TAKING COMMUNITY INTERESTS INTO ACCOUNT IN BANKRUPTCY: AN ESSAY

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I. INTRODUCTION AND CAVEATS

The vast majority of the papers presented at this Conference do not address the import of community interests in bankruptcy.[1] These scholars are certainly not alone in failing to consider community. For example, the well-known work of Thomas Jackson and Douglas Baird explains and justifies bankruptcy without taking community into account.[2] More recently, the oft-cited (and oft-criticized) work of Michael Bradley and Michael Rosenzweig specifically states in two footnotes that the authors' economic model does not pay attention to the effect of the Bankruptcy Code on constituencies other than bondholders and stockholders.[3] While there are certainly differences among the writings of these individuals, their work can be grouped under the general rubric of "law and economics" scholarship.

I do not share the view of these scholars. I believe that community interests must be taken into account in both the corporate and personal bankruptcy systems. My belief that communities matter is obviously just a conclusory statement that masks numerous complex questions. For example, what is meant by "community"? What justifies taking the

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1. *See, e.g.*, Barry E. Adler, *A World Without Debt*, 72 WASH. U. L.Q. 811 (1994); James W. Bowers, *Rehabilitation, Redistribution or Dissipation: The Evidence for Choosing Among Bankruptcy Hypotheses*, 72 WASH. U. L.Q. 955 (1994); Alexander J. Triantis & George G. Triantis, *Conversion Rights and the Design of Financial Contracts*, 72 WASH. U. L.Q. 1231 (1994); Michelle J. White, *Does Chapter 11 Save Economically Inefficient Firms?*, 72 WASH. U. L.Q. 1319 (1994); Philippe Aghion et al., *Improving Bankruptcy Procedure*, 72 WASH. U. L.Q. 849 (1994).

2. *See* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW (1986); Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 J. LEGAL STUD. 127 (1986); Douglas G. Baird & Thomas H. Jackson, *Bargaining After the Fall and the Contours of the Absolute Priority Rule*, 55 U. CHI. L. REV. 738 (1988).

3. *See* Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043, 1056 n.44, 1088-89 n.108 (1992). *See also* Aghion et al., *supra* note 1, at 852 n.7 (stating that "bankruptcy is the wrong instrument" for dealing with considerations such as employment in the local area).

interests of "community" into account? How can we measure the value of community interests, and what are we valuing? How important are the interests of community in the context of the other interests that bankruptcy law must balance? Lastly, why should we depart (are we really departing?) so far from existing bankruptcy law, which is already having trouble doing that which it is supposed to do?

Addressing the purpose and scope of bankruptcy law is not a topic which can be resolved quickly. Indeed, I spend a considerable number of chapters in my forthcoming book addressing these very issues.[4] My goal in this essay is different, and I have taken the Conference organizers at their word when they indicated their desire for short pieces designed to generate discussion and debate (which also accounts for the informal style of this essay). I seek to identify and then critique the premises that appear to underlie the conclusion that community interests have no place in the debate about bankruptcy. The Bradley and Rosenzweig footnotes are particularly instructive in this regard because they actually seek to explain the omission of community interests within their model.[5] I appreciate that the criticism that follows may resemble an exercise in deconstruction—a lot of thrashing without much constructive rebuilding. However, through my criticisms, I seek to contrast the often unspoken underlying assumptions of many of the law and economics scholars, while recognizing that they do not speak with one voice. Though this exercise may not ultimately convince readers inclined to law and economics scholarship to accept my position (that community matters), it goes a long way towards explaining why I reach such different conclusions about the role of community in bankruptcy.

II. COMMON MISPERCEPTIONS

Before I begin, I want to be very clear about what I am *not* saying. As the commentary at this Conference and elsewhere demonstrates, it is easy to misunderstand and mischaracterize what it means to say that community matters.[6] First, saying that community interests are important and must be taken into account in the bankruptcy process does *not* mean that the other

4. *See* KAREN GROSS, FAILURE AND FORGIVENESS: AN ASSESSMENT OF CONTEMPORARY BANKRUPTCY LAW (forthcoming 1995).

5. Some of my comments are drawn from my remarks at two recent meetings: the Western District of Pennsylvania's Annual Bankruptcy Bar Association Meeting (November 1993) and the AALS Creditors' and Debtors' Rights Section Meeting, Orlando, Florida (January 1994).

6. *See infra* text accompanying notes 43-44.

interests that bankruptcy seeks to protect, such as those of creditors and equityholders, are forgotten. Thus, recognizing the import of community does *not* mean, a fortiori, that community interests trump other interests. Second, consideration of community is *not* necessarily a noneconomic decision and is also not, per se, economically inefficient.[7] Taking community interests seriously is *not* synonymous with rejecting all economic modeling; what it reflects is a desire for a different, more expansive economic model. Such a model would account for (value) things not currently considered by the narrow economic paradigm.[8] Finally, considering community does *not* mean that we should always save the buggy whip maker, the euphemism used at this Conference and elsewhere for the company whose need to exist has apparently obsolesced and whose prolonged existence through a Chapter 11 reorganization is a waste of both time and money. Indeed, contrary to popular belief, community interests are *not* always consonant with those of the debtor. And, the decision to save or sink the buggy whip maker may hinge on considerations including, but not limited to, those of community.

Two concrete examples illustrate these points. In his now famous study of American farming in the 1940s (which was updated in the 1970s), anthropology professor Walter Goldschmidt looked at the consequences of agribusiness (large, corporate-owned farming). He evaluated two communities in California, one with small, owner-operated farms and the other with corporate-owned and managed farms with contract farming. Professor Goldschmidt found that the small farms were not energy or production efficient in the short term. On these criteria, agrifarming was superior. However, the quality of community life in the town with farmer-owned and run farms far exceeded that of the town with agrifarming. Streets, sidewalks, parks, schools, and religious and political involvement were all better in the community with small, farmer-owned farms.[9]

Professor Goldschmidt's study suggests several things in the bankruptcy context. Assume that several small, individually owned farms are experiencing financial difficulty (picture a local flood). The local

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7. *See* PETER KINDER ET AL., INVESTING FOR GOOD: MAKING MONEY WHILE BEING SOCIALLY RESPONSIBLE (1993) (arguing for consideration of the value of self-worth, dignity, and respect).

8. *See* Karen Gross, *In Forma Pauperis in Bankruptcy: Reflecting On and Beyond* United States v. Kras, 2 AM. BANKR. INST. L. REV. 57, 67-68 (1994).

9. WALTER GOLDSCHMIDT, AS YOU SOW: THREE STUDIES IN THE SOCIAL CONSEQUENCES OF AGRIBUSINESS (1978); David Kline, *The Embattled Independent Farmer*, N.Y. TIMES, Nov. 29, 1981, § 6 (Magazine), at 138. I am indebted to Professor Philip Shuchman of Rutgers Law School for directing me to this example.

community will be affected by whether these farms are permitted to reorganize in Chapter 11 (in which case the farmers retain ownership) or are sold outright to a farming conglomerate. This does not mean that a court should invariably decide to save the small farmers' farms because such a decision would create other inefficiencies—e.g., in energy and production. It could materially harm banks and trade creditors. But, it does mean that a decision in the name of "economics" does not necessarily mandate that the farms be sold. Everything depends on what criteria are used and what interests we seek to protect. If short-term efficiency (such as immediate cash payout to banks) is the only goal, then the farms should be sold. If long-term quality of community life is the only goal, the farmers should retain the farms. "Community quality" is not useless or valueless merely because we do not currently measure it within the traditional economic model. At a minimum, Professor Goldschmidt's work suggests that the choice of what to do with the debtor farms is immensely more complex than simply determining which approach would yield the greatest recovery to one segment of society.

Now consider the problems currently confronting Asbury Park, New Jersey.[10] A contracting company named Carabetta Enterprises was both a general and limited partner of Ocean Mile, an entity under contract to redevelop a significant portion of beachfront property in Asbury Park. Ocean Mile failed to fulfill its commitments to redevelop Asbury Park. Years later (the project was to have begun in 1986), a settlement agreement was reached between Ocean Mile and the city under which the developer either had to come up with new funding within a limited period or, among other things, resign as the developer. The debtor Carabetta (it filed for Chapter 11 relief in 1992) sought to void the settlement because it diminished the value of its Chapter 11 estate (by curtailing the prospects of proceeding with, and obtaining profits from, the redevelopment).

Meanwhile, the city of Asbury Park was deteriorating. Since 1992, Ocean Mile had not paid taxes on numerous parcels of beachfront land, and it owed the city approximately $1,450,000 in back taxes. Because the redevelopment never commenced, new businesses never arrived, and old businesses moved or closed. Historic buildings and memorabilia from Asbury Park's notable past were lost or sold. As the ultimate punishment, dwindling taxpayer revenue was being spent to defend the city. As stated

10. *See, e.g.*, Nancy Shields, *City Held Hostage*, ASBURY PARK PRESS, Nov. 11, 1993, at 1; *In re* Carabetta Enterprises, Inc., 162 B.R. 399 (Bankr. D. Conn. 1993). I am indebted to Professor William Woodward of Temple Law School for directing me to this example.

by the Executive Director of the Chamber of Commerce, "I just think the people of Asbury Park have suffered too long and too much."

In this situation, the interests of the community of Asbury Park are not consonant with those of the debtor Carabetta. The debtor's interest in retaining the rights to redevelopment conflicts with the needs of the city and its citizens to cut their ties with Ocean Mile and Carabetta as quickly as possible to salvage a dying community. A bankruptcy court asked to decide whether Carabetta should be allowed to overturn the settlement should balance the interests of the community of Asbury Park with those of the corporate debtor. And, if this were the test applied, it is not so clear that the debtor's interests would prevail.[11]

III. UNDERLYING ASSUMPTIONS AND THEORETICAL FRAMEWORKS

Relying on Bradley and Rosenzweig's footnotes as the exemplar, it appears that two premises underlie the conclusion that community interests are not a necessary part of the bankruptcy debate. The first is that community interests are extremely difficult to quantify, and this difficulty accounts for, indeed justifies, their absence from an economic model of bankruptcy. The second premise is that community welfare and well-being are not appropriate concerns for bankruptcy. Instead, bankruptcy is all about repaying creditors in an efficient manner. Indeed, in many ways, a law and economics approach to bankruptcy can be described as "bankruptcy Darwinism"—only the fittest companies should survive. I refer to these two premises collectively as the "L & E Premises."

The L & E Premises, it seems to me, are seriously flawed. If the L & E Premises are flawed, it necessarily follows that the conclusions based on these premises are also flawed. Stated conversely, community is irrelevant only if one accepts the above two premises as true.[12] To address the inadequacy of the L & E Premises, I draw on two recent legal movements: feminist legal theory, in particular feminist economic theory, and communitarianism. I recognize that there is no unitary definition of either of these theories, and within each movement, there is considerable debate

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11. For another bankruptcy case in which community interests are considered, see Judge Leif Clark's decision in *In re* Abacus Broadcasting Corp., 154 B.R. 682 (Bankr. W.D. Tex. 1993) (ruling that, on request for change of venue, bankruptcy court could consider extent to which bankruptcy judge sitting in community in which debtor conducted its business would be better able to administer the case effectively and efficiently and evaluate prospects for successful reorganization).

12. Of course, readers could object to the relevance of community on other grounds, and this essay does not address or respond to these arguments.

as to what each theory actually means.[13] These theories differ from each other in material respects. They also differ dramatically from traditional law and economics, recognizing that law and economics, too, is subject to its own internal variations.

Both feminism and communitarianism are, regrettably, off-putting terms for many people. Just hearing these words independent of each other is enough to send many people running for the hills. Linking them together is even worse. Several conferees correctly suggested that part of the difficulty that people have in accepting my position on community derives from the frameworks that I use to address the issues (the form), and were I to couch my arguments in more mainstream terminology, my ideas (the substance) would be less threatening. At some level, I agree. I do have reservations about shying away from terminology simply because it alienates some people, and I believe that my use of feminism and communitarianism relates to both form and substance. But, at heart, I am also a realist. Because I want people to be able to debate bankruptcy policy issues on the merits, I plan, in a subsequent piece, to recast my argument in more commonly used (traditional) economic terms. Perhaps, then, we will all be speaking a common language. In the meantime, I use the "loaded" words feminism and communitarianism as the backdrop for my observations, realizing all of the risks that go along with that choice.

IV. OPERATING FROM THE INSIDE OUT: METHODOLOGICAL CONCERNS

As a threshold matter, it is important to recognize one dramatic difference between law and economics and communitarianism on the one hand and feminism on the other. Both law and economics and communitarianism proffer what I term a "meta-theory." By this I mean that both theories have predetermined goals that their respective proponents seek to fulfill. Stated most simplistically, law and economics seeks to maximize wealth, and communitarianism seeks to make individuals responsible for their community's well-being. These two theories justify their goals in very different manners: law and economics focuses on individuals as private, autonomous, rational decisionmakers, while communitarianism views individuals as connected to each other and obligated to act in the interests of the good of the community, even if that

13. *See, e.g.*, BEYOND ECONOMIC MAN: FEMINIST THEORY AND ECONOMICS (Marianne A. Ferber & Julie A. Nelson eds., 1993) [hereinafter BEYOND ECONOMIC MAN]; AN ETHIC OF CARE: FEMINIST AND INTERDISCIPLINARY PERSPECTIVES (Mary Jeanne Larrabee ed., 1993).

curtails some individual freedom. But these movements share one thing: they operate from the outside in. What this means is that they share a belief in an overarching theoretical construct that can then be applied to vastly different areas of life.[14]

In some respects, feminism also operates at the level of meta-theory. For example, feminists seek to have us think about the world in which we live in a more interrelated, interconnected, and caring manner. However, feminism differs from both law and economics and communitarianism in that it proffers a methodology that operates from the inside out. Feminists focus on the particular, on context, on the real people and real situations that exist in day-to-day life. In this way, feminism is working from the bottom up rather than from the top down.[15] What this means, lest there be confusion, is that feminist theory is not about studying "only" women or "women's issues." Instead, feminism addresses how to think about people and the world in which we live. The experiences of women have served to reveal that methodology, and women need not necessarily be the only subject of what is being studied.

One nonlegal example exemplifying the differences between working from the outside in (*e.g.*, law and economics; communitarianism) and the inside out (*e.g.*, feminism) is useful. Over the past several months, I have attended a number of professional basketball games. My seat at Madison Square Garden is relatively high up. I can barely see the players' faces, although I have a full view of everything that is happening on the court. I can watch the overall game and detect whether the coach's game strategy is working. Recently, I was privileged to sit in the very first row—virtually under the basket—at the Orlando Arena. Suddenly, it was as if I were seeing a different game. I could still see the overall flow of the game. But, I could see the pushing and shoving. I could hear the "trash talking" among the competitors. I could hear teammates directing each other. I could see the sweat. I could literally feel the heat. In methodological terms, I was seeing the game from the inside out, from the bottom up. And, it is quite a different game from that vantage point.

There is another example that grows out of some of the papers presented at this Conference. A number of the participants at this Conference are quite taken with finding some alternative to our corporate bankruptcy system.[16] Others not in attendance have proffered similar ideas and

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14. RONALD DWORKIN, LIFE'S DOMINION 28-29 (1993).

15. *See generally* FEMINISM AND METHODOLOGY (Sandra G. Harding ed., 1987).

16. *See* Adler, *supra* note 1; Aghion et al., *supra* note 1.

models.[17] Instead of the current system, these scholars offer some version of an auction system in which creditors and equityholders in essence buy out their claims or interests in the troubled company.

These approaches, each with its own set of differences, have great appeal on initial reading. They seem much less cumbersome than the existing federal bankruptcy system with all of its complexities and costs—that is, until one tries to apply them. As Professor Lynn LoPucki points out, a person holding stock in Johns-Manville valued at $1,000 would have to pay $129,000 to protect (retain) that interest in bankruptcy *and* would need to come up with that money within a very short time period under some of these suggested solutions.[18] The auction approaches do not address, as Professor LoPucki puts it, the "human scale—and that is the scale at which most Chapter 11 cases occur."[19]

This matters because, while I proffer insights drawn from both feminism and communitarianism as a basis for critiquing the L & E Premises, my methodological orientation is decidedly inclined towards feminism. This affects how I approach bankruptcy and accounts for, in some respects, my concern for what is happening to real people. In a sense, I could define myself (for those interested in labeling) as a "wary feminist communitarian," or a "wary communitarian feminist" (to coin a new perspective). However, as developed herein, my views regarding both the substance and methodology of communitarianism differ in material respects from those of its proponents.

V. THE L & E PREMISES: RESTING ON STILL OTHER ASSUMPTIONS

Both the focus on quantification and the narrow approach to bankruptcy's scope in the L & E Premises demonstrate reliance on a traditional economic model that itself rests on certain underlying assumptions. The assumptions of neoclassical economic theory are not generally expressed, and therefore, need to be ferreted out. The assumptions that I believe underlie the L & E Premises are: (1) individuals are selfish and nonaltruistic (and hence disinterested in community concerns); (2) tastes and choices are unchanging and exogenous (and thus easily addressed

17. *See, e.g.*, Lucian A. Bebchuk, *A New Approach to Corporate Reorganizations*, 101 HARV. L. REV. 775 (1988); Mark J. Roe, *Bankruptcy and Debt: A New Model for Corporate Reorganization*, 83 COLUM. L. REV. 527 (1983).

18. *See* Lynn M. LoPucki, *Comment: Stakeholder Interests and Bankruptcy*, 43 U. TORONTO L.J. 711, 713 (1993).

19. *Id.*

through ex ante decisionmaking, usually in the form of a contract); and (3) interpersonal utility comparisons are impossible and that which we value can be expressed only in monetary terms.[20] For reasons that I will explain, I disagree with these three assumptions on both feminist and communitarian grounds. And, if these assumptions fall, so do the L & E Premises. Furthermore, as previously noted, if the L & E Premises fall, so too does the position that community interests have no place in bankruptcy.

As mentioned earlier, my disagreement does not mean that I reject all economic models, or even traditional law and economics. I believe that the traditional economic model is useful, albeit limited in scope, because it reveals one important piece of data that must be taken into account in formulating bankruptcy policy—money. Money is not unimportant to bankruptcy on many levels. Indeed, creditors need to get repaid. However, I am suggesting something more. I am suggesting that we think about a more expansive economic model, a model that measures additional things using different formulae.[21]

A. Human Nature

Unlike the assumption in the traditional economic model, I do not believe that people are inherently self-interested and nonaltruistic. I have an optimistic view of human nature and believe that there is room and desire for altruism. I can best explain my position by recounting the "jack" story.

An individual was driving in a deserted area at night. As luck would have it, he got a flat tire. When he went to change it, the driver realized that he had no jack. He waited several minutes but no cars were on the horizon. All he could see for miles was farmland, except for a lighted farmhouse in the distance. Having no choice (and no mobile phone in the car), the driver set out for the farmhouse. After walking for several minutes, he paused and thought to himself, "I could get all the way to the farmhouse, and no one could be home." But, lacking alternatives, he kept on walking. Several minutes later, he thought to himself, "Even if the farmer is home, maybe he won't have a jack." But, he kept on walking. Several minutes more went by and the driver thought to himself, "Even if the farmer has a jack, which he probably does, maybe he won't let me

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20. Paul England, *The Separative Self: Androcentric Bias in Neoclassical Assumptions*, *in* BEYOND ECONOMIC MAN, *supra* note 13, at 37.

21. *See, e.g.*, MARILYN WARING, IF WOMEN COUNTED (1988) (suggesting the addition of the contributions of women to economic analysis).

borrow it." This thought plagued the driver. With each additional step, he wondered whether the farmer would lend him the jack. He thought to himself over and over, "The farmer will slam the door in my face; he'll tell me to leave his land; he'll refuse to help me after I've walked all this way." The driver worked himself into quite a tizzy, anticipatorily angry over his hypothesis that the farmer would not lend him the jack despite the driver's desperate need. A short time later, the driver reached the farmhouse and knocked on the door. Within a minute, a farmer came to the door and opened it. But, before the farmer could even say a single word, the driver raised his fist, wrinkled his brow, and shouted angrily and loudly, "You can just take your jack and stick it."

Assumptions about human behavior affect how we treat people and how we view the world. I much prefer thinking that the driver will arrive at the farmhouse fully expecting that the farmer will give him some help. Indeed, by my way of thinking, the farmer will offer not only to let the driver borrow the jack, but he will also drive the stranger back to his broken down car and help him change the tire. And, if it turns out that the farmer is unwilling to lend the jack, the driver can deal with that unfortunate circumstance when it happens. Moreover, one selfish farmer (who undoubtedly exists) should not lead inevitably to the conclusion that all farmers (or all people) are self-interested and unhelpful. For similar reasons, the perceived failure of one giant Chapter 11 case (such as Eastern) does not mean that the bankruptcy system or the interests of community make no sense; instead, one failure means no more than that—no system will work for everyone or every situation.

A belief in the goodness of human nature leads to another conclusion. In defining the scope of corporate and personal bankruptcy, we should care about the universe beyond the debtor and its immediate creditors. Communitarian thinking is helpful in this regard. As the communitarian movement has pointed out, a rights-centered conceptualization of the world ignores the fact that individuals live in society. And, with rights also come responsibilities. Unlike law and economics, communitarianism rejects a contractarian model of the world. Instead, it suggests a model in which we are challenged to act as our brother's and sister's keeper. As Amitai Etzioni, a sociologist and the founder of communitarianism, asserts, communitarianism seeks to do for society what environmentalists seek to

do for nature: safeguard and enhance its well-being.[22]

The communitarian movement has gained momentum, in part due to the current political climate. In several recent news media reports, the views of Hillary and Bill Clinton on religion, family, and crime have been linked to communitarianism. Indeed, it has been reported that Bill Clinton was recently reading two books—a biography of Woodrow Wilson and the aforementioned new book by Amitai Etzioni.[23]

I have a lot of trouble with aspects of the responsive communitarian platform. At times, it seems internally inconsistent. For example, the platform emphasizes the importance of family and the childrearing done by parents; yet, communitarians simultaneously assert that they value human dignity and do not want to discourage women from working outside of the home.[24] The platform advocates a traditional family, with a mother and a father present. However, many families do not match the traditional model, for reasons of both choice and circumstance. Therefore, whole segments of society will feel disenfranchised from the acceptable "community" we are supposedly trying to promote. Moreover, while I take some comfort in the fact that its proponents cross party lines to include both traditional liberals and conservatives, the communitarian platform rings of moral majoritarianism. Proponents of the theory go to some lengths to disavow the seemingly antidemocratic nature of their platform (notice the word "responsive" that accompanies communitarianism). However, at times, I cannot help but think that, to repeat a worn phrase, the lady doth protest too much.

Notwithstanding these concerns, the communitarian thesis is appealing on several fronts. It recognizes that we are not all separate individuals, but part of an interconnected world. In this sense, communitarianism and feminism share some common ground in that many feminists see the importance of the interdependent and interrelated world in which we live. Communitarians are shifting away from a purely rights-based approach to one that recognizes responsibilities, in particular, our responsibilities to make the world a better place. This strikes me as similar to the feminist ethic of care. The analogy to the environment is helpful for me because we are increasingly willing to pay more and give up certain freedoms to make

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22. AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA 10-11 (1993).

23. Edward Epstein, *It's Controversial and Influencing Clinton*, S.F. CHRON., Jan. 5, 1994, at A1; Margaret Carlson & James Carney, *Interview with Bill Clinton*, TIME, Dec. 13, 1993, at 42.

24. ETZIONI, *supra* note 22, at 55-57.

the environment safer for our neighbors. For example, we sort trash and return bottles and fund governmental cleanup even when there is no adequate way for the polluters themselves to replenish the coffers.

For better or worse, communitarians have largely focused their attention on issues of family, education, and crime (e.g., adopting a children-first approach in deciding property settlements and divorce awards; advocating sobriety checkpoints and mandatory drug and alcohol testing for those involved in public safety). It is in these very areas that I find the communitarian views most threatening to my conceptualization of freedom and self (which is largely grounded in feminist thought). However, I think that the communitarian approach can be linked thoughtfully to other substantive areas, and I sense that it will provide a better, more comfortable fit there, at least for me.

I am not alone in the effort to move communitarianism out of the realm of the family and crime. A recent student note linked communitarianism to insider trading in order to demonstrate why liability against institutions is too infrequently assessed and too narrowly construed.[25] At the recent 1994 Association of American Law Schools (AALS) meeting on communitarian perspectives in Orlando, Florida, Professor John Coffee suggested that we reconceptualize the notion of fiduciary duty and consider the concept of wealth maximization not just in terms of private, individual wealth but in terms of public wealth. His suggestion forces us to rethink the traditional view of the corporation and to reconsider the scope of liability in torts. Perhaps, not surprisingly, feminist scholars have also now moved to expand their approach beyond topics that originally occupied so much of their attention: e.g., family law, criminal law, employment law.[26] Not surprisingly, there has been a stinging feminist critique of tort law, including the no duty to rescue rule and liability for mass torts.[27]

The application of communitarian concepts to the world of bankruptcy suggests that the welfare of the community should be very much a part of corporate bankruptcy. While it may not be evident to those with a different

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25. Rosa Eckstein, Comment, *Towards a Communitarian Theory of Responsibility: Bearing the Burden of the Unintended*, 45 U. MIAMI L. REV. 843 (1991).

26. *See, e.g.*, Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387 (1992); Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 92 PAC. L.J. 1493 (1992).

27. *See* Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848; Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993).

conceptualization of rights and responsibilities, community *does and should* matter to those addressing both corporate and personal bankruptcy. The preamble to the Responsive Community Platform expresses very ably why this is so.

> American men, women, and children are members of many communities—families; neighborhoods; innumerable social, religious, ethnic, workplace, and professional associations; and the body politic itself. Neither human existence nor individual liberty can be sustained for long outside the interdependent and overlapping communities to which all of us belong. Nor can any community long survive unless its members dedicate some of their attention, energy and resources to shared projects. . . .
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> A Communitarian perspective . . . mandates attention to what is often ignored in contemporary policy debates: the social side of human nature; . . . the ripple effects and long-term consequences of present decisions.[28]

This is a very different vision of the world than that which would grow out of the L & E Premises. It is not surprising that this vision of community would produce a different set of issues to consider in the context of developing a bankruptcy system.

B. Contracting Everything Away

Turning to the second assumption, I believe that people do change and that life's exigencies and the passage of time do call for us to rethink personal decisions that we have made. That unexpected things happen is a part of life and how we respond to these events cannot always be predetermined. This is because our predeterminations could have been based on facts, circumstances or feelings that have since been altered. Moreover, different people respond to different situations differently; hence, rules with no room for heterogeneity fail to respond to real-world situations.[29] The recognition that our decisions may change and that such changes are not bad makes us uncomfortable because it disturbs our need for certainty. It makes planning difficult, although far from impossible.[30] On the positive side, it permits flexibility and malleability, concepts with

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28. ETZIONI, *supra* note 22, at 253-54.

29. The work of Richard Thaler is useful in exploring these patterns. *See* RICHARD H. THALER, QUASI RATIONAL ECONOMICS (1991).

30. *See generally* ELIZABETH SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988).

singular importance in bankruptcy.[31]

In terms of the L & E Premises, this means that basing a legal theory on ex ante decisionmaking (default rules) is problematic at its core.[32] Creating a legal system based on how we believe people will act, essentially conjecturing, and then binding them to those conjectures (generally by contract) is certain to create problems. Not only may the initial conjectures be wrong, but the choices among the conjectures may change as well. Ironically, the work of Donald Korobkin, which is ideologically very different from that of law and economics scholars, suffers for relying on ex ante decisionmaking as well.[33]

Indeed, in this context, we would be well-served to reflect on how contract law addresses unforeseen events. Despite the efforts of parties to contract for all future events, they frequently fail to foresee everything that can happen. Moreover, even where parties have made provisions for the future, courts have had to interpret this contractual language in light of facts or circumstances not contemplated when the language was drafted. So, courts have had to interject their own view of what should transpire between the parties. Indeed, there is a growing tendency in contract law to move beyond the paradigm of a voluntary, private relationship between two parties. So, even a bastion of private law like contracts has moved into a more public assessment which recognizes that even careful planning is not foolproof.

My concerns about ex ante decisionmaking are based on feminist theory. It has (until quite recently) been assumed that everyone approaches decisionmaking in the same way (utilizing what could be termed "male dominated" thinking). That is far from the truth. Decisionmaking is extremely complex. For example, some people are more goal-directed than others. Some are more concerned about the effect of decisions on others. Moreover, decisions are frequently not as freely made as some people

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31. *See* John D. Ayer, *Through Chapter 11 With Gun or Camera, But Probably Not Both: A Field Guide*, 72 WASH. U. L.Q. 883 (1994); William C. Whitford, *What's Right About Chapter 11*, 72 WASH. U. L.Q. 1373 (1994).

32. For the theories of a true believer in ex ante decisionmaking, see Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51 (1992); Robert K. Rasmussen, *The Ex Ante Effects of Bankruptcy Reform on Investment Incentives*, 72 WASH. U. L.Q. 1159 (1994).

33. *See* Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717 (1991); Donald R. Korobkin, *Contractarianism and the Normative Foundations of Bankruptcy Law*, 71 TEX. L. REV. 541 (1993). In two forthcoming pieces, Professors Mary Jo Newborne and Larry Ponoroff criticize Professor Korobkin's approach for this, among other reasons.

believe. What we decide may be based on issues over which we have no control. Indeed, were we armed with knowledge, power, and money, many of our decisions would be altered.[34] Life experience tells me that we respond to day-to-day issues differently than we might expect and that change is not necessarily so bad. Similarly, crises (such as illness or financial distress) evoke different conclusions when we view them in the concrete as opposed to the abstract.

Raising children provides a good example. We can say things like: "Unlike my own parents, I will never care whether my kid's room is a mess or whether he is studying enough." Yet, when the kid's room is a mess or the kid somehow prefers basketball to books, it is hard to be bound by one's earlier promises to oneself about how best to behave. Chronic illness presents another example. Without being ill, it is easy to say things like, "I could never live like that quadriplegic," or "I do not want any extraordinary medical procedures used if I have a stroke." Yet, when one is actually ill, are these earlier decisions necessarily so easy and correct?[35] Indeed, what is best may change when one actually confronts a real situation. And, if we have trouble keeping promises with ourselves, it is no wonder that we have trouble keeping them with others.

C. Measuring: What and How

Turning to the third assumption, I do not believe that personal utility comparisons are unquantifiable. I agree with the L & E Premises that they cannot easily be quantified under existing economic models. They do not easily lend themselves to a wealth maximization formula because wealth maximization is directed to individual enhancement rather than enrichment (monetary or nonmonetary) realized through another's enrichment or the enrichment of a community. (Reflect back a moment on the farming discussion in Part II.) However, it is possible to develop other ways of measuring utilities. We should be able to account for altruism in some way. I do not now have the training or tools to suggest how that could be accomplished (we need accounting and business types for this), but I have confidence in the ability to measure seemingly amorphous concepts (which

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34. *See* TERESA L. AMOTT & JULIE A. MATTHAEI, RACE, GENDER, AND WORK: A MULTICULTURAL ECONOMIC HISTORY OF WOMEN IN THE UNITED STATES 4-5 (1991) (stating that radical but not mainstream economic theory considers how economic institutions and practices shape lives).

35. The change can also be experienced by the family member of a very ill person. The "correct" course in the abstract (i.e., prolonging life) may not seem so "correct" when there is profound suffering.

could be termed externalities in economic parlance) if we set about trying to do so rather than assuming it cannot be done.[36]

Perhaps more importantly, even if some community interests could never be measured in economic terms, that does not mean, a fortiori, that they lack value. It is certainly possible that there are things of value that we cannot quantify. For me, their nonquantification does not make them unimportant to our world. The inability to translate the interests of community into money (an "organized market" to use Bradley and Rosenzweig's terminology) does not mean that they lack worth.[37] Instead, it means that we have to consider "worth" in both economic and noneconomic terms.[38]

This leads me to conclude that the third assumption, like the first two, is flawed. It does not necessarily follow that community should *not* be considered because it cannot be quantified. It may be that there are other reasons for which community interests should be discarded in the bankruptcy context but nonquantification is not among them.

VI. GETTING OUT FROM BEING UNDER: FOOTNOTES, SILENCE AND BEYOND

Bradley and Rosenzweig's views on community appear in two footnotes.[39] It is easy to make fun of footnotes and their overuse by academics.[40] Unfortunately, some of the most interesting and difficult issues in legal scholarship and judicial opinions find their place literally below the line.[41]

This is troubling. I think that we have it reversed. The text should contain a discussion of the controversial and interesting aspects of the law, and footnotes should be saved for identifying key sources. Indeed, as Professor Austin notes, footnotes are a safe place for untenable hypotheses:

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36. The work of Wendell Berry and Harvey Leibenstein may prove to be a useful starting point in this regard.

37. For a contrary view on the treatment of human capital, see Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383 (1993).

38. *See* Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

39. *See supra* note 3 and accompanying text.

40. *See, e.g.*, Aside, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975); Arthur Austin, *Footnote* Skulduggery** and Other Bad Habits****, 44 U. MIAMI L. REV. 1009 (1990).

41. One need only reflect on footnote 4 in U.S. v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938), which has generated over 225 references in law reviews since 1980! For a humorous discussion of this, see Aside, *Don't* Cry** Over Filled Milk: The Neglected Footnote Three to* Carolene Products, 136 U. PA. L. REV. 1553 (1988).

"Writers are inclined to behave as if they will be held less accountable for indiscretions committed below the text than in it. . . . Lunacy in small print is lunacy nonetheless."[42]

Bradley and Rosenzweig should not be singled out in this regard. Other scholars avoid paying attention to community by simply not mentioning it, assuming the issue away as unimportant by their silence. Another similar approach is to treat the subject of community with offhand humor and disdain. Those who partake of this practice can probably identify themselves (and if they cannot, my doing so for them will not be useful). Neither silence nor ridicule is particularly productive.[43] Both tend to ensure that serious debate never happens.[44]

What I am suggesting in this essay, at a minimum, is that the debate about community belongs above the line, so to speak. (Feminist scholars may have other explanations for why indiscretions habitually happen below the line and are somehow legitimated because that is where they take place. But, I leave that complex and equally controversial discussion for another time.) The heart of the debate about bankruptcy policy involves a determination of who and what the system is designed to protect. That is a question that we need to address. And, we need to address it where everyone can see it and engage in the debate. We do not need to be wed to the law as it is; we do not even need to justify change based on what was. But, we do need to discuss the fundamental issues, informed by what is currently happening in the bankruptcy system to the extent that we have that information or can gather it based on new empirical work. It is my hope that this Conference and similar interdisciplinary conferences on

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42. Austin, *supra* note 40, at 1009 n.** (quoting G.W. Bowersock, *The Art of the Footnote*, 53 AM. SCHOLAR 54, 61 (1983-84)).

43. For a useful piece on the troubling problem of certain types of scholarship not being taken seriously, see Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992).

44. In his response to this essay, Judge Schermer suggests that I have written "good fiction," and he recites the parable of the mouse, the cat, and the bell to emphasize his point. *See* Hon. 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, 1053 (1994). Unlike others, Judge Schermer does seek to discuss my observations on the merits. *Id.* at 1049, 1052. However, he fails to recognize that the line between fiction and nonfiction is by no means clear. To these ends, I draw Judge Schermer's attention to Margery Cuyler's children's book FAT SANTA (1987). For a more sophisticated recognition of the blurred distinction between fiction and reality in the world of legal thought, see Derrick Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382 (1989); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

bankruptcy will literally force all of us to bring issues to the table. Indeed, in that regard, we would do well prospectively to include anthropology, sociology, and psychology on our list of disciplines that can enrich our thinking on bankruptcy. Then, we can all sit down at the table and discuss what the bankruptcy buffet currently has to offer, what new foods (ideas and data) need to be added, developed, or created, and then what we will each choose to eat and why. That seems to me to be a productive way in which to proceed.