

REFORMING STUDENT LOAN BANKRUPTCY PROCEDURE

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Student loans are not dischargeable in bankruptcy unless “undue hardship” is present. Courts almost universally have placed the burden of showing undue hardship on debtors, justifying this decision on the ground that such debtors are typically at the “nadir” of their earning power because they have just graduated from school with an education that will fuel steadily rising pay. Empirical research shows, however, that the median debtor seeking to discharge student loans is in their mid-40s and earns under \$25,000 per year. Evidence and civil procedure scholarship teaches us that the probability of a matter in question should be a critical determinant of the burden of proof on that matter, and the probability is that a debtor who seeks student loan relief will endure undue hardship.

Other considerations relevant to allocation of the burden of proof – access to evidence bearing on the matter in question and underlying policy considerations – do not support placing the burden on the debtor. Creditors have better access than debtors to much of the evidence relevant to undue hardship, and there is no clear expression of congressional policy to allocate the burden of proof to debtors.

Appellate courts could fix the burden-of-proof problem by reconsidering unhelpful precedents en banc. Another possible avenue for relief would be the bankruptcy rulemaking process. But courts can also act immediately. Although in most jurisdictions lower courts cannot place the burden of proof entirely on the creditor, they can shift the burden once the debtor makes a specified showing. For example, they could determine that if the debtor shows that student loans have been causing hardship for the past five years, they will discharge the loans unless the creditor provides significant, case-specific evidence that the debtor’s condition will change.

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At present, student loan debtors are often called upon to prove that long-existing disabilities will continue far into the future, or that they need bankruptcy discharge now because loan forgiveness decades hence under an alternative repayment program will generate tax liability. Reform of the burden of proof could remove these pointless obstacles to relief for suffering student borrowers.

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INTRODUCTION

In 1994, Noreen Nash seemed to be on track to a lucrative career: she had an undergraduate degree with honors from Dartmouth, an MBA from Yale, a salary of \$120,000 (\$210,000 in today’s dollars), and had been admitted to the University of Michigan Law School.¹ In law school, Nash started to have trouble focusing and was prescribed medication for “manic/depressive

¹Nash v. Conn. Student Loan Found. (*In re Nash*), 446 F.3d 188, 191 (1st Cir. 2006).

symptoms.”² She was unable to function in a law-firm job after her second year and dropped out of school in 1997.³ Nash “did some work as a telemarketer” that year but since then had not worked regularly and was certified as disabled by the Social Security Administration.⁴

Nash sought in 2004 to discharge her \$140,000 in student loans, arguing that repayment would be an undue hardship.⁵ In addition to the Social Security disability determination, she presented a medical diagnosis of bipolar II disorder, corroborated by a doctor’s report that stated that Nash’s disorder “disables her cognitive functioning, endurance, and ability to concentrate.”⁶ Her own testimony “affirm[ed] her doctors’ report.”⁷ Despite Nash’s six years of disability and unemployment, the bankruptcy court denied discharge because Nash had not shown that her difficulties would continue into the future.⁸ The district⁹ and appellate¹⁰ courts affirmed. Other decisions have reached similar results.¹¹

Nash’s case illustrates the importance of the burden of proof of undue hardship when borrowers seek to discharge student loans in bankruptcy, a matter that has received surprisingly little scholarly attention.¹² Undue

²*Id.*

³*Id.*

⁴*Id.*

⁵*Id.* at 189–90, 192.

⁶*Id.* at 192.

⁷*Id.* at 193.

⁸*Id.* at 192 (noting that the debtor “submitted no evidence of her long-term prognosis”).

⁹*Nash v. Conn. Student Loan Found.*, 330 B.R. 323, 328 (D. Mass. 2005).

¹⁰*Nash*, 446 F.3d at 194.

¹¹*See, e.g., Steers v. N.J. Higher Educ. Student Assistance Auth. (In re Steers)*, No. 07-15302, 2008 WL 2038835, at *2, *4 (D.N.J. May 12, 2008) (finding that the debtor had not worked for five years after being raped, and physician testified that she was unable to work because of “a combination of comorbid psychiatric disorders and compounded by her physical problems and pain;” however, explaining that debt discharge was denied because the “record [was] devoid of evidence that Ms. Steers’s condition [was] likely to persist for the foreseeable future”); *Burton v. Pa. Higher Educ. Assistance Agency (In re Burton)*, 117 B.R. 167, 168, 170–71 (Bankr. W.D. Pa. 1990) (mem. op.) (finding that a debtor who had worked only sporadically for at least five years and testified that he suffered from Epstein-Barr syndrome “failed to show what the long-term deleterious effects of the disease are; that he can be expected to suffer those effects during the next ten (10) years or so; or, that this condition will prevent him from being gainfully employed during that time”).

¹²An exception is Raymond L. Woodcock, *Burden of Proof, Undue Hardship, and Other Argument for the Student Debtor Under 11 U.S.C. § 523(a)(8)(B)*, 24 J.C. & U.L. 377 (1998). Woodcock’s insightful article appeared when *Brunner* was only beginning to be widely adopted,

hardship is a requirement for bankruptcy discharge of student loans,¹³ and all federal appellate courts other than those for the D.C. and Federal Circuits¹⁴ have stated that the burden of proving undue hardship is on the debtor.¹⁵ In most jurisdictions courts follow the *Brunner* test: the debtor must show not just that repaying the loans would cause a hardship based on current circumstances, but also that the conditions causing hardship will continue for a significant portion of the repayment period and that the debtor has made good-faith efforts to repay the loans.¹⁶

This paper contends that the debtor should not have to bear this burden and suggests ways to lighten it that are consistent with unhelpful precedents that are binding in most jurisdictions. It argues in Part I that the principles that normally guide the allocation of burdens of proof suggest that it should be the creditor's task to prove the absence of undue hardship. Placing the burden on the debtor is not necessary to carry out congressional policy.¹⁷ Specifically, most bankrupt debtors who seek to discharge student loans will suffer undue hardship absent a discharge.¹⁸ The burden should be on the creditor to show that any particular case is exceptional. Moreover, the

and thus its analysis is not tailored to the three *Brunner* elements and does not address how lower courts bound by *Brunner* can allocate burdens of proof. It also predates the empirical literature that underpins many of this Article's recommendations and does not systematically analyze the burdens in terms of probability, possession of proof, and policy as this Article does.

¹³See 11 U.S.C. § 523(a)(8) (2020).

¹⁴In circuit order, see *Nash*, 446 at 193; *Easterling v. Collecto, Inc.*, 692 F.3d 229, 232 (2d Cir. 2012); *Pa. Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 301 (3d Cir. 1995); *Spence v. Educ. Credit Mgmt. Corp. (In re Spence)*, 541 F.3d 538, 543–44 (4th Cir. 2008); *Thomas v. Dep't of Educ. (In re Thomas)*, 931 F.3d 449, 454 (5th Cir. 2019); *Barrett v. Educ. Credit Mgmt. Corp. (In re Barrett)*, 487 F.3d 353, 360 (6th Cir. 2007); *Williams v. U.S. Dep't of Educ.*, 752 Fed. App'x 363, 365 (7th Cir. 2019); *Educ. Credit Mgmt. Corp. v. Jespersion*, 571 F.3d 775, 779 (8th Cir. 2009); *Nichols v. Align W. States Learning Corp.*, 605 Fed. App'x 660, 660–61 (9th Cir. 2015) (mem. op.); *Alderete v. Educ. Credit Mgmt. Corp. (In re Alderete)*, 412 F.3d 1200, 1206 (10th Cir. 2005); *Educ. Credit Mgmt. Corp. v. Acosta-Conniff (In re Acosta-Conniff)*, 686 Fed. App'x 647, 649 (11th Cir. 2017).

¹⁵The author has located only one decision, an older one from a bankruptcy court, that squarely states that the burden of proof is on the creditor. *Fox v. Pa. Higher Educ. Assistance Agency (In re Fox)*, 163 B.R. 975, 978 (Bankr. M.D. Pa. 1993) (“the ultimate burden of proving that this type of hardship is not present is the creditor’s”). Some courts have adopted a burden-shifting framework, discussed in Part II.C.2.

¹⁶See *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) (per curiam).

¹⁷See discussion *infra* Part I.A.

¹⁸See discussion *infra* Part I.B.

evidence needed to prove the presence or absence of undue hardship is not, as some courts have assumed, particularly in the possession of the debtor.¹⁹

Part II of the paper explores how courts could act on the conclusions of Part I. Ideally, appellate courts would revisit decisions that place the burden of proof on debtors.²⁰ Alternatively, it might be possible to shift the burden through the bankruptcy rulemaking process.²¹ Even if that does not happen, however, lower courts can adopt a number of strategies to move the law in the right direction. They can determine that a specified showing raises an inference that the debtor should prevail unless that inference is specifically rebutted.²² For instance, say a debtor were to show that their current income and expenses are such that repayment would cause hardship, that that condition has persisted for the last five years, and that the debtor has been out of school and the loan has been in repayment for the five-year period. Courts could determine that five years of struggle are enough to suggest continuing hardship and good-faith efforts to repay, unless the creditor presents specific evidence to the contrary.

This approach can be called “shifting the burden of production” to the creditor, “adopting a presumption” of undue hardship triggered by the specified showing, or simply deciding that the debtor has carried its burden under these circumstances.²³ Whatever terminology is used, once the debtor makes the specified showing, the creditor should not prevail unless it comes forward with specific evidence that undue hardship is absent in the situation at hand. For example, in Noreen Nash’s case, the present hardship of repayment due to disability, coupled with six years of unemployment, should have been enough for her to win unless her creditor were able to show a realistic prospect that her condition would improve in the foreseeable future.

Appellate decisions allocating the burden of proof to the debtor do not foreclose bankruptcy courts from adopting a burden-shifting structure, which some already use.²⁴ Nor do such precedents affect the bankruptcy courts’ authority to make factual determinations on the three elements of the *Brunner*

¹⁹ See *id.*

²⁰ See discussion *infra* Part II.A.

²¹ See discussion *infra* Part II.B.

²² See discussion *infra* Part II.C.1.

²³ See discussion *infra* Part II.C.2.

²⁴ See *id.*

test.²⁵ The existing framework is unhelpful but does not foreclose meaningful reform.

I. PROPER ALLOCATION OF THE BURDEN OF PROOF IN UNDUE-HARDSHIP CASES

Student loans are unique in that they cannot be discharged in bankruptcy unless the debtor shows that repayment would cause “undue hardship.”²⁶ The statute does not define this term, and for years different tests for undue hardship were in use.²⁷ Most appellate courts²⁸ have now settled on the so-called *Brunner* test for undue hardship, devised by the District Court for the Southern District of New York in 1985²⁹ and adopted by the Court of Appeals for the Second Circuit in 1987.³⁰

The *Brunner* test:

Requir[es] a three-part showing: (1) that the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.³¹

Thus, in most jurisdictions, the debtor must prove current hardship, likely future hardship, and past good faith efforts to repay.

General burden-allocation principles do not support this arrangement. Treatises generally agree that three major considerations affect the proper allocation of burdens of proof. They are the general likelihood that the

²⁵ See *id.*

²⁶ See 11 U.S.C. § 523(a)(8) (2020).

²⁷ See, e.g., Pa. Higher Educ. Assistance Agency v. Faish (*In re Faish*), 72 F.3d 298, 302–06 (3d Cir. 1995) (rejecting *Johnson* and *Bryant* tests in favor of *Brunner* test).

²⁸ See John Patrick Hunt, *Student Loan Purpose and the Brunner Test*, 15 HARV. L. & POL’Y REV. (forthcoming 2021) (manuscript at 1 n.2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3536649.

²⁹ See *Brunner v. N.Y. State Higher Educ. Servs. Corp.* (*In re Brunner*), 46 B.R. 752, 756 (S.D.N.Y. 1985) (mem. op.).

³⁰ See *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) (*per curiam*).

³¹ *Id.*

proposition at issue is true (“probability”);³² the ease with which each party can carry the burden, often based on which party has access to the relevant evidence (“possession of proof”);³³ and the desire to make it easier or difficult for parties to prevail on a particular type of claim (“policy”).³⁴

A. Policy

Policies to favor plaintiffs or defendants have been described as “perhaps [the] most important” reason for allocating the burden of proof.³⁵ If Congress’s purpose had been to make discharge of student loans more difficult by casting the burden of proof on the debtor, that would be telling. But there is no clear argument that congressional policy requires that the debtor bear the burden of proof in student-loan bankruptcies.

The Bankruptcy Code does not expressly allocate the burden of proof in student loan bankruptcies,³⁶ and the unique substantive requirement of undue hardship is enough to accomplish any congressional purpose to make student-loan discharge more difficult than discharge of other loans. There is no need to pile Pelion upon Ossa by going further and placing the burden of proof upon the debtor.

The legislative record certainly reveals no considered policy judgment to make discharge difficult by giving creditors the benefit of the doubt: the issue was never debated, and most references to the undue-hardship requirement are agnostic on who bears the burden.³⁷ The sparse legislative record on the question of burden that does exist is mixed,³⁸ with the most explicit statement

³²KENNETH W. GRAHAM, JR., 21B FED. PRAC. & PROC. EVID. (WRIGHT & MILLER) § 5122. (2d ed. 2020); ROBERT P. MOSTELLER ET AL., MCCORMICK’S EVIDENCE § 337 (8th ed. 2020); 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 3:3 (4th ed. 2020).

³³GRAHAM, *supra* note 32, § 512232; MOSTELLER ET AL., *supra* note 3232, § 33732; MUELLER & KIRKPATRICK, *supra* note 3232, § 3:332.

³⁴GRAHAM, *supra* note 322, § 512232; MOSTELLER ET AL., *supra* note 322, § 33732; MUELLER & KIRKPATRICK, *supra* note 322, § 3:332. Graham refers to “policy, probability, and possession of proof” as the “Three Ps.” GRAHAM, *supra* note 322, § 512232.

³⁵MUELLER & KIRKPATRICK, *supra* note 32, § 3:332.

³⁶See 11 U.S.C. § 523(a)(8).

³⁷See, e.g., H.R. REP. NO. 95-595, at 157–58 (1977); 124 CONG. REC. 1791, 1792 (1978) (statement of Rep. Ertel); *id.* at 1795 (statement of Rep. Erlenborn); *id.* at 1797 (statement of Rep. Erlenborn).

³⁸On some occasions, members of Congress stated in passing that the debtor would have to “show” or “prove” undue hardship or that student-loan discharge required a “showing” of undue hardship. However, these statements were in the context of general discussions of the substantive requirement of undue hardship; the subject under discussion was not the burden of proof in

placing the burden on the creditor. In describing its proposal to limit dischargeability of student loan debt, the 1973 *Report of the Commission on the Bankruptcy Laws of the United States* stated, “the claimant must establish that the debtor can pay the educational debt from future earnings or other wealth.”³⁹

B. Probability and Possession of Proof

The other two important considerations in allocating burdens of proof, probability, and possession of evidence, are best discussed in connection with each element of the *Brunner* test individually. As for the relative importance of the two factors, the matter is addressed in *McCormick on Evidence*, a work cited in student-loan bankruptcy cases.⁴⁰ *McCormick* provides that a party’s knowledge of the facts relevant to an issue “should not be overemphasized” in burden allocation, noting that plaintiffs in tort and contract cases often must prove facts about which the defendant has greater knowledge.⁴¹ The treatise goes on to note that “[p]erhaps a more frequently significant consideration . . . is the judicial estimate of the probabilities of the situation. The risk of failure of proof may be placed upon the party who contends that the more unusual event has occurred.”⁴² Given these principles, the burdens of production and persuasion are appropriately placed on the creditor for all three elements of the *Brunner* test.

particular. See H.R. REP. NO. 95-595, at 154 (stating Rep. Edwards’s assumption that undue-hardship provision would require debtor to “prove” undue hardship); *id.* at 536 (Rep. Ertel’s description of pre-Bankruptcy-Code provision); *id.* at 538 (Ertel’s description of proposed Bankruptcy Code nondischargeability provision); 124 CONG. REC. 1797 (1978) (statement of Rep. Ertel) (debtor can discharge student loans “if he shows severe hardship”).

³⁹ See H.R. DOC. 93-137, pt. 2, at 140 (1973). The same document states that student loans that enable borrowers to “earn substantially greater income . . . should not as a matter of policy be dischargeable before he has demonstrated that for any reason he is unable to earn sufficient income” to live and repay the debt. *Id.* The latter statement is part of the policy justification for nondischargeability and therefore must yield to the statement quoted in the text, which actually explains the meaning of the provision.

⁴⁰ *E.g.* O’Brien v. Household Bank, FSB (*In re* O’Brien), 165 B.R. 456, 459 (Bankr. W.D. Mo. 1994); Alliger v. Pa. Higher Educ. Assistance Agency (*In re* Alliger), 78 B.R. 96, 99 (Bankr. E.D. Pa. 1987).

⁴¹ MOSTELLER ET AL., *supra* note 32.

⁴² *Id.*

1. *Brunner* One: Present Hardship

The first question the *Brunner* test asks is about current hardship: whether the debtor can maintain a minimal standard of living while repaying the student loans.⁴³ The evidence strongly suggests that most bankrupt student loan debtors who seek discharge cannot maintain such a standard. Professor Jason Iuliano's study of 2007 bankruptcies finds that Chapter 7 debtors who sought student-loan discharge had median monthly income of \$1,704, corresponding to an annual income of \$20,448, compared to a median educational-debt balance of \$47,610, corresponding to a monthly payment of \$454 on a standard ten-year plan at the interest rate applicable to new student loans, which is low by historical standards.⁴⁴ Student loan payments accordingly would be 26% of a low gross income. The averages tell an even worse story than the medians: average monthly income was \$1,932 (\$23,184 annually), and average educational debt was \$80,746, corresponding to a \$770 monthly payment on a standard repayment plan at the current rate.⁴⁵ That amounts to 40% of gross income. Iuliano also finds that among bankrupt debtors who have student loans, those who seek to discharge their student loans are less likely to be employed⁴⁶ and more likely to have medical hardship.⁴⁷

Professor Rafael Pardo's study of the 1,430 student-loan discharge actions commenced in 2011 and 2012 finds that the median debtor had monthly household income of \$1,924 (\$23,088 annually), monthly disposable household income (income less expenses) of *negative* \$61, and a median student loan balance of \$59,315,⁴⁸ corresponding to a monthly

⁴³ *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) (*per curiam*).

⁴⁴ See Jason Iuliano, *An Empirical Assessment of Student Loan Discharges*, 86 AM. BANKR. L.J. 496, 510 Fig. 3 (2012). Apart from temporary relief related to the Covid-19 epidemic, the current interest rate for federal direct undergraduate student loans is 2.75%. See *Federal Interest Rates and Fees*, FEDERAL STUDENT AID, <https://studentaid.gov/understand-aid/types/loans/interest-rates> (last visited Aug. 28, 2020). The monthly payment calculation is by the author.

⁴⁵ See Iuliano, *supra* note 44, at Fig. 3.

⁴⁶ *Id.* at 508 Fig. 2 (reporting that 81% of non-discharge seekers were employed, as compared to 60% of discharge seekers).

⁴⁷ *Id.* (reporting that 51% of discharge seekers and 42% of non-discharge seekers had medical hardship).

⁴⁸ Rafael I. Pardo, *Taking Bankruptcy Rights Seriously*, 91 WASH. L. REV. 1115, 1134, 1184 Tbl. A4 (2016). Pardo also provides quartile figures, showing that 75% of debtors have disposable

payment of \$565, working out to 29% of gross income. More importantly, based on the disposable household income information, that is \$565 per month that the debtor does not have.

To be sure, this data is now rather old, and a more precise analysis would be possible with more information about the distributions of these figures, beyond just means and medians. Despite such qualifications, Iuliano's and Pardo's numbers are highly suggestive: paying 26, 29, or 40% of a sub-\$25,000 gross income to student loans seems highly likely to impose a hardship. Thus, if burdens are to be cast on the party seeking to prove the position that is less likely to be true, the creditor should bear the burden on the first element of the *Brunner* test.

Income-driven repayment (IDR) plans do not change the analysis, at least at this time. Most borrowers of federal student loans are at least theoretically eligible for income-driven repayment plans.⁴⁹ These plans offer lower monthly payments than the standard repayment plan for low-income debtors;⁵⁰ indeed, for debtors near the poverty line the required monthly IDR payment can be \$0.⁵¹ IDR plans also promise loan forgiveness at the end of a 20 or 25-year period.⁵²

However, IDR has many drawbacks. The repayment period is longer than it would be under a standard repayment plan.⁵³ Interest continues to accrue while loans are in an IDR plan, so if IDR payments are not enough to cover the interest, the loan balance will grow rather than shrink over time (the phenomenon is called "negative amortization").⁵⁴ The borrower must

income of less than *negative* five dollars and that 75% of debtors have educational debt of more than \$48,722, corresponding to a monthly payment of \$465. *Id.*

⁴⁹ See *Income-Driven Repayment Plans*, FEDERAL STUDENT AID, (last visited Aug. 28, 2020).

⁵⁰ See *id.* (providing that income-driven repayment amounts are generally 10 to 20% of discretionary income, depending on the IDR plan, but not more than payments under a fixed repayment plan of 10 years (for most IDR plans) or 12 years (for one IDR plan), and that discretionary income is income in excess of 100 or 150% of the poverty level, again depending on the IDR plan).

⁵¹ See, e.g., *Wieckiwick v. Educ. Credit Mgmt. Corp.*, 443 Fed App'x 449, 450 (11th Cir. 2011) (explaining that debtor's IDR payment "could be as low as \$0 per month, depending on his income level").

⁵² See *Income-Driven Repayment Plans*, *supra* note 4949.

⁵³ See *id.* (providing that IDR plans have repayment terms of 20 to 25 years, as opposed to 10 years for a standard repayment plan).

⁵⁴ See, e.g., *Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon)*, 435 B.R. 791, 802 (B.A.P. 1st Cir. 2010) (explaining that IDR participation "may not be appropriate for some debtors because of the impact of the negative amortization of the debt over time when payments are not made").

undertake the administrative burden of annually recertifying income and family size to continue benefiting from IDR.⁵⁵ IDR programs are new enough that the time has not yet arrived for many students to be eligible for IDR forgiveness,⁵⁶ and it is unclear that the promised forgiveness will actually be forthcoming. Most significantly, under current tax law, IDR loan forgiveness creates taxable income. Thus, forgiveness of a large loan balance would create a large tax bill, at least for a solvent debtor.⁵⁷

⁵⁵ See *Income-Driven Plans*, *supra* note 49 (stating that failure to recertify results in being dropped from IDR or in having payments calculated according to the standard repayment plan, depending on the program).

⁵⁶ One IDR plan, the Income-Contingent Repayment Plan, appears to have begun in 1995 and has a 25-year repayment term, so borrowers who started ICR at the earliest opportunity and stayed on the plan should have become eligible for forgiveness in 2020. See Philip G. Schrag, *The Federal Income-Contingent Repayment Option for Law Students*, 29 HOFSTRA L. REV. 733, 837 (2001) (stating that regulations creating ICR were issued at the end of 1994); *Income-Driven Repayment Plans*, *supra* note 49 (25-year term). Some borrowers are also permitted to switch from ICR to later-enacted plans with a 20-year term. See Kendra Cobb, *Switch Now, Pay Less: How Borrowers in ICR Can Reach Student Loan Forgiveness Sooner*, STUDENT LOAN BORROWER ASSISTANCE (Aug. 1, 2019), <https://www.studentloanborrowerassistance.org/switch-now-pay-less-how-borrowers-in-icr-can-reach-student-loan-forgiveness-sooner/>. Thus, forgiveness may have been theoretically possible as early as 2015. Nevertheless, the author has been unable to find information indicating that any loans actually have been forgiven under the IDR programs. The ICR program attracted very few participants in its early years. See Schrag, *supra*, at 831 (stating that “fewer than 1% of new borrowers at schools that offer direct federal loans chooses income-contingent repayment”). Thus, it is unclear that anyone has actually remained in the program for 20-25 years. The IDR program created next after ICR, Income-Based Repayment, became available in 2009 and had a 25-year repayment period. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-17-22, FEDERAL STUDENT LOANS: EDUCATION NEEDS TO IMPROVE ITS INCOME-DRIVEN REPAYMENT PLAN BUDGET ESTIMATES 1 (2016) (2009 initiation); *Income-Driven Repayment Plans*, *supra* note 49 (25-year repayment for original IBR program). Borrowers who started in this program and then switched to a program with a 20-year repayment period could be eligible for forgiveness in 2029. There is reason to doubt that the promised forgiveness will materialize: only 2.5% of applicants for Public Service Loan Forgiveness program, which promises forgiveness after 10 years of public service, have been found eligible. U.S. DEP’T OF EDUC., JUNE 2020 PSLF REPORT, <https://studentaid.gov/data-center/student/loan-forgiveness/pslf-data> (percentage computation by author).

⁵⁷ See John Patrick Hunt, *Help or Hardship?: Income-Driven Repayment in Student-Loan Bankruptcies*, 106 GEO. L.J. 1287, 1340–49 (2018) (describing risk that debt forgiveness at end of IDR program will result in taxable income to debtor). Courts have taken account of the potential tax liability in granting or affirming discharge. See, e.g., *Educ. Credit Mgmt. Corp. v. Metz*, Case No. 18-1281-JWB, 2019 WL 1953119, at *4 (D. Kan. May 2, 2019) (mem. op.); *Educ. Credit Mgmt. Corp. v. Curiston*, 351 B.R. 22, 33 (D. Conn. 2006); *Murphy v. United States (In re Murphy)*, Case No. 15-11240-j7, 2018 WL 2670455, at *11 (Bankr. D.N.M. June 1, 2018) (mem. op.).

The *Brunner* test was created before IDR existed⁵⁸ and contemplated that what was to be analyzed in determining the borrower's ability to pay was a plan that would "pay off"⁵⁹ the student loans in ten years.⁶⁰ As a result, it is unclear how IDR plans fit into the *Brunner* analysis. Some courts have ignored IDR altogether on the ground that an IDR payment of zero (or, possibly, does not cover accumulating interest) is not "repayment."⁶¹ The ABI's Commission on Consumer Bankruptcy also argues for disregarding IDR, contending that the payment obligations an IDR plan calls for are not the contractual "debt" Section 523(a)(8) calls on the court to analyze.⁶² This author has proposed a middle course: granting discharge unless the debtor can maintain an above-minimal standard of living under IDR.⁶³

For present purposes, the point is that courts should substantively refashion the *Brunner* test to take account of the benefits and burdens of IDR programs, which the *Brunner* court had no occasion to consider. Only then can one assess whether debtors are likely to be able to repay under IDR without undue hardship.

As for possession of proof relating to current hardship, the debtor might seem most likely to know their own circumstances and have evidence of their own hardship.⁶⁴ However, the question the first element asks is simple, and the debtor's bankruptcy filing contains most of the information needed to answer it. The inquiry is whether the debtor can, based on current income

⁵⁸ See Hunt, *supra* note 57, at 1340–49 (2018) (describing risk that debt forgiveness at end of IDR program will result in taxable income to debtor). Courts have taken account of the potential tax liability in granting or affirming discharge. See, e.g., *Educ. Credit Mgmt. Corp. v. Metz*, Case No. 18-1281-JWB, 2019 WL 1953119, at *4 (D. Kan. May 2, 2019) (mem. op); *Educ. Credit Mgmt. Corp. v. Curiston*, 351 B.R. 22, 33 (D. Conn. 2006); *Murphy v. United States (In re Murphy)*, Case No. 15-11240-j7, 2018 WL 2670455, at *11 (Bankr. D.N.M. June 1, 2018) (mem. op.).

⁵⁹ The Second Circuit adopted the *Brunner* test in 1987. See *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987). The first pilot IDR program was created in 1992. See Philip G. Schrag, *The Federal Income-Contingent Repayment Option for Law Student Loans*, 29 HOFSTRA L. REV. 733, 765 & n.149 (2001).

⁶⁰ *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 46 B.R. 752, 754, 757 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987).

⁶¹ *Id.* at 754.

⁶² See AM. BANKR. INST., FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY 12 (2019).

⁶³ See, e.g., Hunt, *supra* note 5757, at 1333–38.

⁶⁴ *But cf.* Woodcock, *supra* note 1212, at 434 (determining that in part because of practical difficulties facing debtor in meeting burden of production, the burden "should remain until good reason appears to shift it to the debtor").

and expenses, maintain a minimal standard of living while repaying student loans.⁶⁵ The inquiry can be resolved with basic information about the debtor's income, expenses, and loan obligations.⁶⁶ Most of this data is contained in the bankruptcy petition, and the rest is easily discoverable.⁶⁷ There is no significant advantage from a possession-of-proof standpoint in saddling the debtor with the burden of proof on *Brunner's* first element.

2. *Brunner* Two: Continuing Hardship

The second element of the *Brunner* test looks to whether hardship is likely to continue for a "significant portion of the repayment period."⁶⁸ It demands such a speculative inquiry⁶⁹ that allocation of the burden of proof will often be outcome-determinative.⁷⁰ The evidence that does exist on the point favors placing the burden on the creditor. Direct evidence of persistent hardship comes from research reports that three quarters of bankrupt debtors find it very difficult or somewhat difficult to pay their student debts after

⁶⁵ *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) (per curiam).

⁶⁶ For example, in *Educ. Credit Mgmt. Corp. v. Mason (In re Mason)*, the court upheld the bankruptcy court holding that the debtor met his burden on the first element by showing that his current income typically fluctuated between \$1,000 and \$1,200 per month and that his monthly expenses were between \$1,300 and \$1,340 per month. 464 F.3d 878, 882 (9th Cir. 2006). The court rejected the creditor's argument that the debtor failed the first element of the test because he did not show that he maximized income; it held that the first element is based only on current income and expenses. *Id.* at n.3.

⁶⁷ See FED. R. BANKR. P. 1007(b)(1)(A)–(B) (requiring debtor to file schedules of assets and liabilities and of current income and expenditures); Bankr. Off'l Form 106I, Sched. I: Your Income (requiring debtor to "estimate monthly income as of the date you file this form"); Bankr. Off'l Form 106J, Sched. J: Your Expenses (requiring debtor to "estimate your expenses as of your bankruptcy filing date"); Bankr. Off'l Form 106E/F, Sched. E/F: Creditors Who Have Unsecured Claims (requiring debtor to list and identify student loans).

⁶⁸ See *Brunner*, 831 F.2d at 396.

⁶⁹ See *Crawley v. Educ. Credit Mgmt. Corp. (In re Crawley)*, 460 B.R. 421, 439 (Bankr. E.D. Pa. 2011) (collecting cases emphasizing speculative nature of *Brunner's* second element).

⁷⁰ See, e.g., *Nash v. Conn. Student Loan Found. (In re Nash)*, 446 F.3d 188, 193 (1st Cir. 2006) (bankruptcy court permissibly found that debtor "had not carried her burden of proving a sufficient likely future period of unemployability" where debtor suffered from bipolar disorder but "we have no prognosis from . . . experts," and the debtor's testimony was "necessarily speculative"); *McCoy v. United States*, Civ. No. 3:18-CV-21, 2019 WL 1084211, at *1 (S.D. Tex. March 7, 2019) (mem. op.) (upholding denial of discharge where bankruptcy court found "It's possible – we don't have any evidence at all – that over the next five years, [debtor] could get even better employment").

bankruptcy.⁷¹ More generally, the law typically presumes that an existing condition will continue.⁷² The inference that the debtor's hardship will continue into the future is even stronger when the hardship has persisted for an extended time in the past; Part II suggests that bankruptcy courts should accept such past hardship as prima facie proof of future hardship.

Brunner suggests that given the particular nature of student loans, courts should assume that the debtor's condition will look up unless proven otherwise.⁷³ But that position is based on a view that a debtor has recently graduated and may be about to begin a successful career made possible by the very loans she seeks to discharge.⁷⁴ Marie Brunner, for example, had earned both a bachelor's and a master's degree and sought to discharge her debts seven months after receiving the latter.⁷⁵ If the assumption that bankrupt debtors' prospects are generally bright was ever accurate, it no

⁷¹ See Katherine Porter, *College Lessons: The Financial Risk of Dropping Out*, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 85, 96 (Katherine Porter ed., 2012).

⁷² See *Cent. Pac. Ry. Co. v. Alameda Cnty.*, 284 U.S. 463, 468 (1932) (citing the "general principle that a condition once shown to exist is presumed to continue"); *Boeta v. Fed. Aviation Admin.*, 831 F.3d 636 (5th Cir. 2016) (stating that "[i]t is generally understood that an existing condition is presumed to continue in existence, absent some indication that it has ceased or substantially changed") (collecting cases); *United States v. Charles, II*, 195 Fed. App'x 133, 136 (4th Cir. 2006) ("[T]he general principle . . . that a condition once shown to exist is presumed to continue . . . requires affirmance here" (first two alterations in the original)); *Warren v. Bowen*, 804 F.2d 1120, 1121 (9th Cir. 1986) (referencing "familiar principle that a condition, once proved to exist, is presumed to continue to exist"); *Richardson v. Heckler*, 750 F.2d 506, 510 (6th Cir. 1984) (citing "evidentiary rule that conditions once proved to exist are presumed to continue to exist") (Kennedy, J., dissenting on other grounds); *Nat'l Labor Relations Bd. v. Crispo Cake Cone Co.*, 464 F.2d 233, 235 (8th Cir. 1972) (citing "well-established legal principle that a state of affairs shown to exist is presumed to continue until the contrary is shown"); *Christman v. Cigas Mach. Shop, Inc.*, 293 F. Supp. 2d 538, 543 (E.D. Pa. 2003); *Colvin v. Story Cnty. Bd. of Review*, 653 N.W.2d 345, 349 (Iowa 2002) (stating "[a] condition once shown may be presumed to continue until the contrary is shown").

⁷³ See *Brunner v. N.Y. State Higher Educ. Servs. Corp. (In re Brunner)*, 46 B.R. 752, 754 (S.D.N.Y. 1985) (mem. op.) (noting that bankrupt debtors seeking to discharge student loans "are in all likelihood at the nadir of their earning power").

⁷⁴ See *id.* (quoting legislative history of Section 523(a)(8): "a loan . . . that enables a person to earn substantially greater income over his working life should not as a matter of policy be dischargeable" absent a showing of inability to repay while maintaining the debtor and dependents); *id.* at 754–55 (stating that debtor's hardship might be temporary because they might "have had difficulty securing employment immediately after graduation," so that "[e]xtrapolation of their current earnings is likely to underestimate substantially their earning power over the whole term of loan repayment").

⁷⁵ See *id.* at 753.

longer is: according to the Consumer Bankruptcy Project data on 2007 bankruptcies, “[t]hirty percent of all student loan debtors in bankruptcy are people who dropped out of college.”⁷⁶ Given the demonstrated correlation between dropping out and student loan default,⁷⁷ it is reasonable to suppose that dropouts make up an even greater proportion of those who seek to discharge student loans.

Moreover, Iuliano finds that the median age of debtors seeking discharge of student loans in 2007 was 48.5;⁷⁸ a study by Pardo and Professor Michelle Lacey found a mean age of 45 for such debtors.⁷⁹ Although many students pursuing higher education are older than the traditional college age,⁸⁰ these researchers’ data strongly suggest that the *Brunner* court was wrong in assuming that “[i]t is in the nature of [undue hardship] applications that they are made by individuals who have only recently ended their education.”⁸¹ The evidence suggests that student debtors who actually seek to discharge their loans in bankruptcy typically are not the future high earners *Brunner* presumes them to be.

As for possession of proof, some types of evidence relevant to determining whether the debtor’s hardship will lift, such as facts about the debtor’s dependents,⁸² health,⁸³ and age⁸⁴ are in the debtor’s control. With the

⁷⁶ See Porter, *supra* note 7171, at 86.

⁷⁷ *Id.* at 95.

⁷⁸ See Iuliano, *supra* note 4445, at 509.

⁷⁹ See Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 204 (2009). Pardo and Lacey’s study was of adversary proceedings commenced in the Western District of Washington in the years 2002 to 2006. *Id.* at 202.

⁸⁰ See *Characteristics of Postsecondary Students*, NAT’L CTR. FOR EDUC. STATISTICS, https://nces.ed.gov/programs/coe/indicator_csb.asp (last updated April 2020). The NCES finds that in 2018, while only 2% of undergraduates at four-year public colleges and 5% of undergraduates at private nonprofit colleges were over 35, 28% of undergraduates at private for-profit colleges were over 35. For two-year colleges, the corresponding over-35 figures were 7% for public institutions, 25% for private nonprofits, and 21% for private for-profits.

⁸¹ *Brunner v. N.Y. State Higher Educ. Servs. Corp. (In re Brunner)* 46 B.R. 752, 754 (S.D.N.Y. 1985) (mem. op.).

⁸² *Id.* at 755 (stating that the “large number of dependents” is relevant to satisfaction of second element).

⁸³ *Id.* (“illness” relevant to satisfaction of second element).

⁸⁴ Empirical research indicates that older debtors are more likely to be successful in bankruptcy. See Iuliano, *supra* note 44, at 516 (significantly higher percentage of debt discharged for debtors over sixty than debtors under sixty); Pardo & Lacey, *supra* note 79, at 218 (finding relationship between debtor age and percentage of debt discharged; relationship not statistically significant).

possible information of medical information, this evidence is simple. Creditors can easily gather it during discovery. Other types of relevant evidence, such as evidence of workplace demand for the debtor's skills⁸⁵ and local and national economic trends affecting the debtor's employability,⁸⁶ are more accessible to the creditor, who typically has greater resources. Availability of evidence does not clearly weigh in favor of placing the burden of persuasion on the debtor.

3. *Brunner* Three: Good-Faith Efforts to Repay

The third element of the *Brunner* test is good-faith efforts to repay.⁸⁷ Here, placing the burden on the debtor adopts a default that the debtor has fallen short of bad faith. This default is out of step with the general treatment of bad faith in Chapter 7.⁸⁸ Any debtor's Chapter 7 case can be dismissed for bad faith,⁸⁹ but outside the student-loan context the burden of proof rests with the party asserting bad faith.⁹⁰

The quintessential bad-faith student-loan bankruptcy is one where the debtor files immediately after graduation before making any payments and just before starting a high-paying career the loans made possible.⁹¹ Such

⁸⁵ *Brunner*, 46 B.R. at 755 (explaining that a "lack of usable job skills" is a basis for finding the second element satisfied).

⁸⁶ See, e.g., *Myers v. Pa. Higher Educ. Assistance Agency*, 150 B.R. 139, 144 (Bankr. W.D. Pa. 1993) (denying discharge where "debtor's health-related skills are in great demand in the current economy").

⁸⁷ See *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) (per curiam).

⁸⁸ In Chapter 13, a debtor's case can be dismissed if it is not filed in good faith, and the party seeking dismissal bears the burden of proof. See *In re Love*, 957 F.2d 1350, 1355 (7th Cir. 1992); *Hauk v. Valdivia (In re Valdivia)*, 617 B.R. 278, 288 (Bankr. E.D. Mich. 2020). Good faith in filing the petition and plan is a requirement for confirmation of a Chapter 13 plan, see 11 U.S.C. §§ 1325(a)(3), (a)(7) (2020), and in this case the burden appears to be on the debtor, as it is for all plan confirmation requirements. See *Mason v. Young (In re Young)*, 237 F.3d 1168, 1178 n.8 (10th Cir. 2001); *Hackerman v. Demeza*, 576 B.R. 472, 479 (M.D. Pa. 2017) (mem. op.).

⁸⁹ See 11 U.S.C. §§ 707(b)(1), (b)(3)(A) (2020) (in deciding whether to dismiss debtor's Chapter 7 for "abuse," court is to consider "whether the debtor filed the petition in bad faith").

⁹⁰ See *In re Trotta*, 597 B.R. 269, 281 (Bankr. E.D. Pa. 2019) (holding that the burden of proof is on party asserting bad faith under § 707(b)(3)(A)); *In re Toone*, Case No. 15-30535, 2016 WL 6106398, at *4 (Bankr. D.N.J. Oct. 17, 2016) (initial burden of production is on party asserting bad faith); *In re Campbell*, No. 11-70038-ast, 2012 WL 360031, at *4 (Bankr. E.D.N.Y. Feb. 1, 2012) (burden of proof is on party moving to dismiss for bad faith) (collecting cases).

⁹¹ See 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, 427

bankruptcies have always been more a political bugaboo than a reality: the evidence in the 1970s indicated that fewer than 1% of federally insured student loans were discharged in bankruptcy,⁹² and recent research finds no evidence that student loan debtors abused dischargeability of private student loans before Congress extended nondischargeability to such loans in 2005.⁹³

Whatever the merits of Congress's concern with abusive loan debtors, its suspicions were limited to those who had recently graduated. At first, nondischargeability was limited to five years; subsequent extensions of the period arose from fiscal concerns, not suspicions of debtor bad faith.⁹⁴ And the previously cited evidence that the mean for a debtor seeking to discharge student loans is in their mid to late 40s⁹⁵ strongly suggests that recent graduates rarely seek to discharge student loan debt.

With respect to possession of proof, key information relevant to the debtor's good faith efforts to repay is equally or more available to the creditor than the debtor. This category includes the amount the debtor has repaid⁹⁶

(2005) (describing the archetypal "abusive student loan debtor"); *see generally id.* at 419–28 (emphasizing the importance of the "stereotype of the abusive student loan debtor" in the history of nondischargeability).

⁹²*Id.* at 420.

⁹³*See* Rajeev Darolia & Dubravka Ritter, *Strategic Default Among Private Student Loan Debtors: Evidence from Bankruptcy Reform*, 15 EDUC. FIN & POLICY 487, 487 (2020) ("We do not find evidence to indicate that the moral hazard associated with dischargeability appreciably affected the behavior of private student loan debtors prior to the policy." (*i.e.*, the adoption of nondischargeability for private student loans in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005)).

⁹⁴*See* Hunt, *supra* note 5757, at 1307–12.

⁹⁵*See* 79 Iuliano, *supra* note 44 at 509; Pardo & Lacey, *supra* note 79, at 204; *see also supra* text accompanying notes 78–79.

⁹⁶*See* Woodcock, *supra* note 1212, at 402–05 (noting creditor's greater access to loan-related records and calculations). Courts almost always take the amount paid into account when they apply the third element of the *Brunner* test, although they disagree about how important it is. For recent examples from appellate courts, *see* Williams v. U.S. Dep't of Educ., 752 Fed. App'x 363, 365 (7th Cir. 2019) (upholding finding of lack of good faith efforts where "[n]o admissible evidence explains ... why [debtor] has not, with about \$3000 of annual net income, paid more than \$140 toward lowering his debts"); Hedlund v. Educ. Res. Inst., 718 F.3d 848, 855 (9th Cir. 2013) (weighing fact that debtor had made only a single voluntary payment of \$950 toward his student loans but upholding finding that debtor made good-faith efforts to repay); Coco v. N.J. Higher Educ. Student Assistance Auth. (*In re* Coco), 335 Fed. App'x 224, 228 (3d Cir. 2009) (noting that debtor had made only one payment on student loans but finding that bankruptcy court has "placed too much weight" on that fact).

and how long the loan has been in repayment,⁹⁷ as well as the duration of any forbearance or deferment.⁹⁸ To be sure, application of the good-faith-efforts element often turns on the court's evaluation of the debtor's explanation of their conduct,⁹⁹ and the debtor presumably has better access to that explanation. However, given the backdrop that bad faith is less likely than good faith, the creditor should have to present some evidence of bad faith before the debtor's explanation even comes into question.¹⁰⁰

IDR programs most commonly come up in reported decisions in connection with the good-faith requirement: the debtor is not enrolled in IDR, and the creditor argues that failure to enroll shows a lack of good-faith efforts to repay. Allocation of the burden of proof is important here because IDR programs promise loan cancellation at the end of a 20- or 25-year repayment period.¹⁰¹ Thus, a creditor's argument that the availability of IDR negates an otherwise valid showing of undue hardship raises several highly speculative questions: will the debtor be able to maintain a minimal standard of living over that period while making IDR payments?¹⁰² Will the government's loan servicers fail, so that the debtor is never enrolled in, or improperly expelled

⁹⁷ See *Hedlund*, 718 F.3d at 855–56 (upholding finding of good faith in part because debtor “waited four years from the beginning of his repayment obligations, during which period he was subject to wage garnishments, before filing for bankruptcy”); *Brunner v. N.Y. Higher Educ. Servs. Corp.* (*In re Brunner*), 46 B.R. 752, 758 (S.D.N.Y. 1985) (finding lack of good faith effort to repay where debtor “filed for discharge within a month of the date the first payment of her loans came due”).

⁹⁸ See, e.g., *Coco*, 335 Fed. App'x at 228 (finding that periods of forbearance mitigated debtor's failure to pay more on her student loans); *Roe v. Coll. Access Network* (*In re Roe*), 295 Fed. App'x 927, 930 (10th Cir. 2008) (noting that debtor's not immediately seeking discharge and using deferments and forbearances “are certainly factors to be considered in assessing good faith”).

⁹⁹ See *Educ. Credit Mgmt. Corp. v. Frushour* (*In re Frushour*), 433 F.3d 393, 403 (4th Cir. 2005) (rejecting debtor's explanation for failure to pursue IDR plan and finding lack of good-faith effort to repay); *Trudel v. U.S. Dep't of Educ.* (*In re Trudel*), 514 B.R. 219, 229 (B.A.P. 6th Cir. 2014) (noting that debtors “who fail to make voluntary payments or enroll in a repayment program can still prove good faith” but “need a probative explanation for their behavior”).

¹⁰⁰ See discussion *infra* Part II.C.

¹⁰¹ See *Income-Driven Repayment Plans*, *supra* note 49.49

¹⁰² Courts have found debtors with high unavoidable expenses to be unable to maintain a minimal standard of living while making even small IDR payments. See *Walker v. Sallie Mae Serv. Corp.* (*In re Walker*), 650 F.3d 1227, 1232, 1234–35 (8th Cir. 2011) (five children); *McLaney v. Ky. Higher Educ. Assistance Auth.* (*In re McLaney*), 375 B.R. 666, 671–72, 678 (M.D. Ala. 2007) (medical expenses).

from, IDR?¹⁰³ Will the debtor's loan balance increase over the life of the IDR program and, if so, what toll will that take on the debtor?¹⁰⁴ And most importantly, will the loan cancellation promised at the end of the IDR actually take place,¹⁰⁵ and if so, will it result in a large, nondischargeable tax bill?¹⁰⁶ Debtors frequently lose because courts deem their arguments on these grounds "speculative,"¹⁰⁷ and this outcome squarely demonstrates the

¹⁰³ Examiners from the Consumer Financial Protection Bureau found in 2016 that "servicers were engaged in the unfair practice of denying, or failing to approve, IDR applications that should have been approved on a regular basis." CFPB, SUPERVISORY HIGHLIGHTS 16 (Oct. 2016). The CFPB also sued a major servicer, alleging that its failure to advise borrowers of the IDR programs' income and family-size certification requirements caused borrowers to be dropped from the programs. Complaint at 3, CFPB v. Navient Corp., No. 3:17-cv-00101-RDM (M.D. Pa. Jan. 18, 2017). States also sued Navient, making similar allegations. *See, e.g.*, Complaint, California v. Navient Corp., No. CGC-17-567732 (Super. Ct. S.F. Cty. June 29, 2018).

¹⁰⁴ *E.g.*, Reynolds v. Pa. Higher Educ. Assistance Agency (*In re Reynolds*), 425 F.3d 526, 533 (8th Cir. 2005) (finding that the "mere existence" of "debt burden clearly is a significant block to the Debtor's recovery from mental illness"); Bronsdon v. Educ. Credit Mgmt. Corp. (*In re Bronsdon*), 435 B.R. 791, 802 (B.A.P. 1st Cir. 2010) (recognizing that IDR participation "may not be appropriate for some debtors because of the impact of the negative amortization of the debt over time when payments are not made"); Halverson v. U.S. Dep't of Educ. (*In re Halverson*), 401 B.R. 378, 390 (Bankr. D. Minn. 2009) (taking account of "psychological impact" of negative amortization and long-term high loan balance); Quarles v. Educ. Credit Mgmt. Corp. (*In re Quarles*), No. 02-40709-7, 02-7089, 2004 WL 2191608, at *9 (Bankr. D. Kan. April 22, 2004) (taking account of stress arising from an "ever-increasing balance due . . . for the next twenty-five years").

¹⁰⁵ *See* Schrag, *supra* note 56 56and accompanying text.

¹⁰⁶ *See* Hunt, *supra* note 57 57and accompanying text.

¹⁰⁷ *E.g.*, McCoy v. United States (*In re McCoy*), 810 Fed. App'x 315, 316 n.3 (5th Cir. 2020) (rejecting appellant's argument and deciding debtor's tax liability upon forgiveness was "highly speculative"); Educ. Credit Mgmt. Corp. v. Jespersen, 571 F.3d 775, 782 (8th Cir. 2008) (rejecting bankruptcy court's reliance "potentially significant tax bill" upon cancellation because borrower might not have assets exceeding amount forgiven); Educ. Credit Mgmt. Corp. v. Rhodes, 464 B.R. 918, 926 (W.D. Wash. 2012) (noting that debtor "did not submit evidence" of tax liability "despite the fact he bore the burden of doing so"). Additionally, the Ninth Circuit Bankruptcy Appellate Panel has discouraged speculation over the "tax implications" of IDR. Jones v. Bank One Tex., 376 B.R. 130, 142 n.11 (W.D. Tex. 2007) (noting that "forecasting such tax liability under whatever tax laws will be in effect in 25 years is sheer speculation"); Chance v. United States (*In re Chance*), 600 B.R. 51, 61 (Bankr. S.D. Ind. 2019) (stating that "[a] potential tax liability at the end of the repayment period is too speculative to constitute an undue hardship"); Tinsley v. U.S. Dep't of Educ. (*In re Tinsley*), Case No. 17-28611-ABA, 2018 WL 6819515, at *1 n.2 (Bankr. D. N.J. Dec. 26, 2018) (finding that the potential tax liability was too "speculative" to consider); Hopson v. Ill. Student Assistance Comm'n, 588 B.R. 509, 515 (Bankr. N.D. Ill. 2018) (finding that potential tax liability was "too speculative").

importance of the allocation of burdens. Given the evidence that bad-faith filing is the exception rather than the rule, the burden should be on the creditor to show that the debtor's failure to enroll in IDR results from a simple desire not to repay at all, rather than concerns about the drawbacks of IDR mentioned above.

C. Invalid Arguments for Placing the Burden on the Debtor

Courts have relied on several invalid arguments in deciding that the debtor bears the burden of persuasion in an undue-hardship proceeding. One contention is that it is easier for the debtor to show undue hardship than it is for the creditor to show absence of undue hardship.¹⁰⁸ As discussed, this is an oversimplification and does not overcome the likelihood that repayment would work undue hardship on most bankrupt debtors.

Another typical argument is that undue hardship is "in the nature of an affirmative defense."¹⁰⁹ This argument is odd on its face because the debtor initiates the vast majority of undue-hardship adversary proceedings.¹¹⁰ The debtor is typically more like a plaintiff asserting a claim than a defendant raising an affirmative defense. This aside, the debtor does generally bear the burden of pleading, whether the undue-hardship claim is like an affirmative defense or not,¹¹¹ and that is probably the notion the affirmative-defense

Although decisions finding debtors' IDR-related arguments speculative relate to tax liability, courts have also rejected debtors' arguments based on negative amortization on burden-of-grounds. *See* Reagan v. Educ. Credit Mgmt. Corp. (*In re* Reagan), 587 B.R. 296, 304 n.57 (Bankr. W.D. Pa. 2018) (noting that debtor failed to show how negative amortization "impairs her in the present"); Greene v. U.S. Dep't of Educ. (*In re* Greene), 484 B.R. 98, 131–32 (Bankr. E.D. Va. 2012) (finding that negative amortization in IDR program counted *against* debtor where debtor did not "sustain her burden" of showing that she maximized her income).

¹⁰⁸ *See* 3 WILLIAM L. NORTON III, NORTON BANKR. L. & PRAC. § 57:53 (3d. ed. 2021); Norman v. Fin. Collection Agencies (*In re* Norman), 25 B.R. 545, 548 (Bankr. S.D. Cal. 1982).

¹⁰⁹ *See* NORTON, *supra* note 108108; Conn. Student Loan Found. v. Keenan (*In re* Keenan), 53 B.R. 913, 916 (Bankr. D. Conn. 1985); *Norman*, 25 B.R. at 548 (collecting cases).

¹¹⁰ It is legal error for a bankruptcy court to discharge a student loan absent a finding of undue hardship. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 275 (2010); S. REP. NO. 95-989, at 79 (1978) (noting that Section 523(a)(8) "is intended to be self-executing and the lender or institution is not required to file a complaint to determine the dischargeability of any student loan"). Thus, the debtor typically will be seeking such a finding and therefore will initiate the required adversary proceeding. *See* FED. R. BANKR. P. 7001(6) (providing that action to determine dischargeability of a debt is an adversary proceeding).

¹¹¹ *See* *Espinosa*, 559 U.S. at 276 (2010); *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 444–45 (2004).

argument is getting at.¹¹² However, the burden of pleading is an imperfect guide to the burden of persuasion. The plaintiff may bear the burden on an affirmative defense, for example.¹¹³ More fundamentally, the idea that the burden of proof most commonly follows the burden of pleading may be a statement of empirical fact, but it is not a compelling normative principle.¹¹⁴ The preceding discussion has addressed the substantive concerns that should guide allocation of the burden of persuasion.

At least one influential case has drawn an analogy to the use of “hardship” in the Rules of Civil Procedure as a ground for objecting to discovery requests, noting that there the “burden of proof is . . . placed on the party that would claim a hardship.”¹¹⁵ This example, drawn from a very different context, is of limited relevance in allocating the burden of proof for student loan dischargeability. A closer analogy comes from the Bankruptcy Code itself: when the question whether a reaffirmation agreement imposes an “undue hardship” on the debtor comes before the court, the agreement’s proponents generally have the burden of showing the absence of undue hardship.¹¹⁶

Finally, courts have relied on the fact that undue hardship is an “exception to an exception.”¹¹⁷ Student loans are exceptional in that they are not freely dischargeable like most debts, and undue hardship creates an exception to student-loan nondischargeability. As a leading treatise points out, blind reliance on the idea that a statutory exception must be proved by the party relying on it results in “an arbitrary allocation of the burdens, as the statutory

¹¹²See *Keenan*, 53 B.R. at 917 (placing burden on debtor is consistent with fact that creditor is not required to file a complaint).

¹¹³See MOSTELLER ET AL., *supra* note 3232, § 337 (acknowledging that in a federal diversity case, defendant may be required to plead contributory negligence while plaintiff bears the burden of production and persuasion).

¹¹⁴*Id.* (reliance on burden of pleading to determine burdens of production and persuasion “is no help at all when the rationale behind the allocation is questioned”).

¹¹⁵*Norman v. Fin. Collection Agencies (In re Norman)*, 25 B.R. 545, 549 n.3 (Bankr. S.D. Cal. 1982).

¹¹⁶See 11 U.S.C. § 524(m)(1) (2020) (providing that undue hardship is presumed, and judicial review required, if debtor’s schedule of monthly income and expenses shows less net income than the payment on the reaffirmed debt).

¹¹⁷See *Doyle v. Higher Educ. Assistance Found. (In re Doyle)*, 106 B.R. 272, 274 (Bankr. N.D. Ala. 1989); *Keenan*, 53 B.R. at 916; *Norman*, 25 B.R. at 549. *Norman*, the wellspring of this line of cases, relied on *Hill v. Smith*, which found the burden, of production at least, inherent in “the very form of the law” where the statute provided for an exception to an exception. 260 U.S. 592, 595 (1923)

language may be due to a mere casual choice of form by the draftsman.”¹¹⁸ The structure of Section 523(a)(8) arguably could reflect a deliberate congressional decision to make student-loan discharge difficult by casting the burden of proof on the debtor rather than a “casual choice of form,” but, as discussed above, the legislative record does not bear out this contention.

II. ACHIEVING THE PROPER ALLOCATION OF BURDENS

Part II reviews three possible approaches to achieving a better allocation of the burden of proof in light of existing precedents. Although such precedents constrain most courts’ ability to shift the burden of proof entirely to the creditor, and there are doubts about whether the bankruptcy rulemaking process could accomplish such a shift, lower courts could adopt a burden-shifting framework to provide debtors at least partial relief.

A. *Direct Reconsideration by Judiciary*

As noted, every federal circuit court except those for the D.C. and Federal Circuits has stated explicitly that it is the debtor’s burden to prove undue hardship.¹¹⁹ But the cited appellate opinions have not analyzed the issue; they seem simply to assume that debtor bears the burden. Because the courts have not addressed the argument that the creditor should bear the burden, an appellate panel arguably could consider such an argument without violating its obligation to respect panel precedent.¹²⁰ Such an approach arguably could

¹¹⁸MOSTELLER ET AL., *supra* note 32, § 337.

¹¹⁹Thomas v. Dep’t of Educ. (*In re Thomas*), 931 F.3d 449, 454 (5th Cir. 2019); Williams v. U.S. Dep’t of Educ., 752 Fed. App’x 363, 365 (7th Cir. 2019); CMC v. Acosta-Conniff (*In re Acosta-Conniff*), 686 Fed. App’x 647, 648 (11th Cir. 2017); Nichols v. Align W. States Learning Corp., 605 Fed. App’x 660, 660–61 (9th Cir. 2015) (mem. op.); Easterling v. Collecto, Inc., 692 F.3d 229, 232 (2d Cir. 2012); Educ. Credit Mgmt. Corp. v. Jespersen, 571 F.3d 775, 779 (8th Cir. 2009); Spence v. Educ. Credit Mgmt. Corp. (*In re Spence*), 541 F.3d 538, 543–44 (4th Cir. 2008); Barrett v. Educ. Credit Mgmt. Corp. (*In re Barrett*), 487 F.3d 353, 360 (6th Cir. 2007); Nash v. Conn. Student Loan Found. (*In re Nash*), 446 F.3d 188, 190 (1st Cir. 2006); Alderete v. Educ. Credit Mgmt. Corp. (*In re Alderete*), 412 F.3d 1200, 1206 (10th Cir. 2005); Pa. Higher Educ. Assistance Agency v. Faish (*In re Faish*), 72 F.3d 298, 301 (3d Cir. 1995).

¹²⁰See United States v. Castillo-Rivera, 853 F.3d 218, 237 (5th Cir. 2017) (Smith, Dennis, Prado, Graves, Higginson, Costa, and Southwick, JJ., dissenting) (criticizing decision that panel precedent on conceded matters binds later panel: “How is it fair to cut off resourceful attorneys from making good-faith arguments that no court has ever addressed, seriously considered, or decided?”).

work in the minority of jurisdictions that use the totality-of-the-circumstances test for undue hardship.¹²¹

However, the *Brunner* test, which has been adopted in all geographic circuits other than the D.C., First, and Eighth Circuits,¹²² is probably an obstacle to reform via this avenue. Although the district and circuit court opinions in *Brunner* did not consider the possibility that burdens could be allocated to the creditor, they do seem to reflect deliberate consideration of how heavy the debtor's burden should be.¹²³

Thus, it appears that in *Brunner* jurisdictions, appellate panels and lower courts do not have the option of simply shifting the entire burden of proof to the creditor. (Part II.C discusses the possibility that courts can shift the "burden of production" to the creditor under some circumstances). En banc or Supreme Court review of the *Brunner* test seemingly would be needed to institute the allocation of burdens of proof suggested in Part I.

B. Rules Committee Action

Another approach to reallocating the burdens of production and persuasion would be to amend the Federal Rules of Bankruptcy Procedure. Existing bankruptcy procedure rules expressly allocate some burdens of proof in some circumstances.¹²⁴ However, the bankruptcy rules cannot alter

¹²¹The only federal appellate court to have adopted the totality-of-the-circumstances test is the Court of Appeals for the Eighth Circuit. None of that court's opinions mentioning the burden of proof explains why it falls on the debtor, although one opinion did mention the opinion of the bankruptcy court in the case, which in turn relied on the "exception to the exception" argument addressed above. See *Reynolds v. Pa. Higher Educ. Assistance Auth.* (*In re Reynolds*), 425 F.3d 526, 529 (8th Cir. 2006) (referencing *Reynolds v. Pa. Higher Educ. Assistance Auth.* (*In re Reynolds*), 303 B.R. 823, 826 (Bankr. D. Minn. 2004)).

¹²²See John Patrick Hunt, *Student Loan Purpose and the Brunner Test*, 3-4 HARV. L. & POLICY REV. (forthcoming 2021) (detailing adoption of *Brunner* test in nine federal circuits).

¹²³*Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) (requiring debtor to present evidence that inability to repay will continue is "reasonable in light of the clear congressional intent . . . to make the discharge of student loans more difficult than that of other nonexcepted debt" and "more reliably guarantees that the hardship presented is 'undue'"); *Brunner v. N.Y. State Higher Educ. Servs. Corp.* (*In re Brunner*), 46 B.R. 752, 754-56 (S.D.N.Y. 1985) (mem. op.) (requiring debtor to "demonstrate" or "show" each element of the test leads to a result that, though "draconian," "plainly serves the purposes of the student loan program").

¹²⁴FED. R. BANKR. P. 4003(c) (stating that the burden of proof is on the party objecting to claim of exemption); *id.* at 4005 (stating that the burden of proof is on the party objecting to debtor's receipt of discharge (as opposed to dischargeability of particular debt)); *id.* at 6001 (stating that the burden of proof is on the party objecting under Section 549 to postpetition transfer of property).

substantive rights,¹²⁵ and *Brunner* probably reflects a substantive judicial decision to allocate burdens to the debtor.¹²⁶ In addition, the House Judiciary Committee report on the 1978 Bankruptcy Reform Act states that the rules cannot “shift the burden of proof from the moving party.”¹²⁷ The force of this statement is unclear. Any implication that the party seeking action from the court always bears the burdens of production and persuasion is inaccurate: the Code explicitly allocates some burdens of proof to nonmoving parties.¹²⁸ Current student-loan bankruptcy law places the burden of proving that a loan is covered by Section 523(a)(8) on the creditor,¹²⁹ who typically is the defendant in an adversary proceeding commenced by the debtor.¹³⁰ Moreover, it is unclear that “moving party” refers to the plaintiff in an adversary proceeding, as opposed to the party making a particular motion.

Nevertheless, the cited statement may obstruct allocating burdens away from the moving-party debtor by rule. And the process for changing the bankruptcy rules is lengthy. It involves initial consideration by the Advisory Committee on Bankruptcy Rules, public comment, further consideration by the Advisory Committee, consideration by the Judicial Conference’s Committee on Rules of Practice and Procedure, consideration by the Judicial Conference itself, approval by the Supreme Court, and review by

¹²⁵28 U.S.C.A. § 2075 (West 2020) (stating that bankruptcy rules “shall not abridge, enlarge, or modify any substantive right”).

¹²⁶See discussion *supra* Part II.A.

¹²⁷H.R. REP. NO. 95-595, at 308 (1978).

¹²⁸11 U.S.C.A. § 362(g)(2) (West 2020) (stating that the party opposing a motion for relief from stay has burden of proof on certain issues); *id.* § 363(p)(2) (stating that when a trustee moves to use, sell, or lease party, non-trustee party has burden of proof on certain issues); *id.* § 547(g) (stating that when a trustee seeks to recover transfers as preferences, party against whom relief is sought has burden of proof on certain issues); *id.* § 562(c) (stating that when a party objects to measurement of certain types of damages, nonobjecting party has burden of proof on certain issues).

¹²⁹For decisions by appellate tribunals to this effect, see *Bos. Univ. v. Mehta* (*In re Mehta*), 310 F.3d 308, 311 (3d Cir. 2002); *Cazenovia Coll. v. Renshaw* (*In re Renshaw*), 222 F.3d 82, 86 (2d Cir. 2000); *Kashikar v. Turnstile Cap. Mgmt.* (*In re Kashikar*), 567 B.R. 160, 168 (B.A.P. 9th Cir. 2017); *Roth v. Educ. Credit Mgmt. Corp.* (*In re Roth*), 490 B.R. 908, 916 (B.A.P. 9th Cir. 2013).

¹³⁰*Mehta*, 310 F.3d at 310–11 (noting that the debtor filed the adversary proceeding, but the creditor had the burden of proof); *Kashikar*, 567 B.R. at 162 (same); *Roth*, 490 B.R. at 912 (same); *Dudley v. S. Va. Univ.* (*In re Dudley*), 502 B.R. 259, 271 (Bankr. W.D. Va. 2013) (holding explicitly that creditor had burden of persuasion although debtor filed adversary proceeding).

Congress.¹³¹ Finally, the various bodies involved in the rulemaking process may not want to engage such a controversial issue through procedural rules. In sum, although changing the bankruptcy rules could help student borrowers, another avenue is needed to provide immediate relief.

C. Adoption of Burden-Shifting Structure

Given that reform through appellate or Supreme Court review or through Rules Committee action does not appear imminent, lower courts should consider what they can do to alleviate the debtor's burden.

1. A Proposal to Reform Burden of Proof in Student Loan Bankruptcies

One approach to reform in the direction suggested in Part I would be to decide that if the debtor carries the burden on the first element of *Brunner* by showing that repayment would be a hardship based on current income and expenses, and further shows that that condition of hardship has already persisted for some period of time during which the debtor has been out of school and the loans have been in repayment, the debtor provisionally carries¹³² the burden, and the second and third elements of *Brunner* shift to the creditor.¹³³ Courts could couple this determination with a decision that certain bright-line showings, such as four years of poverty-level income or

¹³¹ See *Overview for the Bench, Bar, and Public*, UNITED STATES COURTS, uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public (last visited Aug. 28, 2020).

¹³² As discussed in Part II.C.2, this proposal could be implemented by “shifting the burden of production,” “adopting a presumption,” or simply determining as a factual matter that the debtor has carried the burden absent further evidence. The article refers collectively to all three approaches as “provisionally carrying the burden.”

¹³³ Other approaches are defensible but may be too aggressive to survive appellate review in most jurisdictions. One, drawing directly on the arguments in Part I, would be to decide that the act of filing bankruptcy and seeking student-loan relief provisionally carries the burden because most debtors in this situation are likely to suffer undue hardship absent discharge. Given that this approach requires no showing beyond the act of filing, it is probably inconsistent with precedents putting the burden on the debtor. See discussion *supra* Part II.A. A second approach would be to decide that a showing of present hardship (the first element of *Brunner*) is sufficient to provisionally carry the burden on continuing hardship and good faith (the other two elements). This approach does not necessarily comply with *Brunner*'s requirement that the debtor show “additional circumstances” beyond present hardship indicating that hardship is likely to continue. *Brunner v. N.Y. State Higher Educ. Assistance Auth.*, 831 F.2d 395, 396 (2d Cir. 1987).

receipt of Social Security disability benefits,¹³⁴ provisionally carry the burden on the first element of *Brunner*.

A candidate for the appropriate period of past hardship is five years. If a borrower has suffered hardship for five years in which loans have been in repayment, a period that generally will end more than five years after leaving school,¹³⁵ both the second and the third elements of *Brunner* are more likely to be satisfied. It is likely both that the hardship will not abate as the debtor's education-fueled earning power grows and that the debtor is not trying to cheat the system by shedding debts without making any effort to repay.

The circumstances of *Brunner* support the five-year proposal. In establishing the continuing-hardship and good-faith-efforts elements of its test, *Brunner* relied heavily on the belief that most bankrupt debtors seeking discharge from student loans are recent graduates,¹³⁶ and under the law at the time student loans became dischargeable without a showing of undue hardship after five years in repayment.¹³⁷ In fact, five years is the only period for which Congress ever determined that heightened scrutiny of student loan bankruptcies for abuse was needed; fiscal concerns underlay subsequent extensions of the period of nondischargeability.¹³⁸

Once the debtor has provisionally carried the burden, the creditor should have to present case-specific evidence that undue hardship actually is absent.

¹³⁴A group of professors has proffered a proposed list of such bright-line circumstances that includes the two mentioned in the text. See Matthew Bruckner et al., *A No-Contest Discharge for Uncollectible Student Loans*, 91 U. COLO. L. REV. 183, 184 (2020). The authors acknowledge Pamela Foohey's extensive contributions to the work.

¹³⁵See *Student Loan Repayment*, FEDERAL STUDENT AID, <https://studentaid.gov/manage-loans/repayment> (last visited Aug. 28, 2020) (indicating that federal student loan repayment begins when a student graduates, leaves school, or drops below half-time enrollment, but that a six-month grace period applies to many loans).

¹³⁶*Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 46 B.R. 752, 754 (S.D.N.Y. 1985) (mem. op.) (justifying continuing-hardship requirement on grounds that "[i]t is the nature of [undue-hardship] application that they are made by individuals who have only recently ended their education. Their earning potential is substantially untested, and because they are inexperienced they are in all likelihood at the nadir of their earning power"). The district court emphasized the five-year nondischargeability period in defending the good-faith requirement. *Id.* at 755–56. Both the district and the circuit court cited the fact that Marie Brunner's loans had only recently come due (because she had only recently graduated) in finding that she had not shown a good-faith effort to repay. *Id.* at 757; *Brunner*, 831 F.2d at 397.

¹³⁷See Hunt, *supra* note 57, at 1302–10 (showing that student loans were freely dischargeable after five years in 1976–90, after seven years in 1990–98, and not freely dischargeable after any period after 1998).

¹³⁸See *id.* at 1310–12.

Given the discussion in Part I, the creditor should not be able to rely on the idea that the debtor bears the burden of proof to defeat discharge with speculative claims that a chronic condition might improve or that debt-free IDR-based discharge might occur in twenty years. The creditor should have to put forth credible evidence that one of the elements of the *Brunner* test is not met, such as evidence of recent significant and continuing improvement for a debtor like Noreen Nash with a disability that precludes work, or evidence of changes in law that make IDR less burdensome and risky than it currently is.¹³⁹

2. The Proposal is Consistent with Precedents on Burdens of Proof

This paper's proposal can be described in several similar ways. No matter which one of the possible characterizations is used, the suggestion here is consistent with existing precedent.

One approach would be to say that once the debtor makes the specified showing, it shifts the "burden of production" to the creditor, so that the creditor will lose unless it comes forward with contrary evidence.¹⁴⁰ A

¹³⁹ See *Traversa v. Educ. Credit Mgmt. Corp. (In re Traversa)*, No. 06-31447 (LMW), 2010 WL 1541443, at *6 (Bankr. D.Conn. Apr. 15, 2010), *aff'd*, 444 Fed. App'x 472 (2d Cir. 2011) (explaining that once a debtor has made a prima facie case, the creditor must "present credible evidence calling into question at least one of the *Brunner* elements").

¹⁴⁰ In cases where the trier of fact is separate from the arbiter of law, the "burden of production" at trial refers to the quantum of evidence needed to avoid a directed verdict as a matter of law, while the "burden of persuasion" refers to a party's responsibility to convince the trier of fact that its position should prevail. See MOSTELLER ET AL., *supra* note 32, § 336. The usefulness of the terms "burden of production" and "burden of persuasion" is less clear in the bankruptcy context, where the bankruptcy judge is the trier of fact. They could potentially be used to signal whether the bankruptcy court is making a ruling of law subject to de novo review or a factual determination subject to review for clear error, see *Thomas v. Dep't of Educ. (In re Thomas)*, 931 F.3d 449, 451–52 (5th Cir. 2019), but the author's research has turned up no case in which the terms actually were used in this way.

number of courts have adopted this general framework,¹⁴¹ and the Second Circuit has affirmed a decision that followed a burden-shifting approach.¹⁴²

For example, in *Tucker v. Sallie Mae, Inc. (In re Tucker)*,¹⁴³ the court stated, “[t]he burden of production may shift from side to side as the case progresses, according to the proof offered in support or denial of the relevant facts.”¹⁴⁴ The debtor in that case had testified to her history of depression and to her belief that her condition would continue to make her unable to work.¹⁴⁵ In applying the *Brunner* test, the court found that this testimony, along with the supporting testimony of a friend, was enough to shift the burden of production on the question of continuing hardship to the creditor, who failed to present contrary evidence.¹⁴⁶ The court thus held that the creditor had failed to meet its (shifted) burden of production and discharged the debtor’s student loans.¹⁴⁷

To the extent that satisfaction of each *Brunner* element is a question of fact,¹⁴⁸ the article’s suggestion can also be cast in the language of presumptions. As a matter of terminology, a rule under which proof of Fact

¹⁴¹ See *Carnduff v. U.S. Dep’t of Educ. (In re Carnduff)*, 367 B.R. 120, 131–32 (B.A.P. 9th Cir. 2007); *Abdinoor v. Navient Sols., Inc. (In re Abdinoor)*, No. AP-1048-BAH, 2015 WL 5178364, at *4 (Bankr. D.N.H. Sept. 3, 2015); *Blanchard v. N.H. Higher Educ. Assistance Found. (In re Blanchard)*, No. ADV-13-1038-JMD, 2014 WL 4071119, at *8 (Bankr. D.N.H. Aug. 14, 2014); *Traversa*, 2010 WL 1541443, at *6 n.18; *Votruba v. Fl. Dep’t of Educ. (In re Votruba)*, 310 B.R. 698, 704 (Bankr. N.D. Ohio 2004); *Parks v. Graduate Loan Ctr. (In re Parks)*, 293 B.R. 900, 902 (Bankr. N.D. Ohio 2003); *Perry v. Student Loan Guarantee Found. (In re Perry)*, 293 B.R. 801, 808–09 (Bankr. W.D. Ark. 1999); *O’Brien v. Household Bank FSB (In re O’Brien)*, 165 B.R. 456, 459 (Bankr. W.D. Mo. 1994); *Fox v. Pa. Higher Educ. Assistance Agency (In re Fox)*, 163 B.R. 975, 978 (Bankr. M.D. Pa. 1993).

¹⁴² See *Traversa v. Educ. Credit Mgmt. Corp. (In re Traversa)*, 444 Fed. App’x 472, 473 (2d Cir. 2011).

¹⁴³ Bankr. No. 08-12158-JMD, 2009 WL 2877906, at *11 (Bankr. D.N.H. Sept. 3, 2009).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at *8.

¹⁴⁶ *Id.* at *11.

¹⁴⁷ *Id.*

¹⁴⁸ Whether the bankruptcy court’s finding on each of the three elements of *Brunner* is a question of fact or law has divided appellate courts. See *Educ. Credit Mgmt. Corp. v. Acosta-Conniff (in re Acosta-Conniff)*, 686 Fed. App’x 647, 649 (11th Cir. 2017) (holding that it is a question of fact); *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 884 (7th Cir. 2013) (explaining that a good-faith-effort element is a “mixed question of fact and law” and may be reviewed as a legal or a factual question depending on the case); *Spence v. Educ. Credit Mgmt. Corp. (In re Spence)*, 541 F.3d 538, 544 (4th Cir. 2008) (reviewing bankruptcy court’s conclusions as to each element de novo, as legal questions).

A is sufficient to permit an inference of Fact B and shifts the burden at least of production on Fact B to the other party can be termed a “presumption.”¹⁴⁹ Using this language, the article suggests that the specified showing raises a presumption that the continuing-hardship and good-faith-efforts elements of the *Brunner* test are met. Significantly, the underlying factors relevant to adopting presumptions – probability, policy, and possession of proof – are the same as those relevant to the allocation of the burden of proof discussed above.¹⁵⁰ Thus, it is unclear that the language of presumptions adds much to the analysis.

Finally, the bankruptcy courts can simply determine as a matter of fact that the showing described above satisfies the debtor’s burden unless it is rebutted, without resorting to the rhetoric of “shifting the burden of production” or “adopting a presumption.” In jurisdictions where satisfaction of each *Brunner* element is a question of fact, this appears to be the most straightforward approach.

No matter how the article’s suggestion is characterized, it is permissible under *Brunner* and the decisions adopting it. The proposal requires a specific factual showing, continued past hardship, that is relevant to both the continuing-hardship and good-faith-efforts elements before shifting the burden of production. It therefore requires the debtor to meet a specific burden on each element and thus satisfies the requirement that the debtor bear the burden of proof.

Brunner does not address what evidentiary showing will meet its substantive standards or foreclose lower courts from adopting rules shifting the burden of proof or adopting presumptions, so it does not foreclose adoption of the article’s proposal. The suggested approach is consistent not just with *Brunner*; but also with appellate authority applying the *Brunner* test in the various circuits. The author’s review of appellate decisions in the student-loan context has found no opinion rejecting a bankruptcy court’s authority to adopt presumptions, shift the burden of production, or draw an inference from the passage of time that the second and third elements of *Brunner* are met. Although some cases state that the debtor bears the burden

¹⁴⁹ See MOSTELLER ET AL., *supra* note 32, at § 342.

¹⁵⁰ See GRAHAM, *supra* note 32, § 5122, 5122.1 (describing bases for general allocation of burden of proof and of presumptions in terms of the “3 P’s”: probability, possession of proof, and policy).

of persuasion,¹⁵¹ or the burden of production and persuasion,¹⁵² none rejects the possibility that either or both of these burdens could shift depending on the evidence presented.

To be sure, the suggested approach might not succeed before all appellate courts. Some courts have adopted extravagant rhetoric that seemingly would require debtors to do the impossible by showing a “certainty of hopelessness” of future repayment in order to satisfy the second element.¹⁵³ Although panels in most circuits that have adopted this language have signaled that the phrasing is not to be taken literally,¹⁵⁴ some decisions do reflect great reluctance to allow bankruptcy courts to make reasonable inferences in favor of the debtor.¹⁵⁵ Such precedents augur ill for any attempt to liberalize student-loan bankruptcy law in some circuits. Nevertheless, shifting the burden based on the passage of time does offer a new avenue of attack and a potential way around harmful authority.

¹⁵¹DeVos v. Price, 583 B.R. 850, 857 (E.D. Pa. 2018); Bolen v. Sallie Mae Servicing Corp. (*In re Bolen*), No. 00-1060, 2003 WL 22327201, at *5 (D. Vt. Oct. 8, 2003); Booth v. U.S. Dep’t of Educ. (*In re Booth*), 410 B.R. 672, 674 (Bankr. E.D. Wash. 2009); Thompson v. N.M. Student Loan Guar. Corp. (*In re Thompson*), 329 B.R. 145, 177 (Bankr. E.D. Va. 2005); Cueto v. Am. Educ. Servs., No. 03-04835S, 2005 WL 1083411, at *3 (Bankr. N.D. Iowa May 9, 2005); Newman v. Educ. Credit Mgmt. Corp. (*In re Newman*), 304 B.R. 188, 192 (Bankr. E.D. Pa. 2002).

¹⁵²Hurst v. S. Ark. Univ. (*In re Hurst*), 553 B.R. 133, 140 (B.A.P. 8th Cir. 2016); Walker v. Sallie Mae (*In re Walker*), 406 B.R. 840, 844–45 (Bankr. D. Minn. 2009), *aff’d*, 650 F.3d 1227 (8th Cir. 2011); Frech v. N.D. State Bd. of Higher Educ. (*In re Frech*), 62 B.R. 235, 239 (Bankr. D. Minn. 1986).

¹⁵³See *Spence*, 541 F.3d at 544; Educ. Credit Mgmt. Corp. v. Mosley (*In re Mosley*), 494 F.3d 1320, 1326 (11th Cir. 2007); Tirsch v. Pa. Higher Educ. Assistance Agency (*In re Tirsch*), 409 F.3d 677, 681 (6th Cir. 2005); O’Hearn v. Educ. Credit Mgmt. Corp. (*In re O’Hearn*), 339 F.3d 559, 564 (7th Cir. 2003); Brightful v. Pa. Higher Educ. Assistance Agency (*In re Brightful*), 267 F.3d 324, 328 (3d Cir. 2001).

¹⁵⁴Opinions issued in three of the five circuits that have adopted this phrase indicate that the wording is not to be taken too seriously. See *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 885 (7th Cir. 2013) (noting that in applying the certainty-of-hopelessness standard the bankruptcy court “necessarily has latitude” and upholding discharge); *Mosley*, 494 F.3d at 1326 (upholding bankruptcy court’s grant of discharge under certainty-of-hopelessness standard); *Barrett v. Educ. Credit Mgmt. Corp. (In re Barrett)*, 487 F.3d 353, 363, 366 (6th Cir. 2007) (same).

¹⁵⁵See, e.g., *O’Hearn*, 339 F.3d at 566 (vacating affirmance of discharge grant because although 50-year-old debtor, who held a master’s degree in public health, had “found the best-paying job he could in the public health field” and had applied to 500 jobs in other fields, the bankruptcy court “did not fully explore” whether debtor could have made more money in another field).

III. CONCLUSION

The near-universal allocation of the burden of proof in student loan bankruptcies to the debtor reflects relatively little judicial analysis and rests on faulty assumptions. The burden-of-proof rules, to the extent they have a factual foundation at all, are based on a conception of the bankrupt student-loan debtor as a recent graduate who is about to start earning a high income using the education the loans made possible. In fact, the typical debtor seeking to discharge their loans in bankruptcy is in their mid-40s and has a household income of less than \$30,000 – far too little to repay their student loan balance in full barring a dramatic reversal of fortune. It is inappropriate to assume as a default that bankrupt student debtors will not suffer undue hardship.

Although unhelpful precedents like *Brunner* may foreclose outright shifting the burden of proof to the creditor, *Brunner* permits adoption of a burden-shift framework. Upon a showing, for example, that repayment already has been causing hardship for five years or more, even courts bound by *Brunner* can require the creditor to show a strong prospect of improvement. This change could free debtors like Noreen Nash from continued suffering arising from unrealistic hopes enshrined in law.