

STUDENT LOANS AND SURMOUNTABLE
ACCESS-TO-JUSTICE BARRIERS

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INTRODUCTION

Professor Rafael I. Pardo has done much to advance our understanding of the student loan discharge process and the hurdles that student loan debtors must surmount in order to obtain relief. In a series of three earlier articles, he reviewed student loan discharge attempts and found that legally irrelevant considerations play a significant role in whether debtors receive a discharge.¹

In his latest piece, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*,

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1. See Rafael I. Pardo, *Illness and Inability to Repay: The Role of Debtor Health in the Discharge of Educational Debt*, 35 FLA. ST. U. L. REV. 505, 517 (2008) (explaining that “of the three most prevalent factors (i.e., the debtor’s health status, monthly household income, and monthly household expenses), only a debtor’s health status had a statistically significant association with legal outcome”); Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 185 (2009) [hereinafter Pardo & Lacey, *The Real Student-Loan Scandal*] (noting that “factors unrelated to the command of the law” account for the disparate treatment of student loan debtors); 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, 433 (2005) (noting that “the law has not treated student loan debtors uniformly”).

Pardo once again tackles the subject of student loan litigation.² This time, however, he examines the other party to the dispute—the student loan creditor. Specifically, Pardo makes a compelling case that student loan creditors have an advantage over individual debtors in the litigation process.³ Using Educational Credit Management Corporation (ECMC) as a case study, he presents an illuminating look at some of the litigation tactics that student loan creditors can use to tilt the field in their favor.⁴

Pardo, however, uses the evidence of ECMC's illegitimate tactics to present a view of the student loan landscape that is far too dire; he depicts a system in which debtors are faced with almost insurmountable access-to-justice barriers.⁵ Pardo is correct in his assertion that student loan debtors are at a disadvantage compared to their creditors, but the situation is not as hopeless as he suggests. Quite simply, the data do not support his pessimism regarding the ability of debtors to discharge their student loans.

In the 2012 edition of the *American Bankruptcy Law Journal*, I published a study that examined a nationwide sample of student loan discharge proceedings.⁶ The data showed that, although discharging student loans is not easy, it is far less difficult than scholars have long maintained. Nearly 40% of debtors who attempted to discharge their student loans were at least partially successful.⁷ Despite this success rate, less than 0.1% of student loan debtors who filed for bankruptcy sought a discharge.⁸ This figure is even more concerning in light of the fact that many of the 99.9% of debtors who did not seek discharges found themselves in financial positions that were just as bad as the debtors who successfully obtained discharges.⁹ This finding led me to conclude that the most significant problem with the undue hardship standard is that almost no one attempts to satisfy it.

In his article, Pardo undertook an in-depth review of my study and questioned its findings.¹⁰ Although many of Pardo's concerns are thoughtfully presented, they ultimately miss their mark. In this piece, I respond on two counts. First, I argue that Pardo's criticisms do not

2. Rafael I. Pardo, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*, 66 FLA. L. REV. 2101 (2014).

3. *See id.* at 2107.

4. *Id.* at 2105.

5. *See id.* at 2173.

6. Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495 (2012).

7. *See id.* at 505 (finding that, of the debtors who filed an adversary proceeding for discharging their student loans, 25% received a full discharge and 14% received a partial discharge).

8. *Id.*

9. *See id.* at 523–24.

10. Pardo, *supra* note 2, at 2124–42.

undermine my study's conclusions. Second, I argue that the widespread pessimism regarding the current undue hardship standard should be tempered.

Admittedly, the undue hardship standard is neither a perfect nor even a particularly reasonable provision.¹¹ However, the standard is also not an impossible hurdle. There is hope in the current system, and as flawed as the undue hardship standard is, one must be careful not to present an unduly pessimistic view. Doing so will only serve to discourage many student loan debtors from seeking the bankruptcy relief they need.

I. FINDINGS AND CONCLUSIONS FROM THE 2012 AMERICAN BANKRUPTCY LAW JOURNAL STUDY

Student loans are unusual. Whereas the vast majority of debts are automatically discharged in bankruptcy, student loans are not.¹² Instead, they are dischargeable only if the debtor can show—through an adversary proceeding—that repaying the loans would inflict an “undue hardship.”¹³

My 2012 article examined how bankruptcy judges apply the undue hardship standard.¹⁴ I sought to test the veracity of the traditional narrative surrounding student loan discharges—a narrative that maintains that it is all but impossible for people to discharge their student loans in bankruptcy. The data showed that this view of the undue hardship standard is not empirically supported.¹⁵ Several key findings led me to that conclusion.

First, as mentioned above, nearly 40% of debtors who attempted to discharge their student loans received either a partial or full discharge.¹⁶ Second, debtors with attorneys fared no better than pro se debtors.¹⁷ Third, judges applied the undue hardship standard in a relatively consistent manner.¹⁸ And fourth, an astonishingly small number of student loan debtors ever seek a discharge.¹⁹ More specifically, I calculated that, each year, more than 200,000 student loan debtors file for bankruptcy, but only a few hundred of those ever file an adversary proceeding to attempt to discharge their loans.²⁰ This means that more than 99% of the bankruptcy filers with student loans do not request a

11. As I discuss in my earlier article, it makes no sense that debtors must meet the undue hardship standard to discharge private student loans. *See* Iuliano, *supra* note 6, at 524 n.92.

12. 11 U.S.C. § 523(a)(8) (2012).

13. *Id.*

14. *See* Iuliano, *supra* note 6.

15. *See id.* at 522–23.

16. *See id.* at 505.

17. *See id.* at 507, 516 (finding that 43% of pro se debtors received a discharge but only 38% of debtors with attorneys received a discharge).

18. *See id.* at 512–22.

19. *See id.* at 522.

20. *See id.* at 505.

discharge from the court. That is a startling statistic, and it is even more troubling given the fact that many of these debtors who do not attempt to discharge their student loans are in worse financial positions than those who were able to successfully discharge their student loans.²¹

These findings led me to conclude that the criticisms directed at the undue hardship standard are overstated. Although the standard is far from ideal, it is not nearly as oppressive as commonly believed. The real issue is that the vast majority of people who would satisfy the undue hardship standard never petition the courts for a discharge.²² Ultimately, I recommended that consumer bankruptcy advocates identify bankruptcy filers who would likely meet the undue hardship requirement and encourage them to pursue discharges.²³ Contrary to conventional wisdom, judges are willing to grant discharges. The problem is that few people ever ask.

Recently, even ECMC recognized the inaccuracy of the traditional narrative. In 2012, at the time my study was published, ECMC's website presented a very bleak picture, claiming that student loans are "rarely" discharged.²⁴ Today, that very same webpage forgoes discussion of probabilities and adopts a more measured, factual position. It merely reports, "Congress intended that discharge for undue hardship be reserved for individuals facing more than the financial hardship that accompanies all bankruptcies. . . . [I]t is up to the bankruptcy court to determine if your situation meets the legal standard set by Congress."²⁵ In short, ECMC knows that it can no longer credibly advance a narrative of hopelessness.

II. MY RESPONSE TO PROFESSOR PARDO'S CRITIQUE

In *The Undue Hardship Thicket*, Pardo disputes my contention that the traditional narrative is incorrect.²⁶ He critiques my study along a variety of dimensions and argues that my conclusions are not supported by the data.²⁷ In this Part, I respond.

21. *See id.* at 523–24 (estimating that an additional sixty-nine thousand student loan debtors in bankruptcy would have had a good chance of discharging their student loans).

22. *Id.*

23. *See id.* at 525.

24. Ron Lieber, *Last Plea on School Loans: Proving a Hopeless Future*, N.Y. TIMES (Aug. 31, 2012), <http://www.nytimes.com/2012/09/01/business/shedding-student-loans-in-bankruptcy-is-an-uphill-battle.html>.

25. *Bankruptcy and Student Loans*, ECMC, <https://www.ecmc.org/borrowers/bankruptcy-and-student-loans.html> (last visited Mar. 22, 2016).

26. Pardo, *supra* note 2, at 2126–42.

27. *See id.*

A. *Sample Composition*

Pardo raises two primary criticisms of my study's sample. First, he claims that I failed to consider all cases from the relevant time period. Second, he states that my search methods for collecting the test sample resulted in undercounting. I reject both of these claims in the following sections.

1. Time Period

With respect to the sample's time period, Pardo critiques my study for "omit[ting] adversary proceedings filed in 2007 in connection with cases that were commenced *prior* to 2007."²⁸ He notes that excluding these proceedings could be problematic because "circumstances surrounding the claim of undue hardship for the delaying filers could be very different than those of the non-delaying filers."²⁹

This problem, however, does not apply to my study. My sample included adversary proceedings initiated in 2007, regardless of the year in which the underlying bankruptcy case was filed. In fact, a full 40% of the debtors in my sample filed for bankruptcy prior to 2007. I did not break down this figure in my original article, so to the extent there was any ambiguity, I use this opportunity to clarify the record.

2. Undercounting

Another criticism Pardo advances is that my sample significantly undercounted the true number of student loan discharge attempts.³⁰ Specifically, Pardo argues that my search methodology was flawed and that I should have searched for student loan cases either by using PACER's Nature of Suit (NOS) Code or by individually searching each bankruptcy court's PACER database for adversary proceedings.³¹ I look at both of these alternatives, in turn.

Pardo correctly claims that an NOS search would have revealed some student loan proceedings that my search methodology failed to identify.³² However, at the time I gathered my sample, PACER did not have the option to conduct such a search. In his article, Pardo speculates that this may have been the case,³³ so I write here merely to confirm that point. Given the inability to perform an NOS search at

28. *Id.* at 2126–27.

29. *Id.* at 2127.

30. *See id.* at 2129 (writing that my study's "search approach likely resulted in a significant undercounting of student-loan adversary proceedings filed in 2007").

31. *See id.* at 2127–29.

32. *See id.* at 2128.

33. *See id.* (noting that "it may be that the search functionality by NOS Code was unavailable during the Iuliano Study").

the time of my study, this option was not a viable alternative.

Pardo's second recommendation would have required searching each of the ninety-one bankruptcy court databases for all the adversary proceedings filed in 2007 and then individually reviewing every search result. In theory, this was a possible option. However, because nearly fifty thousand adversary proceedings were filed in 2007,³⁴ this would have been an extremely time-intensive task and, as I discuss below, would have been unlikely to alter my findings. Given the limitations of Pardo's alternative search methodologies, the Party Name search that I employed was the most practical option.³⁵

That said, because the methodologies do yield a different number of search results, it is worth examining whether my decision to search via the Party Name field could have influenced my findings. An NOS search—which as noted, only became possible after my study—reveals that 445 student loan debtors filed undue hardship proceedings during 2007.³⁶ As I discussed in my original study, given the nature of a Party Name search, my search terms were not designed to identify every case.³⁷ Unlike the NOS search, which searches all filings, my search methodology included only cases involving ECMC and the ten largest student loan creditors.³⁸ This search process identified 213 debtors.³⁹ Restricting the search parameters in this manner would necessarily omit cases.⁴⁰ However, given that these ten creditors hold more than 70% of the student loan debt, I argued that the omissions would not skew my findings and that the sample would be representative of student loan adversary proceedings generally.⁴¹

Pardo disagrees with this assessment. He is concerned that the omitted cases systematically differ from my sample cases along dimensions that affect discharge success.⁴² In particular, he argues that my sample is biased because it likely excluded a disproportionate number of cases involving the U.S. Department of Education (DOE).⁴³ Pardo writes that

34. JAMES C. DUFF, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 35 (2008) (noting that there were 49,976 adversary proceedings filed in 2007).

35. See Iuliano, *supra* note 6, at 502 (“Given PACER’s deficiencies, the most efficient way to gather a nationwide sample of student loan debtors was to limit the search by specific education loan holders.”).

36. See Pardo, *supra* note 2, at 2129 n.176.

37. See Iuliano, *supra* note 6, at 502.

38. *Id.* at 504–05 (noting that the creditors in the study held 71.2% of student loan debt).

39. *Id.* at 503 (noting that, because four debtors filed separate complaints, there were 217 adversary proceedings but only 213 unique debtors).

40. *Id.*

41. See *id.* at 504–05.

42. See Pardo, *supra* note 2, at 2129–31.

43. *Id.* at 2130 (noting that my study “omitted a search for adversary proceedings involving the U.S. Department of Education”).

“[t]his is quite significant given the Pardo–Lacey Study’s finding that the amount of debt discharged was *negatively* correlated with the involvement of the DOE as a party in the adversary proceeding.”⁴⁴

This concern is unwarranted for three reasons. First, even though I did not search specifically for adversary proceedings involving the DOE, the DOE was nonetheless a creditor in 28% of the cases in my sample. By comparison, in the sample from the Pardo–Lacey Study, the DOE was involved in approximately 33% of student loan cases.⁴⁵ This small difference suggests that my search protocol did not systematically undercount DOE cases.

The second reason this objection fails is that, in my sample, there was no difference in discharge rates between cases involving the DOE and those not involving the DOE. A nonparametric Wilcoxon rank-sum test indicated that any discharge differences between the two groups (DOE involvement and no DOE involvement) are not statistically significant ($p = 0.60$).⁴⁶ Admittedly, absence of evidence is not evidence of absence; therefore, the Wilcoxon rank-sum test does not permit me to claim that no difference exists. However, I subsequently conducted an equivalence test—a statistical test that does allow for that inference.⁴⁷ The equivalence test showed that the rates of success for the two populations are likely quite similar.⁴⁸

A third and final point further supports my contention that any omitted DOE cases do not bias my results. In my sample, DOE involvement was positively correlated with the amount of debt discharged. This means that student loan debtors actually fared better in cases in which the DOE was a creditor. Specifically, the mean percentage of debt discharged in adversary proceedings involving the DOE is 37%, but it is only 32% in cases in which the DOE is not a party. Accordingly, to the extent my sample omitted any cases involving the DOE, it biased the findings *against* my conclusions, not—as Pardo argues—in favor of them.

44. *Id.* at 2130–31.

45. Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 1, at 209. The Pardo–Lacey Study identified all student loan cases in the state of Washington from 2002 through 2006. *Id.* at 202.

46. This is in contrast to the Pardo–Lacey Study in which there was a statistical difference. *See id.* at 222.

47. Specifically, I employed the two one-sided tests approach.

48. This statistical technique is essentially the reverse of a normal t-test. For this equivalence test, the null hypothesis holds that there is a statistically significant difference between the discharge rates in the two populations, and the alternative hypothesis holds that there is no significant difference in discharge rates when the DOE is involved versus when it is not. Setting the null hypothesis to a difference of twenty percentage points, this analysis yields significant results ($p < 0.05$) on both sides of the test. *See infra* Table 1 in Appendix A. In other words, I am quite confident that the means of both populations fall within twenty percentage points of each other. The sample, unfortunately, is too small to make a more fine-grained assessment. *See infra* Table 1 in Appendix A.

Therefore, if Pardo's claim that I undercounted DOE cases is correct, it only serves to strengthen my argument that many more debtors can successfully navigate the student loan discharge process.

B. *Study Design*

Pardo advances several critiques regarding the design of my study. In this Section, I address three of his primary contentions. First, I explain why the coding bias that he alleges exists did not skew the results in favor of my conclusion. Next, I examine the impact of using the 2007 Health and Human Services poverty guidelines rather than the 2008 guidelines. Finally, I defend my interpretation of the good faith requirement.

1. Default Judgments and Dismissals

Pardo argues that I inappropriately coded default judgments against the student loan creditor as providing relief and adversary proceeding dismissals as yielding no relief.⁴⁹ Pardo's objection raises an important point: default judgments do not always produce relief, and dismissals sometimes do. Indeed, when deciding how to code such outcomes, I considered—but ultimately rejected—this concern. For the following three reasons, I believe my decision is the correct one.

First, in the vast majority of cases, my assumptions—that a default judgment reduces liability and that a dismissal results in no relief—are likely to be true. Although there are certainly exceptions,⁵⁰ a default judgment against a creditor is generally a favorable judgment for a debtor.⁵¹ Likewise, a dismissal will normally not lead to relief for a debtor.⁵²

Second, the assumptions used in my coding heavily bias the data *against* my conclusions. If I substituted Pardo's assumptions (i.e., some of the default judgments yielded no relief, and some of the dismissals resulted in relief) for my own, the data would show that a substantially higher percentage of student loan debtors who file an adversary proceeding actually receive a discharge. This is the case because my sample contained far more dismissals than default judgments (ninety versus four).⁵³ Accordingly, under Pardo's assumptions, there would be

49. Pardo, *supra* note 2, at 2131–32 (arguing that my conclusions “rest on potentially inaccurate coding protocols for relief”).

50. See FED. R. CIV. P. 55(c) & 60(b) (rules for setting aside a default judgment and grounds for relief from a default judgment).

51. See *Default Judgment*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining “default judgment” as “[a] judgment entered against a defendant who has failed to plead or otherwise defend against the plaintiff's claim”).

52. See *Dismissal*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining “dismissal” as the “[t]ermination of an action or claim without further hearing”).

53. Iuliano, *supra* note 6, at 500 n.30.

significantly more dismissals that resulted in relief than default judgments that yielded no relief. On balance, this would indicate that an even higher percentage of student loan debtors obtain relief. Therefore, if Pardo's critique were accurate, it would actually strengthen my argument that many more student loan debtors could successfully obtain relief.

Third, my coding protocol is sufficiently fine-grained to sort out many of the dismissals that ultimately resulted in relief. When advancing his argument that I incorrectly coded dismissals, Pardo raises the possibility that I failed to account for dismissals in which the proceeding was dismissed for the purpose of allowing the debtor to take advantage of an administrative discharge.⁵⁴ Pardo points to the total and permanent disability program as one salient example.⁵⁵ Although I did not discuss this particular point in the study, my coding did account for this outcome. When an administrative discharge that would completely discharge the loan was stipulated in the court record, I coded the case as involving a discharge.⁵⁶

This situation occurred eight times. Those filings were normally titled as "Agreed Order Discharging Student Loan Debt"⁵⁷ or "Stipulation Agreeing to Discharge Student Loan."⁵⁸ They generally contained a provision stating that the parties reached an agreement, wherein the DOE agreed to discharge the debtor's student loan debt based on the debtor's "Total and Permanent Disability."⁵⁹ Although these are technically voluntary dismissals that led to administrative remedies, I coded them as involving a discharge of student loans. Given that the parties referred to the outcome as a "discharge"⁶⁰ and that there is no way to tell whether these specific debtors would have been granted administrative relief if

54. Pardo, *supra* note 2, at 2131.

55. *Id.*

56. There is, admittedly, a sentence in the original article that could have justifiably led Pardo to conclude that I failed to take this step. Specifically, the sentence reads, "I categorize administrative remedies as a form of 'no relief' in the rest of this article." Iuliano, *supra* note 6, at 506. This sentence, however, was in the context of a discussion about long-term administrative remedies (such as income-based repayment plans) and was meant to refer only to that set of administrative remedies. Accordingly, a clearer version of this sentence would read, "I categorize these administrative remedies as a form of 'no relief' in the rest of this article."

57. *See, e.g.*, Agreed Order Discharging Student Loan Debt at 1, *Savage v. U.S. Dep't of Educ.*, No. 2:06-bk-72392 (Bankr. W.D. Ark. Oct. 24, 2008).

58. *See, e.g.*, Stipulation Agreeing to Discharge Student Loan, *Loudy v. Educ. Credit Mgmt. Corp.*, No. 05-14140 EEB (Bankr. D. Colo. May 26, 2009).

59. *See, e.g.*, Agreed Order Discharging Student Loan Debt, *supra* note 57, at 1; *see also* Stipulation Agreeing to Discharge Student Loan, *supra* note 58 (showing that the parties agree to a dismissal and noting that "[t]he debtor's application for an administrative discharge has been approved by the U.S. Department of Education").

60. Stipulation Agreeing to Discharge Student Loan, *supra* note 58.

they had not filed an adversary proceeding,⁶¹ I believe this is the best possible coding protocol. For the above three reasons, my coding decisions with respect to dismissals and default judgments are unlikely to bias any of my findings.

2. Poverty Guidelines

Pardo also criticizes my use of the 2007 Health and Human Services poverty guidelines to calculate the percentage of debtors in my sample who were living below the poverty line. He observes that, because my sample is drawn from 2007, I should have used the 2008 Health and Human Services poverty guidelines rather than the 2007 guidelines.⁶² Pardo is correct; this is an error on my part. The error, however, is completely inconsequential.

Annual changes in the poverty threshold are extremely small. For instance, the 2007 poverty line for a single-person household in the forty-eight contiguous states and the District of Columbia was \$10,210.⁶³ In 2008, that figure was \$10,400.⁶⁴ Given the minor differences, it should not be surprising that updating my data to reflect the 2008 values had no effect on any of my findings. In fact, regardless of whether I used the 2007 or 2008 figures, 27% of the debtors in my sample were living below the poverty line.

3. Good Faith Requirement

In his article, Pardo claims that I “made unsubstantiated, patently incorrect assertions regarding the undue hardship doctrine.”⁶⁵ He believes that my discussion of the good faith prong of the *Brunner* test shows that my study lacked “the proper lens to carefully and critically analyze the primary materials it reviewed to gather the data upon which its findings are based.”⁶⁶

Specifically, Pardo disagrees with my statement that a debtor’s “[c]urrent employment status is irrelevant as to whether the debtor made a good faith effort to repay student loans in the past.”⁶⁷ In advancing this argument, Pardo begins by citing to a case from the U.S. Court of Appeals for the Ninth Circuit that states, “Good faith is measured by the debtor’s

61. In theory, there should be no difference. However, from reading complaints, it is clear that some people who had previously attempted to procure administrative discharges were only granted them after filing an adversary proceeding.

62. Pardo, *supra* note 2, at 2133–34.

63. U.S. DEP’T OF HEALTH & HUM. SERVS., THE 2007 HHS POVERTY GUIDELINES 3 (2007).

64. *The 2008 HHS Poverty Guidelines*, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://aspe.hhs.gov/2008-hhs-poverty-guidelines> (last visited Mar. 4, 2016).

65. Pardo, *supra* note 2, at 2134.

66. *See id.* at 2134–35.

67. *See id.* at 2134; Iuliano, *supra* note 6, at 517.

efforts to obtain employment, maximize income, and minimize expenses.”⁶⁸ He then writes that “[i]t goes without saying that a debtor who actually is employed has made an effort to gain employment.”⁶⁹ From this, Pardo concludes that employment status provides evidence of good faith.

His conclusion, however, misses an important part of the case law. When the court states that “efforts to obtain employment” indicate good faith, it is referring to a specific type of effort—namely, effort directed toward obtaining the appropriate kind of job.⁷⁰ This is what courts mean when they say “good faith effort.”⁷¹ Although a debtor who has a job has likely made some effort to obtain that job, it does not follow that the debtor has undertaken the good faith effort that courts require.⁷²

For instance, imagine a law school graduate who takes a job as a cashier at a fast food restaurant without ever applying for higher paying legal jobs. This debtor has certainly made an effort to obtain a job. However, he will be unable to convince any court that he has made a *good faith* effort under the *Brunner* test.⁷³ According to case law, current employment status cannot indicate whether a debtor has made a good faith effort to repay his loans. Other factors are determinative. Given the courts’ interpretation of the *Brunner* test, my statement accurately reflects the present state of the law.

This point aside, it is worth noting that this is another criticism that, even if true, would have no bearing on any of my findings or conclusions. The criticism is misdirected because I still used current employment status in all of my calculations. Importantly, I never claimed that

68. Pardo, *supra* note 2, at 2135 (alteration in original) (emphasis omitted) (quoting Educ. Credit Mgmt. Corp. v. Mason (*In re* Mason), 464 F.3d 878, 884 (9th Cir. 2006)).

69. *Id.*

70. See, e.g., *In re* Mason, 464 F.3d at 885 (holding that a debtor failed to establish good faith in part due to his failure to seek *full-time* employment).

71. See, e.g., Roth v. Educ. Credit Mgmt. Corp. (*In re* Roth), 490 B.R. 908, 919 (B.A.P. 9th Cir. 2013) (holding that a debtor made good faith efforts to obtain employment because she “1) remained full-time employed until shortly before she filed Chapter 7, often working two jobs; 2) used her job skills as productively as she could; and 3) lived frugally”); Gitsch v. Iowa Student Loan Liquidity Corp. (*In re* Gitsch), 384 B.R. 555, 558 (Bankr. N.D. Iowa 2008) (inquiring as to “whether the debtor has made a good faith effort to obtain employment”).

72. See, e.g., *In re* Roth, 490 B.R. at 919.

73. See Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 386 (6th Cir. 2005) (“Choosing a low-paying job cannot merit undue hardship relief.”). The debtor must reasonably attempt to maximize income even if this means procuring work in a field unrelated to the debtor’s degree field. See *In re* Mason, 464 F.3d at 885 (finding no good faith where the debtor held only one part-time job, made an insufficient job search given his free time, and did not reattempt the bar exam); U.S. Dep’t of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 93 (5th Cir. 2003) (“[N]othing in the Bankruptcy Code suggests that a debtor may choose to work only in the field in which he was trained, obtain a low-paying job, and then claim that it would be an undue hardship to repay his student loans.”).

employment status was immaterial to a court's undue hardship determination. Instead, I merely claimed that it better fit within two other prongs of the *Brunner* test—whether the debtor has (1) a current inability to repay his student loans or (2) a future inability to repay his student loans.⁷⁴ It seems evident that current employment status is a better predictor of one's current and future ability to repay than it is of one's past efforts to repay.

C. Recommendations

In my study, I concluded that each year there are tens of thousands of debtors in bankruptcy who could successfully discharge their student loans but for some reason never try.⁷⁵ I argued that many of these debtors should attempt to procure a discharge and that they should not be deterred if they cannot afford an attorney. Those who find themselves in such a situation should consider navigating the process pro se.

Pardo criticizes this recommendation as harmful and misguided. In particular, he argues that highly experienced attorneys are beneficial in obtaining discharges and that bankrupt debtors will be unable to successfully litigate an adversary proceeding without the aid of counsel.⁷⁶

First, I do not dispute Pardo's claim that highly experienced attorneys can be beneficial. The Pardo–Lacey Study presented good reason to believe such lawyers do procure discharges at higher rates than pro se litigants.⁷⁷ My claim, however, is not about this very small group of highly experienced attorneys. Instead, it is about the entire group of attorneys who represent debtors in student loan adversary proceedings. Like my study, the Pardo–Lacey Study found no evidence that the average student loan attorney improves discharge outcomes.⁷⁸

In my sample, those debtors who represented themselves actually fared slightly better than those debtors who hired an attorney, although the difference was not statistically significant.⁷⁹ Debtors with attorneys discharged an average of 33% of their student loan debt, but pro se litigants discharged an average of 35% of their student loan debt.⁸⁰ Likewise, 43% of pro se litigants discharged some of their debt, but only

74. Courts routinely discuss employment status in the context of these other prongs. See, e.g., *White v. Educ. Credit Mgmt. Corp.* (*In re White*), Bankr. No. 07-41509, 2008 WL 5272508, at *6 (Bankr. E.D. Tex. Dec. 17, 2008).

75. Iuliano, *supra* note 6, at 524.

76. See Pardo, *supra* note 2, at 2140–42.

77. See Pardo & Lacey, *The Real Student-Loan Scandal*, *supra* note 1, at 221–23.

78. See *id.* at 222 tbl.6 (showing that there was no statistically significant difference in the percentage of debt discharged between those debtors who were “Represented by Counsel” and those who were not).

79. See Iuliano, *supra* note 6, at 516 fig.5.

80. See *id.*

38% of debtors with attorneys did the same.⁸¹

Furthermore, a comparison of the discharge rates of those debtors who hired an attorney with those who did not suggests that the average attorney does not contribute to a successful outcome.⁸² Specifically, a Wilcoxon rank-sum test shows that the difference in discharge rates between the two groups of debtors is not significant ($p = 0.82$) at conventional levels. Additionally, an equivalence test reveals that the difference, if any, between the two groups is likely to be rather small.⁸³ This lack of significance holds even after controlling for other relevant variables.⁸⁴

Pardo seems to suggest that the Pardo–Lacey Study’s findings and my own are incompatible.⁸⁵ However, they are not. It is consistent to maintain both that a small number of highly experienced attorneys improve discharge outcomes and that attorneys, on average, do not provide such benefit.

I do agree with Pardo on one point. It would be ideal for a debtor to have a highly experienced attorney litigate the adversary proceeding. Unfortunately, many debtors do not have this option. Given their poor financial situations, debtors frequently must choose either to do nothing or to attempt to litigate the case themselves. The claim I advanced in my study is merely that debtors who do not have the funds to pay for a lawyer are not at a clear disadvantage insofar as case outcome is concerned.⁸⁶ They can litigate the case themselves just as successfully as if they had hired an average attorney. Certainly, pro se litigants will have to expend more time on the case than litigants with attorneys. However, the fact that a debtor lacks an attorney does not mean that the chances of discharge are reduced.

As I noted above, Pardo also raises a second point: most people are incapable of litigating an adversary proceeding without the aid of counsel.⁸⁷ Although this is undoubtedly true of some debtors, it does not appear to reflect the experiences of most debtors. My sample contains numerous cases in which ordinary debtors prove they are quite capable of successfully representing themselves in adversary proceedings. Admittedly, pro se debtors demonstrate a wide range of competence in their filings. But this is true even for those debtors who successfully discharged their student loans. For instance, here is an excerpt from a

81. *Id.* at 501 n.34.

82. *See id.* at 520–21.

83. The means of the two groups are likely to be within fifteen percentage points of each other ($p < 0.05$).

84. *See* Iuliano, *supra* note 6, at 520–21.

85. *See* Pardo, *supra* note 2, at 2124–30.

86. *See* Iuliano, *supra* note 6, at 516 fig.5 and text accompanying *supra* note 80.

87. *See* Pardo, *supra* note 2, at 2140–41.

handwritten complaint filed by one successful pro se debtor:

After going to multiple Dr's they ruled it a 'epileptic tendency' becuz they could not figure out what was causing the seizures. . . . I worked hard to find a the right Dr to do more aggressive testing and found out that I don't have "Epilepsy" per say but that I will never be able to work on computers, nor drive @ night, let alone disco dance w/ strobe lights ☺, or watch TV in the dark.⁸⁸

When this woman initiated her adversary proceeding, she had \$36,640.39 in student loan debt.⁸⁹ Despite the lack of professionalism in her filings, the case was settled, and her debt was fully discharged.⁹⁰ At the other end of the spectrum, some debtors drafted complaints that displayed substantial legal expertise. At times, these complaints were even superior to those submitted by actual attorneys.⁹¹ These examples certainly do not mean that every single debtor will be able to successfully litigate an adversary proceeding without the aid of an attorney. However, I never suggested as much. I merely argued that many debtors are capable of successfully navigating the discharge process themselves, a fact that the data strongly supports.

CONCLUSION

In *The Undue Hardship Thicket*, Pardo mounted an extended challenge to my 2012 study. In this response, I have argued that his efforts were unsuccessful. At times, Pardo's criticisms advanced minor points that, even if correct, would not undermine any of my study's findings. At other times, Pardo did highlight methodological choices with which all scholars working on student loans must grapple. For these occasions, I hope that this response has provided further justification for my decisions. Ultimately, I believe that my analysis withstands all of Pardo's objections.

These points notwithstanding, Pardo's broader project remains a noteworthy contribution to the literature on student loans. By using an

88. See Complaint at 1, *In re Green*, No. 07-000198-RTB7 (Bankr. D. Ariz. Jan. 30, 2007). This quotation is reproduced exactly as it appears in the original document. All mistakes and symbols are in the complaint.

89. *Id.*

90. See Stipulated Motion to Dismiss Adversary Proceeding at 1–2, *In re Green*, No. 2:07-bk-00198-RTB (Bankr. D. Ariz. May 15, 2009). ECMC approved the loans for a conditional Total and Permanent Disability discharge under federal regulations. *Id.*

91. See, e.g., Complaint to Determine Dischargeability of Student Loans Under Bankruptcy Reform Act (1998), 11 § U.S.C. 523(a)(8) (2012); *Ginger Pennie v. Sallie Mae Educ. Trust, and Servicing Corp.*, 05-09927-PCW7 (Bankr. E.D. Wash. Aug. 16, 2007). This pro se filing demonstrates an excellent understanding of the *Brunner* test and provides the facts necessary to build a strong case in favor of an undue hardship discharge.

original dataset to showcase ECMC's abusive tactics, he reveals additional ways in which student loan debtors are disadvantaged. For anyone evaluating potential reforms to the student loan bankruptcy provisions, Pardo's findings should be taken into consideration.

Despite our disagreements, I doubt that Pardo and I view the undue hardship standard all that differently. We both agree that it is an extremely flawed provision.⁹² Likewise, both of us hope that Congress will reform the student loan discharge process but recognize that such reform is unlikely to be forthcoming.⁹³ Our main point of contention appears to be over how best to work within the current system. Specifically, we disagree over whether more student loan debtors who have filed for bankruptcy should pursue student loan discharges. Pardo is doubtful that many people can satisfy the undue hardship standard, but I am optimistic.

92. For a strong argument in favor of eliminating the undue hardship standard for private student loans, see Adam Levitin, *The Examiners: Discharge Private Student Loans, but Federal Loans Have Safety Net*, WALL ST. J. (May 11, 2015), <http://blogs.wsj.com/bankruptcy/2015/05/11/the-examiners-discharge-private-studentloans-but-federal-loans-have-safety-net>.

93. See Pardo, *supra* note 2, at 2175 (concluding that “[a]t best, Congress might engage in modest reform efforts. At worst, Congress will do nothing”). If Congress does want to reform the student loan discharge process, there are many ways to improve the system. For instance, during the last Congress, Jon Conyers introduced a bill that would allow bankruptcy judges to award attorney’s fees to individual debtors when the creditor has engaged in abusive litigation. See Stopping Abusive Student Loan Collection Practices in Bankruptcy Act of 2014, H.R. 4835, 113th Cong. § 2 (2014). This provision would be an excellent way to reduce the abuses that Pardo identified in his article. Alternatively, for a compelling argument that risk-based pricing of student loans would increase people’s ability to repay their student loans, see Michael Simkovic, *Risk-Based Student Loans*, 70 WASH. & LEE L. REV. 527, 529–31 (2013).

APPENDIX A

TABLE 1: TWO ONE-SIDED TEST FOR EQUIVALENCE—PERCENTAGE OF DEBT DISCHARGED WHEN THE DEPARTMENT OF EDUCATION IS AND IS NOT A CREDITOR

	DOE Creditor	DOE not Creditor
Mean (Percentage Discharged)	36.966	31.531
Variance	2132.8	1952.9
Observations	58	145
Pooled Variance	2003.9	
Hypothesized Mean Difference	20	
df	201	
t Stat	-2.094	-3.657
p-value (one-tailed)	0.019	0.000
p-value (two-tailed)	0.037	

TABLE 2: TWO ONE-SIDED TEST FOR EQUIVALENCE—PERCENTAGE OF DEBT DISCHARGED WHEN THE DEBTOR IS AND IS NOT REPRESENTED BY COUNSEL

	Counsel	No Counsel
Mean (Percentage Discharged)	32.691	34.634
Variance	2019.4	1968.8
Observations	162	41
Pooled Variance	2009.4	
Hypothesized Mean Difference	15	
df	201	
t Stat	-2.162	-1.666
p-value (one-tailed)	0.016	0.049
p-value (two-tailed)	0.097	