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In re Davis

Adam Schlusselberg
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ADAM SCHLUSSELBERG

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ABOUT THE AUTHOR: Adam Schlusselberg is a 2009 J.D. candidate at New York Law School.

A "student debt crisis" is rippling across the nation: for the first time, "student debt is rising faster than starting salaries for new graduates."[1] With the student-loan industry now less restricted than ever, placing approximately $85 billion in loans annually, more and more students are being pushed beneath insurmountable piles of debt.[2] Unlike general unsecured debt, however, discharging student loans has become something of a Herculean task for the beloved "honest, but unfortunate debtor."[3]

In 1978, Congress enacted section 523(a)(8) of the Bankruptcy Code.[4] Section 523 enumerates types of debts that are "not discharge[able]."[5] In particular, subparagraph (a)(8) exempts the student loan from discharge.[6] Congress did, however, provide an exception to this exemption: a student loan will be discharged if forcing repayment would beset an "undue hardship" upon the debtor.[7] Yet despite its merciful intention, Congress failed to define the crucially important term of "undue hardship."[8] In an effort to clarify the term, courts have implemented a variety of tests, each involving a different method for assessing whether a debtor has sustained the "undue hardship" burden.[9] Naturally, judicial attempts to interpret the language have resulted in inconsistent rulings,[10] which is problematic in light of the uniformity requirement of the United States Constitution.[11]

In *In re Davis*, the United States District Court for the Western District of New York ("District Court") considered whether Mrs. Davis would suffer undue hardship

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1. *See* Matthew Reed et al., Project on Student Debt, Student Debt and the Class of 2007, at 1 (2008), *available at* http://projectonstudentdebt.org/files/pub/classof2007.pdf; Brendan Hennessy, *The Partial Discharge of Student Loans: Breaking Apart the All or Nothing Interpretation of 11 U.S.C. 523(a)(8)*, 77 Temp. L. Rev. 71 (2004). *See generally* Karen Dybis & Michelle Weyenberg, *The Hidden Debt Crisis*, Nat'l Jurist, Nov. 2007, at 23 (discussing student debt for law graduates in particular).

2. Jonathan D. Glater, *Education Dept. Criticized as Lax in Policing Loans*, N.Y. Times, Aug. 2, 2007, at A1; *see also* Bloomberg News, *Firm Is Issued Subpoena in Inquiry on Student Loans*, N.Y. Times, Sept. 1, 2007, at C4.

3. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); *see* B.J. Huey, *Undue Hardship or Undue Burden: Has the Time Finally Arrived for Congress to Discharge Section 523(a)(8) of the Bankruptcy Code?*, 34 Tex. Tech L. Rev. 89, 116 (2002).

4. Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, § 523, 92 Stat. 2549 (1978); Patricia Somers & James M. Hollis, *Student Loan Discharge Through Bankruptcy*, 4 Am. Bankr. Inst. L. Rev. 457, 474–75 (1996).

5. 11 U.S.C. § 523 (2006) ("A discharge under . . . this title does not discharge an individual debtor from any debt . . . unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for [a student loan].").

6. *Id.*

7. *Id.*; Jennifer L. Frattini, Note, *The Dischargeability of Student Loans: An Undue Burden?*, 17 Bankr. Dev. J. 537, 552 (2001).

8. Frattini, *supra* note 7.

9. *See* Andresen v. Neb. Student Loan Program, Inc. (*In re* Andresen), 232 B.R. 127, 137–41 (B.A.P. 8th Cir. 1999) (discussing the *Brunner* test, *Johnson* test, *Bryant* test, *Cheesman* and *Pena* tests, totality of the circumstances test, and miscellaneous variations).

10. Hennessy, *supra* note 1, at 71.

11. U.S. Const. art. I, § 8, cl. 4 (stating that Congress shall have the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States").

if forced to repay her student loan.[12] The District Court analyzed Mrs. Davis's situation under the *Brunner* test, which originated in a 1985 decision of the United States District Court for the Southern District of New York.[13] Finding that Mrs. Davis did not satisfy her burden of undue hardship, the District Court accordingly reversed the decision of the United States Bankruptcy Court for the Western District of New York ("Bankruptcy Court") and reinstated Mrs. Davis's entire student loan.[14]

Although section 523(a)(8) was initially created to "rescu[e] the student loan program from insolvency, and to prevent[] abuse of the bankruptcy process by undeserving student debtors,"[15] the legislation's effect has been considered "contrary to the Bankruptcy Act policy of providing the bankrupt with a fresh start," the damage being done to the many "honest, but unfortunate"[16] debtors "far exceed[ing] any possible benefit."[17] Mrs. Davis is only one debtor, but her facts epitomize the reasons underlying our "student debt crisis."[18] Over the past three decades, section 523(a)(8) has been revised several times.[19] Yet, instead of enacting pro-debtor legislation, Congress has taken a contrary stance by "progressively ma[king] student loans more difficult to discharge."[20] This case comment does not contend that the

12. Davis v. Educ. Credit Mgmt. Corp. (*In re* Davis), 373 B.R. 241, 244 (W.D.N.Y. 2007).

13. *Id.* at 245 (citing Brunner v. N.Y. State Higher Educ. Services Corp. (*In re* Brunner), 46 B.R. 752, 756 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987)).

14. *In re Davis*, 373 B.R. at 252.

15. Hicks v. Educ. Credit Mgmt. Corp., 331 B.R. 18, 22 (Bankr. D. Mass. 2005) (quoting *Andresen*, 232 B.R. at 130 (quoting Raymond L. Woodstock, *Burden of Proof, Undue Hardship, and Other Arguments for the Student Loan Debtor under 11 U.S.C. § 523(a)(8)(B)*, 24 J.C. & U.L. 377, 405 (1998))). *Hicks* refers to graduates "filing for bankruptcy to rid themselves of student loan obligations 'on the eve of a lucrative career.'" (quoting *In re Andresen*, 232 B.R. at 130 (quoting Johnson v. Mo. Baptist Coll., 218 B.R. 449, 451 (B.A.P. 8th Cir. 1998))); *see also* Tenn. Student Assistance Corp. v. Hornsby (*In re* Hornsby), 144 F.3d 433, 436–37 (6th Cir. 1998) ("The dischargeability provision at issue, § 523(a)(8), was enacted to prevent indebted college or graduate students from filing for bankruptcy immediately upon graduation, thereby absolving themselves of the obligation to repay their student loans."); Comm'n on the Bankr. Laws of the U.S., Report of the Comm'n on the Bankr. Laws of the U.S., H.R. Doc. No. 93–137, pt. 2, at 140 (1973) [hereinafter 1973 Commission Report] (explaining that section 523(a)(8) "responds to the rising incidence of consumer bankruptcies of former students motivated primarily to avoid payment of educational loan debt").

16. *Local Loan Co.*, 292 U.S. at 244.

17. Hennessy, *supra* note 1, at 74 (citation omitted).

18. *See* Reed, *supra* note 1.

19. Amanda M. Foster, *All or Nothing: Partial Discharge of Student Loans Is Not the Answer to Perceived Unfairness of the Undue Hardship Exception*, 16 Widener L. J. 1053, 1063 (2007). After incorporation into the Bankruptcy Code via the Bankruptcy Reform Act of 1978, Section 523(a)(8) was revised in 1990, 1998, and once more in 2005. *Id.*

20. Craig Peyton Gaumer, *Chaos in the Courts: The Meaning of "Undue Hardship" in 11 U.S.C. § 523(a)(8) and the Argument for Establishing a Uniform Federal Standard*, Am. Bankr. Inst. J., May 2004, at 8. Over the course of the three revisions to section 523(a)(8), the non-dischargeability period was first extended from five years to seven years, then eliminated entirely, leaving the only method of recourse to be the burden of proving "undue hardship." *Id.*

District Court misinterpreted the applicable law, i.e., the *Brunner* test. Alternatively, this case comment is an attempt at spurring judicial activism. Congress will not change the law. Our judges, therefore, must begin to interpret it more leniently. If not, the once realistic solution of a "fresh start" will become nothing more than a *pro se* pipe-dream.[21]

Mrs. Davis earned her bachelor of arts degree from the State University of New York at Fredonia ("SUNY Fredonia") through the financing of several student loans.[22] In 1995, six years after her graduation, she consolidated the loan principals and accrued interest into a single obligation totaling $11,031.48.[23] Although at graduation life most likely promised Mrs. Davis a world of opportunity, the next decade of Mrs. Davis's life was filled largely with disappointment. After marriage to Dale Davis on May 7, 1994, Mrs. Davis and her spouse inhabited a "handyman special" said to have "serious structural problems" furnished with "used items having little or no resale value."[24] Equally as "modest" were the couple's two automobiles, one of which was more than fifteen years old.[25] Further hampering their straitened circumstances were Mrs. Davis's long stints of unemployment, mitigated only by the "medical treatment [she received] for depression."[26] The most extravagant asset of Mrs. Davis's life, aside from her spouse's annual salary of $21,000, was a small investment account valued at $757.79; possibly savings accrued from her $8000 annual salary as a part-time activities aide in a nursing home.[27] Amid all Mrs. Davis's economic misfortune, the cost of her SUNY Fredonia education continued to grow. By December 2, 2004, the balance of her 1995 consolidated student loan had increased nearly three-fold to a total of $29,925.96.[28]

Most likely in response to incessant collection efforts,[29] Mrs. Davis turned to the federal government for relief. On August 13, 2003, she petitioned for a complete discharge of all debts, including her student loan, under Chapter 7 of the Bankruptcy Code.[30]

As *In re Brunner* was decided before the United States Court of Appeals for the Second Circuit, the New York courts have adopted the *Brunner* test as their sole

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21. Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 Harv. L. Rev. 1393 (1985); Susan Thurston, *Behind the Numbers: The New Workload of the U.S. Bankruptcy Courts: Fewer Cases, Added Paperwork, Increased Need for Customer Service*, Am. Bankr. Inst. J., May 2007, at 42, 43 (noting the "increase in the percentage of *pro se* filed cases from pre-BAPCPA days").

22. *In re Davis*, 373 B.R. at 246.

23. Davis v. Educ. Credit Mgmt. Corp. (*In re* Davis), 336 B.R. 604, 606 (Bankr. W.D.N.Y. 2006).

24. *Id.* at 606–07.

25. *In re Davis*, 373 B.R. at 246.

26. *Id.* at 246–47.

27. *Id.* at 246.

28. *In re Davis*, 336 B.R. at 606.

29. Sewell Chan, *An Outcry Rises as Debt Collectors Play Rough*, N.Y. Times, July 5, 2006, at A1.

30. *In re Davis*, 336 B.R. at 606.

method of "undue hardship" assessment.[31] Accordingly, Judge Carl L. Bucki, writing for the Bankruptcy Court, was obligated to assess Mrs. Davis's facts under the test. "Undue hardship," as set forth in *In re Brunner*, is established upon a showing that: 1) 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) 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) the debtor made good faith efforts to repay the loans.[32] The debtor must prove each of these factors by a preponderance of the evidence.[33]

In applying the *Brunner* test to Mrs. Davis, however, Judge Bucki uncovered a "special problem" within the dispute: Mrs. Davis's facts were "fundamentally different" from those considered in *In re Brunner*.[34] Notably, the majority of the family income was derived from wages earned by Mrs. Davis's "non-obligor spouse."[35] Although precedent instructs courts to consider total household income (i.e., income earned by the debtor, the spouse of the debtor (commonly referred to as the "non-obligor" or "non-debtor" spouse), a parent, or a co-habitant),[36] Judge Bucki decided to do otherwise.[37] Deciding not to consider the "consequences of substantial earnings by a non-debtor spouse,"[38] Judge Bucki departed from traditional judicial ruling under *In re Brunner*, and instead proffered a truly equitable solution for both Mrs. Davis and Educational Credit Management Corporation ("ECMC"), the assignee of Mrs. Davis's student loan. Through practical mathematics, a reasonable repayment

31. *In re Davis*, 373 B.R. at 245.

32. *In re Brunner*, 831 F.2d at 396.

33. Educ. Credit Mgmt. Corp. v. Frushour, 433 F.3d 393, 400 (4th Cir. 2005).

34. *In re Davis*, 336 B.R. at 608.

35. *Id.*

36. *In re Davis*, 373 B.R. at 248.

37. *In re Davis*, 336 B.R. at 609.

38. *Id.* ("The present instance involves a debtor living with her gainfully employed spouse. But in a different case, a minimally employed debtor might reside with parents, siblings, or friends. Should discharge depend upon total household income, when a discharge of [student] loans is allowed to a similarly employed and employable debtor who lives alone? Alternatively, should the court deny a discharge because a debtor could have chosen to return to the parental abode? To what extent should the court ever consider the prospects for a marriage that might place the debtor into a household where repayment of the student loan would impose a more manageable financial burden?").

amount was calculated, resulting in a partial discharge[39] "requir[ing] Mrs. Davis to pay all that applicable law could force her to repay."[40]

Although Judge Bucki's Bankruptcy Court decision was equitable, it was not a proper application of the current law, i.e., the *Brunner* test. Declaring the Bankruptcy Court to have "discharged the debt without following the requirements set forth in *Brunner*," ECMC appealed the decision.[41] In reversing Mrs. Davis's partial discharge, the District Court explained how the *Brunner* test was not followed.[42] In regards to the first *Brunner* prong, whether the debtor can maintain a "minimal standard of living," the District Court claimed that "well established case law makes it clear that *total household income* . . . must be considered."[43] Upon establishing the Davis's total household income to be in excess of the annual self-sufficiency wage for two adults,[44] the District Court overruled the Bankruptcy Court and ruled in favor of ECMC, holding Mrs. Davis able to repay her loan while maintaining the requisite "minimal standard of living."[45]

After stating that total household income should "not only . . . be considered with respect to *Brunner*'s first prong, but is clearly relevant with respect to the entire undue hardship analysis," the District Court noted that the Bankruptcy Court did not mention Mr. Davis's income once throughout their consideration of the second *Brunner* prong.[46] The District Court continued by claiming the facts, "as the

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39. *Id.* at 609–10 (relying on Raimondo v. N.Y. State Higher Educ. Services Corp. (*In re* Raimondo), 183 B.R. 677, 681 (Bankr. W.D.N.Y., 1995). For support, Judge Bucki states:

> For purposes of calculating the non-dischargeable balance of the [student] loan, I will assume that Mrs. Davis will likely work about 20 more years, until she becomes eligible for full social security benefits. Her [student] loan presently accrues interest at the rate of nine percent per annum. At that rate, payments of $800 per year for 20 years would fully amortize a loan of approximately $7400. In addition, ECMC could attach the debtor's investment account of approximately $750. In my view, therefore, no undue hardship would arise from repayment of the total sum of $8150.

Id. For more on partial discharges, see Hennessy, *supra* note 1.

40. *In re Davis*, 336 B.R. at 610.

41. *In re Davis*, 373 B.R. at 247.

42. *Id.* ("[The Bankruptcy Court] did not sufficiently consider the strict constraints of presumptive non-dischargeability established in § 523(a)(8) and expounded in *Brunner* and its progeny.").

43. *Id.* at 248 (emphasis added). Total household income would include the income of Mr. Davis, $21,000, as well as Mrs. Davis, $8000. *Id.* at 246.

44. *Id.* at 249 (The court, as requested by the ECMC, used the Bureau of Labor Statistics self-sufficiency wages from the debtor's county as a guide in determining what is needed to maintain a "minimal standard of living.").

45. *Id.* at 249.

46. *Id.* While the District Court flaunts a fourteen-case-long string citation as support for the inclusion of total household income, i.e., accounting of the non-debtor spouse's income, the cases only refer to the non-debtor's income as either "relevant" or "proper to consider," clearly falling short of determinative. Further undermining the District Court's reasoning is the lack of financial similarity between Mr. and Mrs. Davis and the debtor families in each of the cases relied upon. *See id.* at 248 (citations omitted). Ironically, one of the cases that the District Court relies so heavily upon in their string citation is

Bankruptcy Court found them," did not support a satisfaction of the second *Brunner* prong;[47] the

> type of additional circumstances contemplated by *Brunner* are well beyond those hardships that normally accompany any bankruptcy. The second [prong] is, therefore, a "demanding requirement," and necessitates that a "certainty of hopelessness" exists that the debtor will not be able to repay the student loans. Only a debtor with rare circumstances will satisfy this [prong]. For example, although not exhaustive, a debtor might meet this test if she can show "illness, disability, a lack of useable job skills, or the existence of a large number of dependents."[48]

The District Court held Mrs. Davis's circumstances not to suffice the requirements of the second *Brunner* prong.

The District Court mentioned the third *Brunner* prong only in passing as the Bankruptcy Court's decision for a partial discharge was reasoned unwarranted and unprecedented.[49] In conclusion, the District Court vacated and remanded the decision back to the Bankruptcy Court with orders to enter a judgment in favor of ECMC, holding the entire amount of the student loan non-dischargeable and effectively denying Mrs. Davis any "fresh start" in every sense of the term.[50]

Regardless of the District Court's "judicially correct" application of the *Brunner* test, the test remains overly restrictive and mechanical. Examining the test's three prongs illustrates how courts tend to overlook the unique circumstances of each particular debtor before the court,[51] resulting in denials of discharge, and further exacerbating our current "student debt crisis." The first prong of the *Brunner* test requires a finding of whether the debtor will be unable to maintain a "'minimal' standard of living" if forced to repay the loan.[52] According to the Commission on the Bankruptcy Laws of the United States, such an inquiry into the debtor's current and future economic capabilities is appropriate.[53] However, the moment a numerical

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Educational Credit Management Corp. v. Buchanan, 276 B.R. 744, 752 (N.D.W.Va. 2002), where the court deemed the application of the *Brunner* test "fact intensive." *See Davis*, 373 B.R. at 248 n.8.

47. *In re Davis*, 373 B.R. at 249–50.

48. *Id.* at 250 (citiations omitted).

49. *See id.* at 251–52 ("Instead, the partial discharge was given simply upon the 'practical consideration' that it was all that the creditor could recover . . . under NY law anyway. This approach is without basis in law and is contrary to the requirements of *Brunner* and its principles as discussed above." (citing Penn. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 304 (3d Cir. 1995))).

50. *See id.* at 252.

51. *See* Educ. Credit Mgmt. Corp. v. Polleys (*In re* Polleys), 356 F.3d 1302, 1308 (10th Cir. 2004); Scott Pashman, *Discharge of Student Loan Debt Under 11 U.S.C. § 523(a)(8): Reassessing "Undue Hardship" After the Elimination of the Seven-Year Exception*, 44 N.Y.L. Sch. L. Rev. 605, 616 (2001) (arguing the *Brunner* test is too restrictive).

52. *In re Brunner*, 831 F.2d at 396.

53. *See* 1973 Commission Report, *supra* note 15, at 140.

definition is assigned to the "minimal standard of living," as the District Court did,[54] the entire *Brunner* test is transformed into nothing more than a bare threshold analysis;[55] one functionally identical to the *Bryant* test, another method of "undue hardship" assessment.[56] The *Bryant* test finds "undue hardship" present if the debtor's gross income is "at, near or below" the federal poverty guidelines.[57] Not surprisingly, the *Bryant* test is frequently rejected by courts in light of its overly "objective approach"[58] and inability to "examine[] . . . the facts and circumstances surrounding" the many individual bankruptcies.[59] If a debtor happens to be above their federal poverty guideline, just as if a debtor fails to prove his or her inability to "maintain a minimal standard of living" under the *Brunner* test, discharge of the student loan is not possible, in spite of any extenuating circumstances that may be present. For the same reasons the majority of courts reject the *Bryant* test, the first prong of the *Brunner* test should be rejected as well.

The second *Brunner* prong calls for a showing that the current "state of affairs is likely to persist for a significant portion of the repayment period of the student loan."[60] At first glance this requirement seems to "resonate with the forward-looking nature of the undue hardship analysis."[61] While the debtor must show more than the "garden variety" hardship,[62] courts have often "stretch[ed] the text of section 523(a)(8) beyond its logical bounds"[63] by insisting on a showing of "'additional circumstances' that establish a 'certainty of hopelessness.'"[64] This court-imposed "overkill"[65] creates

54. *In re Davis*, 336 B.R. at 607. Both courts and all parties agreed to use the self-sufficiency wages from the Bureau of Labor Statistics of the United Stated Department of Labor as a guide: "Without objection from the debtor, the court granted ECMC's request to take judicial notice of self-sufficiency standards issued by the Bureau of Labor Statistics of the United States Department of Labor." *Id.*

55. *Hicks*, 331 B.R. at 25 ("Each prong must be satisfied before the court proceeds to the next; if any part of the test is not satisfied, the inquiry ends.").

56. Bryant v. Penn. Higher Educ. Assistance Agency (*In re* Bryant), 72 B.R. 913, 916 (Bankr. E.D. Pa. 1987).

57. *In re Bryant*, 72 B.R. at 916.

58. Morgan v. U.S. Dep't of Higher Educ. (*In re* Morgan), 247 B.R. 776, 781 (Bankr. D. Ark. 2000).

59. Wegfehrt v. Ohio Student Loan Comm'n (*In re* Wegfehrt), 10 B.R. 826, 830 (Bankr. N.D. Ohio 1981); *accord In re Faish*, 72 F.3d at 304; Crowley v. United States Dep't of Educ. (*In re* Crowley), 259 B.R. 361, 366 (Bankr. D. Mo. 2001); Sarah Edstrom Smith, *Should the Eighth Circuit Continue To Be the Loan Ranger? A Look at the Totality of the Circumstances Test for Discharging Student Loans Under the Undue Hardship Exception in Bankruptcy*, 29 Hamline L. Rev. 601, 618 (2006) ("Commentators have criticized the *Bryant* test for not examining all of the relevant circumstances in undue hardship cases. Although the court can consider extraordinary circumstances, the court generally does not get a full view of the circumstances of the debtor. For this reason, few courts have adopted the *Bryant* test.").

60. *In re Brunner*, 831 F.2d at 396.

61. *Hicks*, 331 B.R. at 27; *see also* 1973 Commission Report, *supra* note 15, at 140–41.

62. *In re Brunner*, 46 B.R. at 753.

63. *Hicks*, 331 B.R. at 28.

64. *Id.* at 27 (quoting Briscoe v. Bank of N.Y. (*In re* Briscoe), 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981)).

65. *Id.* at 28.

an "almost impossible burden to overcome."[66] All that is required by section 523(a)(8) under the *Brunner* test is a determination of "whether the debtor has adequate resources to repay the loan [while] maintain[ing] a minimum standard of living."[67] What social benefit is derived in denying the discharge of a debt of a debtor who possesses an income insufficient to pay current or future expenses, yet cannot show an absolute "certainty of hopelessness?"[68] Just as in *In re Davis*, "the debtor [will] remain unable to pay, the student loan [will] remain unpaid," and the amount owed will continue to escalate.[69] Such a high burden causes "draconian result[s]" and is "at odds with not only the fundamental 'fresh start' philosophy underlying the entire Bankruptcy Code, but also the history of Section 523(a)(8)."[70]

Examining the third *Brunner* prong in light of the plain language used in section 523(a)(8) provides additional reason as to why the *Brunner* test is inherently flawed.[71] The third and final prong of the *Brunner* test requires debtors to have made good faith efforts in repaying a loan.[72] Simple legislative interpretation reveals this requirement to be unfounded. Section 523(a)(8) provides, in part, that "excepting such debt from discharge . . . *would impose* an undue hardship on the debtor *and the debtor's dependents*."[73] The first italicized phrase, "would impose," indicates that Congress intended for the focus of the courts' inquiry to be on the "*future* impact" of denying discharge.[74] Therefore, however vague the term "undue hardship" is, it must carry a definition in line with the statute's "prospective" considerations.[75] Such a prospective consideration is further supported by the statute's instruction to consider the impact on the debtor's dependents.[76] For if the debtor's dependents are to be considered, the debtor's past actions are irrelevant: "visiting the sins of the father . . . upon the children [is] a result contrary to the letter of the statute and the spirit of the law."[77] Lastly, as general policy instructs the Bankruptcy Code not to concern itself with how the debtor came in to bankruptcy, the prospective interpretation of undue

66. Huey, *supra* note 3, at 116.

67. Kopf v. U.S. Dep't. of Educ. (*In re* Kopf), 245 B.R. 731, 741 (Bankr. D. Me. 2000).

68. *Id*.

69. *Id.* at 744 n.24 (quoting Salinas v. U.S. Aid Funds, Inc. (*In re* Salinas), 240 B.R. 305, 315 n.15 (Bankr. W.D. Wis. 1999)).

70. *Id*.

71. *See In re Crowley*, 259 B.R. at 367.

72. *In re Brunner*, 831 F.2d at 396.

73. 11 U.S.C. § 523 (2006) (emphasis added).

74. *In re Crowley*, 259 B.R. at 368.

75. *Id*.

76. 11 U.S.C. § 523 (2006) ("[U]nless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor *and the debtor's dependents*, for [a student loan]." (emphasis added)).

77. *In re Crowley*, 259 B.R. at 368.

hardship "better harmonizes with the overall structure and principles underlying section 523 as well as the entire Bankruptcy Code."[78]

Although a majority of circuit courts around the country currently rely on *Brunner*, including the district court that decided *In re Davis*,[79] a different, pro-debtor method for assessing undue hardship should be used in its place. The Eighth Circuit's method for assessing undue hardship, the totality of the circumstances test, should be employed instead, as it has often been quoted as better equitably suited for the debtor,[80] "'afford[ing] a determination that contextually considers both the debtor's situation and the policies underlying § 523(a)(8)' and better 'ensur[ing] an appropriate, equitable balance between concern for cases involving extreme abuse and concern for the overall fresh start policy.'"[81] Under the totality of the circumstances test, consideration is given to: "1) the debtor's past, present, and reasonably reliable future financial resources; 2) calculation of the debtor's and his dependents' reasonable necessary living expenses; and 3) any other relevant facts and circumstances surrounding the particular bankruptcy case."[82]

The totality of the circumstances test calls for an inquiry into the debtor's past finances.[83] Allowing the totality of the circumstances test to inquire into the debtor's past finances while discounting the *Brunner* test for the exact same inquiry creates a contradiction. Reconciliation is found, however, upon examination of the motives behind the different tests' *pre*-spective approaches.[84] The *Brunner* test instructs courts to determine whether a debtor's past actions, with regard to repayment, can be classified as "good faith efforts."[85] Not only does such a "moralistic" inquiry distract a court from relevant considerations, i.e., "how the debtor's education, aptitude, and effort might enable him or her to repay loans" and "how legislative objectives might inform the content of the statute's language,"[86] but it is also given "undue emphasis," as the *Brunner* test works in a threshold analysis fashion.[87]

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78. *Id.* ("[A]s a general policy, the Bankruptcy Code doesn't concern itself with how a debtor came to be in the financial position that made bankruptcy necessary.").

79. Educ. Credit Mgmt. Corp. v. Kelly (*In re* Kelly), 312 B.R. 200, 206 (B.A.P. 1st Cir. 2004) ("The *Brunner* test, originated by the Second Circuit, has been adopted by the Third, Fourth, Fifth, Seventh, Ninth, Tenth and Eleventh Circuits.").

80. *See Hicks*, 331 B.R. at 24; *In re Kopf*, 245 B.R. at 741; Huey, *supra* note 3, at 106–07 (2002).

81. *In re Andresen*, 232 B.R. at 140 (quoting Law v. Educ. Res. Inst. (*In re* Law), 159 B.R. 287, 292–93 (Bankr. D. S.D. 1993)).

82. *Id.* at 139.

83. *See id.*

84. The term "*pre*-spective" refers to the tests' inquiries into a debtor's past; analogous to the "prospective" inquiry required by section 523(a)(8) itself. *See* discussion *supra* p. 647.

85. *In re Brunner*, 831 F.2d at 396.

86. *In re Kopf*, 245 B.R. at 741.

87. *Id.* Initial inquiries in threshold analyses are usually given "undue emphasis" due to their objective and mechanical nature. *See supra* note 59 and accompanying text.

The totality of the circumstances test, on the other hand, examines the debtor's past *relevant* reasons.[88] In order to determine "reliable future financ[es]," the totality of the circumstances test requires courts to inspect both a debtor's present *and* past resources.[89] The debtor's past financial responsibility is not subjectively judged as it is in the *Brunner* test, but instead objectively judged, and in passing only, as the debtor's future financial capability is assayed. For example, the following financials are taken into account: average income, assets, and reasonable necessary living expenses.[90] Depending on an objective assessment of the debtor's lifestyle, the first prong of the totality of the circumstances test will either be satisfied or not.[91] Considering the debtor's past for any purposes other than those behind the totality of the circumstances test is clearly "inappropriate."[92]

The second prong of the totality of the circumstances test is self-explanatory. A "calculation of the debtor's . . . living expenses" is clearly required if a determination concerning repayment capability is to be made.[93]

The final prong, consideration of other "facts and circumstances,"[94] is what most sets the totality of the circumstances test apart from other "undue hardship" assessment methods. Peoples' lives are "complex," especially those of debtors.[95] Thus, it is reasonable to expect the courts to utilize a method of assessment that accounts for such complexities. The totality of the circumstances test is that method. It accounts for those "facts and circumstances" unique to every bankrupt, one that "fairness and equity" require.[96]

Already employed by the Eighth Circuit, the totality of the circumstances test reasonably assesses undue hardship, instilling equity into an area of legislative vagueness currently dominated by the overly "restrictive" nature of the *Brunner* test.[97] If the District Court had applied the totality of the circumstances test in *In re Davis*,

88. *Hicks*, 331 B.R. at 31 ("[T]he relevance of any particular factor should be clear; if a particular factor helps answer that question, it should be given appropriate weight and . . . 'if a factor cannot be taken account of in a principled undue hardship assessment, it should not be considered a material factor at all.'" (quoting *In re Kopf*, 245 B.R. at 741)). Examples of such relevant factors are "the debtor's income and expenses, the debtor's health, age, education, number of dependents and other personal or family circumstances, the amount of the monthly payment required, the impact of the general discharge under Chapter 7, and the debtor's ability to find a higher-paying job, move or cut living expenses." *Hicks*, 331 B.R. at 31.

89. *See In re Andresen*, 232 B.R. at 139–40 (1999); *accord In re Kopf*, 245 B.R. at 739; *In re Crowley*, 259 B.R. at 365–66; *Hicks*, 331 B.R. at 24.

90. *E.g.*, *In re Kopf*, 245 B.R. at 745–46; *Hicks*, 331 B.R. at 33–35.

91. *See generally In re Kopf*, 245 B.R. at 747; *Hicks*, 331 B.R. at 38.

92. *In re Kopf*, 245 B.R. at 741.

93. *Id.* at 739.

94. *Id.*

95. *Hicks*, 331 B.R. at 31.

96. Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003).

97. *Id.*; *see also* discussion *supra* pp. 640–41.

as opposed to the *Brunner* test, the likelihood of discharge would have been vastly improved. Mrs. Davis had an annual income of approximately $8000.[98] Aside from a small investment account totaling $757.79, she owned no significant liquid assets or any other property.[99] Assuming, *arguendo*, that non-debtor spousal income should be accounted for, Mr. Davis contributed roughly an additional $21,000 to the couple's annual income.[100] Thus, giving consideration to "the debtor's past, present and reasonably reliable future financial resources," as the totality of the circumstances test instructs,[101] an approximate amount of $30,000 can be estimated for annual gross income.[102]

The second prong of the totality of the circumstances test requires a "calculation of the debtor's . . . reasonable necessary living expenses."[103] Once again, as found by both the Bankruptcy Court and the District Court, Mr. and Mrs. Davis were living in a "handyman special" home and owned only "modest" automobiles.[104] Thus, all expenses related to these assets, e.g., repairs, utilities, food, upkeep, tax, insurance, etc., as well as Mrs. Davis's medical treatments for depression, would need to be totaled.[105]

The first two prongs of the totality of the circumstances test are informative, but any conclusion drawn without the debtor's particular schedules is mere speculation, far from determinative. Nevertheless, had the District Court employed the totality of the circumstances test, Mrs. Davis's "facts and circumstances," e.g., her difficulty finding permanent employment, struggle with depression, and approximate twelve percent interest rate on her student loans,[106] would have realistically afforded her a fair opportunity at a "fresh start" by way of analysis under the third prong.[107] Recently decided cases support this conclusion.

In *In re Kelly*, a case decided in 2004 by the United States Bankruptcy Appellate Panel for the First Circuit, Ms. Kelly, a debtor-graduate of Suffolk University Law

98. *In re Davis*, 373 B.R. at 246.

99. *Id.*

100. *Id.* Again, the District Court relied on an impressive amount of precedent in deciding total household income should be accounted for. *See supra* note 46 and accompanying text. For the purposes of this argument, Mr. Davis shall be assumed to be a "non-debtor spouse." If, hypothetically, Mr. Davis's income is not accountable to Mrs. Davis's student loan obligation, the likelihood of discharge would accordingly increase even more.

101. *In re Kopf*, 245 B.R. at 739.

102. The total of Mrs. Davis's income, her investment account, and her spouse's income equals a gross income of approximately $30,000.

103. *In re Kopf*, 245 B.R. at 739.

104. *In re Davis*, 373 B.R. at 246.

105. *Id.* at 247.

106. The approximate interest rate was calculated with a compound interest formula, where the principal amount was set at $11,000, the current amount set at $30,000, the amount of time set at nine years, compounded annually.

107. *In re Kopf*, 245 B.R. at 739.

School in Boston, successfully sustained the "undue hardship" burden under the totality of the circumstances test and received a discharge of her student loans.[108] The court reasoned that because she was a forty-one year old mother of one and foster parent of two, had a "volatile" income, and received "insufficient" compensation from Massachusetts for her foster parent commitments, "requiring . . . [Ms. Kelly] to repay over $80,000 in student loans would cause her an undue hardship."[109] Recognizing the doubtfulness of Ms. Kelly ever repaying such a large sum of money, the court discharged four of her student loans, totaling over $63,000.[110]

A similar application of the totality of the circumstances test occurred in *In re Jesperson*, a case decided in 2007 by the United States Bankruptcy Court for the District of Minnesota. The debtor, Mr. Jesperson, a forty-three year old recovering alcoholic single father of two, managed to accrue $304,463.62 in student debt while in the process of obtaining a Bachelor of Arts in English Literature from the University of Minnesota and a Juris Doctor from Oregon's Lewis and Clark School of Law.[111] The court carefully considered the "facts and circumstances" of Mr. Jesperson's life, mainly the immense size of his debt, his support obligations for his two children, and his efforts to "maintain . . . sobriety."[112] In concluding Mr. Jesperson's circumstances demanded enough to sustain an undue hardship burden, the court understood that repayment of his student loans was not possible.[113] Accordingly, Mr. Jesperson received a complete discharge under section 523(a)(8).[114]

Based on *In re Kelly* and *In re Jesperson*, if the debtor's personal circumstances dictate a reality in which likelihood of repayment is, for all intents and purposes, nil, the student debt will be discharged. Holding otherwise will create undue hardship for the debtor and his or her dependants. As Judge Bucki writing for the Bankruptcy Court stated, "[f]rom all foreseeable perspectives, [Mrs.] Davis will never repay her [student] loan in full."[115] This seems obvious considering the facts: while Mrs. Davis graduated from SUNY Fredonia more than fifteen years prior, she was still unable to find full-time employment, had medical depression, and had an exponentially increasing student debt.[116] The totality of the circumstances test, rather than the *Brunner* test, would have forced the District Court to recognize and appreciate Mrs.

108. *In re Kelly*, 312 B.R. at 203, 209.

109. *Id.* at 208.

110. *Id.* at 209.

111. Jesperson v. U.S. Dep't of Educ. (*In re* Jesperson), 366 B.R. 908, 910–13 (Bankr. D. Minn. 2007), *aff'd*, No. 05–39651, 2007 U.S. Dist. LEXIS 84595 (Nov. 14, 2007). The size of Mr. Jesperson's debt is most likely attributable to its interest accrual over the course of roughly seventeen years. Despite his struggles, Mr. Jesperson passed the Minnesota bar exam on his first attempt in 2002. *Id.*

112. *Id.* at 918.

113. *Id.* at 917–19.

114. *Id.* at 919.

115. *In re Davis*, 336 B.R. at 609.

116. *Id.* ("Even if ECMC were to garnish her wages to the full extent allowed by law, the loan will negatively amortize, and she will retire with an even greater liability than she now owes.").

Davis's unique facts and circumstances, entitling her to the Bankruptcy Code's "overall fresh start policy" while simultaneously protecting against "extreme abuse."[117]

Our nation's courts must recognize the inadequacies surrounding the *Brunner* test, in light of both a basic application of bankruptcy policy, as well as its effects on the student loan program and our nation's debtors. Only then will it be understood that a new method of assessment must be implemented. Without one, Mrs. Davis and the masses of "honest, but unfortunate" debtors she represents will never have a fair chance of obtaining the fresh start Congress intended our courts to offer.[118]

117. *In re Andresen*, 232 B.R. at 140 (quoting *In re Law*, 159 B.R. at 292–93).

118. *Local Loan Co.*, 292 U.S. at 244.