IN RESPONSE TO RAFAEL I. PARDO'S THE UNDUE HARDSHIP THICKET: ON ACCESS TO JUSTICE, PROCEDURAL NONCOMPLIANCE, AND POLLUTIVE LITIGATION IN BANKRUPTCY

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In this essay, I attempt two impossible tasks. First, limited to approximately 1,000 words, I respond to Professor Rafael Pardo's towering 78 page article, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*.[1] (*Thicket*) Second, I am resisting the temptation to footnote every point I make, and so resort to what is for me a radical task of not using my usual number of footnotes, in contrast to his nearly 500 (most of them heavily annotated and elaborated). There can be little doubt that Professor Pardo has done for student loan debt and its "Undue Hardship" (UH) provisions what Senator (née Professor) Elizabeth Warren did for consumer and family bankruptcy[2] —turn it inside out, study its nooks and crannies, and explain its nuances and intricacies. For this, we all owe him a great debt of gratitude and praise. Reading *Thicket* almost makes me cry, it is so encyclopedic, thorough, and detailed. Added to his earlier works,[3] he has become among the most accomplished researchers and surveyors of this vast area. And one gets the impression that he has not even scratched the surface, as there are many miles to go before he sleeps. He has begun to litigate these issues—a point to which I will return—but he still has not fully gotten his arms around the crucial need for a better discursive narrative in this field.

He undertakes many tasks in this article, and it would be my fool's errand to parse them. His most helpful service—genuinely useful and

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

2. *See* TERESA A. SULLIVAN, JAY LAWRENCE WESTBROOK, & ELIZABETH WARREN, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA (1999) (analyzing consumer bankruptcy cases); ELIZABETH WARREN AND AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS PARENTS ARE GOING BROKE (2003) (examining the financial issues of middle-class families).

3. *See, e.g.*, Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384 (2012); Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors*, 26 EMORY BANKR. DEV. J. 5 (2009); Rafael I. Pardo, *Failing to Answer Whether Bankruptcy Reform Failed: A Critique of the First Report from the 2007 Consumer Bankruptcy Project*, 83 AM. BANKR. L.J. 27 (2009); Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179 (2009); 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 (2008) [hereinafter Pardo, *Illness*].

necessary—is to set out an overarching critique of the barriers to UH through the civil procedure of the field, the administrative law of the field, and the research literature of the field. His unpacking of the major institutional player in the field, the Educational Credit Management Corporation (ECMC),[4] casts great disinfectant sunlight on the villain of the practice, and constitutes a disturbing case study of perfidy. And despite his outrage at the practices, one comes away with the sense that what is truly outrageous and conscience-shocking is what is legal, acceptable, and routine in these transactions. He describes the architecture of these practices in a commendable fashion, and they are not for the faint of heart. (This reminds me of the jokes told about politics in my Northern New Mexico homeland, where what is scandalous is what is allowed, not what is outside the pale.)

In explaining how the entire system works (or does not), Professor Pardo both summarizes his earlier work and identifies the vexing UH provisions as the real problem.[5] In a nutshell, Congress does not want to let students discharge their student loan debts—which are growing substantially both in number and in amount—and so has disallowed most such discharges, with very limited exceptions. As one might imagine, the criteria for walking away from debt are not always clear, but they are punishing. Reading the cases where students have been allowed to reorganize their debt or not repay the loans are truly mortifying and pathetic, in the root sense that the circumstances contain great pathos: usually physical or mental illness, collateral disasters, personal reversals, and dire family circumstances.[6] He has taken these up in very useful fashion, and I have supplemented these by re-reading several reporters that record such cases. Read just one case, to get a sense of the desperation and crushing load borne by some students.

An alcoholic since she was college-aged, Jennifer Griffith Roach became sober and attended several colleges, eventually becoming a registered nurse.[7] After having three children, she divorced and relapsed into alcoholism.[8] She lost her nursing license due to the alcoholism, and

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4. Educational Credit Management Corporation (ECMC) is a nonprofit corporation established to provide college student loan guaranty servicing; it maintains a $39 billion federal student loan portfolio. *See* EDUCATIONAL CREDIT MANAGEMENT, *Our Services*, http://www.ecmc.org/details/ourServices.html (last visited Apr. 11, 2015).

5. *Thicket*, *supra* note 1, at 2122–24.

6. In one of his early pieces, he notes: "very few factual circumstances appeared to be associated with the outcome of discharge determinations. Further statistical analysis has revealed 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. As outlined above, this factor should have an effect on legal outcome, but it should not be the only factor that does so." Pardo, *Illness*, *supra* note 3, at 517.

7. Roach v. U.S. Aid Fund (*In re* Roach), 288 B.R. 437, 440 (Bankr. E.D. La. 2003).

8. *Id.*

took several interim pink-collar jobs.[9] She remarried, but her new husband became incapacitated after serious heart surgery.[10] After in-patient treatment for her alcoholism, she was reinstated as a nurse, but with severe limitations on her working conditions, including probationary restrictions that limited her ability to earn overtime or be unsupervised.[11] After the reinstatement, her total circumstances were such that she could not even maintain a basic living for her family, including her ill husband and her three teenaged children.[12] Still, her debts were not discharged under the UH provisions, even as the judge concluded: "It is indeed a shame that this [forty two year old] debtor has to be denied a discharge under the current state of the law when she has demonstrated her best effort to rehabilitate her life, is working at the best job now available to her, and is supporting several dependents from her own earnings under circumstances that clearly show she cannot maintain a minimal standard of living for herself and her dependents, if forced to repay the loans."[13] The sheer miserable details in these cases are alone cause for concern.

However, Congress does not want students at the front end of their lives consuming public resources only to walk away from their debts. In part, there is a certain understandable sense that debts should be repaid (even within the area of bankruptcy); with poor credit records, no access to credit or collateral, and uncertain futures, college students would be unlikely borrowers for commercial purposes, and poor prospects for receiving the vast sums they can borrow for qualified educational expenses.

But even if one accepts these unspoken premises for the various subsidized loan programs, Congress has spoken with no likely reconsideration. That said, Professor Pardo identifies the many disadvantages that any potential or actual bankrupt student will face to discharge the debts: what he characterizes as Access to Justice barriers and the predatory practices of which he accuses ECMC, both documented with chilling detail. He examines procedure, burdens of proof and their bifurcated structure and the differential allocation that favors creditors, the burdens of proof for creditors and debtors (including what he terms "fractionating,") and the sheer intrinsic complexity of UH. In addition, in his thorough review of previous scholarship, he is also an assassin towards

9. *Id.*

10. *Id.* at 441.

11. *Id.*

12. *Id.* at 441–42.

13. *Id*. at 447. The judge concluded: "However, so long as Congress continues to express in bankruptcy legislation its antipathy to the discharge of student loans, and until the Fifth Circuit adopts a test other than Brunner, this court has no other course to follow . . . . Based upon the Brunner test, the court concludes that Ms. Roach has not proved that undue hardship will result unless her student loans are discharged. Accordingly, her loans are not dischargeable under Section 523(a)(8)." *Id*. at 447–48.

an enormously flawed but influential work, the Iuliano Study,[14] and how it has fragged its way through both policy and political narratives. Space does not allow me to pay tribute to this counter-narrative.

Professor Pardo also constructs a critique of ECMC, the likes of which I have never read: after reviewing hundreds of "mistakes and misbehavior," he pauses:

> If the past is prologue, then one might expect ECMC to continue asserting its frivolous arguments elsewhere throughout the country. This Article now demonstrates why ECMC's claim preclusion argument is a prime example of pollutive litigation (with the added hope that exposing this frivolity will quell further attempts by ECMC to assert the argument).[15]

Then, after summarizing the many deleterious practices and substantive policies that stack the decks against would be student bankruptcy claims, he concludes,

> ECMC's conduct further exacerbates those barriers. It is entirely conceivable that ECMC's procedural noncompliance and pollutive litigation decrease a debtor's odds of prevailing in those proceedings where such litigation conduct occurs. But even if ECMC's conduct does not impose much harm in certain individual cases, aggregating the conduct will reveal something akin to a public health epidemic, one that undermines the integrity of the bankruptcy system.[16]

He is pessimistic that Congress will act, or that bankruptcy judges will create common law solutions for determining the case-by-case reviews that take place in litigation across the circuits.

I recognize the impasses that he sets out in *Thicket*, as it is the same way I see the abject failures in my other areas of scholarship, particularly immigration. I could cite similar chapter and verse barriers to the treatment of the undocumented, particularly undocumented college students, colloquially referred to as DREAMers, for the DREAM Act, federal relief offered regularly since 2001, but tangled up in blue—the highly partisan developments on the road to comprehensive immigration reform (CIR).

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14. *See* Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495 (2012). Professor Pardo dissects the study in *Thicket*, *supra* note 1, at 2124–42.

15. *Id.* at 2166 (citations omitted).

16. *Id*. at 2173.

Congress has not acted in any coordinated fashion for enacting CIR, letting a successful Senate bill expire in in 2015, after it lay fallow for over a year.[17] Worse, the House has acted to defund portions of the DHS funding devoted to Deferred Action for Childhood Arrivals (DACA), the transformative prosecutorial discretion program undertaken by President Obama in 2012, which has allowed almost two-thirds of a million undocumented college students to have their deportations stayed, given them employment authorization and Social Security Numbers, and accorded them "lawful presence."[18] In turn, DACA has rendered them eligible for many state benefits and status-eligibility, such as driver's licenses and state resident tuition.[19] Over twenty states have also allowed undocumented students (DACA students are no longer undocumented) to gain resident tuition, several have accorded them state financial aid, and California allows them to practice law.[20] Immigration law is riddled with

17. *See Bill Summary & Status 113th Congress (2013 - 2014) S.744 Major Congressional Actions*, THE LIBR. OF CONG. THOMAS (June 17, 2013) http://thomas.loc.gov/home/thomas.php (noting that the last major congressional action regarding the Border Security, Economic Opportunity, and Immigration Modernization Act was June 2013); *see also*, Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757 (2009) (describing the similar failure of the DREAM Act to gain traction in Congress); Elizabeth Moss, *Financial Aid for Undocumented Students Is Losing Its Stigma*, N.Y. TIMES, Feb. 27, 2015, at A18, *available at* http://www.nytimes.com/2015/02/27/nyregion/financial-aid-for-undocumented-students-no-longer-discussed-in-hushed-tones.html?_r=0 (describing the efforts of colleges and universities to make higher education affordable for undocumented immigrants); Ashley Parker, *House Approves Security Budget, Without Strings*, N.Y. TIMES, Mar. 4, 2015, at A1, *available at* http://www.nytimes.com/2015/03/04/us/house-homeland-security.html (describing legislative attempts to defund DACA).

18. Ted Hesson, *House Republicans Vote to Defund Immigrant Program*, ABCNEWS (Jun. 6, 2013), http://abcnews.go.com/ABC_Univision/Politics/immigration-reform-hopeful-cringe-house-gop-votes-defund/story?id=19341352.

19. There is an amazing amount of legal and social science literature surrounding this topic, both scholarly and in the public press. *See, e.g.*, Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463, 524 (2012); Tom K. Wong et al., *Paths to Lawful Immigration Status: Results and Implications from the PERSON Survey*, 2 J. MIGRATION & HUM. SEC., 287 (2014) (studying the number of unauthorized immigrants who are unknowingly eligible for lawful immigration status); SARAH HOOKER ET AL., LESSONS FROM THE LOCAL LEVEL: DACA'S IMPLEMENTATION AND IMPACT ON EDUCATION AND TRAINING SUCCESS, MIGRATION POLICY INSTITUTE (2015), *available at* http://www.migrationpolicy.org/research/lessons-local-level-dacas-implementation-and-impact-education-and-training-success.

20. Such policies are posted at Table One: State Laws Allowing Undocumented College Students to Establish Residency, 2015, UNIV. OF HOUS. L. CTR., http://www.law.uh.edu/ihelg/documents/Statute-TableOne.html (last visited Apr. 11, 2015) (outlining accommodationist state laws) [hereinafter Table One]; Table Two: States Restricting Access to Postsecondary Education, 2015, UNIV. OF HOUS. L. CTR., http://www.law.uh.edu/ihelg/documents/Statute-TableTwo.html (last visited Apr. 11, 2015) (outlining restrictionist state laws) [hereinafter Table Two]. California acted to allow even undocumented law applicants to practice law, whereas New York and most other states have not

various determinations of exceptional and unusual hardship, hardship waivers, and other discretionary criteria.[21]

Even so, and with all these many accommodationist policies, the many moving parts are not all in favor of the undocumented. Several states have banned them from even attending their public colleges, much less being eligible for resident tuition.[22] The many unaccompanied minor children or women who have arrived with their children and who have fled gangs and drug violence in Central American have found themselves largely ineligible for any relief, unless they are lucky enough to have volunteer attorneys, where release and relief remedies can be advanced.[23] A very small percentage secure counsel and, even then, few prevail. There are years of backlogs, rendering them in liminal status for long periods of time, in backlogged immigration courts.[24] And locating the children and

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acted. For the entire convoluted court record of the Sergio Garcia case in California courts, see *In re Sergio Garcia on Admission – S202512*, CAL. CTS.: THE JUD. BRANCH OF CAL. http://www.courts.ca.gov/18822.htm (last visited Apr. 11, 2015); *see* Robin Abcarian, *Sergio Garcia Will Practice Law, and He Will Make a Killing*, L.A. TIMES, Sept. 6, 2013, http://articles.latimes.com/2013/sep/06/local/la-me-ln-sergio-garcia-law-20130906. *See also* Kirk Semple, *Bar Exam Passed, Immigrant Still Can't Practice Law*, N.Y. TIMES, Dec. 4, 2013, at A30, *available at* http://www.nytimes.com/2013/12/04/nyregion/for-immigrant-passing-the-bar-exam-wasnt-enough.html?_r=0 (describing the journey of Cesar Vargas, another "unauthorized immigrant," trying to become an attorney in the United States).

21. Immigration scholar Shoba Sivaprasad Wadhia has begun carving out a remarkable career in defining and analyzing the many discretionary terms employed by immigration authorities. *See, e.g.*, Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 284 (2010) (discussing failure to enact "unusual hardship" standard in 212 (c) waivers); Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 GEO. IMMIGR. L.J. 345 (2013) (discussing deferred action by analyzing Professor Wadhia's experience litigating Freedom of Information Act related cases and data from ICE field offices); Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. SEE ALSO 59 (2013) (responding to Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, The DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013)); SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015). And while she has translated many such measures, other such concepts occur in asylum law and other areas of immigration and nationality law with great frequency. 67 INA § 235(b)(1)(B)(v) ("Credible fear of persecution defined: For purposes of this subparagraph, the term 'credible fear of persecution' means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum . . ."). How could it be otherwise?

22. *See* Table One, *supra* note 20 (accommodationist state laws); Table Two, *supra* note 20 (restrictionist state laws).

23. Julia Preston, *Tally of Unaccompanied Minors Crossing Border Illegally Falls*, N.Y. TIMES, Oct. 10, 2014, at A16, *available at* http://www.nytimes.com/2014/10/10/us/tally-of-unaccompanied-minors-crossing-border-illegally-falls-.html?_r=0 (noting a peak and subsequent fall in the number of illegal unaccompanied minors crossing the Southwest border of the United States).

24. *Taking Attendance: New Data Finds Majority of Children Appear in Immigration Court*, IMMIGR. POL'Y CTR., http://www.immigrationpolicy.org/just-facts/taking-attendance-new-data-

mothers in remote rural areas (such as Artesia, NM and Karnes, TX) resembles the various unscrupulous maneuvers described by Professor Pardo, who also notes how few accomplished bankruptcy counsel there are for impoverished student debtors, why no larger-class efforts have arisen, and why the astoundingly long delays wear down even the persistent litigants, who, after all, are broke.[25]

Finally, although there is an informal exchange network by lawyers to offer *pro bono* services to these children, headlined by the ABA and various under-funded immigrant organizations, no such formal resources exist for student debtors or this kind of scholarship. The National Consumer Law Center (NCLC) and the National Association of Consumer Bankruptcy Attorneys (NACBA) are not structured to undertake the massive research and preparatory work needed to undertake any credible reform effort in this area.[26] There is no overarching narrative to lay out the case to the public, and it will be hard to convince various decision makers that bankruptcy reform should extend to college students, no matter their circumstances. I regularly read and rely upon NCLC reference materials, which are truly remarkable resources in a complex and fluid field, especially *Student Loan Law*,[27] but what is truly need is an impartial ALI-type study group, marshalling the various documents identified by Professor Pardo, and assembling the best scholars who can interpret and translate for the rest of us.

Inasmuch as he was recently involved in litigating a UH case, he now also understands the deep tissue of this fascinating field. And with so many financial aid, tax credit, loan repayment, income contingent, and college savings plans swirling around in the public domain, remarkably few scholars have addressed these important issues.[28] In early 2015, former

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finds-majority-children-appear-immigration-court (last visited Apr. 11, 2015) (showing significant differences in represented and unrepresented children in immigration proceedings); *see also*, *Unaccompanied Children: A Resource Page*, IMMIGR. POL'Y CTR., http://www.immigrationpolicy.org/just-facts/unaccompanied-children-resource-page (last visited Apr. 11, 2015) (analyzing various studies and data on court proceedings, 2005-2014).

25. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-362, CENTRAL AMERICA: INFORMATION ON MIGRATION OF UNACCOMPANIED CHILDREN FROM EL SALVADOR, GUATEMALA, AND HONDURAS (2015) (noting the perils of unaccompanied alien minors); *see Thicket*, *supra* note 1, at 2174–78.

26. The National Consumer Law Center (NCLC) is a clearinghouse for consumer law information, and undertakes focused, purposive litigation. *See Case Index*, NCLC: NAT'L CONSUMER L. CTR., http://www.nclc.org/litigation/case-index.html. The National Association of Consumer Bankruptcy Attorneys (NACBA) has produced studies and testified on student loan issues. *See*, *e.g.*, *Student Loan Debt Bomb*, NACBA, http://www.nacba.org/Legislative/StudentLoanDebt.aspx (last visited Apr. 11, 2015).

27. DEANNE LOONIN, STUDENT LOAN LAW (5th ed. 2015). I reviewed an earlier edition in some detail. *See* Michael A. Olivas, *Build It and They Will Publish Finding Aids: The Maturing of Higher Education Law*, 37 J. C. & U. L. 435, 440 (2011).

28. Among the better observers of such issues is Professor Jonathan D. Glater. *See e.g.* Jonathan D. Glater, *The Unsupportable Cost of Variable Pricing of Student Loans*, 70 WASH. & LEE

students of a major proprietary college began a "debt strike," refusing to repay their loans after their college was closed, following its sale to the Zenith Education Group, a new subsidiary of the ECMC Group.[29] And the entire history of ECMC, Corinthian, and federal regulators has not been written, and that will not be a pretty picture. Something has to give.

The sheer complexity of this field is itself a major impediment to the needed legal reform. Perhaps one of the foundations begun by loan processors, such as Lumina or The Access Group, or other major higher education funders could establish such a long-term research and policy project. Until that happens, I and others will rely upon the extraordinary efforts of this accomplished scholar.

L. REV. 2137 (2013) (arguing that student loan terms should not be tied to variable factors such as likely future wages based on college major or likelihood of repayment); Jonathan D. Glater, *The Other Big Test: Why Congress Should Allow College Students to Borrow More through Federal Aid Programs*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y. 11 (2011) (arguing that federal student aid programs should provide loans that cover all costs of college for students).

29. Danielle Douglas-Gabriel, *A Dangerous Revolt: People Are Refusing to Pay Back Student Loans*, WASH. POST, Feb. 25, 2015, *available at* http://www.washingtonpost.com/news/get-there/wp/2015/02/25/a-dangerous-revolt-people-are-refusing-to-pay-back-student-loans.