NOTE

THE NEED FOR DIGNITARY JUSTICE FOR TORT CREDITORS IN CHAPTER 11 BANKRUPTCY

Ella Epstein*

With increased frequency, mass tortfeasors are turning to Chapter 11 to address their liabilities, dragging enormous numbers of tort victims into bankruptcy court with them. These individuals deserve fair and dignified treatment. Indeed, if we care about people's experiences within, and the public's trust in, the bankruptcy courts, such treatment is essential. Yet contemporary corporate bankruptcy law and literature leave little room for dignitary concerns. This Note aims to highlight the system's shortcomings and suggest low-cost interventions which would restore dignity to tort creditors.

* J.D. Candidate 2023, Columbia Law School; B.A. Candidate 2023, Columbia University. My sincerest thanks to Professor Ronald Mann for his invaluable guidance and insights, and to the *CBLR* staff for help in preparing this Note for publication.

I. INTRODUCTION

> At some point, I would like to speak. He was my last family member, and my entire family has been affected through this epidemic, and through Purdue Pharma's family. So I really would like to speak from the pain that it has created and me being left behind with no family.[1]

The recent bankruptcies of Johnson & Johnson, the Boy Scouts of America, and Purdue Pharma have thrust the tight-knit world of Chapter 11 bankruptcy practice[2] under the

[1] Kimberly Krawczyk, calling into Judge Robert Drain's court in 2020 during the Purdue Pharma matter, as told by Patrick Radden Keefe. PATRICK RADDEN KEEFE, EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY 425 (Doubleday 2021) (internal quotation marks omitted).

[2] Jonathan C. Lipson, *Bargaining Bankrupt: A Relational Theory of Contract in Bankruptcy*, 6 HARV. BUS. L. REV. 239, 245 (2016) (describing "the most important participants" in large Chapter 11 cases, including "distress investors, lawyers, and judges" as "often form[ing] a tightly knit community of repeat players"); Tom Corrigan, Joel Eastwood & Jennifer S. Forsyth, *The Power Players That Dominate Chapter 11 Bankruptcy*, WALL ST. J. (May 24, 2019, 5:30 AM), wsj.com/graphics/bankruptcy-power-players/ [https://perma.cc/P8G3-3UHF] (examining the "concentration of

spotlight of public scrutiny. The Purdue case in particular sparked outrage and accusations that the Chapter 11 system serves the rich by keeping them insulated from liability and paying off victims of corporate malfeasance.[3] During the summer of 2021, protesters gathered outside of Judge Robert D. Drain's courthouse, where he was presiding over the Purdue bankruptcy proceedings. Opioid activists "unfurled banners decrying Judge Drain's 'morally bankrupt bankruptcy court'" and depicting the judge winking merrily over a pile of blood-soaked cash; nearby, an eerie cartoon of a red-eyed Judge Drain "loomed over the scene, accompanied by the text 'the devil's judge' and 'iron curtain of the Sackler massacre.'"[4] The activists claimed that Purdue "handpicked" a judge known to be "sympathetic" to them.[5] Perhaps Senator Blumenthal's statement at a press conference introducing the proposed Stop Shielding Assets from Corporate Known Liability by Eliminating Non-Debtor Releases Act (SACKLER Act) best summarizes this sentiment: "Current bankruptcy

power within the bankruptcy system" by reviewing the bankruptcies of every company with assets over $500 million that filed from 2007-2019 and contending that "an elite group of bankruptcy professionals and judges from just two states" controls the process); Samir D. Parikh, *Mass Exploitation*, 170 U. PENN. L. REV. ONLINE 53, 63 (2022) ("A small pool of professionals manages the universe of mass tort bankruptcy cases, and the process is characterized by repeat players.").

[3] *See, e.g.*, *Warren, Nadler, Durbin, Blumenthal, Maloney Announce Legislation to Eliminate Non-Debtor Releases, Prevent Corporations and Private Entities From Escaping Accountability In Bankruptcy Proceedings*, ELIZABETH WARREN (July 28, 2021), https://www.warren.senate.gov/newsroom/press-releases/warren-nadler-durbin-blumenthal-maloney-announce-legislation-to-eliminate-non-debtor-releases-prevent-corporations-and-private-entities-from-escaping-accountability-in-bankruptcy-proceedings [https://perma.cc/7NMS-RWTY] [hereinafter Warren, Nadler, Durbin, Blumenthal, Maloney Announce Legislation to Eliminate Non-Debtor Releases].

[4] Valentina Di Liscia, *A Protest Against Purdue Settlement Transforms Courthouse Landscape Into a Graveyard*, HYPERALLERGIC (Aug. 9, 2021), https://hyperallergic.com/669004/pain-sackler-protest-against-purdue-settlement-transforms-courthouse-landscape-into-graveyard/ [https://perma.cc/WG6W-34UT].

[5] *Id.*

law is unjust and unacceptable. Bankruptcy should not be a safe harbor from accountability, but that's how the law works now."[6]

For the public to have and maintain faith in an adjudicatory system, it must be fair on its face. Law and psychology scholars have long since demonstrated that "experiences of injustice erode the public's beliefs about the legitimacy of the civil justice system."[7] Specifically, litigants want fair and dignified treatment, which entails an opportunity to be heard.[8] It may seem odd to practitioners to bring up dignitary concerns in bankruptcy proceedings, which focus overwhelmingly on financial matters. However, as more mass tortfeasors file for Chapter 11, it grows increasingly important to do so, as mass tort cases implicate dignitary interests on a vast scale (think, for example, of victims of sexual abuse by clergymen).

This Note aims to put the Chapter 11 process and dignitary justice in conversation, and ultimately to suggest tweaks to the system which would restore some dignity to tort victims in bankruptcy court. Part II explains the importance of doing so now, as mass tortfeasors turn to the Chapter 11 process to resolve lawsuits. It also explains what "dignity" should mean in this context, and why it has not yet been explicitly analyzed by bankruptcy scholars. Part III identifies moments in the Chapter 11 process which are particularly injurious to tort claimants' dignity, focusing on three essential components of dignity: voice, forum neutrality, and decisionmaker trustworthiness. Part IV suggests some ways to better protect future tort claimants' dignitary interests.

II. LEGAL, PHILOSOPHICAL BACKGROUND

A. Why Now? The Convergence of Chapter 11 and

[6] *Warren, Nadler, Durbin, Blumenthal, Maloney Announce Legislation to Eliminate Non-Debtor Releases*, *supra* note 3.

[7] Victor D. Quintanilla, *Human-Centered Civil Justice Design*, 121 PENN ST. L. REV. 745, 750 (2017) (collecting studies).

[8] *See infra* Section II.C.

Mass Torts

Mass tort litigation features many dispersed claims which create waves of litigation that are difficult to manage.[9] Starting with the Johns-Manville Corporation in the 1980s, corporate tortfeasors facing such overwhelming liability have resorted to bankruptcy.[10] The tactic has grown increasingly popular over the decades: in the words of one major New York law firm, we are in a "new era of mass tort bankruptcies."[11]

Professor Samir Parikh's article *The New Mass Torts Bargain* explains the shift towards Chapter 11 and away from other resolution mechanisms and the benefits which Chapter 11 bestows on defendants. Personal injury mass tort lawsuits present a unique set of problems. The victims have suffered "significant physical, psychological, and emotional injuries"[12]; there are many victims, often creating "geographic dispersion"[13]; and the harms are "temporally scattered across a broad timeline," both because individuals often come into contact with the tortfeasor at different points in time, and also because some injuries manifest only after a latency period (*e.g.*, asbestosis), potentially creating as-yet-unknown future victims.[14] All these factors and more create "staggering transaction costs" in the process of resolving mass tort

9 Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. DAVIS L. REV. 1613, 1617 (2008).

10 *When Mass Tort Meets Bankruptcy*, EPIQ (March 31, 2021), https://www.epiqglobal.com/en-us/resource-center/articles/when-mass-tort-meets-bankruptcy [https://perma.cc/P43W-KKB8].

11 *Corporate Bankruptcy and Restructuring: 2019—2020,* WACHTELL, LIPTON, ROSEN & KATZ (Jan. 27, 2020), https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.26760.20.pdf [https://perma.cc/2QKD-DY4C] ("[A]s the new wave of cases makes its way through the courts, we expect debtors, parent companies, and plaintiffs alike to continue to look to chapter 11 for creative solutions to mass tort problems."); *see also When Mass Tort Meets Bankruptcy*, *supra* note 10 ("This is a trend which will continue post-pandemic.").

12 Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 447, 457.

13 *Id.*

14 *Id.* at 457–58.

claims—hence the need for streamlined dispute resolution systems, instead of piecemeal litigation of individual claims.[15]

There are three mechanisms through which a federal court, upon gaining jurisdiction over one mass tort case, can aggregate factually similar cases from multiple jurisdictions: (1) class certification, (2) consolidation by the Judicial Panel on Multidistrict Litigation and transfer to a single district court, and (3) corporate bankruptcy filing under Title 11.[16] Professor Parikh argues that the first two have fallen out of favor with corporate tortfeasors.

Rule 23 of the Federal Rules of Civil Procedure provides for the qualification of class actions, so long as the proposed class satisfies the Rule's criteria regarding numerosity, commonality, typicality, and adequacy of representation. Additional criteria are imposed based on the class type, determined under Rule 23(b). The most common class type for actions for money damages is delineated under 23(b)(3),[17] which requires that "questions of law or fact common to class members predominate over any questions affecting only individual[s], and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[18] After two Supreme Court cases from the 1990s made clear that these would be high bars for mass tort plaintiffs to meet[19]—recall the dispersed nature of the claims involved—a consensus emerged that "most personal injury mass torts present too many individual issues surrounding causation and damages to satisfy Rule 23(b)(3)'s predominance and superiority requirements."[20]

Multidistrict litigation (MDL) stepped in to fill the void. MDL is a procedure in which federal civil cases from around the country can be transferred to one court if they have "one or more common questions of fact," and if transfer "will be for

15 *Id.* at 459. For an overview of the problems caused by case-by-case litigation, *see* Smith, *supra* note 9, at 1627–29.

16 Parikh, *The New Mass Torts Bargain*, *supra* note 12, at 452.

17 *Id.* at 470.

18 FED. R. CIV. P. 23(b)(3).

19 Parikh, *The New Mass Torts Bargain*, *supra* note 12, at 472–73.

20 *Id.* at 473.

the convenience of parties and witnesses" and "promote the just and efficient conduct of such actions."[21] MDL has grown at a "meteoric" pace over the past 20 years,[22] and it is still extremely popular.[23] However, all parties find flaws with the MDL system. As relevant here, defendants face inefficient and potentially lengthy settlement proceedings largely controlled by the overseeing judge.[24] These costs are thrown into relief when contrasted with the efficient Chapter 11 process, the final resolution mechanism and an increasingly popular choice for corporate tortfeasors.[25]

The appeal of Chapter 11 is evident from the moment a debtor files for bankruptcy. Venue rules are so lax that debtors can "shop" for the particular forum, even the exact judge, which they think will be most hospitable.[26] All "claims," or demands upon a debtor's estate, are valued and processed in the court in which the debtor filed, absent a rare venue transfer.[27] This means that the vast majority of debtor-related matters are automatically transferred to the bankruptcy court

[21] *Id.*; 28 U.S.C. § 1407.

[22] Parikh, *The New Mass Torts Bargain*, *supra* note 12, at 475.

[23] Half of all civil cases filed in 2020 were part of an MDL. Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, CORNELL L. REV. (forthcoming 2022) (manuscript at 2).

[24] Parikh, *The New Mass Torts Bargain*, *supra* note 12, at 479.

[25] *Corporate Bankruptcy and Restructuring: 2019—2020*, *supra* note 11 ("This past year saw a notable increase in the use of chapter 11 to address mass tort litigation.").

[26] *See* Jared A. Ellias, *What Drives Bankruptcy Forum Shopping? Evidence from Market Data*, 47 J. LEGAL STUD. 119 (2018); Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079, 1084 (2022) (collecting literature on forum- and judge-shopping).

[27] 11 U.S.C. § 101(5) ("The term 'claim' means . . . right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or . . . right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.").

at the moment of filing. [28] Simply filing for bankruptcy presents an efficiency advantage: corporate tortfeasors can collapse disparate litigation into a more streamlined process run out of the court of their choosing. [29] Purdue Pharma, for example, faced approximately 2,900 lawsuits across the country by the time it filed for bankruptcy; filing brought all plaintiffs into one court to negotiate with their common defendants.[30]

The "automatic stay," which the debtor automatically triggers by filing for bankruptcy, freezes most litigation against the debtor by enjoining creditors[31] from starting or continuing to take action against the debtor or its property.[32] Filing thus provides debtors with a respite from defending lawsuits. Moreover, not all creditors get to assert their claims during bankruptcy: the Code weeds out some claims, both by requiring creditors to establish that they have valid claims and by setting a claim bar date by which claimants must file their proof.[33] This reduces the total amount of litigation which the tortfeasor must face.

Additionally, some legal innovations from the 1980s, meant to apply solely in asbestos cases, are now being used by debtors in entirely different industries. For example, in the

[28] And, absent an explicit decision made by the bankruptcy judge otherwise, that is where they will remain until the end of the proceeding. Parikh, *The New Mass Torts Bargain*, *supra* note 12, at 480 ("Bankruptcy courts enjoy jurisdiction over all 'civil proceedings arising under title 11, or arising in or related to cases under title 11.' The seemingly boundless reach of bankruptcy court jurisdiction allows the court to marshal all matters affecting a debtor in one single venue for prompt and efficient adjudication for the benefit of all stakeholders.") (internal citation omitted).

[29] 28 U.S.C. § 157(b)(5); *see also* Smith, *supra* note 9, at 1649.

[30] Katie Benner, *U.S. Seeks to Block Bankruptcy Plan That Would Free Sacklers From Opioid Claims*, N.Y. TIMES (Sept. 16, 2021), https://www.nytimes.com/2021/09/16/us/politics/sackler-bankruptcy-plan.html?searchResultPosition=2 [https://perma.cc/5X2N-PGE8].

[31] In the bankruptcy context, "creditor" is a very broad term, encompassing all entities that hold claims against the debtor that arose upon or before filing. 11 U.S.C. § 101(10). Recall that "claim" is also a sweeping term. *See supra* note 27.

[32] 11 U.S.C. § 362; *see also* Smith, *supra* note 9, at 1639.

[33] Smith, *supra* note 9, at 1640–41.

asbestos context, Section 524(g) permits for the creation of a plaintiffs' trust funded by cash, insurance policy proceeds, and equity in the reorganized debtor. In exchange for contributing to the trust, the debtor and other contributors receive a "channeling injunction" which redirects all claims to the settlement trust and, when the bankruptcy ends, immunizes the debtor and specified third parties from liability.[34] Now, debtors in other industries are drawing on[35] Section 524(g) to craft what Professor Parikh calls an "ad hoc resolution structure" by using the provisions provided in the Code for asbestos manufacturers in their own reorganization plans and convincing bankruptcy judges that granting channeling injunctions and third-party releases is within their broad powers under Sections 105 and 363(f).[36] Such measures include (sometimes nonconsensual) third-party releases

[34] Samir D. Parikh, *Mass Exploitation*, U. PA. L. REV. ONLINE 60 (2022).

[35] Or "cherry-picking" from, according to Professor Parikh. *See* Parikh, *The New Mass Torts Bargain*, *supra* note 12, at 454.

[36] Parikh, *Mass Exploitation*, *supra* note 34, at 60–61. In 2019, there were five mass tort bankruptcies which used channeling injunctions, two of which were unrelated to asbestos. *A Look Back At Mass Tort Bankruptcy Cases in 2019 – Asbestos and Beyond*, CROWELL MORING (Jan. 22, 2020), https://www.crowell.com/NewsEvents/AlertsNewsletters/all/A-Look-Back-at-Mass-Tort-Bankruptcy-Cases-in-2019-Asbestos-and-Beyond [https://perma.cc/5X2N-PGE8]. This does not include their more recent proposed use in the Purdue Pharma, boy Scouts, and USA Olympics bankruptcies. Becky Yerak, *Boy Scouts Bankruptcy Plan Hinges on Releases Deemed Illegal in Purdue Case*, WALL ST. J. (Dec. 22, 2021), https://www.wsj.com/articles/boy-scouts-bankruptcy-plan-hinges-on-releases-deemed-illegal-in-purdue-case-11640214516?tpl=br [https://perma.cc/AR4G-EXHD]; Jonathan Randles, *Purdue Restructuring on Hold After Judge Overturns Settlement*, WALL ST. J. (Dec. 21, 2021), https://www.wsj.com/articles/purdue-restructuring-on-hold-after-judge-overturns-settlement-11640124462?tpl=br [https://perma.cc/YGG7-T3SD] (discussing the proposed immunization of the Sackler family through Purdue's bankruptcy plan); Louise Radnofsky & Jonathan Randles, *Nassar Victims Reach $380 Million Settlement With USA Gymnastics and U.S. Olympic and Paralympic Committee*, WALL ST. J. (Dec. 13, 2021), https://www.wsj.com/articles/nassar-victims-reach-380-million-settlement-with-usa-gymnastics-and-u-s-olympic-and-paralympic-committee-11639406377?mod=article_inline [https://perma.cc/4HCB-MPHT].

which can immunize a wide swath of nondebtor parties.[37] Professor Lindsey Simon argues that the parties closest to the debtor benefit the most from these innovations: "What started as an opportunity primarily for insurers has increased to affiliates, distributors, and even co-defendants."[38]

These are but some of the advantages of bankruptcy over MDLs which have turned Chapter 11 into an appealing alternative for mass tortfeasor corporations. As a result, the interests of large populations of victims are, and likely will continue to be, addressed within bankruptcy courts.

B. The Focus of Bankruptcy Law and Literature on Efficiency—with Notable Exceptions

> Bankruptcy law has never dealt well with questions of moral justice—it is fundamentally a financial process that reduces all manner of obligation to cold, hard dollars . . . This financial logic has an unavoidable mismatch with the dignitary and expressive justice goals of tort law.[39]

As more corporations turn to Chapter 11 and drag hundreds of thousands of victims of corporate malfeasance into bankruptcy court with them, it becomes increasingly difficult to ignore the dignitary harms suffered by these involuntary creditors. However, bankruptcy law and scholarship has long been hostile to such considerations. The long-recognized central goals of the Chapter 11 process are enabling the survival of viable companies past periods of

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[37] Such as "parent and affiliate corporate entities, insurers, professional advisors, board members, and various administrative agents." Parikh, *Mass Exploitation*, *supra* note 34, at 61. For more on third-party releases, *see infra* Section III.B.

[38] Lindsey Simon, *Bankruptcy Grifters*, 131 YALE L. J. 1154, 1202 (2022).

[39] *Oversight of the Bankruptcy Code, Part I: Confronting Abuses of the Chapter 11 System: H. Before the H. Comm. On the Judiciary Subcomm. On Antitrust, Commercial, and Administrative Law* (Levitin testimony, https://docs.house.gov/meetings/JU/JU05/20210728/113996/HHRG-117-JU05-Wstate-LevitinA-20210728.pdf) [https://perma.cc/P7CX-PK42].

financial distress, and maximizing value for creditors.[40] Much of the process centers on "the refinancing and discharge of debt, sale of certain lines of business, entity reconfiguration, and changes in management and personnel and firm governance."[41] One example of the financial focus of the process is the standing requirement: under 11 U.S.C. § 1109, any "party in interest" has a right to be heard on any issue in a bankruptcy case, but courts narrowly interpret "party in interest" to mean a person with a pecuniary interest in the debtor or its assets.[42]

Bankruptcy scholarship reflects this economic orientation, largely focusing on efficiency, albeit with notable exceptions.[43] The law-and-economics school of bankruptcy theory conceptualizes bankruptcy as a private disagreement between parties with contracts with the debtor in question. Specifically, the so-called Creditor's Bargain Theory,[44] the

40 *See* Bank of Am. Nat'l Trust & Sav. Ass'n. v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 453 (1999) (noting that the two basic purposes of Chapter 11 are preserving going concerns and maximizing property available to satisfy the claims of creditors); *see also* Kathleen Noonan, Jonathan Lipson, & William Simon, *Reforming Institutions: The Judicial Function in Bankruptcy and Public Law Litigation*, 94 IND. L. J. 545, 549–50 ("Wealth maximization is the principal normative justification and metric in [Chapter 11] cases . . . Few observers challenge this presumption.").

41 Noonan et al., *supra* note 40, at 548.

42 *In re* Hathaway Ranch Partnership, 116 B.R. 208, 213 (Bankr. C.D. Cal. 1990); *see also* Matter of Farmer, 786 F.2d 618 (4th Cir. 1986) (requiring a financial interest for standing purposes); Nathalie D. Martin, *Noneconomic Interests in Bankruptcy: Standing on the Outside Looking In*, 59 OHIO ST. L.J. 429, 448 (1998) ("[T]he vast majority of courts have held that one must have a pecuniary or economic stake in the proceeding in order to be heard.").

43 Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 7, 1709, 1714 (2020) (noting that "much of today's bankruptcy scholarship . . . usually advocates general efficiency goals"); Melissa Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PA. L. REV. 1715, 1716 (2018) ("[T]he field of corporate bankruptcy has been redistricted to wealth maximization, voluntary lenders, and investors.").

44 This Note focuses on admittedly abnormal Chapter 11 debtors and issues facing involuntary, unsecured creditors. Much of the subsequent

"dominant normative theory of bankruptcy," sounds largely in the private law of contract: it "argues that bankruptcy should be limited to solving coordination problems caused by multiple creditors."[45] Proponents of this theory believe that bankruptcy need not do more than recreate some hypothetical *ex ante* bargain among creditors. While the Creditor's Bargain Theory has come under attack,[46] it is still the predominant framework through which bankruptcy law and policy is analyzed.[47]

A discussion of dignitary justice in this context may thus strike seasoned practitioners as out of place. In *Empire of Pain*, journalist Patrick Radden Keefe recounts a mundane bankruptcy hearing in the Purdue Pharma case, conducted via teleconference, which two victims of the opioid crisis interrupted by calling in and asking to tell the stories of their deceased family members. When one, Ms. Kimberly Krawczyk, asked to speak in her deceased brother's memory on the call, Judge Robert Drain replied, "There are literally hundreds of thousands of people who have lost dear family members because of opioids . . . I don't think that this is the proper forum to do this."[48] While Judge Drain may have been speaking about a specific hearing, his words bring to mind

discussion therefore falls outside of the contractualist framework advocated by proponents of the Creditors' Bargain Theory which, as Professor Lynn LoPucki describes it, rests on the assumption "that each party chooses the contract because the contract makes that party better off"—i.e., it rests on a premise of underlying consent. Involuntary creditors, by definition, do not consent. Lynn LoPucki, *Contract Bankruptcy: A Reply to Alan Schwartz*, 109 YALE L.J. 317, 341 (1999).

45 Kenneth Ayotte & David Skeel, *Bankruptcy Law as a Liquidity Provider*, 80 U. CHI. L. REV. 1557, 1560 (2013).

46 Jacoby, *supra* note 43, 1716 at n. 3 (collecting articles critiquing the Creditor's Bargain Theory).

47 *Id.*; *see also generally* Jay Lawrence Westbrook, *Commercial Law and the Public Interest*, 4 PENN. ST. J. L. & INT'L AFF. 445, 445 (2015) (arguing that contractualism pushed notions of broader social interests into the background, "leaving the policy debates focused largely on competing claims of efficiency and injustice to the immediate parties to an activity or transaction").

48 KEEFE, *supra* note 1, at 425.

Professor Levitin's observation about the incompatibility of business bankruptcy with "questions of moral justice."[49]

Yet, when debtors are tortfeasors, the values implicated in the bankruptcy process range beyond the financial. Personal injury plaintiffs often suffer significant psychological, emotional, and dignitary harms (such as a perceived loss of social status), on top of economic ones.[50] Consider victims of sexual abuse, or families who lost a loved one to opioid addiction. Certainly, they have incurred the calculable costs of lost wages, medical expenses, and the like, but that is doubtless an insufficient metric of the harms they suffered. Even when pain-and-suffering damages are awarded, financial compensation can never restore a victim to his or her prior state, rendering such damages, in a sense, inevitably futile.[51]

Tort law strives to address these dignitary harms, however imperfectly. Scholars have theorized that tort law is "not solely about obtaining compensation": it also "plays an integral role in the promotion of relational dignity," or mutual respect between autonomous individuals—plaintiffs and defendants.[52] As discussed at more length in Part I.C.i., a core element of dignity is the recognition of, and respect for, the inherent worth of every human being.[53] As one scholar put it,

[49] *See supra* note 39.

[50] *See also* Parikh, *The New Mass Torts Bargain*, *supra* note 12, at 457 (victims of complex personal injury mass torts "suffer significant physical, psychological, and emotional injuries"). For a further discussion of the meaning of dignity in this context, see *infra* Section II.C.

[51] Victims' assessments of the adequacy of an award are "comparative, contextual judgment[s]" depending on factors such as the amount a given victim got compared to another, and the identity of the paying party (the defendant, an insurance company, etc.). Valerie P. Hans, *Dignity Takings, Dignity Restoration: A Tort Law Perspective*, 92 CHI.-KENT L. REV. 715, 719–23 (2018).

[52] Val Corbett, *The Promotion of Human Dignity: A Theory of Tort Law*, 58 IRISH JURIST 121, 132 (2017).

[53] Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. 317, 330 (2019).

"objectification is dignity's foil."[54] Tort law accounts for some of the distinct harms to one's dignity by providing causes of action—the dignitary torts—which are meant to reinstate an individual's integrity and restore their humanity after they have been objectified in some ways.[55] The dignitary torts have been characterized as "those in which a defendant's wrong lies in failing to respect a person's worth," as well as those which "intru[de] on a person's right to make decisions for themselves."[56] Their very existence points to tort law's roots in corrective justice.[57]

Mainstream bankruptcy law and theory, on the other hand, exhibits no such concern. In fact, in many ways, it contributes to the objectification of tort victims dragged into the system, as discussed below. As more mass tortfeasors like the Boy Scouts of America and Purdue Pharma file under Chapter 11, there will be an ever-greater need for the system to reckon with the dignitary harms it imposes on the hundreds of thousands of individuals forced into bankruptcy courts by corporate tortfeasors' unilateral decisions.

This Note aims to build on a strain of bankruptcy scholarship which stands in opposition to the law-and-economics approach. It started in the 1990s, when now-Senator Elizabeth Warren and Professors Jay Westbrook, Karen Gross, Donald Korobkin, and others began to argue that a contractualist, private law-oriented approach to bankruptcy is too narrow.[58] They pointed out that the Chapter

54 Erin Daly & James R. May, THE DIGNITY RTS. PROJECT, WIDENER UNIV. DEL. L. SCH., A DIGNITY RIGHTS SYNOPSIS 5 (2017).

55 Think of the role of the tort of defamation, which allows an individual to sue for circulating a false and harmful story intentionally or recklessly. By filing a defamation suit, the victim gets to tell their own side of the story and thereby take back some of the agency they lost when their name was smeared.

56 Stephen D. Sugarman & Caitlin Boucher, *Re-Imagining the Dignitary Torts*, 14 J. TORT L. 101, 105 (2021). For a discussion of the history of dignitary torts, *see* Abraham & White, *supra* note 53, at 317 (2019).

57 This is Aristotle's term. Christina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L. J. 1242, 1327 (2017).

58 *See, e.g.,* Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717, 725–26; Karen Gross,

11 process takes on importance beyond the borders of debtor-creditor contracts, and inevitably implicates broader societal interests.[59] Rather than relying on the lodestone of efficiency, these scholars framed corporate reorganization in terms of feminism and communitarianism.[60] With time, language about the "public interest" seeped into the scholarship,[61] with one scholar arguing that the field should encompass "the interests of anyone who has a stake, financial or otherwise, in the business in bankruptcy."[62] Professor Korobkin strove to reframe bankruptcy law as "a response to the problem of financial distress—not only as an economic, but as a moral, political, personal, and social problem that affects its participants."[63]

Still, much of this scholarship, at least in the 1990s, focused on the *economic* effects of business bankruptcies. The lens expanded from creditor-debtor entitlements to include the effects of liquidation or reorganization on a community, including "employees of the debtor company, consumers, neighbors, taxing authorities, and the surrounding community."[64] The rights of interest to scholars of this period

Taking Community Interests into Account in Bankruptcy: An Essay, 72 WASH. U. L.Q. 1031, 1031 (1994); Westbrook, *supra* note 47, at 445.

[59] *See, e.g.,* ELIZABETH WARREN & JAY L. WESTBROOK, THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS 397–98 (2d ed. 1991) (describing the bankruptcy process as one of many tools in a "system of social protection" and hence needing to advance a swath of social interests); Karen Gross, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM (1997) (discussing the broad societal ramifications of bankruptcy proceedings).

[60] Gross, *Taking Community Interests into Account in Bankruptcy*, *supra* note 58, at 1035–36.

[61] Julie Veach, *On Considering the Public Interest in Bankruptcy: Looking to the Railroads for Answers*, 72 IND. L.J. 1211, 1211 (1997).

[62] *Id*. at 1214.

[63] Korobkin, *supra* note 58, at 762.

[64] Veach, *supra* note 61, at 1212 (summarizing the state of the debate as it stood in the 1990s); *see also* Martin, *supra* note 42, at 444 (examining obligations the debtor owes to society in terms of "fiduciary responsibilities").

included environmental issues,[65] neighborhood safety and wealth,[66] and the value of future employment,[67] all of which are socioeconomic concerns. In short, the focus shifted from the debtor's financial well-being and specific creditors' perquisites to public wealth. It would take until the 2010s for a critique of contractualism grounded in noneconomic interests to develop.[68]

Professor Melissa Jacoby's work closes this gap. She takes the field's understanding of the public interest in corporate bankruptcy one step further by calling the system a "public-private partnership"[69] due to the source of the system's funding, the level of public oversight (from the court and federal and local trustees), and the combined public-private process of rule-setting (from Congress and the courts, as well as from the parties in court). Public-private partnerships are meant to promote the public interest.[70] Crucially, Professor Jacoby narrows down the "public interest" notion to highlight specific public values, using Professor Martha Minow's work on privatization as a jumping-off point.[71] Relevant to this paper, among these values are "achieving social provision—human needs, redressing inequality," "freedom of self-expression," and "accountability."[72] Professor Jacoby thereby broadens the sphere of interests which corporate bankruptcy should take into account from the quantifiable into the moral.

One public interest which has not yet been examined at length in this context is that of the dignity of the individuals

65 *See, e.g.,* Kathryn Heidt, *The Changing Paradigm of Debt*, 72 WASH. U. L.Q. 1055, 1055 (1994).

66 Martin, *supra* note 42, at 491.

67 *Id.*; *see also* Gross, *Taking Community Interests into Account in Bankruptcy*, *supra* note 58, at 1034–35.

68 *But see* Veach, *supra* note 61, at 1225 (briefly mentioning the importance of procedural justice to litigants).

69 Jacoby, *supra* note 43, at 1717.

70 *Id.* at 1720 ("[T]he partnership is meant to promote public values").

71 *Id.* at 1721, *citing* Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003).

72 Jacoby, *supra* note 43, at 1721.

who are unwillingly drawn into bankruptcy court.[73] The concept of human dignity is closely tied to some of Professor Minow's public values: it is often described as a basic human need, underpinning individual freedom and requiring accountability for wrongdoers.[74] The Supreme Court regularly uses the term "human dignity" when deciding cases,[75] and one scholar has gone so far as to argue that "recognizing the intrinsic worth of the individual [i.e., recognizing her dignity] requires that the state *should be seen to exist for the sake of the individual human being*."[76] As a goal that is and should be advanced by government, and as one which, this Note argues, is strongly implicated in mass tortfeasors' bankruptcies, dignity should be acknowledged and advanced in the public-private partnership that is the Chapter 11 process. If, as Professor Jacoby argues, the government is party to corporate reorganizations, and if the U.S. government has a duty to advance dignitary interests, then, under Professor Jacoby's

[73] I have not been able to find an article which explicitly addresses the dignitary concerns implicated in Chapter 11. Professor Jonathan Lipson's 2020 Friel Scanlan lecture is the most detailed analysis yet, and in many ways served as a jumping-off point for this Note. *2020 Friel Scanlan Lecture Jonathan Lipson*, YOUTUBE (Nov. 12, 2020), https://www.youtube.com/watch?v=wF57WhkVeIA. For a definition of dignity, see *infra* Section II.C.i**.**

[74] *See infra* Section II.C.

[75] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 562, 574 (2003) ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy . . . Still, it remains a criminal offense with all that imports for the dignity of the person charged."); Trop v. Dulles, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."); McDonald v. City of Chicago, 130 S.Ct. 3020 (2010) (addressing dignity in the Second Amendment context); Wellons v. Hall, 130 S.Ct. 727, 728 (2010) (per curiam) (noting that judicial proceedings relating to a death penalty case must be conducted with "dignity and respect"). For a full exploration, see Maxine Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEBRASKA L. REV. 740 (2006).

[76] Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights,* 119 EUR. J. INT'L L. 655, 679 (2008) (emphasis added).

public-private partnership model, such interests must be considered in Chapter 11.

C. Dignitary Framework

1. Defining Dignity

Defining dignity is notoriously difficult,[77] and this Note does not purport to provide a thorough overview of the many conceptions relied upon in different legal fields, as this has been done elsewhere.[78] All that is necessary in the bankruptcy context, for now, is to identify a rationale underlying multiple conceptions of dignity (from the libertarian to the communitarian[79]): the Kantian principle that upholding dignity requires treating human beings as ends in and of themselves, rather than as means to an end.[80] Logically and practically speaking, this results in "a demand for recognition as one who has the capacity to make one's own free (and informed) choices . . . [and] a demand that one's own particular free choices be respected."[81] This Kantian principle also places limits on individual autonomy by demanding that we respect

77 Abraham & White, *supra* note 53, at 331 ("[J]ust what individual dignity consists of remains elusive."); *see also* Neomi Rao, *Three Concepts of Dignity in Constitutional Law,* NOTRE DAME L. REV. 183, 186 ("The fact that 'dignity' is an important yet slippery concept has become commonplace.").

78 *See, e.g.*, Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L.J. 200 (2012).

79 *See* Corbett, *supra* note 52, at 123–130 for a discussion of the differences between the libertarian and communitarian theories of dignity; *see also* Roger Brownsword, *An Interest in Human Dignity as the Basis for Genomic Torts*, 42 WASHBURN L.J. 413, 420–421 (2003) ("both interpretations—human dignity as empowerment and human dignity as constraint—can claim to be supported by the seminal writing of Immanuel Kant"). Broadly speaking, the libertarian/communitarian distinction tracks Professor Brownsword's dual conceptions of human dignity: dignity in support of individual autonomy ("human dignity as empowerment") and dignity as a constraint on the autonomy of others. One cannot be treated as a means to another's end, and one cannot treat others as means to one's own ends. Brownsword, *supra* note 79, at 419.

80 For a discussion, *see* George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533 (1987).

81 Brownsword, *supra* note 79, at 420.

others' dignity, and creates social responsibilities as well as rights.[82] It thus "encompasses a normative element which dictates the manner in which we conduct ourselves as individuals and in our relationship with others measured in accordance with societal values."[83]

The Kantian principle, in various formulations, is reflected across multiple fields of law.[84] For example, and as discussed above, Professor Corbett argues that a "relational conception of human dignity," imposing positive duties on individuals and creating responsibilities and community obligations, "supplies an accurate descriptive theory of current tort doctrine."[85] Judge Rao's three concepts of dignity—dignity as the inherent worth of the individual requiring a recognition of their autonomy, as grounds for enforcement of certain social values, and as requiring recognition and respect[86]—reflect the influence of a Kantian conception of dignity on American constitutional jurisprudence. And, most importantly for bankruptcy scholars, dignitary theorists of procedural due process often rely on the autonomy principles implicit in the Kantian framework, focusing on "the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one."[87] It is unsurprising, therefore, that scholars of procedural justice have taken the biggest step towards analyzing dignitary injustice in the bankruptcy process.

2. Perceptions of Fairness of a Justice System

> There are myriad opportunities for people to think that they were taken advantage of, to believe that they were ignored, or to deem the system rigged against

82 Corbett, *supra* note 52, at 127–128.

83 *Id.* at 129.

84 *See* Rao, *supra* note 77 crept into numerous realms of constitutional decision-making.

85 Corbett, *supra* note 52, at 128.

86 Rao, *supra* note 77, at 187–88.

87 Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L. J. 127, 139 (2011).

> particular parties. And each of these opportunities may end in disregard or contempt for individual case outcomes, which can taint perceptions of the entire chapter 11 system.[88]

Since at least the 1970s, psychology research has shown that perceptions of "procedural justice," or the processes afforded to parties, are critical as litigants decide whether a system is fair, separate and apart from substantive outcomes.[89] If litigants deem a decision-making process fair, they will trust it more, be more willing to abide by its outcomes, and see it as more legitimate.[90] If an individual feels as though she has been forced through an unfair dispute resolution process, she is likely to feel as though she has lost control, is being disregarded, and is being used as a means to an end.[91] Enhancing the fairness of a decision-making process will therefore reduce the likelihood of a litigant's incurring dignitary harms.

In addition, the public evaluates a justice system in much the same way as litigants.[92] As one scholar puts it, "[w]hile the public desires favorable outcomes, the public also demands fair procedures and fair treatment."[93] One researcher has gone so far as to argue that the fairness of

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88 Pamela Foohey, *Jevic's Promise: Procedural Justice in Chapter 11*, 93 WASH. L. REV. ONLINE 128, 137 (2018).

89 Hollander-Blumoff, *supra* note 87, at 132.

90 *Id.* at 134.

91 Ryan Hampton, who served as a victim's representative on the Unsecured Creditors' Committee in the Purdue Pharma bankruptcy, had this to say about the victims' treatment: "The lawyers and power brokers who controlled the process said they wanted victims involved. But they never listened to us, never gave us any degree of agency. We were a bargaining chip for the attorneys and big groups and used to beef up corporate claims." RYAN HAMPTON, UNSETTLED: HOW THE PURDUE PHARMA BANKRUPTCY FAILED THE VICTIMS OF THE AMERICAN OVERDOSE CRISIS 301 (2021).

92 *See* Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 L. & SOC. REV. 103 (1988).

93 Quintanilla, *supra* note 7, at 764.

process is the *primary* factor shaping both litigants' and the public's willingness to respect and abide by court rulings.[94]

A handful of papers persuasively argue that procedural justice is not only relevant to corporate bankruptcy, but fundamental to it. Professor Jacoby was the first to link the two concepts.[95] More recently, Professor Jonathan Lipson argued that the Supreme Court's ruling in *Czyzewski v. Jevic Holding Corp.* prioritizes process over outcome in Chapter 11.[96] In *Jevic*, the Court held that bankruptcy courts cannot authorize distributions of proceeds from the debtor's estate that do not follow the Bankruptcy Code's priority distribution scheme without the consent of the affected creditors, *even if* the bankruptcy court believes that such authorization would increase the net payout to creditors, because priority rules are "a basic underpinning of business bankruptcy law."[97] "Stated differently," Professor Pamela Foohey explains, "*Jevic* elevates parties' voices over value preservation and maximization."[98] Professor Lipson interprets *Jevic* as emphasizing the importance of "process values" in Chapter 11: participation, predictability, and procedural integrity.[99] These three ideas overlap with core components of procedural justice, leading Professor Foohey to argue that "*Jevic* is as much about procedural justice as it is about the Code's priority rules."[100]

It is therefore important to identify what procedural justice entails. Broadly speaking, litigants care about how they are treated by both decisionmakers (judge, jury, arbitrators, etc.) and opposing parties, and want fair treatment.[101] One researcher, Professor Tom Tyler, identified four primary

94 *See* Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 28-29 (2007).

95 Jacoby, *supra* note 43, at 1741.

96 Jonathan Lipson, *The Secret Life of Priority: Corporate Reorganization After* Jevic, 93 WASH. U. L. REV. 631 (2018).

97 Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 983, 987 (2017).

98 Foohey, *supra* note 88, at 132.

99 Lipson, *supra* note 96, at 637.

100 Foohey, s*upra* note 88, at 134.

101 Hollander-Blumoff, *supra* note 87, at 133.

factors which influence perceptions of fairness: "(1) how much voice and opportunity to be heard the party believes she has experienced, (2) neutrality of the forum, (3) the trustworthiness of the decisionmaker, and (4) the degree to which the individual has been treated with dignity and respect."[102] Neutrality and trust are related, but distinct: "Neutrality means that decisionmakers are honest, impartial, and objective . . . 'Trustworthiness, in contrast, suggests that the decisionmaker's motivation is above board: that the decisionmaker is benevolent and caring, is concerned about [the parties'] situation and their concerns and needs, [and] considers their arguments[.]'"[103] Finally, securing dignity itself is arguably the end goal of procedural justice: litigants care about the fairness of the procedure "because of the special message that fairness of process sends to its recipients: an authority who acts in a fair manner is an authority who is legitimate and *cares about the dignity* . . . of those who stand before it."[104] Looking at dignity in this light, it becomes clear how involuntary creditors of mass tortfeasors can feel slighted: there are "myriad opportunities," per Professor Foohey, for them to feel disregarded or even used.[105]

To understand why, when, and how involuntary creditors experience dignitary harms in the bankruptcy process, it is helpful to look at Professor Tyler's other aspects of procedural justice—voice, neutrality, and trustworthiness—and see how they play out in the Chapter 11 process. Each of these three elements, if met, enhances the dignity of the individual. Giving a participant an opportunity to air her complaints during the proceedings allows for the "self-definition and self-development" that are central to dignity.[106] Providing a trustworthy and neutral forum for this expression validates it and signals that the community values the individual's

102 *Id.* at 135 (citing Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 121 (2000)).

103 Hollander-Blumoff, *supra* note 87, at 136 (quoting Tyler, *supra* note 102, at 122).

104 *Id*. at 137–38 (emphasis added).

105 *See* Foohey, *supra* note 88, at 137.

106 Daly & May, *supra* note 54, at 2.

dignity. By identifying moments in the Chapter 11 process which abrogate these three principles, this Note aims to demonstrate how victims of mass tortfeasors are mistreated, and thereby propose solutions which could mitigate these harms on an individual level and thereby restore the public's confidence in the system.

III. SHORTCOMINGS OF THE CURRENT SYSTEM

A. Voice

> [Judge Drain] told the court that he held hearings only on what was scheduled before him. Hundreds of thousands of people had lost family members because of opioids, and he couldn't possibly take the time to hear them all—not even one, apparently… The real victims, the people who'd fought and clawed and prayed and protested and hoped and petitioned to be heard, were silenced. Bankruptcy court wasn't the place for their voices—and if it wasn't, where were they supposed to speak?[107]

Individuals do not sue corporations solely for the chance of a payout. As Professor Rachel Bayefsky points out, civil litigation sometimes functions as "a quest for more intangible forms of relief—respect, dignity, or vindication."[108] Even in the relatively impersonal process of class action relief, money is infrequently litigants' sole concern; instead, they want admissions of fault, to protect others, to seek answers, to demand apologies and acknowledgments of harm, and to punish the defendant.[109] Importantly, many wish to be heard.[110] A majority of litigants would prefer to wait longer—by a span of months or even years—for an end to litigation if it meant that they got the chance to tell their stories of harm

107 HAMPTON, *supra* note 91, at 264–265.

108 Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L.J. 1263, 1263 (2021).

109 Elizabeth Chamblee Burch & Margaret S. Williams, *supra* note 23, at 18.

110 *Id.* at 19, 22.

and suffering.[111] One participant in a study memorably remarked, "I think the wors[t] part [of MDL] is being left in the dark by the lawyers and not being able to have a say."[112] Absent this opportunity, MDL participants often[113] feel "disrespected," with one saying, "I felt that I was treated like just another number. No empathy whatsoever."[114] This suggests that denying litigants the chance to speak makes them think that they are being used by experts who leave them in the dark—a classic Kantian dignitary harm.

A majority of litigants involved in group litigation feel that they do not have a chance to tell their stories.[115] Professor Elizabeth Chamblee Burch theorizes that, when deprived of any opportunity to be heard, litigants think that the presiding judge lacks the information needed to make informed decisions.[116] Outcomes aside, participation has a value of its own, as evidenced by the well-documented "voice effect"—the positive effect on parties' evaluation of the fairness of proceedings when they are allowed to voice their perspectives:[117] "[w]hen people feel that they have been permitted to fully and fairly discuss their situations, *even when there is little chance of influencing the final outcome*, they are more likely to feel that an ultimate decision is fair."[118]

While these insights come from MDL and class action contexts, there is no reason why the psychology of tort victims should change in bankruptcy court. Unfortunately, the Chapter 11 bankruptcy process provides even less of an

111 *Id.* at 37–38.

112 *Id.*

113 *Id.* at 42, 46.

114 *Id.* at 42.

115 *Id.* at 46.

116 *Id.* at 41, 47 ("The link between diminished voice opportunities and accuracy is pronounced . . . and it surfaced in several participants' open-ended comments: '[N]o one really wanted to take the time to confirm my story.'").

117 Quintanilla, *supra* note 7, at 766–67.

118 *Id.* at 767 (emphasis added).

opportunity for victims to speak and face defendants than other methods of group litigation.

1. Notice and Voting

To exit Chapter 11, a debtor[119] proposes a plan to either liquidate or reorganize.[120] Much of the work of the Chapter 11 process is about negotiating the plan's terms, as this all-important document determines the fate of the debtor's creditors. In order for a plan to be approved, creditors must vote on and approve its terms. This is the most direct way for creditors to exert voice in a corporate bankruptcy. The plan approval process begins with notifying creditors of their right to file a claim. Actual notice is required only for creditors known to the debtor; for unknown creditors, who cannot be identified or located after a reasonable level of inquiry (like individual, nationally dispersed tort creditors), publication notice is acceptable.[121] There is no bright line rule governing the placement or content of publication notice, but the Third Circuit made clear in *Sweeney v. Alcon Laboratories* that advertising in a national, reputable newspaper, as well as in local periodicals, is sufficient.[122]

It is difficult to secure a truly representative share of tort claimants' votes. Issues of notice were evident in the Purdue Pharma case. As noted above, potential claimants must file proof of their claim by a claim bar date, or else they lose their chance at voting (and recovery). Given Chapter 11's focus on

119 Creditors can propose plans as well, but it is usually the debtor who does so.

120 *See* 11 U.S.C. § 1123.

121 Candace Arthur and Arden Ham, *Adjust Your Focus When Due Process Requirements Are Blurry: Third Circuit Finds Kodak's Notice of Publication Sufficient for Unknown Tort Claimant*, WEIL (May 24, 2021), https://restructuring.weil.com/breaking-the-code/third-circuit-finds-kodaks-notice-of-publication-sufficient-for-unknown-tort-claimant/. [https://perma.cc/2D6D-QA9P]

122 Sweeney v. Alcon Lab'ys, No. 20-2066 ES, 2021 WL 1546031, at *3 (3d Cir. Apr. 20, 2021).

speed and finality,[123] this is a hard deadline which Ryan Hampton, a victims' representative on the Unsecured Creditors' Committee (UCC) in the Purdue matter, found harsh. As he points out in his book chronicling his experience on the UCC, *Unsettled*, despite the pandemic raging at the time of the bar date, only a meagre 30-day extension was granted (he compares this to the 90-day extension granted by the IRS).[124] This, he argues, affected tort victims more than Purdue's other creditors, like hospitals and insurance companies, which are more experienced and well-resourced. He also points out that opioid addicts were likely to be displaced by the pandemic: "The extension fell during an emergency period, when people were getting their water and utilities shut off and becoming homeless due to the pandemic."[125] It was a bad time to deal with the complexities of filing a claim.

To notify victims of their rights after Purdue filed for bankruptcy, the company used an ad campaign to reach individuals potentially affected by Purdue's products. Purdue outsourced this to a well-known third party, Kroll (formerly Prime Clerk), which was used for numerous other major corporate bankruptcies.[126] Despite its apparent expertise, the ad campaign did not seem particularly effective: it only reached 127,000 affected people rather than, potentially, millions.[127] It did not use digital advertising, instead relying on print ads in magazines such as *Field & Stream* and one-off TV spots, places unlikely to reach the affected drug users.[128] The ads apparently were "unclear about where to go, whom to

123 *See, e.g.*, Juan Martinez, *Sexual Abuse and Bankruptcy: How Organizations Abuse Chapter 11 To Avoid Victims' Demands for Answers*, 37 EMORY BANKR. DEV. J. 213, 229 (2020).

124 HAMPTON, *supra* note 91, at 221.

125 *Id.*

126 *Restructuring Administration*, KROLL (date accessed), https://www.krollbusinessservices.com/services/prime-clerk-restructuring-administration (listing corporations) [https://perma.cc/BAN4-8UHD].

127 HAMPTON, *supra* note 91, at 215.

128 HAMPTON, *supra* note 91, at 220.

talk to, and what the process was."[129] Hampton writes that the victims who were reached "found the six-page claims form long and confusing . . . with essay-type questions such as 'Describe all alleged causes of action, sources of damages, legal theories of recovery, etc., that you are asserting against the Debtors.' The first question on the form was 'Who is the creditor?'"[130] Average tort victims would most likely not know the terminology of bankruptcy, and such convoluted processes likely scared away some victims. Eligibility was apparently difficult to decipher as well: "the ads were ambiguous about whether claimants needed to have been harmed by Purdue," and suggested that the victim had to prove that he had a prescription for OxyContin or another Purdue product.[131] Hampton argues that requiring such proof immediately created a barrier for many victims who may have been addicted to opioids for years and thus lost track of some of their documents like prescriptions.[132] The victims who ultimately did get to vote on the Purdue bankruptcy plan therefore comprised a fraction of the population harmed by OxyContin.

It is apparent from the Purdue example that notice procedures may be inadequate in mass tortfeasors' Chapter 11 cases. Another increasingly popular resolution process, called a "Section 363 sale," presents even more severe problems. 11 U.S.C. § 363(f) gives debtors the ability to sell their assets "free and clear" of "any interest in such property" under certain circumstances,[133] and courts have interpreted "any interest in property" broadly to include tort claims.[134] This means that tort liabilities are wiped out of existence when the asset that gave rise to the tort claim is sold under

[129] *Id.* at 216.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] 11 U.S.C. § 363(f).

[134] Corinne McCarthy, *Creditors' Committees: Giving Tort Claimants a Voice in Chapter 11 Bankruptcy Cases*, 31 EMORY BANKR. DEV. J. 431, 436 (2015).

Section 363(f), eliminating tort victims' chance of recovery.[135] This Note does not address Section 363 sales, as extant literature explains their procedural deficiencies, but it is worth mentioning that Section 363 sales can happen extremely quickly (sometimes within a day of the debtor's filing for bankruptcy), thereby presenting due process issues.[136] Their increased popularity[137] suggests that they are another source of significant dignitary harm to tort victims.

2. Unsecured Creditors' Committees

Among the more formal ways in which victims' voices, or at least those of their representatives, are included—or excluded—in the plan negotiation process is through the Unsecured Creditors' Committee (UCC). The Code provides for the formation of an official committee of unsecured creditors appointed by the U.S. Trustee.[138] This committee is meant to represent the interests of *all* unsecured creditors, though it typically winds up being comprised of the seven unsecured creditors with the largest claims.[139] The UCC has a number of powers, including investigating the debtor's financial condition and business operations, participating in forming a plan for reorganization, and requesting the appointment of a trustee or examiner.[140]

In typical Chapter 11 cases, when the debtor files for bankruptcy due to financial distress (and not just to resolve litigation) and when it has secured creditors, unsecured creditors are unlikely to get any payout from the bankruptcy process, so the incentive to participate in plan negotiations is

135 *Id.* at 437.

136 *See, e.g.*, Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L.J. 247 (2022).

137 Czyzewski v. Jevic Holding Corp, 137 S. Ct. 973, 979 (2017) ("Although the Code does not expressly mention structured dismissals, they 'appear to be increasingly common.'").

138 11 U.S.C. § 1102(a)(1).

139 Foohey, *supra* note 88, at 138–39.

140 11 U.S.C. § 1103.

low.[141] The calculus changes when the debtor is a mass tortfeasor, and some of its largest creditors are unsecured involuntary claimants.[142] In such circumstances, one can expect the UCC to wield significant power.

UCCs should be one formal avenue through which victims can exert influence over the proceedings. However, two structural problems exist which reduce their potential impact.

i. The UCC Is Not Adequately Representative

The structure of the UCC results in certain creditors' voices—especially tort creditors'—being silenced or muffled. This is for two distinct reasons.

One is that a UCC may simply be too small to accommodate representatives from enough types of unsecured creditors. As Professor Foohey puts it, "a committee comprised of nine representatives chosen based on unsecured creditors' claim amounts may not be sufficiently diverse to give all unsecured creditors the quality of voice required by procedural justice."[143] If a tortfeasor-debtor has numerous creditors, it may be difficult for victims of the corporation to even get a seat at the table; as Hampton explains, "Only when a company is caught up in some horrible scandal and has harmed dozens, hundreds, or even thousands of people do victims get appointed to the creditors committee, because actual victims make up such a large percentage of

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141 *Official Committees of Unsecured Creditors: Why You Should (Or Should Not) Serve*, FOLEY & LARDNER LLP (Sept. 19, 2019), https://www.foley.com/en/insights/publications/2019/09/official-committees-of-unsecured-creditors [https://perma.cc/JDM4-DDRS] ("In many bankruptcy cases, there is insufficient money to pay secured creditors in full, thus leaving general unsecured creditors with no recovery at all . . . . Because of this dynamic, it may not make economic sense for every general unsecured creditor to hire bankruptcy counsel and to actively participate in the bankruptcy case.").

142 Purdue Pharma is one such debtor. HAMPTON, *supra* note 91, at 81 ("Purdue entered Chapter 11 with zero secured debt; all creditors were 'unsecured creditors.'").

143 Foohey, *supra* note 88, at 139. The size of the UCC can range from seven to nine representatives.

creditors."[144] Creditors have the right to challenge the makeup of the committee if they think it does not adequately represent the creditor body.[145] However, it is difficult to imagine that tort victims, who may not even know that their tortfeasor filed for bankruptcy or know about the existence of the UCC, would be able to organize, hire an attorney, and sue for adequate representation in time.[146]

The second reason is that different groups represented on the UCC frequently have dissimilar goals, yet must bargain with the debtor as a single monolith.[147] Take the example of Montreal, Maine and Atlantic Railway, Ltd., a railroad that filed for bankruptcy after one of its trains caused a catastrophic crash. Both trade creditors and tort creditors were on the UCC in that case. The tort creditors wanted compensation for damage to their physical health or personal property, and they presumably had no interest in the future of the company. The trade creditors, on the other hand, wanted to settle for less money upfront to ensure the survival of the railroad, so that they would have a business partner to sell to in the future. Despite having opposite interests, the two groups had to advocate as one entity—the UCC—when participating in plan negotiations.[148]

A more recent example is that of Purdue Pharma. Its UCC was comprised of four victims' representatives (out of nine

144 HAMPTON, *supra* note 91, at 86.

145 *Two Recent Bankruptcy Cases Highlight Questions Over Unsecured Creditors' Committees*, PHELPS (March 12, 2021), https://www.phelps.com/insights/two-recent-bankruptcy-cases-highlight-questions-over-unsecured-creditors-committees.html [https://perma.cc/2ZG4-DBME].

146 *See* McCarthy, *supra* note 134, at 445–446 ("[U]nlike commercial creditors, tort claimants may not make up a sophisticated or economically stable group. In fact, tort claimants may not be familiar with the Bankruptcy Coed or with how to protect themselves in a bankruptcy proceeding. For example, in the General Motors and Chrysler bankruptcy cases, the tort claimants included individuals who resided throughout the country and who struggled to find individual representation to assert their claims.").

147 McCarthy, *supra* note 134, at 440.

148 *Id*. at 433, 440.

seats—not a majority, but a significant number), and representatives for: CVS Pharmacy, Purdue's co-defendant in the opioid MDL brought against it; West Boca Medical Center, a Florida hospital that had sued Purdue, acting on behalf of all hospitals with claims against Purdue; Blue Cross Blue Shield; the Pension Benefit Guaranty Corporation, a U.S. government agency to which Purdue owed pension contributions and insurance premiums; and LTS Lohmann Therapy Systems Corporation, to which Purdue owed royalties on medicinal patches.[149] The animosity between these entities was highlighted by a filing made by the Ad Hoc[150] Committee on Accountability, which explained how CVS profited from OxyContin oversupply and how insurance companies pushed patients towards opioid use. That Purdue was the business partner of four of these five non-victim creditors also likely affected the goals of those four in plan negotiations.[151]

Even if tort victims gain representation on an UCC, they may not be able to advance their own interests through it, because their voice can be drowned out by other creditors'. This dynamic played out in the Chrysler bankruptcy, in which tort claimants, despite having a seat on the UCC, lost the fight to prevent the debtor's assets from being sold "free and clear" of tort liability to other creditors who pushed for such immunization, and the tort claimants thus got "virtually nothing" from the proceedings.[152] As Ryan Hampton put it, "[r]epresentation and a seat at the table was progress but it certainly wasn't justice."[153]

ii. Ad Hoc Committees are Uncommon

The term "ad hoc committee" refers to any group of stakeholders seeking to collaborate to advance their own interests in a bankruptcy. They are unofficial unless deemed

149 HAMPTON, *supra* note 91, at 86–89.

150 *See supra* Section III.A.ii for a description of ad hoc committees.

151 HAMPTON, *supra* note 91, at 107.

152 McCarthy, *supra* note 134, at 434–35.

153 HAMPTON, *supra* note 91, at 108.

otherwise by the U.S. Trustee and can organize themselves any way they see fit.[154] An ad hoc committee formed pre-petition can be converted to an official unsecured creditors' committee post-petition by the U.S. Trustee if the committee meets several conditions; committees formed post-petition can ask the bankruptcy court to recognize them as additional official creditors' committees.[155] These additional creditors' committees are intended to solve the problem of conflicting interests described above. When deciding whether to formalize an ad hoc group, "[m]uch depends on the nature of the request, the size and complexity of the case, and the unique social, political, and economic environment of each case."[156]

Unofficial ad hoc committees' powers and responsibilities differ from those of official groups. Like official committees, they can retain professionals[157], file pleadings, and appear before the bankruptcy court.[158] Most importantly, they are a "unified, more powerful voice" for the uniform group of stakeholders they represent. Free from the fiduciary duties and nondisclosure obligations which bind the UCC, unofficial ad hoc committees can "aggressively advocate for their own

154 *No More Ad Lib: The Nuts & Bolts of Ad Hoc Bankruptcy Committees*, AMERICAN BAR ASSOCIATION (Dec. 17, 2014), https://www.americanbar.org/groups/business_law/publications/blt/2014/12/02_kevane/ [https://perma.cc/SF2Q-WF8C].

155 11 U.S.C. § 1102(a)(2) ("[T]he court *may* order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation") (emphasis added).

156 Mary J. Wiggins, *Finance and Factionalism: The Uneasy Present (and Future) of Special Interest Committees in Corporate Reorganization Law*, 41 SAN DIEGO L. REV. 1373, 1382 (2004).

157 Though their attorneys' fees will not be automatically paid by the debtor's estate, unlike those of the UCC. *No More Ad Lib*, *supra* note 154.

158 *Ad Hoc Committee Disclosure Requirements - A Bitter Pill to Swallow for Distressed Investors*, JONES DAY (May/June 2007), https://www.jonesday.com/files/Publication/0a396e1a-a5ef-4565-aa63-0ffd9b5e298f/Presentation/PublicationAttachment/430866bd-10b4-4267-9f78-14b09539c6b9/JD_NYI_3996293_1_2019%20Article%20for%20May_June%202007%20BRR.pdf.

interests."[159] Because these representatives are not bound by the confidentiality requirements which apply within the UCC,[160] they can speak publicly about their efforts and their understanding of the case. Ryan Hampton describes various unofficial ad hoc committees as outspoken advocates for victims of the opioid crisis and for increased transparency.[161]

However, unofficial ad hoc committees also lack many of the UCC's powers. They cannot investigate the debtor's financial condition, limiting the amount of information they can access; they cannot consult the trustee concerning the administration of the debtor's estate; and they are not automatically entitled to have the debtor's estate pay their attorneys' fees.[162] Hence, unofficial ad hoc committees may apply to become additional official creditors' committees to gain these powers.

Section 1102 does not provide clear guidelines for judges to use when considering the appointment of such additional committees. It merely states that "the court *may* order the appointment of additional committees of creditors . . . if necessary to assure adequate representation of creditors."[163] This degree of judicial discretion creates uncertainty.[164] The party asking for an additional committee must demonstrate that it is inadequately represented, and case law has set the bar high: the official committee must be incapable of functioning, or its members need to have breached their fiduciary duties to each other, for courts to take such a step. Therefore, the appointment of additional creditors'

159 *No More Ad Lib*, *supra* note 154.

160 *Official Committees of Unsecured Creditors: Why You Should (Or Should Not) Serve*, FOLEY & LARDNER LLP (Sept. 19, 2019), https://www.foley.com/en/insights/publications/2019/09/official-committees-of-unsecured-creditors [https://perma.cc/7PQM-MWR3] ("committee members may be prohibited from sharing information with creditors who are not members of the committee").

161 HAMPTON, *supra* note 91, at 107 (describing the Ad Hoc Committee on Accountability: "They were there to argue for accountability and transparency . . . . They could say things I couldn't.").

162 *No More Ad Lib*, *supra* note 154.

163 11 U.S.C. § 1102(a)(2).

164 Wiggins, *supra* note 156, at 1383.

committees is considered an "extraordinary remedy"[165] infrequently[166] granted, and rarely granted to mass tort victims.[167]

This is a lost opportunity. There are numerous benefits to having ad hoc committees, especially when they represent individuals who may not have a detailed understanding of the bankruptcy system, such as tort victims. Such official creditors' committees only represent one constituency, unlike the UCC, thus increasing that constituency's bargaining power. Special interest committees can therefore "provide crucial social support and institutional transparency" to those whom they represent, and thus "lend a sense of openness and legitimacy to a process that often seems quite mysterious to outsiders."[168] The benefits do not stop at voice and transparency: at least one scholar has argued that tort victims' outcomes in bankruptcy are significantly improved by the use of interest group-specific ad hoc committees.[169] The absence of any codified protection for tort claimants in the plan negotiation process—an often disenfranchised group of involuntary unsecured creditors with relatively little expertise—and the scarcity of additional official creditors' committees means that their voices are all too easily muted.

B. Opacity: Releases and Stays Suppress Information About Tortfeasors' Actions

Opaque legal proceedings are an affront to dignity on several levels. This is made clear by the fact that uncovering the truth is often therapeutic—the process can make victims feel more human after an objectifying experience by letting

165 McCarthy, *supra* note 134, at 443.

166 *No More Ad Lib*, *supra* note 154.

167 Foohey, *supra* note 88, at 139. Not to say that such appointments never occur—they do when the bankruptcy judge deems it necessary. *See* McCarthy, *supra* note 134, at 444 n.90 (collecting cases).

168 Wiggins, *supra* note 156, at 1382.

169 McCarthy, *supra* note 134, at 444 (arguing that "forming creditors' committees is (1) needed for public policy reasons; (2) necessary to guarantee tort claimants' due process rights; . . . and (4) practically important.").

them, for example, gather facts to tell their side of the story and regain whatever status they feel they have lost. The Chapter 11 process blocks fact-finding efforts from the start.

The filing of a bankruptcy petition triggers an automatic stay, which stops any judicial, administrative, or other action against the debtor from proceeding or commencing. The stay remains in effect until the case is either closed or dismissed, or a discharge from the stay is granted.[170] This is particularly significant for mass tortfeasors driven into bankruptcy due to the burden of litigation. It means that, among other things, discovery from any pending litigation grinds to a halt, delaying, if not permanently eliminating, clarity for victims seeking information about the misconduct that led to their injuries.[171]

In the USA Gymnastics case, for example, the victims of Larry Nassar hoped to expose the organization which had shielded him by suing it for alleged negligence, but these efforts had to end the moment USA Gymnastics filed for bankruptcy.[172] Moreover, USA Gymnastics' subsequent refusal to release documents detailing the extent to which officials were aware of Nassar's predatory behavior was "deeply disappoint[ing]" and felt like "a real betrayal," according to a survivor's attorney.[173] This suggests that the opacity baked into Chapter 11 may decrease tort creditors' trust in the bankruptcy process from the beginning. (This feeling is likely compounded by the fact that ad hoc creditors' committees do not have the right to the debtor's financial information after filing, let alone any individuals whom the UCC is meant to represent.) Moreover, one cannot effectively advocate for oneself or others while operating in the dark. From the get-go, then, the bankruptcy process, beginning with the all-important automatic stay, betrays three of Professor

170 11 U.S.C. §§ 362(a)(2), (c)(2).

171 Martinez, *supra* note 123, at 232.

172 *Id.*

173 Scott M. Reid, *Survivors overwhelmingly reject USA Gymnastics settlement offer*, ORANGE CNTY. REG. (Mar. 4, 2020), https://www.ocregister.com/2020/03/04/survivors-overwhelmingly-reject-usa-gymnastics-settlement-offer/ [https://perma.cc/D3LU-R4QY].

Tyler's requirements for a fair procedure: voice, perceived forum neutrality, and perceived decisionmaker trustworthiness.

Another effect of the automatic stay is that it prevents victims from having their day in court, facing the defendant. The bar on litigation, and even long-term immunization from legal liability, can extend to non-debtor entities. One of the tools available to debtors and related entities is called a nonconsensual third-party release, thus named because the immunized party is not the debtor itself, and the debtor's creditors do not consent to the release. These were originally fashioned in the 1980s to protect insurance companies from asbestos liabilities incurred by their clients, asbestos manufacturers who used the bankruptcy process to address mass tort lawsuits.[174] Congress subsequently codified this mechanism in Section 524(g) of the Bankruptcy Code, which applies solely to asbestos cases.[175] Starting in the 1990s, however, certain bankruptcy courts have sanctioned their use outside of the asbestos context.[176]

Such maneuvers have been hotly debated since their inception, both in academic and judicial circles.[177] At the moment, the Ninth and Tenth Circuits flatly prohibit the use of nonconsensual third-party releases on the basis that 11 U.S.C. § 524(e), which provides generally that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt," prohibits them.[178] Most circuits, however, hold that the broad

174 *What is the bankruptcy 'loophole' used in the Purdue Pharma settlement? The Economist explains*, ECONOMIST (Sept. 3, 2021), https://www.economist.com/the-economist-explains/2021/09/03/what-is-the-bankruptcy-loophole-used-in-the-purdue-pharma-settlement [https://perma.cc/SM7P-MQCM].

175 11 U.S.C. § 524.

176 Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959, 962 (1997) (describing this development).

177 *Id*. at 966.

178 11 U.S.C. § 524; *see also* Andrew M. Butler, *In Millennium, the Third Circuit Gives Nonconsensual Third-Party Releases in a Chapter 11*

sweep of 11 U.S.C. § 105—which permits bankruptcy judges to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions" of the Code—authorizes courts to immunize non-debtors under certain circumstances.[179] In courts that permit them, the releases must meet certain criteria. While the exact test varies by jurisdiction, judges typically consider whether the releases are essential to the debtor's reorganization, whether the non-debtor has contributed (or will contribute) significantly to the reorganization, whether there is an identity of interests between the debtor and the third party, whether the release is critical to the success of reorganization, whether affected creditors overwhelmingly support the plan, and whether the affected creditors will be paid.[180]

Setting aside questions of the legal validity of these releases and whether they can ever be justified from an economic point of view, one downside is clear: they eliminate a crucial element of dignitary justice: the victims' ability to hold—or even try to hold—alleged perpetrators to account. This has a twofold impact on tort claimants' dignity. First, victims are robbed of the chance of facing their adversary in court, or of forcing their adversary to hear their stories. Losing yet another opportunity to be heard—especially by the individuals whom the victims feel are responsible for their suffering—likely sharpens victims' sense of disenfranchisement and the feeling that they are being used.[181] Second, these releases make it harder to discover the truth. As Professor Levitin put it, "some creditors, particularly in mass tort cases, are concerned about more than a financial recovery; they want dignitary justice: *a clear record*

Plan a Stern *Look*, JONES DAY INSIGHTS (Apr. 2020), https://www.jonesday.com/en/insights/2020/04/the-third-circuit-gives-thirdparty-releases-a-ster [https://perma.cc/P598-PFVV] (collecting cases).

179 11 U.S.C. § 105; *see also* Butler, *supra* note 178.

180 *See, e.g.*, *In re* Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002); *see also In re* Metromedia Fiber Network, Inc., 416 F.3d 136 (2d Cir. 2005) (providing the test for the Second Circuit, which is similar to that in the Sixth).

181 *See supra* Section III.A.

of responsibility that vindicates the fact that they are victims of others' deliberate or callous wrongdoing. There is no opportunity to vindicate this sort of dignitary interest with a non-debtor release, as no wrong-doing is ever admitted."[182] Absent such a record, there is no acknowledgment of the harms done to the victims—and therefore no acknowledgment of their inherent worth and dignity.

The Purdue Pharma bankruptcy plan is illustrative. It contained one such nonconsensual release—for the Sackler family, Purdue's multi-billionaire owners.[183] As it stood until recently, the plan shielded the Sacklers from future opioid litigation and does not require them to admit wrongdoing. In exchange, the family would give up control and ownership of Purdue Pharma and would contribute approximately $4.3 billion over the next 10 years to states' and municipalities' opioid abatement programs.[184] The bankruptcy court's decision to approve the release spawned controversy, as critics believe it "lets the Sacklers off the hook" in exchange for a fraction of the profits the family is believed to have made from the opioid epidemic.[185] Victims of the opioid crisis expressed

[182] *Oversight of the Bankruptcy Code*, *supra* note 39 (emphasis added).

[183] Notably, this shielded the Sacklers from civil liability only, not criminal liability. *See* Brian Mann, *The Sacklers, Who Made Billions From OxyContin, Win Immunity From Opioid Lawsuits*, NPR (Sept. 1, 2021, 7:33 PM), https://www.npr.org/2021/09/01/1031053251/sackler-family-immunity-purdue-pharma-oxcyontin-opioid-epidemic [https://perma.cc/677F-8VEJ].

[184] Zachary B. Wolf, *The worst drug dealers in history are getting away with billions*, CNN (Sept. 3, 2021, 11:37 AM), https://www.cnn.com/2021/09/02/politics/what-matters-sackler-opioid-purdue-pharma/index.html [https://perma.cc/KM9Z-SJKR].

[185] Jonathan Randles, *Purdue Pharma Bankruptcy Plan Approved, Freeing Sacklers From Lawsuits*, WALL ST. J. (Sept. 1, 2021, 6:55 PM), https://www.wsj.com/articles/purdue-pharma-bankruptcy-plan-approved-freeing-owners-from-lawsuits-11630528636?mod=article_inline (quoting Washington Attorney General Bob Ferguson) [https://perma.cc/Q37P-T78A]; *see also* Jan Hoffman & Danny Hakim, *Purdue Pharma Payments to Sackler Family Soared Amid Opioid Crisis*, N.Y. TIMES (last updated Dec. 17, 2020), https://www.nytimes.com/2019/12/16/health/sacklers-purdue-payments-opioids-.html?te=1&nl=dealbook&emc=edit_dk_20191217?campaign_id=4&instan

deep frustration and outrage over the fact that would-be defendants are paying their way out of the justice system without taking responsibility or acknowledging victims' suffering.[186] A group of states appealed the plan, and on December 16, 2021, U.S. District Judge Colleen McMahon in New York found that bankruptcy judges cannot grant such releases. Judge McMahon clearly invited the Second Circuit to weigh in on the legality of nonconsensual third-party releases, calling it a "great unsettled question" and stating that "the lower courts desperately need a clear answer."[187] Purdue appealed her decision.[188]

IV. SOLUTIONS

For all the drawbacks of the Chapter 11 process as applied in the mass tort context, it still features some significant benefits as compared to litigation, even for victims.[189] Litigation is onerous, time-consuming, expensive, and uncertain. Various apparently debtor-friendly measures, such as third-party releases, may result in higher, faster payouts to claimants than traditional litigation.[190] While some

ce_id=14605&segment_id=19661&user_id=0d3607f1daa902d7801987af9c1ceb4a&regi_id=9440883620191217&login=email&auth=login-email [https://perma.cc/XA87-57VM] (describing a 2019 audit estimating that the Sacklers withdrew more than $10 billion from Purdue Pharma).

186 *See, e.g.* Brian Mann, *supra* note 183 ("'I've never seen any such abuse of justice,' said Nan Goldin . . . a leading opioid activist [formerly addicted to] OxyContin . . . . 'It's shocking. It's really shocking. I've been deeply depressed and horrified.'").

187 Jan Hoffman, *Judge Overturns Purdue Pharma's Opioid Settlement,* N.Y. TIMES (Dec. 16, 2021), https://www.nytimes.com/2021/12/16/health/purdue-pharma-opioid-settlement.html [https://perma.cc/AE82-CS57].

188 *Id.*

189 For an argument in favor of modeling aggregate mass tort litigation on bankruptcy, see Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960 (2012).

190 Clinton E. Cutler, *Is a Legislative Crackdown Coming on Third Party Releases in Bankruptcy Plans?*, FREDRICKSON & BYRON, P.A. (Sept. 24, 2021), https://www.fredlaw.com/the_restructuring_report/is-a-legislative-

individuals may be willing to wait longer for a payout if it means that they get to tell their story, it seems unfair to impose this burden across the board, especially when hundreds of thousands of victims in, for example, opioid litigation would never make it to court; it seems especially unfair if a delayed resolution reduces the payout going to the victims.[191] In addition, absent a major policy change, it seems likely that mass tortfeasors will continue to use the bankruptcy system to address their liabilities. Ideally, bankruptcy courts would be able to dispatch cases quickly while also recognizing the dignitary interests at stake to a greater degree than they have so far. Therefore, reform efforts should come in the form of tweaks to the system, which would enhance victims' dignity without eliminating the benefits that Chapter 11 offers.

A. The Equitable Powers of Bankruptcy Judges

When considering changes, it is necessary to consider upfront the limits to what bankruptcy judges can do without legislative reform. Bankruptcy courts are courts of equity and have the apparent ability to fashion broad relief under Section 105(a), which states that the "court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title."[192] However, the Supreme Court has indicated that their power is not as broad as the text of Section 105 suggests. It has clarified that bankruptcy

crackdown-coming-on-third-party-releases-in-bankruptcy-plans/ [https://perma.cc/CT7X-FFDC].

191 Martinez, *supra* note 123, at 227 ("Some members may opt out of class membership to pursue their claim individually, but they run the risk of receiving a smaller payout than the class members.") As Kathy Strain, an advocate and grandmother of a child exposed to opioids in the womb, put it: "It's time to get this done and over with, get this money into our communities . . . We need resources today, not five years from now." Martha Bebinger, *The Purdue Pharma Deal Would Deliver Billions, But Individual Payouts Will Be Small*, NPR (Sept. 28, 2021), https://www.npr.org/2021/09/28/1040447650/payouts-purdue-pharma-settlement-sackler [https://perma.cc/7L4E-L8L5].

192 11 U.S.C. § 105(a).

judges' power "can only be exercised within the confines of the Bankruptcy Code,"[193] and that the judge must focus on the "ultimate goal of Chapter 11" when considering the equities: "The Bankruptcy Code does not authorize freewheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization."[194] In his book *Bankruptcy and the Supreme Court*, Professor Ronald Mann shows that the Supreme Court "systematically . . . underenforce[s] the Bankruptcy Code" and has "in almost every close case . . . ruled against a broad application of the Bankruptcy Power."[195] As of 2017, the Supreme Court "has taken the narrow view" of bankruptcy judges' power "almost three-quarters of the time."[196] These insights advise caution when crafting remedies. For example, Professor Lipson points out that bankruptcy courts "doubtless lack the power" to order debtors "to say they are sorry, or to order the victims to accept such apologies,"[197] as such a use of the court's equitable powers would not be directed at an "ultimate goal of Chapter 11"[198] or the "success of the reorganization."[199]

193 Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988).

194 NLRB v. Bildisco & Bildisco, 465 U.S. 513, 527 (1984).

195 RONALD MANN, BANKRUPTCY AND THE SUPREME COURT 4 (2017).

196 *Id.* at 231.

197 Jonathan Lipson, *When Churches Fail: The Diocesan Debtor Dilemmas*, S. CAL. L. REV. 363, 453 (2006).

198 Unless, of course, dignitary justice becomes a central goal of Chapter 11, which seems highly unlikely.

199 NLRB v. Bildisco & Bildisco, 465 U.S. 513, 527 (1984). The limitations on Section 105 powers can cut in favor of victims as well, however. The Supreme Court in *Law v. Siegel*, 571 U.S. 415 (2014) ruled that a bankruptcy court may not contravene specific statutory provisions of the Code when exercising its power under Section 105. This suggests that nonconsensual third-party releases are prohibited by the Code, as the Ninth and Tenth Circuits have ruled. Section 524(e) provides that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). The courts which have relied on their equitable powers under Section 105 to grant such releases seem to act in direct contravention of Section 524(e), as nonconsensual third-party releases make the liability of third parties contingent on the discharge of the debtor's debt. If the Supreme Court ever decides to eliminate nonconsensual third-party releases outside of the

B. Voice

1. Voice: Direct

Absent the opportunity to tell their side of the story, participants in legal proceedings can feel used, Professors Bayefsky's and Chamblee Burch's research suggests.[200] But the benefits of voice go beyond the victims themselves: per Professor Tyler's theory, the very legitimacy of a process hinges, in part, on whether the parties are treated with dignity. By taking simple, low-cost steps to allow for more tort victims to tell their stories, the broader public may ultimately trust the corporate bankruptcy system more, even if the victims' financial outcomes remain the same with these interventions as without. Indeed, the fact that such interventions would most likely not change the ultimate allocation of assets means that there should be little resistance to carving out a space for involuntary tort claimants to air their grievances.

It is useful to look to, and borrow from, legal movements in which the importance of victims' voices has been explicitly recognized to see how they forced a field to reckon with dignitary justice. The crime victims' rights movement is one example. The traditional model of criminal justice focused on the relationship between the defendant and the state. Victims' rights advocates felt that they and their families were ignored and treated as "non-participants in a critical event in their

asbestos context, it would thereby eliminate a major threat to tort victims' dignity. I am grateful to Professor Mann for this insight. *But see Congressional Committees Propose Changes to Bankruptcy Code Prohibiting Non-Consensual Releases of Third Parties and Limiting Other Important Bankruptcy Tools*, GIBSON DUNN (Aug. 2, 2021), https://www.gibsondunn.com/congressional-committees-propose-changes-to-bankruptcy-code-prohibiting-non-consensual-releases-of-third-parties-and-limiting-other-important-bankruptcy-tools/ [https://perma.cc/5XEM-PCSS] (arguing in favor of nonconsensual third-party releases).

200 *See supra* Section III.A.

lives" under this model.[201] (Note the similarity in sentiment between crime victims and the tort victims discussed in Part II.A, *supra.*) They argued that the criminal justice system can and should care about victims' rights as well as defendants', and lobbied for fuller participatory rights in criminal proceedings, including the right to be heard.[202] The Crime Victims' Rights Act (CRVA) was one of the movement's victories: it grants to victims "an express, enforceable right to be present and reasonably heard" at any public court or parole proceeding, including sentencing, in federal courts.[203]

Victim allocution enhances the dignity of the victim by giving him a cathartic outlet and acknowledgment by the judge and society at large, if not by the defendant himself.[204] Commentators note that allowing victims to speak at sentencing serves a healing function and allows victims to overcome feelings of powerlessness: "Confronting defendants in open court undoubtedly helps some victims overcome feelings of weakness and loss of status."[205] Professor Richard Bierschbach has argued that allocution is most important for the harms which "flow from *procedural mistreatment* (actual or perceived) by the justice system itself . . . . By giving victims a clear and uninterrupted voice . . . on par with that of

201 Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims' Rights* Act, 26 YALE L. & POL'Y REV. 431, 439 (2008) (internal citation omitted).

202 *Id*. at 433.

203 *Id* at 431 (internal citation omitted), 434.

204 *Id*. at 444.

205 Richard A. Bierschbach, *Allocution and the Purposes of Victim Participation under the CVRA*, 19 FED. SENT'G REP. 44, 46 (2006) (emphasis added); *see also* Briannie Kraft, *Victim Impact Statements and the Case of Larry Nassar*, SYRACUSE L. REV. (Feb. 1, 2018), https://lawreview.syr.edu/victim-impact-statements-and-the-case-of-larry-nassar/ [https://perma.cc/W7WG-JH39] ("Research conducted by Mothers Against Drunk Driving (MADD) helps to illustrate this point. MADD found that 62% of victims were 'satisfied' with the criminal justice system, if they were allowed to present an oral victim impact statement. Meanwhile, 75% of victims, who were not given the opportunity to give any form of a victim impact statement, were 'dissatisfied' with the criminal justice system. The study concluded that victim trauma was reduced when victims were 'taken seriously and believed.'").

defendants and prosecutors, a right to allocate signals both society's recognition of victims' suffering and their importance to the criminal process."[206] In short, allocution restores a measure of dignity to crime victims.

There are parallels between the criminal justice system and the Chapter 11 process as applied to mass tortfeasors. As discussed above, the law-and-economics framework focuses on private debtor-creditor relations, so it is unlikely that noncontractual third-party rights (such as those of tort victims) would be recognized under this regime—just as crime victims' participation rights were initially sidelined by the criminal justice system, which only cared about defendant-state relations. By explicitly tying voice to human dignity, crime victims' advocates successfully pushed for procedural changes that granted them the right to be heard. Tort victims experience a dehumanizing process which renders them "non-participants" at a critical juncture in their lives; it is now their turn to agitate for similar procedural changes to Chapter 11. This is especially clear under Professor Jacoby's model of bankruptcy as a public-private partnership, if one recognizes that the preservation of human dignity is a goal of the state. Given, too, that much of the damage comes from Chapter 11's procedures, Professor Bierschbach's theory indicates that giving victims a platform to speak may be especially necessary in corporate bankruptcy cases.

There are low-cost ways of increasing the volume of victims' voices in Chapter 11 proceedings. For example, a court can set aside a few days toward the end of the proceedings—even after plan confirmation—during which victims could appear in, or call into, court to share their stories, on the record, ideally in front of debtors' representatives. The author could find one court which has taken a step in this direction. In the wake of the General Motors bankruptcy, the presiding judge permitted retirees to call into open court and tell the public how the case affected them.[207] Though no studies assessing the impact of such

206 Bierschbach, *supra* note 206, at 46.

207 Jacoby, *supra* note 43, n.142.

opportunities on creditors' wellbeing and satisfaction seem to exist, in theory, insights from the criminal justice system about the therapeutic effects of allocution should apply in the bankruptcy setting as well. Being heard by a bankruptcy judge, by the tortfeasor, and by the public would likely be a cathartic experience for victims who wished to participate. Even if not all get to speak—if, say, victim advocacy organizations have to select a representative to speak on behalf of a larger group which cannot be accommodated in court—adequate representation at such a proceeding by a constituent member may be sufficient. At least, it would be a step in the right direction. Including written affidavits by any victim who wished to write into court in the case's record would provide an even lower-cost fix. Judge Drain, for one, published dozens of letters from individuals harmed by the opioid crisis; these letters are now part of the public record of the Purdue case and have been relied upon by national media sources to help tell the story of the opioid crisis.[208]

A related idea is encouraging victims to demand apologies from corporate tortfeasors. This would require tortfeasors to explicitly and publicly recognize their wrongs, thereby promoting and validating the victims' stories. While bankruptcy judges cannot force apologies, apologies can be negotiated during the plan process and included as explicit terms in the ultimate agreement. This would require two things: adequate representation of victims at the negotiating table, and widespread awareness of the potential of apologies as bargaining chips. The former issue is addressed below. As for the latter, creditors' attorneys and victim advocates should borrow from the bankruptcy plans of dioceses that harbored sexual abusers, which have included "nonmonetary commitments" requiring bishops to encourage survivors to come forward and speak about their suffering, to write them letters of apology, and even to publicly support the repeal of

[208] Brian Mann, *As Purdue Pharma Bankruptcy Nears Approval, Family Members Write About The Human Toll*, NPR (Aug. 9, 2021), https://www.npr.org/2021/08/09/1025171160/victims-of-purdue-pharmas-painkillers-read-their-letters-to-the-court [https://perma.cc/PE9U-8UBV].

criminal statutes of limitations for child sex offenses.[209] These are functionally costless, post-bankruptcy measures. Corporations experiencing PR crises, especially public corporations, and which have something to gain from salvaging their reputation may be amenable to including analogous terms in their bankruptcy plan agreements.

2. Voice: Indirect: Creditors' Committees and Voting

Though replete with other drawbacks, there are benefits to how the Purdue Pharma and USA Gymnastics bankruptcy cases unfolded with regard to the representation of unsecured creditors. In particular, opioid victims coalesced into a number of unofficial, ad hoc committees in the Purdue Pharma case, which, as discussed above, effectively voiced the concerns of various constituencies which had been impacted by the opioid epidemic and pushed for greater transparency in the Chapter 11 process. They should serve as inspiration to future tort creditors who hope to attract public attention to the individualized concerns of their constituency.

The USA Gymnastics case serves as an even better example to follow. The U.S. Trustee created an Additional Tort Claimants Committee of Sexual Abuse Survivors in that case—an official additional creditors' committee, which works alongside the UCC—which features nine survivors of Larry Nassar's abuse.[210] As Professor Corinne McCarthy argues in her article *Creditors' Committees: Giving Tort Claimants a Voice in Chapter 11 Bankruptcies*, there are benefits to creating official creditors' committees solely for tort victims, some of which are laid out above.[211] These benefits include

[209] Woodworth Winmill, *Enforcing the Unenforceable: Monetary Remedies for Breaches of Nonmonetary Provisions in Sex Abuse Chapter 11 Plans*, 96 AM. BANKR. L.J. 653, 654–55 (2022).

[210] Daniel Gill, *Aly Raisman Named to Abuse Survivor Panel in USA Gymnastics Case*, BLOOMBERG L. (Dec. 20, 2018), https://news.bloomberglaw.com/bankruptcy-law/aly-raisman-named-to-abuse-survivor-panel-in-usa-gymnastics-case [https://perma.cc/M5G4-HSZ2].

[211] See *supra* Section III.A.ii.

both improved outcomes and fairer processes for tort victims by giving them an undiluted voice in the plan negotiation process. Professor McCarthy's idea is laudable and would create a measure of dignitary justice for tort victims, too.

As for the potential of inadequate notice, as in the Purdue case, it would be worthwhile to add a layer of scrutiny to how, exactly, debtors and contractors like Kroll go about providing notice to victims across the country. Judicial review would be costly, but such expense must be weighed against the due process costs of leaving tort victims without legal recourse against a debtor-tortfeasor. Unfortunately, the debtor's incentives directly oppose its victims': the debtor likely wants to minimize the number of claims filed against it and to spend the least amount of money possible on alerting victims to their rights, and so should only be expected to meet the constitutional minimum requirements for notice. There is no reason why a third-party agency like Kroll would act differently. Because these misaligned incentives arguably threaten victims' constitutional as well as dignitary rights, this dynamic calls for bankruptcy judges to take active roles in mediating disputes over notice procedures. Moreover, it seems reasonable for judges handling mass tort bankruptcies, which create creditors out of individuals dispersed throughout the country, to require publication of notice in a national, reputable paper, as in *Sweeney v. Alcon Labs*.[212]

C. Opacity

As suggested at numerous points above, the Chapter 11 process is opaque to non-experts at almost every step—from the moment a tort victim has to figure out how to file her claim, to the automatic stay pausing discovery in its tracks, to secretive plan negotiations. This once again threatens to decrease trust in the system—especially if it seems as though the Chapter 11 process protects debtor-tortfeasors' secrets—and thereby contributes to tort victims' feeling demeaned and

[212] Sweeney v. Alcon Lab'ys, No. 20-2066 ES, 2021 WL 1546031, at *3 (3d Cir. Apr. 20, 2021).

used.[213] Moreover, operating in the dark inhibits effective victim advocacy.

One interesting move which at least two UCCs have made is opening a Twitter account to post information and updates regarding the debtors' bankruptcy proceedings. The UCCs of two cryptocurrency companies, Voyager and Celsius, are using the social media platform to provide updates on scheduling matters,[214] explain decisions made during their respective debtors' bankruptcies,[215] answer questions,[216] and more, all in language accessible to non-lawyers. This is a promising step towards greater transparency for lay creditors, and should be adopted outside of the cryptocurrency arena.

Separately, a bargaining chip that victims' representatives should know about is their ability to demand that documents regarding their tortfeasors' alleged misfeasance be released. The Purdue Pharma plan had this feature: the company agreed to release more than 30 million documents to a public repository, which together were "expected to unfurl the full story of the company's and the Sacklers' involvement in the selling of OxyContin."[217] The settlement which gun manufacturer Remington reached with the families of nine

213 *See supra* Section III.A.

214 CELSIUS OFF. COMM. OF UNSECURED CREDITORS (@CelsiusUCC), TWITTER (Jan. 10, 2023, 8:24 A.M.), https://twitter.com/CelsiusUcc/status/1612802602588151808?s=20 [perma.cc/6X4C-RTW9].

215 VOYAGER OFF. COMM. OF UNSECURED CREDITORS (@VoyagerUCC), TWITTER (Dec. 19, 2022, 7:07 P.M.), https://twitter.com/VoyagerUCC/status/1604991760295677952?s=20 [perma.cc/6ZQJ-SBNC].

216 VOYAGER OFF. COMM. OF UNSECURED CREDITORS (@VoyagerUCC), TWITTER (Jan. 10, 2023, 12:38 P.M.), https://twitter.com/VoyagerUCC/status/1612866531939192840?s=20 [perma.cc/9URQ-MLKS]; VOYAGER OFF. COMM. OF UNSECURED CREDITORS (@VoyagerUCC), TWITTER (Oct. 28, 7:02 P.M.), https://twitter.com/VoyagerUCC/status/1586131196500905984?s=20 [perma.cc/VW5C-ND6E].

217 Jan Hoffman, *Purdue Pharma's Creditors Overwhelmingly Endorse Bankruptcy Plan*, N.Y. TIMES (July 27, 2021), https://www.nytimes.com/2021/07/27/health/purdue-bankruptcy-creditors-settlement.html [https://perma.cc/K7NK-L25W].

Sandy Hook school shooting victims contains a similar provision: Remington "agreed to release thousands of pages of internal company documents, including possible plans for how to market the weapon used in the massacre," a feature of the settlement plan which had been a "key sticking point" during negotiations.[218] In cases in which victims (and the public) have a strong interest in discovering the truth, such releases should be strongly encouraged by bankruptcy judges, and creditors should advocate for their use.

Professor Lindsey Simon has also advocated for increasing the disclosure requirements of non-debtor beneficiaries of the bankruptcy. She points out that debtors expose their financial condition to scrutiny when they file for bankruptcy, and argues that imposing similar disclosure requirements on non-debtors who seek to benefit from the Chapter 11 process (e.g. through immunization) would accelerate negotiations and help prevent fraudulent asset transfers.[219] While financial disclosures would not serve quite the same purpose as disclosure through document discovery, it could still give victims more leverage in the bargaining process to know just how much their opponents might be willing to contribute to a plan.

V. CONCLUSION

As a growing number of mass tortfeasors choose to file for bankruptcy rather than face litigants in more traditional settings, they threaten to undermine the dignitary interests of the tort creditors who have no choice but to assert their claims in bankruptcy court. The Chapter 11 process poses unique challenges to tort victims, some of which this Note

218 Rick Rojas, Karen Zraick & Troy Closson, *Sandy Hook Families Settle With Gunmaker for $73 Million Over Massacre*, N.Y. TIMES (Feb. 15, 2022), https://www.nytimes.com/2022/02/15/nyregion/sandy-hook-families-settlement.html [https://perma.cc/G67T-2TQA]; *see also* Rick Rojas & Kristin Hussey, *How Sandy Hook Families Hope to Pierce the Gun Industry's Legal Shield*, N.Y. TIMES (April 8, 2019), https://www.nytimes.com/2019/04/08/nyregion/sandy-hook-gun-lawsuit.html [https://perma.cc/JJX8-3TPG].

219 Simon, *supra* note 38, at 1204–05.

explores; in particular, victims' voices often go unheard, and their claims are litigated in a forum which they and the public apparently distrust. Bankruptcy scholarship and practice have yet to explicitly address the dignitary harms which the bankruptcy process wreaks on tort creditors. This Note hopes to close that gap, and to suggest some low-cost fixes that can advance victims' interests.