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Foreword: A Bankruptcy Conference for the '90s

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THE WASHINGTON UNIVERSITY INTERDISCIPLINARY CONFERENCE ON BANKRUPTCY AND INSOLVENCY THEORY

FOREWORD: A BANKRUPTCY CONFERENCE FOR THE '90S

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Just under a decade ago, Vanderbilt University School of Law held its Symposium on Bankruptcy and successfully brought together in one place virtually all of the significant scholars in the field.[1] At that time the Bankruptcy Reform Act of 1978 had been in effect for a little over five years. Not surprisingly, most of the papers in that conference focused on specific aspects of the new bankruptcy law.[2]

The landscape of the bankruptcy debate has changed markedly since the mid-1980s, and so too must the character of a bankruptcy conference that attempts to define the decade's thinking on the subject. In that respect, the Washington University Interdisciplinary Conference on Bankruptcy and Insolvency Theory demonstrated the evolution of bankruptcy scholarship

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* Associate Dean and Professor of Law, Washington University. I would like to thank Lynn LoPucki for reading a draft of this Foreword, but more importantly for being the one person most responsible for the success of the Conference that is the subject of this Symposium.

1. *See Symposium on Bankruptcy*, 38 VAND. L. REV. 665 (1985).

2. *See, e.g.*, Lawrence P. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675 (1985); Frank R. Kennedy, *The Discharge of Partnerships and Partners Under the Bankruptcy Code*, 38 VAND. L. REV. 857 (1985).

on at least three distinct fronts: the players, the topics, and the format.

An interesting thing happened to bankruptcy law between the mid-1980s and the early 1990s: scholars other than law professors began to write about it. Indeed, some of the most influential ideas concerning the validity of bankruptcy law's fundamental assumptions have come from scholars in the fields of business, finance, and economics.[3] Reflecting that shift, this Conference included participation not only by nearly all of the leading legal scholars in the bankruptcy field, but also by academics in other fields who have made significant contributions to bankruptcy scholarship. One of the primary goals of the Conference, in fact, was to engage bankruptcy scholars from different disciplines in a dialogue that would facilitate mutual understanding of the particular insights that each discipline could bring to the table.

In addition to a shift in some of the key players, the last decade has also seen a significant change in the terms of the primary bankruptcy debate. That change in focus is clearly reflected in a comparison between the topics that were covered in the Vanderbilt Symposium and those that are the subject of this Symposium. In one sense, the basic difference is whether or not one assumes a world that necessarily includes a law regulating the terms of bankruptcy.

During the 1980s, most bankruptcy scholarship assumed that we would have a bankruptcy law, and therefore focused its attention on what bankruptcy law's optimal terms should be. By contrast, in the 1990s and in this Symposium, much of the fight revolves around the continuing validity of that assumption. So, for example, there is now much ink spent on the viability of such notions as "A World Without Debt"[4] or "A Menu Approach to Corporate Bankruptcy."[5]

In addition to the players and the topics, the third defining feature of this Conference was the format. Most attendees of academic or continuing legal education conferences are familiar with a certain format: perhaps three-quarters of the time will be allotted in advance for individual paper presentations. Individual presentations will actually take up more than that time as presenters run over without being stopped. This Conference was different in two respects. First, only one-third of the time was reserved in

3. *See, e.g.*, Philippe Aghion et al., *The Economics of Bankruptcy Reform*, 8 J.L. ECON. & ORGANIZATION 523 (1992).

4. Barry E. Adler, *A World Without Debt*, 72 WASH. U. L.Q. 811 (1994).

5. Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51 (1992).

advance for individual presentations from paper authors and commentators. Second, tough but polite moderators[6] uniformly enforced those predetermined limits.

The decision to proceed with that format was admittedly a risky one. Would the audience understand it? Would the authors and their egos stand for it? It is singularly unfortunate that this Symposium, the written rendition of the Conference, can never capture the resounding success of the format choice. The beauty here was in the exchange—the two-thirds of the Conference that had no script.

The quality of those exchanges was a tribute to the moderators, to the participants, and to the limited audience that was invited to fill the remaining seats in the eighty-person classroom that served as the site of the Conference proceedings. The audience for this Conference deserves a mention of its own. Consisting mainly of individuals personally invited by the Conference organizers, audience members included an impressive array of bankruptcy academics, bankruptcy judges, and nationally prominent bankruptcy attorneys. In particular, the practical insights brought to bear by the judges and lawyers in the audience served as a sobering influence on some of the academic participants' more ambitious theorizing.

This Symposium presents the papers and commentary that served as the basis for the lively exchange of the Conference itself. The Conference was held at the John M. Olin School of Business, Washington University, on February 25 and 26, 1994. The Conference was sponsored by the Washington University School of Law, and was funded in part through grants from the National Conference of Bankruptcy Judges' Endowment for Education and from the Business, Law, and Economics Center of the Olin School of Business at Washington University.

I. WHOLE NEW WORLDS OF BANKRUPTCY

The opening session of the Conference had as its focus the proposal of a whole new world of bankruptcy. Bankruptcy law has always assumed that claims against a firm's assets could be either debt or equity.[7] Professor Barry Adler's article reexamines that fundamental assumption and suggests interesting implications that flow from a change in that assump-

6. The three moderators were Lynn M. LoPucki, James J. White, and Elizabeth Warren.

7. *See, e.g.*, 11 U.S.C. § 1126(c)-(d) (1988) (distinguishing between a "class of claims" (debt) and a "class of interests" (equity) for purposes of the requisite vote needed for a confirmable plan of reorganization).

tion.[8]

Professor Adler revisits and clarifies the "Chameleon Equity" theory that he first introduced in an article for the *Stanford Law Review*.[9] The heart of Professor Adler's Chameleon Equity theory is that the need for bankruptcy reorganization disappears once we remove individual collection rights from any claimant to the firm's assets. Professor Adler points out that a commonly cited justification for the need for bankruptcy is to overcome the collective action problem that exists under state collection law. The collective action problem itself, however, directly results from debtholders having individual rights to dismember the debtor when there is a default.

Thus, says Professor Adler, if you remove the source of the collective action problem, you can also remove the need for a costly and separate system for resolving that problem. Professor Adler takes great pains to distinguish his proposal from the "Contingent Equity" proposal advanced by Michael Bradley and Michael Rosenzweig in their *Yale Law Journal* article.[10] Although the terms Chameleon Equity and Contingent Equity both utilize the word "equity" preceded by an adjective, Professor Adler argues that the two proposals could not be more dissimilar. Most crucially, the Bradley and Rosenzweig proposal does not purport to remove individual collection rights from creditors who hold contingent equity against the firm. Therefore, the Contingent Equity proposal does nothing to solve the collective action problem that is a core justification for the existence of corporate bankruptcy.

Two other articles in the Symposium, like Professor Adler's paper, propose a sweeping change in bankruptcy law as we know it. An article by Professors Philippe Aghion, Oliver Hart, and John Moore explains their innovative procedure for determining a company's future during Chapter 11.[11] One problem with current Chapter 11 procedure, according to their article, is that it fails to separate issues of asset distribution from issues of asset deployment.

Under the proposed procedure, once a company filed under Chapter 11, the unsecured creditors would immediately become the equityholders and

8. Adler, *supra* note 4.

9. Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 STAN. L. REV. 311 (1993).

10. Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043 (1992).

11. Philippe Aghion et al., *Improving Bankruptcy Procedure*, 72 WASH. U. L.Q. 849 (1994).

the old equity's interest would be cancelled. These new owners then would participate in a judge-supervised procedure in which parties would bid for the company in bankruptcy, either with cash or with shares in the postbankruptcy company. After a few months of bid solicitation, the new owners would decide by a majority vote which proposal to accept, the bidder would pay that price, and the company would exit bankruptcy in the hands of the successful bidders.

The third article in this Symposium that proposes a "whole new world" is perhaps the most radical of all: Professor Robert Rasmussen's "Menu Approach" to bankruptcy.[12] First articulated in his *Texas Law Review* article,[13] Professor Rasmussen's approach advocates allowing each individual firm upon its incorporation to select its own bankruptcy regime. The argument for the Menu Approach is that different types of firms would be best served by different kinds of bankruptcy rules, and that the best world would be one in which bankruptcy rules could be tailored to fit the idiosyncrasies of individual firms.

In his article for this Symposium, Professor Rasmussen provides a new justification for his Menu Approach. The new justification is that the Menu Approach would create the best system for reducing adverse investment incentives inherent in the other major proposals for bankruptcy reform. Professor Rasmussen readily admits that no one system of bankruptcy rules can create the optimal investment incentives for all firms. It is precisely for this reason, he argues, that firms should be allowed to select their own bankruptcy regimes.

Although they do not propose a new bankruptcy scheme, Professors Alexander Triantis and George Triantis explore the debt/equity distinction that serves as the touchstone for many of the schemes that have been proposed.[14] More particularly, they examine how the dynamic process of financial engineering has blurred the traditional distinction between debt and equity instruments.

In their paper, the Triantis brothers compare the convertible bond with the puttable common stock. The former, in effect, is debt that may be converted to equity, and the latter is equity with an option to convert to debt. Though there is no real difference between them, different conceptu-

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12. Robert K. Rasmussen, *The Ex Ante Effects of Bankruptcy Reform on Investment Incentives*, 72 WASH. U. L.Q. 1159 (1994).

13. *See* Rasmussen, *supra* note 5.

14. Alexander J. Triantis & George G. Triantis, *Conversion Rights and the Design of Financial Contracts*, 72 WASH. U. L.Q. 1231 (1994).

alizations of each have led regulators to apply widely disparate rules to these two financial instruments. In examining the two instruments, the authors conclude that it is becoming less useful when making such comparisons to do so under the traditional dichotomy between debt and equity. Rather, given the nature of modern financial instruments, it becomes increasingly essential to refer directly to the various financial and governance features that are packaged in any instrument.

II. ASSESSING THE CURRENT LANDSCAPE

Along with the trio of articles described above calling for a brand-new bankruptcy system, a number of articles in this Symposium step back and conduct large-scale assessments of the corporate reorganization regime that we now have in place. In light of the "whole new worlds" described above, it may be somewhat surprising that a number of these evaluative papers conclude that Chapter 11 as we know it may not be so bad after all.

Several Symposium authors who undertake a global critique of Chapter 11 eventually conclude that the existing corporate bankruptcy system offers a number of benefits that most bankruptcy critics have up to this point failed to appreciate. Professor William Whitford's article epitomizes this theme.[15] Professor Whitford begins his paper by suggesting that those who offer alternative bankruptcy systems tend to exaggerate the costs of the current system. He also points out that an untested system is often easy to advocate because one cannot know all of the potential flaws of a system until it has been tried in practice.

Professor Whitford then proceeds to discuss three underappreciated benefits of the current Chapter 11 regime. First, he gives examples of cases in which the availability of Chapter 11 has helped to facilitate an orderly liquidation in a manner that would probably not have been possible in the absence of the Chapter 11 machinery. Second, Professor Whitford notes Chapter 11's distinctively positive role in enabling corporations with a single large liability, such as a toxic tort, both to handle that liability and to emerge as a viable going concern. Finally, Professor Whitford praises what many others have considered one of Chapter 11's primary weaknesses: the discretion that rests with the bankruptcy judges who are appointed to administer the system. While Professor Whitford concedes that this flexibility can be used unwisely, he argues that it can also enable judges to find creative solutions in cases where an attempt to resort to a legislative

15. William C. Whitford, *What's Right About Chapter 11*, 72 WASH. U. L.Q. 1379 (1994).

solution would almost certainly prove futile.

Professor John Ayer echoes in his paper[16] the last point raised by Professor Whitford. Professor Ayer takes aim at those who would claim to discern a single unifying theory that could explain all of the various workings of Chapter 11. The beauty of Chapter 11, asserts Professor Ayer, is its ability to accommodate simultaneously a number of apparently conflicting aims. Indeed, concludes Professor Ayer, we *want* conflicting things out of a bankruptcy system, and one aim of the system is to obscure the existence of the conflicts.

Professor Douglas Baird explores the costs of corporate reorganizations from a novel angle and concludes that these costs may not be as great as many commentators have led us to believe.[17] Professor Baird begins by challenging the commonly held assumption that a firm is not allowed to opt out of its right to file a bankruptcy petition. The truth is, Professor Baird asserts, firms can and do successfully undertake a de facto opting out of bankruptcy. They do so, for example, by eliminating all institutional debt from their capital structure.

Once we appreciate that opting out of the bankruptcy process is possible, albeit at a price, then we can no longer assume that the bankruptcy system can impose huge costs on its participants with no viable response possible from the market. Professor Baird further observes that a firm could reduce the cost of bankruptcy even if it chose not to eliminate the prospect altogether. This would be possible, for example, by maintaining a relatively simple capital structure, as is typically the case with a closely held firm that is experiencing financial distress.

Professor Baird concludes by noting that an appreciation of how firms can affect their costs of bankruptcy may enable us to focus bankruptcy reform efforts in the proper place. Although much attention in the reform movement has been on how bankruptcy affects distributional entitlements, Professor Baird argues that perhaps the real focus ought to be on the costs of bankruptcy procedures that cannot be as readily mitigated by firms in advance of bankruptcy.

III. BANKRUPTCY EMPIRICISM: THE NEW FRONTIER

Rounding out the evaluative theme of the papers described above are a number of Symposium articles that use empirical techniques to reach a

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16. John D. Ayer, *Through Chapter 11 With Gun or Camera, But Probably Not Both: A Field Guide*, 72 WASH. U. L.Q. 883 (1994).

17. Douglas G. Baird, *The Reorganization of Closely Held Firms and the "Opt Out" Problem*, 72 WASH. U. L.Q. 913 (1994).

conclusion about the merits of Chapter 11. Professor Steven Kaplan's article is one such example.[18] Professor Kaplan undertakes a case study of a single large Chapter 11 debtor, Federated Department Stores. The results of his study reinforce the notion that Chapter 11 is not as flawed as some critics have charged.

Professor Kaplan's data consist mainly of comparisons of the value of Federated's assets at various points in time, including before, during, and after its stint in Chapter 11. From his analysis of these data, Professor Kaplan draws a number of conclusions about the Chapter 11 process. First, he points out that the indirect costs of financial distress (as opposed to economic distress) may not be very high. Second, Professor Kaplan suggests that in Federated's case the Chapter 11 process may have enabled the company to effect a reorganization that ultimately increased the firm's value. Finally, Professor Kaplan questions the wisdom of those proposals that would replace the Chapter 11 process with mandatory auctions. In contrast to the assumptions of these auction proposals, Professor Kaplan's research on Federated suggests that, for at least some financially distressed companies, the costs of the current Chapter 11 system are relatively low and the benefits relatively great.

Professor Michelle White's article, which gathers the empirical research of others and incorporates it into an economic model, provides an interesting perspective on Professor Kaplan's paper on Federated.[19] Professor White's paper focuses on Chapter 11's effectiveness as a filtering device. Like Professor Kaplan, Professor White divides failing firms into two categories: those that are not economically viable, and those that are economically viable but having financial problems.

Professor White would not quarrel with the notion that Chapter 11 can be beneficial for some firms, like Federated, that are economically efficient yet still unable to meet their debt obligations. The problem with Chapter 11, asserts Professor White, is that it fails to distinguish between those firms that are economically distressed and those firms that are merely financially distressed. Thus, Chapter 11 can create needless costs to the extent that it allows access to firms that are economically inefficient.

Professor White offers hypotheses both as to why managers of efficient firms would have an incentive to make their firms appear less efficient, and

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18. Steven N. Kaplan, *Federated's Acquisition and Bankruptcy: Lessons and Implications*, 72 WASH. U. L.Q. 1103 (1994).

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

as to why managers of economically inefficient firms would have an incentive to make their companies appear efficient. She then uses an economic model, along with results from recent empirical research, to conclude that Chapter 11 as it exists today is not likely to serve as an effective filtering device of the firms that are allowed to use it.

Probably the most sweeping empirical condemnation of Chapter 11 is found in Professor James Bowers' article.[20] Professor Bowers surveys existing empirical research on the effects of the reorganization laws to test various hypotheses that have been proposed by those who would defend the existing system. The two main justifications for Chapter 11 that are tested by Professor Bowers are, first, that Chapter 11 successfully rehabilitates firms, and second, that even if Chapter 11 does not rehabilitate firms, it redistributes wealth from some claimants to others in a socially beneficial way.

In testing the rehabilitative hypothesis, Professor Bowers argues that not only do the studies we now have show little rehabilitation taking place in Chapter 11, but they also show that many firms in bankruptcy end up relying on markets outside of bankruptcy to realize whatever value they have. The irony in this, says Professor Bowers, is that these are the very markets that the bankruptcy apologists have dismissed as viable alternatives to bankruptcy on the basis that their transactions costs are prohibitive.

Professor Bowers explores how existing empirical research also contradicts the redistributive explanation for the existence of the corporate bankruptcy system. Existing research on the market values of creditor firms before and after the bankruptcies of their borrowers shows that creditors with high priority claims are not significantly affected, whereas creditors with low priority claims are adversely affected. What this demonstrates, says Professor Bowers, is that either bankruptcy does not inherently effect a significant wealth distribution or, to the extent that it might, creditors simply contract in advance around the wealth redistribution. Either explanation, he claims, contradicts those who would attempt to justify bankruptcy on the basis that it effects a desirable wealth redistribution among claimants.

After rejecting the above two explanations of the effects of corporate bankruptcy law, Professor Bowers concludes by asserting that both theoretical and empirical arguments support the conception of Chapter 11

20. James W. Bowers, *Rehabilitation, Redistribution or Dissipation: The Evidence for Choosing Among Bankruptcy Hypotheses*, 72 WASH. U. L.Q. 955 (1994).

as a wealth-destroying system. The logical response, he says, is to repeal Chapter 11 and let it be replaced with a market alternative.

A more narrowly focused empirical article is Professor Theodore Eisenberg's paper on attorney fees.[21] Professor Eisenberg examines data on attorney fees that were gathered in a study by the American Bankruptcy Institute and ultimately makes observations not only about attorney fees but also about the skepticism with which we ought to view data that are gathered by self-reporting.

Professor Eisenberg notes striking differences in the way in which lawyers and judges view the same world of attorney fees. The differences in how the judges and lawyers described attorney fee practices, Professor Eisenberg says, could best be explained by the common human tendency to view reality in a way that puts each of us in the best light. Thus, judges' responses about how attorney fees were handled were more likely than lawyers' responses to suggest that fee applications were handled fairly and expeditiously. Similarly, lawyers' responses much more than judges' tended to report lawyers as complying with the statutory requirements and as not being greedy.

The larger lesson, suggests Professor Eisenberg, is to consider in any empirical study the possible biases of those who are providing the responses. Thus, when contemplating bankruptcy reform efforts, Professor Eisenberg cautions that any purported assessment of reality as it currently exists must always consider the lens through which that reality was measured.

One of the most exciting Symposium articles on empirical research is about a study that has not yet been done. Professors Teresa Sullivan, Elizabeth Warren and Jay Westbrook used this Conference as the forum to unveil their tentative research design for a five-year, $600,000 study of business bankruptcies that will be funded by the National Conference of Bankruptcy Judges.[22]

Their articles describe their ambitious effort to create a data base for business bankruptcies that will encompass cases filed under Chapter 7, Chapter 11, and Chapter 13. The three researchers describe their intention to cover business cases filed in 1994 in twenty-three judicial districts and

21. Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979 (1994).

22. Elizabeth Warren & Jay Lawrence Westbrook, *Searching for Reorganization Realities*, 72 WASH. U. L.Q. 1257 (1994); Teresa A. Sullivan, *Methodological Realities: Social Science Methods and Business Reorganizations*, 72 WASH. U. L.Q. 1291 (1994).

to follow those cases for five years. The results, they hope, will inform policymaking about business bankruptcies that up until now has too often proceeded without the aid of any comprehensive set of data.

IV. CONTROLLING MANAGERS OF INSOLVENT FIRMS

A common business reorganization issue that is addressed by three of the Symposium papers is how to control the potentially opportunistic behavior of managers in a failing firm. Two of these three articles focus more specifically on the inherent conflict between creditors and shareholders that heightens as a firm approaches and enters a state of insolvency. This conflict is seen most clearly in a firm's investment policy, namely the level of risk that a firm is willing to take in pursuing different investment alternatives. Those caught in the middle of this conflict will often be a company's managers, who on the one hand are often themselves large shareholders, but who on the other hand may owe a fiduciary duty to creditors whose claims are now at the margin.

Professors Lynn LoPucki and William Whitford examine this issue in light of empirical work they have done on the behavior of large, publicly held companies during reorganization.[23] Professors LoPucki and Whitford had reported in an earlier article[24] that Chapter 11 managers tend not to pursue optimal investment policies during the period of reorganization, but restrict themselves instead to a middle-of-the-road asset-preservation approach that the authors have termed "prudent investment."

In reconciling the conflict between a shareholder's desire to pursue high-risk investments and a creditor's desire to pursue low-risk investments, Professors LoPucki and Whitford argue that the prudent investment approach is inherently suboptimal. In place of it, they propose a system whereby management would be obligated to maximize the value of the estate, and the beneficiaries of that policy would be obligated to compensate those disadvantaged by it.

Professors Stuart Gilson and Michael Vetsuypens explore this same tension between the investment incentives of shareholders and creditors of insolvent firms.[25] The primary focus of their paper is how creditors can

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23. Lynn M. LoPucki & William C. Whitford, *Compensating Unsecured Creditors for Extraordinary Bankruptcy Reorganization Risks*, 72 WASH. U. L.Q. 1133 (1994).

24. Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669 (1993).

25. Stuart C. Gilson & Michael R. Vetsuypens, *Creditor Control in Financially Distressed Firms: Empirical Evidence*, 72 WASH. U. L.Q. 1005 (1994).

seek to influence the firm's management in a way that is consistent with the creditors' displacement of shareholders as the true claimants at the margin. The article presents the results of empirical research which suggest that creditors do indeed find ways to influence management policies. These creditor influences, which are mainly brought to bear by banks and other institutional lenders, include highly restrictive debt covenants, replacement of senior management, and even changes in the form of senior managers' executive compensation.

V. WHOSE INTERESTS SHOULD COUNT IN BANKRUPTCY?

Tangentially related to the question of who should have primary control in a Chapter 11 reorganization is the question of whose interests should count at all. An exploration of the parameters of that question is the subject of two Symposium articles. Professor Karen Gross argues that there should be room in the bankruptcy debate for consideration of community values.[26] Too often, she says, the terms of the debate have been limited at the outset by an economic model which rejects any values that cannot be readily quantified.

Difficulty in quantifying interests, however, should not be a basis for ignoring such interests, she asserts. Relying on both feminist legal theory and communitarianism, Professor Gross argues for a broadening of the factors considered relevant in a discussion about the success or failure of the bankruptcy system. Professor Gross challenges the premises that serve as the basis for the traditional economic model, namely that individuals are selfish, that tastes are exogenous and unchanging, and that utilities among different individuals are impossible to compare.

Professor Kathryn Heidt explores the contours of what the bankruptcy system considers to be a debt and in so doing argues that current bankruptcy law fails to fit the reality of modern-day obligations.[27] In particular, Professor Heidt focuses on bankruptcy's inability to handle the long-tailed obligation: the obligation which arises from acts performed in the debtor's past but which fails to manifest itself until some indeterminate point in the future.

Ultimately, Professor Heidt rejects a notion of debt that limits itself to obligations reducible to money. She also argues that bankruptcy needs to

26. Karen Gross, *The Need to Take Community Interests into Account in Bankruptcy: An Essay*, 72 WASH. U. L.Q. 1031 (1994).

27. Kathryn R. Heidt, *The Changing Paradigm of Debt*, 72 WASH. U. L.Q. 1055 (1994).

recognize and account for the concept of a continuing obligation, rather than merely asking whether an obligation can be traced to a past event or transaction. Using the environmental harm context as an example of a continuing obligation, Professor Heidt says that environmental creditors ought to have both a prepetition claim and a continuing claim whenever a debtor continues to own contaminated property.

VI. THE INTERNATIONAL BANKRUPTCY SCENE

In the Symposium's only international bankruptcy article, Professor Douglass Boshkoff discusses the reasons for his pessimism about the prospects for reform of the international bankruptcy system.[28] At present, the United States' bankruptcy laws include Bankruptcy Code section 304, which suggests the possibility of a cooperative administration of a cross-border insolvency estate.[29] Professor Boshkoff points out, however, that in practice this provision has been utilized mainly in cases where the particular action taken would not substantially prejudice American interests. Professor Boshkoff then gives a number of reasons, from national chauvinism to differing countries' views of the fresh start concept, for his belief that the universalist view of bankruptcy remains an unlikely prospect for the immediate future.

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28. Douglass G. Boshkoff, *Some Gloomy Thoughts Concerning Cross-Border Insolvencies*, 72 WASH. U. L.Q. 931 (1994).

29. *See* 11 U.S.C. § 304 (1988).