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BOOK REVIEW: A HUMANISTIC VISION OF BANKRUPTCY LAW

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reviewing

Karen Gross, Failure and Forgiveness: Rebalancing the Bankruptcy System (Yale University Press 1997)

INTRODUCTION

With *Failure and Forgiveness,* Karen Gross has written a wonderful book about bankruptcy policy. Notwithstanding the topic, it is a surprisingly readable book − a book that aims to make a wide range of people think critically about the United States' bankruptcy system. This is the sort of book that policy wonks bring to the beach. It offers explanations about bankruptcy law to all kinds of people who have an interest, but not necessarily an expertise, in the area − well, perhaps not *all* kinds. Although Gross sets out to "interest a wide spectrum of readers − educators, economists, historians, anthropologists, sociologists, psychologists, businesspeople, philosophers, and social workers as well as lawyers, law professors, and judges" [1] − there is one group for whom this book will have little interest. Economists will find little to interest them in *Failure and Forgiveness* because, from their perspectives, it may as well have been written in a foreign language. On this account, *Failure and Forgiveness* is a brave book, because, at least in recent history, bankruptcy commentary has been dominated by the rhetoric of economics. [2]

The book begins with an entertaining description of bankruptcy law and its underlying policies and purposes. Relying on a combination of empirical data, religious parables, feminist theory, bad jokes, art theory and the stories of two hypothetical debtors (a corporation named Seat Co., and an individual named Jason Smythe), Gross paints an accessible and thoughtful picture of the current bankruptcy process. But *Failure and Forgiveness* is much more than a primer on bankruptcy law.

It is also a manifesto that challenges the way bankruptcy law should be conceived, and a blueprint for substantial revision of the Bankruptcy Code. Gross proposes a revision of bankruptcy law as involving the interconnecting interests of debtors, creditors and their communities. As pertains to debtors, Gross argues that bankruptcy law should provide both consumer and business debtors a broad discharge from their obligations "based on notions of forgiveness and rehabilitation." [3] As for creditors, she contests the long−held bankruptcy policy favoring equality in distributions to similarly situated creditors, and instead proposes that "a creditor could rebut the presumption of equal treatment upon a showing of irreparable injury." [4] Finally, she argues that the role of community should be recognized in the bankruptcy process, limiting this recognition to those communities that share "an identifiable nexus" with the debtor's bankruptcy and which have suffered "some real and palpable injury . . . capable of being redressed." [5] But *Failure and Forgiveness* is much more than a proposal to revise bankruptcy law and its underlying policy purposes.

It is also a critique of the economic analysis that has predominated bankruptcy commentary, at least for the last 15 years or so. [6] Gross articulates her vision of bankruptcy in terms confrontational to those trained to consider the economic efficiency of law. She questions the value of abstract models as a starting place for policy analysis. [7] She rejects assumptions regarding the self−interestedness, or "rationality", of individuals −

assumptions that permeate economic analysis of the law. [8] She criticizes the goal of wealth maximization as narrow and misguided. [9] She rejects the value of assumptions regarding the sameness of actors. [10] She makes frequent inter−personal comparisons of utility. [11] She openly questions the value of *ex ante* decision making. [12] But *Failure and Forgiveness* is much more than a critique of the economic analysis of bankruptcy law.

It is also an articulation of a competing theory of bankruptcy law − a theory which Gross does not explicitly articulate, but which permeates every line in her book. I term hers a humanistic vision of bankruptcy law because it is a theory that emphasizes the uniqueness of the human actors involved in the bankruptcy process. It is no wonder, then, that Gross rejects the value of abstract models and suggests that policy is better formulated by first focusing on "the real questions involving a real system that affects real people." [13] Not surprising at all that Gross rejects assumptions that people maximize their self−interest, and instead professes a belief that "individuals can be, and most frequently are, motivated by a concern for the well−being of others and a desire to act in ways that are decent and benefit society." [14] It is not at all remarkable that Gross rejects simplifying assumptions about creditors, contending that these assumptions do "not recognize the significant differences among [people] and the many forms those differences can take." [15] It also follows that Gross advocates a contextual model of bankruptcy decision making that would "free up judges to use their equitable powers." [16] This contextual model "relies heavily on faith in a thoughtful judiciary." [17] Unlike economic analyses of bankruptcy law, Gross' humanistic model advocates a broad vision of "bankruptcy as a vehicle for social change." [18]

Part I considers Gross' proposals and the methodology she employs to support these suggestions. Following her structure, this section is divided into three parts: debtors, creditors and community. Part II tackles the bigger issues implicit in Gross' analysis. Reading between the lines, I understand Gross' book, not just as a rejection of an economic analysis of bankruptcy law, but more broadly as a rejection of theory. The storytelling throughout her book is more than stylistic − it belies a deep−seated mistrust of all that is not grounded firmly in the tangible, real−world practice of bankruptcy law and policy. She implicitly links this practical approach to bankruptcy policy to what she refers to as "contextual decision making" − a brand of dispute resolution enmeshed in factual and equitable determination. [19]

I. PROPOSALS AND METHODOLOGY

A. *Debtors*

Gross asks "why a fresh start should exist," [20] and concludes that "[t]he fresh start is how society (through the bankruptcy system) mandates that creditors and other members of society forgive nonpaying debtors." [21] She defends the bankruptcy discharge on two grounds − one pragmatic, the other religious.

Gross tells us that forgiveness of obligation is important in our credit economy because forgiveness enables a debtor's financial rehabilitation. [22] "Because taking [credit] risks is precisely what we want people to do, we need a mechanism for dealing with the inevitable failures that are part of the process." [23] She argues that rehabilitation is an important part of discharge policy because "we want debtors to be able to *continue* borrowing if they put themselves in the position to be able to repay what they owe their creditors." [24] She describes this bankruptcy rehabilitative goal as "complicated" in that "we want debtors to continue what they were doing, but with a different outcome, that is, success as distinguished from failure." [25]

Turning to religious scholarship on forgiveness, Gross contends that forgiveness is appropriate where a harmful wrong occurs to someone who resents the occurrence, so long as the "wrongdoer acknowledges the wrong done and takes steps to rectify it." [26] According to Gross, forgiveness "has the potential to be restorative" [27] in the bankruptcy context both because it provides to the wronged creditor partial restitution for "the disequilibrium created by nonpayment" [28] and because it provides to the debtor−wrongdoer "the opportunity to regain self−esteem and become once again a productive member of society." [29]

Although Gross admits that the connection between rehabilitation and forgiveness might be counterintuitive, she relies on a biblical allegory to explain that forgiveness paves the way for rehabilitation. [30] We're told that

rehabilitation "encompasses a recovery of spirit; it enables the emotional recovery that allows individuals and businesses to start over as productive members of society." [31] Gross describes the connection between forgiveness and rehabilitation in the following broad terms:

> Individuals and businesses make mistakes. And when they make mistakes, society, by forgiving those mistakes, helps them to get back on their feet. We encourage learning, of which risk taking is a central feature, by acknowledging the possibility of failure and providing a way for people to start over, without either forgetting or condoning the underlying behavior. [32]

In justifying a fresh start through discharge in this way, Gross has built upon prior justifications. At first, American bankruptcy law protected only merchant debtors. [33] Although later these bankruptcy laws greatly expanded upon the class of eligible debtors, [34] discussions of bankruptcy policy continued to be influenced by the presumption that bankruptcy law affected debtors engaged in commercial activities. In the Nineteenth Century, jurists justified discharge as a necessary means for encouraging entrepreneurs to take risks in an emerging market economy. [35] As the Twentieth Century progressed, individuals increasingly financed their purchases with mortgages, loans, leases and credit cards. [36] Eventually, more consumers filed bankruptcy petitions than did businesses. [37] As a result, our conceptions of discharge also changed. Discharge has come to be viewed as a way of protecting consumer−debtors from their systematic over−extensions of credit−financed consumption, [38] as a means of allocating the risk of default on the party better able to avoid that risk, [39] as a necessary curb on negligent lending practices in the consumer finance industry, [40] and as a safety net to prevent debtors who cannot pay their creditors from becoming wards of the state. [41]

Although she breaks no new ground in her focus on the rehabilitative goals of bankruptcy, Gross subtly shifts the debate by emphasizing that a bankruptcy discharge is a necessary part of any economy in which the purchases of individuals and their families are financed with consumer credit rather than paid for out of savings. [42] Describing bankruptcy as a means for encouraging individuals to remain a part of our credit economy, [43] Gross does not advocate an unqualified discharge. Although she argues that there are too many grounds for excepting debts from discharge, [44] Gross concedes, in the abstract, that exceptions to discharge should exist. [45] In deciding what debts should be excepted from discharge, Gross argues that "some debtors cannot be rehabilitated so they should not be forgiven." [46] "Thus," Gross continues, "it is important to be able to distinguish between rehabilitatable debtors (who will get a fresh start) and outliers . . . (. . . who will not get the benefits of bankruptcy)." [47]

Gross' reference to religious connections between rehabilitation and forgiveness is a significant addition to the debate on discharge policy. [48] There are important benefits to Gross' references to religious understanding on the importance of forgiveness to justify and explain bankruptcy discharge. A religious justification of bankruptcy keeps the issue on a human scale. When viewed from this humanistic perspective, bankruptcy seems more about the people who owe or are owed money than about money. Gross' religious focus demands that issues of human dignity move to the forefront of bankruptcy consideration rather than languish quietly in the background. Her emphasis upon the moral questions inherent in a bankruptcy provides guidance and structure when considering not only the (im)morality of a debtor's failure to pay, but also the (im)morality of a creditor's insistent demand for payment.

However, Gross' religious focus on bankruptcy also has its shortcomings. While it generally supports the concept of discharge, it does not direct us toward a detailed discharge policy. It does not tell us who should not receive a discharge. Nor does it help much in identifying what debts should be excepted from discharge.

My biggest criticisms, however, are with the chapter in her book that discusses how best to effectuate the fresh start policy. [49] Although she proposes in this section that the list of nondischargeable debts be narrowed, [50] Gross provides little guidance for distinguishing between the "outliers" and the "rehabilitatable debtors." [51] I was anxious to hear in greater detail how the necessity of consumer credit to our economy, and the desire to forgive and rehabilitate overextended debtors, would have influenced such an attempt. Indeed, in this section, I half−expected Gross to advocate that most of the exceptions from discharge be repealed. After all, if she

really hopes to create an incentive for individuals to resume as meaningful participants in our credit economy, then it follows that the discharge should be as broad as possible. [52]

Gross also proposes in this section that the rule of limited liability for officers and directors (but not shareholders?) of debtor corporations should be curtailed. [53] On public policy grounds, I too favor curtailing the rule of limited liability, at least as it pertains to certain involuntary liability. [54] Nonetheless, Gross' proposal did not square with the rehabilitative goals she had identified earlier in this section of the book. A rule of limited liability immunizes the owners and managers of a corporation from corporate liabilities. Abolishing that rule, thus, precludes the forgiveness of corporate liabilities; yet, nothing in the earlier sections of the book justifies or explains this result. Indeed, her consumer finance and religious explanations of discharge policy don't seem applicable to corporate debtors at all.

B. Creditors

In *Failure and Forgiveness*, Gross advocates more than simply humanizing our treatment of debtors in bankruptcy; she also contends that bankruptcy law should be altered to reflect the basic, but often neglected, fact that creditors are people too. In this section of her book, Gross takes on the long−standing bankruptcy policy favoring equality in distribution among similarly situated creditors, and advocates preferring some creditors over others because they "are more deserving of repayment than others." [55] Although disparate treatment for different creditors within a single class violates the principle that creditors should receive pro rata distributions from a bankruptcy estate, Gross justifies her proposal as emphasizing equality of outcome over equality of treatment. [56]

To permit emphasis on equality of outcome, Gross proposes that we view equality in treatment as a presumption, subject to rebuttal upon a showing of inequality in outcome. [57] She suggests two limited grounds for demonstrating inequality of outcome. First, an unsecured creditor would be permitted to rebut the presumption of equality in treatment with "a showing of irreparable injury" if established "with reasonable certainty." [58] She would not limit the definition of irreparable injury in this context, but suggests that the standard should "include imminent collapse of a business, mortgage foreclosure on the creditor's home, or inability to acquire needed medical care." [59] In addition, involuntary unsecured creditors could rebut this presumption upon a showing that equality in distribution would be substantively unconscionable due to the extreme unfairness of the situation giving rise to the creditor's claim. [60] By involuntary creditors Gross largely means tort victims, [61] although she leaves room in her analysis for other sorts of involuntary claims, such as the claims of a governmental entity for environmental injury. [62]

At first blush, Gross' proposal appears highly controversial. It contravenes the bankruptcy goal of equality in distribution − a rule that seems not only fair and clear, but also simple to administer − in favor of a rule that is highly indeterminative and, thus, costly to apply. Few would relish the task of distinguishing between difficult and impossible cases, and Gross admittedly gives little guidance beyond general direction. Nonetheless, the more I thought about her proposal, the less convinced I was that it was very different from the rule that exists today.

Although courts and commentators frequently repeat the bankruptcy goal of equality in distribution in near−reverential tones, [63] there are numerous exceptions to this rule [64] – nine statutory priorities, [65] eighteen exceptions from discharge, [66] eighteen exemptions from the automatic stay, [67] and eight ever−broadening safe harbors from preference liability. [68] And every couple of years, this list gets longer. If equality in distribution is a fundamental principle of bankruptcy administration, then it is one of the best kept secrets in Congress. Thus, Gross is right to question the continuing viability of the rule of equality in distribution − choosing among deserving creditors happens all the time. Right now, Congress does the choosing and public choice analysis of federal bankruptcy legislation suggests that legislatures may not be the best institution to make these choices. [69]

Gross' suggestion that courts are better equipped to distinguish among creditors' requests for priority in treatment deserves extended consideration. It also highlights a substantive disagreement on the theoretical

justification of priorities in bankruptcy. [70] Absent a framework for assessing the merits of creditors' requests for priority, it is often meaningless to claim that too many creditors' claims deviate from the "norm" of equality in distribution. Gross' proposed standards for rebuttal of the presumption of equality provides an excellent starting point for debating the contours of a theory of priority. [71]

C. The Community

In the final section of her book, Gross "recognize[s] and justif[ies] the role of community in the bankruptcy process." [72] She contends that "[w]hen the perspective of communities is taken into account, the competing interests that bankruptcy must balance are at once expanded and complicated." [73]

Gross is more cautious in this section than in the earlier ones. [74] First, she is careful to note that her proposal would not place community interests above the other interests at stake in a bankruptcy case. [75] On this ground, she distinguishes herself from communitarians who advocate that social good (or community interests) should always prevail over individual liberties. [76] Second, she would limit the communities whose interests should be protected or considered, recognizing that "[i]t is unsatisfactory to determine either that no communities matter in bankruptcy or that all communities matter." [77]

In carving out this less controversial position, however, Gross realizes that she has made her task far more difficult. [78] "Saying that community counts still leaves open the question of which communities a bankruptcy system should consider, and standards are required in order to find and define community within existing bankruptcy law." [79] She looks to the law of standing for guidance, and adopts a three−part test for identifying those communities whose interests should be protected in bankruptcy: nexus; injury and redressability.

> First, the communities that matter are those in which an identifiable nexus exists between the debtor's bankruptcy and the community. That nexus can take a variety of forms. It can be, for example, an ecosystem nexus, a vocational nexus, or a social welfare nexus. Second, if the nexus indeed exists, then there must be some real and palpable injury that is or will be felt by the community as a consequence of the debtor's bankruptcy. This injury does not need to be economic (although it certainly can be), but it cannot be conjectural or hypothetical. Third, the injury must be capable of being redressed in the debtor's bankruptcy case. Some injuries caused by a bankruptcy will not be able to be remedied by, for example, adjusting the treatment of the parties within a plan of reorganization. In this case, the injured community will go unrecognized. Only if all three conditions are satisfied will the community in question have a place at the bankruptcy table. [80]

Moreover, Gross would broadly define injury to include loss, "although that value is not always measured in traditional economic terms." [81]

Gross goes further to propose language for amending the provisions governing confirmation of a chapter 11 plan of reorganization. [82] Her proposal would require that the public interest − community interests − be considered in determining whether a plan of reorganization should be confirmed. Consideration does not, in Gross' proposal, mean that community interests trump all other interests. Indeed, she contends that a plan should be confirmed "even if it was *inconsistent* with the public interest as long as the public interest had been considered and was outweighed by other competing interests." [83]

Gross would be the first to admit that her proposal is far from perfect. She explicitly leaves substantial questions unanswered − "Who would represent communities, and how would those professionals be paid? When would communities need to speak before their rights eclipsed, and how, if at all, would relevant communities be notified of a bankruptcy filing in the first instance?" [84] Presumably, these sorts of "details" would be resolved by bankruptcy judges on a case−by−case basis. [85] Gross is not troubled by leaving these issues to the discretion of the court. In fact she embraces this sort of "contextual decision making." [86]

Gross' community−focused proposals emphasize the unspoken discretion that many bankruptcy judges have exercised time and again. [87] Whether courts *should* be allowed to take community interests into consideration is hotly disputed among bankruptcy commentators, however. [88] For example, in a law review article published after *Failure and Forgiveness*, [89] Alan Schwartz argues on both efficiency and equity grounds that bankruptcy law should not attempt to protect communities, even where there are no good substitutes for the debtor's firm. [90] Schwartz first argues that protection of community interests in bankruptcy is inefficient because, where benefits to the community exceed the costs of preserving these benefits, communities will "internalize the various interests that a firm's disappearance would affect." [91] Although Schwartz concludes that "bankruptcy law is unnecessary to ensure that a firm will remain in its local community if the firm's continued existence is worth more to the community than the cost," [92] he ignores the substantial collective action problems likely to impede this result in the real world. Schwartz also objects to the protection of community interests on equity grounds. He argues that "costs fall on creditors and firms while the benefits accrue to communities. It would seem more equitable to make those who gain pay." [93] With this argument, Schwartz mischaracterizes Gross' position somewhat. Gross is very careful to distance herself from a position that advocates subsidizing community interests in every bankruptcy. [94] She instead proposes that the Bankruptcy Code "be amended to stipulate that *consideration* of community is a prerequisite to confirmation of any reorganization case." [95] Community interests would be recognized, but would not hold veto power over other interests. [96]

My greatest concern with this section of the book was its apparent preoccupation with corporate debtors. By failing to discuss the issue, does Gross understand a community's interests to be irrelevant with regard to individual debtors? If not, then should community standards factor into the question of whether an individual should liquidate its insolvent assets in chapter 7 or reorganize its payments to creditors in chapter 13? Or, whether specific debts should be excepted from discharge?

II. READING BETWEEN THE LINES

A. Viewing Bankruptcy with a Humanistic Perspective, Rather Than an Economic One

Bankruptcy scholarship has become dominated by the rhetoric of law and economics. This economic focus on bankruptcy law and policy began with the work of Thomas Jackson, [97] Douglas Baird [98] and Robert Scott, [99] who described the plight of the creditors of an insolvent debtor as a common pool problem. Many commentators have criticized their economic theory. [100] But over the past several years, scholars from the prestigious student−edited law reviews have been more likely to question, on economic grounds, the continuing need for bankruptcy legislation than to analyze, on any grounds, the content and form of its statutory provisions. [101] Sifting through these law review articles, readers are left to believe that the most important issues of bankruptcy policy involve whether securitization or chameleon equity or an auction should replace chapter 11 of the Bankruptcy Code. Gross' book was quite consciously written in reaction to this literature.

For example, although economic theorists presume debtors to be self−interested, perfectly informed and risk averse, [102] Gross perceives debtors and creditors as both altruistic and honest, [103] and unlucky and susceptible to mistakes. [104] She defends this humanistic vision of bankruptcy on several levels.

First, she argues that her optimistic view of human nature is at least as accurate as (if not more accurate than) the opposing view adopted by conventional law and economics. [105] As a result, she spends several chapters of her book discussing and analyzing existing bankruptcy statistics, and calling for the compilation and study of additional data. [106]

Second, she argues that "a traditional, neoclassical economic model" of bankruptcy theory is both limited and short−sighted. [107] Since it "addresses only a limited number of those affected by a bankruptcy filing," [108] Gross contends that this economic model "fails to take into account the myriad parties touched by a bankruptcy case and the economic consequences of their situations." [109] She also characterizes conventional economic analysis as having "a short−term economic focus." [110]

Finally, Gross argues that her humanistic vision is preferable to economic models of bankruptcy policy because it better expresses our expectations for social conduct: If debtors and creditors are presumed to be self−interested wealth maximizers, and bankruptcy policy is conceived as though these presumptions are universally valid, then bankruptcy law (consciously or unconsciously) rewards strategic behavior and discourages altruism; if debtors and creditors are presumed to act in the best interests of others, then debtors and creditors are encouraged to act consistent with these expectations. [111]

Although she most openly questions the premise that individuals act primarily according to their self−interest, Gross also criticizes many other core economic assumptions. Gross rejects the radically individualist perspective of neoclassical economics [112] when she advocates that community interests should be considered and accommodated in bankruptcy. [113] She rejects wealth maximization as the proper goal of bankruptcy law. [114] Although neoclassical economic analysis rejects interpersonal comparisons of costs or benefits, [115] she advocates rules for rebutting the presumption of equality of distribution in bankruptcy on the premise that "some creditors are more deserving of repayment than others." [116] Although neoclassical definitions of efficiency assume away distributional questions, she explicitly advocates using bankruptcy law to accomplish distributional goals. [117]

Gross is not the first commentator to criticize the premises underlying law and economics. [118] Even economists, and "law and economists," have joined in criticizing and expanding upon these conventional premises, developing a broader economic analysis of the law and legal culture. [119] Although Gross cites this expansive law and economics literature with approval, [120] she does not criticize the economic model of bankruptcy law on economic grounds. Instead, she "question[s] existing beliefs about bankruptcy and the philosophical theories that underlie those beliefs." [121] She redefines bankruptcy policy to reflect her humanistic vision of bankruptcy law − a vision premised on her belief that "people are inherently altruistic." [122] This optimism about the inherent goodwill of individuals, colors not only her proposals regarding the rehabilitation of debtors, distributions to creditors, and involvement of communities, but also her recognition that each of these proposals come at a price − a price that she believes society is willing to shoulder. [123]

Gross' vision of bankruptcy law is thought−provoking. Thought−provoking, not because she presents a rigorous, complex and coherent alternative to the economic analysis of bankruptcy law that has dominated current scholarship in the area, but rather because she consciously rejects the desirability of such a project. She presents a humanistic vision of bankruptcy policy that is, at the same time, emotional, philosophical, spiritual, and anecdotal. It is both simple and messy. It is easy to read and impossible to ignore. It will infuriate most economists who bother to read it.

B. Contextualized Decision Making: Where Compassion Outweighs Certainty

Having identified three distinct interests in bankruptcy: those of debtors, creditors and their communities, Gross then proposes a balancing mechanism. [124] She terms her approach "contextualized decision making" and defines it in broad brush−strokes:

> Contextualized decision making . . . reveals that decisions are not as clear−cut as may first appear. It permits judges to look at the specific facts before the court and then interpret and apply the text in light of those facts. It allows judges to be influenced by the impact of a bankruptcy on the various participants in the process. It allows courts to consider community interests in assessing how to interpret the Code, although the word *community* may not appear in the decision rendered. [125]

Gross understands that contextualized decision−making contradicts the Supreme Court's plain language jurisprudence. [126] However, she characterizes courts' blind reference to the plain language of a statute as "mock textualism rather than textualism" [127] because "they engage in policy making masquerading as textualism." [128] Gross is explicit in advocating that judges take a more activist role in interpreting the Bankruptcy Code, [129] but does not view contextualized decision making as an abdication of precedent. [130] Nonetheless, she views it as a process that leaves "room for individualized justice." [131]

Gross' contextual model of decision making is controversial. [132] For example, Christopher Frost argues that bankruptcy law should not pursue redistributional goals because the judicial process is institutionally incompetent to implement them. [133] Frost questions the capability of the judicial process to accomplish redistributional goals in bankruptcy both because of the polycentric nature of the issues in bankruptcy and because of the procedural limitations confronting bankruptcy judges. [134]

Frost initially argues that any attempt to balance the interests of debtors, creditors and community implicates "economy−wide effects that go beyond those concerning the participants in the particular enterprise." [135] Changes in the contractual relationships among one sort of creditor can "have unpredictable effects in the way risks and returns are distributed throughout the enterprise." [136] Of course, the same argument could be made to question the wisdom of reallocative determinations by any institution. [137]

Frost goes on to explain why he views the judiciary as less capable for formulating redistributive policies than other institutions. First, the judiciary is designed to develop adjudicative facts − facts concerning the immediate parties to the dispute. Procedural rules, including the requirements of standing and the rules of evidence, preclude judges from eliciting the sort of broad−based information most appropriate to policy formation. [138] Second, Frost argues that because "[t]he decision to liquidate or reorganize the operations of a failed firm implicates allocative concerns on an economy−wide basis," [139] the task of effectively identifying all affected interests will be costly and difficult to implement. [140] Prescient of Gross' standard for limiting the communities entitled to representation in bankruptcy, Frost contends that "any limit on the potential range of the interests presented will be as artificial as the limits imposed by the creditor wealth−maximization criterion." [141] But this sort of hyperbole does not respond to Gross' contention that bankruptcy decision making should balance the interests of debtors, creditors and the communities in which both reside, even if only imperfectly. Finally, Frost argues that bankruptcy judges' decision making is uncoordinated, and, thus, unlikely to accomplish broad based reallocative goals. [142] His argument is well founded, if, as he contends, "support for an inclusive bankruptcy regime can be found principally in arguments grounded in distributive justice rather than efficiency." [143] Although other commentators have couched their arguments favoring inclusion of community interests in bankruptcy decision making on distributive justice grounds, [144] Gross seems more concerned with corrective rather than distributive justice.

What both Gross and Frost seem to forget in this debate are the simple pragmatics of bankruptcy decision making. Parties in an insolvency setting rarely can afford full blown litigation. Most bankruptcy disputes are resolved through negotiation and settlement, rather than after a trial on the merits. And bankruptcy practitioners frequently remind me that uncertainty in the Bankruptcy Code is good because it creates room for settlement. Economic theory provides more rigorous support for this practical observation. [145] Additional support and refutation can be found in the debate surrounding preferences for determinate rules or indeterminate standards. [146]

CONCLUSION

Readers of *Failure and Forgiveness* should all agree that bankruptcy is not the "dry and discouraging topic" as it once was described. [147] Gross is right: Bankruptcy "is really a docudrama about the hopes and frailties of people. . . . It is about individuals' responsibilities to one another and to society and about society's responsibilities to individuals." [148] *Failure and Forgiveness* captures all the tension and gritty reality of the drama that is bankruptcy.

FOOTNOTES:

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[1] Karen Gross, Failure and Forgiveness: Rebalancing the Bankruptcy System 4 (1997).Back To Text

[2] *See generally* Thomas Jackson, The Logic and Limits of Bankruptcy Law 7−19 (1986) (describing bankruptcy law as solution to common pool problem facing creditors of insolvent debtor); Robert K. Rasmussen, *An Essay on Optimal Bankruptcy Rules and Social Justice*, 1994 U. Ill. L. Rev. 1, 33 (1994) (justifying economic analysis of bankruptcy law as just and supporting this conclusion by application of John Rawls' theories of justice); Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 Yale L.J. 1807 (1998) (arguing, on economic grounds, that bankruptcy law should be "privatized").Back To Text

[3] Gross, *supra* note 1, at 2.Back To Text

[4] *Id*. at 165.Back To Text

[5] *Id*. at 212.Back To Text

[6] *See supra* note 2 and accompanying text.Back To Text

[7] *See* Gross, *supra* note 1, at 15 ("The current vogue is to determine 'ends' by starting with a general overreaching philosophical or political theory, a metatheory, and then to apply that theory to a concrete context.").Back To Text

[8] *See id.* at 6−7.Back To Text

[9] *See id*. at 138.Back To Text

[10] *See id*.Back To Text

[11] *See, e.g.*, *id*. at 164 ("An approach needs to be found that enables the creditors to achieve equality of outcome. Under such a system, a creditor in need would be repaid more than creditors less needy.").Back To Text

[12] *See* Gross, *supra* note 1, at 237 ("No matter how careful people are in making their original decisions, they change their minds when circumstances change, and that is not a bad thing.").Back To Text

[13] *Id.* at 15 (footnotes omitted). Gross does not reject the value of metatheoretical considerations altogether. Instead, she contends that "general philosophical issues" are best left for consideration after "considering what we want to accomplish based on an understanding of the participants in the process and the problems they encounter on a day−to−day basis." *Id.**Back To Text*

[14] *Id*. at 6.Back To Text

[15] *Id.* at 138.*Back To Text*

[16] *Id*. at 238.Back To Text

[17] Gross, *supra* note 1, at 244.Back To Text

[18] *Id.* at 249.Back To Text

[19] *See id*. at 216.Back To Text

[20] *Id*. at 91. Gross notes that commentary on the fresh start ignores the question of why. "Some commentators have addressed the scope of the discharge itself, that is, who should get a fresh start." *Id*. (footnotes omitted).Back To Text

[21] Gross, *supra* note 1, at 93.Back To Text

[22] *See id*. at 94.Back To Text

[23] *Id.* at 97 (footnotes omitted).Back To Text

[24] *Id*. at 99.Back To Text

[25] *Id.Back To Text*

[26] Gross, *supra* note 1, at 93.Back To Text

[27] *Id.* at 94.Back To Text

[28] *Id*.Back To Text

[29] *Id*.Back To Text

[30] *See id.* at 95−97 (discussing parable in 2 *Kings* 4:1−7 about debtor who, by divine grace, is able to repeatedly replenish her supply of oil in order to satisfy her creditors).Back To Text

[31] Gross, *supra* note 1, at 96.Back To Text

[32] *Id.* at 97.Back To Text

[33] The Bankruptcy Act of 1800 allowed only involuntary bankruptcy filings, and it limited eligibility to merchants or traders owing in excess of $1,000. *See* Bankruptcy Act of 1800, ch. 19, §§1−2, 2 Stat. 19, 19−22 (1800). Back To Text

[34] *See, e.g.*, Bankruptcy Act of 1841, ch. 9, §1, 5 Stat. 440, 440−42 (1841) (permitting both involuntary and voluntary filings, but limiting commencement of involuntary cases to merchants and traders; eligibility for voluntary cases was not so limited).Back To Text

[35] *See* Edwin Mack, *Bankruptcy Legislation*, 28 Am. L. Rev. 1, 5 (1894) (noting importance of debt relief so bankrupt could resume commercial activity again); *On a National Bankrupt Law*, 1 Am. Jurist & L. Mag. 35, 44 (1829) ("It is important, too, to the nation to be able to avail itself of the services of all classes of citizens . . . and to convert [insolvent debtors] into active and useful members of society."); *see also* Charles G. Hallinan, *The 'Fresh Start' Policy in Consumer Bankruptcy: A Historical Inventory and Interpretive Theory*, 21 U. Rich. L. Rev. 49, 56−57 (1986) (describing Nineteenth Century justification of bankruptcy discharge as "founded on a perception of insolvent debtors as potentially valuable contributors to the nation's economic development, whose participation is the economy was impeded by the hopelessness of their financial conditions"); Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy* Discharge, 65 Amer. Bankr. L.J. 325, 344−69 (1991) (discussing development of bankruptcy discharge during Nineteenth Century).Back To Text

[36] *See* D. Stanley & M. Girth, Bankruptcy: Problem, Process, Reform 18, 24−26 (1971) (noting that use of consumer credit exploded after World War II); Maurice L. Shevin, *Consumer Finance − The Fuel that Drives the Economy*, 58 Ala. Law. 230, 230−31 (1997) (tracing growth of consumer credit); *see also* Murphy v. Household Fin. Corp., 560 F.2d 206, 209 (6th Cir. 1977) (noting rapid expansion in use of consumer credit).Back To Text

[37] Gross, *supra* note 1, at 84−85 (indicating that chapter 7 filings constituted over 70% of total bankruptcy filings in 1992).Back To Text

[38] *See* Jackson, *supra* note 2, at 225−79 (justifying discharge policy as compensating for individual debtors' impulsive purchasing behavior given tendencies to underestimate risk of overextension); Thomas H. Jackson, *The Fresh−Start Policy in Bankruptcy Law*, 98 Harv. L. Rev. 1393, 1399−1401 (1985) (same).Back To Text

[39] *Compare* Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. Rev. 953, 981−83 (1981) (contending debtors are better risk avoiders) *with* Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 Ohio St. L.J. 1047, 1063−64 (1987) (arguing creditors are superior risk avoiders); *see also* Jackson, *supra* note 2, at 228−30 (questioning whether creditors or debtors are better risk avoiders); *id.* at 249 (contending that creditors better monitor individuals' consumption of credit than legislators).Back To Text

[40] *See* R. Glen Ayers, Jr., *Reforming the Reform Act: Should the Bankruptcy Reform Act of 1978 Be Amended to Limit the Availability of Discharges to Consumers?*, 17 New Eng. L. Rev. 719, 738 (1982) (arguing that creditors knowingly extend risky credit to individuals); Vern Countryman, *Bankruptcy and the Individual Debtor — And a Modest Proposal to Return to the Seventeenth Century*, 32 Cath. U. L. Rev. 809, 825 (1983) (describing study of credit unions which found that half of their loans were extended without obtaining credit report); G. Stanley Joslin, *The Philosophy of Bankruptcy —A Re−Examination*, 17 U. Fla. L. Rev. 189, 194 (1964) (discussing empirical studies of irresponsible lending by consumer finance industry).Back To Text

[41] *See* Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. Legal Stud. 283, 307−08 (1995) (discussing how "nonpoor" individuals who file for bankruptcy avoid falling below welfare level); *see also* Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 Yale L.J. 763, 785−86 (1983) (describing bankruptcy discharge as "reveal[ing] our acceptance of the fact that beyond a certain point, the sheer magnitude of a person's debt may be demoralizing").Back To Text

[42] *See* Gross, *supra* note 1, at 6 (noting that, "for better or worse, Americans live in a credit economy" and describing this recognition as fundamental assumption underlying her policy prescriptions). Gross is not the first to contend that discharge policy should be framed to accommodate the reality of our consumer credit economy. *See* H.R. Rep. No. 95−595, at 116 (1978) *reprinted in* 1978 U.S.C.C.A.N. 5963, 6076−77 (discussing how factors beyond debtor's control have led to increase in non−commercial bankruptcy filings); Howard, *supra* note 39, at 1048 (advocating "that discharge should be broadly available in order to restore the debtor to participation in the open credit economy"); Charles Jordon Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*, 59 Geo. Wash. L. Rev. 56, 94 (1990) (discussing "social utility" theory of discharge).Back To Text

[43] *See* Gross, *supra* note 1, at 99.Back To Text

[44] *See id*. at 124 (stating growth of nondischargeable debt categories must stop).Back To Text

[45] *See id.* (noting current discharges should be evaluated).Back To Text

[46] *Id.* at 104.Back To Text

[47] *Id.Back To Text*

[48] Gross is not the first commentator to emphasize morality in discussing the contours of discharge policy. *See* John Finnis, Natural Law and Natural Rights 188−92 (1980) (developing theory of natural law and referring to bankruptcy as "an example of justice"); Richard E. Flint, *Bankruptcy Policy: Toward A Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 Wash. & Lee L. Rev. 515, 519−20 (1991) (contending that "the central justification for the debtor financial relief provisions of the Bankruptcy Code is founded in a natural law theory of morality"); Tabb, *supra* note 42, at 95−98 (discussing "humanitarian theory" of discharge, but concluding that ultimately "the humanitarian and moral arguments prove somewhat elusive and in some respects contradictory"); John C. Weistart, *The Costs of Bankruptcy*, 41 Law & Contemp. Probs. 107, 110−11(1977) (observing that bankruptcy law is built upon humanitarian concerns). What differentiates Gross is her focus upon the concept of forgiveness in religion and secular philosophy to justify the bankruptcy discharge. *See* Karen Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 Notre Dame L. Rev. 165, 200 (1990) (stating that discharge policy must be based on "non−instrumental truths," including those found in "philosophy or religion or social custom").Back To Text

[49] *See* Gross, *supra* note 1, at 115−34.Back To Text

[50] *Id.* at 124−25.Back To Text

[51] *Id.* at 104 (stating that outliers — those who do not want to be rehabilitated in bankruptcy — should be treated differently from those who do).Back To Text

[52] *Accord* Tabb, *supra* note 42, at 95 (noting that social utility theory of discharge suggests no basis for exceptions from discharge).Back To Text

[53] *See* Gross, *supra* note 1, at 115 (listing five proposals for changes, including repeal of rule of limited liability).Back To Text

[54] *See* Susan Block−Lieb, *The Unsecured Creditor's Bargain: A Reply*, 80 Va. L. Rev. 1989, 1995 (1994) (refuting contention that secured claims should be subordinated to tort claims on grounds that tortfeasor's managing shareholders are better risk avoiders than its secured creditors).Back To Text

[55] Gross, *supra* note 1, at 165 (proposing creditors demonstrating irreparable injury should be given priority).Back To Text

[56] She illustrates the distinction between equality of treatment and equality of outcome by means of the following hypothetical:

> Suppose three creditors are each owed ten thousand dollars. Based on dollar amount, they are identical. In a pro rata distribution, they would receive the same amount. . . . But these three creditors could be very different. One could be a large Fortune 500 company for which a loss of ten thousand dollars is hardly noticeable. . . . Another creditor could be a small company for which ten thousand dollars is a very large receivable, and collecting the money could be necessary for the company's survival. . . . Finally, suppose that ten thousand dollars is owed to an individual who worked for the debtor as an independent contractor. This individual needs the money to pay for food, clothing, and shelter for herself and her family. Under current law, all three creditors are treated equally, and this is justified on the theory of equality of treatment. . . . Equality of treatment . . . would produce inequality of outcome.

Id. at 163−64. Back To Text

[57] *See id.* at 165 (stating that creditors proving irreparable injury should overcome presumption of equal treatment among creditors). Back To Text

[58] *Id. Back To Text*

[59] *Id.Back To Text*

[60] Gross, *supra* note 1, at 173−74 ("Proof relating to unconscionability, however, does not require that a creditor show dire financial consequences; indeed, the financial consequences could be irrelevant. Instead, the involuntary creditor would show the extreme unfairness of the situation giving rise to the creditor's claim.").Back To Text

[61] This is illustrated by the following example:

> Suppose, for example, that Seat Co. Produces a seat belt made of a fabric that it knows to be flammable. Suppose that it calculates that car accidents involving fire are not the norm, and hence, while some people undoubtedly will be burned, most people using the belt will be just fine. Now assume that a driver whose neck and chest were badly burned sues Seat Co. and

> obtains a judgment of $2 million. Assume that Seat Co.'s insurer pays all except the twenty−thousand−dollar deductible. . . . If the driver wanted to recover more, he could allege substantive unconscionability and perhaps prevail.

Id. at 174.Back To Text

[62] *Id*.Back To Text

[63] *See, e.g.*, Committee of Unsecured Creditors v. Commodity Credit Corp. (*In re* KF Dairies Inc.), 143 B.R. 734, 737 (B.A.P. 9th Cir. 1992) (stating that under Bankruptcy Code, no choice exits other than equal distribution to creditors); Donald H. Hartvig v. Tri−City Baptist Temple, Inc. (*In re* Gomes) 219 B.R. 286, 297 (Bankr. D. Or. 1998) (holding that equal distribution is implemented for obtaining maximum plans of distribution to creditors); Lykes Bros. Steamship Co., v. Hanseatic Marine Serv. (*In re* Lykes Bros. Steamship Co. Inc.) 207 B.R. 282, 284 (Bankr. M.D. Fla. 1997) (stating that in order to achieve bankruptcy goals of chapter 11, equal distribution must occur among creditors).Back To Text

[64] Although bankruptcy priorities most directly contravene the principle of equality, exceptions from discharge, exemptions from the automatic stay, and preference safe harbor provisions also indirectly permit some creditors to receive full payment for their unsecured claims rather than payment in the "insolvent" dollars used to make pro rata distributions from the bankruptcy estate. Although Gross does not explicitly refer to either the automatic stay or preference exceptions in her discussion, she does include exceptions from discharge. *See* Gross, *supra* note 1, at 158. At this juncture, I quibble with Gross, not for her characterization of the exceptions from discharge as contrary to the notion that unsecured creditors should receive equal treatment in bankruptcy, but because I think the standard for rebuttal of the presumption of equality should be higher with the exceptions from discharge than with other provisions. I also thought that Gross would have a similar view because exceptions from discharge contravene Gross' bankruptcy policy favoring debtors' forgiveness. Even where creditors could demonstrate that they would be irreparably injured by pro rata payment in bankruptcy, or that pro rata payment would be substantively unconscionable, I would have expected under Gross' proposal that their claims should not be excepted from discharge unless it also is shown that the debtor is not deserving of the forgiveness that is represented by a discharge in bankruptcy.Back To Text

[65] *See* 11 U.S.C. § 507(a)(1) − (9) (1994).Back To Text

[66] *See id.* § 523(a)(1) − (18).Back To Text

[67] *See id.* § 362(b)(1) − (18).Back To Text

[68] *See id.* § 547(c)(1) − (8).Back To Text

[69] *See* Susan Block−Lieb, *Congress' Temptation to Defect: A Political and Economic Theory of Legislative Resolutions to Financial Common Pool Problems*, 39 Ariz. L. Rev. 801, 871 (1997) (applying game theory and public choice theory to argue that Congress faces incentives to accommodate interest groups' demands for amendments providing preferred treatment under Bankruptcy Code); Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 Mich. L. Rev. 47 (1997) (applying public choice theory to analyze enactment of Bankruptcy Code in 1978 and concluding that political forces both influenced its construction and limited necessary improvements).Back To Text

[70] *Compare, e.g.*, James W. Bowers, *Groping and Coping in the Shadow of Murphy's Law: Bankruptcy Theory and the Elementary Economics of Failure*, 88 Mich. L. Rev. 2097, 2143−44 (1990) (contending that debtors are most efficient allocators of their own insolvent estate and, thus, should be able to determine which creditors should get paid in full and which should not) *with, e.g.*, Thomas H. Jackson, *Bankruptcy, Non−Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L.J. 857, 866−67 (1982) (arguing that equality in distribution best resolves common pool problem that insolvent debtor's assets presents to its

creditors, and deviations from this rule should exist only to promote important competing federal bankruptcy policy).Back To Text

[71] *See supra* notes 57−62 and accompanying text.Back To Text

[72] Gross, *supra* note 1, at 2.Back To Text

[73] *Id.* Gross goes on to explain that

> [t]he universe of communities within the bankruptcy process includes the named participants — the debtors, creditors, and equity holders — and the unnamed participants. These are the families of debtors and creditors. They are future tort claimants. They are affected workers. They are local businesses that are not owed money. They are the communities where the debtor is located. They are the communities where a debtor's acquirer may relocate the debtor's business.

Id. at 207.Back To Text

[74] This is perhaps because the book permits her to reflect upon an earlier effort to advocate that bankruptcy account for community interests, Karen Gross, *Taking Community Interests Into Account In Bankruptcy: An Essay*, 72 Wash. U.L.Q. 1031, 1031 (1994), and the commentary it engendered. *See* Hon. Barry S. Schermer, *Response to Professor Gross: Taking Interests of the Community into Account in Bankruptcy – A Modern−Day Tale of Belling the Cat*, 72 Wash. U. L.Q. 1049, 1049 (1994) (dismissing Gross' suggestion that bankruptcy cases directly affect community); *see also* Christopher W. Frost, *Bankruptcy Redistributive Policies and the Limits of the Judicial Process*, 74 N.C. L. Rev. 75, 129 − 34 (1995) (discussing impracticality of taking community's interests into account). *But see* Nathalie D. Martin, *Noneconomic Interests in Bankruptcy: Standing on the Outside Looking In*, 59 Ohio St. L.J. 429, 434 − 39 (1998) (recognizing that chapter 11's rehabilitative goals are not only meant to assist debtor and creditors, but also community at large).Back To Text

[75] *See* Gross, *supra* note 1, at 208 ("It is true that in some cases community interests will be more important than other interests. It is equally true that in other situations the interests of the debtor will outweigh those of community. In still other contexts, the interests of creditors will overshadow all other interests.").Back To Text

[76] *See, e.g.*, Rosa Eckstein, Comment, *Towards a Communitarian Theory of Responsibility: Bearing the Burden for the Unintended*, 45 U. Miami L. Rev. 843, 851 (1991) (stating that whenever court redistributes rights or entitlements it draws on principles based on public values).Back To Text

[77] Gross, *supra* note 1, at 206.Back To Text

[78] *See id.* at 207 (admitting that deciding which communities to consider is no easy task).Back To Text

[79] *Id.* at 211.Back To Text

[80] *Id.* at 212 (footnotes omitted).Back To Text

[81] *Id.* at 199.

> Saving a basketball program or a marriage clearly has benefits. It makes people feel good about themselves, and that benefit allows them to function well in society. And keeping stores open in a small town also matters: the town provides a pleasant place to live. Although pleasantness of surroundings is not commonly factored into the traditional neoclassical economic model, the long−term consequences of human unhappiness with a place are not

insignificant.

Gross, *supra* note 1, at 199.Back To Text

[82] *See id.* at 228 (arguing introductory language in sections 1129, 1225, and 1325 should be changed).Back To Text

[83] *Id.Back To Text*

[84] *Id.* at 231.Back To Text

[85] *See id.* at 230−31 (noting such cases will be fact intensive and their outcome would be up to judicial interpretation).Back To Text

[86] *See* Gross, *supra* note 1, at 216−19 (stating no harm is done by adding flexibility to rule application).Back To Text

[87] *See id.* at 215−16 ("[J]udges' decisions on bankruptcy and other issues are frequently influenced by their judicial philosophy and their personal sense of what a particular provision means in context.").Back To Text

[88] *Compare, e.g.*, Martin, *supra* note 74, at 434−39 (arguing that chapter 11's rehabilitative goals are not only meant to assist debtor and creditors, but also communities and other stake−holders), *with, e.g.*, Frost, *supra* note 74, at 129 (acknowledging that community is affected when businesses fail, but arguing that consideration of these interests in bankruptcy would be impractical) *and* Schermer, *supra* note 74, at 1050 (stating that principles of Federalism are violated when bankruptcy judges prefer interests of citizens in one jurisdiction over interests of citizens in another jurisdiction).Back To Text

[89] Schwartz, s*upra* note 2.Back To Text

[90] *See id.* at 1817 (arguing that local communities have procedural options available to protect their interests when firms go bankrupt).Back To Text

[91] *Id.* "For example, the costs of a bankruptcy fall on local suppliers as well as on creditors. If firms were reorganized to protect suppliers, the creditors, anticipating the resultant cost, presumably would make wiser lending decisions." *Id.* at 1816.Back To Text

[92] *Id.* at 1817−18.Back To Text

[93] Schwartz, *supra* note 2, at 1818.Back To Text

[94] *See* Gross, *supra* note 1, at 210 (noting that her proposals would not "mandate the supremacy of community"). In another section, Gross clarifies her understanding that consideration of community interests might, but need not, impose costs on creditors:

> Suppose . . . that a judge is considering two competing bids for a corporate debtor's assets. One bid is from a company that plans to keep the debtor's business largely intact. That bid is somewhat lower than the bid of a company that plans to break up the assets and sell them piecemeal, leaving no surviving business. Assume that the creditors will receive twenty−five cents on the dollar from the first bid as opposed to thirty−five cents on the dollar from the second bid. Depending on the particular facts, a judge, using the contextual model, could decide that the lower bid was better because the community where the debtor was located would retain an important employer. This decision would mean that the ten−cent decrease would come out of the pockets of the unsecured creditors, unless the local community was willing and able to contribute to the Chapter 11 plan. If the local community was willing to

> give the debtor a two−year moratorium on local property taxes, then the debtor could increase payments to its creditors by several cents, thereby diminishing their financial loss. Even with added incentives, however, balancing could foist some of the costs of reorganization onto unsecured creditors. If this occurs, any creditor who would be severely harmed by the proposed payout would have a safety valve: it could overturn the rebuttable presumption of pro rata distribution.

Id. at 240−41.Back To Text

[95] *Id.* at 228 (emphasis added)Back To Text

[96] *See id.* (noting that "a plan could be confirmed even if it was *inconsistent* with the public interest as long as the public interest had been considered and was outweighed by other competing interests").Back To Text

[97] *See, e.g.*, Jackson, *supra* note 2 (applying economic analysis to formulate creditors' bargain model of bankruptcy law); Jackson, *supra* note 38 (providing economic justification for individuals' non−waiveable discharge in bankruptcy).Back To Text

[98] *See* Douglas G. Baird & Thomas H. Jackson, Cases, Problems and Materials on Bankruptcy 53 (2d ed. 1990) (setting forth view that normative purpose of bankruptcy is maximization of creditors' collective wealth); Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. Chi. L. Rev. 815, 821 (1987) (discussing need for parallel rules concerning distribution of losses both inside and outside bankruptcy); Douglas G. Baird, *A World Without Bankruptcy*, 50 Law & Contemp. Probs. 173, 174 (1987) (addressing need to separate bankruptcy problem from the general problem which brought about bankruptcy); Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. Chi. L. Rev. 97, 118−19 n.68 (1984) (contending that participants in bankruptcy proceeding are concerned with economic costs and benefits of their decisions).Back To Text

[99] *See, e.g.*, Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditor's Bargain*, 75 Va. L. Rev. 155, 187−88 (1989) (developing expanded creditors' bargain theory of bankruptcy).Back To Text

[100] *See* David Gray Carlson, *Bankruptcy Theory and the Creditors' Bargain*, 61 U. Cin. L. Rev. 453, 509 (1992) (criticizing Jackson and Scott's expanded creditors' bargain model); David Gray Carlson, *Philosophy in Bankruptcy*, 85 Mich. L. Rev. 1341, 1341 (1987) (critically reviewing The Logic and Limits of Bankruptcy Law); Donald R. Korobkin, *Contractarianism and the Normative Foundations of Bankruptcy Law*, 71 Tex. L. Rev. 541, 544, 555−56 (1993) (developing expansive Rawlsian model of bankruptcy; criticizing Jackson's contractarian model of bankruptcy law on grounds that it views bankruptcy law as being exclusively responsive to problem of collecting debt); Mark J. Roe, *Commentary on "On the Nature of Bankruptcy": Bankruptcy, Priority and Economics*, 75 Va. L. Rev. 219, 219−20 (1989) (criticizing expanded creditors' bargain model presented by Jackson and Scott); Elizabeth Warren, *Bankruptcy Policy*, 54 U. Chi. L. Rev. 775, 776−77 (1987) [hereinafter Warren, *Bankruptcy Policy*] (disagreeing with Baird's view of bankruptcy that focuses on single goal of maximizing creditors' collection of state−defined property rights); Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 Mich. L. Rev. 336, 336 (1993) (describing Baird and Jackson's efforts as "skilled, but narrow law−and−economics challenge" to laws of bankruptcy).Back To Text

[101] For commentators who argue that bankruptcy legislation should be either viewed as default rule, or repealed, because voluntary agreements among a debtor and its creditors provide preferable resolution of financial distress. *S*ee, *e.g.*, Barry E. Adler, *A Theory of Corporate Insolvency*, 72 N.Y.U. L. Rev. 343, 380−82 (1997); Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 Stan. L. Rev. 311, 313 (1993); Bowers, *supra* note 70, at 2145−46; Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 Yale L.J. 1043, 1049 (1992); Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 Tex. L. Rev. 51, 75 (1992); Schwartz, *supra* note 2, at

1839.Back To Text

[102] *See* Jackson, *supra* note 2, at 10 n.9 (1986) (stating premises of creditors' bargain model in which creditors are assumed to be rational, perfectly informed and risk averse).Back To Text

[103] *See* Gross, *supra* note 1, at 6 ("I operate from the premise that individuals can be, and most frequently are, motivated by a concern for the well−being of others and a desire to act in ways that are decent and benefit society.").Back To Text

[104] *See id*. at 100 ("Businesses can miscalculate costs and demands for new product. . . . Individuals, too, are fallible, and illness, job layoff, or a natural disaster can disrupt the best−laid plans. People (as well as businesses) also may be unwittingly overoptimistic about their prospects.").Back To Text

[105] *See id.* at 6−7 (noting positive view of human nature is not shared by all). *See, e.g.*, Lewis D. Solomon & Kathleen J. Collins, *Humanistic Economics: A New Model for the Corporate Social Responsibility Debate*, 12 J. Corp. L. 331, 352 (1987) (explaining new model of humanistic economics which was designed to improve corporate social responsibility).Back To Text

[106] *See* Gross, *supra* note 1, at 60−88 (discussing collection and analysis of data). Back To Text

[107] *See id*. at 101 (arguing that economic theory of bankruptcy law does not address adverse affects filing has on multitude of parties other than creditors). Back To Text

[108] *Id.* at 101.Back To Text

[109] *Id.Back To Text*

[110] *Id.Back To Text*

[111] For example, Gross defends her rehabilitative vision of the bankruptcy discharge on the following grounds:

> Rehabilitation is a goal that says something about American society. In part, society assists debtors on humanitarian grounds. Rehabilitating debtors is part of the responsibility to treat members of society humanely. It promotes values of human dignity and self−respect.

Gross, *supra* note 1, at 102. *See also* Tabb, *supra* note 42, at 95 (explaining that humanitarian theory underlying bankruptcy discharge "recognize[s] and facilitate[s] the intrinsic self−worth of the individual debtor" which in turn benefits society generally).Back To Text

[112] *See, e.g.*, Robin Paul Malloy, *Toward a New Discourse of Law and Economics*, 42 Syracuse L. Rev. 27, 67−68 (1991) ("Both systems, individualist philosophy and neoclassical economics, order decision making power by focusing on the individual.").Back To Text

[113] *See* Gross, *supra* note 1, at 3 ("My approach thus moves away from reigning philosophical trends supporting individualism in favor of less well accepted theories of social welfare and, as such, challenges the underpinnings of American bankruptcy laws."); *see also id.* at 193 ("Bringing the import of community to light offers an opportunity to change not only bankruptcy law itself but the direction of and approach to bankruptcy scholarship."); notes 72−96 *supra* and accompanying text.Back To Text

[114] *See* Gross, *supra* note 1, at 138 ("Bankruptcy involves much more than maximizing creditors' recovery as measured in dollars and cents. Bankruptcy is concerned with rehabilitating debtors, which may not benefit creditors' short−term recovery. American society may forfeit some economic efficiency now for future economic and personal growth, for national humanity.").Back To Text

[115] *See* Kenneth G. Dau−Schmidt, *Relaxing Traditional Economic Assumptions and Values: Toward a New Multidisciplinary Discourse on Law*, 42 Syracuse L. Rev. 181, 187−88 (1991) ("Under the Pareto criterion the merit of an act or policy is judged alternatively from each affected individual's position to determine whether he or she is made better or worse off. There is no interpersonal comparison of benefits and costs or societal perspective on these benefits and costs.").Back To Text

[116] Gross, *supra* note 1, at 2; *see also id.* at 138 ("Not all creditors reached their predicament in the same fashion, and not all will emerge equally able to withstand the financial losses caused by the debtor's nonpayment."); notes 55−71 *supra* and accompanying text.Back To Text

[117] *See* Gross, *supra* note 1, at 248−49 ("In this book I treat bankruptcy as a vehicle for social change . . . . Bankruptcy provides an opportunity to deal with a social problem immediately, not in the sense of creating a global solution but in terms of resolving an actual situation."). The appropriateness of bankruptcy law as a vehicle for accomplishing social policy goals remains hotly debated. *Compare, e.g.*, Schwartz, *supra* note 2, at 1814−20 (rejecting distributive goals as bad public policy) *with, e.g.*, Ronald J. Mann, *Bankruptcy and the Entitlements of the Government: Whose Money is it Anyway?*, 70 N.Y.U. L. Rev. 993, 1038−52 (1995) (contending that reallocative goals of bankruptcy legislation are justified by distributive justice concerns).Back To Text

[118] *See, e.g.*, Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. Legal Stud. 191, 219−20 (1980) (rejecting normative and descriptive claims of "economic analysis of law"); Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. Legal Stud. 227, 242 (1980) (characterizing Posner's theory of wealth maximization as "a bad principle as well as incoherent one"); Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 Va. L. Rev. 451, 459 (1974) (criticizing American legal nominalism because it substitutes definitions for both normative and empirical propositions); Robin Paul Malloy, *Invisible Hand or Sleight of Hand? Adam Smith, Richard Posner, and the Philosophy of Law and Economics*, 36 U. Kan. L. Rev. 209, 259 (1988) (arguing that classical liberalism, in contrast to Posnerian wealth maximization, provides framework for integrating principles of law and economics that are consistent with goals of individualism and free market economics); Frank I. Michelman, *Some Uses and Abuses of Economics in Law*, 46 U. Chi. L. Rev. 307, 308 (1979) (supporting Posner's positive economic theory of law, yet asserting that "more accurate statement of the hypothesis . . . would be that the rules, taken as a whole, tend to look as though they were chosen with a view to maximizing social wealth . . . by judges subscribing to a certain set of ('microeconomic') theoretical principles"); Gary Minda, *Toward a More "Just" Economics of Justice — A Review Essay*, 10 Cardozo L. Rev. 1855, 1876 (1989) (criticizing Posner's theory of law and economics because it fails to recognize "human dimension of moral and political philosophy"); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 Harv. L. Rev. 384, 391 (1985) (criticizing Posner's theory of wealth maximization, and concluding that Posner's identification of consent as moral justification of wealth maximization rests on "inadequate picture of human nature").Back To Text

[119] *See, e.g.*, Amitai Etzioni, The Moral Dimension: toward A New Economics 239 (1988) (asserting that social behavior and moral factors should be considered in determining economic policy); Albert O. Hirschman, Rival Views of Market Society and Other Recent Essays 52 (1986) (noting that some economists are beginning to take altruism, ethical values and concern for the group into account in determining rational activity); Cass R. Sunstein, Free Markets and Social Justice 4 (1997) ("[S]ocial norms are an important determinant of behavior, and they have received far too little attention from those interested in free markets, economic analysis of law, and social justice."); Robin Paul Malloy, *A New Law and Economics, in* Law and Economics: New and Critical Perspectives 1 (Robin Paul Malloy & Christopher K. Braun eds., 1995) (advocating "'discourse or rhetoric' school of the new law and economics"); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471, 1471 (1998) (arguing that "law and economics analysis may be improved by increased attention to insight about actual human behavior"); Malloy, *supra* note 112, at 29 (characterizing study of law and economics as "a creative process of legal economic discourse").Back To Text

[120] *See* Gross, *supra* note 1, at 276−77 n.4, 284 n.6.Back To Text

[121] *Id.* at 3.Back To Text

[122] *Id.* at 245.Back To Text

[123] *See id.* ("An omnipresent theme of this book is that nothing in life is free. What price Americans are willing to pay for failure is a question for which readers will have to reach their own conclusions. But, for me, it is clear that if society is to function productively and humanely, the bankruptcy system needs to mirror how society wants people to feel about themselves.").Back To Text

[124] She proposes first that each individual participant and the space they occupy be looked at; second, that the interrelationship between these individuals be observed; and finally, that observing each participant be considered as part of whole in consideration of equitable outcome. *See* Gross, *supra* note 1, at 235−243 (discussing balancing scheme).Back To Text

[125] *Id.* at 216.Back To Text

[126] *See* United States v. Ron Pair Enters, Inc., 489 U.S. 235, 241 (1989) (stating when statute's language is plain, courts inquiry should end); Patterson v. Shumate, 504 U.S. 753, 757 (1992) (relying on plain language of Bankruptcy Code).Back To Text

[127] Gross, *supra* note 1, at 216.Back To Text

[128] *Id.Back To Text*

[129] *See id.* (asserting wise judicial decision occur by seeing the meaning behind the text).Back To Text

[130] *See id.* at 217 (observing prior decisions and legislative history should be considered in judicial determinations).Back To Text

[131] *Id.* (arguing flexibility in judicial decision making is in best interest of individual cases).Back To Text

[132] *See, e.g.*, Schermer, *supra* note 74, at 1053 (characterizing contextualized decision making model as less like a good solution than like good fiction). This controversy is odd in view of the conventional wisdom in law and economics that the common law process results in efficient rules. *See* John C. Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. Legal Stud. 393, 394−95 (1978) (arguing that efficient rules stem from efficiency of legal precedents); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. Legal Stud. 65, 65−66 (1977) (arguing that inefficient rules will face more frequent litigation and will be changed sooner than rules that are efficient); Richard Posner, *The Ethical and Political Basis of the Efficiency Norms in Common Law Adjudication*, 8 Hofstra L. Rev. 487, 488 (1980) (arguing consent to efficient solutions can be presumed in common law process). Back To Text

[133] *See* Frost, *supra* note 74, at 138−39 ("The institutional structure of the bankruptcy process renders it unable to develop the kind of detailed understanding necessary to formulate a rational redistributive policy or to act on that information in a uniform manner.").Back To Text

[134] *See id.* at 124−26 (asserting judicial process suffers from limited fact gathering capabilities and remedial options).Back To Text

[135] *Id.* at 124.Back To Text

[136] *Id.Back To Text*

[137] Frost admits this later on, *see id.* at 127 (observing many institutions may face same problems with respect to redistribution but confining his argument to judiciary).Back To Text

[138] *See* Frost, *supra* note 74, at 124−27 (discussing limitations on judiciary).Back To Text

[139] *Id.* at 130.Back To Text

[140] *See id.* at 130−31 (contemplating that consideration of all interests affected by bankruptcy may be only theoretically possible).Back To Text

[141] *Id.* at 132.Back To Text

[142] *See id.* at 132−35 (noting judges do not know the aggregate effect of their decisions).Back To Text

[143] Frost, *supra* note 74, at 135.Back To Text

[144] *See* Korobkin, *supra* note 100, at 572−75 (advocating decision making policy that would include all parties affected by financial distress); Mann, *supra* note 117, at 1000 (arguing that bankruptcy system should take into account all players); Warren, *Bankruptcy Policy*, *supra* note 100, at 787 (stating that those who aren't technically creditors still have stake in failing business).Back To Text

[145] *See generally* Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasian Trades*, 104 Yale L.J. 1027, 1029−30 (1995) (arguing that uncertainty about entitlements and their protection can promote efficient bargaining); Jason Scott Johnston, *Bargaining Under Rules Versus Standards*, 11 J.L. Econ. & Org. 256, 257 (1995) (arguing that "contingent, *ex post*" entitlements can promote bargaining when *ex post* balancing by courts is imperfectly anticipated by parties).Back To Text

[146] *See generally* Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule−Based Decision−Making in Law and in Life 15 (1991) (developing theory of rule−based decision−making, described as "a form of decision−making characterized by its reliance on entrenched but potentially under− and over−inclusive generalizations."); Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. Pa. L. Rev. 1191, 1194 (1994) ("To serve its purpose effectively, a rule . . . must claim to be something other or more than it is."); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. Legal Stud. 257, 281 (1974) (arguing that "the extent of efficient precision of public rules as well as the optimal balance between rules promulgated by the legislative, executive, and judicial branches of government is . . . determined so as to minimize social costs"); Louis Kaplow, *Rules Versus Standards: An Economic Approach*, 42 Duke L.J. 557, 621 (1992) (examining economic consequences of rules and standards); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1685−86, 1777 (1976) (discussing private law connection between individualism and clearly defined rules, and altruism and policy standards); William Powers, Jr., *Structural Aspects of the Impact of Law on Moral Duty Within Utilitarianism and Social Contract Theory*, 26 UCLA L. Rev. 1263, 1266 (1979) (evaluating effect determinate rules have on moral behavior); Carol M. Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577, 604−05 (1988) (developing "crystal/mud dichotomy" to describe rules of property law).Back To Text

[147] Charles Warren, Bankruptcy in United States History 1 (1935).Back To Text

[148] Gross, *supra* note 1, at 1.Back To Text