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RESPONSE TO PROFESSOR GROSS: TAKING THE INTERESTS OF THE COMMUNITY INTO ACCOUNT IN BANKRUPTCY—A MODERN-DAY TALE OF BELLING THE CAT

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I. INTRODUCTION

William Langland inspired the famous children's story involving a group of mice who one day meet to complain about the hunting success of a local cat and to discuss some possible solutions to prevent future rodent deaths.[1] One mouse, feeling that he has the solution, suggests that their survival chances would increase dramatically if they simply put a bell around the neck of the cat. The support for this idea quickly dissipates, however, when an older mouse—well-versed in the dilemma of individual sacrifice and group survival—asks a very obvious yet poignant question: "Who is to bell the cat?"

Professor Gross' proposal to take community interests into account in bankruptcy is reminiscent of the proposal to bell the cat. Both suggestions present a solution on the theoretical level, but both are certain to fail in their application because they do not consider present realities. The community interest argument fails on three fronts: definition, application, and the role of the decisionmaker. After a short illustration, each shortcoming will be addressed in turn.

II. IDENTIFYING, APPLYING, AND CHOOSING THE DECISIONMAKER FOR COMMUNITY INTERESTS

A. *Identifying the Problem*

The community interest issue often arises in the context of the § 363 sale[2] of either substantially all of the estate's assets, or an entire business

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1. WILLIAM LANGLAND, THE VISION OF PIERS PLOWMAN 7-8 (Henry W. Wells trans., Sheed & Ward 1935) (n.d.).

2. A sale of most or all of a debtor's assets would constitute a sale out of the ordinary course of business pursuant to 11 U.S.C. § 363(b) (1988).

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division. Consider the following example:

> The Debtor is a Hat Manufacturing Company operating in State A. The Debtor wants to sell all of its tangible personal property, which consists of manufacturing and office equipment, to Other Hat Company also located in State A. At the auction, Big Hat Company, a hat manufacturer from State B, is the high bidder. Big Hat wants to shut down the Debtor's plant and move all of the business assets to State B.[3]

Here the court is asked to make a choice between two competing proposals. One bidder is offering to keep the business open and operating. Individuals in the local community will keep their jobs and the local municipality will continue to collect tax revenue from the Debtor. The other bidder is a competitor offering a higher price, who will shut down the business and eliminate the competition.

Under our present system, there is no dilemma in resolving the preceding example. "The fundamental purpose of a sale of debtor's assets is to benefit creditors."[4] A bankruptcy court need only look at the money that a proposed sale will generate and make its decision based upon the potential return for the creditors. These decisions are made without consideration of loss of local jobs, loss of a regional business, or loss of tax revenue.

Professor Gross argues that the bankruptcy judge should consider the community interests in the above example. Although she admits that community interests could never be measured in economic terms, "that does not mean . . . that they lack value."[5] Yet, it is the very fact that community interests cannot be measured that helps to defeat any argument that they should be applied in a bankruptcy court. While some articulated community interests may be valuable, the bankruptcy court is not the appropriate forum for defining, applying, and considering community interests.

B. Identifying the Community and the Interest

How does a federal judge determine a community interest? The first task, of course, would be to designate the community, but even this initial step appears impossible. If a community were viewed in geographic terms, it would be altogether inappropriate for a court of the United States to prefer the interests of the citizens in one state over the interests of the citizens in another state. This is inconsistent with principles of federalism,

3. *See generally In re* Benay-Albee Novelty Co., 146 B.R. 680 (Bankr. E.D. Va. 1992).

4. *Id.* at 680.

5. Karen Gross, *Taking Community Interests into Account in Bankruptcy: An Essay*, 72 WASH. U. L.Q. 1031, 1046 (1994).

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and it serves to contradict the intent behind an Article I Court.

Geographical boundaries aside, a community may be as broad as the asserted community interest. However, it is also impossible to delineate the community in this fashion because there are an infinite number of community interests at stake in each bankruptcy and their boundaries are limitless. If, for example, the community interest were defined as that portion of the citizenry that is affected by a debtor's business, the breadth of the community could reach a potentially infinite number, since almost anyone, from local employee to distant supplier, can claim some remote loss due to the failure of a once-viable local business. The Bankruptcy Code solves this problem by limiting those who can claim that they are affected by the bankruptcy because it makes entitlement to money or contract rights the criteria for consideration in the decisionmaking process. The broad standing provisions of 11 U.S.C. § 1109 and Federal Rule of Bankruptcy Procedure 2018 further define those involved in a bankruptcy proceeding. Under these provisions, the SEC, any creditor, and any state's attorney general (acting for consumer creditors) can be heard in the proceeding. Professor Gross' proposal goes beyond these provisions and opens up a Pandora's box of possible "claimants" without offering any solutions as to how this potentially vast group could be limited.[6]

Thus, the problem is not that community interests cannot be identified, but that there are so many potential interests in every bankruptcy. Whether the community interest is minority employment, local jobs, tax revenue, or environmental concerns, a major problem with Professor Gross' theory is the plethora of potential interests and the extent to which consideration for these interests should extend when the decisionmaker is a federal court.

C. *The Obstacle of Application*

Even if some community interest could be articulated, there is a problem with application. When dollars and contract entitlements are not the criteria, there is no adequate medium to consider community interests vis-a-vis monetary interests, or even among competing community interests.

In the Hat Manufacturer bankruptcy example cited above, suppose that the bankruptcy judge were faced with a choice between two competing bids. One bid, Option 1, would pay all secured creditors in full and all unsecured creditors fifty cents on the dollar. Another bid, Option 2, would promise little return for the creditors, but would boost minority employment and would provide funding for cleaning up some environmental problems

6. One could even take this a step further and question how notice of hearing could be sent to a community comprised of an infinite number of "affected" community members.

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caused by the Debtor. Here, the bankruptcy judge is forced to choose between these two bids without a medium of exchange that will permit the judge to weigh adequately the relative value of each option.

This obstacle to applying community interests in decisionmaking becomes even more acute when the community interests are competing against each other. How does a bankruptcy court weigh a local community's interest in maintaining its job base against potential long-term environmental damage? A bankruptcy court cannot make this determination because there is no common medium for weighing these interests, and because a bankruptcy court should not be the decisionmaker for any community interest analysis.

D. *Choosing the Appropriate Decisionmaker*

Professor Gross emphasizes the need to view the world as interconnected, with the welfare of the community being very much a part of corporate bankruptcy.[7] In addition to the problems of defining the scope of both the community and the community interest, and weighing those interests in the traditional bankruptcy context, there is also considerable difficulty in placing these responsibilities in the hands of a bankruptcy judge.

When the judge is to make the decision regarding appropriate community interests, he is invited to make decisions based on his own view as to what is best for the community. Rather than rely on an objective and predictable standard, i.e., money and contract rights, one individual would be permitted to decide what should and what should not be considered a community problem. In making these broad policy decisions, the judiciary would risk involvement in intensely politicized decisions and would step on the toes of elected legislators who, under our Constitution, are charged with developing public policy by identifying and responding to the interests of the public.

A judge who decides an issue based on a perceived community interest may also face appellate review based purely on policy, rather than legal, grounds. Furthermore, as each community is comprised of different individuals, each community may not place the same weight on similar community interests. These differing viewpoints would result in a breakdown in our system of stare decisis—similar legal issues embodying identical community interests would not be decided consistently because one judge weighs one community interest, e.g., the spotted owl, more heavily than another community interest, e.g., local jobs.

7. Gross, *supra* note 5, at 1042-43.

III. CONCLUSION

Rather than creating a system which is fairer to more people, Professor Gross advocates a position that is unworkable because it fails to consider the realities of our legal and political systems. In attacking the assumptions underlying our present economic organization, she proposes a sweeping new vision without reflecting on the necessary details. Her purported feminist methodology—focusing on the particular, on context, and on real people and real situations[8]—may require more fine tuning before it can be applied in bankruptcy. In short, her ideas on taking community interests into account in bankruptcy bear yet another similarity with Langland's story of "belling the cat"—both are good fiction.

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8. Gross, *supra* note 5, at 1037.

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