SHOULD WE REPLACE OR REPAIR THE *BRUNNER* TEST? DISCHARGING STUDENT LOAN DEBT THROUGH CHAPTER 7 BANKRUPTCY

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ABSTRACT

Judge Morris from the Southern District of New York recently decided a bankruptcy proceeding where she ruled in favor of Kevin Rosenberg, a US Navy veteran with over $220,000 of student loan debt. Judge Morris's decision has drawn quite a lot of attention and has many wondering if this will start a new trend in the discharge of student loan debt under Chapter 7 bankruptcy.

Judge Morris's decision to discharge Rosenberg's student loan debt was a significant occurrence because many people previously believed it practically impossible to discharge student loan debt through bankruptcy. These beliefs are partly true because of the way in which the *Brunner* test has been applied by courts in determining whether an individual has met the high standard of undue hardship. Morris's decision is unique because it is one of the first to take a step back and recognize that the *Brunner* test is being applied with unnecessary standards that raise the bar to an unreasonable height, making it extremely difficult to achieve success in discharging student loan debt.

As a result, many currently wonder whether other judges will follow Judge Morris's lead in dismantling the heightened standards that have developed over time, and return to the original intent of the *Brunner* court. This Note argues that judges should continue to utilize the *Brunner* test when determining whether an individual's student loan debt should be discharged in bankruptcy. However, judges should use Judge Morris's approach as a model when applying the *Brunner* test to the particular facts of each individual case.

INTRODUCTION

On January 7, 2020 Kevin J. Rosenberg attracted national news coverage after he successfully had his student loan debt discharged in bankruptcy court.[1] Rosenberg borrowed a total of $116,464.75 to fund his bachelor's degree from the University of Arizona and his law degree from Cardozo Law School at Yeshiva University.[2] Due to an interest rate of 3.38 percent per annum, his total student loan balance reached $221,385.49 as of November 19, 2019.[3] Rosenberg joins a select group

1. *See* Rosenberg v. New York State Higher Educ. Servs. Corp. (*In re* Rosenberg), 610 B.R. 454, 462 (Bankr. S.D.N.Y. 2020).

2. *See id.* at 457.

3. *See id.*

of individuals who have successfully discharged their student loan debt in bankruptcy court, something that many believe to be nearly impossible.[4] Rosenberg successfully had his student loans discharged by proving that it would impose an undue financial hardship under the *Brunner* test, named after a case decided in the Second Circuit Court of Appeals.[5] Rosenberg met the undue hardship requirement in part by demonstrating that his monthly income at the time of filing was negative $1,548.74, resulting from monthly expenses of $4,005.00 and a monthly income of only $2,456.24.[6]

In the United States, the total student loan debt has reached nearly $1.6 trillion and affects upwards of forty-five million people.[7] As a result, Rosenberg's success in bankruptcy court coincides with political discussions regarding how best to handle the current student loan debt crisis.[8] This likely explains why there has been national coverage of the decision in Rosenberg's case.[9] However, Rosenberg's success in Chapter 7 is also newsworthy because of the judge's attempt to dispel myths surrounding the *Brunner* test and her claim that she applied the *Brunner* test to Rosenberg's case in the way that the test was originally intended to be applied.[10]

This Note argues that it makes sense for student loan debt to be treated differently from other types of debt that are generally dischargeable under Chapter 7, but that the *Brunner* test as it has been applied is an unreliable method for determining when student loan debt should be discharged in bankruptcy. Thus, this Note ultimately suggests that courts should continue to use the *Brunner* test to determine whether

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4. *See id.* at 459.

5. *See* Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987).

6. *Rosenberg*, 610 B.R. at 460.

7. *See* Zack Friedman, *Student Loan Debt Statistics in 2020: A Record $1.6 Trillion*, FORBES (Feb. 3, 2020, 6:51 PM), https://www.forbes.com/sites/zackfriedman/2020/02/03/student-loan-debt-statistics/#60ccdc18281f.

8. *See* Benjy Sarlin, *The Student Debt Crisis and What Democratic Candidates Propose Doing About It*, NBC NEWS (Sept. 12, 2019, 4:07 PM), https://www.nbcnews.com/politics/2020-election/student-loan-debt-policy-proposals-n1051451.

9. *See, e.g.*, Adam S. Minsky, *A Judge Just Wiped Out This Man's $221,000 in Student Debt*, FORBES (Jan. 22, 2020, 11:52 AM), https://www.forbes.com/sites/adamminsky/2020/01/22/a-judge-just-wiped-out-this-mans-221000-in-student-debt/#15c7667d3782.

10. *Rosenberg*, 610 B.R. at 459 (citing Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 884 (7th Cir. 2013)).

discharge of student loan debt is proper, but the application of the test should mirror Judge Cecilia G. Morris's application of the test.

Part I provides some background information on how debt was originally treated in the United States and the origin of bankruptcy laws in the United States. As part of this history, this section discusses where Congress derives its power to establish bankruptcy laws and surveys the history of Congress's use of this power. Part II introduces Chapter 7 bankruptcy claims and discusses the requirements that must be met in order to make a Chapter 7 claim, including a portion devoted to a brief overview of the "means test." This section also includes information regarding the types of debt eligible for discharge under Chapter 7 as well as the consequences associated with filing for bankruptcy.

Part III provides a brief background on the origins of federal student loans in the United States and the current program used to fund students' education. This section also provides some of the current student loan debt statistics to demonstrate the severity of the student loan debt crisis affecting American students.

Part IV discusses the *Brunner* test and examines each of the elements that must be met under the current system in order for an individual to successfully have her student loan debt discharged. This section will provide examples to demonstrate how these elements have been applied to different factual scenarios. Part V assesses whether Judge Cecilia G. Morris differed in her application of the *Brunner* test in Rosenberg's case. After concluding that Morris relaxed the requirements under each prong of the *Brunner* test, this section explains how her approach differed from other cases applying the *Brunner* test.

Part VI argues that the courts should continue using the *Brunner* test, but that judges should follow in the steps of Judge Cecilia G. Morris and apply the test as it was originally intended, without the punitive traits that it has developed since its conception.

I. HISTORY OF DEBT TREATMENT IN THE UNITED STATES

A. Debtors' Prison

Beginning in the late 1600s and lasting until as late as the early 1800s, debtors would actually be sent to prisons and locked up until they were able to pay off their debts.[11] If debtors were unable to acquire the funds to clear their debts, they would be forced to work off the debt

11. Eli Hager, *Debtors' Prisons, Then and Now: FAQ*, MARSHALL PROJECT (Feb. 24, 2015, 7:15 AM), https://www.themarshallproject.org/2015/02/24/debtors-prisons-then-and-now-faq.

through penal labor, leading to many debtors dying in prison.[12] Following the War of 1812, many Americans had gone into debt and the thought of imprisoning everyone who was in debt did not seem sensible.[13] As a result, Congress abandoned the use of debtors' prisons under federal law in 1833 and many states followed suit soon after.[14] More recently, the Supreme Court has deemed it unconstitutional to incarcerate individuals who are too poor to repay debt and has directed courts to differentiate between those who are too poor to pay and those who are able, but voluntarily choose not to pay.[15] As the United States moved away from the practice of imprisoning debtors for failing to repay debts, it moved into the beginning of bankruptcy law which placed more emphasis on resolving as much debt as possible and discharging the rest, instead of punishing individuals with incarceration.[16]

B. Bankruptcy Law in the United States

The Constitution itself is the starting place for bankruptcy laws in the United States.[17] Article I, Section 8 of the United States Constitution provides that Congress has the power "[t]o establish an uniform Rule of Naturalization, *and uniform Laws on the subject of Bankruptcies throughout the United States*[.]"[18] However, Congress did not choose to exercise this power until 1800.[19] In the meantime, several states developed their own bankruptcy systems, many of which favored creditors and allowed for the imprisonment of debtors.[20]

Congress's first federal law relating to bankruptcy was the Bankruptcy Act of 1800, which closely resembled the existing state bankruptcy systems in that it "only permitted involuntary bankruptcies of merchant debtors" and was heavily creditor-friendly.[21] The Bankruptcy

12. *See id.*
13. *Id.*
14. *See id.*
15. *See id; see also* Williams v. Illinois, 399 U.S. 235, 241–42 (1970) (holding that maximum prison term cannot be extended based on the defendant's failure to pay court costs or fines); *see also* Tate v. Short, 401 U.S. 395, 398–99 (1971) (holding that the defendant may not be imprisoned based on inability to pay fine as a result of indigency); *see also* Bearden v. Georgia, 461 U.S. 660, 667–69 (1983) (instructing judges to differentiate between those who are too poor to pay and those who choose not to pay).
16. *See* Hager, *supra* note 11.
17. *See* U.S. CONST. art. I, § 8, cl. 4.
18. *Id.* (emphasis added).
19. *See* David Haynes, *History of Bankruptcy in the United States,* BALANCE (last updated Feb. 13, 2020), https://www.thebalance.com/history-of-bankruptcy-in-the-united-states-316225.
20. *See id.*
21. *Id.*

Act of 1800 was repealed three years later and states returned to their bankruptcy systems in the absence of any federal laws governing bankruptcy.[22]

Congress's next use of its authority to create laws regulating bankruptcy came in the form of the Bankruptcy Act of 1841.[23] This was the first bankruptcy law that allowed debtors to initiate bankruptcy proceedings voluntarily.[24] However, this law was also repealed quickly because too many debtors were receiving discharges of their debts.[25] Congress tried again with the Bankruptcy Act of 1867 which faced the same fate as the two earlier federal bankruptcy laws.[26] However, in 1898 Congress finally implemented a federal bankruptcy law that would endure.[27] The Bankruptcy Act of 1898 went through several amendments, but it was never repealed, and it was not replaced until 1978.[28]

In 1978 Congress passed the Bankruptcy Reform Act of 1978 which introduced the Bankruptcy Code and significantly altered the bankruptcy system.[29] The next significant change came with the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[30] The BAPCPA is significant because it introduced the "means test" as the method for determining a debtor's eligibility for Chapter 7 and it implemented mandatory credit counseling and debtor education courses.[31] There have been several recent amendments to the Bankruptcy Code, but these recent amendments are far more specific and specialized and need not be discussed for purposes of this Note.

II. INTRODUCTION TO CHAPTER 7

Individuals, partnerships, corporations, or other business entities are eligible for relief under Chapter 7.[32] Under Chapter 7 the amount of debt and an individual's solvency are both irrelevant in determining whether someone is eligible for relief.[33] Instead, the "means test" is used to determine one's eligibility for Chapter 7 bankruptcy, which weighs one's

22. *See id.*
23. *See id.*
24. *See* Haynes, *supra* note 19.
25. *See id.*
26. *See id.*
27. *See id.*
28. *See id.*
29. *See* Haynes, *supra* note 19.
30. *Id.*
31. *Id.*
32. *See* 11 U.S.C. § 101(41) (2021); *see also* 11 U.S.C. § 109(b) (2021).
33. *Id.*

income against her ability to pay creditors.[34] One of the primary purposes of bankruptcy is to give a "fresh start" to deserving debtors and Chapter 7 is particularly successful at fulfilling this goal because it frequently results in the total discharge of debts.[35]

A. How Chapter 7 Works

Once an individual files for Chapter 7 bankruptcy, creditors cannot pursue debts owed by that individual because the court places a stay on the filing individual's current debts.[36] The court then takes possession of the debtor's property and a trustee is appointed to oversee the debtor's Chapter 7 case.[37] The two major responsibilities of the trustee are (1) to sell the debtor's nonexempt property and use the proceeds from such sale to pay the debtor's creditors and (2) to arrange a meeting between the debtor and her creditors where the debtor must answer questions regarding the bankruptcy filing.[38] The debtor's remaining debts are then discharged about four to six months after the initial filing.[39]

Another common type of bankruptcy filing available to consumers is Chapter 13, which involves placing the debtor on a more flexible repayment plan to repay creditors pursuant to a repayment plan and then the remaining debt at the conclusion of the repayment plan is discharged.[40] The benefit of filing for bankruptcy under Chapter 13 instead of Chapter 7 is that the debtor's belongings are not sold under a Chapter 13 bankruptcy proceeding.[41] This Note will discuss the discharge of student loan debt in the context of Chapter 7 only, but it is helpful to know about the existence of Chapter 13 and the basic differences between the two because they are fairly similar. Further, this Note focuses primarily on Chapter 7 bankruptcy because total discharge of student debt through bankruptcy will likely become a hot topic if Judge Morris's ruling stands.

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34. *See* Mark A. Neal & Sandra Manocchio, *Means Testing: The Heart of BAPCPA*, 40 MD. B.J. 26, 27 (2007).

35. 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, 94 (2002).

36. Louis DeNicola, *What Is Chapter 7 Bankruptcy?*, EXPERIAN (Dec. 2, 2019), https://www.experian.com/blogs/ask-experian/what-is-chapter-7-bankruptcy/.

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.*

41. *See* DeNicola, *supra* note 36.

B. The "Means Test" & Eligibility for Chapter 7

The "means test" was introduced by the BAPCPA and its requirements are set out in 11 U.S.C. § 707(b)(2).[42] "In general terms [the means test] provides that the court shall presume abuse if the debtor's current monthly income, reduced by certain allowed expenses, produces a specified amount of disposable income (income that could be devoted to a repayment plan)."[43] Debtors filing for bankruptcy under Chapter 7 and Chapter 13 are now required to complete "means test" forms.[44] The first part of the "means test" consists of determining whether the debtor's annualized current monthly income ("CMI") falls below the applicable median income of the State in which the bankruptcy proceeding takes place.[45] If it does, then there is no presumption of abuse, however if it does not then the debtor must complete the rest of the "means test" form.[46] The remainder of the form guides a debtor through the monthly expenses that are allowed as deductions, which include things like food and clothing expenses, as well child care and health care expenses.[47] After accounting for all of the deductions, if the debtor has no disposable income then there is no presumption of abuse, however if there is disposable income remaining then the debtor must satisfy a mathematical test under section 707(b)(2)(A)(i).[48]

C. Types of Debt Dischargeable Under Chapter 7 & Consequences of Filing

Under Chapter 7, unsecured debts including credit card debt, medical bills, and unsecured loans are generally dischargeable.[49] It is also possible to have debt on secured loans discharged through Chapter 7 bankruptcy.[50] On the other hand, the following types of unsecured debts

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42. *See* 11 U.S.C. § 707(b)(2) (2021).
43. Neal & Manocchio, *supra* note 34, at 27.
44. *Id.*
45. *See id.* at 28.
46. *See id.*
47. *See id.*
48. Neal & Manocchio, *supra* note 34 at 28. "The formula works essentially as follows: [i]f the debtor has disposable income of less than $100 per month, the debtor passes the abuse test. If the debtor's disposable income is between $100 and $166.66 per month, the debtor will pass the abuse test if the surplus income over 60 months is less than 25% of the debtor's unsecured debt. If the debtor's disposable income is $166.67 per month or more (which would produce a payout to creditors of at least $10,000 over 60 months), the debtor's case will be presumptively abusive." *Id.*
49. *See* DeNicola, *supra* note 36. Unsecured debts are those that are not backed by any type of collateral. *See id*. Secured loans on the other hand are those backed by collateral, "such as your home for a mortgage, or when a creditor has a lien on your property." *Id.*
50. *See id.*

are rarely discharged via Chapter 7 bankruptcy: child support, alimony, student loans, certain tax debt, homeowners association fees, court fees and penalties, and personal injury debts resulting from accidents in which the debtor was intoxicated.[51] It is also possible for creditors to object to the discharge of debt in certain circumstances, in which case the debtor may be forced to repay such debts.[52]

Even though filing for bankruptcy may seem enticing for those struggling to repay large sums of debt, it does not come without consequences.[53] First, Chapter 7 bankruptcy can remain on the debtor's credit reports for ten years from the original filing date.[54] It is also likely that the debtor's credit score will be negatively impacted by filing for Chapter 7 bankruptcy.[55] Chapter 7 bankruptcy can drastically decrease the debtor's credit score, make it more difficult to qualify for new credit in the future, and result in higher interest rates and fees when new credit is approved.[56] Being forced to have your nonexempt property sold to settle as much of your debt as possible is also a consequence of filing for bankruptcy.[57]

III. HISTORY OF FEDERAL STUDENT LOANS

This section aims to provide a brief look at the history and development of student loans. This history is important because it demonstrates the link between student loan debt and bankruptcy. As the number of students borrowing money to pay for and attend college increased and individuals fell behind on loan payments, there was likely an increase in the number of people seeking discharge of student loan debt through Chapter 7 bankruptcy. Therefore, the history of the development of the federal student loan program provides necessary contextual information for the connection between Chapter 7 bankruptcy and filers with student loan debt.

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51. *See id.*

52. *See* DeNicola, *supra* note 36 ("For example, a credit card company could object to the debt from recent luxury goods purchases or cash advances, and the court may decide you still need to repay this portion of the credit card's balance.").

53. *See Bankruptcy: How It Works, Types & Consequences*, EXPIERAN, https://www.experian.com/blogs/ask-experian/credit-education/bankruptcy-how-it-works-types-and-consequences/ (last visited Oct. 24, 2020).

54. *See* DeNicola, *supra* note 36.

55. *See* Sarah Brady, *What Is Chapter 7 Bankruptcy*, CREDIT KARMA (last updated Dec. 8, 2020), https://www.creditkarma.com/advice/i/what-is-chapter-7-bankruptcy/.

56. *See id.*

57. *See Bankruptcy: How It Works, Types & Consequences*, supra note 53.

A. Federal Student Loan Programs

The beginning of federal student loans began with the National Defense Education Act of 1958, which created what is now known as the Perkins Loans Program.[58] This program was implemented amid fears that the Soviet Union was outpacing the United States in education and provided low-cost student loans to encourage more students to pursue higher education.[59] About seven years later the Higher Education Act of 1965 (HEA) was passed which increased federal funding for college.[60] Currently the most common types of federal student loans are direct subsidized loans, direct unsubsidized loans, parent PLUS loans, graduate PLUS loans, and direct consolidation loans.[61] The previously mentioned Perkins Loan program is no longer active as of June 30, 2018.[62]

B. Student Loan Debt Statistics

The most recent student loan debt statistics indicate that forty-five million Americans collectively owe almost $1.6 trillion.[63] This places the amount of student debt behind only mortgage debt with respect to types of consumer debt, surpassing credit card and auto loan debt.[64] The default rate of student loans is 10.8 percent which equates to about 5.5 million borrowers.[65] This number is significant in the bankruptcy context especially if even half of these borrowers have made good faith attempts to repay their student loan debt. One of the student loan forgiveness programs is the Public Service Loan Forgiveness Program.[66] Under this program there are a total of 1,195,497 borrowers.[67] Over 100,000 of these borrowers have submitted applications for forgiveness under this program.[68] However, only about one percent of those who have applied for loan forgiveness under this program have had their applications

58. *See* Kevin J. Smith, *Defining the* Brunner *Test's Three Parts: Time to Set a National Standard for All Three Parts to Determine When to Allow the Discharge of Federal Student Loans*, 58 S.D. L. REV. 250, 251 (2013); *see also* Pub. L. No. 85-864, Title I, §§ 201–09, 72 Stat. 1580, 1583–87 (1958).

59. *A Visual Timeline of Student Loans: Where We've Been and Where We're Headed*, SOFI (Nov. 22, 2016), https://www.sofi.com/blog/visual-timeline-student-loans/.

60. *Id.*

61. Cecillia Barr, *Types of Student Loans*, DEBT.ORG (Oct. 1, 2019), https://www.debt.org/students/types-of-loans/.

62. *Id.*

63. *See* Friedman, *supra* note 7.

64. *See id.*

65. *Id.*

66. *See id.*

67. *See id.* (data last updated on Sept. 30, 2019).

68. *See* Friedman, *supra* note 7.

approved.[69] Over fifty percent of those who submitted applications were denied because their payments do not qualify under the program and another twenty-four percent had their applications denied as a result of information missing from the application.[70] In order to qualify for the Public Service Loan Forgiveness Program one must do the following: (1) be employed by a U.S. federal, state, local, or tribal government or not-for-profit organization; (2) work full-time for that agency or organization; (3) have Direct Loans; (4) repay his or her loans under an income-driven repayment plan; and (5) make 120 qualifying payments.[71] It is also advisable to submit a Public Service Loan Forgiveness: Employment Certification Form each year, or after changing employers to ensure the payments qualify.[72] Looking at these numbers explains why borrowers are turning to any remedy possible, including Chapter 7 bankruptcy, in order to have their student loans discharged.

IV. THE EVOLUTION OF STUDENT LOAN DEBT TREATMENT IN BANKRUPTCY

Student loan debt was treated no differently than other forms of unsecured debt until the end of the 1970s, when federal student loan spending began to spike.[73] In response to concerns that students would take advantage of bankruptcy and use it to discharge student loans, Congress enacted section 523(a)(8) restricting the circumstances under which student loan debt can be discharged.[74] Congress's concerns about students abusing the system by trying to avoid repayment of student loans through bankruptcy were not entirely unfounded.[75] Some students who attempted to discharge their student loan debt through bankruptcy were actually graduates of prestigious universities who possessed a high earning potential, but made no effort to repay their loans before filing for bankruptcy.[76] Thus, even if these were just a few bad apples, Congress recognized the potential for abuse of the bankruptcy system as a way to

69. *See id.*

70. *See id.*

71. *Public Service Loan Forgiveness (PSLF)*, FED. STUDENT AID, https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service#qualify (last visited Oct. 19, 2020).

72. *See id.*

73. *See* Huey, *supra* note 35, at 97.

74. *See id.* at 97, 100.

75. *See* Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans?*, 71 TUL. L. REV. 139, 145 (1996).

76. *See id.*

avoid paying for student loans and enacted section 523(a)(8) in order to address this problem before it became more severe and pervasive.[77]

A. Restricting Discharge of Student Loan Debt

Section 523(a)(8) originally had two exceptions, but it currently only allows student loan debt to be discharged when "excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents[.]"[78] Congress conveniently failed to shed light on what it meant by "undue hardship," leaving courts to interpret and essentially define the phrase.[79] In addition to the actual bankruptcy filing, an individual seeking to have her student loan debt discharged in bankruptcy must file an adversary proceeding against the affected creditor.[80] It is within this adversary proceeding that the court considers whether forcing the debtor to repay her student loan debt will cause undue hardship.[81] Although there are a few different tests used to evaluate undue hardship, most courts have settled on a test created by the court in *Brunner v. New York State Higher Education Services Corp.*[82]

The other notable test that is used to analyze the undue hardship requirement is the totality of the circumstances test, which is employed by the Eighth Circuit.[83] Under the totality of the circumstances test the court considers: "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the reasonable living expenses of the debtor and her dependents; and (3) any other relevant facts and circumstances surrounding the particular bankruptcy case."[84] Since the totality of the circumstances test is used only in the Eighth

77. *See* Huey, *supra* note 35, at 100.

78. 11 U.S.C. § 523(a)(8) (2020).

79. Paul B. Porvaznik, *Is Discharging Student Loan Debt in Bankruptcy Getting Easier?*, 102 ILL. B.J. 540, 541 (2014).

80. *See id.*

81. *See id.*

82. *Id.* at 541–42 (citing 831 F.2d 395, 396 (2d Cir. 1987)).

83. Porvaznik, *supra* note 79, at 543.

84. *Id.* (quoting Walker v. Sallie Mae Servicing Corp., 650 F.3d 1227, 1230 (8th Cir. 2011)). The factors that the court will often consider under the third catch-all factor include: "(1) the debtor's total present and future incapacity to pay debts for reasons not within his control; (2) whether the debtor has made a good faith effort to negotiate a deferment or forbearance of payment; (3) whether the hardship will be long-term; (4) whether the debtor has made payments on the student loan; (5) the permanent or long-term disability of the debtor; (6) the ability of the debtor to obtain gainful employment in the area of study; (7) the debtor's good faith effort to maximize income and minimize expenses; (8) whether the dominant purpose of the bankruptcy petition was to discharge the student loans; and (9) the ratio of student loan debt to total indebtedness." *Id.* (quoting Bakken v. Alaska Comm'n on Postsecondary Educ., No. 11-31048, 2014 Bankr. LEXIS 348, at *22 (Bankr. D.N.D. Jan. 27, 2014)).

Circuit, this Note focuses primarily on the *Brunner* test which is used by the vast majority of courts in analyzing the undue hardship requirement.

B. The Brunner *Test*

The *Brunner* test consists of three different prongs, all of which must be satisfied for the court to conclude that forcing the debtor to pay off her student loan debt will impose an undue hardship.[85] The three elements that the debtor must prove under *Brunner* are:

> (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.[86]

1. Prong One of the Brunner *Test*

Under the first prong of the *Brunner* test, courts have identified a number of elements used to set the baseline for the minimal standard of living.[87] The following elements were set forth by the court in *In re Ivory* and have been used by several other courts since:

> 1. People need shelter, shelter that must be furnished, maintained, kept clean, and free of pests. In most climates it also must be heated and cooled.
>
> 2. People need basic utilities such as electricity, water, and natural gas. People need to operate electrical lights, to cook, and to refrigerate. People need water for drinking, bathing, washing, cooking, and sewer. They need telephones to communicate.
>
> 3. People need food and personal hygiene products. They need decent clothing and footwear and the ability to clean those items when those items are dirty. They need the ability to replace them when they are worn.
>
> 4. People need vehicles to go to work, to go to stores, and to go to doctors. They must have insurance for and the ability to buy tags for those vehicles. They must pay for gasoline. They must have the ability to pay for routine maintenance such as oil changes and tire replacements and they must be able to pay for unexpected repairs.

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85. *See id.* at 542.

86. Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987).

87. *See* Ivory v. United States (*In re* Ivory), 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001).

> 5. People must have health insurance or have the ability to pay for medical and dental expenses when they arise. People must have at least small amounts of life insurance or other financial savings for burials and other final expenses.
>
> 6. People must have the ability to pay for some small diversion or source of recreation, even if it is just watching television or keeping a pet.[88]

With these elements in mind, courts are left to analyze debtors' income and expenses and decide whether the debtor has enough money to pay her student loans after paying for the essentials.[89] This forces judges to make subjective evaluations on a case by case basis which naturally results in inconsistent outcomes.[90]

One of these subjective evaluations under the first element involves the court assessing the debtor's expenses and determining whether the debtor could have saved money by making decisions to reduce those expenses, or eliminate them completely.[91] When judges engage in this analysis, it is very easy to be critical of an individual's spending and find areas where an individual could have exercised better spending habits. This natural inclination to be critical of an individual's spending decisions may result in a stricter application of the first prong of the *Brunner* test than was originally intended.[92] For example, in one case the court concluded that the debtor did not satisfy the first prong of the *Brunner* test because he failed to maximize his earnings by pursuing lower paying jobs and he contributed unreasonable amounts of money to charity.[93]

2. Prong Two of the Brunner *Test*

Under the second prong of the *Brunner* test, debtors must present evidence of circumstances out of their control that demonstrate their future inability to pay off their student loan debt.[94] This prong again forces judges to make subjective evaluations that cause inconsistent outcomes, while also requiring them to essentially predict the future. The court in *In re Nys* provided a list of circumstances that have satisfied the second prong of the *Brunner* test in the past which included: (1) "Serious

88. *Id.*
89. *See* Smith, *supra* note 58, at 257–58.
90. *See id.* at 258.
91. *See id.* at 259.
92. *See id.*
93. *See* Educ. Credit Mgmt. Corp. v. Rhodes, 464 B.R. 918, 923, 924 (W.D. Wash. 2012). The debtor contributed an average of $190 per month to the charity, while paying $35 per month toward his student loan debt. *See id.* at 923.
94. *See* Smith, *supra* note 58, at 261.

mental or physical disability of the debtor or the debtor's dependents which prevents employment or advancement;" (2) "The debtor's obligations to care for dependents;" (3) "Lack of, or severely limited education;" (4) "Poor quality of education;" (5) "Lack of usable or marketable job skills;" (6) "Underemployment."[95] From this list, illness and unemployability are particularly common grounds on which student loan debt will be discharged under Chapter 7.[96]

Though these factors are objectively valid and understandable grounds for discharging one's student loan debt, the fact that these are the most common factors sheds light on just how difficult it is to satisfy the *Brunner* test and achieve discharge of student loan debt in bankruptcy. The phrase "certainty of hopelessness" has been used to describe the level that must be reached to satisfy the second prong of the *Brunner* test, but this language seemingly developed through judges' subjective interpretation of the *Brunner* test as it was not provided by the court in *Brunner*.[97] This language has basically injected another requirement into the second prong of the *Brunner* test which has made it even more difficult to satisfy the undue hardship test.[98]

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95. *Id.* at 262 (quoting Nys v. Educ. Credit Mgmt. Corp. (*In re* Nys), 308 B.R. 436, 446–47 (B.A.P. 9th Cir. 2004)).

96. *Id.* at 262, 263.

97. *See, e.g.*, Bukovics v. Navient (*In re* Bukovics), 587 B.R. 695, 707 (Bankr. N.D. Ill. 2018) (quoting Goulet v. Educ. Credit Mgmt. Corp., 284 F.3d 773, 778 (7th Cir. 2002) (court used the "certainty of hopelessness" standard to determine if the plaintiff satisfied the second prong of the *Brunner* test)); Augustin v. U.S. Dep't of Educ. (*In re* Augustin), 588 B.R. 141, 148 (Bankr. D. Md. 2018) (quoting Murphy v. CEO/Manager, Sallie Mae (*In re* Murphy), 305 B.R. 780, 792 (Bankr. E.D. Va. 2004) (court explicitly states that the debtor must present additional circumstances that demonstrate a "certainty of hopelessness" in order to meet the second prong of the *Brunner* test)); Tuttle v. Educ. Credit Mgmt. Corp. (*In re* Tuttle), 600 B.R. 783, 801 (Bankr. E.D. Wis. 2019) (citing *Goulet*, 284 F.3d at 778, 779) (court concludes that the plaintiff failed to show circumstances that rose to the "certainty of hopelessness" standard required by the second prong of the *Brunner* test)); Chenault v. Great Lakes Higher Educ. Corp. (*In re* Chenault), 586 B.R. 414, 420 (B.A.P. 6th Cir. 2018) (quoting Looper v. U.S. Dep't of Educ. (*In re* Looper), No. 05-38187, 2007 Bankr. LEXIS 1482, *17 (Bankr. E.D. Tenn. Apr. 25, 2007) (court uses the phrase "certainty of hopelessness" when describing the requirements under the second prong of the *Brunner* test)); Chance v. United States (*In re* Chance), 600 B.R. 51, 59 (Bankr. S.D. Ind. 2019) (court explicitly states that the plaintiff failed to satisfy the "certainty of hopelessness" requirement)).

98. *See* Rosenberg v. New York State Higher Educ. Servs. Corp. (*In re* Rosenberg), 610 B.R. 454, 462 (Bankr. S.D.N.Y. 2020) (first citing Briscoe v. Bank of N.Y. (*In re* Briscoe), 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981); and then citing Jean-Baptiste v. Educ. Credit Mgmt. Corp. (*In re* Jean-Baptiste), 584 B.R. 574, 588 (Bankr. E.D.N.Y. 2018)).

3. Prong Three of the Brunner *Test*

Finally, under the third prong of the *Brunner* test, the amount of time between the first student loan payment due date and the debtor's date of filing for bankruptcy becomes highly relevant.[99] It makes sense that this duration of time is particularly helpful in convincing judges that a debtor has made a good faith effort to repay student loans.[100] If only a short amount of time has passed between the due date of the debtor's first student loan payment and her filing for bankruptcy, it is practically impossible for a judge to conclude that the debtor has made good faith efforts to repay the student loans.[101] On the contrary, a short passage of time may actually tend to demonstrate bad faith on behalf of the debtor because the natural assumption is that the debtor did not even try to make any payments.[102] In addition, other factors that may be considered under the third prong "include the number of payments the debtor made, attempt to negotiate with the lender, proportion of loans to total debt, and possible abuse of the bankruptcy process."[103]

V. *IN RE ROSENBERG*

A. Introduction to In Re Rosenberg

Judge Cecilia G. Morris claims that other courts that have applied the *Brunner* test in evaluating whether debtors have satisfied the undue hardship test have applied the test incorrectly by allowing "retributive dicta" to be "applied and reapplied so frequently in the context of *Brunner* that they have subsumed the actual language of the *Brunner* test."[104] Judge Morris goes on to state that "[t]his Court will not participate in perpetuating these myths[,]" and that it "will apply the *Brunner* test as it was originally intended."[105]

99. *See* Smith, *supra* note 58, at 266.
100. *See id.*
101. *See id.*
102. *Id.*
103. U.S. Dep't of Educ. v. Wallace (*In re* Wallace), 259 B.R. 170, 185 (Bankr. C.D. Cal. 2000) (quoting Windland v. U.S. Dep't of Educ. (*In re* Windland), 201 B.R. 178, 183–84 (Bankr. N.D. Ohio 1996)).
104. Rosenberg v. New York State Higher Educ. Servs. Corp. (*In re* Rosenberg), 610 B.R. 454, 459 (Bankr. S.D.N.Y. 2020).
105. *Id.* (citing Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 884 (7th Cir. 2013)).

B. Applying the Brunner *Test to* Rosenberg

1. Prong One

Under the first prong of the *Brunner* test, Judge Morris emphasized the fact that the court must base its conclusion regarding whether the debtor can maintain a minimal standard of living on the debtor's *current* income and expenses.[106] Judge Morris immediately strays from the analysis undertaken by many other courts by conducting the analysis of the first prong by utilizing the "means test" instead of utilizing the elements provided by the court in *In re Ivory* or digging into the particulars of where Rosenberg spends his money.[107] Judge Morris concludes that Rosenberg meets the first prong of the *Brunner* test because he has a monthly income of negative $1,548.74, resulting from monthly expenses of $4,005.00 and a monthly income of only $2,456.24, leaving him with nowhere close to enough money to repay his student loan while maintaining a minimal standard of living.[108]

2. Prong Two

Under the second prong, Judge Morris immediately turns to confronting two incorrect claims made by the creditor in the case.[109] Judge Morris first clarifies that the *Brunner* test does not require a finding that the debtor's state of affairs will persist forever.[110] Additionally, Judge Morris states that the second prong does not require the court to "make a determination about whether the Petitioner's 'state of affairs' was created by 'choice' as ECMC suggests in its papers."[111] Judge Morris explains that it is only necessary to consider "whether the Petitioner's present state of affairs is likely to persist 'for a significant portion of the repayment period of the [current contractual] student loans."[112] This prong is where many courts have used the "certainty of hopelessness" language as the bar that must be reached in order to satisfy the second prong of the

106. *Id.* at 459 (citing Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987)).

107. *See id.* (first citing 11 U.S.C § 707(b)(2); and then citing *In re* Perelman, 419 B.R. 168, 172 (Bankr. E.D.N.Y. 2009)).

108. *See id.* at 460.

109. *See Rosenberg*, 610 B.R at 461 (citing Norasteh v. Boston Univ. (*In re* Norasteh*)*, 311 B.R. 671, 678 (Bankr. S.D.N.Y. 2004)).

110. *Id.*

111. *Id.*

112. *Id.* (alteration in original) (citing ROBERT LAWLESS, AMERICAN BANKR. INST., FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY 12 (2019)).

Brunner test.[113] However, Judge Morris discards this language and takes a very practical approach to determining whether Rosenberg's state of affairs will persist for a significant portion of the repayment period.[114] With respect to Rosenberg's particular circumstances, Judge Morris concludes that since Rosenberg's student loan is in default, and due in full, "his circumstances will certainly exist for the remainder of the repayment period[.]"[115]

3. Prong Three

Finally, under the third prong of the *Brunner* test Judge Morris begins by drawing attention to the language "the debtor *'has made'* good faith efforts to repay the loans."[116] Judge Morris focuses attention on the phrase "has made" in order to demonstrate that "[i]t is therefore inappropriate to consider: Petitioner's reasons for filing bankruptcy; how much debt he has; or whether the Petitioner rejected repayment options."[117] At the outset, Judge Morris notes that Rosenberg only missed sixteen payments over the course of nearly thirteen years.[118] Judge Morris also points out that during a period of forbearance Rosenberg continued to make payments, despite not being required to do so.[119] Based on this information Judge Morris concluded that Rosenberg made a good faith effort to repay his student loan and ultimately reached the conclusion that Rosenberg satisfied the undue hardship requirement.[120]

C. Is Judge Morris's Application of the Brunner *Test Actually Different?*

After walking through Judge Morris's analysis of the *Brunner* test in the context of Rosenberg's financial circumstances, it is clear that she adopted a far more relaxed application of the *Brunner* test as compared to other courts that have considered student loan debt discharge requests

113. *Id.* at 458–59 (citing Briscoe v. Bank of N.Y. (*In re* Briscoe), 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981); and then citing Jean-Baptiste v. Educ. Credit Mgmt. Corp. (*In re* Jean-Baptiste), 584 B.R. 574, 588 (Bankr. E.D.N.Y. 2018)).

114. *See Rosenberg*, 610 B.R at 461.

115. *See id.*

116. *Id.* (emphasis added) (quoting Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987)).

117. *Id.* (citing Kelly v. Sallie Mae Serv. (*In re* Kelly), 351 B.R. 45, 54–55 (Bankr. E.D.N.Y. 2006) (concluding the debtor failed to show good faith because she rejected consolidation options)).

118. *See id.* at 461–62.

119. *See Rosenberg*, 610 B.R at 462.

120. *Id.* (citing 11 U.S.C. § 523(a)(8)).

in bankruptcy court.[121] First of all, Judge Morris's use of the "means test" to guide her analysis under the first prong of the *Brunner* test is an entirely new approach to evaluating whether the debtor could maintain a minimal standard of living while repaying the student loan debt.[122] This approach makes total sense, especially when one remembers that the third prong of the *Brunner* test centers on the debtor's good faith in attempting to repay the student loan debt.[123] The current analysis under the first prong varies widely and overlaps with the third prong because judges will often try to gauge whether an individual is exercising smart money management.[124] Simplifying the analysis under the first prong of the *Brunner* test by holding that an individual automatically satisfies the first prong if he satisfies the "means test" eliminates this duplicity and will sufficiently address whether a debtor can maintain a minimal standard of living in most cases.

Next, Judge Morris departs the farthest from the usual application of the *Brunner* test under the second prong.[125] Under this prong Judge Morris explicitly expresses her disapproval of the "certainty of hopelessness" language that has "become a quasi-standard of mythic proportions so much so that most people (bankruptcy professionals as well as lay individuals) believe it impossible to discharge student loans."[126] Even if courts do not expressly use the "certainty of hopelessness" language in determining if the circumstances are likely to persist for a significant portion of the repayment period, the factors that courts have used tend to set a relatively high bar.[127] Judge Morris even departs from these factors and simply approaches Rosenberg's situation from a practical standpoint in finding that the conditions will persist because the repayment period has technically ended.[128] As a result, although Judge Morris has clearly strayed from the traditional analysis of

121. *See supra* Part IV.B.1. (describing part one of the *Brunner* test where the court assesses the debtor's expenses and determines whether the debtor could have saved money by making decisions to reduce those expenses or eliminate them completely).

122. *See Rosenberg*, 610 B.R at 460.

123. *Id.* at 461 (quoting Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987)).

124. *See* Smith, *supra* note 58, at 259.

125. *See Rosenberg*, 610 B.R. at 461 (citing Norasteh v. Boston Univ. (In re Norasteh), 311 B.R. 671, 678 (Bankr. S.D.N.Y. 2004)); *but see Brunner*, 831 F.2d at 396 ("The record demonstrates no 'additional circumstances' indicating a likelihood that her current inability to find any work will extend for a significant portion of the loan repayment period.").

126. *Id.* at 459.

127. *See supra* Part IV.B.2. (describing part two of the *Brunner* test where debtors must present evidence of circumstances out of their control that demonstrate their future inability to pay off their student loan debt, and the subjective evaluations involved therein).

128. *See Rosenberg*, 610 B.R at 461.

the second prong,[129] it is difficult to know how Judge Morris would have handled the second prong if the repayment period were still active.

Finally, under the third prong Judge Morris again finds a way to differentiate her approach from past practices.[130] Under this prong Judge Morris's analysis closely resembles the good faith evaluation that other courts have conducted, but offers a warning at the outset about the specific language that should be used to guide the analysis.[131] Judge Morris issues this warning to signal that she will only evaluate the debtor's behavior that took place before he filed for bankruptcy.[132] Aside from this warning, Judge Morris applies the third prong much like other courts have in the past.[133] Judge Morris considered the amount of time that passed since the start date of the student loan and assessed Rosenberg's payment history, including any periods of deferment or forbearance.[134]

VI. SHOULD FUTURE COURTS RELAX THE *BRUNNER* TEST?

Having established that Judge Morris applied the *Brunner* test in a more relaxed way that reflected how it was originally intended to be applied,[135] it is necessary to determine whether future courts should follow in Judge Morris's steps. Judge Morris makes a very compelling argument that courts have been applying the *Brunner* test in a stricter and more punitive manner than the text of the *Brunner* test itself provides for and intended.[136] Furthermore, Judge Morris supports these claims by pointing to cases in which the test has been made stricter and cases which have perpetuated these heightened requirements.[137] For example, Judge Morris attributes the court in *In re Briscoe* with inventing the phrase "certainty of hopelessness" which has been used to elevate the second prong of the *Brunner* test to a practically insurmountable level.[138] Judge

129. *Compare Brunner*, 831 F.2d at 396–97, *with Rosenberg*, 610 B.R at 461.

130. *Compare Rosenberg*, 610 B.R. at 461 (quoting *Brunner*, 831 F.2d at 396), *with* Kelly v. Sallie Mae Serv. (*In re* Kelly), 351 B.R. 45, 54–55 (Bankr. E.D.N.Y. 2006) (concluding the debtor failed to show good faith because she rejected consolidation options).

131. *See Rosenberg*, 610 B.R. at 461 (citing *Kelly*, 351 B.R. at 54–55).

132. *See id.*

133. *See id.* at 461–62.

134. *See id.* at 462.

135. *See supra* Part V.C. (comparing Judge Morris's application of the *Brunner* test to more traditional applications of the test).

136. *See Rosenberg*, 610 B.R. at 458.

137. *See id.* at 458–59 (first citing Briscoe v. Bank of N.Y. (*In re* Briscoe), 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981); and then citing Jean-Baptiste v. Educ. Credit Mgmt. Corp. (*In re* Jean-Baptiste), 584 B.R. 574, 588 (Bankr. E.D.N.Y. 2018)).

138. *See id.* at 459 (citing *Briscoe*, 16 B.R. at 131).

Morris also offers a fairly recent case to show that courts are still requiring debtors to satisfy the "certainty of hopelessness" standard.[139]

If nothing else, courts in the future should at least abandon this "certainty of hopelessness" standard when evaluating whether debtors have satisfied the second prong of the *Brunner* test. As Judge Morris wisely notes, "a harsh standard made sense when student loans were fully dischargeable after making only five years of payments and when the total due on the loan was approximately $9,000 for both undergraduate and graduate student loans."[140] However, this harsh standard is no longer necessary especially when considering how difficult it is to satisfy all three prongs of the *Brunner* test.[141]

It would also make sense for future courts to adopt Judge Morris's method of approaching the first prong of the *Brunner* test. Instead of forcing judges to make subjective determinations about how debtors should spend their money, those seeking the discharge of student loan debt should automatically satisfy the first prong of the *Brunner* test so long as they have satisfied the "means test." Doing so would simplify the *Brunner* test dramatically because it would decrease the overlap between the first prong and the third prong while simultaneously achieving the purpose of the first prong.

Other law journal articles that address the discharge of student loan debt through Chapter 7 bankruptcy argue that 11 U.S.C. § 532(a)(8) should be repealed and student loan debt should be treated the same as any other type of unsecured debt.[142] However, this approach may actually go too far. Genuine and logical reasons existed for categorizing student loan debt as mostly exempt from Chapter 7 bankruptcy discharge and those reasons remain true today, perhaps even more than they did when section 532(a)(8) first took effect.[143] Students are burdened by massive amounts of debt and the prospect of paying down the entire amount is extremely daunting, which has caused many to search for ways of escaping this heavy burden.[144] However, bankruptcy is not and should not be the solution to our country's student debt crisis. The *Brunner* test

139. *See id.* (citing *Jean-Baptiste*, 584 B.R. at 588).

140. *Id.* n.3 (citing Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 753 (S.D.N.Y. 1985)).

141. *See Rosenberg*, 610 B.R. at 458 (citing Gesinde v. U.S. Dep't of Ed. (*In re* Gesinde), 2019 Bankr. LEXIS 3250, *13–14 (Bankr. S.D.N.Y. Oct. 10, 2019).

142. *See, e.g.*, Huey, *supra* note 35, at 119.

143. *See id.* at 97–98.

144. *See PSLF*, *supra* note 71; *see also Chapter 7 – Bankruptcy Basics*, U.S. COURTS, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics (last visited Oct. 31, 2020) (describing alternatives to Chapter 7 bankruptcy for debtors seeking relief).

provides the perfect balance because it allows those who are truly crippled by their student debt to seek discharge through bankruptcy and aims to weed out those who are simply seeking an easy way out from under their debt.

Even though this Note does not advocate that 11 U.S.C. § 532(a)(8) should be repealed, it would be naïve to suggest that the extreme cost of education is something our students simply need to accept. The cost of education and the amount of debt that the average college student graduates with confines them to a metaphorical debtor's prison for years to come.[145] Students with loan debt are forced to live paycheck to paycheck and are unable to spend money and save for their futures because of the massive pile of debt that they must crawl out from under first.[146] As a result, this Note supports efforts to reduce the weight of the burden that student loan debt imposes on students, while also making the statement that bankruptcy is not the proper avenue for such relief.

Overall, Judge Morris's approach to the application of the *Brunner* test should be implemented by future courts handling the question as to whether a debtor's student loan debt should be discharged through Chapter 7 bankruptcy. Judge Morris's approach finds the perfect happy medium between helping those who are in desperate need of student loan debt discharge and those who are hoping to find an easy path to becoming student loan debt free.

CONCLUSION

Student load debt was excluded from the general discharge of debt that occurs under Chapter 7 because of fears, and actual instances of students attempting to take advantage of the bankruptcy system by receiving a discharge of their student loan debt shortly after graduating. These concerns are very much still relevant today in light of the current student loan debt statistics.[147] However, some sort of reform of the current process under Chapter 7 discharge of student loan debt needs to take place in order to make it a realistic vehicle for providing relief to those who are truly deserving of a fresh start.

If there is one takeaway from exploring the undue hardship requirement with a primary focus on how it is proved under the *Brunner* test, it is that the judges in bankruptcy courts have incredible discretion in determining whether an individual has met each of the three prongs

145. *See generally* Hager, *supra* note 11 (describing the history of debtors' prisons in the United States).

146. *See* Friedman, *supra* note 7.

147. *See* Friedman, *supra* note 7.

under the *Brunner* test. This discretion has led to certain courts implementing and perpetuating standards that have essentially supplanted the original requirements under the *Brunner* test, increasing the level of difficulty in successfully receiving a student loan debt discharge. This Note urges courts to utilize this expansive discretion allotted them to dismantle the additional obstacles that have been erected throughout the application of the *Brunner* test and to follow in the footsteps of Judge Morris in applying the test as it was intended.

The most important changes that courts should consider when applying the *Brunner* test to determine if a debtor's student loan debt should be discharged under Chapter 7 are the discarding of the "certainty of hopelessness" standard under the second prong and the implementation of the "means test" within the first prong of the *Brunner* test. Judge Morris clearly demonstrated the origin of the "certainty of hopelessness" standard and provided an extremely reasonable and convincing explanation of why the use of the "certainty of hopelessness" standard is unnecessarily punitive and no longer applicable under the consideration of student loan debt discharges.

Additionally, implementing the "means test" as a component of the first prong of the *Brunner* test will simplify the process immensely for judges while upholding the ultimate purpose of the first prong. Using the "means test" under the first prong will make it unnecessary for judges to engage in subjective evaluations of the way in which debtors are spending their money. Furthermore, using the "means test" will make the process more efficient because judges will not be engaging in duplicative evaluations of debtors' payment history. As the *Brunner* test is currently applied, the first prong and the third prong overlap because each of them involve looking at the debtor's payments.[148]

Ultimately, Judge Morris demonstrated that the *Brunner* test is salvageable and that it can be used in an effective way to determine when a debtor qualifies to have her student loan debt discharged through Chapter 7 bankruptcy.[149] However, whether Judge Morris's application of the *Brunner* test and decision to discharge Rosenberg's student loan debt will be upheld is now a question to be answered by the United States District Court on appeal.[150]

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148. The first prong is concerned about what the debtor is spending his money on while the third prong is focused primarily on whether good faith efforts are being made to repay the student loan debt, which can involve looking at how the debtor is spending his money.

149. *Rosenberg*, 610 B.R. at 458, 459.

150. *See* Aarthi Swaminathan, *Student Loan Servicer Appeals Landmark $220,000 Bankruptcy Ruling*, YAHOO! FIN. (Jan. 24, 2020), https://finance.yahoo.com/news/student-loans-bankruptcy-ruling-131844930.html.