If You Don't Have Anything Good to Say...

Peter A. Alces
William & Mary Law School, paalce@wm.edu

Copyright © 1999 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
Failure and Forgiveness: Rebalancing the Bankruptcy System.

"If you don't have anything good to say . . . ."

Reviewed by
Peter A. Alces**

Upon first reading Professor Gross's Failure and Forgiveness, ("Failure")¹ I was struck by its clarity, its candor, and its simplicity. Rereading the book in preparation for this review confirmed that the work is provocative, and focused my attention on five of the author's conclusions:

1. Bankruptcy judges have very little time to spend on individual bankruptcy cases, and as case loads multiply, judges will have less and less time to spend on individual cases.
2. There are debtors and there are debtors. The bankruptcy world would work better, at least be more aesthetically pleasing, if we distinguish "good" from "not so good" from "bad debtors."

* Karen Gross is a professor of law at New York Law School.
** Professor of Law, The College of William and Mary.
3. Creditors should expect no more from bankruptcy than what they need.
4. Apparently unique from other areas of the law, bankruptcy affects people beyond the immediate parties to the bankruptcy proceeding.
5. People are fundamentally altruistic.

I am convinced that these five points are central to Professor Gross's thesis. And I am equally convinced that the book does no more to advance the literature than throwing a pie in the face of Bill Gates does to advance the Luddite cause.

Still, it was difficult shake the suspicion that there must be important points made by the book. There have to be important points; after all the book is 250 pages long and took the author and a very prestigious publisher several years to produce. Certainly so much talent and effort could not have been expended on a project that says absolutely nothing new and worthwhile.

I was wrong.

I shall elaborate on that conclusion in the four Parts that follow by first responding to Professor Gross's observations regarding the bankruptcy process, next considering her depiction of debtors, then discerning the consequences of her proposals regarding creditors, and finally coming to terms with the vacuity of her conception of community.

I. "WERE THERE BUT WORLD ENOUGH AND TIME . . ."

The strongest chapter of Failure is Chapter 5: "What Is Transpiring in the Bankruptcy System?" Gross offers a cacophony of figures and statistics describing the bankruptcy system in terms that might well support careful analysis of the status quo and worthwhile recommendations for adjustment of current law. She tells us about the number of filings, the rate of increase in the number of filings, and types of bankruptcy protection that debtors seek. She counts creditors and takes account of the types of claims that they bring to

---

3 See id. at 74, 76.
4 See id. at 83-85.
the bankruptcy table. And she notices the type of interests affected by bankruptcy that the bankruptcy statistics do not notice.

It is never really clear what point Gross is making by her recitation of bankruptcy statistics, and the conclusion of Chapter 5 offers little guidance:

Owing to quantification problems, some commentators believe that the welfare of communities, the continuity of existing businesses, and the preservation of self-worth and human dignity should not be considered within the bankruptcy process. [No cite is offered in support of that accusation.] But the inability to measure these interests easily in dollars and cents does not mean that the interests lack value. Instead, what it demonstrates is that our existing economic model is too narrow. If we limit our assessment of bankruptcy's impact to money, we resort to a unidimensional perspective. Therefore, the felt costs of business bankruptcy may not be measurable in strict, neoclassical economic models.

It could be, of course, that those who consider numbers, dollars and cents, believe that the values Gross would champion are not measurable and that these values are neither vindicated nor frustrated by the bankruptcy law. That is, people engage in economic activity to achieve economic goals, and one economic result is no more certain than another to further or frustrate self-worth and human dignity. For instance, family farming may be charming, and family farmers may choose to make economic sacrifices to enjoy that unique charm; but if we ask others to subsidize that lifestyle (by forcing investment of economic rather than psychic assets to the preservation of the farm) we may well be compromising someone else's dream. Bankruptcy cannot answer every question; it cannot make all dreams come true. It can endeavor to minimize some of

---

4 See id. at 79-81.
5 See id. at 81-83, 88.
6 Id. at 88.
7 Consider:

Though the irrationality and absurdity of modern agricultural policy is perhaps most easily seen in the United States, we must turn to other countries if we are to become aware of the full extent to which such policies, systematically pursued, are liable to impose restrictions on the farmer (whose "sturdy independence" is at the same time often referred to as an argument for maintaining him at public expense) and turn him into the most regimented and supervised of all producers.

the economic and financial disruption caused by outrageous fortune or improvident choices.

Gross's perspective demands more of bankruptcy and it is difficult to see why she would limit the scope of her agenda to the bankruptcy system. Certainly she seems unconcerned with the scarcity of resources, though she notes that

At a 95% level of statistical reliability, business Chapter 7 cases occupied 40 minutes per case of judicial time, whereas nonbusiness Chapter 7 cases occupied 10 minutes of time per case. On average, judges spent 38 minutes on each Chapter 13 case. Judges spent on average 456 minutes [seven and one-half hours] on each Chapter 11 case, with the amount of time increasing with the size of the case.\(^8\)

So whatever Professor Gross has in mind for the bankruptcy system, she will have to work her proposals into those time constraints or find a way to attract more judicial resources, as well as the means to pay for them, without sacrificing anything that she might find worthwhile in the current system.

But it is not even at all clear that Gross really understands the very figures she recites. After offering the foregoing delineation of judicial time spent on different types of bankruptcy cases, she identifies what she apparently perceives to be an anomaly: "In simple terms, the greatest amount of judicial time is spent on cases that constitute the smallest percentage of filed cases—the mega chapter 11 cases."\(^9\) She seems to ignore the fact that those mega chapter 11 cases may well have the greatest effect on the community interests that she would champion. That is, the statistics she uses to demonstrate judicial inattention to the interests of individuals may establish, were she to look a bit further, that courts do spend the most time on the cases that directly and indirectly affect the most people.

Notwithstanding her curious catalog and reading of the statistics she amassed, Gross's arithmetic conclusion regarding the amount of time judges can spend on cases is helpful. It provides the frame of reference to consider her conclusions about bankruptcy debtors, creditors, and the impact that bankruptcy has on community.

\(^{8}\) Gross, supra note 1, at 132.
\(^{9}\) Id.
II. DEBTOR EQUITY

Despite what the Bible says about stealing, a Church of England priest suggested today it is no sin to shoplift—as long as the victim is a big supermarket. . . . [The cleric] drew a distinction between stealing from individuals or small merchants—which he said is wrong—and stealing from giant retailing corporations. Those, he said, have run little stores out of business and harmed local communities. . . . The Church of England distanced itself from [the cleric], and others joined in.10

Professor Gross places debtors on a culpability scale and then describes how debtor culpability might inform the sum and substance of the bankruptcy law. Her conclusion is that debtors need forgiveness; in fact, forgiveness is “[T]he solution to the problem of nonpaying debtors.”11 I am in favor of forgiveness. I seek it often and am also pleased to find it; occasionally I forgive. (I’ve even been known to forget.) But Professor Gross fails to come to terms with the incentives for strategic behavior that her focus on forgiveness invites, and she paints the points on her culpability scale in the simplistic primary colors that ignore the shades of grey that more accurately would capture real debtors and their debts. Sure it would be great if we could all forgive and be forgiven without any undesirable consequences. But life, and certainly bankruptcy life, is too often a zero sum game and forgiveness comes at a cost. Further, even were we sure that forgiveness is the answer, Gross acknowledges that forgiveness must be deserved. How are we to determine who is deserving and at what cost? Gross posits a myopic continuum:

Suppose that each of five farmers borrowed money from the bank to buy seed for the next crop. The farmers and the bank anticipated that the crop revenues would be sufficient to service this short-term borrowing. Come time to repay, however, none of the five farmers had sufficient funds. The reasons why they could not repay are very different.

First Farmer planted his seed, but his fields were hit by a plague of locusts, destroying the crop. The money to repay the bank never

11 GROSS, supra note 1, at 93.
materialized. Second Farmer also planted his seed. As it was growing, he decided to purchase a new machine that was supposed to make harvesting less expensive by decreasing the amount of necessary labor. Unfortunately, the machine did not function faster than manual harvesting, as Second Farmer had hoped. Had Second Farmer thoroughly investigated the machine, he would have learned that it had not been fully tested. Because the machine failed, Second Farmer’s crop was delayed getting to market, and the crop yielded less revenue than he needed to repay his debt. Third Farmer planted, harvested, and sold his crop. Rather than repay the bank, however, he used the money to repay some of his other creditors, who were hounding him. Fourth Farmer planted his seed and harvested his crop, and he had sufficient revenues. But on the way to the bank, he bumped into a group of old friends, and they sat down together to play some cards. Fourth Farmer lost all his money. Finally, Fifth Farmer, unlike the other farmers, never purchased the seed. Instead, he took the proceeds of the bank loan and used them to purchase a new luxury automobile and take a cruise to the Bahamas. In the end, he, too, had no money to repay the bank.12

Professor Gross follows that hypothetical with her own conclusions regarding the culpability of each of the farmers and the impact of their relative culpability on their claims to forgiveness.13 The First Farmer is least culpable (most deserving of forgiveness, “discharge” in bankruptcy parlance) and the Fifth Farmer the most culpable, least deserving. She would forgive more readily the less blameworthy and thereby create incentives for people to be less blameworthy.

Of course, Professor Gross’s hypotheticals are so simplistic as to be essentially useless given her aspirations for the bankruptcy system. The venal do not always appear so obviously so and the difference between the well meaning but ignorant and the careless is not always so easily discerned. It would not be responsive for her to argue that the hypotheticals are only designed to describe in summary terms the nature of her forgiveness calculus. Facts are hard (and expensive) to find, and her construction depends on the reliable determination of facts. Further, her framework assumes that all people will respond to forgiveness the same way (“people are inherently decent,”14 whatever that might mean), that blameless third

---

12 Id. at 105-06.
13 See id. at 106-08.
14 Id. at 109.
parties will not be affected by a decision not to forgive the debtor. In Professor Gross's world of forgiveness, would we really want to punish, refuse to forgive Fifth Farmer, if he is the sole source of support for an invalid child who is unable to care for herself? could we ignore the fact that First Farmer has a criminal record and a history of embezzlement and does not have any dependents that rely on him?

In the real bankruptcy world we choose to ignore a good deal that would complicate a forgiveness calculus. But do we ignore complicating facts because we are not concerned with social reality? No. We ignore them in bankruptcy because there is only so much we can do in bankruptcy. We cannot determine who is deserving of forgiveness. It is ludicrous, presumptuous, and even arrogant to believe that we could. That is not to say that the world would not be a more beautiful place if only the deserving were forgiven, and forgiven in the right measure. Bankruptcy, though, has no business trying to do what our philosophical, theological, and general normative inquiries have failed to do. Gross is more confident of her philosophical and psychological acumen than I can be about anyone's wisdom.

In the Code's bar to discharge provisions, bankruptcy already takes into account some of the culpability indicia that Gross would utilize. Granted, the Code does the cutting with a hatchet rather than a scalpel. But, if anything, the bankruptcy law should do less rather than more to further social policies unrelated to economic distress. The Code already looks too much like the Internal Revenue Code. I would argue that the Bankruptcy Code should not try to be the social engineering catastrophe that the IRC has become. Perhaps we need a normatively flat Code as some would argue that we need a flat tax. And that is not because it would be undesirable to have bankruptcy do some equity. That is because the cost of its doing equity, and probably doing it badly in the knee jerk way Gross contemplates, would be both prohibitively expensive and ultimately foolish.

---

\(^{15}\) Professor Gross does make the point that "some debtors cannot be rehabilitated so they should not be forgiven." Id. at 104. We can imagine that loan applications would need to include a line on which the borrower describes her capacity for rehabilitation.

\(^{16}\) Id. at 108-11.

Bankruptcy law, like all law, is to an extent about finding out what we can afford to find out. Professor Gross has no sense of the limits of the possible, and reflects that nonsense in the very same text in which she reproduces figures describing the very few minutes that bankruptcy judges have to spend on cases. Further, why would we want (largely affluent and insulated) bankruptcy judges to make normative judgments they have no particular training or expertise to make, even if there were enough time and resources?

Another phase of the same type of fundamental error emerges when Professor Gross takes on corporate law by attacking the limited liability system. The normative vacuity of limited liability is not much of a discovery. It does not take much moral sense to realize that those who do not have to answer for their failures will fail more often. If you can use someone else's money, you will gamble more and be less risk averse. That circumstance is only exacerbated when you can gamble with someone else's money, keep the winnings for yourself, and leave the losses on your benefactor. The attack on the limited liability doctrine can be made, but must be made in a thoughtful, deliberate manner. The legal literature is not much advanced by attacking the excesses of the doctrine without taking into account the economic consequences of doing so.

Failure concludes that limited liability makes good sense in many nonbankruptcy contexts. But it produces a wide range of anomalous results within the bankruptcy system that lead to concern over whether it should be fully retained in that context. Because limited liability is clearly a matter of state law, one must ask whether federal law (that is, bankruptcy) should take precedence over state law, thereby curtailing limited liability for corporate officers, directors, and shareholders.

Of course it is in bankruptcy that limited liability most matters. It is striking that a law professor could conclude that limited liability should be abrogated in the case where the officers, directors, and shareholders would most want to rely on their liability's being limited—when the firm fails—and not take into account, not even try to imagine, the consequences of abrogating limited liability in that setting. To abrogate limited liability in bankruptcy, where it arguably matters most, is essentially to abrogate limited liability alto-

---

18 See GROSS, supra note 1, at 132.
19 Id. at 126.
gether. If Professor Gross wants to make that argument, she must at least consider the case that can be made for limited liability. It is simply not responsible to ignore the incentives that her proposal would create and the consequences of her proposal in economic terms.

The commentator’s “analysis” is not sophisticated. While she acknowledges that “[t]he approach [abrogation of limited liability] has its downsides” and the “[i]mportance of directors[,]” she rejoins that “individuals now continue to serve despite fiduciary liability or even environmental claims.” Is she really unable to appreciate the difference between fiduciary tax and environmental liability and the potential liability for all tort and contract claims assertable against a corporate debtor? Does it make any sense to posit personal liability of corporate shareholders without considering the nature of shareholder involvement? Should I be personally liable for the contract and tort liability of every company whose stock is held by a mutual fund in which I invest?

III. AFFIRMATIVE ACTION FOR CREDITORS OR HOW TO MAKE BIG CREDITORS SMALL CREDITORS

GEORGE BAILEY: You’re thinking of this place all wrong, as if I’ve got the money back in a safe. The money’s not here. Well your money’s in Joe’s house; that’s right next to yours and the Kennedy house and a hundred others. You’re lending them the money to build and then they are going to pay you back as best they can. Now what are you going to do? Foreclose on them?

TOM: I’ve got $242 in here and $242 isn’t going to break anybody.


TOM: how much do you need?

TOM: $242.

GEORGE: Ah Tom, just enough to tide you over ‘til the bank reopens.

TOM: I’ll take $242.

GEORGE: There you are.

...
MAN: I've got $300, George.
GEORGE: What'll it take 'til the bank opens?
MAN: Well, I suppose $20.
GEORGE: $20. Now you're talkin'. Now, Mrs. Compton, how much do you want?
MRS. COMPTON: But it's your money, George.
GEORGE: Never mind about that. Now, how much do you want?
MRS. COMPTON: I can get along with $20. Alright.
GEORGE: $20, fine.
MRS. COMPTON: And I'll sign a paper.
GEORGE: You don't need to sign anything. I know, you pay it when you can. Hi Miss Davis.
MISS DAVIS: Can I have $17.50?
GEORGE: Bless your heart. Of course you can have it. 

Professor Gross begins her discussion of the treatment of creditors in bankruptcy by distinguishing equality of treatment from equality of outcome, and she pursues the distinction for many more pages than are necessary to make the point that a loss of $5000 to me is more significant, in some way, than would be the loss of $5000 to Microsoft. So if we both lose that amount, we have been treated equally but have experienced unequal outcomes. On that certainly accurate premise, Gross rests her conclusion that bankruptcy should take into account the impact bankruptcy will have on a particular creditor (though not those dependent on the creditor?) in deciding how much a creditor should realize from the bankruptcy proceeding. This leads her to champion the cause of "small" creditors over that of larger creditors.

To some extent the distinction that she draws is already vindicated in the priority provisions of the Bankruptcy Code, but once again Gross would go further in her quest for equality than does the current law:

Under [her proposal], any unsecured creditor, large or small in either size of entity or amount owed, could challenge the standard pro rata distribution as it applied to him or her. The distribution system would continue to operate based on equality of treatment (subject to

\[\text{\textsuperscript{21}} \text{IT'S A WONDERFUL LIFE (Liberty Films 1946).}\]
\[\text{\textsuperscript{22}} \text{See GROSS, supra note 1, at 138-44.}\]
\[\text{\textsuperscript{23}} \text{See 11 U.S.C. § 507 (1994).}\]
the more elaborate understanding of equal treatment with separate classification and payouts), but a creditor could rebut the presumption of equal treatment upon a showing of irreparable injury. A rebuttal would then enable the creditor to recover based on equality of outcome rather than equality of treatment.\footnote{GROSS, supra note 1, at 165.}

Irreparably injured creditors would receive a priority. Professor Gross offers examples of sufficiently irreparable injury: "imminent collapse of a business, mortgage foreclosure on the creditor's home, or inability to acquire needed medical care."\footnote{Id.} She again offers a sliding scale of irreparable injury\footnote{Suppose four creditors each lent Smythe one thousand dollars. They all seek to rebut the presumption. First Creditor, a good friend, wants to be repaid so she can buy luxury goods for herself. Had she not lent Smythe the money (or had she been repaid), she would have been able to make such purchases, having saved and invested prudently. Second Creditor is Smythe's next door neighbor. Since the loan, her spouse has become very ill, and without obtaining repayment or taking out a home equity loan, she cannot put food on the table. Third Creditor is Smythe's co-worker. A profligate spender, he needs to be repaid so he can pay his own rent because he has no savings. Fourth Creditor is a finance company that had mailed Smythe a credit application, which it subsequently approved without much investigation. \textit{Id.} at 165-66.} and reaches conclusions about the creditors' relative worthiness.\footnote{Distinguishing among these creditors is hard and can be done only through a subjective assessment. With that caveat, an argument can be proffered that only Second Creditor and Third Creditor will suffer irreparable harm if they are not repaid. Although one may not feel badly [sic] for Fourth Creditor, First Creditor evokes sympathy—but not enough to rebut the presumption. \textit{Id.} at 166 (emphasis added). (Perhaps I date myself, and reveal something embarrassing about my early television viewing habits, but does that type of pathos meter sound a little bit like "Queen for a Day"?)} That "analysis" is no more convincing than it was when Gross compared debtors' relative forgiveness-worthiness. There is no reason to re-engage her on essentially the same front.

More interesting is Professor Gross's consideration of the way that her scheme would have an impact on transactors' strategic behavior.

At first glance, it seems that creditors as a whole would be disinclined to adopt this suggested approach, particularly as one or more creditors could obtain greater distribution than others and receive it ear-
lier to boot. But creditors could be convinced of the merits of the system. First, some creditors are willing to look beyond their own self-interest. Moreover, creditors may appreciate the concept of the rebuttable presumption because it would be available to them if they needed it prospectively. Additionally, if creditors were aware of the possibility that a limited pool of creditors would receive preferential treatment, they could factor this into the initial assessment of whether to do business with the debtor and at what price.28

Her statement is ludicrous. Put aside the fact that there are real disincentives for investing in businesses that “look beyond their own self-interest” in the amorphous sense that Gross seems to have in mind and concentrate on her observation that creditors would price the financial extremis of their debtors’ other creditors into the prices they charge those debtors. Would there be a question on loan applications such as: “List all of your current and potential future creditors and offer an assessment of the impact of your financial failure on their financial condition. Attach a separate sheet if necessary”? It is impossible to imagine the deleterious effects that Gross’s proposal would have on the cost of credit. This proposal, just like the discharge proposal, would introduce fatal uncertainty into the economy, complicating if not confounding any pricing mechanism, and destroying the fundamental assumptions that support our financial system. Perhaps I exaggerate, but not much.

The *reductio ad absurdum* of Professor Gross’s rebuttable presumption proposal is captured in her conclusion that

Large creditors, unlike many small ones, do have the capacity to recoup losses by passing them onto others [employees, consumers, and small creditors?] and withstanding the lag time between the loss and the recoupment. And unlike many small community-based businesses, large businesses can decide not to extend unsecured credit in large amounts. Because large creditors have these options, it is easier to foist more burdens on them, reallocating loss from unstable business to more stable ones [and making the stable ones unstable too?]29

This conclusion rises to the level of irresponsible scholarship because Gross fails to thoughtfully work through the ramifications of her scheme. Frankly, it would be more coherent, but no more re-

28 Id. at 167.
29 Id. at 175.
sponsible, for her to argue that the United States Treasury should simply print whatever amount of money is necessary to avoid anything less than one hundred cents on the dollar payoffs in bankruptcy. In fact, it might well be that the deleterious impact of that suggestion would be less extreme than the consequences of the argument in Gross’s Failure.

As in the Debtors section of her book, Professor Gross does not advance the literature in the Creditors section. The world she imagines has no “reality referent” and her efforts to posit facts that would accommodate her analysis are incomplete and fundamentally flawed. She takes into account some of the incentives to which her proposals would give rise but describes their operation incompletely, ignoring cost and simply imagining that, somehow, her proposal would create wealth. In fact, it is probably more likely that her adjustment of the bankruptcy law would destroy wealth and reduce welfare (at the expense of society’s most destitute) by undermining certainty in commercial transactions and increasing fact finding costs exponentially.

IV. COMMUNITY: WHAT A WONDERFUL DAY IN THE NEIGHBORHOOD

One cannot be a propagandist in the service of truth or an advocate in the service of justice, for the character and the motives are wrong. And character and motive are for these purposes everything, for ‘truth’ and ‘justice’ are not abstract absolutes, to be attained or not in materially measurable ways; these are words that define shared motives out of which a community and a culture can be built and a character made for the individual and his world. They express an attitude, imply a process, and promise a community.

“Mercy to a criminal may be gross injustice to the community.”

Professor Gross’s arguments concerning the validation of community interests in bankruptcy is the crescendo toward which the first nearly two hundred pages of her book builds. At the outset of Part IV she asks the question: “What is meant by community?”

32 GROSS, supra note 1, at 198.
And, best as I can tell, she never provides a worthwhile definition of the term. It would seem to me that community is what we mean by the sum total of pooled individual interests. There is no alchemy by which the whole is somehow normatively greater than the sum of its parts. Indeed, in some responsible philosophies, the individual may be more important than the community, in significant ways. There is a distributive power generated by interdependent individuals; conscientious pursuit of self-interest, broadly (and correctly) defined may well do more to assure the greater welfare than any more awkward and intrusive efforts at social engineering in the name of “community.”

But Professor Gross ignores Adam Smith’s invisible hand and waxes poetic about terms that she never stops to define. In arguing for small town squares over less personal shopping malls she observes that “[a]lthough 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.” I have no idea what support could possibly be offered for the assertion that the neoclassical economic model takes no account of “pleasantness of surroundings.” People go to malls, spend money in malls, and earn money in malls because such places are pleasant, more pleasant, at least in an economic sense because they are more convenient, than the alternative village squares. If that were not so, the malls would be ghost towns and every suburb would have a vibrant downtown. Economics can explain why people go to malls, why people (in the aggregate) prefer malls to downtown storefronts, but economics does not rely on indeterminate conceptions such as “pleasantness” to explain why people shop at malls. That does not mean that economics takes no account of pleasantness. Economics merely uses less subjective and more comprehensible terminology than words such as “pleasant.”

To support her conclusion that people care about community for the sake of community (and not as the sum of their individual interests), Gross posits the foundation of her philosophy: “[A]t their core, people are altruistic and are willing to forgo certain self-interests to accomplish larger goals.” She anticipates the reflex response to her bald and obviously unsupported conclusion:

---

[33] Id. at 199.
[34] Id. at 200.
ultimately, I am no more able to prove that people are inherently good than detractors will be able to prove that people are inherently bad. All I can hope to demonstrate is that the picture is not as bleak as some imagine it to be.\textsuperscript{35}

First, it is not at all clear what it would mean to say that people are “all good.” All people are likely a combination of things that some people would consider good and other people would consider not so good or even bad. Second, the “detractors” Gross refers to would likely not say that people are all bad just because people act in their own self interest. That is not bad; it is just human. Third, if by “bad” Gross does mean selfish, then her “detractors” would be able to prove that they are more right than Gross by pointing to the great predictive value of microeconomics, which is based on the assumption that people act in their own self-interest.

It would be tempting to beat that horse further, but ultimately the exercise would generate more heat than light. It is probably more worthwhile to turn to a consideration of Professor Gross’s specific proposal for explicitly including community interest into the bankruptcy calculus. She would adjust the chapter 11 Reorganization law to provide that “[t]he court shall confirm a plan if . . . [t]he plan takes the interests of community into account unless the balance of equities clearly favors denial of these interests.” She would define “community” as “those persons, including the government, with a nexus with the debtor for whom (1) there is substantial injury caused by the bankruptcy filing and (2) that injury is redressable through the reorganization process.”\textsuperscript{36} That proposal seems vacuous to me, and I do not mean merely that it is inefficacious or would do little or no good. I mean that it would do incalculable harm because it would require a bankruptcy court to engage in an exercise akin to calculating the number of angels that can dance on the head of a pin. Why not just enjoin the bankruptcy court to “do the right thing, all things considered.”

I have no doubt that Professor Gross believes that she could make such a calculation, and with great certainty. She demonstrates no reticence about coming to terms, in chauvinistic fashion, with life’s fundamental mysteries in ways that she deems supportive of her communitarian view. For example, she states that: “people who

\textsuperscript{35} Id.
\textsuperscript{36} Id. at 228-29.
are married experience a different kind of commitment from those who are unmarried,"37 That assertion is probably preposterous and certainly useless and does not deserve to be taken seriously on its own merits, much less as an argument in favor of taking community interest into account. Gross's brand of pseudo-science, psychology, and philosophy is the foundation of Failure.

V. CONCLUSION

In her preface to the soft-cover edition of Failure, Professor Gross notes that in the bankruptcy debate, the running dialogue about the essential values that a bankruptcy system should vindicate, lines have been drawn and even ad hominem attacks have begun to surface. If she is right about the tenor of the debate, and I have no reason to question her observations in that regard, that is unfortunate. The tone of this review has been derisive and I acknowledge that. But my attack is on Failure, not on Karen Gross. She is a fine person, who, from what I can tell, takes her job seriously and does the best she can to contribute to the literature. My conclusion that Failure is a failure is not a conclusion that Professor Gross cannot make important contributions as a teacher and commentator on the bankruptcy law. I have seen her make fine presentations that reveal a keen sense of the Supreme Court's bankruptcy jurisprudence.

I am troubled by the fact that Failure does not seem to me to be responsible scholarship. The commercial law (including the bankruptcy law) is too often belittled in favor of more "prestigious" legal subjects. That is unfortunate. A book about bankruptcy, published by the Yale University Press, that endeavors to be accessible to lay people should be thoughtful, should anticipate the difficult questions that engaged readers would ask, and should offer responses. Failure does not do any of that, in any but the most superficial terms. The book falls back on words that have emotional currency, "altruism," for instance, but which the law cannot afford to treat in the superficial, facile manner of day time talk shows.

I must make clear, however, that I am not troubled by Professor Gross's aspirations for the bankruptcy law (and the world, for that matter). I agree it would be wonderful if every debtor received his just desserts and were perfectly happy with that. In fact, were that possible, I can see no reason for limiting that result to the bank-

37 Id. at 230.
ruptcy courts. In a way, Professor Gross is not ambitious enough, why not extend her argument to all dispute resolution fora? Wouldn’t the world be a better place if we could always, in every legal setting, irrespective of the financial extremis of one of the parties, distribute resources in the most “fair” way? In a world of perfect justice, those of us who do not know what is just would be enlightened and there would be no waste. VCRs would even be easy to program and no one would ever need exact change.

That goal, perfect justice, is not realizable because we could never reach consensus on what perfect justice is any more than we could agree on what “community” or “culpability” means. Professor Gross’s book fails because she ignores the limits of the possible. We do not all live in Bedford Falls; but we do not live in Potterville either. We live where we live and we can afford to do what we can afford to do. A book that recognizes the limits of the possible would be much more worthwhile than a road map of George Bailey’s hometown.

We have the right to expect more serious scholarship than Failure delivers, and that is the pity. The work has received much more attention than it deserves; we should move on.