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Failure and Forgiveness: A Review

by

James J. White*

In *Failure and Forgiveness*,¹ Professor Karen Gross has written two books about bankruptcy. The first book, found in the first nine chapters, describes the bankruptcy law, the bankruptcy system, its operation, and the policies that support that law and system. This first book is written for a lay audience, and it is an admirable exposition of the law and policy. The second book, chapters ten to fifteen, contains several proposals for change in the bankruptcy law and states arguments to justify those proposals. The second book shows Professor Gross to be a kindly socialist, deeply suspicious of free markets and modern economic man, and quite willing to distribute the debtor's assets in bankruptcy according to the claimants' needs, not according to their deserts.² This second book is written for bankruptcy professionals. Since *Failure and Forgiveness* was published by an academic press, it is unlikely ever to be seen by the lay public who could profit from the first book; unfortunately its audience will be limited to academics and a few bankruptcy practitioners who will not greatly profit from the second book.

In my opinion most of the suggestions in chapters ten to fifteen for modifications in the American bankruptcy law are wrong-headed, and they are not saved by Professor Gross' concession that some of her "proposed solutions can be viewed as impractical based on logistical and political realities."³ Some of these "logistical and political realities" rest on sound footings, a point that Professor Gross should have considered.

I limit my discussion to two proposals that are contained in the last half of Professor Gross' book. The first is a suggestion that the Chapter 11 process should be opened up to consider the interests of certain "communities," defined as interested parties who do not have claims and therefore are not creditors.⁴ Professor Gross' most radical suggestion is to give those communities a voice somehow, perhaps with some real power in the typical Chapter 11 case and its proceedings. Second, I discuss her proposal to grant special

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¹KAREN GROSS, *FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM* (1997).

²See, e.g., *id.* at 155 (1997) (describing the priority enjoyed by secured creditors as "one of the more problematic" priorities).

³*Id.* at 3.

⁴See *id.* at 193.

priority to certain unsecured creditors who can show that the conventional pro rata distribution causes them "irreparable injury."⁵

Years ago when Tom Hayden's political party was in control of the City Council of Santa Monica, California, one of his followers proposed a solution for Santa Monica's homeless problem. Recognizing that many citizens of Santa Monica had empty bedrooms because their children had moved away or because they had bought a house bigger than they needed, and understanding that there were hundreds of homeless people in Santa Monica, this person proposed a law that would require a resident with extra bedrooms to rent those bedrooms (presumably for rent to be paid by the City Council) to the homeless. Those refusing to rent their spare rooms would suffer a penalty in the form of increased taxes or the like. So with the stroke of the pen Tom and his friends would both alleviate an important social problem—beds for the homeless—and put to good use a wasted asset—empty bedrooms in citizens' homes. Some of Professor Gross' proposals for the Bankruptcy Code remind me of Tom Hayden's homeless solution. Like his, her proposals have an ingenuous appeal. Regrettably her proposals share other characteristics of the homeless suggestion; they are likely to be adopted only when hell freezes over and, like Hayden's proposal, Professor Gross' suggestions omit consideration of many practical and political—not to say moral—difficulties inherent in the proposal.

I. EMPOWERING "COMMUNITIES"

According to Professor Gross the Chapter 11 process should take account of the interests of relevant "communities." Once status as a "community" has been established, Professor Gross suggests no restrictions on its rights. While she ignores the details (for example, will the community have a right to vote on a plan?), it appears that she anticipates a role in the reorganization process for communities similar to the role that any creditor would have.⁶

Like the proponent of the homeless ordinance, Professor Gross makes several points concerning her proposal that are irrefutable. First she notes that certain "communities" are already represented and are given particular and unique status by the Bankruptcy Code. Among these for example, are employees, retirees, and persons injured by drunk drivers.⁷ In the railroad reor-

⁵See *id.* at 165.

⁶See *id.* at 228-29 (discussing communities' roles in confirmation process).

⁷See 11 U.S.C. § 507(a)(3)(A) (1994) (giving priority to wages, salaries, sick leave, and vacation leave earned within 90 days of filing of petition or cessation of business, up to \$4,000 per employee); *id.* § 507(a)(4) (giving priority to other benefits earned within 180 days of filing); *id.* § 1114(e)(2) (giving priority to retirement benefits); *id.* § 523(a)(9) (making debts arising from drunk driving nondischargeable). Note that all of these favored groups are creditors.

ganization cases the interests of communities that might be injured by liquidation of the railroad are recognized.⁸ She notes too that some creditors are so favored that their claims are not discharged in bankruptcy.⁹

But of course she gives no satisfactory explanation of the characteristics of these persons who are entitled to special status,¹⁰ and she overlooks the possibility that the railroad reorganizations ought to be regarded as a model to be abhorred, not to be emulated.¹¹ She also ignores the limited success that "communities" have had in getting the Congress or the state legislatures to protect their interests.¹² She fails to note that the preferences granted to favored classes by current bankruptcy law are quite limited.¹³

Professor Gross is right in stating that a Chapter 11 case can have a large and direct impact on persons who are not technically creditors and who therefore have no standing to take part in the Chapter 11 proceedings under the current law. Recognizing that injury might occur to taxing agencies, customers and suppliers of a debtor and to other users of a debtor's services is one thing. Saying that those persons have sufficiently substantial interests to be treated as though they were creditors is another.

How would Professor Gross' proposals change the Chapter 11 process? With an optimism that makes Pangloss look dour, Professor Gross visualizes a bankruptcy love fest where her "communities" appear and convince the debtor and all creditors to accept their positions. In her proposed world these requests are logical, consistent with one another and always reasonable. They never burden the process; they always improve the product.

One could take a less optimistic view of her proposal. First is the possibility that vigilant bankruptcy judges, hostile to the idea of "communities" growing up in their courtroom, will pinch off all "communities" in the bud. Under Professor Gross' proposal, judges could do so by finding that those

⁸See GROSS, *supra* note 1, at 219-20; 11 U.S.C. § 1161-74 (1994 & Supp. 1997) (special subchapter for railroad organization); *id.* § 1170(a)(2) (stating that the railroad lines can only be abandoned if it is consistent with the public interest); *id.* § 1173(a)(4) (1994) (stating that railroad reorganization plan can only be confirmed if consistent with public interest). See also Reorganization of Railroads Engaged in Interstate Commerce, Pub. L. No. 72-420, 47 Stat. 1474 (1933) (governing railroad insolvency prior to 1978).

⁹See GROSS, *supra* note 1, at 27.

¹⁰See *id.* at 158 ("[T]he justifications for differing treatment under the current law do not withstand scrutiny").

¹¹See Julie A. Veach, Note, *On Considering the Public Interest in Bankruptcy: Looking to the Railroads for Answers*, 72 IND. L.J. 1211, 1220 (1997) (noting that of the twenty-eight large railroads that filed petitions under the old railroad reorganization provisions between 1933 and 1940, none completed its reorganization during that time).

¹²See, e.g., 29 U.S.C. § 2102 (1994) (requiring employers to give sixty days notice prior to closing a plant, but not otherwise restricting their freedom to do so).

¹³See 11 U.S.C. § 507 (1994) (listing, exclusively, only nine types of unsecured claims with priority status); *id.* § 523 (1994 & Supp. 1997) (listing, exclusively, only eighteen debts that are exempt from discharge).

asserting rights as “communities” would not be “substantially injured” by the Chapter 11 case or that their grievances are not “redressable” there. If either of those conditions is met, there is no right in the community to take part in the Chapter 11. Since neither of those conditions is defined in Professor Gross’ proposal it is likely that some bankruptcy judges would make them high barriers for communities to participate in a Chapter 11 case.

Second is the opposite possibility, that bankruptcy judges enamored of Professor Gross’ ideas¹⁴ would construe “substantial injury” as broadly as suggested in her book and would concede that almost everything is “redressable” in Chapter 11. Before such a judge proceedings in a Chapter 11 case could take on the appearance of a utility rate hearing in which every conceivable representative of the public, consumers and businesses alike, would be welcome participants. That sort of hearing, of course, would be an indeterminate mess. Without standards, the judge would have to reconcile the rights of unsecured creditors, secured creditors, the Sierra Club, unions and, possibly, customers. Some of these parties would align with one another, but in most circumstances the negotiations would be multi-lateral—many different parties pulling in many different directions. To have so many participants with stakes that are so uncertain and with rights that are ill-defined attempting to take part in the process of running the company while it is in Chapter 11 and devising a Chapter 11 exit plan can only cause confusion and uncertainty and bring delay and expense. I would predict that few judges would welcome new, vocal and officious “communities” into their courtrooms and that insubstantial change in the status quo would be most likely. Some bankruptcy judges may believe that customers, unions, taxpayers, taxing authorities and the like should have a larger say in major Chapter 11 cases, and I suspect that some judges, at least initially, would interpret Professor Gross’ rules to allow extensive intervention by “communities.” Even those who issued a broad invitation initially would tire of the experience. Of course, a judge’s reputation for free invitation of “communities” would insure that no major Chapter 11 cases would be filed in his or her district.¹⁵

Consider some of the probable consequences of and practical difficulties with Professor Gross’ proposals. Although she suggests that only § 1129 would have to be modified to allow participation by these communities in a

¹⁴See, e.g., *In re Bruzese*, 214 B.R. 444, 447 (Bankr. E.D.N.Y. 1997) (Bernstein, J.) (characterizing Professor Gross as one of several “imaginative and resourceful scholars” currently addressing bankruptcy issues).

¹⁵See 28 U.S.C. § 1408 (1994) (governing venue in bankruptcy cases); DAVID G. EPSTEIN ET AL., *BANKRUPTCY* 876 (1993) (“[V]irtually every major reorganization case presents several venue options, and that a significant amount of ‘forum shopping’ goes on in selecting the district in which to file the petition”).

Chapter 11,¹⁶ surely other sections would have to be added to that list and communities' participation would have to be expanded. Assume a manufacturer in Chapter 11 wants to close a plant, discharge its workers, and move its operations from one city to another. Assume further that the local union, the city and other tax collecting agencies are opposed to the closing. If each of those interested parties could appear and oppose the closure only as part of the negotiation of the plan of reorganization under § 1129, the obvious solution for the debtor is to foreclose any § 1129 debate by closing the plant under the authority of § 363, with court approval but without the interference of the "communities" who would be invited to take part in the § 1129 process.¹⁷ Of course, as the example suggests, if Professor Gross' proposal makes sense for § 1129, it also makes sense for similar decisions under § 363. Therefore Professor Gross' simple suggestion that we invite the communities into the plan negotiation process under § 1129 really means that we must invite the communities into earlier transactions—for fear that those transactions will foreclose any possibility of the community's involvement in preparation and negotiation of the plan. So the starting point of her simple plan will not work. We will have to invite the communities in early to take part in any § 363 decisions and possibly any decisions under § 364; conceivably they should have a say even in automatic stay decisions under § 362. That, of course, means that her proposal brings interference not merely to the negotiation of the plan, but interference at every stage of the Chapter 11 case from its beginning to its end.

A second consequence of Professor Gross' proposal is that creditors and debtors will appear in "community" clothing. One can easily imagine an unsecured creditor or a deeply insolvent debtor who will be paid nothing on liquidation inviting the taxing authorities and the Chamber of Commerce to make his arguments. These guests will claim to be self-interested communities when in fact they will be singing lyrics written by the creditor's lawyer. These disingenuous expressions of interest by "communities" might be the

¹⁶See Gross, *supra* note 1, at 228, 248.

¹⁷See 11 U.S.C. § 363 (1994); Official Comm. of Unsecured Creditors of LTV Aerospace and Defense Co. v. LTV Corp. (*In re Chateaugay Corp.*), 973 F.2d 141 (2d Cir. 1992); Stephens Indus., Inc. v. McClung, 789 F.2d 386 (6th Cir. 1986); Committee of Equity Security Holders v. Lionel Corp. (*In re Lionel Corp.*), 722 F.2d 1063 (2d Cir. 1983); *In re Lady H. Coal Co.*, 193 B.R. 233 (Bankr. S.D. W.Va. 1996); *In re Whet, Inc.*, 12 B.R. 743 (Bankr. D. Mass. 1981) (all of these cases allow sale of all or a substantial part of debtors' assets under § 363). See also 1 COLLIER BANKRUPTCY MANUAL (MB) § 363.10 (3rd ed. Rev. 1997) ("It is now generally accepted that section 363 allows such sales in Chapter 11, provided, however, that the sale proponent demonstrates a good, sound business justification for conducting the sale prior to confirmation (other than appeasement of the loudest creditor, that there has been adequate and reasonable notice of the sale, that the sale is proposed in good faith, and that the purchase price is fair and reasonable"); DAVID G. EPSTEIN ET AL., BANKRUPTCY 180 (1993) ("§363(b) authorizes the sale of all or substantially all of the assets of a company in Chapter 11, even though there is no finding of actual emergency").

most dramatic consequence of Professor Gross' proposals. Creditors or the debtor will thus seek to elevate their own arguments by making those arguments appear to be the arguments of the taxing authorities, the Chamber of Commerce, citizens or the like. If I am correct, most communities, such as the a mayor or citizens, will merely be making arguments that already have been made by creditors, the debtor or others in the process. To the extent they add nothing to the arguments but cost time and cause delays, they are dead weight.

A third costly sideshow certain to follow Professor Gross' community proposals might be called equal protection litigation. Assume, for example, that the airline that services Blytheville, Arkansas, goes into Chapter 11. Assume further that the bankruptcy court recognizes a citizen group, "Citizens for Flight," to appear as a "community" on behalf of the debtor's attempt to reorganize. What if the "Arkansas Community Bussing Association," an organization whose members will gain revenue and business if the airline fails, seeks to intervene? If the court accepts one advocate and rejects the other, it will surely be challenged for discriminatory application of the standards. That of course is new, inevitable litigation that will arise in any significant Chapter 11 case where there are conflicting interests among those who technically are not creditors.

Perhaps the most significant difficulty with Professor Gross' proposed community rules has been well explained by Bankruptcy Judge Barry S. Schermer: the absence of a medium of exchange between creditors on the one hand and "communities" on the other.¹⁸ Current Chapter 11 law and the rules published under it have explicit statements of the voting rights and relative priorities of various parties. These provisions and the decisions under them give parties a reasonable basis to determine the class into which they will be placed and the nature of their rights in the reorganization proceedings. For example, creditors know that if they make up more than one half in number or two thirds in dollars, they can vote the decision of the class into which they are inserted.¹⁹ They know also that they will be protected against inappropriate inclusion in the wrong class and that a vote of at least one class will be necessary for the plan's approval over the objection of other classes.²⁰ They know that their claims will prime the shareholders' rights but lose to more senior secured creditors' claims.²¹ Professor Gross makes no provision to grant votes to her communities nor to include them in any class. She does not specify any other way how communities are to exert their influence in

¹⁸See Barry S. Schermer, *Response to Professor Gross: Taking the Interests of the Community Into Account in Bankruptcy—A Modern-Day Tale of Belling the Cat*, 72 WASH. U. L.Q. 1049, 1051 (1994).

¹⁹See 11 U.S.C. § 1126(c) (1994).

²⁰See *id.* § 1129(a)(10).

²¹See *id.* § 1129(b)(2).

any case in which there is disagreement among the debtor, creditors and communities. How is one to determine their rights and to resolve conflicts between a community and the controlling creditors or the debtor?

Assume, for example, a tannery in Chapter 11 that has been a long-term polluter. Assume also that the debtor and most of the creditors are interested in a reorganization but the citizens of the community, represented perhaps by the Sierra Club, would like the tannery closed and its assets devoted to an environmental cleanup. How is the court to equilibrate the interests of the citizens with the interests of the creditors and the debtor? Would the Sierra Club be treated as a class that could vote against the plan but would be unable by itself to stop a confirmation in most circumstances? If so, what are those rights? Or does the judge, if persuaded by the Sierra Club, simply rule that it would be better that the tannery go away? One can foresee lawless decisions that are bound only by the judge's whim. In her proposal, Professor Gross gives the judge no principled way to decide the weight to be given to a particular community's claim.²² If the judge is an environmentalist, the tannery dies; if the judge is an environmental skeptic, the tannery lives; and if the judge is both an environmentalist and a union sympathizer, the case drags on without resolution.²³

One should understand a probable, though not certain, consequence of Professor Gross' rules. Almost all of her examples involve "communities" such as taxing authorities,²⁴ customers of airlines²⁵ and patients at hospitals.²⁶ Almost all of her exemplars would favor the reorganization of the debtor and oppose the debtor's liquidation. If her vision is accurate, the adoption of her proposal would further exacerbate the "type I" error that is now widely made. According to Professor Michelle White, a type I error is one in which a business that would be better off dead is kept alive a longer period than it should be.²⁷ Professor White's assertion is that the Chapter 11 system often errs on one side or the other, namely that it kills businesses that should be kept alive and keeps alive businesses that should be killed. If we now err by keeping too many businesses alive for too long and if Professor Gross is correct in her assumption that the principal "communities" will push for reorganization, it will mean businesses that should be killed will be kept alive yet longer than is currently the case. If she is correct about what will

²²See GROSS, *supra* note 1, at 215-19.

²³Cf. *id.* at 227 ("If community is to be recognized, some specific amendments to the Code are needed.")

²⁴See *id.* at 153-55.

²⁵See *id.* at 212-14.

²⁶See *id.* at 221-23.

²⁷Michelle J. White, *Does Chapter 11 Save Economically Inefficient Firms?*, 72 WASH. U. L.Q. 1319 (1994).

happen and I am correct in concluding that Chapter 11 routinely prolongs the life of dying businesses,²⁸ adoption of her community proposal will enlarge existing waste.

There may be some other thorns among Professor Gross' roses. For example, it is plausible that citizens would prefer to see a polluting tannery go out of business, that the operators of and patrons at one struggling hospital would like to see the cross-town hospital liquidated, and that the owners and patrons of a small, local grocery store would like to see the Safeway go out of business. In those cases the communities would appear and opt for liquidation, not for reorganization. I wonder if that is what Professor Gross has in mind.

I believe that inviting guests to Chapter 11 cases and proceedings, guests who do not vote, do not pay, and do not benefit or suffer directly, is not wise. I believe Professor Gross' proposal would increase the cost and change the outcome in Chapter 11 in ways that cannot be fully predicted. It probably would prolong the deathroes of companies that should liquidate and would waste money that could otherwise go to creditors. Conceivably it would turn Chapter 11 proceedings into grand circuses with multiple interests speaking with many tongues. Most likely it will merely increase the cost of Chapter 11 and decrease the certainty of that outcome. By doing so it will of course raise the cost of credit by some increment and cause creditors to look for ways, necessarily inefficient, to insulate themselves from the effects of Professor Gross' proposal.

II. SPECIAL PRIORITY FOR CREDITORS SUFFERING "IRREPARABLE INJURY"

Professor Gross' second radical suggestion is to grant special priority to unsecured creditors in bankruptcy who can show that the standard pro rata distribution will cause them "irreparable injury."²⁹ She gives an example of irreparable injury that might result from a creditor's failure to be paid when its debtor goes into bankruptcy: "a mortgage foreclosure on the creditor's home or inability [of the creditor] to acquire needed medical care."³⁰ Why one would ever apply such a rule of special priority and how one would justify it as applied to one among several identically situated creditors is beyond my understanding. As Professor Gross points out, the Bankruptcy Code now draws distinctions among classes of creditors.³¹ This discrimina-

²⁸See James J. White, *Harvey's Silence*, 69 AM. BANKR. L.J. 467, 476 (1995).

²⁹GROSS, *supra* note 1, at 165 ("[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").

³⁰*Id.*

³¹See *id.* at 145 ("Certain groups of creditors are accorded priority over the others").

tion, of course, is based upon the difference in the status of those classes of creditors, not upon differing needs of creditors within the same status. For example, the claims of those injured by drunk drivers,³² the claims of taxing authorities³³ and the claims of people who lend money after the petition has been filed³⁴ all get special treatment vis-à-vis others who have lent money on an unsecured basis prior to the petition's filing.

Should she argue that a particular class that is different from other classes deserves special treatment (for example, that person who has suffered personal injury should be paid first), her argument would be difficult to refute. One would have to do the kind of balancing that Congress did when it first adopted the current Bankruptcy Code in 1978.³⁵ Certainly it would not have been crazy for Congress to have given all or some set of tort claimants priority over other unsecured claims.³⁶ The Congress chose not to do that, and I do not interpret Professor Gross as doing it either.³⁷ Her rule would apply to a trade creditor with limited capital that had made exactly the same loan to the debtor as a larger supplier. Assume for example that Exxon had sold jet fuel to a failed airline and had not been paid. Assume a smaller company had done the same and had not been paid. According to Professor Gross, the smaller company, but never Exxon, might get higher priority in the bankruptcy than other unsecured creditors if it could show that failure to receive payment would cause it, the smaller creditor, to fail. Even the most liberal advocates of the new code in 1978 did not have the chutzpah to justify discrimination among creditors based on certain creditor's needs as opposed to their deserts. Professor Gross does and has.

Worse, her examples show that her "irreparable injury" does not consist solely of economic necessity; it would have a moral component as well.³⁸ For example, if our trade creditor had gotten where he was by losing company money at the gambling tables, his injury might not be treated as irreparable, for, as a spendthrift, he would not be deserving. Consider Professor Gross' example:

Suppose four creditors each lent Smythe one thousand dol-

³²See 11 U.S.C. § 523(a)(9) (1994) (making debts arising from drunk driving accidents nondischargeable).

³³See *id.* § 507(a)(8) (giving priority to tax authorities); *id.* § 523(a)(1) (making debts arising from unpaid taxes nondischargeable).

³⁴See *id.* § 364 (describing varying degrees of priority for post petition lenders).

³⁵11 U.S.C. §§ 101 et seq. (1978).

³⁶See generally Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887, 1896-1916 (1994) (arguing for priority for involuntary creditors).

³⁷If she is less honest than I take her to be she might visualize persons who have suffered personal injuries to be the principal beneficiaries of her unequal distribution rule, but she does not say that and does not use tort claimants as her example.

³⁸GROSS, *supra* note 1, at 166.

lars. 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 is subsequently approved without much investigation.

Third Creditor may be the most needy (he could be rendered homeless), but he did contribute to his own downfall. First Creditor is among the least needy but, unlike Fourth Creditor, did behave in a prudent manner that will go unrewarded—a particularly troubling result if the improvident Third Creditor recovers and she does not. Second Creditor, who could not control her situation, needs food as distinguished from shelter. Although she could obtain a home equity loan to tide her over, such a loan would increase her obligations; she would be out of pocket by two thousand dollars, not just one thousand dollars. Fourth Creditor has little going for it; it is in the business of lending and chose not to investigate Smythe's application (perhaps in exchange for a higher interest rate). 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 for Fourth Creditor, First Creditor evokes sympathy—but not enough to rebut the presumption. If a court allows too many rebuttals, there may not be enough money to go around. This is a realistic concern. Being a rebutting creditor does not guarantee payment; instead, it guarantees an order of payment if funds are sufficient. If there is a shortfall, the available amount is divided pro rata among the successfully rebutting creditors, which is a return to the very approach we are avoiding.³⁹

³⁹*Id.* at 165-66.

The rights of her creditors are not dependent merely upon their economic situation but also upon "sympathy" and diligence. The first creditor does not evoke sufficient sympathy because she wants to buy "luxury goods." The fourth is eliminated from high priority not only because it is a "finance company" but also because it lacks diligence, having granted a loan "without much investigation." Finally, creditor three is on the cusp; that creditor may "lose his house" (evoking sympathy), but his problems result in part because he is a "profligate spender" (not evoking sympathy).

Although her explicit legal standard of irreparable harm says nothing about moral justification, each of her examples is engorged with moral judgment. To say that some creditors who share identical economic circumstances are preferred over the others because one was wasteful and the other was frugal is a foolish step beyond the dubious suggestion that a court should take account of the wealth of the various creditors in discriminating among them.

Consider some drastic possibilities that her proposal for favoritism might produce. Assume that some significant part of the bankruptcy bench accepts her invitation and embraces proposals for priority treatment on the grounds of irreparable injury. Assume each of three women has had a breast implant and has a claim against Dow Corning. The first, who has little money, got the breast implant in reconstructive surgery following breast cancer. The second has full insurance coverage, has had her implants removed at the cost of the insurance company and has even recovered insurance payments for her pain and suffering. The third woman had a breast implant not because she had cancer but because she thought it would enhance her future as a dancer in Las Vegas where she works in a chorus line. She is comparatively well-off but is now suffering some of the symptoms of the disease claimed to be caused by the implant.

Has any, or all, of these women suffered "irreparable injury"? Clearly, the first makes the grade. She is poor, she has suffered injury as a result of cancer, and she appears otherwise to be an exemplary person—thrifty but unlucky. The second is an easy loser. Her claim is now asserted by an insurance company, a wealthy pariah, which is incapable of engendering "sympathy." It loses. The third candidate also loses. She is condemned not only by her wealth, which was earned without admirable thrift, but also because she is engaged in morally reprehensible conduct and has made the particularly foolish decision to enhance her capacity to engage in that conduct by having a breast implant. Never mind that each of these persons has an identical claim against the debtor. Never mind that the insurance company's incentive to settle cases in the future will be influenced by a rejection of its rights as an assignee or subrogee. And never mind that another judge might regard the chorus girl's behavior as an admirable exercise of her own freedom to do what

she pleases. Two fail and one succeeds. Except in contested divorces where someone must decide who gets custody of which children and control of what property, I know of no cases where we grant such grand discretion to judges to redistribute wealth based upon ad hoc judgments about the parties' status, behavior and moral flavor. Granting such discretion to judges unnecessarily seems intuitively wrong to me. In practice, it might seem like a bad idea even to Professor Gross.

Strategic behavior by creditors would surely follow from widespread application of Professor Gross' irreparable injury suggestion. First, of course, professional lenders and trade creditors would raise their prices, or reduce the amount of credit they would grant, by some increment to offset the cost and uncertainty. Again, the predictability of outcome under the Bankruptcy Code is diminished. Conceivably, professional lenders and sophisticated trade creditors might try to limit claims for priority by encouraging their debtors to deal only with trade creditors and others with a net worth high enough to keep them from being appealing beneficiaries for redistribution of others' wealth.

Her proposal would surely carry festering litigation in its trail. With such open-ended invitations for judges to indulge their biases, I cannot imagine that case law could establish standards from which one could reasonably predict outcomes without hundreds, perhaps thousands of cases, stretching beyond the middle of the twenty-first century.

By establishing different rules in bankruptcy than exist outside, her proposal would exacerbate an existing difficulty of Chapter 11. Professors Baird and Jackson long ago warned of the costs in having one set of rules outside of bankruptcy and another set within.⁴⁰ If a creditor's or a debtor's rights are greater in one regime than the other, the creditor or debtor has an incentive to move from one regime to the other—even when the movement might be costly to the debtor and to the creditors taken as a whole. Particularly if the irreparable injury rule were applied to large classes such as tort plaintiffs, there is a real possibility that creditors could and would put the debtor into bankruptcy involuntarily, even when bankruptcy would cause a net loss to all.

Other strategic behavior might include a creditor's purchase of the claims with special priority potential. Of course Professor Gross' rules would increase the cost of those claims, but it still might be in general creditors' interests to make those purchases.

These practical objections to Professor Gross' irreparable injury proposals

⁴⁰See Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 818 (1987); THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 21 (1986).

are insignificant in comparison to the moral objections one might make. Since bankruptcy is usually a zero sum game, where more for me is less for you, her proposals are worse than misguided generosity. The proposal to take from rich creditors and give to poor creditors, despite the fact that each holds identical claims, is fundamentally an immoral attempt to take the wealth of one and give it to another simply because the former is wealthy and the latter is poor. If the creditor who will suffer irreparable harm by its failure to be paid deserves to be subsidized, I know of no moral justification that requires other creditors to provide that subsidy. What did the rich creditors do to deserve such a burden? If there is a justification for such a subsidy, the subsidy should be provided by the taxpayers, not by other creditors who happen to have made the same mistake as the subsidized creditor. Even if one ignores the cost of bankruptcy litigation that would surely follow such proposals and even if one disregards the perverse incentive that it gives to a trade creditor who might enjoy the added priority, Professor Gross' proposal should be rejected as unfair. It is unfair to subject wealthy creditors to the whims of judges who must act without guidance, and it is unfair to take the money of one and give it to another only because the former happens to be near at hand while both have made the same bad judgment about the debtor's capacity to pay.

CONCLUSION

With any luck, Professor Gross' proposals in *Failure and Forgiveness* will enjoy no more acceptance than Tom Hayden's. Chapter 11 needs change, but not the changes suggested by Professor Gross.

