DEEPER DEBT, DENIAL OF DISCHARGE: THE HARSH TREATMENT OF STUDENT LOAN DEBT IN BANKRUPTCY, RECENT DEVELOPMENTS, AND PROPOSED REFORMS

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INTRODUCTION

College tuition has increased dramatically over the last three decades. From 1982 to 2006, the average total of tuition and fees jumped 439%, greatly outpacing the average increase in family income of 147% over the same period.[1] The high cost of a college education forces many students to take out loans, resulting in an average debt burden of $24,000 for the Class of 2009.[2] Many debtors, especially those who borrow to attend both undergraduate and graduate schools, face debt burdens that are several times higher. Furthermore, an increase in reliance on private loans, as opposed to comparatively cheaper government-backed loans, results in repayment difficulties for the many borrowers who will be saddled with high interest rates for decades to come. The volume of private loans issuance doubled from $7.2 billion in the 2003–2004 academic year to $15 billion in the 2007–2008 academic year.[3] Perhaps even more perplexing, however, is the fact that a majority of students who relied on private loans did not even take out the maximum amount of federal Stafford loans, which charge a lower interest rate than private loans.[4] Over a quarter of students

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1. THE NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., *Measuring Up 2008: The National Report Card on Higher Education* 8 (2008), http://measuringup2008.highereducation.org/print/NCPPHEMUNationalRpt.pdf.

2. Tamar Lewin, *Average College Debt Rose to $24,000 in 2009, Report Finds*, N.Y. TIMES, Oct. 22, 2010, at A15.

3. THE PROJECT ON STUDENT DEBT, PRIVATE LOANS: FACTS AND TRENDS 1 (2009), *available at* http://projectonstudentdebt.org/files/pub/private_loan_facts_trends_09.pdf.

4. *Id.*

taking out private loans took out no Stafford loans whatsoever.[5]

Unlike other private debts such as credit card balances, car loans, and mortgages, student loans are virtually impossible to discharge in bankruptcy.[6] The United States Bankruptcy Code ("the Bankruptcy Code") makes educational loans nondischargeable only if the continued obligation to repay will not impose an "undue hardship" on the debtor.[7] But in 2008, only 29 of 72,000 student loan borrowers in bankruptcy managed to have their loans discharged—less than one twentieth of one percent of all borrowers.[8] Recent research indicates that the extent of relief obtained by those few debtors is heavily contingent on extralegal factors: a debtor's inability to repay her loans was less of a factor affecting whether she obtained relief than her attorney's level of experience or the past tendencies of the bankruptcy judge presiding over her case.[9] Most student loan borrowers have little chance to discharge their debt in bankruptcy, and what chance they do have remains largely out of their control.

This was not always the case. Prior to 1976, educational loans were treated the same as all other loans, so educational loans were dischargeable in bankruptcy.[10] Congress gradually increased the bankruptcy protection for lenders of educational loans over time, and amended the Bankruptcy

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5. *Id.*

6. Tanya Roth, *Will Change in Bankruptcy Law Affect Student Loans?*, LAW & DAILY LIFE BLOG (May 7, 2010, 10:45 AM), http://blogs.findlaw.com/law_and_life/2010/05/change-in-bankruptcy-law-could-effect-student-loans.html.

7. 11 U.S.C. § 523(a)(8) (2006).

8. Mark Kantrowitz, *Congress Proposes Allowing Private Student Loans to be Discharged in Bankruptcy*, FASTWEB (Apr. 22, 2010), http://www.fastweb.com/financial-aid/articles/2259-congress-proposes-allowing-private-student-loans-to-be-discharged-in-bankruptcy.

9. Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 232–34 (2009). The authors note that the absence of a statutory definition of undue hardship leads to inconsistent applications of the law:

> As one bankruptcy judge has observed, because of the lack of a statutory definition for undue hardship, 'so much is therefore left to the individual view of each judge who, after all, brings the sum of who and what he was, what he has become, and what he sees through his own eyes.' When disparate treatment results from the judge to whom a case has been assigned, rather than from differences in the factual characteristics underlying a debtor's claim of undue hardship, we have a uniform law only in form and not in substance. In the context of undue hardship discharge litigation, this has the consequence of denying access to justice and thus undermining the fresh start principle enshrined in the Bankruptcy Code.

Id. at 234.

10. *Id.* at 180.

Code in 2005 to extend this protection even to private, for-profit lenders.[11] Proponents of these laws argue that they increase the availability of student loans and decrease the rates of interest that lenders will charge; if borrowers cannot get out from their responsibilities, banks will be more willing to extend them credit in the first place. Critics hotly dispute these contentions, pointing to evidence suggesting that allowing modification of student loans in bankruptcy would have little to no effect on the price or availability of those loans, and would allow overburdened debtors to pay as much of their loans as feasible while obtaining a fresh start and contributing to economic growth.

Some signs indicate a return to an era of more lenient treatment of student loans in bankruptcy. In a recent case, *United Student Aid Funds v. Espinosa*, the Supreme Court allowed a debtor to discharge some student loan debt without a finding of undue hardship.[12] The case was decided on narrow grounds, and standing alone is not likely to change the way in which student loan bankruptcies are handled; however, taken with other recent developments, it may indicate changes in the industry. For example, H.R. 5043, also known as the Private Student Loan Bankruptcy Fairness Act, which was proposed in April of 2010, would have made private student loans easier to discharge.[13] Though it stalled in the House Judiciary Committee and never made it to a vote, it may be a harbinger of future legislation.

In this Comment, I argue for a relaxation of the bankruptcy restrictions on student loan debt. After charting the statutory changes in bankruptcy law, I shall show how the more recent developments in *Espinosa* and H.R. 5043 indicate a shift in the momentum of bankruptcy policy in the United States. Then, I examine the justifications for making student loans nondischargeable, and explain why a return to the pre-2005, or even pre-1978, laws would create a more equitable system without unfairly impacting creditors or significantly restricting borrowers' access to new credit. Finally, I draw on studies concerning the modification of home mortgages as a point of comparison. Recent analyses of the economic assumptions underlying the bankruptcy modification of home-mortgage debt that arose out of the recent mortgage foreclosure crisis indicate that a liberalization of modification laws would have little effect on the price and availability of loans.[14] I use these same economic analyses to evaluate the

11. *Id.* at 181.

12. 130 S.Ct. 1367 (2010).

13. Private Student Loan Bankruptcy Fairness Act of 2010, H.R. 5043, 111th Cong. (2d Sess. 2010).

14. *See, e.g.*, Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 WIS. L. REV. 565, 648 (2009) (arguing instead for increased

dischargeability of student loans, arguing that the proposed changes in the student loans industry would have a similarly small effect on the price and availability of student loans.

I. BACKGROUND: THE INCREASING PROTECTION FOR STUDENT LOAN LENDERS SINCE 1976

Federal bankruptcy law is designed to afford debtors a fresh start—an opportunity to clear all or much of their debt so that they can begin anew with a clean slate.[15] A Chapter 7 discharge involves the liquidation of much of the debtor's assets and a discharge of nearly all her debts.[16] Before obtaining a Chapter 7 discharge, however, a debtor must pass a means test.[17] This ensures that individuals with incomes above the mean level in their states and with adequate disposable income do not abuse the bankruptcy system. If the debtor does not qualify for Chapter 7, she can still file a Chapter 13 bankruptcy, which allows the debtor to keep more of her property, but requires a repayment plan over the course of three to five years.[18] A Chapter 13 repayment plan must return to creditors at least as much money as they would have received under a Chapter 7 liquidation.[19] Though bankruptcy is no financial panacea, it improves the situation of the majority of the debtors who file. A recent study found that one year after filing for Chapter 7, seventy-five percent of filers were no longer having trouble paying their debts.[20] For the twenty-five percent who were still having difficulties, researchers found that most were not abusing credit, but rather struggling with "keeping a roof over their family's heads."[21] The majority of those who file for bankruptcy "are acknowledging the realities of their debts" and treat "the decision to file in bankruptcy as a responsible financial step."[22] Bankruptcy serves as an important legal protection so that debtors can emerge from financial distress.

Before 1976, educational loans could be discharged in bankruptcy,

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modification of home mortgages in bankruptcy as a solution to the foreclosure crisis).

15. *See* Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1047, 1059 (1987) (recognizing statutory steps of counseling, exercising intelligent choices in bankruptcy, and avoiding future financial difficulties).

16. 11 U.S.C. § 727 (2006).

17. *See* 11 U.S.C. § 707(b) (2006) (determining, via means test, which consumer debtors have the ability to repay their debts).

18. 11 U.S.C. § 1322 (2006).

19. 11 U.S.C. § 1325(a)(4) (2006).

20. Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 84 (2006).

21. *Id.* at 86.

22. *Id.* at 124.

like other types of debt.[23] Whether through a Chapter 7 liquidation or a Chapter 13 reorganization and repayment plan, individuals who had overwhelming educational debt retained a safety valve. Those debtors for whom there was no prospect of earning an adequate income to repay their loans could have some or all of those loans discharged. But the Bankruptcy Act Commission, which Congress established in 1970 to help reform the Bankruptcy Act of 1898, recommended a new direction.[24] When the Commission issued its recommendations in 1973, it was generally full of pro-debtor policies; however, members ceded ground on the issue of student loan debts in an effort to gain public confidence.[25] The provisions were perceived as necessary to prevent public outrage at allowing students to shirk responsibility, despite evidence that less than one percent of government-backed loans were discharged in bankruptcy.[26]

As congressmen debated whether to protect government-backed student loans from discharge in bankruptcy, two competing viewpoints became clear. Representative James O'Hara fought against the adoption of the bill, arguing that the bill "visits a special discrimination upon [students] . . . it treats educational loans precisely as the law now treats loans incurred by fraud, felony, and alimony-dodging. No other legitimately contracted consumer loan . . . is subjected to the assumption of criminality which this provision applies to every educational loan."[27] This view looked at the proposed protections as an unwarranted exception, singling out students as one of the only groups for whom bankruptcy protections are not available. On the other hand, Representative Allen E. Ertel compared the options of a recent college graduate with high debt, and concluded that a student who declared bankruptcy would be "rewarded for refusing to honor a legal obligation."[28] By declaring bankruptcy and discharging all debt, the student would receive a free education and learn that "it 'does not pay' to honor one's debts or other legal obligations."[29] Representative Ertel saw the amendment not as singling out students, but as closing a loophole.[30]

Ertel's viewpoint carried the day, and the Bankruptcy Code was

23. Pardo & Lacey, *supra* note 9, at 180.

24. 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, 420 (2005).

25. *Id.* at 420–21.

26. H.R. DOC. NO. 93-137, pt. 1, at 178 n.5 (1973).

27. H.R. REP. NO. 94-1232, at 75 (1976), *reprinted in* H.R. REP. NO. 95-595, at 149 (1977), *and* 1978 U.S.C.C.A.N. 5963, 6110.

28. H.R. REP. NO. 95-595, at 536-37, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6424.

29. *Id.*

30. *Id.* at 538, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6425.

amended to make the discharge of student loans more difficult. It was only a first step, however, towards the current state of near-impossibility of student loan discharge. First, the 1976 Amendments applied only to federally insured and guaranteed loans. Students were still eligible to discharge loans from any non-governmental lenders.[31] Furthermore, the amendments put in place the "time-lapse rule," which specified that loans would not be dischargeable only if they had come due within five years of the bankruptcy filing.[32] Therefore, loans that had been due for more than five years could be discharged; if a debtor's financial distress was prolonged, he could simply wait out the time-lapse rule and discharge his loans after five years. Finally, the amendments allowed for a discharge, even for federally backed loans, even within five years of when they came due, if repayment of those loans would impose an "undue hardship" on the debtor.[33] This language has remained in the Bankruptcy Code to this date, though courts' interpretation of its meaning has become ever stricter.

Congress revised the bankruptcy provisions relating to the dischargeability of student loans five times since 1976, making it progressively harder for student debtors to obtain a discharge.[34] Legislators have employed two methods to accomplish this end: (1) protecting an increasingly broad class of creditors, and (2) narrowing the set of situations in which a student debtor may seek a discharge.[35] In 1979, legislators expanded the protection for creditors to include "educational loans made, insured, or guaranteed by a governmental unit, or a nonprofit institution of higher education."[36] This amendment meant that loans needed only to be guaranteed or insured, and not necessarily issued, by the federal government for creditors to receive protection in bankruptcy. By 1984, the language was amended again to protect private student loans that were funded or guaranteed in any part by a governmental or nonprofit entity.[37] In 1990, the five-year waiting period during which a debtor could not discharge his loans was increased to seven years; in 1998 it was eliminated altogether, and affected loans could not be discharged after any time period.[38] By 2005, the requirement for loans was broadened to include

31. Education Amendments of 1976, Pub. L. No. 94-482, 90 Stat. 2081 (codified at 20 U.S.C. § 1087-3 (1976)), *repealed by* Bankruptcy Reform Act of 1978, ch. 90, § 316, 92 Stat. 2549.

32. *Id.*

33. *Id.*

34. Pardo & Lacey, *supra* note 24, at 427.

35. *Id.*

36. Act of Aug. 14, 1979, Pub. L. No. 96-56, 93 Stat. 387.

37. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

38. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789; Higher Education

"any qualified educational loan," so that, not just governmentally funded, but all student loans were exempt from discharge, regardless of the lender.[39]

The history of student bankruptcy legislation, then, shows a clear progression towards complete nondischargeability of all forms of student loans in bankruptcy. Many critics argue that an unsubstantiated myth of abusive student debtors has fueled this progression; for example, rhetoric about future high-earning doctors and lawyers strategically eliminating the entirety of their debt through bankruptcy. These myths, however, are not substantiated by data of actual bankruptcy filings.[40] In fact, the General Accounting Office report that Congress considered when first tightening regulation for student loan bankruptcies in the 1970s revealed that less than 1.8% and 1.3% of those filing were lawyers and doctors, respectively.[41] This myth of abusive student debtors, however unfounded, only fueled the progression towards stricter laws. The progression of increasing strictness has also "emboldened [some courts] to apply the undue hardship standard from a less forgiving stance."[42] Though the record of the debate in Congress shows sharply divided views, like those of Representatives O'Hara and Ertel examined above, courts increasingly looked to the recommendations of the Bankruptcy Committee's 1973 report to find support for tightening the requirements for a finding of undue hardship.[43] Even though the Committee's views do not necessarily reflect Congress' intent at the time, they have been used to justify the current law allowing virtually no discharges for student debtors, irrespective of their circumstances.

Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581.

39. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

40. Pardo & Lacey, *supra* note 24, at 427.

41. H.R. REP. NO. 95-595, at 143 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6104.

42. Pardo & Lacey, *supra* note 24, at 428.

43. *See, e.g.*, Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1306 (10th Cir. 2004) (observing that statutory provisions designed by the Committee were "designed to remove the temptation of recent graduates to use the bankruptcy system as a low-cost method of unencumbering future earnings"); Cazenovia College v. Renshaw (*In re* Renshaw), 222 F.3d 82, 87 (2d Cir. 2000) (noting that the Committee's heightened undue hardship recommendations were supported by "increasing abuse of the bankruptcy process that threatened the viability of educational loan programs"); United Student Aid Funds, Inc. (*In re* Pena), 155 F.3d 1108, 1111 (9th Cir. 1998) (noting congressional intent that ordinary hardship, as opposed to undue hardship, should not facilitate a discharge of student loans).

II. RECENT DEVELOPMENTS: A REVERSAL OF COURSE?

Despite the trend toward increasing protection for creditors over the last thirty-five years, a recent case, *United Student Aid Funds v. Espinosa*, allowed a debtor to discharge some student loan debt without a finding of undue hardship.[44] Though the case was decided on narrow grounds, and will not directly impact the way in which student loans are treated, it signals at the very least a change in momentum. H.R. 5043, which would have made private student loans easier to discharge, also stands as a sign of a new direction in bankruptcy policy.[45]

In *Espinosa*, a student-loan debtor obtained a Chapter 13 discharge of some of his student loan debt without a finding of undue hardship when his creditors failed to object to his proposed plan.[46] Espinosa's only source of indebtedness was $17,832 in student loans, of which $13,250 was principal and $4,582 was accrued interest.[47] He proposed a Chapter 13 plan to repay the principal and discharge the interest. Espinosa's creditor did not object, the bankruptcy court did not make a finding of undue hardship, and the interest was discharged.[48] Seven years later, the creditor began efforts to collect the discharged interest, arguing that the bankruptcy court did not have the power to discharge any of Espinosa's educational loans without a finding of undue hardship.[49]

The Supreme Court held that the Bankruptcy Code's undue hardship requirement in section 523(a)(8), though described as "self-executing" in previous cases,[50] meant only that the bankruptcy court must make an undue hardship finding even if the creditor does not request one, not that its failure to make such a finding renders a subsequent confirmation order void.[51] Despite the bankruptcy court's error—it should have made a finding of undue hardship—that error did not rise to a level of severity sufficient to reopen the case. Perhaps more significantly, the Supreme Court distinguished student loans from other types of nondischargeable

44. United Student Aid Funds, Inc. v. Espinosa, 130 S.Ct. 1367 (2010).
45. H.R. 5043 .
46. *Espinosa* 130 S.Ct. at 1373.
47. *Id.* at 1373–74.
48. *Id.* at 1374.
49. *Id.* at 1375.
50. *See* Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 450 (2004) (noting that "[u]nless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt. . . . Thus, the major difference between the discharge of a student loan debt and the discharge of most other debts is that governmental creditors, including States, that choose not to submit themselves to the court's jurisdiction might still receive some benefit: The debtor's personal liability on the loan may survive the discharge.").
51. *Espinosa*, 130 S.Ct. at 1379.

debt, like specified tax debts, domestic support obligations, and debts arising from unlawful operation of a vehicle while intoxicated.[52] By drawing a distinction between student debt and these other forms of debt, the court affirmed that the former might be dischargeable with a finding of undue hardship, while the latter is never dischargeable, no matter the circumstances.

Media and commentators predicted that the decision would portend a series of changes in the bankruptcy industry.[53] Some suggested that the ruling would open a loophole for the discharge of student loans. Given the short timeline in which lenders can object to Chapter 13 reorganization plans, discharges not technically allowed by the Bankruptcy Code, like the one in *Espinosa*, would be bound to slip through the cracks.[54] However, it is important to bear in mind that *Espinosa* does not increase the availability of a discharge for educational loans under Chapter 13. The debtor was successful only because of the lender's failure to object and the bankruptcy court's erroneous approval of the plan.[55] Many bankruptcy judges have stated that they would not approve plans that discharge student loans, whether or not the lender objected, because they are clearly contrary to the Bankruptcy Code.[56] The Supreme Court itself addressed the issue in *Espinosa* as more an issue of striking a "balance between the need for finality of judgments and the importance of ensuring that litigants have a full and fair opportunity to litigate a dispute."[57] Nevertheless, *Espinosa* represents, at the very least, recognition that student loans are dischargeable in some circumstances, and it may also signal a change in the direction of student loan reform.

H.R. 5043, the Private Student Loan Bankruptcy Fairness Act of 2010, also signaled a potential reversal of direction in bankruptcy policy. The bill would have reversed the amendments of 2005, removing bankruptcy protection from private student lenders.[58] Congressman Steve Cohen introduced the bill, stating that, "[t]he bankruptcy system should work as a

52. *Id.* at 1379 n.10.

53. Adam Liptak, *Bankruptcy Ruling in Student Loan Case*, N.Y. TIMES, Mar. 24, 2010, at A17; Nina Totenberg, *High Court Hears Student Loan Bankruptcy Case*, NPR (Dec. 1, 2009), http://www.npr.org/templates/story/story.php?storyId=120846940&ft=1&f=1001; Maryam K. Ansari, *Supreme Court Rules for Debtor in Student Loan Discharge Case*, FINDLAW (Mar. 24, 2010, 10:54 AM), http://blogs.findlaw.com/decided/2010/03/sup-ct-rules-for-debtor-in-student-loan-discharge.html.

54. Asher Hawkins, *Bankruptcy: New Haven For Student Borrowers?*, FORBES (Oct. 20, 2009, 2:25 PM), http://www.forbes.com/2009/10/20/student-loan-discharge-supreme-court-personal-finance-espinosa.html.

55. *Espinosa*, 130 S.Ct. at 1378.

56. *Id.*

57. *Espinosa*, 130 S. Ct. at 1380.

58. H.R. 5043 .

safety net that allows people to get the education they want with the assurance that, should their finances come under strain by layoffs, accidents, or other unforeseen life events, they will be protected. My bill takes a modest but important step toward achieving this goal."[59] He pointed out that private loans only concern private profit, with no governmental cap on interest rate or amount borrowed.[60] Another sponsor of the bill, Representative Daniel K. Davis, noted that the "2005 change gave special federal protections to for-profit lenders, penalized borrowers for pursuing higher education, and provided no incentive to private lenders to lend responsibly. Private education debt is no different than other consumer debt; it involves private profit and deserves no privileged treatment."[61] A similar companion bill was introduced in the Senate.[62] Though H.R. 5043 was voted out of subcommittees in September 2010 by a vote of six yeas to three nays, it never made it out of committee for a vote on the floor.[63] The Senate version of the bill also stalled, and never came to a vote.[64]

As one would expect, the student loan industry opposed the legislation to repeal protection for private student lenders. Sallie Mae, the largest private student loan company in the country, said that it supported the spirit of the legislation, but objected to the "singling out" of private loans.[65] Sallie Mae spokesman Conway Casillas advocated for Congress to "extend the same consumer protections to all education loans, regardless of the source or tax status of the entity or governmental institution providing the funds."[66] Interestingly, Casillas also noted that the company would support

59. *Congressman Steve Cohen's Private Student Loan Bankruptcy Fairness Act of 2010 Passes Subcommittee*, COHEN FOR CONGRESS (Sept. 15, 2010), http://www.cohenforcongress.com/category/h-r-5043/.

60. *Id.*

61. *Davis Applauds Advancement of Legislation to Protect Students with Private Education Loans*, THE ONLINE OFFICE OF CONGRESSMAN DANNY K. DAVIS, http://davis.house.gov/index.php?option=com_content&task=view&id=217&Itemid=1 (last visited May 8, 2012).

62. Fairness for Struggling Students Act of 2010, S. 3219, 111th Cong. (2010), *available at* http://www.opencongress.org/bill/111-s3219/show.

63. Private Student Loan Bankruptcy Fairness Act of 2010, H.R. 5043, 111th Cong. (2d Sess. 2010), *available at* http://www.opencongress.org/bill/111-h5043/show; *Congressman Steve Cohen's Private Student Loan Bankruptcy Fairness Act of 2010 Passes Subcommittee*, *supra* note 59.

64. Fairness for Struggling Students Act of 2010, S. 3219, 111th Cong. (2010), *available at* http://www.opencongress.org/bill/111-s3219/show.

65. *Proposed Legislation Allows Discharge of Private Student Loans in Bankruptcy*, STUDENT LOAN BLOG (MAY 4, 2010), http://web.archive.org/web/20100508203138/ http://www.nextstudent.com/student-loan-blog/blogs/sample_weblog/archive/2010/05/04/ Proposed-Legislation-Allows-Discharge-of-Private-Student-Loans-in-Bankruptcy.aspx.

66. *Id.*

"reform that would allow federal and private student loans to be dischargeable in bankruptcy for those who have made a good-faith effort to repay their student loans over a five-to-seven-year period and still experience financial difficulty."[67] This sort of reform, while leaving in place the 2005 amendments protecting private student loans, would essentially undo the 1998 amendments that eliminated the "time lapse rule," so that any educational debt would be potentially dischargeable after a period of good-faith effort to repay. Perhaps the lenders realized that if debtors struggling after five to seven years of repayment efforts were unlikely to ever get out from under the loan, and the lender would be able to extract little additional money by refusing a discharge.

Student loan advocacy groups, on the other hand, supported the bills, and argued that Sallie Mae's proposals would not go far enough to protect student debtors. Alan Collinge of StudentLoanJustice.org, an on-line group advocating for borrowers who have defaulted on their student loans, objected to any sort of time lapse rule that would require that borrowers make payments on their student loans for five to seven years before the loans become dischargeable. Collinge insisted that student loan borrowers should be afforded "the same fundamental consumer protections that all other borrowers enjoy."[68]

Ultimately, neither the *Espinosa* decision nor the failed reforms of H.R. 5043 and S. 3219 did much to ease the burden of student loan debt. However, they did incite interest in student loan reform, and they signal that perhaps the march towards non-dischargeability of student loan debt has reached its nadir and will soon reverse course. The proposed legislation has provoked sharp critiques of the current policy in mass media, raising the profile of the cause.[69] A single Facebook group has amassed nearly 300,000 supporters for student loan forgiveness.[70] The time is ripe for reform.

67. *Id.*

68. *Id.*

69. Jane Bryant Quinn, *Student Loans: Time to Reform the Law That Treats Debtors Like Crooks*, CBSNEWS (Sept. 24, 2010, 9:34 AM), http://moneywatch.bnet.com/investing/blog/make-money/student-loans-time-to-reform-the-law-that-treats-debtors-like-crooks/492/.

70. *See ForgiveStudentLoanDebt.com*, FACEBOOK, http://www.facebook.com/groups/forgivestudentloandebt/ (last visited June 2, 2012) (advocating unconditional loan discharge, without bankruptcy, for student loan debtors).

III. THE ARGUMENTS FOR AND AGAINST DISCHARGEABILITY: WOULD MAKING STUDENT LOANS DISCHARGEABLE HELP OR HURT STUDENTS?

The policy arguments behind student bankruptcy discharge policy are couched in terms of either student welfare or simple morality. No large bank will argue that student loans should remain nondischargeable in bankruptcy in order to help their own bottom line, though that consideration must certainly enter into their calculus. Instead, lenders argue that dischargeability of student loans would be bad for students in the aggregate. They posit that if student loans could be discharged, lenders would experience greater exposure to the risk of bankruptcy write-offs, and so would necessarily tighten the requirements for obtaining a loan, thereby making private student loans unobtainable for many borrowers, especially those with lower credit scores.[71] This would result in a net decrease in welfare to students as a group. There is no benefit to having the ability to discharge a loan in bankruptcy if you cannot get a loan in the first place. Alternately, lenders often advance simple moral arguments, saying that allowing discharge will encourage unscrupulous students to abuse the system, take banks' money, and escape with a free education.

John Pottow has developed several more specific explanations that could justify special protections for student loans in bankruptcy, including: fraud, soft fraud, internalization, preservation of the public fisc, and the cost of private capital.[72] Noting that other nondischargeable debts are all extraordinary, like those of an intentional tortfeasor, drunk driver, or a parent owing child support,[73] Pottow concludes that it must take one or more of these compelling reasons to justify the policy of non-dischargeability of student loans.[74] The first four are essentially moral arguments, while only the cost of private capital addresses concern with the borrower himself. In this section, I address these five arguments for maintaining the current anti-discharge system and examine the responses and empirical studies that contradict each position.

The fraud theory assumes that students deliberately borrow money with no intention of paying it back.[75] Though this may seem to be an

71. *Proposed Legislation Allows Discharge of Private Student Loans in Bankruptcy*, STUDENT LOAN BLOG (MAY 4, 2010), http://web.archive.org/web/20100508203138/http://www.nextstudent.com/student-loan-blog/blogs/sample_weblog/archive/2010/05/04/Proposed-Legislation-Allows-Discharge-of-Private-Student-Loans-in-Bankruptcy.aspx.

72. John A.E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44 CAN. BUS. L.J. 245 (2007).

73. 11 U.S.C. § 523(a)(6) (2006).

74. Pottow, *supra* note 72, at 250.

75. *Id.* at 251.

extreme allegation, it would certainly justify the current policy if students were in fact deliberately scamming the bankruptcy system *en masse*. As discussed above, there is a pervasive, yet unsubstantiated, myth of student abuse in the bankruptcy system: the archetypal greedy lawyer who discharges his student loans on the eve of beginning his lucrative career.[76] Despite the absence of any data to confirm these myths, courts still view students in a negative light. The Third Circuit bemoaned that it must "account for the fact that one of the most common reasons student loan debtors find themselves in bankruptcy court is that their 'subjective value judgments' are often (but not always) indicative of a spendthrift philosophy."[77]

Even if students were abusing the bankruptcy system by borrowing money with the intent to discharge rather than repay the debt, that alone could not justify a separate provision making student loans non-dischargeable. There are already other fraud provisions in the Bankruptcy Code to protect against this abuse, and the same potential for abuse exists in all bankruptcy cases. The Bankruptcy Code clearly exempts any debt incurred fraudulently from discharge, whether or not it relates to educational debt.[78] A justification for nondischargeability of student loans based on a theory of fraud, then, would have to presuppose that the fraud provisions of the Bankruptcy Code were ineffective, or that students as a class were disproportionately acting fraudulently. Even if this were the case, a better solution would be to modify the fraud provisions themselves, making them stricter and more specific to address any problems in the student context, rather than implementing the overbroad measure of rendering all student debt nondischargeable.

Next, and more plausible, is a theory of soft fraud. This theory posits that a student did not take on educational loans with the intent to never repay them, but rather chose bankruptcy after completing his education, when he realizes it would be advantageous.[79] This theory is more akin to opportunism, and, as already discussed, Representative Ertel voiced this concern in the drafting of the initial modifications of the Bankruptcy Act in the 1970s.[80] If a student, saddled with tens, or even hundreds, of thousands of dollars of educational debt realizes that he can discharge that debt immediately after graduation, when he likely has little personal property but high earning potential, it would be advantageous for him to do so.

76. *See supra* text accompanying notes 40–41.

77. Penn. Higher Educ. Assistance Agency v. Faish *(*In re *Faish)*, 72 F.3d 298, 304 (3d Cir. 1995).

78. 11 U.S.C. § 523(a)(2) (2006).

79. Pottow, *supra* note 72, at 253.

80. *See supra* note 28.

Educational debts are different than other debts under this theory because they tend to be incurred at a younger age, when there are more years of earnings ahead of the debtor, and because the educational degree for which the debt was incurred cannot be taken away from the debtor as a result of the bankruptcy.[81] If a consumer debtor took on credit card debt to amass luxury goods, many of those goods would be liquidated during a bankruptcy, and the possession of those goods would not have increased the debtor's expected future income in any way. For a student, however, a J.D. or M.D. cannot be stripped away in bankruptcy, and the degree will have greatly increased the debtor's future earnings.

However, there is a dearth of empirical evidence showing that any such abuse existed before the nondischargeability provisions were introduced into the Bankruptcy Code in the 1970s.[82] Furthermore, the outright ban on the discharge of student loans is an overbroad solution to this problem. The Bankruptcy Code could simply make the discharge of educational debts contingent on future earnings, so any debtor declaring bankruptcy would be forced to repay a percentage of future earnings if they rose above a set level.[83]

Similar to soft fraud is the theory of internalization, which argues that education is primarily a private rather than a public good, in that it confers on the student the subjective enjoyment of study for several years, as well as an increased expectation of future income.[84] Of course, an income-contingent repayment scheme could curtail this abuse just as easily as it could curtail soft fraud. However, where internalization differs from soft fraud is in the case of the low-income debtor. For example, a cellist who incurs a high debt burden to be trained, and then embarks on a low-income career, would be eligible for discharge under an income contingent repayment model. One judge mused that "it is difficult to imagine a professional orchestra musician who would not qualify for an undue hardship discharge."[85] Such a musician, then, would internalize the benefit of his education in personal enjoyment, but never be able to pay back its cost. This seems feasible, though it is surely not widespread. The majority of debtors will take loans to pursue a higher-earning career, not a lower-earning one. Furthermore, a cellist-debtor who took out loans without the

81. Pottow, *supra* note 72, at 254–55.

82. *See* Pardo & Lacey, *supra* note 24, at 420 (explaining that "[d]espite evidence presented to the [1973] Commission that less than one percent of federally insured student loans were discharged in bankruptcy, its recommendation essentially sought to preempt 'potential abuses,' defaults that industry representatives of the student loan system anticipated would occur").

83. Pottow, *supra* note 72, at 267.

84. *Id.* at 256.

85. *In re* Gerhardt, 348 F.3d 89, 93 (5th Cir. 2003).

intent to repay them would still be subject to the Bankruptcy Code's fraud provisions.

A public fisc theory argues that nondischargeability of student loans is necessary to preserve the solvency of the government's student loan program. If loans are easy to discharge, the theory goes, it will be more attractive for students to declare bankruptcy.[86] More discharges will lead to more losses for the government, and less money available to lend to new borrowers. This is straightforward, and convincing at first glance.

However, this theory rests upon the assumption that the decision to file bankruptcy is endogenous: that debtors are making a strategic choice to file bankruptcy rather than filing out of necessity.[87] Empirical research contradicts this assumption, suggesting that debtors are not strategically considering bankruptcy *ex ante*, but rather choosing it as the only way out of dire circumstances.[88] Of course, the public fisc theory completely falls apart when considering protection for private lenders. The bankruptcy protections extended to private educational lenders in 2005 cannot be justified in terms of conserving governmental resources, but rather look like a bare preference for one segment of private loans over another.

Finally, an argument based on the cost of private capital supposes that treating student loans more harshly in bankruptcy will decrease the number of filings, increase profits for lenders, and, ergo, make the loans more available in the first place.[89] With higher returns on educational loans, lenders would be more willing to lend to higher-risk borrowers, essentially lowering the minimum credit score required for loan approval. This can be justified if, from a public policy perspective, the government wants to make student loans cheaper than other loans, say, credit cards for example.[90]

Recent research does not support this argument. Analysis of the FICO credit score of borrowers before and after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (which introduced protection for private lenders) revealed little change in the availability of loans.[91] If the private capital argument were correct, one would expect to see a decrease in the average credit score of private loan borrowers, as lenders became more willing to take on high-risk borrowers because of the increased bankruptcy protection of BAPCPA. Borrowers from Sallie Mae had an average credit score of 718 both before and after the legislation,

86. Pottow, *supra* note 72, at 261.
87. *Id.* at 270.
88. *Id.* at 270 n.105.
89. *Id.* at 262.
90. *Id.* at 263.
91. Mark Kantrowitz, *Impact of the Bankruptcy Exception for Private Student Loans on Private Student Loan Availability*, FINAID.ORG (2007), http://www.finaid.org/educators/20070814pslFICOdistribution.pdf.

while borrowers from First Marblehead had FICO scores of 719 before the legislation and 715 afterwards.[92] The latter number represents a change in availability of loans, but a very small one. Furthermore, the low end of the FICO spectrum (i.e., the minimum credit score a borrower must have in order to be approved for a loan) remained virtually unchanged for both Sallie Mae and First Marblehead.[93] The research, then, indicates that "[i]f Congress were to roll back the BAPCPA exception to discharge for private student loans . . . it [would be] unlikely to result in a significant decrease in private student loan availability to prospective borrowers with low credit scores."[94] This conclusion, that there would be little if any effect on the availability of loans based on changes in dischargeability, undermines one of the most persuasive arguments for limiting student loan discharge in bankruptcy.

The arguments for the removal of bankruptcy protection for student loans are far more convincing, especially in the absence of a compelling reason for the continued existence of the exceptions. The protection of student loan debt, and not any other variety of private debt, represents an unjustified windfall for lenders. Debtors in unstable financial situations may never be able to get out from under the burden of their loans.[95] Means testing that is already a part of the Bankruptcy Code prevents debtors with high incomes from discharging their loans.[96] Furthermore, an income-contingent repayment system could easily demand higher payments from any debtor who experiences an increase in earnings after filing for bankruptcy. And there is always the stigma and negative impact on credit scores that accompany bankruptcy; no evidence exists to suggest that debtors take filing for bankruptcy lightly.[97] Removing the unwarranted protection for student loan lenders in bankruptcy would not open the floodgates to opportunistic filers, but rather open an escape hatch for those who legitimately need the protection afforded by the bankruptcy system. Leaving the current system in place benefits only private lenders, not student borrowers.

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92. *Id.* at 5.

93. *Id.*

94. *Id.*

95. *See* Justin R. La Mort, *Generation Debt and the American Dream: The Need for Student Loan Reform*, HARV. L. & POL'Y REV. (MAY 21, 2010), *http://hlpronline.com/2010/05/lamort_deb/* (discussing the deleterious effects of student debt and examining the removal of unwarranted bankruptcy protection of student loans and institution of loan forgiveness programs as potential solutions).

96. *See id.* (noting that in 2005, Congress amended the bankruptcy code to add a means test and counseling requirements).

97. *See id.* (observing the "serious consequences" of bankruptcy on the bankrupt's credit score and employment prospects).

IV. A POINT OF COMPARISON – EFFECT OF MORTGAGE MODIFICATION IN BANKRUPTCY ON THE COST AND AVAILABILITY OF LOANS

Similar to the debate over the dischargeability of student loans, an intense debate over the modification of mortgages during bankruptcy has emerged. Over 10% of American households with mortgages were past due or already in foreclosure in 2008–the highest level ever.[98] And, just as it affords special protection for student loan lenders, the Bankruptcy Code contains strong protections for mortgage lenders; any mortgage loan that is secured primarily by a debtor's principal residence cannot be modified in bankruptcy.[99] Unless a debtor can repay a mortgage on its original terms, including all fees she may have incurred for falling behind on payments, the lender will need to foreclose on the house to recoup at least some of the loan. The justification for this policy mirrors that of student-loan nondischargeability: allowing modification of loans would increase interest rates and decrease the availability of mortgages.[100] Of course, mortgages are different from student loans in that the property serves as collateral, whereas a lender cannot foreclose on a student's diploma. But the question of whether allowing bankruptcy modification will affect interest rates and availability so closely corresponds to the student context that an examination of the mortgage modification question can illuminate some new aspects of the student loan debate.

Adam Levitin argues that allowing modification of all mortgages would not affect their price or availability, and furthermore would "help foster voluntary, private solutions to the mortgage crisis."[101] To test this hypothesis, Levitin looked for any variation in mortgage interest rates between owner-occupied single-family homes and other property types.[102] Because only mortgages secured by a debtor's principal residence are immune from bankruptcy modification, one would expect to see a difference in interest rates between property types if the laws protecting against mortgage modification were indeed lowering interest rates by protecting lenders. Comparing rates from four major mortgage lenders, across three states, and a wide range of credit scores, Levitin found no such

98. *See Delinquencies Continue to Climb in Latest MBA National Delinquency Survey*, MORTG. BANKERS ASS'N (Mar. 5, 2009), http://www.mbaa.org/NewsandMedia/PressCenter/68008.htm (reporting record jumps in delinquency rates for mortgage loans on one-to-four-unit residential properties).

99. 11 U.S.C. § 1322(b)(2) (2006).

100. *See* Levitin, *supra* note 14, at 572 (2009) (noting that "preventing modification of home-mortgage loans in bankruptcy limits lenders' losses and thereby encourages greater mortgage credit availability and lower mortgage credit costs").

101. *Id.* at 576.

102. *See id.* at 586–87 (discussing the author's experiment design).

difference in interest rates, leading him to conclude that, "[t]he expected rate-premium differential among property types does not exist."[103] Levitin explained this failure to price in response to bankruptcy law on the cost of foreclosure. Due to fees, transactional costs, and the low value obtained at foreclosure sales, lenders could actually recover somewhat more money through bankruptcy than foreclosure.[104]

The modification of mortgages, like the modification of student loans, should seek to increase the amount that the lender can recover while decreasing the debt burden of the borrower to a level that she can feasibly repay. If both bankruptcy and foreclosure impose high fees and transaction costs on both parties, then one must wonder why both parties cannot work out a mutual modification outside of bankruptcy. Levitin explains that market frictions, including disincentives for middlemen loan servicers (as opposed to the lenders themselves), serve to discourage modification outside bankruptcy. Servicers have a financial incentive to foreclose, so that will often be the preferred course, even if it is not the best option for either the borrower or lender.[105] A modification in bankruptcy law, however, could correct this problem.

The existence of a bankruptcy-modification option would shift the dynamics of voluntary workouts. To the extent that borrowers have a bankruptcy option, it puts pressure on servicers and lenders to make a deal outside of bankruptcy. Permitting bankruptcy modification of mortgages would make voluntary modification of mortgages more likely, and would also make it more likely that Chapter 13 plans would succeed, as debtors who wished to retain their homes would have lower payment burdens to meet.[106]

The creation of a second option, then—that borrowers could choose modification in bankruptcy instead of being forced into foreclosure—would give debtors some leverage and encourage more voluntary workouts. And voluntary workouts should be most advantageous to both sides (only hurting middlemen capitalizing on the fees and transaction costs involved in bankruptcy or foreclosure).

Allowing the modification of student loans in bankruptcy would have a similar positive effect. It seems plausible that transaction costs similar to those faced in the home foreclosure context also affect the student loan market. If banks must pay collection agencies and court fees in order to get small sums of money from indigent debtors, they would be indifferent between a debtor declaring bankruptcy and a debtor struggling to make

103. *Id.* at 590.
104. *Id.* at 618.
105. *Id.* at 624.
106. *Id.* at 626.

payments on loans that she can never discharge. The fact that lenders do not seem to alter their prices in response to bankruptcy laws supports this hypothesis. As discussed earlier, research into FICO credit scores demonstrated that there was virtually no change in the availability of student loans after the enactment of the 2005 bankruptcy amendments that protected private borrowers.[107] This suggests that lenders are not raising their interest rates or tightening credit requirements based on legal protections preventing student loan discharge. Absent some other impediment to free market pricing, lenders would have altered their rates in response to a change in bankruptcy laws that affected their returns. As increased prices and decreased availability of loans was by far the strongest justification for preventing the discharge of student loans in bankruptcy, a conclusion that bankruptcy law is not affecting prices seriously undermines the argument for maintaining bankruptcy protection for student loans.

It also seems reasonable to conclude that voluntary workouts outside of bankruptcy would be the best possible solution in the student loan context. Bankruptcy necessarily involves transactional costs, in addition to damaging the bankrupt's credit score and reputation. But a bank incurs collection costs and is unlikely to receive payment in full if it seeks to collect loans from a debtor without adequate means to repay them. The best solution, then, appears to be for the lender and debtor to voluntarily modify the terms of the loan outside of a bankruptcy proceeding. As Levitin argued in addressing mortgages, the availability of a modification option in bankruptcy will encourage more modifications outside of bankruptcy. When the debtor has a choice to enter bankruptcy and modify the terms of her loan, the lenders and servicers will be incentivized to modify the terms of the loan outside of bankruptcy.[108]

One could attack this comparison between bankruptcy law governing mortgages and student loans by pointing out that only mortgages are secured by a tangible asset—a house. However, even though educational lenders cannot foreclose on a diploma, they are still entitled to a share of a borrower's income until the debt is repaid, and that income stream should have increased as a result of the educational loans. Graduates of four-year universities earn an average of $800,000 more over the course of their careers than workers with only a high school diploma.[109] In the aggregate,

107. *See* Kantrowitz, *supra* note 91, at 3–4 (showing that, in one data set, borrowers' credit scores did not change at all after the legislation was enacted, and, in a second data set, that those scores changed only minimally).

108. Levitin, *supra* note 14, at 626.

109. SANDY BAUM & JENNIFER MA, EDUCATION PAYS: THE BENEFITS OF HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY 10 (College Board 2007), http://www.collegeboard.com/prod_downloads/about/news_info/trends/ed_pays_2007.pdf.

then, lenders are "secured" in their loan by the increased stream of income that the borrower will earn throughout his life as a result of his degree. Of course, some educational borrowers will not increase their income through their studies, and some will borrow money but never complete a degree. But some mortgages will end up underwater—indeed, with the recent downturn in housing prices, a record twenty-three percent of all mortgage holders owe more than what their home is worth.[110] Thus, there is no fundamental difference between student loans and mortgages that would prevent an analogy between how they would respond to changes in bankruptcy law.

V. MOVING TOWARDS A BETTER SYSTEM

As it has been shown, there is little justification for keeping the current system in place. The long history of increased protections for lenders has been based on justifications of fraud, soft fraud, internalization, public fisc, and the cost of private capital. The first four arguments are easily dismissed, and clearly insufficient to support a law that so seriously limits the options of debtors who have taken on student loan debt. Only the cost of private capital argument remains as a serious reason for the current law, and while it is widely advanced by the credit industry, the results of the FICO credit study by Kantrowitz and the analysis of mortgages done by Levitin both undermine this theory.[111] Those studies both showed little or no change in the price or availability of loans based on the underlying bankruptcy laws; without a correlation between bankruptcy laws and the cost of capital, there is no remaining justification for the current policy. Though lawmakers have singled out educational loans for special discharge protections since the 1970s, there is no evidence that educational loans are fundamentally different from other types of loans that can be discharged.

There are several possible ways to reform the way in which the bankruptcy system treats student loans, the simplest of which is to turn back the clock on the amendments to the law. A gradual repeal of the bankruptcy amendments would clearly be the most politically palatable, as a return to the law of 1976 where all students' loans were dischargeable would encounter enormous opposition from lenders. The 2005 amendments, which extended protections to private lenders instead of only

110. AnnaMaria Andriotis, *New Options for Underwater Homeowners*, MARKETWATCH (Mar. 30, 2011, 11:28 AM),http://www.marketwatch.com/story/new-options-for-underwater-homeowners-1301075928064 (concluding this metric from data sourced from CoreLogic, a mortgage-data firm).

111. *See* Kantrowitz, *supra* note 91, at 3–4 (describing experiment results); Levitin, *supra* note 14, at 590 (same).

governmentally connected loans, are the first place to start. If Kantrowitz's research into the availability of student loans is correct, and a return to the pre-2005 law did not affect the availability of student loans, there would be strong justifications for continuing to undo the bankruptcy code modifications: bringing back waiting periods (after which time loans would be dischargeable), limiting the loans that were protected from discharge, and relaxing the definition of undue hardship, so that debtors with true hardship have access to discharge and/or modification of their loans in bankruptcy.

It is important to note that a repeal of bankruptcy protections for student loans does not mean a regime of easy discharge for soon-to-be high wage earners. The fraud provisions of the bankruptcy code already prevent this.[112] And any bankruptcy system allowing for the discharge of educational loans could easily make that discharge conditional on future income. If the bankrupt's income rose substantially in the period immediately after he declared bankruptcy, his creditors would be entitled to recoup more of the debt that was discharged.[113] While this would hinder the bankruptcy principle of giving a debtor a fresh start, in that he would not be completely liberated from creditor's claims until several years after a bankruptcy, it would strike a balance between the needs of the borrower and lender, and certainly be more equitable than the current system.

In crafting such a system, one could look to the Loan Repayment Assistance Programs (LRAPs) already in place at many law schools. In order to address the concerns of law students who want to work in lower paying public interest positions, but would need to borrow six figures in student loans in order to afford their legal education, LRAPs promise that a law school will repay a student's debt if he makes less than a specified annual salary for a set period of time. For example, the University of Chicago will pay off all law school loans for students who work a public interest position for ten years and make less than $80,000 per year.[114]

Of course, the Bankruptcy Code cannot seek to create a system to match the generous loan repayment programs at prestigious private

112. *See* 11 U.S.C. § 523(a)(2) (2006) (barring bankruptcy discharge where "debts for money, property, services, or an extension, renewal, or refinancing of credit" were obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition").

113. *See* Pottow, *supra* note 72, at 267 (examining "income contingent systems" in place in Australia, New Zealand, and the United Kingdom, under which "the more a debtor earns, the more she pays toward her government-funded student debt").

114. The University of Chicago Law School Office of Communications, *Dramatic New LRAP Offers Chicago Law Graduates in Public Interest Careers Unparalleled Support* (Mar. 11, 2011), http://www.law.uchicago.edu/news/dramatic-new-lrap-offers-chicago-law-graduates-public-interest-careers-unparalleled-support.

universities. But the logic behind the systems must be the same. One should not seek repayment for loans from individuals who are not making enough money to repay them. Of course, borrowers must be required to show an inability to repay their loans, as well as agree to continue to repay as much of their loans as feasible at a lower monthly rate. A system that would demand higher payments if the debtor's income increased after bankruptcy, but also allow some discharge of the debt, would safeguard against fears of abuse. This sort of compromise, then, between the current system of no discharges whatsoever, and the pre-1976 system offering a complete fresh start, may provide the best solution for allowing debtors some relief while ensuring that lenders are repaid at an acceptable rate.