

The Long Fight Over the Borrower Defense to Repayment of Student Loans in the Aftermath of the Collapse of Corinthian College

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ABSTRACT

Student Loans are a growing burden on the current generation of students. This burden is especially acute for students at for-profit colleges. For-profit colleges make up a disproportionate part of student loans in default. The collapse of Corinthian College created a large group of debtors with a debtor defense to repayment. This defense allows a student debtor to ask a court to find a debt invalid because of fraud committed by the offending college. The Department of Education found Corinthian committed fraud in its marketing, and thus its students all had viable cases for cancelling their debt. Several interpretations of rules were propagated by the Obama and Trump Administrations to deal with this large class of debtors.

The Corinthian students should be allowed to cancel their debts in their entirety as the law provides. The partial repayment solutions proposed by the Department of Education do not give the students the full protection of the current law. The general problem of student debt can be solved by forgiving student loans. A novel solution is also proposed in this article; students could finance their education by having investors pay for their education up front and then over time investors could collect a percentage of future earnings of the student. This would allow more people to graduate from college debt free and encourage the study of fields with strong career potential.

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I. INTRODUCTION

The Department of Education (“DOE”) is in a protracted legal battle concerning loan assistance offered to students defrauded by for-profit colleges.² The most recent area of dispute surrounding student debt is related to the debt of for-profit colleges that went bankrupt.³ The DOE allows a student with federal loans to discharge the loan if the college they were going to engaged in fraud through a defense known as the “Borrower Defense.”⁴ A 2016 rule created the regulations and procedures which forgives loans if they are for a college that committed fraud in their recruitment of the student.⁵ A 2019 rule changed the system to give DOE more ways to deny relief.⁶ Recent court decisions require the Secretary of Education to enforce the law.⁷

The history of the current landscape of higher education has its roots in the G.I. Bill after World War II.⁸ During World War II, millions of servicemen were promised an education and a chance at a better life through the Montgomery G.I. Bill.⁹ With the government providing a extensive amounts of federal money to colleges, a scourge of unscrupulous colleges appeared throughout the country.¹⁰ The number of nontraditional and for-profit universities tripled in the

² See Stacy Cowley, *DeVos Tries Again to Cut Debt Relief for Students Who Were Misled*, NEW YORK TIMES (Dec. 10, 2019), <https://www.nytimes.com/2019/12/10/business/betsy-devos-student-loan-forgiveness.html>.

³ See *Id.*

⁴ *U.S. Department of Education Announces Final Regulations to Protect Students and Taxpayers from Predatory Institutions*, U.S. DEPARTMENT OF EDUCATION, (Oct 28, 2016), <https://www.ed.gov/news/press-releases/us-department-education-announces-final-regulations-protect-students-and-taxpayers-predatory-institutions> [hereinafter *2016 DOE Statement*].

⁵ *Id.*

⁶ See Cowley, *supra* note 2 (showing how the Department of Education tried to use individual income as a determining factor in use of a “partial-relief” approach.)

⁷ See *Id.*

⁸ See *The Creation Story: Correspondence Schools and the GI Bill of Rights*, NEW AMERICA, <https://www.newamerica.org/education-policy/reports/cautionary-tale-correspondence-schools/the-creation-story-correspondence-schools-and-the-gi-bill-of-rights/> (last visited November 25, 2020) [hereinafter *GI Bill Creation Story*].

⁹ *Id.*

¹⁰ See *Id.*

years after the war.¹¹ It was a national scandal that GIs were being swindled by meaningless mail correspondence courses.¹² The ex-servicemen were trained in bartending, dancing, and outdoor recreation.¹³ Reporting was also limited and the amount of veterans being placed in new jobs was unknown.¹⁴ Under President Eisenhower, a detailed study was commissioned and a final report was delivered in 1965.¹⁵ For profit colleges and trade schools were found to be the center of abuse of the system.¹⁶ At trade schools, only 20% of veterans completed their course, and at for-profit schools the number was about 10%.¹⁷ Correspondence courses also ate a disproportionate amount of federal education dollars.¹⁸ Before World War II, correspondence courses were often used to complete high school educations, but these uses skyrocketed after the war.¹⁹ These “diploma mills” were the functional equivalent of some modern online universities because they promised convenience and a chance at a better life. On the whole, they saw abysmally low completion rates and saddled their students with debt.²⁰

The extensive study on the post war for-profit college boom led to reforms.²¹ The scourge of fraudulent colleges post World War II was addressed in the Higher Education Act of 1965, signed into law by President Johnson. The law sought to crack down on for-profit school and trade schools by requiring reports of the job prospects of their graduates, and protections for students of colleges making dishonest claims about the job prospects of their graduates.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

This bill created the Borrower Defense to repayment so that if a student was defrauded by a college, and the college tried to collect on the debt, the borrower had a legal defense. The law created a defense, but this was only a reactive measure. A student had to wait to be sued on the loan and only then could they use the Borrower Defense to repayment.²²

In 1995, the DOE's regulation included the Borrower Defense, but the regulations did not provide a clear path to relief.²³ Unfortunately, this set of regulations did not give students any guidance on how to pursue one of these claims, or on how the DOE should adjudicate them.²⁴ The Borrower Defense action remained an individual effort, and students had to take the initiative to contact a lawyer and sue their school.²⁵

In the 2000s, Corinthian College was determined by the DOE to have misled students in their marketing.²⁶ The College misrepresented their graduate's career prospects.²⁷ With this determination, it was a legal fact that Corinthian committed fraud against their students and each student only needed to get into a court room to win an action using the borrower defense to repayment.²⁸ Corinthian College collapsed after this determination and the government promulgated a set of 2016 rules in response to the crisis.²⁹ A special master was created by the Department of Education and the office handled the students claims in mass.³⁰ So, under the 2016 rules, students did not have to go to court to sue their old school, they could get their loans cancelled administratively.³¹

²² See *Manriquez v. Devos*, 345 F. Supp. 3d 1077, 1085 (N.D. Cal. 2018).

²³ 2016 DOE Statement, *supra* note 4.

²⁴ See *Id.*

²⁵ See generally *Cowley*, *supra* note 2.

²⁶ *Manriquez*, 345 F. Supp. 3d at 1086.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 1087.

³⁰ *Id.* at 1089.

³¹ *Id.*

Secretary of Education Betsy DeVos promulgated the 2019 rules, which undercut the Obama Administration’s 2016 rule.³² Under the 2019 rules, instead of cancelling the debt of the defrauded students,³³ the DOE simply reduces the loans in proportion to the student’s reduced income. The income test considers the average income of people working in a given field and compares it to the student’s current income. If the student makes less than the average worker in that field, the DOE will reduce the loans of that student. The loan is also only reduced in proportion to the gap between the student’s income and the average income.³⁴ This test harms students who managed to make something of themselves in spite of their education. It also harms all the students who are under performing because it does not cancel the whole loan, but rather only reduces it.³⁵ The law gives defrauded students a defense to repayment. This appears on its face to mean the whole amount is canceled, not some portion of it. Under Secretary DeVos, that law has been rendered ineffective, because she only allows it to be used to reduce the amount.³⁶ The secretary lost in court over this issue, as her rule was found to be in violation of the law.³⁷ In spite of court orders to enforce the law as interpreted by the 2016 rule, she has persisted in her efforts to collect the fraudulent loans from student borrowers of for-profit colleges.³⁸

Student Loan debt currently burdens young people in America on an unprecedented scale.³⁹ Young people are delaying purchasing homes and starting families because of the burden they are carrying from financing their education.⁴⁰ In a time of rising inequality, the burden of student debt

³² See Cowley, *supra* note 2.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ See *Id.*

³⁷ See *Manriquez v. Devos*, 345 F. Supp. 3d 1077, 1109-10 (N.D. Cal. 2018).

³⁸ See Cowley, *supra* note 2.

³⁹ See generally Ellen Paris, *Student Loan Debt Still Impacting Millennial Homebuyers*, FORBES (Mar. 21, 2019) <https://www.forbes.com/sites/ellenparis/2019/03/31/student-loan-debt-still-impacting-millennial-homebuyers/#2b565f593e78> (showing how millennials, burdened by student debt, have put off buying homes.)

⁴⁰ See *Id.*

contributes to the inequality of wealth and income in society, and stagnates normal economic growth.⁴¹

Several presidential candidates made suggestions to reform student debt.⁴² The issue of student loans has loomed large over politics in recent years. Multiple candidates are proposing plans to eliminate student debt.⁴³

In Section I of this article, the issue of student loan debt and the DOE's legal battle with students of Corinthian College is introduced. Section II reviews the historical background on the closure of Corinthian College. In Section III, the Borrower Defense is discussed, along with the standards for discharging student loans through bankruptcy. Section IV discusses possible solutions to the student loan debt crises, as well as the future of the Borrower Defense. Section V concludes.

II. HISTORY

Well before Corinthian College closed, there were indications of trouble. During the Financial Crisis of 2007, the college was scrutinized.⁴⁴ California sued Corinthian in 2007 for deceptive marketing.⁴⁵ The state's lawsuit was dropped in exchange for the college paying fines.⁴⁶ The college did not collapse just yet. In 2009, Corinthian had over 100 campuses and federal student loans contributed to 80% of its income.⁴⁷ The college collected a disproportionate amount

⁴¹ *See Id.*

⁴² *See Affordable Higher Education for All*, WARREN DEMOCRATS, (April 22, 2019), <https://elizabethwarren.com/plans/affordable-higher-education> [hereinafter *Higher Education for All*].

⁴³ *See Id.*

⁴⁴ *See* Andrew Galvin, *Corinthian to pay \$6.5 million*, ORANGE COUNTY REGISTER, (Aug. 1, 2007), <https://www.ocregister.com/2007/08/01/corinthian-to-pay-65-million/>.

⁴⁵ *See Id.*

⁴⁶ *Id.* (“California Attorney General Jerry Brown said Tuesday that Santa Ana-based Corinthian Colleges Inc. agreed to pay \$6.5 million to settle allegations that the for-profit operator of vocational schools engaged in false advertising.”).

⁴⁷ *Manriquez v. Devos*, 345 F. Supp. 3d 1077, 1086 (N.D. Cal. 2018).

of federal student loans compared to the size of the student body.⁴⁸ In 2015, the Secretary of Education determined that Corinthian made false claims about the job placement rates of Corinthian students.⁴⁹ Over 100,000 students were eligible for relief and the DOE setup a special office to handle the matter.⁵⁰ Corinthian College went under in 2015, leaving its students with high student debt and no degree to support their future careers.⁵¹ The college had a history of abuse leading up to its closure.⁵² The college was portrayed by California Attorney General Kamala Harris as targeting low self-esteem individuals, and selling them programs that were underperforming and not meeting required standards.⁵³

The students at these colleges are now fighting for the DOE to discharge their loans. The ability of the students to obtain a discharge of loans from a college that committed recruiting fraud has been part of the law since the 1965 Higher Education Act passed as part of President Johnson's great society program.⁵⁴ The relevant subsection of the act creates the Borrower Defense.⁵⁵

Notwithstanding any other provision of State or Federal law, the Secretary shall specify in regulations which acts or omissions of an institution of higher education

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Alex Johnson, *Corinthian Colleges Shuts Down, Ending Classes for 16,000 Overnight*, NBC NEWS, (Apr. 26, 2015), <https://www.nbcnews.com/news/education/corinthian-colleges-shuts-down-ending-classes-16-000-overnight-n348741> ("In what's believed to be the biggest shutdown in the history of higher education in the United States, Corinthian Colleges said Sunday it's closing its remaining 28 for-profit schools effective immediately, kicking about 16,000 students out of school.").

⁵² David Halperin, *Who Owns The Awful Corinthian Colleges? Wells Fargo, Marc Morial, Pension Funds*, HUFFPOST, (OCT 15, 2013), https://www.huffpost.com/entry/who-owns-the-awful-corint_b_4101323. ("Last Thursday, California's attorney general, Kamala Harris, sued Corinthian Colleges, one of the country's biggest — and worst — for-profit college companies, for "false and predatory advertising, intentional misrepresentations to students, securities fraud and unlawful use of military seals in advertisements." Harris's lawsuit claims that Corinthian, which operates the schools Heald, Everest, and Wyotech, deceived prospective students, investors, and accrediting agencies about its graduates' job placement rates and other critical information. Five years ago, the company paid \$6.6 million to settle similar claims by the California AG, but the bad behavior allegedly did not stop.").

⁵³ *Id.*

⁵⁴ 20 U.S.C. § 1087e(h); Lyndon B. Johnson, *Remarks at Southwest Texas State College Upon Signing the Higher Education Act of 1965*. (Nov 8, 1965), https://web.archive.org/web/20070714005531/http://www.lbjlib.utexas.edu/johnson/lbjforkids/edu_whca370-text.shtm.

⁵⁵ 20 U.S.C. § 1087e(h).

a borrower may assert as a defense to repayment of a loan made under this part, except that in no event may a borrower recover from the Secretary, in any action arising from or relating to a loan made under this part, an amount in excess of the amount such borrower has repaid on such loan.⁵⁶

The statute creates a cap on the amount of money a student may recover by saying that the student under no events will recover more than they paid.⁵⁷ Essentially, this means that student will not get punitive damages for the fraud by the financial institution, and they will not be paid an amount for their unpaid debts.⁵⁸

While the 1965 Act created the Borrower Defense, the DOE did not have a dedicated office or system to handle it. It was up to the individual student to make this defense. After the collapse of Corinthian College in 2015, the large number of defrauded students pushed the DOE to create a special office to handle their claims. Prior to the adoption of the 2016 rules, the Department was operating on a set of rules passed in 1995 that allowed students to argue fraud as a cause of action against the school,⁵⁹ but until the 2016 rules, the Department did not have a way of collecting these student complaints.⁶⁰ In 2016, the Department of Education adopted rules to allow the processing of these fraud claims through a dedicated office.⁶¹

III. DISCUSSION

Students defrauded by their college are entitled to forgiveness of their student loans under the Borrower Defense to Repayment mechanism.⁶² In 2016, The Obama administration issued a rule about the Borrower Defense. The 2016 Rule allowed students to discharge their debt by

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See 34 C.F.R. § 685.206(C)(1), (“any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law.”).

⁶⁰ *Manriquez v. Devos*, 345 F. Supp. 3d 1077, 1085-86 (N.D. Cal. 2018).

⁶¹ *2016 DOE Statement*, *supra* note 4.

⁶² See *Borrower Defense Application To Repayment Application*, DEPARTMENT OF EDUCATION, <https://studentaid.gov/manage-loans/forgiveness-cancellation/borrower-defense>.

proving that the college committed fraud in their marketing.⁶³ Using the “gainful employment” test, if the defrauding college did not prepare the student to earn enough to repay the loan, the debt could be discharged.⁶⁴ The 2016 Rule clarified the process of a defrauded student to make an affirmative defense claim.⁶⁵ The 2016 Rule also freed students from their pre-dispute arbitration agreements and class action waivers so that a student would have the opportunity of raising the Borrower Defense in court.⁶⁶ Schools participating in the federal direct loans programs were required by the 2016 Rule to follow this new regulation on dispute resolution agreements.⁶⁷ Not being allowed in court because of a small print agreement made by a student makes the legal protection of the Borrower Defense ineffective. This rule was in direct response to the closure of Corinthian Collage.⁶⁸

On January 20, 2017, the DOE stopped processing claims by the Corinthian students.⁶⁹ A class was certified in 2018 of Corinthian students seeking a discharge of their loans.⁷⁰ In 2019, a new rule on the issue was published.⁷¹ The 2019 Rule will take effect in July of 2020.⁷² The 2019 Rule makes loan forgiveness harder to achieve for defrauded students and limits the amount forgiven to the actual harm resulting from the fraud.⁷³ Using the “Average Earning Rule,” a

⁶³ 2016 DOE Statement, *supra* note 4.

⁶⁴ *Manriquez*, 345 F.Supp.3d at 1090.

⁶⁵ 2016 DOE Statement, *supra* note 4.

⁶⁶ Student Assistance General Provisions, 81 Fed. Reg. 75926 (Nov. 1 2016).

⁶⁷ *Id.*

⁶⁸ 2016 DOE Statement, *supra* note 4.

⁶⁹ *Manriquez v. Devos*, 411 F.Supp.3d. 535, 537 (N.D. Cal. 20019).

⁷⁰ *Id.* at 538.

⁷¹ Preston Cooper, *Devos Fixes the “Borrow Defense” Rule’s Biggest Problems*, FORBES, (Sep. 9, 2019), <https://www.forbes.com/sites/prestoncooper2/2019/09/09/devos-fixes-the-borrower-defense-rules-biggest-problems/#18bb41225330> (“Recently, the Trump administration released the final version of the BDR rule, which builds on a preliminary rule issued in 2018, which in turn replaced an Obama-era version of the rule issued in 2016. The next administration will probably issue another version. Nevertheless, Education Secretary Betsy DeVos’ final rule is the best iteration issued so far, improving on both the Obama rule and DeVos’ own preliminary rule.”).

⁷² *Manriquez v. Devos*, 345 F. Supp. 3d 1077, 1089 (N.D. Cal. 2018); Student Assistance General Provisions, 84 Fed. Reg 49788, (Sept. 23, 2019) [hereinafter Student Assistance General Provisions].

⁷³ *Manriquez v. Devos*, 345 F. Supp. 3d 1077, 1090 (N.D. Cal. 2018).

student's current earnings are compared to the average incomes for their field, and the student can only receive compensation for the difference between their income and the average.⁷⁴ Secretary DeVos believed that the 2016 Rule was too generous to defrauded students.⁷⁵ Prior to the 2019 Rules, a student who was under-educated at a deceitful college, who later obtained an education and a well-paying job, could obtain a discharge from the DOE of the loans for the fraudulently-marketed college. Under the 2019 Rule, students who succeed despite their college leaving them unprepared cannot receive a discharge. Students very close to earning the same amount as their peers at other colleges would get a proportionately lower amount of debt forgiveness. The 2019 Rule means that after a court finds a college has defrauded students, the DOE may reduce the student's relief via the average income test.⁷⁶ This increases the burden on the students and allows the college additional defenses.

A federal district court recently ordered Secretary DeVos to stop collecting on the loans of Corinthian College.⁷⁷ DeVos implemented a tiered system of repayment depending on whether the student went on to find gainful employment.⁷⁸ The court ordered an end to this procedure, and Secretary DeVos halted relieving these loans. In May 2018, the United States District Court for the Northern District of California held that the gainful employment test was an illegal methodology.⁷⁹ In December of 2019, DeVos introduced the new "average income" methodology as an alternative way to reduce the debt forgiveness given out to students.

⁷⁴ *Id.* at 1091.

⁷⁵ Student Assistance General Provisions, *supra* note 72.

⁷⁶ *See* Cowley, *supra* note 2.

⁷⁷ Erica Green, *Devos Halts Partial Debt Relief Policy After Judge Slams Procedures*, NEW YORK TIMES, (June 6, 2018) <https://www.nytimes.com/2018/06/06/us/politics/betsy-devos-student-debt-relief.html>.

⁷⁸ *See* Cowley, *supra* note 2.

⁷⁹ *Manriquez v. Devos*, 345 F. Supp. 3d 1077, 1110 (N.D. Cal. 2018).

In October of 2019, Secretary DeVos was held in contempt of court for allowing the continued collection of Corinthian students' debt.⁸⁰ Although the DOE was ordered to stop collecting on the debts, it instead sent emails to almost 16,000 students demanding payment of their student loans.⁸¹ In spite of the court order, the Department garnished wages and tax refunds to collect on the loans of the students who did not pay voluntarily.⁸² While DeVos claimed this collection effort was inadvertent,⁸³ this seems highly unlikely. Far from just a mistaken email, wage garnishment and tax return garnishment show an institutional effort to continue to collect on these loans.⁸⁴ The allegedly inadvertent error follows the pattern of pressing defrauded students to pay their loans.⁸⁵

The Borrower Defense was targeted for elimination by the House of Representatives in 2017,⁸⁶ and the PROSPER Act was introduced in Congress to remove it.⁸⁷ The bill did not advance to a floor vote.⁸⁸ Congress never scheduled a vote for the Act, and control of the House has since changed parties, so the legislative removal of the act is now unlikely.⁸⁹

Bankruptcy traditionally provides a fresh start for insolvent debtors.⁹⁰ If the debtor has so much debt that they will never be able to repay it, he or she loses the incentive to work and be

⁸⁰ Elissa Nadworny & Anya Kamenetz, *DeVos Held In Contempt Of Court For Enforcing Loans On Defrauded College Students*, NPR, (Oct. 25, 2019) <https://www.npr.org/2019/10/25/773334681/devos-held-in-contempt-of-court-ed-department-fined-100-000-in-student-loan-case>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Alexis Goldstein, *Betsy DeVos' refusal to honor student loan forgiveness shows her disrespect for the law*, NBC News, (July 16, 2020) <https://www.nbcnews.com/think/opinion/betsy-devos-refusal-honor-student-loan-forgiveness-shows-her-disrespect-ncna1234074>.

⁸⁵ *Id.*

⁸⁶ Erica Green, *New Higher Education Bill Rolls Back Obama-Era Safeguards*, NEW YORK TIMES, (Dec. 12, 2017) <https://www.nytimes.com/2017/12/12/us/politics/house-republican-higher-education-bill-obama.html>.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Andrew Kreighbaum, *Seeking Votes on PROSPER, GOP Appears to Come Up Short*, INSIDE HIGHER ED, (June 14, 2018) <https://www.insidehighered.com/news/2018/06/14/no-movement-prosper-act-after-gop-vote-count>.

⁹⁰ *Process – Bankruptcy Basics*, UNITED STATES COURTS, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics> (last visited Nov. 25, 2020).

productive.⁹¹ The law treats student loan debt differently from other forms of debt, and rightly so.⁹² The protection from discharge given to student loan debt encourages loans to uneducated young people, who will repay when they are more employable.⁹³ But in cases like *Corinthian*, a student is saddled with loads of student debt but not the skills needed to be employed in their chosen field. While *Corinthian College* was unusual in that it involved fraud, the typical path to the discharge is difficult, but possible.

As a general rule, student loans are exempt from discharge under bankruptcy.⁹⁴ There is an exception that allows the discharge of student loans in bankruptcy in limited circumstances.⁹⁵ The current standard for discharging student loans in bankruptcy is “undue hardship.”⁹⁶ This term is found in the bankruptcy code and the term is further defined by the Brunner Test,⁹⁷ the current test used in these cases.⁹⁸ The Brunner Test requires that a debtor show: (1) they cannot maintain a minimal standard of living, (2) the situation is likely to persist, and (3) the debtor makes a good faith effort to repay the loans.⁹⁹ The first requirement sounds like a high bar to clear, but is flexible in practice.¹⁰⁰ The third requirement for a good faith effort stops newly graduated students from immediately filing for a discharge of their student loans in bankruptcy.¹⁰¹ Many more people meet the Brunner Test than one might expect.¹⁰²

⁹¹ *Id.*

⁹² 11 U.S.C. § 523(a)(8) (2020).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Brunner v. New York State Higher Educ. Services Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).

⁹⁸ Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L. J. 495, 497 (2012).

⁹⁹ *Brunner*, 831 F.2d at 396.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See Chris Arnold, *Myth Busted: Turns Out Bankruptcy Can Wipe Out Student Loan Debt After All*, NPR (Jan. 22, 2020) <https://www.npr.org/2020/01/22/797330613/myth-busted-turns-out-bankruptcy-can-wipe-out-student-loan-debt-after-all>.

The idea that student loans are not dischargeable in bankruptcy is so deeply ingrained in mainstream culture and the legal profession that most people with student loan debts do not think to ask about bankruptcy.¹⁰³ Even many lawyers do not try to get student loans discharged.¹⁰⁴ Most people still believe that student loans cannot be discharged.¹⁰⁵ Some courts have characterized “undue hardship” as needing a “certainty of hopelessness”,¹⁰⁶ despite that standard not coming from the code or the Brunner Test.¹⁰⁷ Most students do not file for bankruptcy, but about half of those who do are granted some relief.¹⁰⁸ So while the standards for discharging student loans are high, (“below a minimum standard of living”), they are not unachievably bleak (“certainty of hopelessness”).¹⁰⁹

The students of Corinthian College struggle for relief and are in limbo between full relief and partial relief depending on which rule prevails in the long run. At minimum they do have to go to Bankruptcy Court to prove to a court that their life is below the minimum standard of living.¹¹⁰ Without the special provision protecting defrauded students, they have little alternative but filing for discharge in bankruptcy.¹¹¹

IV. SOLUTIONS

During the 2020 Democratic presidential primaries, several presidential candidates spoke about student loans and proposed plans for dealing with the problem.¹¹² Elizabeth Warren

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Rosenberg v. N.Y. Higher Education Services Corp.*, 610 B.R. 454, 459 (Bankr. S.D.N.Y. 2020).

¹⁰⁶ *Id.*

¹⁰⁷ *See Arnold*, *supra* note 102.

¹⁰⁸ Iuliano, *supra* note 98, at 505 (“Those debtors who did file adversary proceedings were relatively successful. Half of them received some type of relief. More specifically, the remedies were as follows: fifty-one (25% of the entire sample) full discharges, thirty (14%) partial discharges, and twenty-five (12%) administrative repayment plans. Despite the availability of these remedies, debtors who received any form of relief constituted less than 0.1 percent of student loan borrowers in bankruptcy.”).

¹⁰⁹ *Rosenberg*, 610 B.R. at 459.

¹¹⁰ *Id.*

¹¹¹ *Paris*, *supra* note 39.

¹¹² *See Higher Education for All*, *supra* note 42.

proposed eliminating most student loan debt.¹¹³ She also proposed barring federally-subsidized student loans from going to for-profit institutions, which would directly affect colleges like Corinthian in the future.¹¹⁴ Corinthian College targeted marginal students who had little chance of finishing their programs. For-profit colleges like Corinthian educate only “10% of the students in America but receive 50% of the federal student loan defaults.”¹¹⁵ This disproportionate share of student loans given by the federal government to for-profit institutions has amounted to poor government policy over the last several decades.¹¹⁶ If the Warren plan were implemented, it would send shock waves through for-profit colleges. According to Senator Warren, “Many for-profit colleges have built a business model around sucking down taxpayer dollars while delivering a poor education....”¹¹⁷ The Warren plan goes beyond defrauded students and promises to forgive the loans for 75% of borrowers entirely, and portions of loans of 95% of student borrowers.¹¹⁸

The statute establishing the borrower defense has been implemented in different ways by the Obama administration and the Trump administration.¹¹⁹ The current bureaucratic knife fight shows how widely the same small section of statute can be interpreted and can be the basis of very different programs.¹²⁰ In order to protect students from the political winds of the Secretaries of Education, the legislature should pass a revised statute that codifies the Borrower Defense as a cause of action against a school. The updated rules should also require the Department of Education to process the claims of defrauded students and invalidate their debts. The statute does

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Howard Gold, *Who’s at fault for student-loan defaults?*, CBR (May 13, 2019)

<https://review.chicagobooth.edu/public-policy/2019/article/who-s-fault-student-loan-defaults>.

¹¹⁶ See Robert Shireman, *The Policies That Work – and Don’t Work – To Stop Predatory For-Profit Colleges*, THE CENTURY FOUNDATION (May 20, 2019), <https://tcf.org/content/report/policies-work-dont-work-stop-predatory-profit-colleges/?agreed=1>.

¹¹⁷ See *Higher Education for All*, *supra* note 42.

¹¹⁸ *Id.*

¹¹⁹ Cowley, *supra* note 2; 2016 DOE Statement, *supra* note 4.

¹²⁰ See generally Cowley, *supra* note 2.

not explicitly say that the full amount of their debts should be forgiven, but this is implied since the courts have found that merely reducing the amount of the debt was a violation of the statute.

The larger issue of students being burdened with unreasonably high amounts of student loan debt poses a larger problem. I propose a big-picture idea that could change the college financial landscape. A student and a college could enter a contract where the student goes to college at the college's expense in exchange for a percent of a student's income after graduation for a specific amount of years. This would encourage a college to train students for in-demand jobs, and try to help place the students in careers. In this program, the college would be taking a risk for each student that enrolls in the school. Critics of this proposal might argue that it favors wealthy students who already have strong employment prospects and incentivizes students to pursue high-paying careers at the cost of personal fulfillment. But if the payment is based on the next 15 years or so of income, colleges would want to help driven students find a path that they would enjoy. This system does not have to be the only way to finance college. This approach would incentivize colleges to align their instruction more closely to market demand. While a liberal education provides more in terms of human enrichment than merely vocational training and placement, the current misalignment of student debt and student's job prospects cry out from radical change in the system.

Considering the amount of fraud in for-profit colleges in the last hundred years, the federal government would be wise to stop any federal student aid from going to for-profit universities and recommend that no student loans are issued to students attending these institutions. A complete ban on for-profit education would go too far and be impractical.. The problem with a for-profit university is that the ever-present incentive to increase profits leads to higher levels of tuition and fees while reducing the costs. Fewer staff and facilities while increasing the tuition level leads to

the kind of high-debt-low-skilled graduates that we expect to see from for-profit colleges. A short-term desire for profit leads to the degradation of an institution. Because the benefits are so delayed, the consumers of for-profit education are not able to judge the quality of the outcome until well after they are out of the college and in the work force. For this reason, a university driven by profit motive is inherently suspicious as an institution of higher learning, in a way that other for-profit companies are not.¹²¹ A seller of food, clothes or entertainment must deliver a product that is immediately able to be scrutinized. To stay profitable, they must keep the quality and price in balance so that the market keeps buying. In education, a series of perverse incentives lead for-profit colleges toward being low quality overpriced products. They are able to find customers through fraudulent representations of where its students will be after graduation.

For-profit universities should be more heavily and punitively regulated than they are now. A law meant to effectively end for-profit colleges could include a prohibition of federal student loans from going to for-profit institutions. A prohibition could be placed on using veterans' benefits to attend a for-profit college. Federal education funds could be conditional on a university's non-acceptance of transfer credit from for-profit colleges. A federal law could also prohibit for-profit regional accreditation. Through these harsh measures, for-profit education would be limited to teaching skills that are tangibly beneficial. For example, a bar exam prep course could be taught by a for-profit company, but the fees must be paid by the student out-of-pocket, and there will be no degree or certificate granted that will be accepted by other colleges. The service will only be valuable to the student for what they learn, and how the course actually helps them. Then the college would be incentivized to actually instruct to the best of its ability, in

¹²¹ See Tressie Cottom, *How For-Profit Colleges Sell 'Risky Education' To The Most Vulnerable*, NPR (March 27, 2017), <https://www.npr.org/2017/03/27/521371034/how-for-profit-colleges-sell-risky-education-to-the-most-vulnerable>.

order for its product to be desirable. There would not be quite as strong an opportunity to over-charge for low-quality instruction; the benefit would have to be immediate to be desirable to paying customer. Removing the federal dollars may reduce tuition inflation.

The prohibition on certificates and degrees that are recognized by other colleges is meant to deter these colleges from becoming diploma mills. If their diplomas are worthless, the only value in the instruction is the actual instruction. While a traditional non-profit university relies on its history and reputation to reassure customers that the educational product is trustworthy, a for-profit college often uses dishonest marketing and promises of prospects with a diploma in hand.¹²² Stopping for-profit colleges from giving out degrees would make the focus of their instruction the immediate benefit. If the student is not satisfied with the product, he will not buy more of it. There would be less of an incentive to stick with a for-profit for the long haul to get a degree, if the student does not feel the benefit of the instruction.

Even without the aid of federal student loans, these schools may still pressure students to take out loans to pay for instruction. The government could attach conditions on federal education funding, saying that if the state wants federal education dollars, no loans or payments may go to a for-profit college. These same conditions could be placed on banks that are federally insured. Cutting off all practical avenues for a student to take out a loan to attend a for-profit college would fundamentally change the nature of the business they are in. Only smaller courses would be viable, where the costs were paid out-of-pocket by the student, and the instruction was of immediate benefit to the student. For those for-profit instruction companies that did survive this proposed onslaught of restrictions, they would need to convince their students of the immediate benefits of their courses.

¹²² See *GI Bill Creation Story*, *supra* note 8.

V. CONCLUSION

The DOE acted outside the law when it promulgated its 2019 Rule on the Borrower Defense.¹²³ Courts have stopped attempted overreach by the Department of Education,¹²⁴ and the future is bright in terms of proposals to help out student borrowers that are in over their heads.¹²⁵ The recent boom and bust in for-profit institutions of supposedly higher learning parallels the post-World War II phenomenon of an influx of federal dollars leading to an expansion of universities of dubious quality.¹²⁶ Both the Postwar era and the current era ended with a public backlash against for-profit colleges in the form of laws and regulation to curtail their abuses.¹²⁷ Secretary DeVos is stubbornly trying to extend the era of dishonest for-profit universities taking advantage of students by stymieing their attempts to get loan forgiveness.¹²⁸ The 2019 Rules stand in opposition of the law, public opinion, and sound policy. There is no good reason to continue collecting the debts of sketchy organizations engaged in a fraud.¹²⁹ Now that Corinthian College is defunct, the Secretary of Education should not continue her efforts to collect on the fraudulently procured loans taken out by the university's students.¹³⁰ Going forward, the federal government should protect students from the predatory practices of for-profit colleges by increasing the restrictions on federal money going to the institutions.¹³¹

¹²³ See Cowley, *supra* note 2.

¹²⁴ See *Id.*

¹²⁵ See generally *Higher Education for All*, *supra* note 42 (showing how changes are on at least one legislator's minds).

¹²⁶ *GI Bill Creation Story*, *supra* note 8.

¹²⁷ *Id.*

¹²⁸ See Cowley, *supra* note 2.

¹²⁹ See *Id.*

¹³⁰ See *Id.*

¹³¹ See generally *Higher Education for All*, *supra* note 42 (showing how this strategy would be implemented by Elizabeth Warren).

At all universities, students' loans are unsustainably high and alternative, debt-free plans for financing college should be explored.¹³² And for the former students saddled with an overabundance of debt, some form of student loan forgiveness across the board would help an entire generation of people trying to start a new life.¹³³ The economy is more than a series of statistics. The people burdened by high student loans would be able to move forward in their lives if their loans were lifted.¹³⁴ The possibility of an explosion of home-buying, marriage and family creation is a likely outcome of mass student loan forgiveness.¹³⁵ The current debts are keeping too many people from starting their lives.¹³⁶ It is not a matter of whether the country can afford to pay for these loans. The better question is: can the country afford not to?

¹³² See Paris, *supra* note 38.

¹³³ See generally *Higher Education for All*, *supra* note 42.

¹³⁴ Paris, *supra* note 38.

¹³⁵ See *Id.*

¹³⁶ See *Id.*