Help or Hardship?: Income-Driven Repayment in Student-Loan Bankruptcies

JOHN PATRICK HUNT*

Roughly $152 billion of student loans are ninety or more days delinquent. Bankruptcy would seem to be an appropriate way to address this problem, but student-loan debtors labor under a unique disadvantage. Such debtors must show "undue hardship" to get a bankruptcy discharge of their student loans. Because the bankruptcy system provides permanent debt relief through granting a discharge, this "undue hardship" requirement is an obstacle for student-loan debtors. At the same time, the federal government offers an option for most student loans that may make repayment easier: income-driven repayment ("IDR") plans, under which the debtor makes payments of ten to twenty percent of discretionary income for twenty to twenty-five years, after which any outstanding balance is cancelled.

This Article addresses how the availability of IDR should affect the analysis of undue hardship in student-loan bankruptcy. It reviews legislative history and Supreme Court precedent pertinent to bankruptcy's fresh-start policy, the student-loan exception to dischargeability, and the IDR programs, and draws three principal conclusions. First, the policies supporting a fresh start in bankruptcy apply to student loans, even if participating in IDR would result in an affordable payment. Second, when student loans have been in repayment for more than five years, the only policy supporting nondischargeability is that of creditor recovery. Third, IDR is intended to make life easier for student-loan debtors, not to increase their exposure to hardship through denial of discharge.

This Article applies these findings to several factual situations common in student-loan bankruptcy. It argues that IDR's availability should not count against discharge if the debtor could not maintain a minimal standard of living while making IDR payments, or if IDR would extend the repayment period and the debtor could not maintain an above-minimal standard of living during the repayment period. In bankruptcies commenced after five years of repayment, the student-loan debtor generally should receive discharge if the creditor cannot show a substantial likelihood of significant repayment, so the availability of a zero-payment IDR plan should not weigh against discharge. Other possible consequences of IDR include negative amortization—loan balances that increase because

* Professor of Law and Martin Luther King, Jr. Research Scholar, University of California, Davis School of Law (King Hall), jphunt@ucdavis.edu. Thanks to King Hall Dean Kevin Johnson and Senior Associate Dean for Academic Affairs Madhavi Sunder for financial support of this work. Thanks to Katherine Florey for helpful conversations. Thanks also to the Mabie Law Library staff and to Shaun Wong for valuable research assistance. All opinions and errors are the author's own.

payments are not enough to cover accumulating interest on the debt—and tax liability upon discharge because the forgiven debt is treated as income. These consequences should weigh in favor of discharge, potentially by increasing the level of expected repayment the creditor must demonstrate. The debtor's failure to learn about IDR usually should not count against the debtor, unless IDR actually would provide a viable alternative to discharge.

TABLE OF CONTENTS

INTRODUCTION

Over $1.3 trillion in student-loan debt is currently outstanding,[1] and student loans are the largest category of consumer debt other than mortgages—bigger than debt from credit cards or auto loans.[2] Eleven percent of the total student loan balance outstanding is ninety or more days delinquent.[3] These numbers suggest that student-loan bankruptcy is a major issue, and the pressure for bankruptcy relief may increase if current efforts to repeal other forms of loan cancellation, such as Public-Service Loan Forgiveness, are successful.[4] However, an important legal obstacle obstructs student-loan debt relief in bankruptcy: such relief is not available unless the debtor affirmatively shows that repaying the loans would be an "undue hardship."[5] Although the vast majority of bankrupt student-loan debtors do not even try to discharge student loans,[6] the absolute number of cases in which undue hardship is litigated is apparently quite large.[7]

1. RESEARCH AND STATISTICS GRP., FED. RESERVE BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT, at i (2018) (reporting $1.38 trillion in outstanding student-loan balances as of the fourth quarter of 2017).

2. *Id.* at 3.

3. *Id.* at 12.

4. *See* Nick DeSantis, *Trump's Budget Could Eliminate Public-Service Loan Forgiveness. Here's What to Know*, CHRON. OF HIGHER EDUC. (May 17, 2017), https://www.chronicle.com/blogs/ticker/trumps-budget-could-eliminate-public-service-loan-forgiveness-heres-what-to-know/118468 [https://perma.cc/6RGE-ZTP5] (reporting that President Trump's proposed budget calls for elimination of public-service loan forgiveness); *see also* John R. Przypyszny & Jonathan D. Tarnow, *Higher Education Act Reauthorization Moves Forward into 2018 Following House Committee Action*, NAT'L L. REV. (Jan. 2, 2018), https://www.natlawreview.com/article/higher-education-act-reauthorization-moves-forward-2018-following-house-committee [https://perma.cc/A93P-YL5F] (reporting that the House of Representatives Committee on Education and the Workforce approved the Promoting Real Opportunity, Success, and Prosperity through Education Reform Act (PROSPER Act) and that the PROSPER Act "would eliminate current loan forgiveness programs, including the Public Service Loan Forgiveness Program").

5. *See* 11 U.S.C. § 523(a)(8) (2012) (excluding student loans from discharge unless "undue hardship" is present).

6. *See, e.g.*, Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 505 (2012) (reporting that in 2007, out of an estimated 169,774 debtors who owed student loans to one of the ten largest student loan holders, only 217 or 0.1 percent attempted to obtain a discharge); Aaron N. Taylor & Daniel J. Sheffner, *Oh, What a Relief It (Sometimes) Is: An Analysis of Chapter 7 Bankruptcy Petitions to Discharge Student Loans*, 27 STAN. L. & POL'Y REV. 295, 315 (2016) (reporting that approximately 0.1 percent of Chapter 7 debtors in the First and Third Circuits between 2011 and 2014 sought discharge of student-loan debt).

7. *See, e.g.*, Reported Cases in Which Undue Hardship Is at Issue, LEXIS, https://advance.Lexis.com (follow "Advanced Search" hyperlink; then follow "Cases" hyperlink; then enter "'undue hardship' and 'student loan'" into the search bar) (returning 2,208 cases on Feb. 10, 2018).

This Article addresses an issue that commonly arises when undue hardship is litigated: the income-driven repayment (IDR) plans that are available to many student-loan debtors.[8] These plans permit the debtor to pay a percentage of her income for twenty to twenty-five years and provide for cancellation of any outstanding balance at the end of the repayment period.[9] IDR plans can make student-loan repayment more affordable by offering lower payments than are available in other plans.[10] Some parties have argued in student-loan bankruptcies that the availability of IDR should foreclose discharge: it is not an undue hardship, they say, to repay under a more affordable plan.[11] Courts generally have not accepted this sweeping argument, but they have often considered the availability of IDR as a factor weighing against discharge.[12] This Article evaluates how IDR should figure into the undue-hardship analysis in various factual scenarios based on the legislative history of the relevant statutes and Supreme Court precedent.

Two earlier articles have discussed the relationship between IDR and undue hardship. The first, by Judge Terrence Michael and Janie Phelps, concludes that IDR does not completely foreclose bankruptcy relief and that a case-by-case analysis of undue hardship is warranted even when IDR is available.[13] All appellate courts that have considered the issue have embraced Michael and Phelps's conclusion.[14] This Article pushes the analysis further by addressing how IDR should matter in particular fact situations. The second article, a recent work by Kevin Smith, concludes that all bankrupt student-loan debtors should be forced to enroll in IDR.[15] This Article disagrees with that conclusion, drawing on sources that are not considered at length in Smith's paper.[16]

---

8. "IDR" is the umbrella term for all of the federal government's income-driven repayment plans, some of which have similar abbreviations to IDR and to each other. The individual plans include income-contingent repayment (ICR), income-based repayment (IBR), Pay As You Earn (PAYE), and Revised Pay As You Earn (REPAYE). These plans are discussed in greater detail in Part II.

9. *See infra* notes 174–82 and accompanying text (describing IDR programs and their differing repayment terms, obligations, and eligibility requirements).

10. *See infra* Part II.

11. *See* Terrence L. Michael & Janie M. Phelps, *"Judges?!—We Don't Need No Stinking Judges!!!": The Discharge of Student Loans in Bankruptcy Cases and the Income Contingent Repayment Plan*, 38 TEX. TECH. L. REV. 73, 75 & n.6 (2005) (describing the argument that, "due to the existence of programs such as the ICRP, the nondischarge of a student loan can never constitute an undue hardship").

12. *See infra* Section III.B.2.

13. *See* Michael & Phelps, *supra* note 11, at 103–06 (setting forth the reasons why, even with IDR, debtors are still "entitled to a meaningful day in court").

14. *See infra* note 287 and accompanying text.

15. Kevin J. Smith, *The Income-Based Repayment Plans and For-Profit Education: How Does This Combination Affect the Question to Include Student Loans in Bankruptcy?*, 32 GA. ST. U. L. REV. 603, 658 (2016) ("Borrowers should use the IBR plan and be accountable, even if the payment is zero.").

16. This Article draws extensively on the legislative history of the student-loan dischargeability exception and of the statutes authorizing IDR, matters that are discussed in less depth in Smith's article. *Compare* Smith, *supra* note 15, at 638–42 (conducting a broad historical overview of the treatment of student loans under the Bankruptcy Code), *with infra* Section I.B (reviewing in detail the legislative history accompanying the enactment and development of student-loan nondischargeability); *compare* Smith, *supra* note 15, at 612–14 (conducting a broad overview of the legislative history accompanying the enactment of IDR), *with infra* Part II (examining in detail the legislative history of all relevant statutes enacting various IDR programs). This Article also addresses the case law interpreting student-

This Article makes three contributions. First, it adds to our understanding of the legislative history of relevant provisions, particularly those expanding the student-loan exception to discharge and those authorizing IDR. Second, it offers a new interpretation of the student-loan exception to discharge based on that review of legislative history. Third, it is the first to apply the policies revealed by legislative history and Supreme Court authorities, in a structured way, to commonly encountered factual situations in undue-hardship litigation.

The Article proceeds as follows. Part I reviews the legislative history and Supreme Court precedents addressing the "fresh start" in bankruptcy.[17] It identifies the purposes of the fresh start as affording relief from the hardship of unmanageable debt and enhancing the debtor's ability to participate in the economy and society, including the ability to accumulate wealth. The fresh start reflects a legislative judgment that excessive debt can discourage such participation.

Part I also reviews the legislative history of the exception to the bankruptcy discharge of student loans, and of the exception to that exception for undue hardship.[18] It reveals that the original version of the exception to the fresh start for student loans—an exception that applied only for the first five years of repayment—was intended to combat abuse of the bankruptcy system. Such abuse exemplified by the recent graduate who immediately sought to discharge student-loan debt before embarking on a lucrative career that the debt had made possible, taking advantage of her temporary lack of assets to go through a bankruptcy that cost her little. Congress perceived a heightened risk of abuse in the first five years of repayment and required student-loan debtors who sought discharge during that period, and only during that period, to show "undue hardship." Congress did not perceive such a risk for student-loan debtors who waited five years to file a bankruptcy petition. Such debtors could discharge student debts on the same basis as most other loans, without showing undue hardship.

Congress later eliminated the student-loan debtor's right to a discharge after five years and required all student-loan debtors to show undue hardship to escape their loans in bankruptcy. Importantly, however, Congress's motivation for doing so was not increased suspicion of abusive debtors. Instead, Congress eliminated free availability of discharge after five years for purely financial reasons, to increase recovery of federal student loan funds. Moreover, nothing in the legislative history of the student-loan exception indicates that the benefits of the fresh start—alleviating debtor hardship and facilitating debtor participation in the economy and society—are any less applicable to student-loan debtors.

Part II reviews the legislative history of the statutes that authorize the various IDR plans.[19] In authorizing IDR plans, Congress sought to enable students to

loan dischargeability in detail, which Smith's does not. *See infra* Sections III.B–C. These differences likely stem in large part from the somewhat different focus of Smith's article, which addresses the interaction of IDR and for-profit education. *See* Smith, *supra* note 15, at 611.

17. *See infra* Sections I.A.1–2.

18. *See infra* Section I.B.

19. *See infra* Part II.

pursue lower-paying careers, particularly careers in public service; to encourage prospective students to enroll in higher education; and, to a lesser extent, to avoid default and increase government recoveries by providing more affordable repayment options. Congress recognized the potential harm of long repayment periods and of loan balances that increased when income-based payments were not enough to cover interest. There is no indication that Congress had any intent to make it more difficult for student-loan borrowers to get bankruptcy relief. To the contrary, the overall intention was to make life easier for student-loan debtors.

Part III applies the findings of Parts I and II to analyze how IDR should fit into the analysis of undue hardship.[20] It first explains that fresh-start policies apply to student loans, even if IDR renders payments affordable.[21] Even with affordable payments, continuing indebtedness exposes the debtor to the risk of default and subsequent collection, and can have negative effects on mental and emotional health and credit. IDR's requirement that the debtor devote a percentage of each additional dollar earned to loan repayment is a disincentive to debtor productivity.

Part III then explains the doctrinal tests for undue hardship and argues that IDR is relevant to the undue hardship analysis.[22] The prevailing test for undue hardship is the *Brunner* test, which requires that the debtor prove that she cannot maintain a minimal standard of living while making loan payments, that this condition will persist for a significant portion of the repayment period, and that she has made a good-faith effort to repay the student-loan debts.[23] IDR should be incorporated into the part of the inquiry that tests whether the debtor made a good-faith effort to repay her debts.

Part III finally turns to how the availability of IDR should be incorporated into the analysis of specific factual situations. The proposals flow from the propositions that fresh-start policies apply to student-loan debtors, that the only purpose of student-loan nondischargeability after five years is financial recovery, and that IDR was not intended to increase the hardship a debtor must endure.

First, if the debtor could not maintain a minimal standard of living while making the IDR payments, IDR should not count against discharge.[24]

Second, and perhaps more controversially, if IDR would extend the period of indebtedness, the debtor should be allowed an above-minimal standard of living rather than a minimal standard of living.[25] The extension of indebtedness increases the debtor's hardship, and the debtor should be compensated by being allowed a better standard of living. If the debtor cannot maintain an above-minimal standard of living while making IDR payments, IDR should not count against discharge.

20. *See infra* Part III.
21. *See infra* Section III.A.
22. *See infra* Section III.B.
23. *See infra* Section III.B.1 (describing test articulated in Brunner v. N.Y. State Educ. Servs. Co., 831 F.2d 395 (2d Cir. 1987)).
24. *See infra* Section III.C.1.
25. *See infra* Section III.C.2.

Third, if bankruptcy is commenced after more than five years in repayment, IDR should not count against discharge unless the debtor's participation in IDR would produce a substantial likelihood of a significant financial recovery for creditors.[26] In student-loan cases, creditor recovery is the only policy underlying nondischargeability in such cases. Thus, if IDR would produce zero or minimal payments, as will be the case for low-income debtors, the debtor should be able to get a discharge notwithstanding IDR's availability.

Fourth, if the debtor's participation in IDR would result in "negative amortization"—an increase in loan balance because payments do not cover interest—negative amortization should be a factor weighing in favor of discharge.[27] One way of taking this factor into account is to increase the expected financial recovery a creditor must show when negative amortization is present.

Fifth, if IDR would potentially subject the debtor to tax liability upon cancellation of debt at the end of the IDR period, potential tax liability should weigh in favor of discharge.[28] Although the actual incurrence of such a liability is typically speculative, it is not speculative that the risk of liability itself interferes with the debtor's fresh start.

Finally, the debtor's failure to pursue IDR diligently before bankruptcy generally should not count against discharge, as long as nonparticipation in IDR would otherwise be excused under the tests above.[29] An exception to this guideline should apply if the debtor's conduct leads to actual loss of the ability to participate in a viable IDR program through conduct more culpable than simple negligence.

I. BANKRUPTCY POLICIES

Giving the debtor a "fresh start" is a fundamental goal of bankruptcy law,[30] underlying the debtor's right to a discharge.[31] For student-loan debts, this policy is limited by the requirement that the debtor show "undue hardship" to get a discharge.[32] The undue-hardship standard is open-ended and subject to

26. *See infra* Section III.C.3.

27. *See infra* Section III.C.4.

28. *See infra* Section III.C.5.

29. *See infra* Section III.C.6.

30. *See, e.g.*, Harris v. Viegelahn, 135 S. Ct. 1829, 1838 (2015) ("Shielding a Chapter 7 debtor's postpetition earnings from creditors enables the 'honest but unfortunate debtor' to make the 'fresh start' the Bankruptcy Code aims to facilitate." (quoting Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007))); *Marrama*, 549 U.S. at 367 ("The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" (quoting Grogan v. Garner, 498 U.S. 279, 286–87 (1991))); *Grogan*, 498 U.S. at 286–87 (finding that a "fresh start" for the "honest but unfortunate debtor" is "a central purpose of the Code" (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934))).

31. *See* H.R. DOC. NO. 93-137, pt. 1, at 80 (1973) (indicating that "discharge relief" is a key element of debtor rehabilitation).

32. *See* 11 U.S.C. § 523(a)(8) (2012) (providing that education debts are nondischargeable unless excepting the debts from discharge would impose "undue hardship" on the "debtor and the debtor's dependents").

judicial elaboration; the statutory text provides courts little guidance.[33] Accordingly, this Article looks to the objectives of the fresh-start policy and the undue-hardship requirement to cast light on how to apply the undue-hardship requirement in varying factual situations.[34] This Part examines the policies underlying the fresh start and the undue-hardship requirement, drawing on the legislative history of the Bankruptcy Code and the Supreme Court's precedents.

A. FRESH START

It is often stated that providing the "honest but unfortunate debtor" a fresh start is itself a basic goal of bankruptcy.[35] As legislative history and Supreme Court precedent reveal, the fresh start is itself designed to advance two even more fundamental policies: alleviating debtor hardship and encouraging participation in the economy and society (including the opportunity to accumulate wealth).[36]

1. Legislative History

The legislative history of the 1978 Bankruptcy Reform Act,[37] the comprehensive bankruptcy statute that enacted the Bankruptcy Code, is rich with statements that the "fresh start" is an important bankruptcy policy.[38] The history is less explicit about why the fresh start is important, but two purposes can be discerned:

(1) enabling the debtor to participate more fully in the economy and society, and

(2) alleviating hardship arising from unmanageable debt.

The most comprehensive discussion of the underpinnings of the fresh-start policy appears in the *Report of the Commission on the Bankruptcy Laws of the*

---

33. *See, e.g.*, Krieger v. Educ. Credit Mgmt. Corp. (*In re* Krieger), 713 F.3d 882, 885 (7th Cir. 2013) (describing undue-hardship provision as "open-ended").

34. *See infra* Section III.C (addressing how the undue-hardship requirement should be applied in several specific factual settings).

35. *See, e.g., Harris*, 135 S.Ct. at 1838.

36. There is an extensive literature on the normative purposes the fresh start ought to serve. *See, e.g.*, Jonathon S. Byington, *The Fresh Start Canon*, 69 FLA. L. REV. 115, 118–23 (2017) (reviewing literature); Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1048 (1987) (representing the classic work in the field and arguing that "discharge should be broadly available to restore the debtor to participation in the open credit economy"). This Article focuses on the positive law of the fresh start as revealed through legislative history and Supreme Court precedent because these sources are the most relevant to courts applying the undue-hardship rule when IDR is at issue.

37. Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1532).

38. *See, e.g.*, H.R. REP. NO. 95-595 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963. The Report uses the term "fresh start" at least twenty-five times, including calling it "the essence of modern bankruptcy law," *id.* at 117, *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6078, and stating that the bill "enunciates a bankruptcy policy favoring a fresh start" *id.* at 126, *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6087. Even before the process that led to the 1978 Bankruptcy Reform Act, legislative materials recognized the importance of the fresh start. *See* S. REP. NO. 89-1158, at 2 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2468, 2469 ("The fundamental policy of the Bankruptcy Act is to provide a means for (1) the effective rehabilitation of the bankrupt and (2) the equitable distribution of his assets among his creditors.") (quoting H.R. REP. NO. 89-687, at 2 (1965)).

United States, issued in July 1973.[39] Congress established the Commission in 1970 to study United States bankruptcy law and recommend improvements,[40] and the Commission's recommendations served as the starting point for the Bankruptcy Code of 1978.[41]

The Commission recognized that one policy underlying the fresh start is relief from the hardship of unmanageable debt. In a chapter entitled "A Philosophical Basis for a Federal Bankruptcy Act,"[42] the Commission's Report states that it is "important to be able to obtain authoritative relief, through discharge, from the hardship of unpaid debts."[43] The Commission also took note of "[t]he higher incidence of marital difficulties and other family problems among financially burdened debtors than among the general population," although it did not explicitly link these issues to the fresh-start policy.[44]

The view that unmanageable debt inherently or presumptively imposes hardship also appeared later in the legislative process. The House Judiciary Committee report on one of the bills that contributed to the Bankruptcy Reform Act describes the fresh start as a state of being "free from creditor harassment and free from the worries and pressures of too much debt."[45]

Alleviation of suffering is not the only function the fresh start serves. The Commission's Report stated that a "second function" of the bankruptcy system served by the fresh start is to "rehabilitate debtors for continued and more value-productive participation, *i.e.*, to provide a meaningful 'fresh start.'"[46] The "participation" in question seems to be participation in the credit economy.[47]

In the preceding passage, the Commission's Report seems to be speaking of rehabilitation as a purely economic concept, perhaps referring to the notion that people have less incentive to be productive if the fruits of their labors go to creditors. Elsewhere, however, the Commission's Report confirms that rehabilitation, a "principal internal goal[]"[48] of bankruptcy, entails "continuation of [the debtor's] household as a social and economic unit."[49] Taken literally, this last sentence could be about preventing the outright dissolution of households, but in light of the broader purpose of rehabilitation mentioned above, the sentence more

39. H.R. DOC. NO. 93-137 (1973).

40. Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468.

41. Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, *reprinted in* COLLIER ON BANKRUPTCY app., pt. 4(b), at 4-199 to 4-201 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2012).

42. H.R. DOC. NO. 93-137, pt. 1, at 61 (1973).

43. *Id.* at 71. The Commission found that such relief from hardship served the more general "primary function of the bankruptcy system," which is "to continue the law-based orderliness of the open credit economy in the event of a debtor's inability or unwillingness generally to pay his debts." *Id.*

44. *Id.* at 53.

45. H.R. REP. NO. 95-595, at 125 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6068.

46. H.R. DOC. NO. 93-137, pt. 1, at 71 (1973).

47. *See id.* at 68 (stating that "debtors with 'fresh starts' are better enabled to participate in the credit economy"); *id.* at 73–74 (arguing that bankruptcy does not threaten the goals of the open credit economy).

48. *Id.* at 75.

49. *Id.* at 79.

likely means that the discharge is intended to facilitate the debtor's full participation in social and economic life. This idea is somewhat vaguely expressed, but it is not difficult to imagine that the shame attending unmanageable debt, and the stress of trying to manage that debt, would discourage debtors from joining civil-society organizations, for example.

A key element of debtor rehabilitation, according to the report, is "discharge relief," and the policy in favor of rehabilitation is so strong that "nondischargeability should be limited to debts incurred through fraud or similar conduct and to debts, such as family support obligations, the creditors of which as a class can ill afford the loss."[50] As will be seen, the original enactment of the student-loan exception to dischargeability reflected the former principle, and subsequent amendments reflected the latter.[51]

The 1978 Bankruptcy Reform Act has been amended repeatedly, and two such amendments should be mentioned. The Bankruptcy Amendments and Federal Judgeship Act of 1984 provided, *inter alia*, that a Chapter 7 case could be dismissed for "substantial abuse."[52] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 changed the test to "abuse" and added a means test intended to bar "can-pay" debtors from Chapter 7 relief.[53] Both statutes can be understood as tempering the fresh-start policy with a view that debtors who "can pay" their debts, at least in part, should do so rather than seek a discharge. However, there is no indication that these statutes changed the fresh-start policy for debtors who pass the tests they impose, as student-loan debtors must do in seeking discharge.

2. Fresh Start in the Supreme Court

The Supreme Court's classic explanation of the "fresh start" policy appears in *Local Loan Co. v. Hunt*, in which the Court found that an assignment of wages was not enforceable post-discharge.[54] Hunt had borrowed $300 and had executed an "assignment of wages," an instrument that gave his creditor the right, in the event of default, to collect a portion of Hunt's wages directly from his employer.[55] The Court held that enforcing the assignment after Hunt received a bankruptcy discharge would impermissibly interfere with bankruptcy's fresh-start policy.[56] In so doing, the *Hunt* opinion, like the Commission Report that

50. *Id.* at 80.

51. *See* discussion *infra* Section I.B.7.

52. Pub. L. No. 98-353, § 312, 98 Stat. 333, 355 (codified as amended at 11 U.S.C. § 707(b) (2012)).

53. Pub. L. No. 109-8, § 102, 119 Stat. 23, 27–33 (codified as amended at 11 U.S.C. § 707) (describing means test applicable to Chapter 7 debtors); H.R. REP. NO. 109-31, at 5 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 92 (describing committee's view that "some bankruptcy debtors are able to repay a significant portion of their debts").

The Report also describes the means test as a way of enhancing effectiveness of existing provision designed to prevent "debtors who could easily pay their creditors" from using Chapter 7. H.R. REP. NO. 109-31, at 11–12, *as reprinted in* 2005 U.S.C.C.A.N. 88, 98 (quoting LAWRENCE P. KING ET AL., COLLIER ON BANKRUPTCY § 707.04 (15th ed. rev. 2002)).

54. 292 U.S. 234, 245 (1934).

55. *Id.* at 238.

56. *Id.* at 244–45.

would follow it nearly four decades later, recognized that the fresh start serves a twofold purpose.[57]

The first purpose of the fresh start is to provide a "private" benefit to the debtor.[58] This benefit derives from having a "new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[59] The Court thus was willing to presume that unmanageable debt pressures and discourages the debtor, and that relief from that pressure and discouragement was a "primary" purpose of the then-existing Bankruptcy Act.[60]

The fresh start's second purpose is to provide a "public" benefit.[61] *Hunt* does not specify what the public benefit is, but it is reasonable to suppose that it relates to society's benefit from the debtor's ability to participate fully in social and economic life, the purposes later recognized in the Commission's Report.[62] That the fresh start avoids "pauperism," as *Hunt* noted, seems to serve both the private and the public purpose.[63] Debtors may become paupers because their earnings are devoted entirely to debt or because their debt burden discourages them from working at all. Neither debtors themselves nor the public at large want this result.

The discussion of the fresh start in *Hunt* built on several prior decisions endorsing the fresh start as a chief purpose of the Bankruptcy Act.[64] *Hunt*'s discussion of the fresh start also has been incorporated into many subsequent Supreme Court decisions, both before[65] and after[66] enactment of the Bankruptcy Code in 1978. In general, little has been added to *Hunt's* explanation of the fresh start. The Court elaborated slightly in the 1966 case *Segal v. Rochelle*, recognizing that a purpose of the fresh start is to "leave the bankrupt free . . . to accumulate new wealth in

57. *Id.* at 244 (noting that the "purpose of the act . . . [is] of public as well as private interest"); *id.* at 245 (stating that preserving the "power of the individual to earn a living" is "a matter of great public concern").

58. *Id.* at 244–45.

59. *Id.* at 244.

60. *Id.*

61. *Id.* at 244–45.

62. H.R. DOC. NO. 93-137, pt. 1, at 68, 71 (1973) (discussing the rehabilitative function of the fresh start policy).

63. 292 U.S. at 245.

64. *See* Stellwagen v. Clum, 245 U.S. 605, 617 (1918); Burlingham v. Crouse, 228 U.S. 459, 473 (1913); Wetmore v. Markoe, 196 U.S. 68, 77 (1904); *see also* Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 188, 192 (1902) (stating that "[t]he subject of 'bankruptcies' includes the power to" liberate "the honest and unfortunate debtor . . . from encumbrance on future exertion"); Neal v. Clark, 95 U.S. 704, 709 (1877) (noting that bankruptcy is "a general law by which the honest citizen may be relieved from the burden of hopeless insolvency").

65. *See* Kokoszka v. Belford, 417 U.S. 642, 647 (1974); Lines v. Frederick, 400 U.S. 18, 20 (1970) (per curiam).

66. *See* Grogan v. Garner, 498 U.S. 279, 286–87 (1991) (observing that a "fresh start" for the "honest but unfortunate debtor" is "a central purpose" of the Code) (citing Local Loan Co. v. Hunt, 292 U.S. 234 (1934)); *see also* Schwab v. Reilly, 560 U.S. 770, 791 (2010) (describing the "fresh start" as a "fundamental bankruptcy concept") (citing Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007))); *Marrama*, 549 U.S. at 367 ("The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'") (quoting *Grogan*, 498 U.S. at 286–87)).

the future."[67]

Hunt makes another point that is relevant to the interaction of undue hardship and IDR. It held that wage assignments were unenforceable post-discharge even though the "amount of the indebtedness, or the proportion of wages assigned, may here be small," holding that the "principle, once established, will equally apply where both are very great."[68] The Court thus found that the fresh-start policy supports discharge even in a case where the actual intrusion on the debtor's income was small.

The Court has mentioned the relationship between the fresh-start policy and the exceptions to discharge on at least one occasion. In *Grogan v. Garner*, the Court described the discharge exceptions, including the one for "certain unpaid educational loans," as covering categories of debts for which "Congress evidently concluded that the creditors' interest in recovering full payment of debts . . . outweighed the debtors' interest in a complete fresh start."[69] The Court thus found that the discharge exceptions balance competing policies.[70] In determining the sweep of an exception of uncertain scope, it is appropriate to balance the policies on a fact-intensive basis. That is the approach this Article follows.

3. Conclusion: Purposes of Fresh Start

The legislative history and Supreme Court precedent on the fresh start reveal two principal purposes. The first is to reduce debtor suffering.[71] "Too much" debt imposes a hardship through its attendant "worries and pressures."[72] There is no indication that the unaffordability of payments is the only problem of "too much" debt that the fresh start is to address—instead, the fresh start seems intended to combat any harms potentially arising from outstanding debt that the debtor cannot retire. Thus, even if the debtor can afford IDR payments—in that she is able to make the monthly payments—other debt-related hardships would activate the fresh-start policy.[73]

The second purpose of the fresh start is to help the debtor participate fully in the economy and society.[74] It applies, for example, when debt interferes with the debtor's ability to engage in credit transactions or discourages the debtor from earning. This purpose can apply even when IDR payments are low.[75]

67. 382 U.S. 375, 379 (1966); *see also Kokoszka*, 417 U.S. at 646 (noting "the intent of Congress 'to leave the bankrupt free after the date of his petition to accumulate new wealth in the future' and thus 'make an unencumbered fresh start'") (citation omitted) (quoting *Segal*, 382 U.S. at 379, 380).

68. *Hunt*, 292 U.S. at 245.

69. 498 U.S. 279, 287 (1991). The opinion does not specifically mention the anti-abuse purpose of student-loan nondischargeability. However, the opinion is consistent with the idea that in situations of actual or presumed abuse, the interest in a fresh start is weak and therefore outweighed by the creditor's interest in payment.

70. *Id*.

71. *See supra* notes 42–45 and accompanying text.

72. H.R. REP. NO. 95-595, at 125 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6068.

73. For further discussion, see *infra* Section III.A.2.a.

74. *See supra* notes 46–51 and accompanying text.

75. *See* discussion *infra* Section III.A.2.b.

Hunt held that a post-discharge enforcement of a wage assignment was impermissible, even though "the proportion of wages assigned may here be small."[76] Thus, fresh-start policies forbid imposing even numerically insignificant encumbrances on the bankrupt debtor. The fact that IDR payments may be small should not in itself foreclose discharge.

Despite the strength of the fresh-start policy, it may be outweighed in a particular case by concerns about the debtor's potential "fraud or similar conduct," or about the creditor's ability to afford the loss.[77] The student-loan exception to dischargeability and the undue-hardship exception to the exception invite such a balancing of the fresh-start policies against these other interests.

B. STUDENT-LOAN NONDISCHARGEABILITY AND THE UNDUE-HARDSHIP EXCEPTION

The Supreme Court has not discussed the scope of the student-loan exception to dischargeability,[78] so this section addresses only the legislative history of the exception and of its own exception for undue hardship.[79] Specifically, this section traces student-loan nondischargeability from when it was initially proposed in the 1973 *Report of the Commission on the Bankruptcy Laws of the United States*, through its adoption in the Education Amendments of 1976, to its retention after substantial debate in the Bankruptcy Reform Act of 1978, which enacted the modern Bankruptcy Code. This section then discusses the expansion of student-loan nondischargeability in the Crime Control Act of 1990, the Higher Education Amendments of 1998, and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

The key conclusions are that the underlying purposes of the student-loan exception are to combat abuse and to promote financial recovery, but that the first purpose—to combat abuse—applies only when discharge is sought during the first five years of repayment. The reason for the latter conclusion is that student-loan nondischargeability after the five-year mark was explained in Congress purely as a means of enhancing financial recovery, not as a way of policing debtor abuse.

---

76. Local Loan Co. v. Hunt, 292 U.S. 234, 245 (1934) (punctuation omitted).

77. *See* H.R. DOC. NO. 93-137, pt. 1, at 80 (1973).

78. However, the Supreme Court has addressed other aspects of the student-loan exception. *See* U.S. Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 273–74 (2010) (stating that an order discharging student loans without a finding of undue hardship is erroneous but not void); Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 443–44 (2004) (holding that an adversary proceeding may be brought against a state entity to determine undue hardship despite state sovereign immunity).

79. Other authors have discussed the legislative history of the student-loan exception and the undue-hardship provision. *See* Michael & Phelps, *supra* note 11, at 77–81; 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. 405, 419–28 (2005). This Article presents additional information about the history of the student-loan exception and offers a new assessment of the overall import of that history as it relates to IDR and the undue-hardship requirement.

1. The 1973 Commission Report

The legislative history of the student-loan exception begins with the *Report of the Commission on the Bankruptcy Laws of the United States*, discussed above.[80] The Commission recommended that educational debts be made nondischargeable for the first five years of repayment, provided that the debt's "payment from future income or other wealth will not impose an undue hardship on the debtor and his dependents."[81]

The Commission wanted to avoid "the possibility that the right to a discharge may be abused" by "the use of bankruptcy to avoid payment of an educational loan without any real attempt to repay the loan,"[82] because "such abuses discredit the system and cause disrespect for the law and those charged with its administration."[83] Although the Commission noted that it had received testimony that "easy availability of discharge from educational loans threatens the survival of existing educational loan programs,"[84] it stated that it was "not aware of any evidence" that graduates' abuse of the system was a "significant problem[] numerically."[85]

In notes explaining the nondischargeability recommendation, the Commission stated that

> a loan . . . extended to finance higher education that enables a person to earn substantially greater income over his working life should not as a matter of policy be dischargeable before he has demonstrated that for any reason he is unable to earn sufficient income to maintain himself and his dependents and to repay the educational debt.[86]

The Commission wrote that, although "[i]n usual circumstances, suspending dischargeability of the debt for five years is fair to both the debtor and the creditor," the undue-hardship exception "recognizes that in some circumstances the debtor, because of factors beyond his reasonable control, may be unable to earn an income adequate both to meet the living costs of himself and his dependents and to make the educational debt payments."[87] The Commission defended the

---

80. *See supra* notes 39–41 and accompanying text.

81. H.R. DOC. NO. 93-137, pt. 2, at 136 (1973).

82. H.R. DOC. NO. 93-137, pt. 1, at 170; *see also id.* at 176–77 (reporting that the Commission found it "reprehensible" and "a threat to the continuance of educational loan programs" that "[s]ome individuals have financed their education and upon graduation have filed petitions under the Bankruptcy Act and obtained a discharge without any attempt to repay the educational loan and without the presence of any extenuating circumstance").

83. *Id.* at 170.

84. *Id.* at 11.

85. *Id.* at 170; *see also id.* at 178 n.5 (noting Commission staff calculation that for Guaranteed Loan Program loans, the ultimate bankruptcy rate was 0.69 percent). *But see* H.R. DOC. NO. 93-137, pt. 2, at 140 (stating that student loan nondischargeability provision "responds to the rising incidence of consumer bankruptcies of former students motivated primarily to avoid payment of educational loan debts" and that "[i]t can be anticipated that the incidence will continue to increase as greater numbers of higher educational loans become payable").

86. H.R. DOC. NO. 93-137, pt. 2, at 140.

87. *Id.*

limited nature of the proposed nondischargeability provision on the ground that a limited rule "distinguish[es] between persons scheduling educational debts who, under the general 'fresh start' policy of the proposed Act, should and those who should not be enabled to discharge them."[88]

In sum, the Commission's Report recognized that the fresh-start policy applies to student debtors as well as to other debtors. Although the Report is not entirely clear, the overall thrust seems to be that student-loan dischargeability should be restricted to counter potential abuse, with abuse defined as seeking a discharge without making any real attempt to repay the loan, particularly where the borrower's education allows him or her to earn a "substantially greater income."[89] The Commission did not urge that discharge be restricted because inescapable student loan debt is any less onerous than other types of inescapable debt. With its recommendation that student loans be dischargeable after five years even without undue hardship, the Commission's Report can be understood to say that the suspicion of abuse is dispelled after a loan has been in repayment for five years.

2. The Education Amendments of 1976

In 1976, a student-loan exception to dischargeability entered into law as section 439A of the Higher Education Act of 1965.[90] The exception followed the Commission's proposal: Section 439A provided that federally insured or guaranteed loans could be discharged in bankruptcy only after five years had passed, unless the court determined that "payment from future income or other wealth will impose an undue hardship on the debtor or his dependents."[91]

The Senate's higher education bill called for an *unconditional* five-year bar to dischargeability—that is, a five-year bar with no provision for undue hardship.[92] The report of the Senate Committee on Labor and Public Welfare, noting testimony that student-loan bankruptcies were on the rise, stated:

> The Committee bill seeks to eliminate the defense of bankruptcy for a five-year period, to avoid the situation where a student, *upon graduation*, files for a discharge of his loan obligation in bankruptcy, then enters upon his working career free of the debt he rightfully owes. After a five-year period, an individual who has been faithfully repaying his loan may really become bankrupt. He should not be denied this right, and is not under the Committee bill.[93]

The Senate bill appeared to target abuse, with abuse defined as seeking a discharge of student-loan debt immediately upon graduation. The bill seems to

88. *Id.*
89. *Id.*
90. Education Amendments of 1976, Pub. L. No. 94-482, § 127(a), 90 Stat. 2081, 2141 (adding § 439A to Higher Education Act of 1965) (repealed 1978).
91. *Id.*
92. *See* S. REP. NO. 94-882, at 244 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 4713, 4860.
93. *Id.* at 32, *as reprinted in* 1976 U.S.C.C.A.N. 4713, 4744 (emphasis added).

contemplate that any suggestion of abuse is overcome after five years, at least where the debtor "has been faithfully repaying his loan."[94]

The House bill also contained a five-year bar to dischargeability, but included an exception for undue hardship.[95] In support of nondischargeability, the report of the House Committee on Education and Labor, like that of the Senate's Labor Committee, pointed to testimony that student-loan bankruptcies were on the rise, as well as to the claim that "in some areas of the country students are being counseled on filing for bankruptcy to discharge their obligation to repay guaranteed student loans."[96] The House Committee Report noted that students who graduate with large loans and no assets would be "technically eligible to declare bankruptcy," and argued that the five-year bar on discharge "would offer a more realistic view on the student's ability to repay a student loan."[97] The only guidance the House Committee Report gave on the meaning of "undue hardship" was that the hardship provision applied "in cases where exceptional circumstances exist" and that "[t]he decision in these cases would be up to the bankruptcy referee."[98]

The House Committee Report included a statement from Representative James O'Hara strongly opposing the student-loan exception to dischargeability.[99] Representative O'Hara's principal argument was that student borrowers were not going bankrupt at a rate higher than that of the general population, suggesting that special restrictions on the discharge of student loans were not warranted.[100] O'Hara characterized the arguments for the student-loan exception as based on the assumption that student borrowers were abusing bankruptcy: "The proponents of this amendment assert that a large and growing number of students are cheating the government by utilizing a loophole in the law which enables them to simply, easily, and harmlessly evade paying their debts."[101]

When the chambers' respective bills were debated on the floor, discussion of the student-loan exception was nonexistent in the House and limited in the Senate. In the Senate floor debate on the 1976 Education Amendments, five senators spoke for nondischargeability and none spoke against it.[102] Only two senators stated reasons for creating a student-loan exception to dischargeability, and both made arguments that centered on abuse.[103] Senator Percy of Illinois stated that the bar to dischargeability would "go a long way toward curbing the abuses and

94. *Id.*

95. H.R. REP. NO. 94-1232, at 67 (1976). *But see id.* at 73–77 (statement of Rep. James G. O'Hara) (expressing disapproval of undue hardship exception).

96. *Id.* at 13–14.

97. *Id.* at 14.

98. *Id.*

99. *Id.* at 73–77.

100. *Id.* at 75 (citing testimony that "students are not going into bankruptcy *more than other people*.") (emphasis added)).

101. *Id.* at 73.

102. *See* 122 CONG. REC. 27,977–78 (1976) (statement of Sen. Percy); *id.* at 28,027 (statement of Sen. Williams); *id.* at 28,033 (statement of Sen. Taft); *id.* at 28,037–38 (statement of Sen. Beall); *id.* at 28,041 (statement of Sen. Domenici).

103. *See id.* at 27,038, 27,978.

the growing default rate of the guaranteed student loan program so that the needed moneys might properly reach the intended beneficiaries—students in need."[104] Senator Beall of Maryland argued that the bar to dischargeability "will save the taxpayers money and prevent . . . abuses."[105] He illustrated abuse with the story of "a legal aid lawyer and his wife" in Arkansas who discharged their student loans in bankruptcy, apparently immediately after graduation.[106] Again, "abuse[]" of bankruptcy, manifested by seeking a discharge immediately after graduation, was an evil adequately addressed by a five-year period of conditional nondischargeability.[107]

The subsequent legislative history reveals nothing further about the purpose of student-loan nondischargeability,[108] which entered the Education Amendments of 1976.[109] The Education Amendments became law on October 12, 1976.[110]

3. The Bankruptcy Reform Act of 1978

The student-loan exception to dischargeability in the Education Amendments of 1976 was soon replaced with a substantially identical provision in the Bankruptcy Reform Act of 1978, which enacted the Bankruptcy Code.[111] The legislative history of the Bankruptcy Reform Act addresses student-loan nondischargeability at some length.[112]

The Judiciary Committee Report on the House version of the bankruptcy bill recommended that student loans again be made unconditionally dischargeable.[113] The Report's position was ultimately rejected, but it sheds some light on the arguments in favor of student-loan nondischargeability. It noted that the "rate of educational loans discharged in bankruptcy has risen dramatically in recent years," and that "a few serious abuses of the bankruptcy laws by debtors with large amounts of educational loans, few other debts and well-paying jobs, who have filed bankruptcy shortly after leaving school and before any loans became due,

104. *Id.* at 27,978.

105. *Id.* at 28,038.

106. *Id.* at 28,037. Senator Beall stated that the couple was able to claim bankruptcy successfully because "bankruptcy proceedings only require the listing of earnings for the 2-year period prior to filing" and the debtors had been students during that period. *Id.*

107. *Id.* at 28,037–38 (statement of Sen. Beall).

108. *See* H.R. REP. NO. 94-1701, at 196 (1976) (Conf. Rep.), *as reprinted in* 1976 U.S.C.C.A.N. 4877, 4897 (indicating only that the appropriate court would determine undue hardship); 122 CONG. REC. 33,639 (statement of Rep. Perkins) (stating only that nondischargeability was part of the bill without explanation).

109. Pub. L. No. 94-482, § 127(a), 90 Stat. 2081, 2141 (1976) (repealed 1978).

110. *Id.* However, the provision did not go into effect until 1977. The proponents reportedly agreed to this delay in part to avoid a jurisdictional objection from the House Judiciary Committee, which was working on a comprehensive bankruptcy reform but to which the Education Amendments of 1976 had not been referred. *See* Pardo & Lacey, *supra* note 79, at 422.

111. Pub. L. No. 95-598, § 523, 92 Stat. 2549, 2590–91 (codified at 11 U.S.C. § 523(a)(8) (2012)).

112. *See* H.R. REP. NO. 95-595, at 132–62 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6093–6123 (devoting over 30 pages to nondischargeability in the House Judiciary Committee Report); 124 CONG. REC. 1791–98 (1978) (containing eight-pages of floor debate on nondischargeability).

113. H.R. REP. NO. 95-595, at 132.

have generated the movement for an exception to the discharge."[114] The report also noted the argument that student loans are unfit for discharge in bankruptcy because they are "made without business considerations . . . relying for repayment solely on the debtor's future increased income resulting from the education."[115] The premise of the latter argument appears to be that the loan does in fact increase the debtor's earning power.

The House version of the bankruptcy bill, as reported out of committee, would have repealed the 1976 provision limiting student-loan dischargeability. It would have provided that student loans could be discharged on the same basis as most unsecured debts.[116] However, the House bill was amended on the floor to reintroduce nondischargeability of student debts for five years except in cases of undue hardship.[117] The House floor debate on student-loan nondischargeability provides significant insight into the purpose of barring student-loan dischargeability.

Although proponents of nondischargeability asserted that the rate of student-loan bankruptcies was increasing[118] and that such bankruptcies were numerous,[119] the principal concern was the perceived abuses of bankruptcy. The paradigm case of abuse was the hypothetical borrower who discharged her debt immediately upon graduation without making any effort to repay the debt while enjoying an increased salary because of the education the debt made possible.

As Representative Allen Ertel of Pennsylvania, sponsor of the nondischargeability amendment,[120] put it:

> What [the nondischargeability provision] does prevent is that when a student gets through school, having taken a student loan, comes out, and says, "Well, it is nice to get a fresh start. I will not pay back my loan. I will declare bankruptcy and I will not have to worry about it." And discharge the only loan they have which is a student loan.[121]

Another proponent of nondischargeability, Representative John Erlenborn of Illinois, framed the issue in similar terms. Erlenborn argued that the student "pledg[es] his future earning power"[122] to repay his or her debts, given that the student "would not, in the ordinary course of events, be able to obtain credit."[123] Under those circumstances, "[h]aving pledged that future earning power, if,

114. *Id.* at 133.

115. *Id.*

116. *See* H.R. 8200, 95th Cong. § 101 (as referred to the H. Comm. on the Judiciary, July 11, 1977) (repealing section 439A of the Higher Education Act of 1965). This version of the House bankruptcy bill did not contain a replacement for section 439A.

117. *See* 124 CONG. REC. 1791 (1978) (offering amendment); *id.* at 1798 (adopting amendment).

118. *Id.* at 1792 (statement of Rep. Ertel); *id.* at 1792 (statement of Rep. Mottl); *id.* at 1794 (statement of Rep. Erlenborn).

119. *Id.* at 1793 (statement of Rep. Ertel).

120. *Id.* at 1791.

121. *Id.* at 1792.

122. *Id.* at 1793; *see also id.* at 1792 (statement of Rep. Ertel) (noting that student loan borrower's "collateral is the ability he will have to make a better living after he has gotten that education").

123. *Id.* at 1793.

shortly after graduation and before having an opportunity to get assets to repay the debt, [the graduate] seeks to discharge that obligation, I say that is tantamount to fraud."[124]

Proponents argued that nondischargeability was necessary to save the student loan program,[125] not just because bankruptcies were harming the program financially, but also because they undermined public support for student lending.[126] Representative Erlenborn argued that "the street-wise student who is avoiding his obligation and making the taxpayers pick up the tab for him is going to discredit [the student loan] program."[127]

Representative Bob Michel presented a frankly moralistic appeal. He sidestepped the debate over the frequency of student-loan bankruptcies, stating, "the number of bankruptcies is not so important as the principle involved," and that the issue was one "of moral, not financial dimensions."[128] The controlling principle, in his view, was that of "individual responsibility," the view of "every individual as a responsible moral being."[129] Allowing student bankruptcies to continue would "allow[] the element of irresponsibility to gain an accepted place in our national life."[130] Contrasting student-loan debtors who sought discharge with "the vast majority of students who are trying their best to live up to high standards of responsibility," Michel concluded that "it is time we do what is right for all students and that means . . . putting ourselves on the side of the majority of young men and women who want to do the right thing, even against great odds."[131]

Given that seeking a discharge immediately upon graduation was the paradigm case that nondischargeability was supposed to solve, it is not surprising that proponents of nondischargeability emphasized that student loans would be dischargeable after five years. Representative Ertel stated:

124. *Id.*; *see also id.* at 1797 (statement of Rep. Erlenborn) ("[W]e should remember that these are people who have graduated from school and who have pledged their initial earnings and who are now reneging on their pledge."). Despite Representative Erlenborn's description, nondischargeability applied then and applies now to student loans of students who do not graduate as well as to loans made to graduates. *See* 11 U.S.C. § 523(a)(8) (2012) (providing no exception to nondischargeability for students who do not graduate).

125. 124 CONG. REC. 1792 (1978) (statement of Rep. Ertel) (claiming that the purpose of the amendment reinstating nondischargeability is "to keep the student loan program going, and to keep it viable."); *id.* (statement of Rep. Mottl) ("If the student loan program is to remain viable it is imperative we pass this amendment . . . ."); *id.* at 1797 (statement of Rep. Ertel) ("We are trying to protect future students, to make their loans viable . . . .").

126. *Id.* at 1792 (statement of Rep. Ertel) (noting that defaults "penaliz[e] students who are coming along through the system" because loan repayments go into a "revolving fund which is then available for other students on down the line").

127. *Id.* at 1794.

128. *Id.* at 1795.

129. *Id.*

130. *Id.* (statement of Rep. Michel).

131. *Id.*

> By letting a person out of his debts immediately we do not even give a person a chance to earn enough to pay his debts. During the 5-year period he has an opportunity to accumulate assets, so he will not want to discharge himself in bankruptcy after the 5 years.[132]

Proponents of nondischargeability indicated that the undue-hardship exception would be used only rarely,[133] at least as long as debts became dischargeable after five years. Hardship discharge was said to be appropriate in cases where the debtor was faced with a "medical problem,"[134] a spouse's "severe illness,"[135] or the debtor's inability to get a job.[136]

The Senate bill also contained a five-year bar to dischargeability with an undue-hardship exception,[137] although the Senate bill's provision covered a slightly different set of loans.[138] After a compromise on the loans covered by the bar to dischargeability,[139] the five-year bar with an undue-hardship exception was enacted as part of the 1978 Bankruptcy Code.[140]

4. The Crime Control Act of 1990

Student borrowers' ability to discharge their debts after five years, even without undue hardship, was important when the dischargeability bar was adopted in the Education Amendments of 1976 and then readopted in the Bankruptcy Code of 1978. However, the ability to get a discharge without showing undue hardship after the passage of a specified period of time was restricted in the Crime Control Act of 1990[141] and eliminated entirely in the Higher Education Amendments of

---

132. *Id.* at 1794; *see also id.* (statement of Rep. Ertel) ("It is only during that 5-year period when he is prevented. After the 5-year period, if he has not been able to accumulate assets, he can go into bankruptcy."); *id.* at 1797 (statement of Rep. Ertel) ("I would point out that the amendment as proposed only delays the ability to be discharged for a period of 5 years and allows that person to be discharged if he shows severe hardship.").

133. *Id.* at 1791 (statement of Rep. Ertel) (pointing out an exception to nondischargeability for severe hardship); *id.* (statement of Rep. Ertel) (describing discharge as available "if the ex-student has severe financial problems"); *id.* at 1795 (statement of Rep. Michel) (noting that "hardship cases" where "bankruptcy is unavoidable . . . are exceptions").

134. *Id.* at 1792 (statement of Rep. Ertel).

135. *Id.* (statement of Rep. Ertel).

136. *Id.* at 1797 (statement of Rep. Butler) (raising issue of inability to get a job as an argument against nondischargeability); *id.* (statement of Rep. Erlenborn) (calling Representative Butler's argument "very persuasive" but pointing to undue-hardship exception as an answer).

137. *See* S. 2266, 95th Cong. § 521 (as amended by Sen. Long, Aug. 10, 1978) (proposing § 523(a)(8) of Bankruptcy Code, providing for nondischargeability of educational debt for five years unless undue hardship is present).

138. The House version, as amended, covered loans "insured or guaranteed under part B of title IV of the Higher Education Act of 1965," 124 CONG. REC. 1791 (1978), and the Senate bill covered "educational" loans, S. 2266, 95th Cong., § 101 (1978).

139. *See* 124 CONG. REC. 32,399 (1978) (describing House–Senate compromise over scope of § 523(a)(8) in House Congressional Record); *id.* at 33,998 (same in Senate Congressional Record).

140. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523(a)(8)(A), 92 Stat. 2549, 2591 (including § 523(a)(8) in Bankruptcy Code).

141. Pub. L. No, 101-647, § 3621(2), 104 Stat. 4789, 4965.

1998.[142] Both statutes amended the student-loan nondischargeability provision.

The Federal Debt Collection Procedures Act (FDCPA) was contained as in Title XXXVI of the Crime Control Act of 1990.[143] The FDCPA was mainly concerned with creating a uniform system for collection of debts owed the government, supplanting existing rules that required collection under varying state laws.[144] Among its provisions was one that provided that student loan debts could be discharged without undue hardship only after seven, not five, years had passed.[145] Although the earliest versions of the bill, introduced in the House and Senate in 1988, provided for a ten-year nondischargeability period,[146] the proposed period was later reduced to seven years.[147] The seven-year period appeared in each of the several subsequent bills that culminated in the FDCPA[148] and was included in the FDCPA itself.[149]

A group of Assistant U.S. Attorneys prepared the initial draft of the FDCPA, and the FDCPA had the support of all ninety-three sitting U.S. Attorneys.[150] When the House took up the FDCPA after it had passed the Senate, a U.S. Attorney involved with the drafting process stated in written testimony that "[t]he limitation period is extended in the Senate on these claims from five to seven years in recognition of the lengthy processing and enforcement requirements. We recommend a further extension to 10 years."[151] This committee witness's statement about processing and enforcement requirements appears to be the only statement about the reason for extending student-loan nondischargeability that appears in the legislative history of the FDCPA, at least from the introduction of the first bills in the House and Senate forward. The concern is about processing and enforcement requirements related to the government's ability to collect loans

142. *See* Pub. L. No. 105-244, § 971(a), 112 Stat. 1581, 1837 (requiring undue hardship for all student-loan discharges). For further discussion of this aspect of the Higher Education Amendments of 1978, see *infra* Section I.B.5.

143. Pub. L. No, 101-647, §§ 3601–31, 104 Stat. at 4933–66.

144. *See, e.g.*, H.R. REP. NO. 101-736, at 23 (1990) ("Creation of a uniform federal framework for the collection of Federal debts in the Federal courts will improve the efficiency and speed in collecting those debts, thereby lessening the effect of delinquent debts on the massive federal budget deficit now undermining the economic well-being of the Nation.").

145. Pub. L. No, 101-647, § 3621(2), 104. Stat. at 4965.

146. H.R. 3984, 100th Cong. § 205 (as referred to the H. Comm. on the Judiciary, Feb. 22, 1988); S. 1961, 100th Cong. § 205 (as referred to S. Comm. on the Judiciary, Dec. 15, 1987).

147. S. 1961, 100th Cong. § 613 (as referred to S. Comm. on the Judiciary, Oct. 19, 1988).

148. S. 84, 101st Cong. § 203 (as passed by Senate Nov. 3, 1989 (*see* 135 CONG. REC. 27,168 (1989))); H.R. 5640, 101st Cong., § 201 (as referred to H. Comm. on the Judiciary, Sept. 18, 1990); S. 3266, 101st Cong. § 3621 (as passed by both houses, Oct. 27, 1990 (*see* 136 CONG. REC. 13,288 (1990) (passing in the House), *id.* at 17,595 (passing in the Senate))).

149. Crime Control Act of 1990, Pub. L. No, 101-647, § 3621(2), 104 Stat. 4789, 4965.

150. *The Federal Debt Collection Procedures Act of 1988: Hearing on S. 1961 Before the Subcomm. on Courts & Admin. Practice of the S. Comm. on the Judiciary*, 100th Cong. 141 (April 15, 1988) (statement of Hon. Vinton DeVane Lide, U.S. Attorney, D.S.C.).

151. *Federal Debt Collection Procedures: Hearing Before the Subcomm. on Econ. & Commercial Law of the H. Comm. on the Judiciar*y, 101st Cong. 75 (June 14, 1990) [hereinafter *June 14, 1990 Hearing*] (response of Hon. Bob Wortham, U.S. Attorney, E.D. Tex., to questions from Chairman Rep. Brooks).

within the nondischargeability period. The available evidence suggests that increasing government financial recovery was the purpose of extending the nondischargeability period in the Crime Control Act of 1990.

5. The Higher Education Amendments of 1998

In the Higher Education Amendments of 1998, Congress entirely eliminated debtors' ability to discharge student loans without showing undue hardship.[152] The limited legislative history pertaining to this change, which appeared abruptly after the House–Senate conference that produced the final version of the statute, suggests that the amendment was intended for the limited purpose of enhancing government financial recovery. The single paragraph the conference report devoted to the new provision stated that it was a revenue-recovery measure:

> The conferees, in the effort to ensure the budget neutrality of this bill, adopted a provision eliminating the current bankruptcy discharge for student borrowers after they have been in repayment for seven years. The conferees note that this change does not affect the current provisions allowing any student borrower to discharge a student loan during bankruptcy if they can prove undue economic hardship. The conferees also note the availability of various options to increase the affordability of student loan debt, including deferment, forbearance, cancellation and extended, graduated, income-contingent and income-sensitive repayment options.[153]

On the Senate floor, Senator James Jeffords of Vermont indicated that the conference made the "difficult" decision to end unconditional dischargeability of student loans in order to "compl[y] with the Budget Act" and "bring the bill into balance."[154] In particular, removing the discharge was intended to preserve other student benefits, including extended repayment. Senator Jeffords stated:

> Individuals who file for bankruptcy may still have their student loans canceled if the bankruptcy court determines that repaying the loans would cause undue hardship. Currently, the undue hardship option accounts for 70 percent of all student loan discharges. In addition, a number of options are available to assist borrowers who are having difficulties repaying their loans, including deferment, forbearance, cancellation, and extended, graduated, income-contingent and income-sensitive repayment options. In just about every case, these options are preferable to declaring bankruptcy.[155]

As with the extension of the nondischargeability period to seven years in 1990, Congress was not expressing a judgment that it is presumptively abusive to seek discharge; it was simply trying to increase government financial recoveries.

152. Pub. L. No. 105-244, § 971(a), 112 Stat. 1581, 1837.

153. H.R. REP. NO. 105-750, at 408 (1998) (Conf. Rep.), *as reprinted in* 1998 U.S.C.C.A.N. 404, 812.

154. 144 CONG. REC. 22,680 (1998).

155. *Id.*

6. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) for the first time required a showing of undue hardship to discharge not just government-issued or government-backed student-loan debt, but also private student-loan debt.[156] This provision has minimal legislative history.[157] It appears to have originated with a floor amendment offered by Representative Lindsey Graham of South Carolina on May 5, 1999, to a predecessor bill to the BAPCPA.[158] There was little debate on the amendment. Representative Graham stated that "we are trying to give the private lender the same protection under bankruptcy that the federally guaranteed loan program has" and that the amendment was aimed at trying to ensure that "the loan volume necessary to take care of college expenses are available for students."[159] No one spoke in opposition. The BAPCPA provision does not appear to affect the analysis of the underlying purpose of the student-loan exception to dischargeability, although it apparently extends the financial-recovery goal to cover private loans.

7. Conclusion: Purposes of Student-Loan Exception and Undue-Hardship Requirement

The Commission Report stated that the "general 'fresh start' policy" applies to student loans, and there is no indication in the legislative history of the student-loan exception that the policies underlying the fresh start are inapplicable to students or student loans. [160] No one said that student loans cannot be overwhelming and cause suffering or that students as a class should be disabled by debt from full participation in the economy or society. When applying the student-loan exception and the undue-hardship requirement, courts should recognize that students are entitled to a fresh start unless the fresh-start policies are outweighed in a particular case by the policies underlying the student-loan exception. In other words, the hardship of denying discharge is "undue" unless the relevant considerations on balance disfavor discharge.

The first such consideration, applicable for the first five years of repayment, is the desire to counter "irresponsibility"[161] that was seen as "abuse[],"[162] indeed,

156. Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (amending § 523(a)(8) of Bankruptcy Code to include provision covering private educational loans).

157. *See* Nunez v. Key Educ. Res./GLESI (*In re* Nunez), 527 B.R. 410, 413 (Bankr. D. Or. 2015) ("The legislative history with respect to BAPCPA's amendments to § 523(a)(8) is sparse . . . ." (citing only H.R. REP. NO. 109-31 (2005) as example of legislative history)); H.R. REP. NO. 109-31, at 62, *as reprinted in* 2005 U.S.C.C.A.N. 88, 131–32 (paraphrasing text of § 220 of BAPCPA but giving no rationale).

158. 145 CONG. REC. 8566–67 (1999).

159. *Id.* at 8567.

160. H.R. DOC. NO. 93-137, pt. 2, at 140 (1973).

161. 124 CONG. REC. 1795 (1978) (statement of Rep. Michel).

162. H.R. DOC. NO. 93-137, pt. 1, at 170; H.R. REP. NO. 95-595, at 133 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6094; 122 CONG. REC. 27,978 (1976) (statement of Sen. Percy); *id.* at 28,038 (statement of Sen. Beall).

"tantamount to fraud."[163] The bad conduct in question was discharging student loans "shortly after graduation"[164] and "without any real attempt to repay the loan[s]"[165] before embarking on a lucrative career that those very loans had made possible.[166] After all, the basis for extending student loans was the student's "future earning power,"[167] so the graduate—and the discussion was exclusively about graduates, not student-loan debtors who did not graduate—should be required to use that earning power to service the loans. Congress decided to combat that problem by making student loans conditionally nondischargeable for five years. It made the judgment that for the first five years, a presumption of abuse applied to the student debtor.

The moral judgment pronounced on opportunistic student-loan debtors when Congress adopted five-year conditional nondischargeability[168] was notably absent when the period of conditional nondischargeability was extended, first to seven years, and then to an unlimited period. The objective in extending the nondischargeability period was not fighting abuse. Rather, it was promoting government[169] recovery of funds: dealing with "lengthy processing and enforcement requirements"[170] faced by U.S. Attorneys in collection, and ensuring the "budget neutrality" of the Higher Education Amendments of 1998.[171]

These observations suggest that the considerations at issue shift when loans have been in repayment for five years. Before the five-year mark, student-loan debtors labor under a presumption of opportunism or abuse. Courts should balance the fresh-start objectives discussed above against both Congress's moral opprobrium for quick-discharging debtors and the desirability of recovering funds. After the five-year mark, the balance is simply between the fresh start on the one hand and the interest in recovering funds on the other.

The legislative history also suggests that the policy against dischargeability applies primarily when the student's education actually equips her to increase her earnings. In undue-hardship proceedings, this is frequently not the case.[172]

---

163. 124 CONG. REC. 1793 (1978) (statement of Rep. Erlenborn).

164. *Id.*; *see also* S. REP. NO. 94-882, at 32 (1976) (noting that nondischargeability protects against student debtors' filing for bankruptcy immediately "upon graduation").

165. H.R. DOC. NO. 93-137, pt. 1, at 170.

166. H.R. DOC. NO. 93-137, pt. 2, at 140.

167. 124 CONG. REC. 1793 (1978) (statement of Rep. Erlenborn).

168. *See, e.g.*, *supra* notes 118–31 and accompanying text.

169. A pro-creditor reading of BAPCPA would be that that statute extended to private student-loan creditors the same solicitude for financial recovery that the government already enjoyed.

170. *June 14, 1990 Hearing*, *supra* note 151, at 75 (response of Hon. Bob Wortham, U.S. Attorney, E.D. Tex., to questions from Chairman, Rep. Brooks).

171. H.R. REP. NO. 105-750, at 408 (1998), *as reprinted in* 1998 U.S.C.C.A.N. 404, 812.

172. *See, e.g.*, Coco v. N.J. Higher Educ. Student Assistance Auth. (*In re* Coco), 335 F. App'x 224, 229 (3d Cir. 2009) ("After Coco's loans became due, it appears that she struggled—often below the poverty line—for more than a decade before applying for bankruptcy."); Najafian v. Educ. Credit Mgmt. Corp., No. 1:12-cv-01408, 2013 U.S. Dist. LEXIS 50040, at *3, *10 (E.D. Va. April 5, 2013) (upholding denial of discharge for a sixty-five year old physician who was unemployed and homeless despite "extensive efforts to obtain employment as an ophthalmologist all over the country" because debtor sought employment only as a physician).

Finally, the legislative history indicates that the undue-hardship exception to student-loan nondischargeability was expected to apply only in exceptional cases.[173] This expectation has come to pass: only a minuscule fraction of student-loan debts are discharged in bankruptcy, and student-loan discharge would remain exceptional even if the rate of discharge increased dramatically.[174] Representative Ertel, sponsor of the amendment that added student-loan nondischargeability to the Bankruptcy Reform Act of 1978, stated that the undue-hardship exception was to apply to cases of "severe" hardship.[175] However, the prevailing *Brunner* test requires the debtor to prove that repayment will subject her to a below-minimal standard of living for a significant portion of the repayment period.[176] A debtor who satisfies this demanding test probably has shown severe hardship.

II. INCOME-DRIVEN REPAYMENT POLICIES

IDR programs allow the student-loan debtor to pay a percentage of her income, rather than making a fixed monthly payment, calculated to pay off her loan over a specified period of time. There are currently five IDR programs, each with differing repayment obligations and terms and differing eligibility requirements:[177] income-contingent repayment (ICR),[178] "old" income-based repayment (old IBR),[179] Pay As You Earn (PAYE),[180] "new" income-based repayment (new IBR),[181] and Revised Pay As You Earn (REPAYE).[182] To identify IDR's

173. 124 CONG. REC. 1795 (1978) (statement of Rep. Michel) (noting that undue-hardship cases are "exceptions").

174. *See, e.g.*, Iuliano, *supra* note 6, at 505 (reporting that in 2007, out of an estimated 169,774 debtors in bankruptcy who owed student loans to one of the ten largest student loan holders, only 217 or 0.1 percent) attempted to obtain a discharge, and only half of those received any relief). Thus, approximately 0.05 percent of student-loan debtors *in bankruptcy* received relief. Given that not all student-loan debtors enter bankruptcy, the overall proportion of student-loan debtors receiving relief would be smaller still.

175. 124 CONG. REC. 1791 (1978); *id.* at 1793 (statement of Rep. Erlenborn) (referring to this concept but calling it "real financial hardship"); *id.* at 1797 (statement of Rep. Ertel).

176. *See* Brunner v. N.Y. Higher Educ. Serv. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (per curiam). Section III.B.1, *infra*, discusses the *Brunner* test in more detail.

177. *See* Gregory Crespi, *The Obama Administration's New "REPAYE" Plan for Student Loan Borrowers: Not Much Help for Law School Graduates*, 35 QUINNIPIAC L. REV. 323, 325–26, 332–37 (2017) (describing IDR plans and coining terms "old" and "new" IBR).

178. ICR requires payments of twenty percent of discretionary income—income in excess of the poverty level—with any remaining balance cancelled after twenty-five years. *See* 34 C.F.R. § 685.209 (b)(1)(ii)(B)(iii)(A) (2017). For all other plans, discretionary income is income above 150 percent of the poverty level. *See* Crespi, *supra* note 177, at 331.

179. Old IBR requires payments of fifteen percent of discretionary income and provides for cancellation after twenty-five years. *See id.* at 331–33.

180. PAYE requires payments of ten percent of discretionary income and provides for cancellation after twenty years. *See id.* at 332–33.

181. New IBR requires payments of ten percent of discretionary income and provides for cancellation after twenty years. *See id.* at 333.

182. REPAYE requires payments of ten percent of discretionary income and provides for cancellation after 20 years (for debtors with only undergraduate loans) or twenty-five years (for debtors with graduate loans). *See id.* at 335–36.

purposes, this Part examines the legislative history[183] of the statutes that authorized the various IDR programs, including the Omnibus Budget Reconciliation Act of 1993,[184] the 2007 College Cost Reduction and Access Act,[185] and the Health Care and Education Reconciliation Act of 2010.[186] Although the author has not found any discussion of bankruptcy in that history, the programs' clear intent is to expand students' options and to reduce, not increase, the burden on student-loan debtors. Such an intent is incompatible with the use of IDR to increase the hardship of such debtors, as discussed in more detail in Part III.

A. THE OMNIBUS BUDGET RECONCILIATION ACT OF 1993

The Omnibus Budget Reconciliation Act of 1993[187] ("1993 Act") was the first statute to prescribe that income-driven repayment would be widely available to student-loan borrowers.[188] The 1993 Act instructs the Secretary of Education to provide federal direct-loan borrowers with an "income contingent repayment plan" with a repayment period "not to exceed 25 years."[189] This is the statutory authorization, not just for the ICR plan, but also for the PAYE[190] and REPAYE[191] plans. The 1993 Act also created the Federal Direct Loan Program, under which the federal government itself makes loans to students.[192] Previously, federal support for student loans had come in the form of guarantees for private lending.[193]

The most frequently referenced goal[194] for ICR was making it easier for graduates to pursue lower-paying but important vocations, such as public-service

183. The Supreme Court has not addressed IDR.

184. Pub. L. No 103-66, § 4021, 107 Stat. 302, 348 (codified at 20 U.S.C. §1087e(d)(1)(D) (2012)) (adding § 455(d)(1)(D) to the Higher Education Act).

185. Pub. L. No. 110-84, § 203, 121 Stat. 784, 792–95.

186. Pub. L. No. 111-152, § 2213, 124 Stat. 1029, 1081.

187. Pub. L. No. 103-66, 107 Stat. 312.

188. In 1992, Congress created a pilot program providing for income-contingent repayment of federal direct loans at a small number of schools. Philip G. Schrag, *The Federal Income-Contingent Repayment Option for Law Student Loans*, 29 HOFSTRA L. REV. 733, 765 & n.149 (2001).

189. Pub. L. 103-66, § 4021, 107 Stat. 302, 348 (codified at 20 U.S.C. §1087e(d)(1)(D) (2012)) (adding § 455(d)(1)(D) to the Higher Education Act).

190. *See* Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 77 Fed. Reg. 42,086, 42,098 (proposed July 17, 2012) (citing § 455 (d)(1)(D) of the Higher Education Act, which was added to the Higher Education Act by the 1993 Act, as the basis for the proposed PAYE plan).

191. *See* Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 80 Fed. Reg. 39,608, 39,616–17 (proposed July 9, 2015) (citing § 455(d)(1)(D) of the Higher Education Act, which was added to the Higher Education Act by the 1993 Act, as the statutory basis for the REPAYE plan).

192. Schrag, *supra* note 188, at 764.

193. *Id*. Federal direct lending coexisted with a private-loan guarantee program until 2010, when the Health Care and Education Reconciliation Act terminated federal guarantees for private loans. *See Student Loan History*, NEW AMERICA, https://www.newamerica.org/education-policy/policy-explainers/higher-ed-workforce/federal-student-aid/federal-student-loans/federal-student-loan-history/ [https://perma.cc/US3Q-YKRC] (last visited Feb. 19, 2018).

194. *See* S. COMM. ON LABOR & HUMAN RESOURCES, 103D CONG., RECONCILIATION SUBMISSIONS OF THE INSTRUCTED COMMITTEES PURSUANT TO THE CONCURRENT RESOLUTION ON THE BUDGET (H.R. CON. RES. 64) 447 (Comm. Print 1993) (explaining that ICR "will allow students to take lower paying

careers.[195] Another commonly mentioned goal was that of providing flexibility to student borrowers. Both the Senate and the House versions of the ICR proposal stated that "flexibility in managing . . . student loan repayment obligations" was among the purposes of the proposal.[196] In the floor debates, both Senator Edward Kennedy of Massachusetts[197] and Representative William Ford of Michigan[198] pointed to flexibility as a goal.

Other goals for ICR were also expressed, if less often. These included reducing defaults[199] and encouraging students to pursue higher education by making payments more manageable.[200] Committee testimony also referenced the desirability of simply "easing" borrowers' repayment burdens.[201] Monetary recovery for the government also came up, at least once. In hearings, Deputy Education Secretary Madeline Kunin testified that, with ICR, the government "would eventually get

community and public service jobs without the fear of being overburdened with loan debt"); H.R. REP. NO. 103-111, at 112 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 378, 480 (explaining goal of ICR is to provide flexibility so public service careers not foreclosed); *id.* at 121, *as reprinted in* 1993 U.S.C.C.A.N. 378, 489 (stating that ICR "is intended to accommodate borrowers whose income after graduation from an institution of higher education is low, and thus would be attractive to borrowers who plan to enter lower-paying community service jobs"); *id.* at 158, *as reprinted in* 1993 U.S.C.C.A.N. 378, 526 (noting that goal of ICR is that student-loan "obligations do not foreclose community service-oriented career choices"); 139 CONG. REC. 9442 (1993) (statement of Sen. Kennedy) (noting that the purpose of ICR is to "permit[] [recent graduates] to pursue lower paying careers in public service or other areas"); *id.* at 9495 (statement of Sen. Simon) (explaining that ICR can provide career flexibility); *id.* at 9496–97 (statement of Sen. Dodd) (same); *id.* at 9500 (statement of Sen. Wellstone) (stating that ICR "opens up many more career options."); *id.* at 19,836 (statement of Sen. Simon) (observing that the ICR is desirable because "no one is prevented from serving the country as a teacher, rural health worker, or other valuable yet lower-paying profession").

195. This solicitude for public service probably reflects the political landscape of the time—President Clinton had linked national service and income-contingent loan repayment in the 1992 presidential campaign. *See* Schrag, *supra* note 188, at 765–66; *see also Student Loan Reform*: *Hearing on S. 920 Before the S. Comm. on Labor & Human Res.*, 103d Cong. 73 (1993) [hereinafter *S. 920 Hearing*] (statement of Sen. Jeffords) (expressing hope that students would find loan forgiveness tied to public service to be more attractive than ICR).

196. S. 920, 103d Cong. § 112 (as referred to the S. Comm. on Labor and Human Res., May 6, 1993); H.R. REP. NO. 103-111, at 158, *as reprinted in* 1993 U.S.C.C.A.N. 378, 526 (providing text of the House bill, which specified at § 451(a) that purpose of proposal was "flexibility in managing . . . student loan repayment obligations"); *see also* 139 CONG. REC. 9485 (stating during a section-by-section analysis that ICR was included in the House bill "so that borrowers have flexibility in managing their student loan repayment obligations").

197. *See* 139 CONG. REC. 9505 (statement of Sen. Kennedy) (noting that ICR was included in the bill "so that [borrowers] have flexibility in managing their student loan repayment obligations").

198. *Id.* at 19,358 (statement of Rep. Ford) (stating that ICR provided "flexible repayment options").

199. *S. 920 Hearing*, *supra* note 195, at 5 (statement of Sen. Pell) (noting that ICR "will help reduce defaults"); *id.* at 153 (report of Nat'l Consumers League) (explaining that ICR expected to help address the student-loan default rate); H.R. REP. NO. 103-111, at 107, *as reprinted in* 1993 U.S.C.C.A.N. 378, 475 (suggesting that ICR discourages defaults "since borrowers would be better able to manage the repayment of their loans").

200. 139 CONG. REC. 9500 (statement of Sen. Wellstone) (stating that ICR is important because people who want to go to college will have less of a cash flow problem in repaying debt).

201. *S. 920 Hearing*, *supra* note 195, at 76 (statement of R. Marshall Witten, Comm'r, Nat'l Comm. on Responsibilities for Financing Postsecondary Educ.); H.R. REP. NO. 103-111, at 158, *as reprinted in* 1993 U.S.C.C.A.N. 378, 526 (noting that ICR provided borrowers with "flexibility in managing their student loan repayment obligations").

paid, and even if you get paid $10 a week, it's better than getting paid nothing."[202]

The legislative record indicates that lengthy ICR repayment periods were seen as burdensome on student borrowers. The version of the 1993 Act that passed the House permitted the Secretary of Education to determine the length of repayment, with no outer limit.[203] The report accompanying the House bill indicated that repayment periods might extend for "a very lengthy period, for example, 40 years," but stated that, "[i]t is expected that the period of repayment on an income contingent loan would not extend for the borrower beyond age 65."[204]

In May 1993, the Senate passed the House bill with an amendment that included a maximum twenty-year repayment term.[205] Later that month, the Senate Committee on Labor and Human Resources heard testimony expressing concern about long repayment periods. A college president testified that repayment periods as long as forty years would "threaten . . . the rationality of the proposal,"[206] arguing that "[w]e should not allow income-contingent repayment to become a form of indentured servitude."[207] A college student asked, "Will I be using my Social Security checks to pay off my student loans after I retire?"[208] The president of the American Council on Education testified that "[n]o one should incur negative amortization, and no one should pay back more than the principal and interest owed, and no one should have payments stretched out over as long as 40 years . . . ."[209] A group called the Coalition on Student Loan Reform (CSLR), which was opposed to federal direct lending, presented a proposal calling for a maximum repayment period of twenty years.[210] At the same time, the Clinton Administration recommended that student-loan balances be canceled after twenty-five years of ICR.[211]

A compromise ultimately resolved the disagreement between the House and the Senate over the length of the repayment period on the administration's terms. The Secretary was to determine the length of repayment, but the repayment term

---

202. *S. 920 Hearing*, *supra* note 195, at 48.

203. H.R. REP. NO. 103-213, at 447 (1993) (Conf. Rep.).

204. H.R. REP. NO. 103-111, at 121, *as reprinted in* 1993 U.S.C.C.A.N. 378, 489.

205. H.R. REP. NO. 103-213, at 447 (Conf. Rep.). An earlier bill in the Senate had provided for no maximum repayment but expressed the expectation that repayment end before age 65. S. 920, 103d Cong. § 116 (as referred to the S. Comm. on Labor and Human Res., May 6, 1993) (providing for no maximum repayment for ICR plans); 139 CONG. REC. 9488 (stating during a section-by-section analysis of S. 920 that expected period of repayment "would not extend for the borrower beyond the age of 65").

206. *S. 920 Hearing*, *supra* note 195, at 54 (statement of Reverend Bartley MacPhaidin, President, Stonehill College).

207. *Id.* at 54–55.

208. *Id.* at 62 (statement of J. L. Nelson, student, Iowa State University).

209. *Id.* at 90 (statement of Dr. Robert H. Atwell, President, American Council on Education).

210. *Id.* at 101 (proposal of CSLR). It is not clear whether the CSLR's proposal called for cancellation of the remaining balance at the end of the twenty-year period.

211. *Id.* at 67 (statement of Sen. Nancy Kassebaum).

was limited to twenty-five years.[212] Congress thus recognized that limiting the repayment term was crucial to the goal of limiting the potential hardship imposed by student loans.

B. THE COLLEGE COST REDUCTION AND ACCESS ACT

The College Cost Reduction and Access Act, enacted in 2007 ("2007 Act"), provides the statutory basis for old IBR.[213] The 2007 Act also instituted public-service loan forgiveness (PSLF), under which federal student loans are cancelled after ten years of payments made while in full-time public service employment.[214]

The 2007 Act made IDR more generous by creating a program that capped payments at fifteen percent of discretionary income instead of twenty percent, and that covered federally guaranteed private loans and not just federal direct loans.[215] IBR was seen as an extension of ICR and not as a measure that changed its purpose.[216] Again, the most commonly mentioned goal for the program was making it easier for graduates to pursue low-income careers,[217] particularly in public service.[218]

The legislative record does not reveal any direct connection between IBR and bankruptcy, although Representative Thomas Petri of Wisconsin did state in a hearing that the cap on payments at fifteen percent of income would "eliminate

212. H.R. REP. NO. 103-213, at 447 (1993) (Conf. Rep.); *see also* The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 4021, 107 Stat. 312, 348 (codified at 20 U.S.C. § 1087e(d)(1)(D) (2012)).

213. Pub. L. No. 110-84, § 203, 121 Stat. 784, 792–94 (2007) (codified at 20 U.S.C. § 1098e (2012)) (providing for income-based repayment plan); Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 73 Fed. Reg. 37,694, 37,698–702 (proposed July 1, 2008) (to be codified at 34 C.F.R. pts. 682 & 685) (citing provisions of 2007 Act for proposed rules that became old IBR).

214. The College Cost Reduction and Access Act, Pub. L. No. 110-84, § 401, 121 Stat., at 800–01 (codified at 20 U.S.C. § 1087e(m)) (adding § 455(m), providing for public service loan forgiveness, to the Higher Education Act); Student Aid, *Income-Driven Plans*, U.S. DEP'T OF EDUC., https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven [https://perma.cc/Q5U2-7RNR] (last visited Feb. 20, 2018) [hereinafter *Income-Driven Plans*] (PSLF forgiveness available based on ten years of participation in any IDR plan).

215. *See* Pub. L. No. 110-84, § 203, 121 Stat. at 792–94.

216. H.R. REP. NO. 110-317, at 44 (2007) (Conf. Rep.), *as reprinted in* 2007 U.S.C.C.A.N. 254, 298; H.R. REP. NO. 110-210, at 39 (2007) (stating that IBR "builds on the tenets" of ICR).

217. *Paying for a College Education: Barriers and Solutions for Students and Families: Hearing Before the H. Subcomm. on Higher Educ., Lifelong Learning, and Competitiveness, H. Comm. on Educ. and Labor*, 110th Cong. 40 (2007) [hereinafter *Paying for a College Education*] (statement of Rep. Petri).

218. *Id.* at 53 (statement of Luke Swarthout, higher education advocate, Public Interest Research Group); H.R. REP. NO. 110-210, at 44 (2007) (stating that IBR "serve[s] to expand rather than restrict educational and economic opportunities for graduates who would otherwise be unable to afford to work as teachers or social workers."); 153 CONG. REC. 19,735 (2007) (statement of Sen. Feingold) (explaining that IBR "will help those graduating students in Wisconsin and around the country who want to pursue careers in public service."); *id.* at 23,880 (statement of Sen. Kennedy) (stating that IBR will help students cope with debt that is "discouraging many young people from choosing . . . low-paying but vital jobs that bring large benefits to our society.").

the problem of default and poor credit rating."[219] Others stated that IBR would help student borrowers in more general terms. Committee testimony referenced "fear of unmanageable debt,"[220] and Senator Edward Kennedy described IBR as part of the "help we'll provide to students" under the 2007 Act.[221] The legislative record reveals little expressed opposition to IBR.[222]

C. THE HEALTH CARE AND EDUCATION RECONCILIATION ACT OF 2010

The Health Care and Education Reconciliation Act of 2010[223] included the SAFRA Act[224] ("2010 Act") as Title II, Subtitle A.[225] The 2010 Act provides the statutory basis for new IBR.[226] The 2010 Act once again made IDR more generous, authorizing a program that requires borrowers to pay ten percent of discretionary income, with a maximum repayment period of twenty years.[227] Old IBR, the most generous previously existing program, called for payment of fifteen percent of discretionary income over a period of twenty-five years.[228]

The legislative history of the 2010 change to IDR is somewhat opaque. Education Secretary Arne Duncan mentioned in testimony, in February 2010, a bill providing for reduction in the repayment amount under IDR from fifteen percent to ten percent.[229] The statutory text pertaining to IBR appeared in a reconciliation measure introduced on March 18, 2010, a week before passage of the 2010 Act.[230] No committee report elaborates on the purpose of the amendment. Senator Tom Harkin of Iowa stated in the Senate debate over the final bill that the

219. *Paying for a College Education*, *supra* note 217, at 40.

220. *Id.* at 41 (statement of Luke Swarthout, higher education advocate, Public Interest Research Group).

221. 153 CONG. REC. 23,880.

222. *But see* 153 CONG. REC. 18,520 (statement of Rep. Souder) (suggesting that IBR "reverses the normal role of trying to balance what you purchase with your ability to repay"); *id.* at 23,918 (statement of Rep. Souder) (arguing that IBR was a "socialist" program that undermined "both the lending premise of the private sector and the personal responsibility of parents and students").

223. Pub. L. No. 111-152, 124 Stat. 1029.

224. "SAFRA" appears to be an acronym based on the Student Aid and Fiscal Responsibility Act of 2009. *See* H.R. 3221, 111th Cong. (2009).

225. Pub. L. No. 111-152, § 2001(a), 124 Stat., at 1071.

226. Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 77 Fed. Reg. 42,086, 42,103–04 (proposed July 17, 2012) (citing SAFRA as basis for new IBR) (codified at 34 C.F.R. Pts. 674, 682, & 685).

227. Pub. L. No. 111-152, § 2213, 124 Stat. at 1081.

228. *See supra* Section II.B.

229. *Department of Education Fiscal Year 2011 Budget: Hearing Before the H. Comm. on the Budget*, 111th Cong. 15 (2010) ("[I]f this bill passes—it is called income-based repayment, IBR—that number would go down to 10 percent of your salary."); *see also Building a Stronger Economy: Spurring Reform and Innovation in American Education: Hearing Before the H. Comm. on Educ. and Labor*, 111th Cong. 40 (2010) (statement of Arne Duncan, Sec'y of Educ.) (stating that "if we can reduce loan repayments to 10 percent of income" and cancel loans after 10 years for public servants, "I think we can get that next generation of extraordinarily talented folks to come into education").

230. *See* Amendment in the Nature of a Substitute to H.R. 4872, 111th Cong. § 2214 (2010); *see generally* CASSANDRIA DORTCH ET AL., CONG. RESEARCH SERV., 7-5700, THE SAFRA ACT: EDUCATION PROGRAMS IN THE FY2010 BUDGET RECONCILIATION (2010) (explaining planned process for enactment of reconciliation bill and relationship of bill to other health care legislation).

IBR provision passed in 2007 had been "targeted . . . to people who had the most difficult time repaying their loan."[231] The proposed change would "make college much more affordable for students even after they graduate."[232] Senator Ben Cardin of Maryland stated that the new IBR provision would "make[] it easier for new borrowers after 2014 to repay Federal loans."[233]

The focus in enacting the 2010 changes to IDR seems to have been largely on the welfare of student borrowers; the stated rationale for the changes was to make it "easier" for borrowers to repay their loans.

D. CONCLUSION: PURPOSES OF IDR

The legislative history of IDR does reflect some solicitude for the public fisc, but such concerns were secondary at best, with scattered references to reducing default rates[234] and a single mention of enhancing government financial recovery.[235] Nevertheless, the legislative history of IDR can be read to suggest that financial recovery is a subsidiary goal of the program.

The main purposes of IDR appear to be enabling students to pursue low-paying careers[236] and making life easier for student-loan borrowers by reducing the burden of repayment.[237] Longer repayment periods were recognized as a source of hardship.[238] There was no real consideration of bankruptcy, and certainly no indication that IDR was intended to increase the level of hardship required for discharge.[239] Indeed, such a result seems contrary to the main purposes of the program.

III. RELATIONSHIP BETWEEN IDR AND BANKRUPTCY

This Part discusses how IDR fits into the analysis of undue hardship. It addresses the interaction of the policies underlying the fresh start, the student-loan exception to discharge, and the IDR program. Section III.A explains that fresh-start policies apply in student-loan bankruptcies, even when IDR makes payments affordable. Section III.B discusses why IDR is relevant to evaluating undue hardship and how IDR fits into the formal structure of undue-hardship analysis under the prevailing tests. Section III.C makes suggestions for how specific factual situations presented by IDR should be handled in light of the relevant policies.

231. 156 CONG. REC. 4816 (2010).
232. *Id.* (statement of Sen. Harkin).
233. *Id.* at 4857.
234. *See supra* notes 199 & 219 and accompanying text.
235. *See supra* note 202.
236. *See supra* notes 194–95, 217–18 and accompanying text.
237. *See supra* notes 201, 220–21 and accompanying text.
238. *See supra* notes 203–11 and accompanying text.
239. To be sure, IDR could make it harder in some cases to show undue hardship in that IDR actually reduces hardship.

A. APPLICABILITY OF FRESH-START POLICY IN STUDENT-LOAN BANKRUPTCIES

This section argues that the policies underlying the fresh start apply in student-loan bankruptcies, although they may be outweighed by other policies in particular situations. It then argues that student loans can have the same negative effects the fresh start is supposed to remedy, even if IDR makes payments affordable.

1. Applicability of Fresh-Start Policy to Student Loans

Federal appellate courts are split on how much weight to give the fresh-start policy when student loans are at issue. On the anti-fresh-start side is *Frushour v. Educational Credit Management Corp.* (*In re Frushour*).[240] There, the Fourth Circuit noted that "Frushour's only reasons for refusing [IDR] . . . were that it was not suited for her and she wanted a fresh start," and concluded that "[i]t is hard to see why these reasons are not simply shorthand for her lack of interest in repaying her debt."[241] Likewise, Judge Loken's opinion for the Eighth Circuit in *Educational Credit Management Corp. v. Jesperson* (*In re Jesperson*) states:

> Congress carved an exception to the 'fresh start' permitted by discharge for unpaid, federally subsidized student loans. If the debtor with the help of an ICRP program can make student loan repayments while still maintaining a minimal standard of living, the absence of a fresh start is not undue hardship.[242]

On the other side is *Barrett v. Educational Credit Management Corporation* (*In re Barrett*).[243] In *Barrett*, the Sixth Circuit affirmed the discharge of Barrett's student loans.[244] In rejecting ECMC's argument that Barrett did not act in good faith because he unjustifiably refused to enroll in ICR,[245] the court found that "requiring enrollment in [ICR] runs counter to the Bankruptcy Code's aim in providing debtors a 'fresh start.'"[246] The panel noted the "additional worry and anxiety" the debtor could suffer as a result of continued indebtedness.[247] Lower courts have on occasion concluded that extension of indebtedness is itself a reason not

240. 433 F.3d 393 (4th Cir. 2005).

241. *Id.* at 403.

242. 571 F.3d 775, 782 (8th Cir. 2009). Neither of the two other judges on the panel endorsed this reasoning. *See id.* at 783 (Smith, J., concurring) ("I write separately to emphasize that whether the debtor enrolled in the Income Contingent Repayment Plan (ICRP) remains merely 'a factor' to consider when applying the totality-of-the-circumstances test."); *id.* at 786 (Bye, J., dissenting) ("I write separately to emphasize that, in accordance with the overwhelming majority of courts, a debtor is not ineligible for a hardship discharge if capable of making payments under the . . . Income Contingent Repayment Plan (ICRP).").

243. 487 F.3d 353 (6th Cir. 2007).

244. *Id.* at 366.

245. *Id.* at 363.

246. *Id.* at 364.

247. *Id.* at 365 n.8 ("ECMC's argument overlooks the psychological effect of having a significant debt remain . . . and discards the central aim of the Bankruptcy Code—to provide the debtor a fresh start.") (citations omitted).

to deny a discharge to the debtor who does not enroll in IDR.[248]

If *Frushour* and Judge Loken's opinion in *Jesperson* express the view that the policies underlying the fresh start simply do not apply to student-loan debtors, this Article disagrees. As discussed, there is no indication in the legislative history of the student-loan discharge exception that the policies underlying the fresh start are inapplicable to student loans.[249] No one said that student loans could not be burdensome or could not hamper participation in the economy and society, or that student-loan borrowers in general do not deserve a fresh start. Instead, the policies in favor of a fresh start might be outweighed in a particular case by the interests in fighting abuse and in financial recovery for creditors.

2. Applicability of Fresh-Start Policy to Student Loans with Affordable Payments in IDR

IDR might make a debtor's student-loan payments affordable in the sense that IDR can make it more likely that the debtor will be able to make the required monthly payment. This section argues that even if that is the case, the policies underlying the fresh start—alleviation of debtor suffering and facilitating debtor participation in the economy and society—are still in play and should be considered in deciding whether undue hardship will result if the loans are not discharged. The conclusion that fresh-start policies are relevant even when IDR payments are affordable is consistent with *Hunt*, which held that the policies underlying the fresh start justify discharge even when the monetary imposition on the debtor of denying discharge is small.[250]

a. Fresh-Start Policy: Alleviation of Suffering. As discussed, the alleviation of debtor suffering is a goal of the fresh start.[251] Even if IDR renders the monthly payments more affordable, indebtedness can inflict suffering by exacting a mental and emotional toll on the debtor. It also exposes the debtor to the risk of stressful collection action in the event of default.

At least one appellate court has given weight to the possible mental health or emotional toll that continuing indebtedness may inflict. In *Reynolds v. Pennsylvania Higher Education Assistance Agency* (*In re Reynolds*), the Eighth Circuit upheld the bankruptcy court's grant of discharge where the bankruptcy court had found—in "inferences well-supported by the record"[252]—that "continuing liability from the [student-loan] debts would pose a threat to Reynolds's

248. *See* Durrani v. Educ. Credit Mgmt. Corp. (*In re* Durrani), 311 B.R. 496, 507–08 (Bankr. N.D. Ill. 2004), *aff'd*, 320 B.R. 357 (N.D. Ill. 2005) (containing a heading entitled "The Existence of the ICRP Cannot Obliterate the Bankruptcy Code's 'Fresh Start' Policy," under which Judge Hollis stated that, "binding Durrani to her debt until 2029 would give no weight whatsoever to the notion that at some point, honest but unfortunate debtors are entitled to a fresh start"); *see* Marshall v. Student Loan Corp., 430 B.R. 809, 815 (Bankr. S.D. Ohio 2010) ("The existence of the IBR cannot 'obliterate' the Code's policy of a 'fresh start.'" (quoting *In re* Durrani, 311 B.R. at 507)).

249. *See supra* Section I.B.

250. *See supra* Section I.A.2; Local Loan Co. v. Hunt, 292 U.S. 234, 245 (1934).

251. *See supra* Section I.A.3.

252. 425 F.3d 526, 533 (8th Cir. 2005).

fragile mental health,"[253] and that "the mere existence of this debt burden clearly is a significant block to the Debtor's recovery from mental illness."[254]

Lower courts have also taken note of the possibility of emotional or psychological harm from continuing indebtedness. Sometimes this concern is based on specific evidence that the debtor faces such harm,[255] as was present in *Reynolds*,[256] but more often it is not.[257]

If a debtor can affirmatively show that continued indebtedness will actually affect her mental or emotional health, then it seems clear that there is a reason to grant a fresh start. However, such harm arguably should be presumed even without an affirmative showing. There is a strand of scholarly literature suggesting that debt often leads to depression and anxiety, as well as other harms.[258] This body of work does not attempt to identify whether the mental health effect of debt stems only from unaffordable payments or may have other causes, but the legislative history and Supreme Court precedent relating to the fresh start do not indicate that unaffordable payments are the only way debt can lead to debtor suffering.[259] Moreover, anxiety and pressure arguably arise naturally from the risks of the other concrete harms of indebtedness described in this section, such as collection action and poor credit.

The risk of collection action is another harm to debtors that makes a fresh start desirable. If a debtor participates in IDR rather than getting a discharge, she is

253. *Id.* (citing Reynolds v. Pa. Higher Educ. Assistance Agency (*In re* Reynolds), 303 B.R. 823, 840 (Bankr. D. Minn. 2004)).

254. *Id.* (quoting *In re Reynolds*, 303 B.R. at 837). Although *Reynolds* did not directly address IDR, its reasoning is applicable to situations where IDR is in issue, at least where the debtor has an increasing loan balance while in IDR.

255. Abney v. U.S. Dep't of Educ. (*In re* Abney), 540 B.R. 681, 689 (Bankr. W.D. Mo. 2015) (noting the possibility of prospective emotional harm and observing the fact that the debtor "has already suffered emotionally from his ongoing debt struggles and was in fact hospitalized in part because of it").

256. *In re Reynolds*, 303 B.R. at 832 & n.7, 839–40 (basing its holding on a record which contained expert evidence of the debtor's mental illness and its interference with her ability to earn money). The conclusion that continuing indebtedness would interfere with the debtor's recovery seems to have been the bankruptcy court's conclusion, rather than the subject of direct expert testimony. *Id.* at 840.

257. *See, e.g.*, Larson v. United States (*In re* Larson), 426 B.R. 782, 794 (Bankr. N.D. Ill. 2010) (noting that in IDR, debtors "would bear an emotional and a social toll"); Marshall v. Student Loan Corp., 430 B.R. 809, 815 (Bankr. S.D. Ohio 2010) ("Even if the Debtor was not required to make any payment under the IBR, the debt is still hanging over her head, it will affect her credit and cause a psychological and emotional toll." (citations omitted)); Halverson v. U.S. Dep't of Educ. (*In re* Halverson), 401 B.R. 378, 390 (Bankr. D. Minn. 2009) (describing the "financial and psychological impact of living with over $300,000.00 of debt"); Durrani v. Educ. Credit Mgmt. Corp. (*In re* Durrani), 311 B.R. 496, 508 (Bankr. N.D. Ill. 2004), *aff'd*, 320 B.R. 357 (N.D. Ill. 2005) ("The psychological and emotional toll . . . that results from adding 25 years to the life of a student loan should not be overlooked.").

258. *See* Katheryn E. Hancock, *A Certainty of Hopelessness: Debt, Depression, and the Discharge of Student Loans Under the Bankruptcy Code*, 33 L. & PSYCHOL. REV. 151, 160–63 (2009) (reviewing scholarly literature and treatment of mental health issues by courts); Melissa B. Jacoby, *Does Indebtedness Influence Health? A Preliminary Inquiry*, 30 J.L. MED. & ETHICS 560, 561–64 (2002) (reviewing psychological studies); *see also* Katherine Porter, *The Damage of Debt*, 69 WASH. & LEE L. REV. 979, 1003–17 (2012) (reviewing potential harms from over-indebtedness, including health-related harms).

259. *See supra* Section I.A.3.

exposed to the risk that she may default and face a collection action. The legislative history expressly mentions avoiding creditor harassment as a reason for the fresh start.[260] Although the term "harassment" is open to interpretation, student-loan collection can be aggressive, including administrative garnishment of wages and tax refunds, as well as reduction of some federal benefits.[261]

b. Fresh-Start Policy: Participation in Economy and Society. The second fundamental goal of the fresh-start policy is to promote the debtor's renewed participation in the economy and society.[262] IDR preserves indebtedness and usually takes some of each additional dollar the debtor earns.[263] Because these effects can interfere with the debtor's participation even if payments are low, discharge notwithstanding IDR availability advances the second goal of the fresh start.

Indebtedness can interfere with debtor participation in two ways, first, through its effect on credit. Student-loan balances appear on credit reports[264] and—in the eyes of some—may signal lack of creditworthiness or of responsibility more generally. Some courts in student-loan bankruptcies have been willing to presume that high student-loan debts worsen credit and thus reduce not just the debtor's ability to borrow, but also "employment opportunities and access to housing."[265] More skeptical courts might require the debtor to produce affirmative evidence that her student-loan balance harms her credit. A debtor potentially could show that student debt harms her credit score. Although the precise methodologies for computing credit scores are proprietary[266] and the effect of student-loan debt on the credit score depends on individual factors,[267] online calculators are available

260. *See* H.R. REP. NO. 95-595, at 125 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6068.

261. *See* Doug Rendleman & Scott Weingart, *Collection of Student Loans: A Critical Examination*, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 215, 243–47 (2014) (discussing wage garnishment); *id*. at 248–49 (discussing garnishment of tax refunds); *id*. at 249–51 (discussing garnishment of federal benefits).

262. *See supra* Section I.A.3.

263. *See supra* notes 177–82.

264. *See. e.g.*, Experian Team, *Student Loans on Credit Report While in Deferment*, EXPERIAN (Sept. 27, 2013), https://www.experian.com/blogs/ask-experian/student-loans-may-appear-in-credit-report-while-in-deferment/ [https://perma.cc/UQ7C-BDYF].

265. Abney v. U.S. Dep't of Educ. (*In re* Abney), 540 B.R. 681, 689 (Bankr. W.D. Mo. 2015); *see* Marshall v. Student Loan Corp., 430 B.R. 809, 815 (Bankr. S.D. Ohio 2010) (discussing debt's effect on credit and its "psychological and emotional toll") (quoting Larson v. United States (*In re* Larson), 426 B.R. 782, 794 (Bankr. N.D. Ill. 2010))); *In re Larson*, 426 B.R. at 794 (same); Durrani v. Educ. Credit Mgmt. Corp. (*In re* Durrani), 311 B.R. 496, 508 (Bankr. N.D. Ill. 2004), *aff'd*, 320 B.R. 357 (N.D. Ill. 2005) (noting that student loan balance may prevent debtor from moving to safer neighborhood).

266. *See* Sarah Shemkus, *Not All Credit Scores Are Created Equal*, BOS. GLOBE (Jan. 7, 2017), https://www.bostonglobe.com/business/2017/01/06/not-all-credit-scores-are-created-equal/oikyxT5hqPpept56tlqbDM/story.html [https://perma.cc/A8E6-J5LM].

267. *See* Jan Miller, *9 Ways Student Loans Impact Your Credit Score*, DESERET NEWS (Mar. 13, 2013; 11:10 am), https://www.deseretnews.com/article/865575650/9-ways-student-loans-impact-your-credit-score.html [https://perma.cc/UU74-3US3] (indicating ways in which student debts can increase or decrease credit score).

to estimate credit scores.[268] These calculators can be used to estimate whether a student-loan balance harms credit in an individual case. Even if student-loan balances per se do not reduce credit scores, they expose the borrower to the risk of late payment and default on student loans. Further, because student-loan payments reduce funds available for other debt service, student-loan balances increase the risk of late payment and default on any other loans the borrower may have. Such defaults decrease credit scores.[269]

A second way in which IDR interferes with debtor participation is the drag IDR imposes on the debtor's increased earnings. Under IDR, the debtor who has a nonzero payment must devote at least ten percent of every additional dollar she earns to loan repayment.[270] This "discouragement" of effort obstructs the debtor's "clear field for future effort" and thus calls for a fresh start.[271] It might be argued that ten percent is a small drag on the debtor's earnings and thus a small disincentive. Yet ten percent is not so small in context: wage garnishment for ordinary debts is limited to twenty-five percent of disposable pay by federal statute,[272] and some states impose lower limits.[273] Ordinary discharge thus protects, at most, twenty-five percent of earnings, not one hundred percent.

Other harms associated with high indebtedness include loss of a government security clearance[274] and possibly reduced marriage prospects.[275] Taking all these potential harms together, it is reasonable to presume that indebtedness harms the student-loan debtor's ability to participate in the economy and society, and the debtor should be able to get a fresh start unless countervailing policies are weightier in her particular case.

Even if a court is unwilling to presume harm or interference, the debtor should be allowed to invoke the fresh start by presenting evidence of harm or interference

268. *See, e.g*, *Free Credit Score Estimator*, MYFICO, https://www.myfico.com/ficocreditscoreestimator/estimator.aspx [https://perma.cc/WTS2-AFUU]; *Estimate Your Credit Score*, CALCXML, http://www.calcxml.com/calculators/credit-score-calculator [https://perma.cc/3WAV-5F3N].

269. *See* Federal Student Aid, *Understanding Delinquency and Default*, U.S. DEP'T OF EDUC., https://studentaid.ed.gov/sa/repay-loans/default#consequences [https://perma.cc/L49L-5VJ5] (last visited Feb. 21, 2018).

270. Depending on the IDR program, the debtor may be obliged to pay ten, fifteen, or twenty percent of discretionary income toward student loans. *See supra* notes 195–99.

271. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

272. *See* 15 U.S.C. § 1673(a)(1) (2012).

273. *See, e.g.*, 735 ILL. COMP. STAT. 5/12-803 (2017) (limiting garnishment to fifteen percent of wages). Administrative wage garnishment of student debtors is limited to fifteen percent of disposable pay. *See* Rendleman & Weingart, *supra* note 261, at 244.

274. *See* Pedro A. Rodriguez, *NDW Ready to Kick Off Military Saves Week*, COMMANDER, NAVY INSTALLATIONS COMMAND (Feb. 19, 2016), https://cnic.navy.mil/regions/ndw/news/ndw-ready-to-kick-off-military-saves-week-.html [https://perma.cc/K86J-WFW2].

275. *Women in Debt Less Likely to Marry*, CTR. FOR RET. RESEARCH AT B.C.: SQUARED AWAY BLOG (Feb. 14, 2013), http://squaredawayblog.bc.edu/squared-away/money-culture/women-in-debt-less-likely-to-marry/ [https://perma.cc/83NC-3XQ2] ("Women with large student loan balances are less likely to marry than their girlfriends who've graduated debt-free, new research shows.").

in her individual case.[276]

B. DOCTRINAL STRUCTURE OF UNDUE-HARDSHIP ANALYSIS WHEN IDR IS AN ISSUE

This section first reviews the existing doctrinal tests for undue hardship—the *Brunner* test and the totality-of-the-circumstances test. It then explains how IDR may be relevant to the analysis of undue hardship. Finally, it reviews how IDR has been incorporated into the doctrinal structure and endorses the leading approach for doing so: considering the availability of IDR in evaluating the debtor's good-faith effort to repay the debt.

1. Doctrinal Tests for Undue Hardship

Most courts evaluate undue hardship under the three-part test set forth in *Brunner v. New York State Higher Education Services Corp.*[277] To receive a discharge of student loans under the *Brunner* test, the debtor must show:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.[278]

The only circuit in which a federal appellate court has embraced a test other than that of *Brunner* is the Eighth Circuit,[279] which follows the "totality-of-the-

276. Some programs provide for quicker loan forgiveness than is available under standard IDR. For example, the Public Service Loan Forgiveness Program provides for discharge of student-loan debt after ten years of work in a public service position. Such programs may reduce, but do not entirely eliminate, the need for a fresh start. For example, the promise that a police officer's student loans will be forgiven after ten years of service may reduce, but will not entirely eliminate, stress because the borrower may be locked into a certain type of employment and in any event the promised relief may not be forthcoming. *See* Federal Student Aid, *Public Service Loan Forgiveness*, U.S. DEP'T OF EDUC., https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service [https://perma.cc/CP82-SZMF] (last visited Feb. 21, 2018).

277. 831 F.2d 395 (2d Cir. 1987) (per curiam).

278. *Id.* at 396.

279. In addition to the Second Circuit where it originated, the *Brunner* test has been adopted in the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits. *See* Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 400 (4th Cir. 2005); Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 385 (6th Cir. 2005); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004); U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 91 (5th Cir. 2003); Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238, 1242 (11th Cir. 2003); U.S. Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1112 (9th Cir. 1998); Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 306 (3d Cir. 1995); Robertson v. Ill. Student Assistance Comm'n (*In re* Roberson), 999 F.2d 1132, 1135 (7th Cir. 1993). The First Circuit has declined to choose between the *Brunner* and totality-of-the-circumstances tests. Nash v. Conn. Student Loan Found. (*In re* Nash), 446 F.3d 188, 190 (1st Cir. 2006) ("We see no need in this case to pronounce our views of a preferred method of identifying a case of 'undue hardship.'"). The author has located only one D.C. Circuit case involving the undue-hardship provision and that court did not, in its unpublished disposition, articulate a standard. *See* Gilchrist v. Dep't of Educ., No. 88-5106, 1988 U.S. App. LEXIS 18806, at *2 (D.C. Cir. Dec. 30, 1988).

circumstances" test.[280] As its name suggests, the latter test is a multifactor one that incorporates a wide variety of considerations.[281] Although the totality-of-the-circumstances test on its face is more forgiving of student-loan debtors, the choice of test may not make much difference to case outcomes.[282]

The prevailing *Brunner* test has been criticized in law review articles[283] and by some courts,[284] and it has even been argued that IDR undermines the *Brunner* test.[285] Nevertheless, this Article evaluates IDR's relevance to undue hardship primarily within the *Brunner* framework. In most jurisdictions, bankruptcy courts do not have discretion to depart from the *Brunner* test, and the appellate courts have shown no sign that they are abandoning it.[286]

2. Relevance of IDR to Undue-Hardship Analysis

No statute or regulation explicitly provides that IDR is to be considered in student-loan bankruptcies. Nevertheless, the seven federal appellate courts that have taken up the relationship between IDR and undue hardship unanimously have treated the availability of IDR as relevant in assessing undue hardship.[287] These courts have assumed the relevance of IDR to student-loan discharge. This section briefly explains the three reasons why IDR is relevant, based on the text

---

280. *See, e.g.*, Walker v. Sallie Mae Serv. Corp. (*In re* Walker), 650 F.3d 1227, 1230 (8th Cir. 2011) (describing totality-of-the-circumstances test applied in Eighth Circuit); Andrews v. S.D. Student Loan Assistance Corp. (*In re* Andrews), 661 F.2d 702, 704 (8th Cir. 1981) (adopting totality-of-the-circumstances test).

281. *See* Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775, 783–84 (8th Cir. 2009) (Smith, J., concurring) (listing nine factors included in totality-of-the-circumstances test).

282. *See, e.g.*, Taylor & Sheffner, *supra* note 6, at 332 (suggesting, based on sample of cases from First and Third Circuits, that intra-circuit variation may be more important than choice of test).

283. *See, e.g.*, Rafael I. Pardo, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*, 66 FLA. L. REV. 2101, 2120–21 (2014) (arguing that three-element structure of *Brunner* test creates a problem of "conjoined probability" for debtors and thus is a barrier to access to justice); Ben Wallen, *One Standard to Rule Them All: An Argument for Consistency in Education Debt Discharge in Bankruptcy Proceedings*, 16 HOUS. BUS. & TAX L.J. 232, 251 (2016) ("The outdated *Brunner* test, with its backwards-looking element and good faith requirement is unrepresentative of § 523(a)(8)."); Anne E. Wells, *Replacing Undue Hardship with Good Faith: An Alternative Proposal for Discharging Student Loans in Bankruptcy*, 33 CAL. BANKR. J. 313, 339 (2016) ("The undue hardship requirement and the judicially created *Brunner* test are out of date, unworkable, and make obtaining relief too difficult for debtors who truly need it.").

284. *See, e.g.*, Batdorf v. Sallie Mae (*In re* Batdorf), No. 13-22960-C-7, 2014 Bankr. LEXIS 4236, at *8 (Bankr. E.D. Cal. Sept. 26, 2014) (arguing that *Brunner* test should be abandoned "or, at a minimum . . . re-calibrated" because Congress began to require undue hardship for all student-loan discharges after *Brunner* was decided).

285. *See* Smith, *supra* note 15, at 651–52 (arguing that all three parts of the *Brunner* test are obsolete because of existence of zero-payment plans under IDR).

286. *See supra* note 279 and cases cited therein.

287. *See* Hedlund v. Educ. Res. Inst., Inc., 718 F.3d 848, 851 (9th Cir. 2013); Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 883–84 (7th Cir. 2013); Coco v. N.J. Higher Educ. Student Assistance (*In re* Coco), 335 F. App'x 224, 227–28 (3d Cir. 2009); Roe v. College Access Network (*In re* Roe), 295 F. App'x 927, 931 (10th Cir. 2008); Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320, 1327 (11th Cir. 2007); Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 363–64 (6th Cir. 2007); Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 402–03 (4th Cir. 2005).

and history of the undue-hardship requirement and the policies underlying the fresh start and the IDR program.

First, the Bankruptcy Code calls for evaluation of "undue hardship."[288] Because IDR can reduce payments, IDR can reduce "hardship" according to the ordinary meaning of the term. Undue hardship is meant to cover cases where the debtor is "unable" to repay while maintaining herself and her dependents.[289] As IDR often allows the debtor to make lower payments, it might affect the undue hardship analysis by rendering a debtor "able" to repay.

Second, IDR arguably reduces the need for the fresh start. As noted, reducing payments does not provide all of the benefits the fresh start offers.[290] Nevertheless, cutting payments can reduce debtor suffering. The "worries and pressures of too much debt" are at least arguably lessened when the payments on that debt are limited by income.[291] Moreover, by allowing the debtor to keep more income, IDR can encourage "value-productive participation" in the economy.[292] Making payments under IDR does not give the debtor an altogether "clear field for future effort," but the field is less obstructed than it otherwise would be.[293]

Third, creditor monetary recovery will sometimes increase if the debtor enters IDR instead of getting a discharge. Monetary recovery is manifestly a policy underlying the student-loan exception to discharge[294] and is at least arguably a goal of IDR itself, if a secondary one.[295] Thus, this Article concurs with the federal appellate courts that IDR is at least potentially relevant in deciding whether student loans should be discharged.

3. Incorporation of IDR into Doctrinal Structure of Undue-Hardship Tests

Federal appellate courts applying the *Brunner* test have treated IDR as one factor to consider in determining whether the debtor has made good-faith efforts to repay the loans, that is, whether the third part of the *Brunner* test is met.[296] No federal appellate court has given an overall explanation of how to incorporate IDR into the good-faith analysis or weigh it as a factor. Instead, the typical approach is to mention the debtor's IDR-related efforts along with other

288. 11 U.S.C. § 523(a)(8) (2012).

289. H.R. DOC. NO. 93-137, pt. 2, at 140 (1973).

290. *See supra* Section III.A.2.

291. H.R. REP. NO. 95-595, at 125 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6068.

292. H.R. DOC. NO. 93-137, pt. 1, at 71.

293. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

294. *See supra* Section I.B.7.

295. *See supra* Section II.D.

296. *See* Hedlund v. Educ. Res. Inst., Inc., 718 F.3d 848, 855 (9th Cir. 2013) (evaluating debtor's efforts to participate in IDR as part of the good faith part of the *Brunner* test); Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 883–84 (7th Cir. 2013) (same); Coco v. N.J. Higher Educ. Student Assistance (*In re* Coco), 335 F. App'x 224, 227–28 (3d Cir. 2009) (same); Roe v. College Access Network (*In re* Roe), 295 F. App'x 927, 931 (10th Cir. 2008) (same); Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320, 1327 (11th Cir. 2007) (same); Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 363–64 (6th Cir. 2007) (same); Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 402–03 (4th Cir. 2005) (same).

considerations relevant to good faith, such as the debtor's efforts to maximize income and minimize expenses, and then to state a conclusion about whether the debtor acted in good faith.[297] In the Eighth Circuit, which uses the totality-of-the-circumstances test, IDR participation is "one factor" to be considered in evaluating undue hardship.[298] The occasional appellate judge has suggested that a debtor should never get a discharge if she can enroll in IDR,[299] but this appears to be a distinctly minority position.

Although the appellate courts that have addressed the issue consider IDR under *Brunner*'s third part (debtor's good-faith effort to repay), lower courts sometimes address IDR under the first part—whether the debtor can maintain a minimal standard of living while repaying.[300] This Article disagrees with that approach.

---

297. *See Hedlund*, 718 F.3d at 855 (discussing debtor's IDR efforts along with other factors relevant to good faith and upholding that bankruptcy court's finding that debtor acted in good faith without explicitly weighing the factors); *Krieger*, 713 F.3d at 884 (stating that "[t]o the extent the district judge thought that debtors *always* must agree to a payment plan and forgo a discharge, that is . . . an incorrect proposition" without further elaboration on how IDR should be considered); *In re Coco*, 335 F. App'x at 227–28 (mentioning that debtor's refusal to participate in ICRP and explanation therefore along with other factors in evaluating good faith, without further explanation); *In re Roe*, 295 F. App'x at 931 (same); *In re Mosley*, 494 F.3d at 1327 (stating that "courts have rejected a per se rule that a debtor cannot show good faith where he or she has not enrolled in the Income Contingent Repayment Program," but then providing no explanation of how ICRP participation is weighed against other good-faith factors considered, such as debtor's efforts to maximize income) (citations omitted); *In re Barrett*, 487 F.3d at 363–64 (stating that the decision not to enroll in IDR is "not a per se indication of a lack of good faith" but "is probative of [his] intent to repay [his] loans") (quoting Tirch v. Pa. Higher Educ. Assistance Agency (*In re* Tirch), 409 F.3d 677, 682 (6th Cir. 2005))); Fields v. Sallie Mae Servs. Corp. (*In re* Fields), 286 F. App'x 246, 250–51 (6th Cir. 2007) (noting that "[i]n cases involving a partial discharge of student loans, it is a difficult, although not necessarily insurmountable burden for a debtor who is offered, but then declines the government's income-contingent repayment program, to come to this Court and seek an equitable adjustment of their student loan debt," but then providing no further explanation of how this burden could be sustained) (quoting *In re Tirch*, 409 F.3d at 682)); Educ. Credit Mgmt. Corp. v. Mason (*In re* Mason), 464 F.3d 878, 885 (9th Cir. 2006) (mentioning debtor's failure to participate in ICRP along with failure to maximize income in evaluating debtor's good faith, but failing to explain how to weigh or combine the considerations); Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 446 F.3d 938, 947 (9th Cir. 2006) (explaining that "participation in a repayment program is not required to satisfy the good-faith prong" but "is considered an important indicator of good faith" without providing further elaboration) (internal quotation marks omitted) (quoting Alderete v. Educ. Credit Mgmt. Corp. (*In re* Alderete), 412 F.3d 1200, 1206 (10th Cir. 2005))); *In re Frushour*, 433 F.3d at 402–03 (noting that debtor's effort to participate in income-contingent repayment "[a]lthough not always dispositive[,] . . . illustrates that the debtor takes her loan obligations seriously, and is doing her utmost to repay them"); *In re Alderete*, 412 F.3d at 1206 (stating participation in IDR "is not required to satisfy the good-faith prong of the *Brunner* test" but is "an important indicator of good faith," and then discussing debtor's failure to investigate IDR along with other good-faith factors without explaining how to weigh these factors).

298. Nielsen v. ACS, Inc., 502 F. App'x 634, 635 (8th Cir. 2013) ("[T]he bankruptcy court did not err in considering Nielsen's eligibility for the Income Contingent Repayment Program as one factor in its analysis.") (citation omitted); Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775, 781 (8th Cir. 2009) ("ICRP is a factor to consider in evaluating the totality of the debtor's circumstances.") (quoting *In re* Lee, 352 B.R. 91, 95 (B.A.P. 8th Cir. 2006))); *id.* at 783 (Smith. J., concurring) ("Income Contingent Repayment Plan (ICRP) remains merely 'a factor' to consider . . . .").

299. *See Krieger*, 713 F.3d at 886 (Manion, J., concurring).

300. *See, e.g.*, Williams v. Am. Educ. Serv. (*In re* Williams), 492 B.R. 79, 86 n.12 (Bankr. M.D. Ga. 2013) (collecting cases).

Although IDR is relevant to determining undue hardship, its relevance should be determined with respect to specific factual situations. It is inappropriate to simply plug the projected IDR payments into the first part of the *Brunner* test, because there are situations where the debtor should not be expected to participate in IDR.[301] Instead, this Article endorses the federal appellate courts' more flexible approach. In *Brunner* jurisdictions, IDR should be evaluated as part of the open-ended third part of the *Brunner* test, which considers the debtor's good-faith efforts to repay the debt. In totality-of-the-circumstances jurisdictions, IDR should be treated simply as one factor in evaluating the totality of the circumstances.

This Article states conditions under which nonparticipation in IDR usually should not count against good faith. It thus suggests a more definite framework for evaluating IDR than has been used to date, even though the good-faith analysis of which IDR is a part cannot be reduced to a precise test.

In suggesting how IDR should apply in specific situations, this Article relies principally on three propositions. First, the history of, and precedent interpreting, the fresh start indicate that the policies underlying the fresh start apply to student debts, and can apply even when payments are affordable under IDR.[302] Second, the history of the undue-hardship exception indicates that when student-loan bankruptcy is commenced after five years in repayment, the only interest usually weighing against the fresh start is that of creditor recovery.[303] Such bankruptcies should not be treated with special suspicion of abuse because student loans are involved. Third, the legislative history of IDR indicates that it was intended to ease burdens on student borrowers and expand their options, not to make life more difficult for them by increasing the hardship they must suffer to discharge student loans.[304]

C. EVALUATION OF UNDUE HARDSHIP IN SPECIFIC FACTUAL SITUATIONS PRESENTED BY IDR

This section makes proposals for analyzing several factual situations involving IDR and student-loan bankruptcy that commonly appear in the case law, by drawing on the policies underlying the fresh start, the undue-hardship requirement, and the IDR programs.[305] Table 1 summarizes the factual situations addressed and the suggested treatment for each.

In totality-of-the-circumstances jurisdictions, failure to participate in IDR would not count as a factor weighing against discharge in situations where the failure to participate in IDR would not count as a factor weighing against good faith in a *Brunner* jurisdiction.

301. *See infra* Section III.C (describing in detail factual situations in which the debtor's failure to participate in IDR should not count against discharge).

302. *See supra* Section III.A.

303. *See supra* Section I.B.7.

304. *See supra* Section II.D.

305. Cases in which each factual situation appears are cited in the discussion of that specific factual situation.

TABLE 1: SUGGESTED TREATMENT OF NONPARTICIPATION IN IDR IN VARIOUS FACT SITUATIONS (*BRUNNER* JURISDICTIONS)

Factual Situation	**Suggested Treatment of Nonparticipation in IDR**
(1) Inability to make IDR payments while maintaining minimal standard of living.	Nonparticipation in IDR does not count against good faith if debtor would be unable to maintain a minimal standard of living while making IDR payments for a significant portion of the original repayment period.
(2) IDR would extend of indebtedness.	Nonparticipation in IDR does not count against good faith if debtor would be unable to maintain an above-minimal standard of living while making IDR payments for a significant portion of the IDR repayment period.
(3) Bankruptcy is commenced after five years in repayment.	Nonparticipation in IDR does not count against good faith if participation would not produce a substantial likelihood of a significant financial recovery. Nonparticipation in IDR should not count against good faith if projected IDR payment is zero.
(4) Negative amortization is projected under IDR.	Factor weighing against finding that nonparticipation in IDR counts against good faith. Can be accounted for by requiring creditor to show an increased projected financial recovery to count nonparticipation in IDR against good faith.
(5) IDR loan cancellation potentially creates future tax liability.	Factor weighing against finding that nonparticipation in IDR is bad faith. Issue should not be ignored on ground that tax liability is speculative.
(6) Nonparticipation in IDR is because debtor did not know of IDR's availability or of debtor's eligibility.	If nonparticipation in IDR would not count against good faith under the principles above, reasons for debtor nonparticipation usually are not relevant. Debtor's failure to investigate IDR can count against debtor if she loses the opportunity to participate in a viable IDR program through conduct more culpable than negligence.

1. Inability to Make IDR Payments While Maintaining Minimal Standard of Living

IDR should not obstruct discharge if the debtor cannot afford even the IDR payments. IDR may be affordable in most cases, but the formula for determining payments under IDR is based only on income and does not allow for a case-by-case analysis of expenses. Thus, a debtor may not be able to maintain a minimal standard of living while making IDR payments, for example, if she has high expenses arising from medical needs[306] or dependents.[307]

If the debtor cannot make IDR payments while maintaining a minimal standard of living, she should have to show that this condition will persist only for a significant portion of the existing repayment period of the loan, if IDR would extend the loan term.[308] Because IDR was not intended to, and should not, make life more difficult for student debtors,[309] IDR should not extend the period in which the debtor must endure a below-minimal standard of living to show undue hardship.

For example, assume that a significant portion of the original repayment period is six years and a significant portion of the IDR repayment period is fifteen years. In a world without IDR, a debtor can show undue hardship by demonstrating that repayment of her debt would require her to live below a minimal standard of living for six years. With IDR, if the IDR repayment period is used to determine undue hardship, undue hardship cannot be shown unless the debtor demonstrates that repayment of her debt would require her to live below a minimal standard of living for fifteen years. If IDR counted against discharge in this case, the debtor who could show the prospect of six, but not fifteen, years of a below-minimal standard of living could be denied discharge. IDR's existence would subject the debtor to a longer period of a sub-minimal lifestyle. That result is contrary to the purpose of IDR,[310] suggesting that if IDR would extend repayment, the original repayment term should be used to analyze whether good faith requires the debtor to participate in IDR.

Figure 1 illustrates the foregoing discussion. According to the *Brunner* test, hardship is defined in terms of the debtor's standard of living and the period for

---

306. *See, e.g.*, McLaney v. Ky. Higher Educ. Assistance Auth. (*In re* McLaney), 375 B.R. 666, 671–72, 678 (M.D. Ala. 2007) (finding that it was not bad faith for debtors with numerous chronic illnesses to decline to enroll in loan consolidation program that would have reduced payments from approximately $509 per month to $165 per month where disposable income after medical expenses of $350 per month was only $142 per month).

307. *See, e.g.*, Walker v. Sallie Mae Serv. Corp. (*In re* Walker), 650 F.3d 1227, 1232, 1234–35 (8th Cir. 2011) (holding that a family with five children could not afford the $594 ICRP payment despite income of nearly $68,000).

308. The standard student loan repayment term is typically ten years. *See* Federal Student Aid, *Standard Plan*, U.S. DEP'T OF EDUC., https://studentaid.ed.gov/sa/repay-loans/understand/plans/standard [https://perma.cc/c6LJ-ZHFJ] (last visited Feb. 23, 2018). IDR terms are twenty or twenty-five years. *See supra* notes 195–99.

309. *See supra* Section II.D.

310. *See supra* Section II.D.

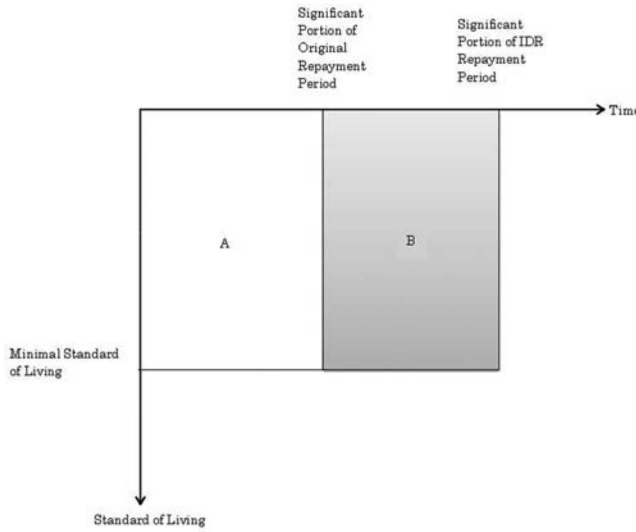

Figure 1. IDR and Inability to Maintain a Minimal Standard of Living.

which that standard of living persists.[311] Hardship increases as the standard of living decreases and as the period for which it is endured increases. Thus, the areas inside the rectangles can be thought of loosely as "quantities" of hardship. Without IDR, a debtor would be eligible for discharge if she endured a below-minimal standard for a significant portion of the original repayment period, indicated by Rectangle A. With IDR, there would be a greater hardship—corresponding to the sum of Rectangles A and B—because eligibility for discharge would require a showing that a below-minimal standard of living would persist for a significant portion of the IDR period. Because IDR is not intended to increase debtor hardship, the additional hardship represented by Rectangle B should not be required for discharge.[312]

If participating in IDR would not extend the loan term,[313] the debtor arguably should have to show a below-minimal standard of living for a significant portion of the IDR repayment period. However, even in this case, it can be argued that the baseline level of hardship required under the *Brunner* test should be based on the standard ten-year repayment period. The *Brunner* court described ten years as the "generally" applicable repayment period, and did not address how to

311. *See* Brunner v. N.Y. Higher Ed. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987).
312. *See supra* Section II.D.
313. This could occur if the debtor were already in IDR at the time of the bankruptcy or if the debtor were in a plan with a repayment term longer than the IDR term, such as the extended repayment plan and/or the standard repayment plan for a consolidation loan with a high balance. *See* Federal Student Aid, *Repayment Plans*, U.S. DEP'T OF EDUC., https://studentaid.ed.gov/sa/repay-loans/understand/plans [https://perma.cc/3VB6-KN6T] (last visited Feb. 23, 2018).

interpret "the repayment period" when multiple repayment plans are available.[314] Moreover, the debtor's choice of repayment plan outside of bankruptcy arguably is a fortuity that should not increase the total level of hardship required for discharge.

Courts have often reached conclusions consistent with the suggested approach. For example, in *Walker v. Sallie Mae Servicing Corp.* (*In re Walker*), the Eighth Circuit held that a debtor with five children, including autistic twins, who was running a monthly deficit of nearly $650[315]—despite earning an annual family income of up to $67,639[316]—could get a discharge, notwithstanding that ICRP offered a monthly payment of $593.98.[317] Other federal appellate courts have found that an inability to afford IDR payments is a legitimate reason not to participate in the program, but have provided less detail.[318] Lower courts have granted or upheld discharge despite nonparticipation in IDR where the debtor could not afford the IDR payment.[319]

However, not all courts have been so willing to forgive debtors who cannot afford IDR. In *Fields v. Sallie Mae Services Corp.* (*In re Fields*), the bankruptcy court found that the debtor's projected monthly IDR payment of $884 was "unworkable" given the debtor's "current financial circumstances" and granted a partial discharge despite the debtor's decision not to apply for IDR.[320] The Sixth Circuit reversed the Bankruptcy Appellate Panel's affirmance of the bankruptcy

314. *See* Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 754 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987) ("[I]t is not unreasonable to hold that committing the debtor to a life of poverty for the term of the loan—generally ten years—imposes 'undue' hardship.").

315. 650 F.3d 1227, 1234 (8th Cir. 2011).

316. *Id.* at 1230.

317. *Id.* at 1234.

318. *See* Kelly v. Sallie Mae, Inc., 594 F. App'x 413, 414 (9th Cir. 2015) (holding that debtor's good faith belief that she was ineligible for a loan repayment plan because "she could not afford the payments after consolidation" supported discharge); Hedlund v. Educ. Res. Inst., Inc., 718 F.3d 848, 853 & n.7 (9th Cir. 2013) (upholding discharge where bankruptcy court determined that ICRP payment exceeded debtor's ability to pay); Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320, 1327 (11th Cir. 2007) (concluding that "in light of [debtor's] dire living conditions and persistent inability to obtain steady work," IDR did not provide debtor a "realistic solution"); Lokey v. U.S. Dep't of Educ. (*In re* Lokey), 98 F. App'x 938, 941 (4th Cir. 2004) (per curiam) (holding that the bankruptcy court clearly erred in finding that debtor did not act in good faith where debtor investigated IDR but determined she could not afford payments); Floyd v. Educ. Credit Mgmt. Corp., 54 F. App'x 124, 126 (4th Cir. 2002) (per curiam) (holding that the bankruptcy court did not clearly err in finding debtor acted in good faith when debtor "investigated the possibility of consolidating the loans and other workout options, but the payments would have been too high for him to be able to pay"); *accord* Tirch v. Pa. Higher Educ. Assistance Agency (*In re* Tirch), 409 F.3d 677, 682–83 (6th Cir. 2005) (reversing Bankruptcy Appellate Panel's decision affirming partial discharge where bankruptcy court miscalculated IDR payment and where the correct amount was less than what the bankruptcy court determined debtor could pay).

319. *See, e.g.*, Educ. Credit Mgmt. Corp. v. Curiston. 351 B.R. 22, 33 (D. Conn. 2006) (noting that participation in IDR would be "futile" because debtor could not "afford the minimum payment under the program."); Halverson v. U.S. Dep't of Educ. (*In re* Halverson), 401 B.R. 378, 390 (Bankr. D. Minn. 2009) (granting discharge after finding ICRP unaffordable); Durrani v. Educ. Credit Mgmt. Corp. (*In re* Durrani), 311 B.R. 496, 506 (Bankr. N.D. Ill. 2004), *aff'd*, 320 B.R. 357 (N.D. Ill. 2005) (granting discharge where the debtor could not "realistically afford to make the payments required by the ICRP").

320. 286 F. App'x 246, 250 (6th Cir. 2007).

court's decision, stating that the debtor "did not use all realistically available resources to repay her loans, inasmuch as she had not even applied for ICR relief."[321] In reversing, the Sixth Circuit did not discuss the bankruptcy court's finding that the IDR payment itself would have been unaffordable.

2. Extension of Indebtedness Under IDR

If IDR would extend the debtor's repayment period, the availability of IDR should not count against discharge if (1) the debtor is unable to maintain an above-minimal standard of living while making IDR payments, and (2) this condition will persist for a significant portion of the IDR repayment period.

IDR does more than reduce payments; it typically extends the loan term. The legislative history of IDR shows that Congress viewed long repayment terms under IDR as a source of hardship.[322] Thus, when IDR would extend the loan term, the undue-hardship standard should be applied in a way that incorporates the disadvantage of IDR to the debtor (a longer loan term) along with its advantage (lower payments). IDR's existence should not increase the amount of hardship a debtor must show to get discharge. Thus, if IDR extends the loan term, the debtor should be allowed an above-minimal standard of living.[323]

The previous section argued that the existence of IDR should not prolong the period in which the debtor is required to endure a below-minimal standard of living to get a discharge. This section argues that for above-minimal debtors, IDR may prolong the period for which the debtor is required to show hardship to get a discharge, but that the total amount of hardship the debtor faces should be preserved by allowing the debtor an above-minimal standard of living for that prolonged period.

a. Allowing the IDR Debtor an Above-Minimal Standard of Living. When participation in IDR would extend the repayment term, IDR's availability should not count against discharge if the debtor can establish that she would be unable to maintain an above-minimal standard of living for a significant portion of the IDR repayment term. Extending the repayment period increases the debtor's hardship and obstructs the debtor's participation in the economy and society—the kinds of negative effects the fresh-start policy is supposed to address.[324] To ensure that

321. *Id.*

322. *See supra* notes 203–11 and accompanying text.

323. It might be objected that using an above-minimal standard of living to assess hardship in this context is inconsistent with the *Brunner* test, which recognizes hardship only when the debtor endures a below-minimal standard of living. *See* Brunner v. N.Y. Higher Ed. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987). However, under this Article's proposed analysis, a debtor seeking a discharge of student loans does have to demonstrate that she cannot maintain a minimal standard of living for a significant portion of her repayment period while making her current payments, as *Brunner* prescribes. *Id.* The above-minimal standard of living comes into play only when the debtor has made such a showing and the creditor argues that discharge should nevertheless be denied for failing *Brunner*'s good faith requirement because the debtor did not participate in IDR. This Article proposes that in evaluating that creditor argument, the debtor should not be denied discharge if participating in IDR would require her to live at a below-minimal standard of living for a significant portion of the IDR repayment period.

324. *See supra* Section I.A.3.

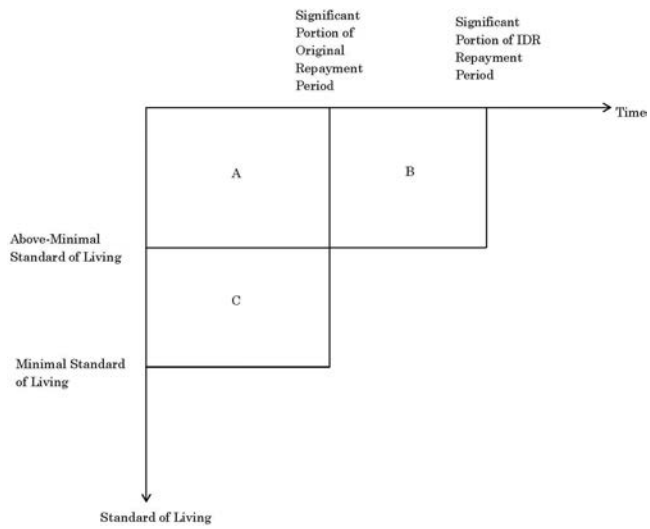

Figure 2. Extension of Repayment Period in IDR.

IDR's existence does not increase the debtor's overall hardship, which would be contrary to the goals of IDR program,[325] the extension of repayment should be counterbalanced with an increase in the standard of living the debtor is allowed while in repayment.

The burden of proof falls on the debtor in an adversary proceeding to determine the dischargeability of student debt. Thus, requiring the debtor to prove inability to maintain a particular standard of living over a longer period increases the evidentiary burden on the debtor. For example, having to show inability to maintain an above-minimal standard of living for the next, say, fifteen years (a "significant portion" of the IDR period), could be an insurmountable burden. If discharge were denied because the debtor could not make this showing, IDR would make life harder for the debtor, contrary to the program's intent.[326] Accordingly, if the debtor can show that she cannot make IDR payments and maintain an above-minimal standard of living for a significant portion of the original repayment period, a court in a proper case should be willing to infer that such a situation would persist for a significant portion of the IDR period unless the creditor presents evidence to the contrary.

Figure 2 illustrates the preceding argument. Like Figure 1, Figure 2 represents hardship in terms of (x), the period for which the hardship is suffered, and (y), the standard of living endured. These are the two factors that determine hardship under the *Brunner* test. Without IDR, the debtor can receive a discharge if she demonstrates a below-minimal standard of standard of living for a significant portion of the original repayment period. This corresponds to Rectangles A and C. With IDR, if debtor must show that she will endure below an above-minimal

325. *See supra* Section II.D.
326. *See supra* Section II.D.

standard of living for a significant portion of the IDR repayment period, Rectangles A and B represent the required hardship. To prevent the extension of the required period from increasing the total hardship the debtor must show, the allowable standard of living should be increased. In terms of Figure 2, the "above-minimal standard of living" line should be moved up to the point where Rectangle B is the same size as Rectangle C.

b. Defining an Above-Minimal Standard of Living. The above-minimal standard of living probably allows a higher standard of living than that allowed in *Kuznicki v. Educational Credit Management Corp.* (*In re Kuznicki*) where the court emphasized that "[a] minimal standard of living requires more than a showing of tight finances."[327] In *Kuznicki*, the bankruptcy court found that a debtor failed to maintain a minimal standard of living because he spent $140 per month on transportation (though he had no car) and $75 per month on entertainment.[328] An above-minimal standard of living presumably would allow such expenses.

In defining an above-minimal standard of living, courts could draw on precedents applying the "reasonably necessary" standard for expenditures under Chapter 13.[329] Courts have described the lifestyle afforded by "reasonably necessary" payments as "adequate but not first-class."[330] As Judge David Kennedy and R. Spencer Clift, III, wrote, the Chapter 13 debtor can enjoy the "modest pleasures of life balanced with consideration of the rights of creditors."[331] Life in Chapter 13 "may require some sacrifices"[332] but nevertheless appears to be above a minimal standard of living.

The Chapter 13 standard could be adapted to evaluating undue hardship in light of IDR. The debtor projects the income she could earn with good-faith effort over a significant portion of the repayment period and deducts reasonably necessary expenditures over that period. If enough is left over to make the IDR payments,

---

327. No. 11-20563-BM, 2012 Bankr. LEXIS 605, at *7 (Bankr. W.D. Pa. Feb. 21, 2012).

328. *Id.* at *9–10.

329. *See* 11 U.S.C. § 1325(b)(1)(B), (b)(2)(A)(i) (2012) (providing that if the trustee or an unsecured creditor objects to a Chapter 13 plan, the plan must provide that all of the debtor's "disposable income" will be applied to unsecured debts, and defining "disposable income" as current monthly income "less amounts reasonably necessary to be expended for the maintenance and support of the debtor, or a dependent of the debtor").

330. *See In re* McDonald, No. 14-11740, 2015 Bankr. LEXIS 966, at *8 (Bankr. W.D. La. Mar. 27, 2015) (describing lifestyle as "adequate but not first-class"). *In re* Sandercock, No. 03-36260F, 2005 Bankr. LEXIS 3352, at *15 (Bankr. E.D. Pa. Jan. 20, 2005) (same); *In re* Woodman, 287 B.R. 589, 596 (Bankr. D. Me. 2003) (describing the Chapter 13 standard as requiring "that expenses provide the means to live 'adequately,' but not 'first class'" (quoting 2 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY § 165.1, at 165-5 to 165-6 (3d ed. 2000))).

331. David S. Kennedy & R. Spencer Clift, III, *Reasonable and Necessary Expenses Under Section 1325(b) of the Bankruptcy Code, Postconfirmation Considerations, and the Effect of Conversion and Dismissal of Chapter 13 Cases*, 32 U. MEM. L. REV. 789, 877 (2002) (describing the purpose of the "reasonably necessary" requirement in Chapter 13).

332. S. REP. NO. 98-65, at 22 (1983) (describing the purpose of the "reasonably necessary" standard in Chapter 13).

the debtor's refusal of IDR weighs against good faith. Otherwise, the debtor can refuse IDR in good faith.[333]

Although both tests are open-ended, it seems that the "reasonably necessary" standard is more forgiving than the "minimal lifestyle" standard under the *Brunner* test, and is thus appropriate for evaluating an above-minimal lifestyle. For example, a leading bankruptcy treatise, *Collier on Bankruptcy*, states of the reasonably-necessary standard that "[t]he debtor's expenses should be scrutinized only for luxuries that are not enjoyed by an average American family."[334] By contrast, the "minimal standard of living" has been found to be a sub-middle-class lifestyle.[335]

The "reasonably necessary" standard under Chapter 13 has been criticized as overly subjective.[336] In response, the 2005 bankruptcy statute, BAPCPA, provides for partial standardization of what is reasonably necessary for above-median-income debtors.[337] Despite this criticism, the standard may have acquired

333. If the amount left over after subtracting reasonably necessary expenditures is enough to cover some but not all of the IDR payment, then—assuming the other parts of the *Brunner* test are met—the court could grant a partial discharge in jurisdictions where such a discharge is permissible. If partial discharge is not available, then the debtor should presumptively be able to refuse IDR without losing the discharge, because she is unable to make the IDR payments while maintaining an above-minimal standard of living for a significant portion of the repayment period.

334. COLLIER ON BANKRUPTCY, *supra* note 53, ¶ 1325.11[4][c] at 1325–66. Robert Salvin proposed in 1996 that student loan debt be dischargeable unless the debtor can lead a middle-class lifestyle while making payments. Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans?*, 71 TUL. L. REV. 139, 175–76 (1996). This Article makes the more limited argument that IDR's availability should not prevent a debtor from getting a discharge if the debtor would be unable to maintain an above-minimal standard of living for a significant portion of the IDR repayment period.

335. *See, e.g.*, Educ. Credit Mgmt. Corp. v. Howe (*In re* Howe), 319 B.R. 886, 889 (B.A.P. 9th Cir. 2005) ("[A] minimal standard of living under § 523(a)(8) does not equate to a middle class standard of living."). It appears that, to date, only courts in the Ninth Circuit have directly compared minimal and middle-class standards of living. All have followed *In re Howe* and stated that a minimal standard of living is below a middle-class one. *See* Hansen v. Sallie Mae, Inc., No. 2:14-cv-00116-MJP, 2014 U.S. Dist. LEXIS 113998, at *6 (W.D. Wash. Aug. 14, 2014); Educ. Credit Mgmt. Corp. v. Beattie, 490 B.R. 581, 586 (W.D. Wash. 2012); Educ. Credit Mgmt. Corp. v. Kelly, No. C11-1263RSL, 2012 U.S. Dist. LEXIS 56052, at *5 (W.D. Wash. Apr. 20, 2012), *rev'd on other grounds*, Kelly v. Sallie Mae, Inc., 594 F. App'x 413 (9th Cir. 2015); Lewellen v. Access Grp., Inc. (*In re* Lewellen), No. 07-31666-TEC, 2010 Bankr. LEXIS 4306, at *3–4 (Bankr. N.D. Cal. Dec. 2, 2010); Dimoyannis v. Sallie Mae Serv. (*In re* Dimoyannis), No. 09-43869-EDJ, 2010 Bankr. LEXIS 1480, at *5 (Bankr. N.D. Cal. Apr. 29, 2010); Avellano v. Educ. Credit Mgmt. Corp. (*In re* Avellano), No. 01-30885-TEC, 2009 Bankr. LEXIS 2459, at *4 (Bankr. N.D. Cal. June 16, 2009). *See also* McLaney v. Ky. Higher Educ. Assistance Auth. (*In re* McLaney), 375 B.R. 666, 674 (M.D. Ala. 2007) ("[A] minimal standard of living lies somewhere between poverty and mere difficulty.") (quoting McLaney v. Ky. Higher Educ. Assistance Auth. (*In re* McLaney), 314 B.R. 228, 234 (Bankr. M.D. Ala. 2004))).

336. *See, e.g.*, Irving A. Breitowitz, *New Developments in Consumer Bankruptcies: Chapter 7 Dismissal on the Basis of "Substantial Abuse,"* 59 AM. BANKR. L.J. 327, 353 (1985).

337. *See* Pub. L. No. 109-8, § 102, 119 Stat. 23, 59 (codified at 11 U.S.C. § 1325(b)(3) (2012)); *see also* 11 U.S.C. § 1325(b)(3) (providing that "reasonably necessary" expenses for above-median-income debtors are to be determined under 11 U.S.C. § 707(b)(2)(A)–(B), which in turn provides that certain categories of expenditures "shall be" amounts "specified under the National Standards and Local Standards" promulgated by the IRS. *See* 11 U.S.C. § 707(b)(2)(A)(ii)(I)).

some definite meaning because courts have significant experience applying it.[338] However, courts looking for more specific guidance could turn to quantitative data. For example, the Bureau of Labor Statistics ("BLS") Consumer Expenditures Survey collects consumer expenditures by category,[339] income level,[340] geographic area,[341] and consumer-unit size.[342] Although the BLS does not currently publish a table that presents average expenditures for each possible combination of these factors (for instance, food expenditures for a fiftieth-income-percentile household of two in the South), the raw data is available[343] and academic researchers or the United States Trustee Program could produce such an analysis.[344] A court could then decide, for example, that an above-minimal standard of living typically entails expenditures equal to the average expenditures of a household of the same size in the same geographic area at the 40th percentile of the income distribution, and use those figures as benchmark for allowable expenditures.

The IRS Collection Financial Standards are another potential source of information. The Standards provide allowances for certain categories of expenditures that are used in other bankruptcy contexts.[345] The Internal Revenue Manual has described the standards as "establish[ing] the minimum a taxpayer and family needs to live,"[346] so perhaps they could furnish a guideline for the lower limit on expenses in the categories they cover.[347]

In sum, an above-minimal standard of living is, as the name suggests, one that exceeds a minimal standard of living. In deciding how much better a lifestyle the

---

338. *See, e.g.*, Cases in which the "Reasonably Necessary" Standard is Applied, LEXIS, https://advance.Lexis.com (follow the "Search" toolbar and, under "Category" select "Cases"; then enter "'reasonably necessary' /s 'expens!'" into the search bar) (returning 909 cases on July 28, 2017).

339. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REPORT NO. 1066: CONSUMER EXPENDITURES IN 2015 2–3 (2017).

340. *Id.* at 9–13.

341. *Id.* at 33–35.

342. *Id.* at 24–28.

343. Bureau of Labor Statistics, *Consumer Expenditure Survey*, U.S. DEP'T OF LABOR, https://www.bls.gov/cex/#products [https://perma.cc/866F-95KK] (last visited Feb. 2, 2018) (describing Consumer Expenditure Survey data available to public).

344. "The United States Trustee Program is a component of the Department of Justice that seeks to promote the efficiency and protect the integrity of the Federal bankruptcy system." *U.S. Trustee Program*, U.S. DEP'T OF JUSTICE (May 12, 2016), https://www.justice.gov/ust/about-program [https://perma.cc/EC2R-854T]. The United States Trustee Program currently provides information relating to allowable family expenditures for purposes of applying the "means test," which renders some debtors ineligible for Chapter 7 bankruptcy. *Means Testing*, U.S. DEP'T OF JUSTICE (Oct. 16, 2017), https://www.justice.gov/ust/means-testing [https://perma.cc/H3H4-V7HE]. That function is not too far afield from the permissible-expenditure analysis suggested in the text.

345. *See, e.g.*, 11 U.S.C. § 707(b)(2)(A)(ii)(I), (V) (2012) (prescribing the use of IRS Standards in applying the means test for substantial abuse of Chapter 7); *id.* § 1325(b)(3) (prescribing use of IRS Standards in determining disposable income of above-median-income Chapter 13 debtor).

346. Financial Analysis Handbook, INTERNAL REVENUE MANUAL 5.15.1.7 (Oct. 2, 2012), https://www.irs.gov/irm/part5/irm_05_015-001 [https://perma.cc/AJR9-GJ].

347. Creditors have argued unsuccessfully that the Standards should be used as an upper limit on allowable expenses. *See, e.g.*, Educ. Credit Mgmt. Corp. v. Howe (*In re* Howe), 319 B.R. 886, 890, 893 (B.A.P. 9th Cir. 2005) (citing favorably the IRS Collection Financial Standards and rejecting "creditor's argument that the IRS Standards are useful only as establishing a ceiling on a debtor's expenses").

above-minimal standard of living affords, courts could turn to existing precedents decided under Chapter 13 and to quantitative measures of expenditures maintained by the federal government.

3. Bankruptcy Commenced After Five Years in Repayment

When the bankruptcy case is started after the debtor has been in repayment for five years, IDR should not count against discharge, unless the creditor shows that there is a substantial likelihood that it will have a significant financial recovery if the debtor participates in IDR. The only reason for restricting the debtor's fresh start after the initial five-year period is the interest in monetary recovery, and if there is no substantial likelihood of significant recovery, then denying the debtor's fresh start is not justified.[348]

This principle applies in cases where the student-loan debtor's income is so low that her IDR payment will be zero for the foreseeable future—a situation that has attracted considerable attention.[349] Courts have divided over what to do in this instance. Many courts, including the Bankruptcy Appellate Panels for the First[350] and Ninth[351] Circuits, find that the availability of IDR should not bar discharge when the projected payment is zero.[352] These courts find that it is "futile"[353] or "meaningless"[354] to make the debtor enroll in IDR so that she can make "payments" of zero. They sometimes point to the administrative burden of IDR enrollment on the debtor[355] or to the injustice of denying discharge when the debtor has a zero-payment IDR option, thereby denying a fresh start to the debtors most in need of one.[356] By contrast, other courts find that the zero-payment IDR option is a reason to deny discharge. One such decision, affirmed per curiam by the Fourth Circuit, states that a payment of zero does not itself render the debtor unable to maintain a minimal standard of living.[357] Another case

348. *See supra* Section I.B.7.

349. The income level for which payment is zero is 100 percent of the poverty level for ICR and 150 percent of the poverty level for other IDR plans. *See* 34 C.F.R. § 685.209(b)(1)(iii)(A) (2016) (ICR); *id.* § 685.209(a)(2)(v)(A–B) (PAYE); *id.* § 685.209(c)(1)(iv)(2) (REPAYE); *id.* § 685.221(a)(5)(i) (IBR).

350. Bronsdon v. Educ. Credit Mgmt. Corp. (*In re* Bronsdon), 435 B.R. 791, 803–04 (B.A.P. 1st Cir. 2010).

351. Roth v. Educ. Credit Mgmt. Corp. (*In re* Roth), 490 B.R. 908, 919–20 (B.A.P. 9th Cir. 2013).

352. *See* Durrani v. Educ. Credit Mgmt. Corp. (*In re* Durrani), 311 B.R. 496, 506 (Bankr. N.D. Ill. 2004), *aff'd*, 320 B.R. 357 (N.D. Ill. 2005) (collecting cases granting discharge despite zero dollar projected IDR payment of zero dollars).

353. *In re Roth*, 490 B.R. at 920.

354. *In re Bronsdon*, 435 B.R. at 803 (quoting Bronsdon v. Educ. Credit Mgmt. Corp. (*In re* Bronsdon), No. 07-14215, 2010 Bankr. LEXIS 71, at *6 (Bankr. D. Mass. Jan. 8, 2010)).

355. *See* Booth v. U.S. Dep't of Educ. (*In re* Booth), 410 B.R. 672, 675 (Bankr. E.D. Wash. 2009) (noting that under IDR, "further action . . . will . . . be taken to collect the obligation, even if that action is simply requiring the debtor to provide annual financial information to the Department of Education").

356. *See* Nightingale v. N.C. State Educ. Assistance Auth. (*In re* Nightingale), 529 B.R. 641, 650 (Bankr. M.D.N.C. 2015).

357. *See* Greene v. U.S. Dep't of Educ., No. 4:13cv79, 2013 U.S. Dist. LEXIS 143678, at *12–13 (E.D. Va. Oct. 2, 2013), *aff'd*, 573 F. App'x. 300 (4th Cir. 2014) (per curiam); *see also* Nielsen v. ACS, Inc. (*In re* Nielsen), 518 B.R. 529, 535 (B.A.P. 8th Cir. 2014) ("[T]he Debtor could participate in the zero monthly payment ICRP without compromising her minimal standard of living.").

emphasizes that the government should be able to recover if the debtor's financial situation does improve.[358]

The pro-discharge position relies on the idea that zero payment means zero benefit to the creditor; the anti-discharge position rests on the proposition that zero payment means zero harm to the debtor. But, as noted, outstanding loan balances present the risk of harm and engage the fresh-start policy even without the need to make payments.[359] On the other side of the ledger—in cases commenced after the five-year mark where the debtor otherwise acts in good faith—is only the interest in financial recovery.[360] That interest is served only when the debtor actually makes payments and thus is unimportant when the debtor convincingly projects zero payments for the foreseeable future. There are costs to the debtor in the zero-payment case that are not counterbalanced by a corresponding benefit to the creditor. Thus, IDR usually should not be a barrier to discharge in the no-payment case, at least when the case is commenced after five years have passed.

4. IDR Payments Would Result in Negative Amortization

IDR payments are based on the debtor's income, not on a schedule that provides for complete repayment of the educational debts over the repayment period. Thus, it can and often does happen that the IDR payments are insufficient to cover the interest on the debt, so that the debt balance rises while the borrower is in IDR.[361] This phenomenon is called "negative amortization" and is potentially an additional source of harm for student borrowers. The zero-payment case discussed above is an extreme example of negative amortization.

At least one appellate decision can be read as rejecting the idea that negative amortization can be a source of harm. In *Roe v. College Access Network*, the panel found in somewhat cryptic fashion that a debtor's argument that she should not have to participate in IDR because of negative amortization "misse[d] the point," and that failure to participate in IDR was a factor indicating lack of good faith.[362] On the other hand, in *Barrett v. Education Credit Management Corp.* (*In re Barrett*), the Sixth Circuit recognized negative amortization as a form of hardship, taking heed of the "additional worry and anxiety that the Debtor is likely to suffer if he is compelled to watch his debt steadily increase knowing that he does not have the ability to repay it for reasons beyond his control."[363] Although the worry and anxiety may not have played a major role in the analysis, the court was

358. *See* Nielsen v. ACS, Inc. (*In re* Nielsen), No, 09-04888, 2013 Bankr. LEXIS 2116, at *24–25 (Bankr. S.D. Iowa May 24, 2013), *aff'd*, 518 B.R. 529 (B.A.P. 8th Cir. 2014) (zero-payment IDR "affords an opportunity for [the creditor] to be repaid if [the debtor's] financial situation changes").

359. *See supra* Section III.A.

360. *See supra* Section I.B.7.

361. *See, e.g.*, Bronsdon v. Educ. Credit Mgmt. Corp. (*In re Bronsdon*), 435 B.R. 791, 803 (B.A.P. 1st Cir. 2010); Michaud v. Sallie Mae, Inc. (*In re* Michaud), No. 8:13-bk-07220-KRM, 2014 Bankr. LEXIS 2977, at *3 (Bankr. M.D. Fla. July 9, 2014).

362. 295 F. App'x. 927, 931 (10th Cir. 2008).

363. 487 F.3d 353, 365 n.8 (6th Cir. 2007) (quoting Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 337 B.R. 896, 904 (B.A.P. 6th Cir. 2006)).

willing to take notice of the stress of negative amortization without specific evidence in the record that the debtor was suffering in that way.[364]

A number of lower courts likewise have found that negative amortization is in itself a harm that justifies granting a discharge despite the availability of IDR.[365] For example, in the recent case of *Fern v. FedLoan Servicing* (*In re Fern*), the bankruptcy court noted that the "hardships imposed by income-based repayment programs include . . . the continued accrual of interest and charges on the debt such that the debt would continue to grow during the 20 or 25 year period."[366] The court discharged the student-loan debt and considered negative amortization as a hardship separate from other negative effects of the debt.[367]

As discussed, loan balances themselves can cause debtors harm even if the monthly repayment is affordable.[368] Some of these harms, such as mental-health effects and negative effects on credit, can be presumed to be worse when the student-loan balance is growing because payments are not even covering the interest.[369] There seems to be a stronger argument in such a case that the debtor has "too much debt."[370] Thus, the debtor's case for discharge notwithstanding IDR seems stronger when participating in IDR would lead to negative amortization. The harm of negative amortization can be balanced against the creditor's interest in recovery by requiring the creditor to show a greater expected financial recovery under IDR if negative amortization is present.

5. Potential Tax Burden upon IDR-Based Debt Cancellation

Under current law, participation in IDR can result in tax liability when the student-loan debt is canceled at the end of the repayment period. This section first explains both the statutory provisions that create the liability and those that limit it in some circumstances. It then describes how the courts have dealt in student-loan bankruptcies with the possible tax liability arising from IDR participation.

364. The court in *Barrett* mentioned worry and anxiety only in a footnote and relied primarily on the debtor's potential tax liability upon completion of IDR to support its conclusion that the debtor acted in good faith even though he did not participate in IDR. *Id.* at 364–65, 365 n.8.

365. *See, e.g.*, Murray v. Educ. Credit Mgmt. Corp. (*In re* Murray), 563 B.R. 52, 59–60 (Bankr. D. Kan. 2016) (holding debtors' student loans dischargeable because debtors' "monthly payments [under IDR], although affordable . . . would not even be sufficient to pay the interest"); Brooks v. Educ. Credit Mgmt. Corp. (*In re* Brooks), 406 B.R. 382, 396 (Bankr. D. Minn. 2009) (weighing projection that "the debt would simply continue to grow over the twenty-five year period as interest accrues" in granting discharge); Halverson v. U.S. Dep't of Educ. (*In re* Halverson), 401 B.R. 378, 389–90 (Bankr. D. Minn. 2009) (stating that ICRP "does not further the Bankruptcy Code's purpose of providing a fresh start to 'honest but unfortunate debtors'") (quoting Lee v. Regions Bank Student Loans (*In re* Lee), 352 B.R. 91, 96–97 (B.A.P. 8th Cir. 2006))).

366. 553 B.R. 362, 369 (Bankr. N.D. Iowa 2016) (citing Abney v. U.S. Dep't of Educ. (*In re* Abney), 540 B.R. 681, 688–89 (Bankr. W.D. Mo. 2015)).

367. *Id.* Other harms considered by the court included access to credit, ability to obtain employment and housing, effect on mental and emotional health, and potential tax burden. *Id.* at 369–70.

368. *See supra* Section III.A.

369. The potential tax liability on cancellation at the end of the IDR period will also increase as the loan balance increases. *See infra* Section III.C.5.

370. *See* H.R. REP. NO. 95-595, at 125 (1977), *as reprinted in* 1978 U.S.C.C.A.N 5963, 6068.

Finally, it proposes two alternative approaches, one quantitative and one qualitative, for addressing the issue.

a. Statutory Provisions. IDR programs provide for cancellation of indebtedness if the debtor still owes money after making payments for a specified period. Depending on the program, the period may be ten, twenty, or twenty-five years.[371] This debt cancellation may have tax consequences. The typical tax rule for all types of loans, including student loans, is that when a taxpayer's debt is cancelled other than through bankruptcy,[372] the taxpayer recognizes income equal to the amount of the cancelled debt, and this income is subject to tax.[373] A special exception to this rule covers programs in which cancellation is based on service, notably the Public Service Loan Forgiveness program.[374] The exception does not, however, cover loan cancellation under IDR, so that under current law cancellation of indebtedness at the expiration of the IDR period would result in taxable income.

An exception to the cancellation-of-indebtedness tax rule applies if the taxpayer is insolvent.[375] The cancellation-of-indebtedness income is reduced by the amount of the taxpayer's insolvency immediately before the cancellation.[376] The "amount of insolvency" here is defined as the fair market value of the taxpayer's assets minus the taxpayer's liabilities.[377] The IRS gives the following example of the insolvency exception: if immediately before the cancellation a taxpayer has total liabilities of $10,000 and the fair market value of her assets is $7,000, then the taxpayer is insolvent in the amount of $3,000. If a credit-card lender forgives $5,000 of this taxpayer's debt, then the $5,000 in cancellation-of-indebtedness income is reduced by the $3,000 amount of insolvency, so the taxpayer would recognize $2,000 of cancellation-of-indebtedness income.[378]

---

371. *See supra* notes 177–82.

372. *See* 26 U.S.C. § 108(a)(1)(A) (2006) (excluding from gross income amounts discharged "in a title 11 [bankruptcy] case").

373. *Id.* § 61(a)(12) (2006) (defining gross income to include "income from discharge of indebtedness"); MARTIN J. MCMAHON & LAWRENCE A. ZELENAK, FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 4.05[2] (3d ed. 2017) (explaining codification of Supreme Court's decision that cancellation of indebtedness results in income for tax purposes).

374. 26 U.S.C. § 108(f)(1) (2006) (excluding from gross income "any amount which (but for this subsection) would be includible in gross income by reason of the discharge . . . of any student loan if such discharge was pursuant to a provision of such loan under which all or part of the indebtedness of the individual would be discharged if the individual worked for a certain period of time in certain professions for any of a broad class of employers"); MCMAHON & ZELENAK, *supra* note 373, ¶ 4.05[3][g] (explaining limited exclusion for service-based loan forgiveness).

375. *See* 26 U.S.C. § 108(a)(1)(B) (2006) (excluding from gross income discharges that "occur[] when the taxpayer is insolvent").

376. *See* 26 U.S.C. § 108(d)(3) (2006) (providing that insolvency is determined "on the basis of the taxpayer's assets and liabilities immediately before the discharge"); MCMAHON & ZELENAK, *supra* note 373, ¶ 4.05[5] (same).

377. IRS, U.S. DEP'T OF THE TREASURY, PUB NO. 4681, CANCELLED DEBTS, FORECLOSURES, REPOSSESSIONS AND ABANDONMENTS 5–6 (2017).

378. *Id.* at 7.

This rule means that cancellation-of-indebtedness income is capped at the taxpayer's net worth excluding the cancelled debt. In the example above, ignoring the $5,000 in forgiven credit-card debt, the taxpayer had a net worth of $2,000 ($7,000 minus $5,000), which equals the cancellation-of-indebtedness income. Thus, the cancellation-of-indebtedness income will be the lesser of the debt cancelled, or the taxpayer's net worth excluding the cancelled debt. The tax paid will be the cancellation-of-indebtedness income multiplied by the tax rate.

The income tax liability for cancellation of income is itself nondischargeable in bankruptcy, at least until three to four years have passed.[379] Thus, commentators have noted that a debtor who participates in IDR "has exchanged one nondischargeable debt for another,"[380] and appellate courts have echoed this language.[381] This pithy formulation emphasizes that cancellation on completion of IDR is not necessarily a complete solution to the debtor's problems, even though the tax liability on the forgiven debt would be less than the liability for the debt itself.

b. Treatment in Federal Court. The potential income tax liability upon completion of an IDR program could be a reason to grant a discharge in spite of the debtor's failure to participate in IDR. Four federal appellate courts have considered the issue, and three have decided for the debtor, giving significant weight to the possible tax liability. However, the possible tax liability was not the only factor supporting the debtor's good faith in any of the three cases. This section first discusses the cases decided in favor of the debtor, and then one case decided against the debtor.

In *Barrett v. Education Credit Management Corp.* (*In re Barrett*), a panel of the Sixth Circuit affirmed the grant of discharge.[382] The court noted that in general "requiring enrollment in the ICRP runs counter to the Bankruptcy Code's aim in providing debtors a 'fresh start.'"[383] It then reviewed the debtor's reasons for declining to participate in the ICRP and approvingly quoted the bankruptcy court: "In light of the significant tax consequences of enrolling in the ICRP due to his present and future inability to pay his student debt, Barrett's decision to forgo the ICRP was reasonable and is not grounds for finding bad faith."[384] In

379. *See* 11 U.S.C. § 523(a)(1)(A) (2012) (providing that tax debts specified in 11 U.S.C. § 507(a)(8) are not dischargeable); *Id.* § 507(a)(8)(A)(i) (specifying that income tax debts "for which a return . . . is last due . . . after three years before the filing of the petition"). During that three-year period, the IRS may record a tax lien on the debtor's property, and the tax lien will survive the bankruptcy discharge.

380. Michael & Phelps, *supra* note 11, at 105; *see also* Rendleman & Weingart, *supra* note 261, at 288.

381. *See* Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320, 1327 (11th Cir. 2007) (noting that a debtor could "trade one nondischargeable debt for another") (citing Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 364 (6th Cir. 2007)).

382. 487 F.3d 353 (6th Cir. 2007).

383. *Id.* at 364.

384. *Id.* at 365; *see also id.* (quoting debtor testimony that due to negative amortization and tax, completing ICRP "would be like paying more than the actual loan amount, so it doesn't really make any sense. This is not a viable alternative.").

Education Credit Management Corp. v. Mosley (*In re Mosley*), a panel of the Eleventh Circuit approvingly cited *Barrett* in determining that "the [ICR] Program is not always a viable option for debtors like Mosley, . . . because any debt that is discharged under the program is treated as taxable income."[385] The Third Circuit likewise took tax liability on ICRP debt cancellation seriously in *Coco v. New Jersey Higher Education Student Assistance (In re Coco)*.[386] Reversing the district court's affirmance of the bankruptcy court's grant of summary judgment to the creditor, the court found that,

> [t]he Bankruptcy Court placed too much weight on Coco's refusal to enroll in the ICRP. . . . Importantly, and as Coco emphasizes, because any discharged portion of her loan would be treated as taxable income at the time of the discharge, her participation in the ICRP could ultimately result in her simply trading a student loan debt for an IRS debt. In light of her purported financial and medical circumstances, which Coco's proffered evidence suggests will continue indefinitely, her decision to forgo enrolling in the ICRP seems reasonable.[387]

By contrast, in *Education Credit Management Corp. v. Jesperson*, a divided panel of the U.S. Court of Appeals for the Eighth Circuit denied discharge despite the debtor's argument that adverse tax consequences of IDR debt cancellation excused participation in the program.[388] In *Jesperson*, the bankruptcy court had granted a discharge and the district court affirmed.[389] The bankruptcy court relied in part on the "negative amortization of the student loan debt and a potentially significant tax bill if the student loan is ultimately forgiven after 25 years" under IDR.[390]

Judge Loken, writing for the panel, found to the contrary: "the [bankruptcy] court's reference to 'a potentially significant tax bill' when any unpaid balance is cancelled after twenty-five years ignored the fact that cancellation results in taxable income only if the borrower has assets exceeding the amount of the debt being cancelled."[391] Judge Smith, in a concurrence that was necessary to the

385. 494 F.3d 1320, 1327 (11th Cir. 2007).

386. 335 F. App'x 224 (3d Cir. 2009).

387. *Id.* at 228 (internal citations omitted).

388. 571 F.3d 775, 778 (8th Cir. 2009).

389. *Id.*

390. Jesperson v. U.S. Dep't of Educ. (*In re* Jesperson), 366 B.R. 908, 915 (Bankr. D. Minn. 2007) (quoting Lee v. Regions Bank Student Loans (*In re* Lee), 352 B.R. 91, 97 (B.A.P. 8th Cir. 2006)).

391. *Jesperson*, 571 F.3d at 782. This formulation of the insolvency exception to tax liability for cancellation-of-indebtedness income appears to be incorrect. Consider a debtor with $100,000 in student loan debt, $20,000 in assets, and no other debts. Upon cancellation, the $100,000 in cancellation-of-indebtedness income will be reduced to the extent of the taxpayer's insolvency immediately before the discharge. The insolvency immediately before the discharge, defined as the excess of liabilities over the fair market value of assets, is $80,000. The $100,000 in cancellation-of-indebtedness income would thus be reduced by $80,000 to $20,000. The taxpayer's gross income would increase by $20,000 as a result of the cancellation, even though the taxpayer does not have "assets exceeding the amount of the debt being cancelled." *Id.*

judgment, took a more forgiving view of the tax issue. He argued that "[a] bankruptcy court should not place too much weight on the debtor's refusal to enroll in the ICRP" because "any discharged portion of the debtor's loan would be treated as taxable income at the time of the discharge, meaning that the debtor's participation in the ICRP could ultimately result in the debtor simply trading a student loan for an IRS debt."[392]

Lower courts have split deeply on the tax issue. Among courts that have rejected the tax-liability argument, the most common reason is that the possible future tax bill is too speculative to consider.[393] Sometimes courts mention specifically that the debtor's solvency is too speculative.[394] Relatedly, some courts have stated that the proper time to address the tax consequences of loan forgiveness is when the forgiveness occurs and the tax liability arises,[395] sometimes asserting that the debtor can negotiate with the IRS or file bankruptcy again at that time.[396] At least one court has rejected the idea that the debtor's future tax liability should

392. *Id*. at 784 (quoting *In re Coco*, 335 F. App'x at 228).

393. *See, e.g.*, Nielsen v. ACS, Inc. *(In re* Nielsen), 518 B.R. 529, 536 (B.A.P. 8th Cir. 2014) (stating that "no one can predict" tax liability at end of IDR period); Pa. Higher Educ. Assistance Agency v. Birrane (*In re* Birrane), 287 B.R. 490, 500 n.7 (B.A.P. 9th Cir. 2002); Guilfoyle v. Educ. Credit Mgmt. Corp. No. 1:13-CV-01330, 2015 U.S. Dist. LEXIS 44903, at *16 (E.D. Cal. March 27, 2015); Magsino v. U.S. Dep't of Educ. (*In re* Magsino), No. 3:14-cv-00179, 2014 U.S. Dist. LEXIS 121557, at *7 (W.D. N.C. Aug. 29, 2014); Greene v. U.S. Dep't of Educ., No. 4:13cv79, 2013 U.S. Dist. LEXIS 143678, at *15 (E.D. Va. Oct. 2, 2013); Educ. Credit Mgmt. Corp. v. Rhodes, 464 B.R. 918, 926 (W.D. Wash. 2012); Educ. Credit Mgmt. Corp. v. Bronsdon, 421 B.R. 27, 35 (D. Mass. 2009), *discharge granted on remand*, No. 07-14215-FJB, 2010 Bankr. LEXIS 71 (Bankr. D. Mass. Jan. 8, 2010), *aff'd*, 435 B.R. 791 (B.A.P. 1st Cir. 2010); Jones v. Bank One Tex., 376 B.R. 130, 142 n.11 (W.D. Tex. 2007); Educ. Credit Mgmt. Corp. v. Stanley, 300 B.R. 813, 819 n.8 (N.D. Fla. 2003); Johnson v. U.S. Dep't of Educ. (*In re* Johnson), 543 B.R. 601, 609–10 (Bankr. W.D. Mo. 2015); Murphy v. U.S. Dep't of Educ. (*In re* Murphy), 535 B.R. 97, 106–07 (Bankr. W.D. Pa. 2015) (finding that debtor made no effort to quantify tax liability); Bray v. Educ. Credit Mgmt. Corp. (*In re* Bray), 332 B.R. 186, 198 (Bankr. W.D. Mo. 2014) (noting that insolvency, and therefore tax liability, was speculative); Gesualdi v. Educ. Credit Mgmt. Corp. (*In re* Gesualdi), 505 B.R. 330, 346 (Bankr. S.D. Fla. 2013); Dep't of Educ. v. Healy (*In re* Healy), No. 05-34722DM, 2010 Bankr. LEXIS 2119, at *7–8 (Bankr. N.D. Cal. June 29, 2010); Gibson v. Educ. Credit Mgmt. Corp. (*In re* Gibson), 428 B.R. 385, 392 (Bankr. W.D. Mich. 2010); Buckland v. Educ. Mgmt. Corp. (*In re* Buckland), 424 B.R. 883, 895 (Bankr. D. Kan. 2010) (stating that although debtor's tax concerns were "legitimate," they do not excuse nonparticipation in IDR because they are speculative); Burton v. Educ. Credit Mgmt. Corp. (*In re* Burton), 339 B.R. 856, 889 n.48 (Bankr. E.D. Va. 2006).

394. *See, e.g.*, *In re Bray*, 332 B.R. at 198; *In re Gesualdi*, 505 B.R. at 346 (noting that debtor presented no evidence of future solvency); Boston v. Educ. Credit Mgmt. Corp. (*In re* Boston), No. 10-33189, 2011 Bankr. LEXIS 3901, at *9–10 (Bankr. W.D.N.C. Oct. 5, 2011); *see also* U.S. Dep't of Educ. v. Rose (*In re* Rose), 227 B.R. 518, 525–26 (W.D. Mo. 1998) (noting that IRS is authorized to forgive tax debt if there is doubt as to its collectability (citing 26 C.F.R. § 301.7122-1 (1998))).

395. *See, e.g.*, Dunlap v. Educ. Credit Mgmt. Corp. (*In re* Dunlap), No. 15-30795, 2016 Bankr. LEXIS 38, at *7 (Bankr. W.D.N.C. Jan. 6, 2016) ("[T]he proper time to obtain relief from that liability is when it is incurred—not now. . . ." (quoting Graney v. U.S. Dep't of Educ., No. 12-41489-789, 2013 Bankr. LEXIS 2278, at *10–*11 (Bankr. E.D. Mo. Mar. 20, 2013))).

396. *See, e.g.*, *In re Johnson*, 543 B.R. at 610 ("[O]ffers in compromise options are available to the Debtor and the IRS has the authority to forgive tax indebtedness if it doubts its collectability."); *In re Bray*, 332 B.R. at 198 (same); *Graney*, 2013 Bankr. LEXIS 2278, at *10–11 (noting that when tax liability arises, debtor can seek repayment program or compromise with taxing authorities or file bankruptcy again).

matter at all to student loan dischargeability.[397] In certain circumstances, solvency and tax liability upon expiration of the IDR period are found inconsistent with the showing required by the second part of *Brunner*: that the debtor's inability to repay the loans will persist for a significant portion of the repayment period.[398]

Many courts have given at least some weight to the possible tax liability incurred on loan forgiveness under IDR,[399] with some finding that this reason is

397. *See In re Gibson*, 428 B.R. at 392 ("[T]he court is not persuaded that a debtor's long-term tax strategy or concerns should foreclose the possibility of at least some debt repayment over the next twenty-five years . . . .").

398. *See* Najafian v. Educ. Credit Mgmt. Corp. (*In re* Najafian), No. 09-18112, 2012 Bankr. LEXIS 4737, at *21 (Bankr. E.D. Va. Oct. 9, 2012); Educ. Credit Mgmt. Corp. v. Krieger, 482 B.R. 238, 247 n.14 (C.D. Ill. 2012), *rev'd*, 713 F.3d 882, 884 (7th Cir. 2013).

399. *See, e.g.*, Fern v. FedLoan Serv. (*In re* Fern), 563 B.R. 1, 5 (B.A.P. 8th Cir. 2017) (finding it permissible for bankruptcy court to "supplement its determination" of undue hardship with consideration of potential tax liability arising from IDR); Roth v. Educ. Credit Mgmt. Corp. (*In re* Roth), 490 B.R. 908, 920 (B.A.P. 9th Cir. 2013) (noting "potentially disastrous" tax consequences of IDR in reversing bankruptcy court's denial of discharge); Bronsdon v. Educ. Credit Mgmt. Corp. (*In re* Bronsdon), 435 B.R. 791, 802 (B.A.P. 1st Cir. 2010) (stating that exchange of student loan debt for tax debt at end of IDR period "provides little or no relief to debtors"); Lee v. Regions Bank Student Loans (*In re* Lee), 352 B.R. 91, 97 (B.A.P. 8th Cir. 2006) ("Some aspects of the ICRP might even be viewed as inimical to the goals of the fresh start because the ICRP allows for negative amortization of the student loan debt and a potentially significant tax bill if the student's loan is ultimately forgiven after 25 years."); Murphy v. Educ. Credit Mgmt. Corp., 511 B.R. 1, 5 (D. Mass. 2014) (finding that, because tax liability may render IDR financially harmful, "I do not place great emphasis on Murphy's failure to explore the ICRP" but upholding denial of discharge); Educ. Credit Mgmt. Corp. v. Curiston, 351 B.R. 22, 33 (D. Conn. 2006) (upholding grant of discharge in part because debtor "may . . . be facing a large, non-dischargeable tax liability at the end of the payment period"); Jackson v. Educ. Credit Mgmt. Corp., No. 3:03CV7692, 2004 U.S. Dist. LEXIS 7579, at *23 n.7 (N.D. Ohio Apr. 30, 2004) (noting tax consequences upon IDR forgiveness in affirming bankruptcy court's grant of discharge); Murray v. Educ. Credit Mgmt. Corp. (*In re* Murray), 563 B.R. 52, 60 (Bankr. D. Kan. 2016) (noting tax consequences of forgiveness of IDR in rejecting IDR as a basis for denying discharge); Demmons v. R3 Educ., Inc. (*In re* Demmons), No. 14-11638, 2016 Bankr. LEXIS 3659, at *31–32 (Bankr. E.D. La. Oct. 7, 2016) (same); Wallace v. Nelnet, Inc. (*In re* Wallace), 557 B.R. 129, 146 (Bankr. E.D. Ark. 2016); Barrett v. U.S. Dep't of Educ. (*In re* Barrett), 545 B.R. 625, 633 (Bankr. N.D. Cal. 2016) ("An income contingent payment plan is not the functional equivalent of a Chapter 7 discharge, particularly given the possibility that a debtor may face a substantial tax liability when the student debt is forgiven."); Nightingale v. N.C. State Educ. Assistance Auth. (*In re* Nightingale), 543 B.R. 538, 550 (Bankr. M.D.N. C. 2016) (citing potential tax liability in finding that availability of IDR did not preclude discharge); Abney v. U.S. Dep't of Educ. (*In re* Abney), 540 B.R. 681, 690 (Bankr. W.D. Mo. 2015) (granting discharge despite availability of IDR where at end of IDR period, debtor "would either be left with no assets for extraordinary expenses of his later years, or a tax bill to the extent he has accumulated any such assets"); Lamento v. U.S. Dep't of Educ. (*In re* Lamento), 520 B.R. 667, 678 (Bankr. N.D. Ohio 2014) (noting tax consequences of forgiveness of IDR in rejecting IDR as a basis for denying discharge); Morrison v. Sallie Mae (*In re* Morrison), No. 13-00933, 2014 Bankr. LEXIS 751, at *26 n.45 (Bankr. E. D. Wash. Feb. 26, 2014) (same); Ablavsky v. U.S. Dep't of Educ. (*In re* Ablavsky), 504 B.R. 709, 720 (Bankr. D. Mass. 2014) (same); Wolfe v. U.S. Dep't of Educ. (In re *Wolfe*), 501 B.R. 426, 439 (Bankr. M.D. Fla. 2013) ("Eventually, enrollment in [IDR] will likely lead to future forgiveness of an even larger debt and a significant income tax liability."); Fields v. Educ. Credit Mgmt. Corp. (*In re* Fields), No. 10-71051, 2012 WL 3235844, at *7 (Bankr. N.D. Ala. Mar. 23, 2012) ("the most likely outcome" of debtor's enrollment in ICRP would be "a large tax bill"); Champagne v. Educ. Credit Mgmt. Corp. (*In re* Champagne), No. 6:10-bk-14228-ABB, 2012 Bankr. LEXIS 321, at *9–10 (Bankr. M.D. Fla. Jan. 12, 2012) ("Debtor's concern about potential future tax liability is not unwarranted; it is unlikely he would have the resources to pay a tax bill on $82,000.00 of forgiven student loan debt."); Stevenson v. Educ.

enough to excuse nonparticipation in IDR, at least when combined with the prospect of negative amortization.[400] Often, courts do not elaborate on why the tax-liability issue is relevant. Those that have done so have noted that the combination of negative amortization and tax liability upon discharge under IDR could leave the debtor in a worse financial position than before participation in IDR.[401] Some courts have found the insolvency exemption irrelevant on the ground that the debtor should not have to remain insolvent until the end of the IDR period to avoid tax liability.[402] Where the debtor would complete IDR only at an advanced age, courts have found the debtor unable to pay the future tax bill.[403]

Credit Mgmt. Corp. (*In re* Stevenson), 463 B.R. 586, 595–96 (Bankr. D. Mass. 2011) (weighing tax liability at end of IDR in granting partial discharge); Nixon v. Key Educ. Res. (*In re* Nixon), 453 B.R. 311, 334 (Bankr. S.D. Ohio 2011) (granting partial discharge despite failure to participate in IDR because of potential tax consequences); Kloos v. U.S. Dep't of Educ. (*In re* Kloos), No. BK08-82245-TJM, 2010 Bankr. LEXIS 2350, at *9–10 (Bankr. D. Neb. Aug. 5, 2010); Marshall v. Student Loan Corp., 430 B.R. 809, 815 (Bankr. S.D. Ohio 2010) ("The tax consequences [of IDR forgiveness] for someone in that position could be devastating."); Larson v. United States (*In re* Larson), 426 B.R. 782, 794 (Bankr. N.D. Ill. 2010) (noting tax consequences at end of ICR period in granting discharge despite debtor's participation in ICR); Bronsdon v. Educ. Credit Mgmt. Corp. (*In re* Bronsdon), No. 07-14215-FJB, 2010 Bankr. LEXIS 71, at *1 n.1 (Bankr. D. Mass. Jan. 8, 2010) (noting potential tax consequences of IDR in granting discharge despite debtor's nonparticipation in IDR); Booth v. U.S. Dep't of Educ., 410 B.R. 672, 676 (Bankr. E.D. Wash. 2009) (noting that debtor may incur non-dischargeable tax liability at conclusion of IDR in denying summary judgment in favor of creditor in student-loan discharge proceeding); Benjumen v. AES/Charter Bank (*In re* Benjumen), 408 B.R. 9, 24 (Bankr. E.D. N.Y. 2009); Brooks v. Educ. Credit Mgmt. Corp. (*In re* Brooks), 406 B.R. 382, 394–95 (Bankr. D. Minn. 2009); Halverson v. U.S. Dep't of Educ. (*In re* Halverson), 401 B.R. 378, 390 (Bankr. D. Minn. 2009); Durrani v. Educ. Credit Mgmt. Corp. (*In re* Durrani), 311 B.R. 496, 508 (Bankr. N.D. Ill. 2004), *aff'd*, 320 B.R. 357 (N.D. Ill. 2005).

400. *See, e.g.*, *In re Wolfe*, 501 B.R. at 439 (citing likely negative amortization and tax consequences as only reason for rejecting IDR as a bar to discharge); *In re Fields*, 2012 WL 3235844, at *7–8 (same); *In re Nixon*, 453 B.R. at 334 (same, granting partial discharge); *In re Kloos*, 2010 Bankr. LEXIS 2350, at *9 (same, full discharge); *In re Benjumen*, 408 B.R. at 24 (noting bankruptcy court's continuing role in determining discharge even in light of IDR and citing negative amortization and tax liability as only specific reason for rejecting IDR as a bar to discharge).

401. *See, e.g.*, Murphy v. Educ. Credit Mgmt. Corp., 511 B.R. at 5 (observing that IDR can leave debtor worse off but upholding denial of discharge on grounds other than debtor's failure to explore IDR); *In re Bronsdon*, 435 B.R. at 803; *In re Lee*, 352 B.R. at 97 ("Some aspects of ICRP might even be viewed as inimical to the goals of the fresh start because the ICRP allows for negative amortization of the debt and a potentially significant tax bill if the loan is ultimately forgiven after 25 years."), *called into doubt by* Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775, 782 (8th Cir. 2009) (denying discharge despite similar claim)); *In re Wolfe*, 501 B.R. at 439 ("[A] contingent-income repayment plan is likely to be severely prejudicial to this debtor"); *In re Fields*, 2012 WL 3235844, at *7; *In re Kloos*, 2010 Bankr. LEXIS 2350, at *9 ("For a debtor with little surplus income, a large student loan debt, reasonable expenses, and little likelihood of greater income in the future, the ICRP offers no advantage because the debtor will never be able to make headway against the debt and may face a significant tax burden when the debt is forgiven at the end of the term.").

402. *In re Abney*, 540 B.R. at 690 (finding undue hardship where participation in IDR "would effectively bar the Debtor from putting away anything meaningful for his later years" because of tax liability if debtor were solvent at the end of IDR period).

403. It appears that most courts that have considered the advanced-age argument have granted discharge. *See* Ford v. Student Loan Guar. Found. of Ark. (*In re* Ford), 269 B.R. 673, 677 (B.A.P. 8th Cir. 2001) (noting that debtor would be eighty-seven upon loan forgiveness under ICR); *In re Wallace*, 557 B.R. at 146 (refusing to speculate as to insolvency but finding that debtor won't be able to pay tax liability at eighty-eight); *In re Bronsdon*, 2010 Bankr. LEXIS 71, at *1 n.1 (holding that Bankruptcy

c. Alternative Approaches. One way of addressing the tax issue is with a financial analysis. The debtor could project the extent of her solvency at the end of the IDR period based on the amount of asset accumulation (for example, retirement savings) consistent with an above-minimal standard of living. Next, the amount of solvency could be compared with the expected balance outstanding at the end of the IDR period as a basis for estimating the tax liability upon cancellation. Then, the debtor's projected funds available to maintain his or her lifestyle during the IDR period could be decreased by the amount needed to set aside enough to cover the projected tax liability.[404] Finally, using the increased outflows, the court could determine whether the debtor would be unable to maintain a minimal lifestyle for a significant portion of the original repayment period or would be unable to maintain an above-minimal lifestyle for a significant portion of the IDR period.

The above approach is attractive because it puts the tax issue into a defined quantitative framework that uses the same terms—duration of hardship and standard of living—as the *Brunner* test. However, the *Brunner* test already requires speculative analysis of the debtor's future financial situation,[405] and the approach just described entails a number of further projections and estimates.

The resource constraints of the typical student-loan discharge proceeding and the inherent uncertainties of projecting solvency, loan balance, and tax rates up to twenty-five years in the future may make the quantitative analysis proposed above unworkable (at least in some cases). Accordingly, this Article suggests a qualitative approach based on the relevant legislative history. Specifically, this Article posits that the speculative nature of the tax burden is important but favors the debtor instead of the creditor, as usually assumed. To see why this is the case, consider in turn the disadvantages and advantages of denying discharge.

If discharge is denied, the potential tax liability acts as a kind of penalty on the debtor's future success. If the debtor is able to achieve a positive net worth apart from her student loan, she will be solvent when the student debt is cancelled and will owe taxes equal to the product of her tax rate and her net worth excluding student debt.[406] This risk obstructs the debtor's "clear field for future effort"[407]

Code does not require court to subject debtor to uncertainty about tax consequences of participating in IDR "as she enters her senior years"; debtor was sixty-five); *In re Halverson*, 401 B.R. at 390 (noting debtor's possible "tax liability in his nineties that could equal his lifetime earnings" under IDR in granting discharge).

404. These savings for taxes would themselves increase the extent of the borrower's solvency and thus the borrower's potential tax liability upon forgiveness. The calculation described in the text would have to incorporate an adjustment to address this consequence of the borrower's saving to pay future tax liability.

405. *See, e.g.*, Pa. Higher Educ. Assistance Agency v. Birrane (*In re* Birrane), 287 B.R. 490, 498 (B.A.P. 9th Cir. 2002) (noting that in applying the second part of the *Brunner* test, "some speculation is obviously involved").

406. This liability will be capped at the product of her tax rate and the amount of debt cancelled. *See infra* notes 409–11 and accompanying text.

407. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

and freedom "to accumulate new wealth"[408] with certainty. The possibility of a tax bill exerts "pressure and discouragement"[409] on the debtor and disincentivizes "value-productive participation."[410] The effect is in addition to the drag on her efforts resulting from the IDR payments themselves. The possibility of future tax liability non-speculatively interferes with fresh-start policies.

On the other side of the ledger is the creditor's interest in financial recovery,[411] which may be served by collecting the taxes from the debtor if the government is the lender or a guarantor. The tax liability does not serve this interest at all in the case of an unguaranteed private loan because the creditor does not benefit from the payment of the taxes. However, even if the government is the creditor, recovery through taxes is speculative. The government will recover only if the debtor is solvent and if the government is actually able to collect the tax liability when it is assessed. The government might be unable to collect even if the debtor is solvent because assets count toward solvency even if they are protected from collection.[412] Moreover, in determining solvency, assets are valued at their fair market value,[413] which the taxpayer might not in fact be able to realize on a disposition for taxes. Thus—at least once five years have passed—the speculative nature of the tax liability works in favor of granting a discharge. Without discharge, denial of a fresh start is a certainty, whereas additional revenue for the government is only a possibility. The advantage of denying discharge, not its disadvantage, is speculative.

On net, the possibility of tax liability upon completion will weigh slightly in favor of discharge in the typical case where it is difficult to determine whether the debtor is likely to owe taxes upon completion of IDR. The possible tax liability weighs more heavily in favor of discharge of student loans made by a private entity and not guaranteed by the government, because paying the taxes will not contribute to creditor recovery. Indeed, it is not clear that the analysis changes much if tax liability is more likely. A more probable tax liability is a greater impediment to the fresh start, but also serves the interest in creditor recovery, at least so long as the government is the creditor and is likely to be paid. Thus, although, in theory, the tax liability could be put into a quantitative framework, in practice, the possible tax liability usually should be a "soft" factor weighing in favor of discharge.

Some courts take the potential tax liability out of the equation by finding that any student-loan balance outstanding at the end of the IDR period is discharged

408. Segal v. Rochelle, 382 U.S. 375, 379 (1966).

409. *Hunt*, 292 U.S. at 244.

410. H.R. DOC. NO. 93-137, pt. 1, at 71 (1973).

411. *See supra* Section I.B.7.

412. *See* 26 U.S.C. § 6334 (2012) (listing property exempted from IRS tax levy); IRS, *supra* note 377, at 5 (stating that, in determining solvency, "assets include the value of everything you own (including . . . exempt assets which are beyond the reach of your creditors under the law)").

413. *See* IRS, *supra* note 377, at 5 (providing for use of "the FMV of all your assets" in determining solvency).

in bankruptcy and therefore does not create tax liability.[414] Sometimes this happens because the creditor proposes a stipulation to that effect.[415] Given the potential tax liability's uncertainty and ambivalent effect, eliminating it from the analysis in this way seems reasonable.[416]

6. Debtor's Lack of Awareness of Availability of IDR

The Fourth, Sixth, Ninth, and Tenth Circuits have held that failure to pursue IDR weighs against good faith where the debtor did not explain her failure to pursue IDR.[417] On the other hand, lack of awareness of IDR is sometimes accepted as an excuse, even when the debtor does not explain why she was unaware.[418] Where the debtor was aware of IDR but had a good-faith belief that she was ineligible, appellate courts have been willing to excuse a debtor's nonparticipation.[419] Even failure to present a good reason for not exploring IDR availability has not always been fatal to the debtor.[420]

---

414. *See* Erbschloe v. U.S. Dep't of Educ. (*In re* Erbschloe), 502 B.R. 470, 483–84 (Bankr. W.D. Va. 2013); Ayele v. Educ. Credit Mgmt. Corp. (*In re* Ayele), 490 B.R. 460, 463 (D. Mass. 2013); Stevenson v. Educ. Credit Mgmt. Corp. (*In re* Stevenson), 463 B.R. 586, 599 (Bankr. D. Mass. 2011), *aff'd*, 475 B.R. 286 (D. Mass. 2012); Brunell v. Citibank, N.A. (*In re* Brunell), 356 B.R. 567, 580–81 (Bankr. D. Mass. 2006); Grove v. Educ. Credit Mgmt. Corp. (*In re* Grove), 323 B.R. 216, 230 (Bankr. N.D. Ohio 2005).

415. *See* Trudel v. U.S. Dep't of Educ. (*In re* Trudel), 514 B.R. 219, 229 (B.A.P. 6th Cir. 2014); Goodman v. U.S. Dep't of Educ. (*In re* Goodman), 449 B.R. 287, 297 (Bankr. N.D. Ohio 2011).

416. At least in some jurisdictions, the court could use this approach only if the debtor would suffer undue hardship absent the tax relief. *See, e.g.*, Educ. Credit Mgmt. Corp. v. Pulley, 532 B.R. 12, 25 n.16 (E.D. Va. 2015) ("Every court of appeals to consider the issue . . . has held that § 105(a) does not permit the bankruptcy court to grant a partial discharge of a student loan debt without a finding of undue hardship." (citing cases from the Sixth, Ninth, Tenth, and Eleventh Circuits)).

417. *See* Spence v. Educ. Credit Mgmt. Corp. (*In re* Spence), 541 F.3d 538, 545 (4th Cir. 2008) (holding that debtor's failure to "fully explore the possibility of loan consolidation options that offer reduced payments based upon the debtor's limited income" supported a finding of bad faith); Educ. Credit Mgmt. Corp. v. Mosko (*In re* Mosko), 515 F.3d 319, 326 (4th Cir. 2008) (noting that failure to "adequately pursue" IDR supported determination of lack of good faith where there was no evidence that the IDR payments would be unaffordable); Fields v. Sallie Mae Servs. Corp. (*In re* Fields), 286 F. App'x 246, 251 (6th Cir. 2007) (emphasizing that debtor's failure "even to apply for ICR relief" supported finding of bad faith); Educ. Credit Mgmt. Corp. v. Mason (*In re* Mason), 464 F.3d 878, 885 (9th Cir. 2006) (finding that "[t]he record demonstrates that [the debtor] could have attempted renegotiation of his debt under the ICRP, but failed to pursue this option with diligence" in reversing the Bankruptcy Appellate Panel's determination that debtor acted in good faith); Alderete v. Educ. Credit Mgmt. Corp. (*In re* Alderete), 412 F.3d 1200, 1206 (10th Cir. 2005) (according "significant weight" to debtor's "fail[ure] to consider alternate repayment options prior to filing bankruptcy" in upholding a finding of bad faith).

418. Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320, 1327 (11th Cir. 2007) (affirming discharge despite IDR nonparticipation where it was "questionable whether [the debtor] even knew about alternative payment options").

419. *See* Kelly v. Sallie Mae, Inc., 594 F. App'x 413, 414 (9th Cir. 2015) (holding no error in granting discharge where the debtor "at least minimally investigated" IDR and "had a good-faith belief that she was ineligible"); Hedlund v. Educ. Res. Inst., Inc., 718 F.3d 848, 853, 855 (9th Cir. 2013) (finding good faith where debtor "had investigated the ICRP option online but concluded that he was not eligible because he was in default," despite the court's finding that the debtor failed to pursue IDR "with diligence").

420. *Hedlund*, 718 F.3d at 855 (finding good faith even though debtor failed "to pursue the ICRP option 'with diligence'" (quoting *In re* Mason, 464 F.3d 878, 885 (9th Cir. 2006))); *see also* Frushour v.

The analysis usually should focus on whether IDR in fact offers the debtor a viable choice for repayment without unduly intruding on the fresh start. If participation in IDR would have been excused under the analysis already presented (debtor cannot afford a minimum standard of living in IDR, debtor commenced bankruptcy after five years and IDR payment was zero, etc.), then the debtor's failure to pursue the program usually should not be held against her, because investigating IDR likely would have been futile.[421]

As an exception to the foregoing, failure to pursue IDR could contribute to a finding of the debtor's lack of good faith where the debtor could have participated in IDR without undue hardship but lost the opportunity to do so through her own action or inaction, and her action or inaction fell below some standard. For example, default can render a debtor ineligible for IDR in certain circumstances.[422] If a debtor defaults instead of entering an otherwise viable IDR program, her conduct could count against good faith if accompanied by the appropriate mental state. Given that the overall inquiry is into good faith, the exception should not apply if the debtor was simply negligent in failing to investigate IDR.[423]

CONCLUSION

The law evidences no intention to make fresh-start policies inapplicable to student-loan debtors, to deprive student-loan debtors of the fresh start after five years except to the extent necessary to protect creditors' recovery, or to make IDR increase the hardship student-loan debtors suffer. These three principles, drawn from this Article's review of legislative history and Supreme Court precedent, underlie its suggestions for how IDR should figure into student-loan bankruptcies.

Because IDR is not supposed to make life more difficult for student debtors, IDR should not count against discharge if participation would subject the debtor to a below-minimal standard of living. On the same basis, if IDR would extend the debtor's repayment period, the debtor should be able to maintain an above-minimal standard of living in repayment. The debtor's failure to investigate IDR

Educ. Credit Mgmt. Corp. (*In re* Frushour), 433 F.3d 393, 410 (4th Cir. 2005) (Hamilton, J., concurring in part and dissenting in part) (arguing record supported that the bankruptcy court's finding of good faith, despite debtor's refusal to enroll in ICR, where the "record contains no evidence to suggest that [the debtor] knew of [ICR] prior to her seeking to discharge her student loan").

421. *See* Roth v. Educ. Credit Mgmt. Corp. (*In re* Roth), 490 B.R. 908, 920 (B.A.P. 9th Cir. 2013) ("[T]he law does not require a party to engage in futile acts.").

422. IDR is not available for defaulted loans. It appears that it is usually possible to get out of default by consolidating federal loans and certain other loans into a Direct Consolidation Loan. However, this option is not available if the borrower defaults on a loan that has already been consolidated. *See* Federal Student Aid, *Loan Consolidation*, U.S. DEP'T OF EDUC., https://studentaid.ed.gov/sa/repay-loans/consolidation [https://perma.cc/3HS9-NC6S] (last visited Feb. 21, 2018).

423. *See, e.g.*, Perlin v. Hitachi Capital Am. Corp. (*In re* Perlin), 497 F.3d 364, 374 (3d Cir. 2007) (equating bad faith in Chapter 13 proceeding to "conduct akin to fraud, misconduct, or gross negligence"); Donovan v. RRL Corp., 27 P.3d 702, 717 (Cal. 2001) (noting that "ordinary negligence does not constitute neglect of a legal duty" within the statutory definition).

usually should not count against discharge if the debtor could not have afforded IDR under either of the two tests just mentioned.

As the interest in financial recovery is the only interest underlying the student-loan exception to discharge in cases filed after five years in repayment is the interest in financial recovery, creditors should have to show a significant likelihood of substantial financial recovery in such cases. Thus, if participation in IDR would yield a trivial payment or none at all, nonparticipation should not count against the debtor.

The fresh-start policies of alleviating debtor suffering and enhancing participation in the economy and society apply to student-loan debtors. Therefore, negative amortization and potential tax liability in IDR should weigh in favor of discharge, even if IDR payments themselves are affordable.

Attention to the policies underlying the fresh start, the student-loan exception to discharge, and the IDR program should help judges make informed, fair decisions. Hopefully, this Article will be of some assistance in that regard.