress context, it's even more so.

So can we create materials that address these barriers? These are some of the literatures that we—we had a couple of students do this who are amazing—have scoured, looking for ways in which those literatures address similar problems. So in public health there are lots of issues with people taking their medicine on time or showing up to appointments or sticking to a weight management plan. And there's been tons and tons of research in those areas, and we think those are similar to the problems that individuals face when they're pro se. So addressing cognitive and emotional challenges: so the idea that you have to now stand up for yourself even though you feel like this is your fault, like you got yourself into this mess and there's a moral culpability, a moral issue that you're dealing with, but at the same time you need to advocate for yourself.

From tons of literature, some of this is going to sound like—it sounded like voodoo to us in the first instance, and we don't know if it works. We have some evidence that it might, but you might be skeptical, but this is what we found from tons of other research.

Illustrations. Illustrations have been shown to basically diffuse a tense situation, to help people keep turning the page and reading material, to deal with difficult subjects. In the health literature for instance, you have a serious medical condition and here's what it means, or here are the steps you need to take to improve your life going forward. But the illustrations have to be simple. At first we thought, or at least I think the intuitive thing to say is, if we can take a picture of the exact courtroom where you're going to be and we can just point in that picture to where you're going to be, where the judge is, etc., that is the best. It's exactly like when you walk in there; it will look exactly the same. Thanks to artificial lighting, etc., it really can look exactly the same. Actually that is apparently not a good idea. And the reason is that people who don't have a reference point for what this means and what they're supposed to get from it will get mired in details that don't matter. So they'll start looking at whatever is behind the judge over there. Or they're focusing on where the bailiff is sitting, and if the bailiff is sitting somewhere else, they'll just not understand what's going on.

So instead we need illustrations, simple like this one. We're really just pointing out what is important, what is relevant. You need to just pare it down to the barest, relevant details. This is about small-claims debt-collection lawsuits. So this is where you sit waiting to be called. Eventually you sit up there. The collector is going to be here and the judge sits there. And it's just a

way to give people the lay of the land and to feel like they're actually closer to—this may be the first time they've ever stepped in a courtroom—but they have a sense of what to expect once they get there, which we think will give them a little bit of confidence.

Overcoming the shame, guilt, and anxiety that I'm talking about, especially in the financial distress context. From psychology, and this one is voodoo I think, we have self-affirmation theory. I'd never heard of this, and none of us had heard of this before. There are actually hundreds of randomized controlled trial studies in various contexts, in education, in health and tons of other contexts, showing that this actually works. So self-affirmation theory basically says that when you're about to be given—when you're given difficult information, so say you're a smoker and you're about to—you see an advertisement or something that says smoking kills you, you're going to have lung cancer, it's really terrible, etc. For most people just receiving that message when they're smokers, they identify that message as a challenge to them, to their self, to their sense of self. They are smokers. That is part of their identity. So what you have to do is separate. The theory says separate this message which is challenging to your identity and the fact that your identity is not smoking, but having a rational conversation about this doesn't—we don't have evidence that that works.

What we have evidence that works is actually to do a self-affirmation exercise where, before you're given the very challenging message, you're instead told to think about your life, your values, yourself, your family, what is important to you. Basically remind yourself of whom you are, that has nothing to do with smoking or the challenging message you're going to receive immediately after. And that really works.

In the classroom, in science, math, in the STEM disciplines, we have a theory; for minorities and women there's a sense, the psychologists call it a stereotype threat. Just being in the classroom with the expectations that rightly or wrongly people think are going on, depresses the scores of women and minorities in STEM classrooms. If you have them in a classroom, and this has been done in multiple contexts, if you have them do an essay before the class starts where they are basically writing for fifteen minutes about themselves and what they value and what's important to them, that depression of the scores between women and minorities and the rest actually shrink significantly.

So self-affirmation theory, most of the studies involve taking fifteen minutes to write an essay or something of the sort. We don't think we can get

self-represented litigants to do this so instead we've pared it down to something like this. Pick some words that describe you. We have in other contexts blanks; we have a crossword puzzle that involves good things about yourself or the world. We want to do tests of just this issue because apparently the idea is you give this message just before the next page says you're going to now call the debt collector and tell them that you can only pay \$15 a month and you have to stick to your guns because that's all you really can pay. You already determined that.

Overcoming a lack of agency or this idea that it's very difficult to advocate for yourself—so we have sort of role-playing exercises within the packets. Say “I have rights” in front of the mirror, actually go do this yourself. These are others. Some people actually react negatively to this image because they think he's mad—but he kind of is mad. I mean, we want to in some ways arouse people to the level of, yeah, I can do this, pump them up. It's like going to a game or something. Haley Pope, who's now graduated from Harvard Law, did all these cartoons, and now we have other cartoonists and she's still working on it, so I didn't do any of this. My cartoons are terrible.

Basically visualizing when you go before the debt collector or the mediator or just your list of demands. I think I had one about the judge. But if you go before the judge, this is what's going to happen. This is how you're going to do it.

So more empowerment and encouragement messages. Practice with a friend this role-playing idea. Bring a friend or family member to court with you so you feel better. And actually people do this. We've seen that some people actually bring someone else.

Using analogies has been shown in the education literature to really help with understanding—understanding and we think also visualizing. So this image is our debt monster. This is from one of our student loan packets, and that's Blob defeating the debt monster at various parts of the packet. Now someone said that monster was too cute. We might change that. We've been testing them in court, in small claims court by going to people and asking them if they'd talk to us for fifteen minutes in exchange for a \$10 gift card. And these have been tested in schools actually. So far we've changed them when we hear sort of a message that is consistent.

Overcoming uncertainty about the situation. So previewing the day in court or in the bankruptcy context everything that's going to happen, sort of step by

step so you feel like you actually have knowledge as to what is coming up. In Maine, Massachusetts, and Connecticut we have these hallways—I think it’s everywhere really—a hallway outside of the courtroom where people are standing and the debt collector is actually standing there waiting for and sometimes calling out names, waiting for people to come up to them so that they can enter into a payment plan. They’re just like, “Okay, so you’re so and so, you owe this amount, how do you want to pay? Do you have a job? Do you have a car? How much do you pay a month?” And that’s really the conversation. The good ones first say, “Do you recognize this debt?” But not everyone does.

Overcoming fears about lack of familiarity with the formal legal system. So we have literally just these images that go on for many, many pages and that is a sort of negative of doing things this way, but we think with the cartoons, most pages don’t have a lot of text. There is some evidence that that is actually okay. So this is literally what the statement of claims form that starts a lawsuit in small claims court in Maine looks like, and where the various pieces of information can be found. Talk about structural issues, the thing is called Statement of Claim, Small Claims. What does that mean? That’s actually the complaint, but it’s not clear at all that that’s what’s happening if you just look at one of these.

This language is from one of our packets and it’s on a third-grade level. Most of the language is third- or fourth-grade level. The reason is, not because we think people can’t read beyond that, but because people are overwhelmed with everything else that’s going on in their lives. This is a large set of challenging information that they have to go through, so the easier it is to read, the more likely it is that it will be read.

More visualization. This is from our student loan packet. You’re going to—rain, snow, sleet, or shine, you’re going to pay your student loans every month once you’ve—in this context we have it’s not in bankruptcy—you’re going to enter into a payment plan, like an income-based repayment plan or something, and this is how you’re going to make your payments.

Post-its and other kinds of planning prompts within the packets themselves. In the help literature these have been shown to really help. So something like a post-it literally included within the materials that you can get out and put on your fridge, and they’ve done this for colonoscopy appointments. Don’t forget to do this, and sometimes you put a blank and then you fill in the blank. It seems silly, but the idea here is, imagine yourself really, most people have lots

of things going on. I mean, just the amount of things you have to keep track of in your normal day, if you have kids, if you have a job, it can be overwhelming. So this is a way to ensure sort of more compliance.

I think this is more or less the final one. Can we commoditize self-help to some extent? Really consumer bankruptcy as practiced by attorneys is commoditized. We have one or two computer programs that people are using where you enter the information and then the forms are printed out. And most of the time it's really the paralegal that's taking the intake information and the attorney just reviews things. So that's commoditized. Can we do that to some extent for individuals who are not attorneys? So this is from debt collection context. We have scripts that are at a sixth-grade level. I'm not going to read this, but the idea here is, here are your arguments: Your Honor, these are the problems. First, this; second, that. And as you can see, the first one ends with "they need personal knowledge," and that's sort of explained in the paragraph what personal knowledge means. In case, Your Honor, you weren't paying attention, here's the key word, the key legal word that I'm talking about. They need personal knowledge in order to be able to put on this evidence.

We don't know if this will work and part of me thinks, well, if this is the first time a judge has heard this and you're reading this and you don't actually know what it means, it won't work. But at least in Maine where we're testing this, attorneys are actually going to court and making these arguments in attorney language the whole time. So the judges should know, and anyway they really should know, right? If you hear the words personal knowledge, they should know what's going on. And the idea is that it's just there for the individual to read, sixth-grade level, and then there's at the end a tear-off sheet that's essentially the rules and the statutes that are relevant to the situation that they—and it just says you don't need to read this. Just give this to the judge.

We have some evidence that this may work; at least a part of this may work. We have another study in Boston Municipal Court, just one court where there's a 90% default rate in consumer debt-collection cases. One thing about that court is that you must file an answer in duplicate and then keep a copy for yourself because they won't give you one, before you're able to get a court date. So essentially you need to copy three times and the two that you send to the court must be originals so no photocopying your answer in response to a lawsuit. Then you get a court date. Then you have to go to court, the pretrial, all of this. It's not small claims. So 90% default rate I thought was actually

pretty low. I mean, I thought there would be more defaults. Let's put it that way.

So our study question is, what mailings can get consumers to answer the lawsuit? Can we decrease that default rate? We had three groups. One doesn't get any mailings. So we go through everyone who's sued every week and we randomize. A third of them don't get anything, a third of them get a packet that includes a cartoon-based letter with psychological techniques, self-affirmation and others, answer forms, blank answer forms, envelopes, and a map to the courthouse. And then the other one gets the same but also a reminder postcard the day before, stamps, and an envelope to make it even easier for you to mail that out.

So the evidence that this may work is that we have statistically significant differences between the control and the other interventions. There's no difference between what we call the limited and the maximal intervention. So you don't need to spend the money on the postage or on the postcard. It seems to work, just the letter. We don't know, we'd have to do more tests to figure out is it the cartoons? Is it the fact of the letter, etc.? But we think that basically we're on the right track and we need lots more fine-tuning, and we're intending to do many, many studies that will test all of this. I am looking forward to your comments.

MS. POON: Thank you. And for those students in the room, it might sound like a complex study that Professor Jiménez is doing, but for those of you who kind of work in Atlanta and practice in Atlanta, we do have a lot of these pro se packets and these kinds of answers, like check off the box answers, in a lot of our courts, and we're always looking for volunteers to help us make those packets, too.

Actually, kind of reacting to Professor Jiménez' study, I want to hear, Judge Mullins and Professor Pardo, your reaction to this solution to the problem. Does it address a lot of the issues? I mean you have pointed out many issues, procedural, lack of representation, all of these different issues. What is your reaction to this?

JUDGE MULLINS: I think, especially if you get in the student loan discharge, as long as you have a test like *Brunner* and you have what happened at least in my particular case—you have a pro se person, and he's short three semesters from graduating college, and he was a commissioned officer; he was pretty smart. But when he hears the cases coming back, and he starts hearing

the terms and the cases and certainty of hopelessness, income-contingent repayment, and bad faith, then he kinds of loses his bearings. So at one point in the hearing where he got upset on the stand is, he got upset with the use of cases and the lawyers kept saying bad faith as “I’m a bad person and I never tried,” and what he was saying is, the test is good faith and if you didn’t sign a contingent repayment plan that’s bad faith, not that you’re a bad person.

So I think that something like this for a lot of matters when they’re coming in for pro se debtors is very helpful to maybe get them oriented to the court and to be able to speak. The thing that I observed about especially Education Credit Management Corp. is that they are, I haven’t seen very many settlements from them. I think they tend to go to the wall on it. If they go to the wall on it, they hire lawyers—that’s pretty much what they do and they’ve got the cases down. They can recite it, and then they’re standing there and a lot of what they’re saying, it just doesn’t make sense to even an educated person. But I think you’re on the right path because even getting to the initial part of the case, if you’re in a chapter 7, maybe the § 341 or if there’s one issue that comes up and you have to get into court initially, it would help if you had some of these things that would kind of demystify it. So I think it’s certainly a worthy project. It’s just when you get to dischargeability of a student debt in the current climate, it’s difficult litigation.

PROFESSOR PARDO: My reaction is, I think that the intuition is 100% correct. That is, the key is how do you get the self-represented folks to advocate for themselves? And at least what I’ve personally witnessed in this context when litigating these matters on behalf of student loan debtors, particularly when defending a deposition: When you’re defending a deposition, you can object on the record, but the person has to answer unless it’s a very narrow set of circumstances. And time and time again I’ve witnessed the client get so flustered and break down, even though I’m in the room and I’m lodging my objections and they know that I’m there looking out for them, but when they’re on their own, they fall apart. And if that’s happening when an attorney is present and they know that they’ve got an attorney in their back corner, imagine if you’re just a self-represented person doing this on your own. So I think that the key is, you’re hitting the nail on the head, and it’s how do we find mechanisms that allow them to vindicate their rights?

MS. POON: I just got the time’s up notice, but I would like to go to the three of you to do some closing remarks and maybe some call to arms. One thing that we didn’t necessarily talk about is the question of whether or not as

practitioners we're a little bit let off the hook with these self-help packets. I mean I think Atlanta Legal Aid is not let off the hook, but as private practitioners, and that's one thing that all of you did talk about which is this bifurcation of representation. Our for-profit consumer attorneys sometimes are just not able to tackle this, so I just want you to talk about concluding remarks. Do you want to start, Professor Jiménez?

PROFESSOR JIMÉNEZ: Sure. There's a lot to be done, and this project, we've been doing this for two and a half years and we probably have at least another year to go to finish all the materials. The idea though, is once that's done they're pretty much done. You can then sort of distribute them in courts everywhere where the law is applicable or just change them as the law changes. We actually think, or my hope is, it's actually going to help consumer attorneys, because we're thinking through this process about how can we commoditize parts of the discharge litigation. There are various moving parts. Like if you commoditize it and more consumer attorneys get involved, then maybe the law changes. And at the same time, the White House and others are thinking of other things to do in this area. So maybe it will all move in sort of the right direction or what I see as the right direction.

I don't think this lets off Legal Aid or pro bono work at all. I think the self-help materials of any kind cannot work just by themselves on a website. I didn't really mention this, but in our study we have a paralegal that will answer the phones if people call and have sort of logistical questions or just basic questions. They're not giving advice. They're just telling them, "Oh, this is on page such and such," or "Here's where you'll find that information." If you think about it, all the law students in the room, you're going for three years to law school and that doesn't mean you can do one of these cases afterwards. I'll tell you that right now. And then we're asking people who don't have any education to go and do these.

I don't know if you want to take a question. There's a question.

MS. POON: Go ahead.

[Inaudible question or comment from audience]

MS. POON: Right. Sounds like it's a political, a legislative issue is what you're trying to say.

[Inaudible question or comment from audience]

MS. POON: Thank you for that. I'm going to give Professor Pardo and Judge Mullins just a last few comments.

PROFESSOR PARDO: Just sort of in response to that very quickly. My sense is, and if you do look at the history, Congress hasn't shown an appetite for doing much legislation on any topic. So I'm not sanguine about student loan reform and discharge in bankruptcy. So that's why I've tried to focus my efforts on procedural changes because we do have a lot of control over the rules and judges have a lot of control over how they manage their dockets and their policies. And so I think maybe it's incremental. Maybe it's marginal, but it's better than the status quo.

MS. POON: Judge Mullins?

JUDGE MULLINS: I think that's right. I agree with Professor Pardo. I don't want to take time from the second panel, but yes, it's a difficult problem and you have to kind of go back I think to fundamentals for the changes. The default rates were low. When all the fear came about, default rates were low. So you start from a false proposition to make it tougher, and I think people need to go back and look at that. But again, that's legislative and that's going to be tough.

MS. POON: Thank you. Can we have a round of applause for our consumer panel?