VICTIM IMPACT STATEMENTS IN MASS TORT BANKRUPTCY CASES: BALANCING CHAPTER 11'S PROCEDURALISM WITH TORT LAW'S COMMITMENT TO NONMONETARY RECOVERY

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ABSTRACT

Bankruptcy has evolved into tortfeasors' choice of law for resolving mass tort litigation. The United States Bankruptcy Code is equipped with procedural devices designed to maximize litigants' financial recovery and enhance judicial efficiency. Although bankruptcy procedures aim to resolve widespread liability and open the courthouse doors to litigants who may not otherwise recover, they simultaneously overlook the nonmonetary and dignitary objectives underlying tort law. This Note uses the Supreme Court's recent decision in *Harrington v. Purdue Pharma*—a high-profile example of mass tort litigation resolved through bankruptcy—to examine the extent to which bankruptcy procedures are unable to fulfill the nonmonetary objectives sought by mass tort litigants, such as the opportunity to be heard. Drawing upon the victims' rights movement that codified victims' legal right to be reasonably heard throughout criminal judicial proceedings, this Note proposes that mass tort victims whose claims are resolved in bankruptcy court should be similarly entitled to exercise their legal right to be heard through victim impact statements. Extending this legal right to mass tort victims, who are often precluded from actively participating in litigation, balances the irreconcilable objectives sought by bankruptcy law and tort law. This Note also addresses the logistics behind the recommendation's practical implementation before defending it against three possible critiques. Overall, this Note aims to extend discussion of *Harrington* as a means of identifying and understanding the often-overlooked issues with litigating mass tort claims in bankruptcy court.

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Sections I.B.1 and III.C include discussion of sexual harassment and abuse, which may be unsettling for some readers.

TABLE OF CONTENTS

INTRODUCTION

Aggregate litigation plays an important role in resolving mass torts[1] and increasing access to justice.[2] Without aggregation, victims harmed by faulty medical devices, sexual predators, or toxic chemicals may not otherwise have the opportunity to litigate[3] or recover on their small-value claims.[4] For example, individual litigants may lack the financial resources to support the high costs of litigation, or their case may present enough uncertainty that deters lawyers who are paid on a contingency-fee basis from representing them.[5] Accordingly, aggregate litigation, which includes class actions, multidistrict litigation, and bankruptcy procedures, opens the courthouse doors to litigants whose circumstances otherwise preclude them from having their day in court.[6]

Aggregate litigation also promotes judicial efficiency and fairness.[7] Courts are able to consolidate thousands of claims spanning a wide geographic area, apply consistent judgments across the board, and reduce litigation costs.[8] The potential "pitfall" of aggregate litigation, however, is its impact on individual voice and control.[9] Aggregate litigation has the potential to silence individual voices[10]—ironically, the very voices of those whose alleged injuries support the litigation in the first place. And perhaps paradoxically, as more victims speak out against their alleged tortfeasors and as their collective injuries accumulate, the judicial system becomes less able to provide individual justice.[11] Procedural devices used in aggregate litigation may foster judicial efficiency by moving along claims expeditiously,[12] but they also inevitably leave some voices out of the process.[13]

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1. William Organek, *Mass Tort Bankruptcy Goes Public*, 77 VAND. L. REV. 723, 733 (2024).
2. Tom R. Tyler, *The Psychology of Aggregation: Promise and Potential Pitfalls*, 64 DEPAUL L. REV. 711, 712 (2015) ("[A]ggregation is desirable because it allows more people access to bring their grievances into the legal system . . . .").
3. *See generally id.* at 719 ("This limitation has become very apparent in situations of mass injury, where many people suffer similar injuries emanating from a similar source that they may not be able to seek justice for under traditional models of litigation.").
4. Organek, *supra* note 1, at 733.
5. Tyler, *supra* note 2, at 719.
6. *Id.* at 720; Organek, *supra* note 1, at 726 n.8.
7. David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J 561, 565 (1987).
8. Organek, *supra* note 1, at 733–34 (Aggregation is seen as a "crucial alternative to inefficient and unfair case-by-case adjudication."); Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1164–65 (2022); Rosenberg, *supra* note 7, at 565; *see* Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. DAVIS L. REV. 1613, 1625 (2008).
9. Tyler, *supra* note 2, at 721.
10. *See id.*
11. Smith, *supra* note 8, at 1617–18; Tyler, *supra* note 2, at 721. *See generally* Mike Spector, Benjamin Lesser, Disha Raychaudhuri, Dan Levine, & Kristina Cooke, *How Corporate Chiefs Dodge Lawsuits Over Sexual Abuse and Deadly Products*, REUTERS (Nov. 7, 2022, 11:00AM) [hereinafter *Corporate Chiefs*], https://www.reuters.com/investigates/special-report/bankruptcy-tactics-releases/.
12. Smith, *supra* note 8, at 1649; *Corporate Chiefs*, *supra* note 11.
13. *See* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 3 (1995) ("How can we provide each plaintiff and each defendant with the benefits of a system in mass torts that treats

This Note discusses the often-overlooked consequences of litigating mass torts in bankruptcy court, which has evolved into the forum of choice for resolving mass torts.[14] Part I briefly discusses the principles underlying tort law before examining the complex motivations that often compel vulnerable victims to file suit. This Part draws on research about the Catholic Church clergy abuse scandal[15] and sentiments expressed by opioid litigants to identify important nonmonetary goals sought by mass tort litigants. Part II traces bankruptcy's evolution into tortfeasors' choice of law for resolving mass torts litigation before using the opioid litigation against Purdue Pharma[16]—a recent example of mass tort litigation pursued in bankruptcy court—as a case study to illustrate how bankruptcy's procedures inhibit victims from vindicating their nonmonetary and dignitary objectives, including the opportunity to be heard. Part III discusses the victims' rights movement and its influence on the codification of certain protections for victims of violent crime, including the legal right to deliver victim impact statements to the court. This Part evaluates the role of victim impact statements in amplifying litigant voices throughout the sentencing hearing of former USA Gymnastics physician Larry Nassar.[17] Finally, Part IV argues that the legal right to submit victim statements should not be limited to criminal cases and should also extend to mass tort cases litigated in bankruptcy court. This Part also explores the feasibility of implementing this recommendation before defending it against three potential critiques.

By analyzing high-profile examples of mass tort litigation and describing the ways in which group litigation procedures silence mass tort litigants, this Note contributes a different perspective to the ongoing academic discussion of the Bankruptcy Code prompted by the Supreme Court's recent decision in *Harrington v. Purdue Pharma L.P.*[18] This Note supplements published scholarship that evaluates and critiques the use of Chapter 11 bankruptcy procedures to resolve mass tort claims,[19] and it

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him or her as an individual person? How can each person obtain the respect that his or her individuality and personal needs should command in an egalitarian democracy such as ours?").

14. Organek, *supra* note 1, at 733 (explaining that bankruptcy offers debtors certain benefits unavailable in other forms of aggregate litigation).

15. Jennifer M. Balboni & Donna M. Bishop, *Transformative Justice: Survivor Perspectives on Clergy Sexual Abuse Litigation*, 13 CONTEMP. JUST. REV. 133, 133 (2010).

16. WEN W. SHEN, CONG. RSCH. SERV., LSB10365, OVERVIEW OF THE OPIOID LITIGATION AND RELATED SETTLEMENTS AND SETTLEMENT PROPOSALS 1 (2019); *see also* Harrington v. Purdue Pharma L.P., 603 U.S. 204, 209–10 (2024).

17. Katie L. Gibson, *A Rupture in the Courtroom: Collective Rhetoric, Survivor Speech, and the Subversive Limits of the Victim Impact Statement*, 44 WOMEN'S STUD. IN COMMC'N 518, 518 (2021).

18. 603 U.S. 204 (2024).

19. *See* Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 VA. L. REV. 1261, 1264–66 (2023) (describing how corporations are increasingly resorting to Chapter 11 bankruptcy procedures to bypass procedural justice); *see also* Simon, *supra* note 8, at 1158 (identifying bankruptcy grifters as those who attempt to reap the benefits of bankruptcy without filing for bankruptcy themselves); Daniel J. Bussel, *The Mass Tort Claimants' Bargain*, 97 AM. BANKR. L.J. 684, 686 (2023) (explaining the criticism behind the use of bankruptcy procedures to resolve mass tort claims).

should be read in tandem with any discussion imploring Congress to revise the Bankruptcy Code. The central point of this Note is to critically examine the ways in which the judicial pendulum has swung too far in the direction of proceduralism—at the expense of mass tort victims and their voices.

I. WHY DO MASS TORT VICTIMS CHOOSE TO LITIGATE?

Mass tort litigants seek relief through litigation despite "long delays, high transaction costs, defendant bankruptcies, and unpaid claimants."[20] Thus, economic incentives do not fully account for the motivations of mass tort litigants. To that end, this Part first explains the theories of tort law before drawing on the Catholic Church clergy abuse scandal to identify some of the nonmonetary objectives mass tort litigants seek. Then, this Part illustrates the extent to which these nonmonetary objectives overlapped with the motivations shared by opioid victims and their families throughout the litigation against Purdue Pharma. Finally, this Part narrows in on one specific nonmonetary objective sought by opioid victims: the desire to be heard in court. Overall, this Part aims to provide a theoretical framework to identify the restorative goals mass tort litigants seek and their willingness to enter a "perilous"[21] arena in pursuit of those goals.

A. Tort Law's Objectives and Values

Even though tort law has been the subject of philosophical reflection since the days of Aristotle,[22] the foundations of American tort law stand on shaky ground because "consensus is nowhere in sight."[23] Disagreement among theorists makes it difficult to extrapolate a uniform set of beliefs regarding the purposes and objectives of tort law.

In the broadest sense,[24] theorists justify tort law on instrumental or moral grounds.[25] Instrumental scholars view tort law as an institution designed to achieve one or more several public policy or social goals: to compensate the injured, to deter risky behavior,[26] or to promote the efficient allocation of resources.[27] Instrumental theories of tort law, such as

20. THOMAS E. WILLGING, FED. JUD. CTR., APPENDIX C: MASS TORTS PROBLEMS & PROPOSALS 3 (1999) (quoting Professor John Siliciano).

21. Balboni & Bishop, *supra* note 15, at 133 (explaining that mass tort litigation is "perilous" for survivor–litigants, whose childhood trauma caused substantial and lasting psychological and emotional harm).

22. ARTHUR RIPSTEIN, STANFORD ENCYCLOPEDIA OF PHILOSOPHY: THEORIES OF THE COMMON LAW OF TORTS 5 (summer 2022 ed., 2022).

23. Jason M. Solomon, *Judging Plaintiffs*, 60 VAND. L. REV. 1749, 1753 (2007).

24. This Section is not intended to capture the philosophical nuances underlying various tort theories. It aims, however, to accomplish two tasks: (1) to alert readers—particularly those unfamiliar with tort law—to spectrums of the theoretical debate, and (2) to present readers with a general framework to facilitate their understanding of tort law, particularly to demonstrate how the Note's recommendation embraces and aligns with tort law's moral objectives.

25. Solomon, *supra* note 23, at 1753.

26. *Id.* at 1755.

27. Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 1, 37 (2018).

the law and economics approach,[28] strongly influenced contemporary tort law, but have come under attack in recent years because they do not, among other things, provide adequate analyses of tort law concepts or achieve their stated goals particularly well.[29]

The moral theory of tort law lies at the other end of the spectrum and posits that tortfeasors have a moral responsibility to repair losses caused by their wrongdoing.[30] More specifically, the corrective justice model—the leading example of the moral theory of tort law[31]—"treats an injury as disturbing the equilibrium that existed before the injury and tort law as the mechanism for 'correcting' or restoring the normative equilibrium."[32] For example, corrective theorists view "two parties in a position of equality, represented by a line divid[ing them] into equal segments."[33] When one party wrongs the other, the tortfeasor's segment becomes longer while the victim's segment becomes shorter.[34] Corrective theorists view tort law as a means of restoring the parties' equilibrium by taking from the tortfeasor and giving to the victim,[35] typically through compensatory damages.[36] Corrective justice theory's central logic is to make the plaintiff "whole."[37] Though other moral theories of tort law have critiqued corrective justice theory, judges tend to rely on its principles.[38]

Two other moral theories, expressivism and civil recourse theory, warrant discussion here because they observe principles that closely align with the dignitary goals that motivate tort victims to litigate their claims.[39] Expressivism, defended by Scott Hershovitz of the University of Michigan Law School, suggests that tort law's purpose lies in what it communicates—namely, that the defendant wronged the plaintiff.[40] Hershovitz recognizes that some scholars may write off this point as trivial, but counterargues that "[s]ometimes we need to say, clearly and loudly, *this defendant wronged that plaintiff*"[41] in order to vindicate a victim's social standing.[42]

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28. "[T]he goal of tort law is to maximize social welfare by minimizing the costs of accidents and accident prevention." Solomon, *supra* note 23, at 1756.

29. ZAHR K. SAID, TORT LAW: A 21ST-CENTURY APPROACH 11 (2d ed. 2022); Solomon, *supra* note 23, at 1755–56.

30. John C.P. Goldberg & Benjamin C. Zipursky, *Thoroughly Modern Tort Theory*, 134 HARV. L. REV. F. 184, 186 (2021).

31. Solomon, *supra* note 23, at 1759.

32. *Id.*

33. Hershovitz, *supra* note 27, at 37.

34. *Id.*

35. *Id.*

36. Solomon, *supra* note 23, at 1759.

37. SAID, *supra* note 29, at 11–12.

38. Solomon, *supra* note 23, at 1759–60.

39. *See infra* Sections I.B.1–2.

40. Hershovitz, *supra* note 27, at 2.

41. *Id.* at 4.

42. *Id.* at 10.

In essence, expressivism is "a vivid illustration of the equalizing and empowering force of tort law."[43]

While the expressive argument for tort law focuses on the message communicated, proponents of civil recourse theory view tort law as an institution that allocates power by providing victims who have been wronged with a private right of action.[44] According to this theory, tort law provides an injured person with a right of recourse—the right to have their legal claim evaluated.[45] Tort law thus respects dignity by giving power to the injured person.[46]

Though these philosophical theories do not definitely or uniformly resolve tort law's purposes and objectives, they do arrive at some consensus: tort law is not just about money and harm.[47] Tort law is about empowerment,[48] vindication of physical, emotional, and dignitary rights,[49] and accountability for wrongdoing.[50]

B. Motivations of Mass Tort Litigants

The previous Section provided a general framework for understanding tort law's nonmonetary objectives. This Section now turns to two high-profile mass tort cases to identify the specific motivations of mass tort victims who opted to litigate their civil claims against the Roman Catholic Archdiocese of Boston (for its role in the clergy abuse scandal) and against Purdue Pharma (for its role in the opioid crisis). This Section concludes with an acknowledgment that the moral framework for understanding tort law—i.e., corrective justice, expressivism, and civil recourse theory—closely aligns with what mass tort victims aim to achieve through litigation.

1. Catholic Church Clergy Abuse Survivors: Litigation as a Tool for Truth-Seeking, Accountability, and Dignity

In 2002, 552 survivors[51] of clergy sexual abuse sued the Roman Catholic Archdiocese of Boston, sparking national lawsuits against the

43. Benjamin C. Zipursky, *Expressivism, Corrective Justice, and Civil Recourse*, JOTWELL (Feb. 20, 2018), https://torts.jotwell.com/expressivism-corrective-justice-civil-recourse/.

44. *Id.*

45. SAID, *supra* note 29, at 12.

46. Zipursky, *supra* note 43.

47. *Id.*

48. Julia Brodsky, *The Big Idea: Torts are Wrongs*, FORDHAM L. NEWS (July 7, 2020), https://news.law.fordham.edu/blog/2020/07/07/the-big-idea-torts-are-wrongs/.

49. Tort law provides redress to those who suffer physical injury but evolved throughout the twentieth century to provide causes of action for those who suffer dignitary or emotional harm, allowing claims such as intentional infliction of emotional distress, defamation, and intrusion upon seclusion. *See* Leslie Bender, *Tort Law's Role as a Tool for Social Justice Struggle*, 37 WASHBURN L.J. 249, 256–57 (1998).

50. Brodsky, *supra* note 48.

51. Academic literature, news media articles, and organizations often refer to those who experience sexual abuse as "survivors." This Note follows that practice. *See, e.g.*, JENNIFER M. BALBONI, CLERGY SEXUAL ABUSE LITIGATION: SURVIVORS SEEKING JUSTICE 2 (2011); *Resources for*

Catholic Church that implicated multiple perpetrators and dioceses across several countries.[52] After these survivors filed suit, critics accused them of being financially opportunistic.[53] Recognizing the survivors' vulnerability, two Northeastern University criminology scholars conducted a study to better understand why they voluntarily and publicly exposed themselves to additional harm by initiating or joining litigation.[54] The researchers sought to clarify survivors' multiple objectives and identify litigation's role in rendering positive and transformative outcomes.[55]

The study involved face-to-face interviews with twenty-two survivors who filed suit against the Catholic Church and more than a dozen plaintiffs' attorneys and legal advocates.[56] The researchers found that in the early stages of litigation, the survivors remained primarily motivated to expose the truth of their abuse.[57] Some sought the truth as a healing mechanism—to "exorcize the ghosts of their memories"—in order to release them of the shame and humiliation they carried.[58] Contrary to allegations that the survivors sought to "cash in" on their claims, none of the surveyed survivors identified money as their primary motivation for filing suit.[59] One survivor aptly summarized this sentiment: "Money don't mean shit to me. . . . I don't need a friggin' dime. But I want this priest removed, and I want an apology acknowledging that I was raped as a boy and they are sorry. I want acknowledgement about what was done to me."[60]

For many survivors, group litigation also acquired social value.[61] Survivors explained they viewed group litigation as an opportunity to build community and gain legitimacy—to amass strength in numbers against their powerful tortfeasor.[62] By filing suit and publicly sharing their experiences, the survivors sought to encourage more reluctant survivors to come forward and openly share their stories of abuse.[63] This in turn allowed survivors to support each other throughout the difficult litigation process and lent credence to each others' claims.[64]

Survivors, SURVIVORS NETWORK OF THOSE ABUSED BY PRIESTS, https://www.snapnetwork.org/resources_for_survivors (last visited Jan. 17, 2025); Leslie H. Wind, James M. Sullivan, & Daniel J. Levins, *Survivors' Perspectives on the Impact of Clergy Sexual Abuse on Families of Origin*, 17 J. CHILD SEXUAL ABUSE 238, 238 (2008); Katharine Q. Seelye, *Phil Saviano, Survivor of Clergy Sex Abuse, Dies at 69*, N.Y. TIMES (Nov. 28, 2021), https://www.nytimes.com/2021/11/28/us/phil-saviano-dead.html.

52. Balboni & Bishop, *supra* note 15, at 133.
53. *Id.*
54. *Id.*
55. *Id.* at 135.
56. *Id.* at 137.
57. *Id.* at 139.
58. *Id.*
59. *Id.* at 133, 139.
60. *Id.* at 139.
61. *Id.* at 145–46.
62. *Id.*
63. *Id.*
64. *Id.*

Other survivors viewed litigation as their only means to exercise their voice and to make the Church finally listen.[65] Even those who attempted to alert Church officials to the abuse were often turned away.[66] The stigma surrounding sexual abuse coupled with the religious deference "owed" to Catholic clergy meant that many survivors suffered in silence because of their reluctance to challenge "heavenly" authority.[67]

One survivor reflected:

> The point of going to the attorney was to get their attention back. To say, "You can't just brush me aside." . . . I wanted to get involved in this conversation. I wanted a seat at the table . . . . I had always felt that I had allowed my voice to be squelched, and I didn't want that to happen again. I wanted to be able to speak.[68]

Though the survivors surveyed in the Catholic Church clergy abuse litigation study represent a small sample of mass tort litigants, the principles underlying their responses provide a greater understanding of the nonmonetary motivations of mass tort litigants, including the desire to be heard. Civil litigation thus provides a forum through which litigants may symbolically recover intangible forms of relief: respect, dignity, and vindication.[69]

2. Opioid Victims: Litigation as a Tool of Expression

In 2019, Purdue Pharma, the manufacturers of OxyContin,[70] filed for Chapter 11 bankruptcy "after facing a wave of litigation for its role in the opioid epidemic."[71] Though the details of those proceedings are discussed in Section II.B, the sentiments expressed by opioid victims throughout litigation warrant acknowledgment here because they parallel the expressive goals identified by the Catholic Church clergy abuse survivors. For example, Peter W. Jackson, who lost his teenage daughter to an OxyContin overdose, wrote to Bankruptcy Judge Robert Drain, who oversaw Purdue Pharma's bankruptcy filing,[72] about the importance of using the litigation proceedings to unveil the truth:

> For my family, the truth is the only thing that matters. No amount of money could ever fill the hole in my life created by the loss of my sweet daughter. . . . It is particularly important to shine a bright light on all available evidence so that the American public can understand,

65. *Id.* at 149.
66. *Id.*
67. *Id.*
68. *Id.*
69. Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L. REV. 1263, 1263 (2021); Balboni & Bishop, *supra* note 15, at 136.
70. OxyContin became the most powerful brand-name narcotic in the United States. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 210 (2024).
71. *Id.* at 209.
72. *See In re* Purdue Pharma L.P., 633 B.R. 53 (Bankr. S.D.N.Y. 2021), *vacated*, 635 B.R. 26 (S.D.N.Y. 2021), *rev'd*, 69 F.4th 45 (2d Cir. 2023), *rev'd*, 603 U.S. 204 (2024).

> once and for all, exactly how this company and their owners conducted themselves and how their actions sparked the epidemic that continues to harm Americans.[73]

Meanwhile, Stephanie Lubinski, who lost her husband to suicide after years of struggling with addiction, sought accountability.[74] She said, "Troy Lubinski . . . meant the world to us, and he needs to be remembered and apologized to by the Sackler family."[75]

These remarks from opioid victims' families are not intended to undermine the role of monetary recovery in mass tort litigation.[76] Opioid litigants who supported the controversial Purdue Pharma settlement plan (which effectively allowed members of the Sackler family to buy legal immunity) did so on the condition that settlement funds would be allocated to abatement and addiction recovery programs across the country.[77] Leading up to and in the immediate aftermath of the Supreme Court decision in *Harrington* that suspended the $6 billion settlement,[78] opioid victims expressed anger and frustration towards the government for stalling their financial recovery.[79]

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73. Letter from Peter W. Jackson to Robert D. Drain, U.S. Bankr. Ct. Judge (July 15, 2020), https://restructuring.ra.kroll.com/purduepharma/Home-DocketInfo (enter "1538" into the search bar and click on the search button; then click on "Letter requesting appointment of examiner Filed by Peter W. Jackson.").

74. Letter from Stephanie Lubinski to Robert D. Drain, U.S. Bankr. Ct. Judge (Jan. 6, 2021), https://restructuring.ra.kroll.com/purduepharma/Home-DocketInfo (enter "Lubinski" into the search bar and click on the search button; then click on "Statement/Victim Statement filed by Stephanie Lubinski.").

75. *Id.*

76. *Id.* ("[N]othing will replace our beloved Troy. But my children deserve some compensation, while the Sacklers have not suffered at all.").

77. *See, e.g.*, Adam Piore, *'It's devastating:' Mass. Residents React to Supreme Court Decision in Purdue Pharma Case*, BOSTON GLOBE (June 27, 2024, 3:51PM), https://www.bostonglobe.com/2024/06/27/metro/sacklers-purdue-pharma-opioids-healey-supreme-court/; Phil Helsel, Jake Lubbehusen, & Amy Delgado, *Families of Those Lost in Opioid Crisis 'Devastated' by Supreme Court's Decision to Reject Purdue Settlement*, NBC NEWS (June 27, 2024, 8:14PM), https://www.nbcnews.com/news/us-news/families-lost-opioid-crisis-devastated-supreme-courts-decision-reject-rcna159364.

78. In January 2025, a bipartisan coalition of states and other involved parties reached a $7.5 billion settlement agreement with Purdue Pharma. Press Release, N.Y. State Att'y Gen., Attorney General James Secures $7.4 Billion from Purdue Pharma and the Sackler Family for Fueling the Opioid Crisis (Jan. 23, 2025), https://ag.ny.gov/press-release/2025/attorney-general-james-secures-74-billion-purdue-pharma-and-sackler-family. Though members of the Sackler family can no longer receive immunity from future opioid lawsuits due to the *Harrington* decision, the latest settlement agreement proposes that $800 million be funneled into a legal defense fund for the Sackler family. Jan Hoffman, *Sacklers Up Their Offer to Settle Purdue Opioids Case, With a New Condition*, N.Y. TIMES (Jan. 23, 2025), https://www.nytimes.com/2025/01/23/health/sacklers-purdue-settlement-opioids.html.

79. Piore, *supra* note 77; Helsel, Lubbehusen, & Delgado, *supra* note 77 ("Now we have to go back and tell all these people, 'Sorry, it's off the table' . . . . "It's heart-wrenching. We asked these people to trust us."). That sentiment also formed the basis of Justice Kavanaugh's dissent in Harrington. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 230 (2024) (Kavanaugh, J., dissenting) ("The opioid victims and their families are deprived of their hard-won relief. And the communities devastated by the opioid crisis are deprived of the funding needed to help prevent and treat opioid addiction.").

Despite this, the Catholic Church clergy abuse scandal and the opioid crisis provide unique lenses through which it is possible to develop a more comprehensive understanding of the complexity of mass tort litigation. The motivations of mass tort litigants cannot be categorized into binary boxes.[80] Financial recovery and intangible forms of relief both play important roles in achieving mass tort victims' goals.[81] Litigation functions both as a mechanism to deliver concrete relief (i.e., compensation) and as a therapeutic process through which litigants can secure community, validation, and voice.[82]

C. The Moral Theory of Tort Law Aligns with Litigants' Objectives

The brief discussion of the Catholic Church clergy abuse scandal and the opioid crisis illustrates the difficulty in capturing the dynamic objectives sought by mass tort litigants—perhaps explaining the enduring philosophical disagreement among tort law scholars. Yet the goals identified by proponents who subscribe to the moral framework of tort law, such as corrective justice, expressivism, and civil recourse theory, more closely align with the motivations expressed by mass tort litigants than those advanced by instrumentalist theories. The moral theoretical framework of tort law thus provides a foundation for critiquing Chapter 11 bankruptcy—discussed in Part II—as an ill-suited legal process to effectuate the type of recovery sought by mass tort litigants.

II. A BROKEN SYSTEM: RESOLVING MASS TORTS THROUGH BANKRUPTCY PROCEEDINGS

> "As distasteful as it is, bankruptcy is about recovery to creditors, monetary recovery—not about moral victory."[83]

After two Supreme Court cases limited class actions as an effective device to achieve a global resolution of claims,[84] multidistrict litigation and bankruptcy surfaced as the viable alternatives for resolving mass torts.[85] Bankruptcy, however, emerged as "the most powerful aggregation mechanism available."[86] The Bankruptcy Code offers "additional powers" not available in other forms of aggregate litigation,[87] provides courts with

80. *See* Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 36–37 (2002).

81. *See id.* at 36–37.

82. *See id.* at 37–38 ("We sue because we feel that we have been wronged, that our world has been knocked out of balance, and we wish to restore a sense of harmony to our lives and our relationships with those who surround us. . . . We engage in conflict as a way of righting ourselves with the world.").

83. *Corporate Chiefs*, *supra* note 11 (quoting bankruptcy lawyer Thomas Salerno).

84. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619–20 (1997) (showing that Rule 23 certification requirements apply to settlements); Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999) (stating that the certification of a class on a limited fund theory requires a showing that the fund is limited by more than by agreement of the parties).

85. Organek, *supra* note 1, at 733–34.

86. *Id.* at 737.

87. *Id.*

tools to effectively manage the challenging realities of mass tort cases where a high volume of claims threaten a company's financial stability,[88] and solves some of the jurisdictional and procedural limitations exhibited in multidistrict litigation.[89]

For these reasons, household names like Johnson & Johnson,[90] the Boy Scouts of America,[91] USA Gymnastics,[92] Purdue Pharma,[93] and 3M[94] have looked to bankruptcy procedures to respond to mass tort claims related to cancerous baby powder, sexual abuse scandals involving minors, the opioid addiction crisis, and faulty earplugs, respectively.[95] Contrary to common assumptions, many of these entities did not go bankrupt and are, in fact, cash-rich companies that exploited bankruptcy procedures to limit their liability.[96] And while these companies reap the benefits of bankruptcy's procedures, claimants pay the price.[97] Plaintiffs face increased pressure to either sign away their rights—some argue unconstitutionally[98]—to sue related parties or risk losing the ability to recover any

88. Simon, *supra* note 8, at 1163; Leah A. O'Farrell, *Debt-Free Bankruptcy: The Pros and Cons of Litigating Mass Tort Litigation Through Bankruptcy*, AM. BAR ASS'N (Nov. 30, 2022), https://www.americanbar.org/groups/judicial/publications/judges_journal/2022/fall/debtfree-bankruptcy-pros-and-cons/; Organek, *supra* note 1, at 738.

89. Organek, *supra* note 1, at 736–38.

90. Press Release, Johnson & Johnson, Johnson & Johnson Announces That Its Subsidiary, Red River Talc LLC, Has Filed a Voluntary Prepackaged Chapter 11 Case to Resolve All Current and Future Ovarian Cancer Talc Claims (Sept. 20, 2024), https://www.jnj.com/media-center/press-releases/johnson-johnson-announces-that-its-subsidiary-red-river-talc-llc-has-filed-a-voluntary-prepackaged-chapter-11-case-to-resolve-all-current-and-future-ovarian-cancer-talc-claims.

91. Simon, *supra* note 8, at 1158.

92. Press Release, USA Gymnastics, Settlement with Survivors Approved by Court; USA Gymnastics to Exit Bankruptcy (Dec. 13, 2021) [hereinafter USA Gymnastics Press Release], https://usagym.org/settlement-with-survivors-approved-by-court-usa-gymnastics-to-exit-bankruptcy/.

93. Jan Hoffman & Mary Williams Walsh, *Purdue Pharma, Maker of OxyContin, Files for Bankruptcy*, N.Y. TIMES, https://www.nytimes.com/2019/09/15/health/purdue-pharma-bankruptcy-opioids-settlement.html (Nov. 24, 2020).

94. Organek, *supra* note 1, at 726.

95. Dietrich Knauth, *US Judge Rejects 3M Effort to Resolve Earplug Lawsuits in Bankruptcy*, REUTERS (June 9, 2023, 3:38PM), https://www.reuters.com/legal/us-judge-rejects-3m-effort-resolve-earplug-lawsuits-bankruptcy-2023-06-09/; Mike Spector, *The Battle Over J&J's Bankruptcy Plan to End Talc Lawsuits*, REUTERS (July 8, 2024, 10:00AM), https://www.reuters.com/investigates/special-report/usa-lawsuits-johnson-and-johnson-bankruptcy/; Abbie VanSickle, *Supreme Court Allows $2.4 Billion Boy Scouts Sex Abuse Deal to Go Forward*, N.Y. TIMES (Feb. 22, 2024), https://www.nytimes.com/2024/02/22/us/politics/supreme-court-boy-scouts-sex-abuse-settlement.html; *see Corporate Chiefs*, *supra* note 11.

96. *See, e.g.*, Jeff Neal, *Waltzing Across Texas*, HARV. L. TODAY (Feb. 6, 2024), https://hls.harvard.edu/today/expert-explains-how-companies-are-using-a-controversial-bankruptcy-maneuver-to-handle-mass-tort-claims/ (The "Texas Two-Step" is a legal tactic where a company splits itself into a "bad" and "good" company and allocates the liability from the mass tort claims into the "bad" company, which then files for bankruptcy); Marci A. Hamilton & Bridget Brainard, *Rethinking Chapter 11 for Mass Child Sexual Abuse Claims: Shifting the Focus from Debtor Institutions to the Victims*, 30 NORTON J. BANKR. L. & PRAC. 1, 6 (2021) (Nondebtor release provisions "shield[] third parties who share an identity of interest with the debtor, usually corporate officers and directors of the organization, from any claim, cause of action, or liability from any party who has filed a claim under the bankruptcy proceeding.").

97. *Corporate Chiefs*, *supra* note 11.

98. *Id.*; Katherine M. Anand, Note, *Demanding Due Process: The Constitutionality of the § 524 Channeling Injunction and Trust Mechanisms that Effectively Discharge Asbestos Claims in Chapter 11 Reorganization*, 80 NOTRE DAME L. REV. 1187, 1197 (2005).

monetary damages.[99] Victims of mass torts thus face a difficult question: is the ability to potentially recover monetary damages from the tortfeasor worth sacrificing in order to hold the tortfeasor accountable for their wrongdoing? Nearly 1.2 million claimants from twenty-nine mass tort bankruptcies answered in the affirmative by signing away their rights, but this statistic fails to capture the full story.[100]

The following Sections aim to fill in the missing gaps, first by explaining how the Bankruptcy Code became the preferred mechanism for resolving mass torts in the 1970s when thousands of litigants filed personal injury claims against asbestos producers. Section II.A first describes three bankruptcy procedures—automatic stays, channeling injunctions, and third-party nondebtor releases—all of which helped the judiciary manage, and ultimately respond to, the unique challenges of asbestos litigation. The use of these procedural devices in the asbestos context created a bankruptcy blueprint for other companies to later follow, including Purdue Pharma, as described in Section II.B. Section II.C. concludes with two specific examples that illustrate how these procedural devices inadvertently silenced the voices of opioid victims and their families.

A. Creating the Bankruptcy Blueprint: Johns-Manville Corporation and Asbestos Litigation

Asbestos litigation is the longest running mass tort litigation in U.S. history,[101] with the number of claims exploding in the 1970s.[102] Thousands of litigants filed personal injury claims against Johns-Manville Corporation ("Johns-Manville"), the world's largest asbestos producer.[103] The long latency period of asbestos-related diseases and the increasing number of claimants seeking relief prompted courts to shift from traditional aggregate litigation devices to Bankruptcy Code procedures.[104] Due to the looming "spectre of proliferating, overburdening [asbestos] litigation," Johns-Manville filed for Chapter 11 bankruptcy in 1982.[105] This move enabled Johns-Manville to respond to its asbestos liability in new and innovative ways.[106]

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99. *Corporate Chiefs*, *supra* note 11.

100. *Id.*

101. STEPHEN J. CARROLL, DEBORAH HENSLER, JENNIFER GROSS, ELIZABETH M. SLOSS, MATTHIAS SCHONLAU, ALLAN ABRAHAMSE, & J. SCOTT ASHWOOD, ASBESTOS LITIGATION, at xvii (2005) [hereinafter ASBESTOS LITIGATION]; Michelle Whitmer, *What Is Asbestos Litigation?*, THE MESOTHELIOMA CTR. (Oct. 14, 2024), https://www.asbestos.com/mesothelioma-lawyer/asbestos-litigation/ (Asbestos litigation dates back to the late 1960s.).

102. ASBESTOS LITIGATION, *supra* note 101, at 23; Simon, *supra* note 8, at 1172.

103. Simon, *supra* note 8, at 1172; *In re* Johns-Manville Corp., 581 B.R. 38, 41 (Bankr. S.D.N.Y. 2018).

104. ASBESTOS LITIGATION, *supra* note 101, at 21.

105. *In re Johns-Manville Corp*, 581 B.R. at 42 (quoting *In re* Johns-Manville Corp., 36 B.R. 743, 745 (Bankr. S.D.N.Y. 1984)).

106. Simon, *supra* note 8, at 1172.

To understand how bankruptcy procedures aided Johns-Manville's response to an "avalanche of litigation,"[107] one must first be familiar with three key bankruptcy law tools: automatic stays, channeling injunctions, and third-party releases of nondebtors. Each of these are addressed in turn.

The automatic stay is one of the most powerful mechanisms available under the Bankruptcy Code and becomes effective as soon as the debtor files a petition for bankruptcy.[108] By pausing all litigation against the debtor and prohibiting new litigation,[109] the automatic stay prevents claimants from racing to the courthouse to collect compensation before the debtor's money depletes.[110] A channeling injunction, however, is "a bankruptcy-created device that permanently enjoins all claims against certain parties, and instead funnels those claims into a [litigation] trust."[111] The litigation trust typically assumes the debtor's current and future liabilities to tort victims.[112] The trust is structured to make distributions to present and future claimants.[113] If the reorganization plan ultimately receives judicial approval, then the court may issue a channeling injunction that releases the debtor (i.e., the corporation seeking bankruptcy) and other third parties from liability.[114] The injured parties are only permitted to assert claims against the trust and not against the corporation allegedly responsible for their injury.[115] In contrast, third-party releases of nondebtors offer nondebtors (i.e. those who did not file bankruptcy, such as corporate officers, directors, insurance providers, or those otherwise affiliated with the debtor) a release of liability in connection with the confirmation of the debtor's Chapter 11 plan.[116] These procedural devices are the center of the bankruptcy "blueprint" that made bankruptcy court into the forum of choice for companies responding to mass tort litigation.[117]

Johns-Manville closely followed this blueprint in its own bankruptcy proceedings. Pursuant to its Chapter 11 bankruptcy filing, the court

107. Smith, *supra* note 8, at 1617.
108. Simon, *supra* note 8, at 1163.
109. Organek, *supra* note 1, at 738.
110. Simon, *supra* note 8, at 1163.
111. *Id.* at 1167.
112. *Id.*
113. *Channeling Injunction: Financial Restructuring & Bankruptcy Glossary*, LEXISNEXIS (Dec. 1, 2021), https://plus.lexis.com/document/openwebdocview/Channeling-Injunction-Financial-Restructuring-Bankruptcy-Glossary-/.
114. Simon, *supra* note 8, at 1167.
115. *Id.* at 1167–69.
116. Monique D. Hayes, *Balancing Justice and Accountability in Opioid Bankruptcies*, LAW360 (Oct. 20, 2023, 1:23PM), https://www.law360.com/articles/1733439/balancing-justice-and-accountability-in-opioid-bankruptcies.
117. *See* Simon, *supra* note 8, at 1173–74; *see also* Gary Svirsky, Tancred Schiavoni, Andrew Sorkin, & Gerard Savaresse, *A Field Guide to Channeling Injunctions and Litigation Trusts*, N.Y.L.J. (July 13, 2018, 3:40PM), https://www.law.com/newyorklawjournal/2018/07/13/channelling-injunctions-and-litigation-trusts-a-field-guide/; *In re* Johns-Manville Corp., 40 B.R. 219, 225 (Bankr. S.D.N.Y. 1984) ("[T]he statutory purpose of the stay in bankruptcy . . . gives 'the debtor a breathing period in which to organize his or her affairs.'").

approved an automatic stay.[118] In addition, Johns-Manville created two litigation trusts.[119] The Asbestos Health Trust resolved victims' claims of asbestos-related diseases while the Property Damage Trust resolved property-related claims involving asbestos.[120] Under the reorganization plan, the court issued a channeling injunction[121] that required all claims against the corporation to be settled through the trust and prohibited "all parties with asbestos-related personal injury or property damage claims from suing certain protected entities."[122] In effect, injured parties were able to recover from the trusts but were prohibited from suing the company, its subsidiaries, or its insurance carriers.[123] The channeling injunction also released and shielded the nondebtors (i.e., the insurance companies) from liability in exchange for the insurance companies providing $770 million to the trusts.[124] The intent behind this maneuver was to prevent claimants from recovering twice: first from the settlement and second from an insurance claim.[125]

Johns-Manville's Chapter 11 bankruptcy blueprint prompted other debtors facing asbestos liability to use channeling injunctions and third-party releases of nondebtors.[126] In 1994, Congress amended the Bankruptcy Code and added a provision that explicitly approved third-party nondebtor releases and channeling injunctions in asbestos litigation.[127] However, notwithstanding the fact that Congress limited these procedural devices to the asbestos context, courts significantly expanded their use outside of the asbestos context.[128] This paved the way for corporations such as Johnson & Johnson,[129] the Boy Scouts of America,[130] USA Gymnastics,[131] and Purdue Pharma[132] to use these procedures to mitigate their mass tort exposure.[133]

A recent study shows that judges approved third-party nondebtor releases in 90% of the largest bankruptcies between 2012 and 2021.[134]

118. *In re Johns-Manville Corp.*, 40 B.R. at 226 (explaining that litigation proceedings against Johns-Manville "would frustrate the bankruptcy proceedings").
119. *In re* Johns-Manville Corp., 68 B.R. 618, 621 (Bankr. S.D.N.Y. 1986).
120. *Id.* at 621–22.
121. Simon, *supra* note 8, at 1173.
122. *In re Johns-Manville Corp.*, 68 B.R. at 622.
123. Simon, *supra* note 8, at 1172.
124. *Id.* at 1173; *Corporate Chiefs*, *supra* note 11.
125. *Corporate Chiefs*, *supra* note 11.
126. Simon, *supra* note 8, at 1173.
127. *Id.*; 11 U.S.C. § 524(g).
128. Simon, *supra* note 8, at 1173.
129. *See generally* J. Maria Glover, *Due Process Discontents in Mass-Tort Bankruptcy*, 72 DEPAUL L. REV. 535, 563–65 (2023) (explaining Johnson & Johnson's use of the "Texas Two Step" and bankruptcy protections to limit its tort liability).
130. Nat'l Union Fire Ins., Co. v. Boy Scouts of Am. (*In re* BSA), No. 20-10343-LSS, 2023 U.S. Dist. LEXIS 63098, at *48 (D. Del. Apr. 11, 2023).
131. USA Gymnastics Press Release, *supra* note 92.
132. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 211 (2024).
133. Simon, *supra* note 8, at 1157–58; *Corporate Chiefs*, *supra* note 11; Nathan Bomey, *3M to Pay $6 Billion to Earplug Customers After Bankruptcy Plan Failed*, AXIOS (Aug. 29, 2023), https://www.axios.com/2023/08/29/3m-aearo-technologies-combat-earplugs-settlement.
134. *Corporate Chiefs*, *supra* note 11.

However, the Supreme Court ended this decades-long practice of granting immunity to nondebtors in non-asbestos litigation in *Harrington*.[135] The Court stated that the Bankruptcy Code does not authorize third-party nondebtor releases or injunctions that effectively discharge claims against a nondebtor without the consent of claimants.[136]

B. Following the Bankruptcy Blueprint: Purdue Pharma and Opioid Litigation

In 2017, the Northern District of Ohio consolidated thousands of civil opioid suits[137] that were filed in various federal courts pursuant to 28 U.S.C. § 1407, a special federal procedure called "multidistrict litigation" designed to streamline complex civil litigation.[138] The opioid multidistrict litigation began after sixty cities and counties across the country sued opioid manufacturers, including Purdue Pharma.[139] With a trial in Ohio looming, the makers of OxyContin and various state attorneys general entered into settlement negotiations.[140] Presiding Judge Dan Polster, who recognized the diverse interests at play, mandated that at least thirty-five states agree to any possible settlement.[141] This threshold requirement added another element of complexity to the settlement process. State officials were weary of settling, believing that the Sackler family[142] "ha[d] blood on their hands.[143] Ultimately, settlement negotiations reached an impasse, and Purdue Pharma looked to bankruptcy procedures to resolve the mounting lawsuits against it.[144]

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135. *Harrington*, 603 U.S. at 225–27.

136. *Id.* at 227.

137. *In re* Purdue Pharma, L.P., 635 B.R. 26, 49 (Bankr. S.D.N.Y. 2021), *rev'd*, 69 F.4th 45 (2d Cir. 2023), *rev'd sub nom*. Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024) (stating that the claims asserted against Purdue Pharma included public nuisance, false representations, unjust enrichment, common law *parens patriae*, negligence, gross negligence, and consumer protection act claims).

138. SHEN, *supra* note 16, at 2; 28 U.S.C. § 1407.

139. SHEN, *supra* note 16, at 2; Jan Hoffman, *Sacklers Would Give Up Ownership of Purdue Pharma Under Settlement Proposal*, N.Y. TIMES, https://www.nytimes.com/2019/08/27/health/sacklers-purdue-pharma-opioid-settlement.html (Oct. 21, 2020).

140. Brian Mann, *Purdue Pharma: Sackler Family's 'Personal Wealth' Offered in Opioid Deal*, NPR (Sept. 9, 2019, 5:07AM), https://www.npr.org/2019/09/09/758927743/sacklers-reject-demand-they-surrender-personal-wealth-to-settle-opioid-claims; PATRICK RADDEN KEEFE, EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY 394 (2021).

141. KEEFE, *supra* note 140, at 397.

142. The Sackler family owned Purdue Pharma, the makers of a highly-addictive narcotic called OxyContin. OxyContin became "the most prescribed brand-name narcotic medication in the United States." Harrington v. Purdue Pharma L.P., 603 U.S. 204, 210 (2024). OxyContin played a role in the opioid epidemic, which has so far claimed the lives of more than 500,000 people. DAVID J. SENCER CDC MUSEUM PUB. HEALTH ACAD., UNCOVERING THE OPIOID EPIDEMIC 1, https://www.cdc.gov/museum/pdf/cdcm-pha-stem-uncovering-the-opioid-epidemic-lesson.pdf.

143. KEEFE, *supra* note 140, at 397 (quoting former Pennsylvania Attorney General Josh Shapiro); Steve Karnowski & Geoff Mulvihill, *States Split by Party on Accepting Purdue Pharma Settlement*, ASSOCIATED PRESS (Sept. 13, 2019, 8:20PM), https://apnews.com/article/c89c308de07b40c4a0ae215e721f913a (quoting Delaware Attorney General Kathy Jennings).

144. KEEFE, *supra* note 140, at 397.

Purdue Pharma filed for Chapter 11 bankruptcy in 2019, which procedurally benefitted the company in several ways.[145] The imposition of an automatic stay paused all litigation against Purdue Pharma (the debtor) and also prohibited additional litigation from commencing.[146] As a result, Purdue Pharma effectively brought all opioid suits against it to a screeching halt pending the resolution of the bankruptcy proceedings.[147] In addition, Purdue Pharma's bankruptcy filing enabled the company to forcibly move the legal proceedings from Northern Ohio, where trial loomed, to a more friendly federal forum in White Plains, New York, in front of experienced Bankruptcy Judge Robert Drain.[148] Purdue Pharma obtained both of these procedural benefits without claimants' consent.[149]

After two years of highly charged negotiations, infighting among the original plaintiffs,[150] and twelve amended bankruptcy plans,[151] Purdue Pharma and the claimants agreed to a global resolution.[152] The settlement called for Purdue Pharma to transform into a public benefit company called Knoa Pharma for the purpose of funding opioid abatement trusts.[153] The settlement also required the Sackler family to contribute several billion dollars to opioid abatement programs and "restoring victims of the crisis."[154] In exchange, members of the Sackler family sought civil immunity from opioid litigation through third-party nondebtor releases and a channeling injunction.[155] The settlement agreement released all civil claims, including personal injury claims, against members of the Sackler family and Purdue Pharma for actions related to the sale and marketing of OxyContin.[156] These procedures bound all current and future claimants.[157]

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145. *Chapter 11—Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics (last visited Dec. 21, 2024); Simon, *supra* note 8, at 1188.

146. 11 U.S.C. § 362; Joseph F. Rice & Nancy W. Davis, *The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 S.C. L. REV. 405, 435–36 (1999); RYAN HAMPTON, CLAIRE RUDY FOSTER, & HILLEL ARON, UNSETTLED: HOW THE PURDUE PHARMA BANKRUPTCY FAILED THE VICTIMS OF THE AMERICAN OVERDOSE CRISIS 80 (2021).

147. Simon, *supra* note 8, at 1188; KEEFE, *supra* note 140, at 397, 400–01.

148. KEEFE, *supra* note 140, at 400–01.

149. *Id.* at 397, 400; Simon, *supra* note 8, at 1188; HAMPTON, FOSTER, & ARON, *supra* note 146, at 80.

150. KEEFE, *supra* note 140, at 401–02 (Republican and Democratic attorneys general disagreeing about the settlement provisions).

151. Simon, *supra* note 8, at 1189.

152. William Organek, *"A Bitter Result:" Purdue Pharma, a Sackler Bankruptcy Filing, and Improving Monetary and Nonmonetary Recoveries in Mass Tort Bankruptcies*, 96 AM. BANKR. L.J. 361, 369–70 (2022) [hereinafter *A Bitter Result*].

153. *Id.* at 370; Press Release, Purdue Pharma, Confirmed Plan of Reorganization Facilitates Creation of New Company—"Knoa Pharma" (Sept. 3, 2021), https://www.purduepharma.com/news/2021/09/03/confirmed-plan-of-reorganization-facilitates-creation-of-new-company-knoa-pharma/.

154. *In re* Purdue Pharma, L.P., 635 B.R. 26, 62 (S.D.N.Y. 2021), *rev'd*, 69 F.4th 45 (2d Cir. 2023), *rev'd*, 603 U.S. 204 (2024); Simon, *supra* note 8, at 1189.

155. Simon, *supra* note 8, at 1189–90; Amy Howe, *Justices Put Purdue Pharma Bankruptcy Plan on Hold*, SCOTUSBLOG (Aug. 10, 2023, 4:41PM), https://www.scotusblog.com/2023/08/justices-put-purdue-pharma-bankruptcy-plan-on-hold/.

156. *A Bitter Result*, *supra* note 152, at 370.

157. *Id.*; Harrington v. Purdue Pharma L.P., 603 U.S. 204, 210 (2024).

In effect, the Sacklers sought an injunction "'forever stay[ing], restrain[ing], and enjoin[ing]' claims against them."[158]

As part of the Chapter 11 bankruptcy process, claimants are allowed to vote whether they approve or reject the reorganization plan.[159] However, only those classes of claimants with "impaired"[160] interests may vote on the plan.[161] As part of Purdue Pharma's Chapter 11 reorganization plan, the company provided ballots to more than 600,000 claimants.[162] Fewer than 20 percent of eligible creditors voted[163]—roughly equating to 120,000 individuals.[164] More than ninety-five percent of those 120,000 claimants who voted supported the plan.[165]

Thousands of claimants objected to the plan, too.[166] They wrote in a court filing, "Our system of justice . . . demands that the allegations against the Sackler family be fully and fairly litigated in a public and open trial, that they be judged by an impartial jury, and that they be held accountable to those they have harmed."[167] Eight states, the District of Columbia, the city of Seattle, and various Canadian municipalities and Tribes objected to the plan as well.[168] But these objections did not obstruct the plan's approval.[169] Judge Drain described the reorganization plan as a "bitter result" because the mediations did not result in a larger payment by the Sackler family.[170] However, he reluctantly accepted the plan because he said it was the only way to provide funding to communities decimated by the opioid crisis.[171]

The United States government, the nonconsenting states, and other participating entitles (such as Canadian municipalities and Indigenous groups) immediately appealed the plan to the U.S. District Court for the Southern District of New York.[172] Judge Colleen McMahon rejected the bankruptcy court's legal conclusion that the Bankruptcy Code authorizes

158. *Harrington*, 603 U.S. at 212.
159. *Chapter 11*, *supra* note 145.
160. Individuals whose rights have been altered by the plan have the opportunity to vote. *Id.*
161. *Id.*
162. Press Release, Purdue, Purdue Pharma L.P. to Begin Soliciting Votes for Its Broadly Supported Chapter 11 Plan of Reorganization (June 3, 2021), https://www.purduepharma.com/news/2021/06/03/purdue-pharma-l-p-to-begin-soliciting-votes-for-its-broadly-supported-chapter-11-plan-of-reorganization/.
163. *Harrington*, 603 U.S. at 212.
164. Press Release, Purdue, Plan of Reorganization of Purdue Pharma L.P. Receives Bankruptcy Court Approval (Sept. 1, 2021), https://www.purduepharma.com/news/2021/09/01/plan-of-reorganization-of-purdue-pharma-l-p-receives-bankruptcy-court-approval/.
165. *Id.*
166. *Harrington*, 603 U.S. at 212.
167. *Id.* at 2079–80.
168. *Id.* at 2080.
169. *Id.*
170. *A Bitter Result*, *supra* note 152, at 371.
171. *Id.*; Howe, *supra* note 155.
172. *In re* Purdue Pharma, L.P., 635 B.R. 26, 77 (S.D.N.Y. 2021), *rev'd*, 69 F.4th 45 (2d Cir. 2023), *rev'd*, 603 U.S. 204 (2024); *A Bitter Result*, *supra* note 152, at 371; 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.

the nonconsensual release of third-party claims against nondebtors in Chapter 11 bankruptcy reorganization.[173] More specifically, she reasoned that the third-party releases should not be approved because they are not a "fundamentally central aspect of a Chapter 11 case's adjustment of the debtor/creditor relationship,"[174] as asserted by Judge Drain. Instead, Judge McMahon stated that the question before the court was whether the third-party releases either "stem[] from the bankruptcy itself or would necessarily be resolved in the claims allowance process."[175] Judge McMahon concluded that the third-party claims at issue "neither stem from Purdue's bankruptcy nor can they be resolved in the claims allowance process."[176]

Judge McMahon also acknowledged that the claims were "released and extinguished, without the claimants' consent."[177] She seemed to take issue with Purdue Pharma's manufacturing of constitutional authority to release the Sacklers (who were not filing for bankruptcy themselves) as part of the reorganization plan, particularly without claimants' consent.[178] Accordingly, Judge McMahon vacated the bankruptcy court's order.[179]

The Second Circuit reversed the district court's decision,[180] concluding that legal precedent permits the imposition of nonconsensual third-party releases.[181] Specifically, the Second Circuit pointed to litigation involving Johns-Manville as supporting the Bankruptcy Code's authority to grant such releases.[182] The Supreme Court granted the U.S. government's certiorari petition[183] so it could resolve the "great unsettled question":[184] whether the Bankruptcy Code authorizes nonconsensual third-party nondebtor releases beyond the asbestos context.[185]

During oral argument, the Justices formed alliances outside of typical ideological lines,[186] which evidences the complexity of the legal question at issue. More notable than the Justices' unlikely alliances, however, was their attempt to incorporate the views and voices of opioid victims.[187] In one exchange, Justices Elena Kagan and Brett Kavanaugh approached the

173. *In re Purdue Pharma, L.P.*, 635 B.R. at 78.
174. *Id.* at 80.
175. *Id.* at 81 (citation omitted).
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 118.
180. *In re* Pharma L.P., 69 F.4th 45, 85 (2d Cir. 2023), *rev'd*, 603 U.S. 204 (2024).
181. *In re Pharma L.P.*, 69 F.4th at 74.
182. *Id.* at 75–76.
183. *Harrington v. Purdue Pharma L.P.*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/harrington-v-purdue-pharma-l-p/ (last visited Dec. 21, 2024) (showing writ of certiorari granted in August 2023).
184. *In re Purdue Pharma, L.P.*, 635 B.R. at 37, *rev'd*, 69 F.4th 45 (2d Cir. 2023), *rev'd*, 603 U.S. 204 (2024).
185. *In re Purdue Pharma, L.P.*, 635 B.R. at 37.
186. *See* Transcript of Oral Argument at 20, 22, Harrington v. Purdue Pharma, L.P., 603 U.S. 204 (2024) (No. 23-124) (Justice Brett Kavanaugh and Justice Elena Kagan showing approval of the bankruptcy plan).
187. *Id.* at 19–21 ("[Y]our opening never mentioned the opioid victims.").

government's position with skepticism.[188] They hesitated to effectively nullify a multibillion dollar settlement approved by more than 95% of voting claimants.[189] Justice Kagan pointed to the plan's overwhelming support among people who "think that the Sacklers are pretty much the worst people on earth."[190] A "huge, huge, huge majority of claimants . . . decided that, if [the civil immunity] provision goes under," victims will "end up with nothing."[191] The negotiated bankruptcy deal, therefore, reflects the "best [deal] that they can get."[192] The federal government, according to Justice Kagan, should not interfere with the wishes of those who negotiated the deal.[193]

Justice Kavanaugh similarly underscored the disconnect between the federal government's position, as articulated by Deputy Solicitor General Curtis Gannon,[194] and the wishes of the opioid victims.[195] This became particularly apparent in one exchange:

> JUSTICE KAVANAUGH: And the views of the opioid victims and their families is—is not—doesn't matter?
>
> MR. GANNON: I'm not saying it doesn't matter. I'm saying that there are—
>
> JUSTICE KAVANAUGH: I think you are. I think your position is saying it doesn't matter.
>
> MR. GANNON: Our position is saying that there are other opioid victims with also heart-breaking and tragic losses that are saying we are not consenting to have our property rights forcibly extinguished in this way. We are not comfortable with being part of this proceeding as you have designed it.[196]

Justice Ketanji Brown Jackson also remained skeptical of the bankruptcy plan, though for slightly different reasons.[197] She expressed concern about the victims and the circumstances under which the plan was negotiated.[198] Specifically, she referenced the Sackler family's decision to move billions of dollars from Purdue Pharma to offshore accounts before the company sought bankruptcy protection.[199] In her view, when the Sacklers initially withheld their assets, they started the set of circumstances that left

188. *Id.* at 20–22.
189. *Id.* at 19, 22; Harrington v. Purdue Pharma L.P., 603 U.S. 204, 250 (2024) (Kavanaugh, J., dissenting).
190. Transcript of Oral Argument, *supra* note 186, at 22.
191. *Id.* at 23–24.
192. *Id.* at 22.
193. *Id.* at 23–24.
194. *Id.* at 2.
195. *Id.* at 46–47.
196. *Id.* at 47.
197. *Id.* at 66–67.
198. *Id.*
199. *Id.* at 66–68.

Purdue Pharma unable to pay its creditors.[200] She alleged that members of the Sackler family strategically funneled money into offshore accounts to give themselves more leverage in negotiating the conditions of nonconsensual third-party releases.[201] Justice Jackson's remarks during oral argument thus insinuated that the victims had little bargaining power and voice compared to the Sackler family when negotiating the settlement.

In June 2024, the Supreme Court resolved the "great unsettled question"[202] in an ideologically mixed 5–4 decision.[203] Justice Neil Gorsuch authored the majority opinion, joined by Justices Jackson, Clarence Thomas, Samuel Alito, and Amy Coney Barrett, holding that the Bankruptcy Code does not authorize nonconsensual third-party releases or injunctions that "effectively seek[] to discharge claims against a nondebtor without the consent of affected claimants."[204] The Court explained that the Sacklers, who had not filed for bankruptcy, sought bankruptcy protections without claimants' consent and without following the designated procedures that enable a fair and equitable distribution of funds to victims.[205] The Court subtly acknowledged that this holding implicates victims' recovery and the negotiated settlement, but also underscored that Congress is the more appropriate authority to consider policy judgments about the scope of the Bankruptcy Code.[206]

The majority opinion also contextualized a statistic touted by the bankruptcy plan's proponents: that "virtually all of the opioid victims and creditors in this case fervently support[ed]" Purdue's bankruptcy plan.[207] It is true that, when polled on the proposed bankruptcy plan, most creditors returned ballots supporting it.[208] However, fewer than twenty percent of eligible creditors participated,[209] and thousands of opioid victims voted against the plan.[210] Many pleaded with the bankruptcy court not to extinguish their claims against the Sacklers without their consent.[211]

In the Court's dissenting opinion, Justice Kavanaugh sharply rebuked the majority's analysis, describing the decision as an example of the Court

200. *Id.* at 66–67.

201. *See id.* at 68 ("[I]t's not like by operation of law it's necessary to do this. It is necessary to do this because the Sacklers have taken the money and are not willing to give it back unless they have this condition.").

202. *In re* Purdue Pharma, L.P., 635 B.R. 26, 37 (S.D.N.Y. 2021), *rev'd*, 69 F.4th 45 (2d Cir. 2023), *rev'd*, 603 U.S. 204 (2024).

203. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 207 (2024).

204. *Id.* at 224, 227 ("No one has directed us to a statute or case suggesting American courts in the past enjoyed the power in bankruptcy to discharge claims brought by nondebtors against other nondebtors, all without the consent of those affected.").

205. *Id.* at 215.

206. *Id.* at 226 ("Congress may choose to add to the bankruptcy code special rules for opioid-related bankruptcies as it has for asbestos-related cases. Or it may choose not to do so. Either way, if a policy decision like that is to be made, it is for Congress to make.").

207. *Id.* at 228 (Kavanaugh, J., dissenting).

208. *Id.* at 212 (majority opinion).

209. *Id.*

210. *Id.*

211. *Id.*

rewriting the Bankruptcy Code[212] with "devastating [consequences] for more than 100,000 opioid victims and their families."[213] Because of the Court's decision, Justice Kavanaugh opined that opioid victims would be deprived of the monetary recovery that they "long fought for and finally secured after years of litigation."[214] He underscored the importance of nondebtor releases in resolving the complex collective-action problems that surface in mass tort litigation and their pivotal role in ensuring that assets are distributed fairly and equitably among victims.[215] Justice Kavanaugh also explained that nondebtor releases were essential in "extraordinarily complex" bankruptcy proceedings where the total number of filed claims stood at more than 600,000.[216] According to his view, the nondebtor release provision, for example, prevented victims and creditors from racing to the courthouse to sue the Sacklers, which reduced the risk that indemnification claims otherwise depleted Purdue's estate.[217] Thus, he argued, nondebtor releases were a critical tool in the opioid litigation, where the claims amount to more than $40 *trillion* of alleged damages against the Sackler family and Purdue Pharma.[218]

On the surface, members of the Supreme Court merely disagreed about whether the Bankruptcy Code authorizes courts to grant nonconsensual releases to nondebtors. However, this disagreement brings an important discussion to the surface—one that extends beyond one specific Bankruptcy Code legal issue. A common objective is threaded through the Justices' disagreement: an eagerness to represent the voices of those harmed by the opioid epidemic but who have otherwise been silenced by the negotiation procedures.[219] The Supreme Court's critique of the process that led to the Purdue Pharma opioid agreement provides a meaningful opportunity for the legal community to consider how bankruptcy procedures could better accommodate the nonmonetary objectives sought by mass tort victims, including the opportunity to be heard.

C. Bankruptcy Procedures Silenced Opioid Victims

> "At some point, I would like to speak. He was my last family member, and my entire family has been affected through this epidemic . . . . So

212. *Id.* The Bankruptcy Code has never explicitly authorized nonconsensual releases for nondebtors outside of the asbestos context. Case law, rather, has evolved to interpret the Bankruptcy Code as authorizing nonconsensual releases for nondebtors *outside* of the asbestos context. *See* 11 U.S.C. § 524(g)(2)(B)(i)(I).

213. *Harrington*, 603 U.S. at 227 (Kavanaugh, J., dissenting).

214. *Id.*

215. *Id.* at 234–37.

216. *Id.* at 245.

217. *Id.* at 247.

218. *Id.* at 245 (explaining that $40 trillion is about seven times the total annual amount of spending by the U.S. government).

219. *See id.* at 212 (majority opinion) (describing how many pleaded with the bankruptcy court not to bar claims against the Sacklers).

> I really would like to speak from the pain that it has created and me being left behind with no family."[220]

In 2021, just weeks before Judge Drain intended to approve Purdue Pharma's controversial Chapter 11 bankruptcy plan, bankruptcy scholar and Georgetown University law professor Adam Levitin testified before Congress in a hearing entitled, *Oversight of the Bankruptcy Code, Part I: Confronting Abuses of the Chapter 11 System*.[221] His testimony warned of the dangers associated with approving the Purdue Pharma settlement plan, explaining that the Sacklers would emerge as "billionaires several times over" while opioid victims would be denied their day in court.[222] He opined:

> 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, which are then allocated according to the Bankruptcy Code's priority structure. This financial logic has been an unavoidable mismatch with the dignitary and expressive justice goals of tort law.[223]

Professor Levitin's testimony aligned with the views of opioid victims, activists, and other legal scholars who have argued against the use of bankruptcy court as a forum for litigating opioid claims.[224] Alexis Pleus, who lost her son to opioid addiction, expressed similar dissatisfaction with the bankruptcy process and the settlement agreement.[225] "This is not the justice we were looking for," she said.[226]

As demonstrated in Part I, mass tort litigants' goals are complex and resist neat categorization; thousands of similarly-situated claimants choose to litigate for different reasons—illustrating that justice is individually perceived and examined through the eyes of the beholder.[227] A close examination of sentiments expressed by opioid victims and their families in Section I.B.2 reveals some consensus identifying voice, or the desire to be heard, as an important nonmonetary objective.[228] Despite this agreement, this goal was not met. The following Subsections highlight two specific instances in which bankruptcy's procedures stonewalled and stifled

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220. Kimberly Krawczyk spoke these words during a bankruptcy court proceeding involving Purdue Pharma in 2020. KEEFE, *supra* note 140, at 425.

221. *Oversight of the Bankruptcy Code, Part I: Hearing on Confronting Abuses of the Chapter 11 System Before the Subcomm. on Antitrust, Com., and Admin. Law*, 117th Cong. 1 (2021) (statement of Adam J. Levitin, Professor of Law at Georgetown University Law Center).

222. *Id.* at 4.

223. *Id.* at 5.

224. *Id.*; Brian Mann, *As Purdue Pharma Bankruptcy Nears Approval, Family Members Write About the Human Toll*, NPR NEWS (Aug. 9, 2021, 10:41 AM) [hereinafter *As Purdue Pharma Bankruptcy Nears Approval*], https://www.npr.org/2021/08/09/1025171160/victims-of-purdue-pharmas-painkillers-read-their-letters-to-the-court.

225. *As Purdue Pharma Bankruptcy Nears Approval*, *supra* note 224.

226. *Id.*

227. WEINSTEIN, *supra* note 13, at 1.

228. *See supra* Section I.B.2.

opioid victims' voices and thus their ability to recover an important non-monetary objective.

1. A Demand for Answers: "I Got a Few Things I'd Like to Say"[229]

The first example occurred in 2020 when Judge Drain held a routine bankruptcy proceeding by telephone.[230] Judge Drain asked if anyone had any remarks about a procedural motion agreed upon by the parties.[231] Suddenly, a voice blurted out, "I don't know what the motion means. I got a few things I'd like to say."[232] The voice came from Tim Kramer, a man whose fiancée died from opioid addiction[233] and whose personal story epitomizes the harm experienced by so many victims.[234] In the immediate aftermath of his fiancée's untimely death, Kramer demanded justice and shared his fiancée's story of addiction in letters addressed to townships, county courts, and government institutions.[235] However, his letters went unanswered.[236] Desperate for information and accountability, he called a phone number provided by a lawyer's office.[237] It turned out that the lawyer's office had provided him with a wrong number,[238] and Kramer unknowingly dialed into Judge Drain's bankruptcy proceeding.[239]

After Kramer's interjection, Judge Drain inquired about Kramer's role in the case. In response, Kramer repeated his story of losing his fiancée to opioid addiction.[240] After Kramer finished speaking, Judge Drain asked, once again, if anyone had any remarks regarding the procedural motion at issue.[241] Suddenly, other claimants followed Kramer's example, transforming the routine bankruptcy proceeding into an ad hoc town hall.[242]

Seemingly losing his patience, Judge Drain informed Kramer and others that this was not the proper forum for testimonials.[243] Judge Drain then subtly acknowledged the irreconcilable conflict between bankruptcy law and tort law: "As much as I know your words are important, this isn't the right setting for it."[244] Judge Drain's remarks unveiled a troubling reality: the victims, whose stories of loss and harm formed the basis of the

229. Tim Kramer spoke during a bankruptcy proceeding in 2020. HAMPTON, FOSTER, & ARON, *supra* note 146, at 262 (capitalized to reflect title case).
230. *Id.* at 261.
231. *Id.* at 261–62.
232. *Id.* at 262.
233. *Id.* at 242.
234. *See id.* at 261.
235. *Id.* at 243–44.
236. *Id.* at 244.
237. *Id.*
238. *Id.* at 262.
239. *Id.*
240. *Id.*
241. *Id.* at 263.
242. *Id.*
243. *Id.* at 263–64.
244. *Id.* at 264.

claims against Purdue Pharma, had no avenue to be heard in court.[245] Accordingly, bankruptcy court is ill-suited to contemplate the moral justice sought by tort law and is unequipped to listen to those "who[] fought and clawed and prayed and protested and hoped and petitioned to be heard."[246]

2. The Right to Speak: An Opportunity for Some, but Not All

A second example underscoring the extent to which bankruptcy procedures silenced opioid victims occurred in March 2022.[247] At the recommendation of mediator Judge Shelley Chapman,[248] Judge Drain held an unconventional Zoom bankruptcy proceeding[249] that provided some victims with the opportunity to testify and confront their tortfeasor: members of the Sackler family.[250] At first glance, the proceeding seemed to provide victims with an opportunity to fulfill their desire to be heard. However, the proceeding only allocated two hours for victim testimony.[251] The hearing notice even acknowledged the impact of the two-hour time constraints, stating: "Please note that due to the time limit allocated for the Victim Statement Portion of the Settlement Hearing, it will not be possible to accommodate every request."[252] Accordingly, only twenty-six victims preapproved by lawyers[253]—a small subset of the thousands of claimants who filed suit against Purdue Pharma[254]—were allowed to speak at the proceeding.[255] This siloing of victims—assigning credibility and worth to some stories but not others—subjected claimants to additional harm beyond their opioid-related injuries.

The timing of the "Victim Statement Portion of the Settlement Hearing"[256] further raises doubts about the extent to which the court desired to

245. *Id.* at 264–65.

246. *Id.*

247. Lauren del Valle & Ray Sanchez, *Victims of Opioid Crisis Confront Owners of OxyContin Maker Purdue Pharma*, CNN, https://www.cnn.com/2022/03/10/us/us-bankruptcy-purdue-pharma-sacklers-victims/index.html (Mar. 10, 2022, 8:42PM).

248. Lauren del Valle, *Purdue Pharma and Sacklers Reach $6 Billion Opioid Settlement Agreement with States*, CNN (Mar. 3, 2022, 2:35PM), https://www.cnn.com/2022/03/03/business/purdue-pharma-sacklers-opioid-settlement/index.html.

249. Notice of Hearing Regarding Motion of Debtors Pursuant to 11 U.S.C. § 105(a) and 363(b) for Entry of an Order Authorizing and Approving Settlement Term Sheet, Including Portion of Hearing Specifically Allocated for Victim Statements, *In re* Purdue Pharma, L.P., No. 19-23649 (S.D.N.Y. Mar. 7, 2022) [hereinafter Notice of Hearing], https://restructuring.ra.kroll.com/purduepharma/Home-DownloadPDF?id1=MTMyMzQxNw==&id2=-1 (Judge Drain scheduled a hearing to confirm the settlement terms agreed to by the parties. As part of that hearing, Judge Drain allowed victims to testify.).

250. Geoff Mulvihill & Jennifer Peltz, *After Years of Pain, Opioid Crisis Victims Confront Sackler Family in Court*, PBS NEWSHOUR (Mar. 10, 2022, 12:40PM), https://www.pbs.org/newshour/nation/after-years-of-pain-opioid-crisis-victims-confront-sackler-family-in-court; del Valle & Sanchez, *supra* note 247.

251. Notice of Hearing, *supra* note 249, at 2.

252. *Id.*

253. *Id.*; del Valle & Sanchez, *supra* note 247.

254. *See Personal Injury Claim Summary as of 12/13/2023*, KROLL 1 (2023), https://restructuring.ra.kroll.com/purduepharma/Home-DownloadPDF?id1=MjYwODk1Ng%3D%3D&id2=0 (showing that as of December 2023, the number of claims filed against Purdue Pharma totaled more than 629,000).

255. del Valle & Sanchez, *supra* note 247.

256. Notice of Hearing, *supra* note 249, at 2.

comprehensively incorporate victims' voices into the judicial proceedings. The Victim Statement Portion of the Settlement Hearing occurred one day *after* Judge Drain approved the settlement plan, leaving victims, once again, to question whether the law cared about their stories and injuries at all.[257] One two-hour judicial proceeding scheduled after the settlement's approval underscores the extent to which bankruptcy's procedures fall short of achieving tort law's expressive and dignitary objectives.

III. VICTIM IMPACT STATEMENTS: THEN AND NOW

Reforms designed to increase victim participation and incorporate victim voices in litigation proceedings are relatively new and narrow in scope.[258] Before the 1970s, victims could only participate in the judicial process through trial testimony.[259] However, the victims' rights movement in the 1970s spawned a new era of victim protections.[260] One now-codified protection is the ability for victims to confront their perpetrator and describe the extent of their harms through a victim impact statement submitted to the court.[261]

This Part begins with a brief historical overview of the victims' rights movement that led to the codification of certain procedural protections for victims. It focuses on the evolution of victim impact statements as an important protection for victims. This Part then examines the sentencing hearing of former USA Gymnastics team doctor Larry Nassar where the court admitted an unprecedented number of victim impact statements. Examining victim impact statements in this context bolsters the foundational principle upon which this recommendation is based: victim impact statements enable litigants to vindicate important nonmonetary and dignitary objectives, including the ability to confront their abuser and the opportunity to be heard. Finally, this Part acknowledges that victim impact statements are codified criminal protections that do not extend to mass tort victims who pursue civil relief for egregious harms, like in the litigation against Purdue Pharma. This Part provides an important framework for understanding this Note's ultimate recommendation: mass tort victims who file civil claims should be entitled to submit victim impact statements to the court as a means of aligning the conflicting principles underlying tort law and bankruptcy law.

A. The Origins of Victim Impact Statements

Until the 1970s, victims had little opportunity to participate in criminal proceedings.[262] Victims could only participate in the judicial process

257. del Valle & Sanchez, *supra* note 247.

258. *See* Raphael Ginsberg, *Mighty Crime Victims: Victims' Rights and Neoliberalism in the American Conjuncture*, 28 CULTURAL STUD. 911, 918–19 (2014).

259. *Id.* at 916.

260. *Id.* at 919–21.

261. *Id.* at 920; Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 3, 96 Stat. 1248, 1249 (1982).

262. Ginsberg, *supra* note 258, at 916.

when called to testify at trial[263]—they did not participate in plea bargaining or sentencing, nor did they have any role in the formulation of criminal justice policy.[264] Frank Carrington, the "[f]ather of the victims' rights movement," led the public campaign to increase victims' rights in judicial proceedings.[265]

When President Ronald Reagan assumed the presidency, he expressed a commitment to Carrington's theories of victims' rights, thereby beginning to transform abstract philosophies into political action.[266] President Reagan established a presidential task force to investigate the treatment of victims in the criminal justice system.[267] In its findings, the task force alarmingly described victims as "appendages of a system appallingly out of balance" who are treated with "institutionalized disinterest."[268] The task force detailed sixty-seven recommendations, including a proposal to amend the Sixth Amendment to the United States Constitution to include a victims' rights provision that would allow all victims "to be present and to be heard at all critical stages of judicial proceedings."[269] The task force's final report signaled the "national arrival of victims' rights" and served as a "catalyst for a decade of advances in victims' rights."[270]

Building upon the task force's momentum, Congress took action to elevate victim voices.[271] Political stakeholders recognized that the criminal justice system was unresponsive and unaccommodating to victims' unique harms yet depended on them for the successful prosecution of a case.[272] Accordingly, Congress passed landmark legislation codifying victims' rights.[273] The Victim and Witness Protection Act of 1982 (VWPA) greatly expanded protections for victims of violent crime.[274] Importantly, the Act amended the Federal Rules of Criminal Procedure to require presentencing reports to include a victim impact statement detailing "information

263. *Id.*
264. *Id.*
265. *Id.* at 919 (In *The Victims*, Carrington opined that due process protections and perceptions of leniency jeopardized victims' well-being and perceptions of their personal worth. He argued for increased victim participation in criminal justice proceedings.).
266. *Id.* at 920.
267. Jennifer J. Stearman, *An Amendment to the Constitution of the United States to Protect the Rights of Crime Victims: Exploring the Effectiveness of State Efforts*, 30 U. BALT. L.F. 43, 44 (1999).
268. *Id.* at 45 (quoting OFF. FOR VICTIMS OF CRIME, U.S. DEP'T OF JUST., PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT, at vi (1982), https://www.ojp.gov/pdffiles1/ovc/87299.pdf).
269. Ginsberg, *supra* note 258, at 920; OFF. FOR VICTIMS OF CRIME, *supra* note 268, at 17–18, 37, 57, 63–64, 72–73, 83, 89, 95, 97, 101, 105, 108, 114; Paul G. Cassell, *On the Importance of Listening to Crime Victims . . . Merciful and Otherwise*, 102 TEX. L. REV. 1381, 1383 (2024).
270. Ginsberg, *supra* note 258, at 920 (quoting OFF. FOR VICTIMS OF CRIME, U.S. DEP'T OF JUST., NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 4 (1997), https://www.ncjrs.gov/ovc_archives/directions/pdftxt/direct.pdf).
271. *Id.*
272. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291 § 2, 96 Stat. 1248, 1248–49 (1982).
273. *See* Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982).
274. *Id.*

concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense."[275]

Throughout the next two decades, Congress continued to expand VWPA's scope.[276] Currently, the Crime Victims' Rights Act[277] lists the federal rights afforded to crime victims, including the right to be reasonably heard at public proceedings involving plea agreements, release, sentencing, or parole.[278] All fifty states and the District of Columbia have codified similar protections and permit crime victims to present a victim impact statement at sentencing.[279]

B. The Effect of Victim Impact Statements

Victim impact statements are oral or written statements submitted to the court.[280] They enable victims of crime to detail the emotional, physical, and financial impacts of the crime committed against them.[281] The presiding judge may consider these statements along with the presentence report and sentencing guidelines when determining a defendant's sentence.[282] Moreover, the victim's assessment of any financial loss that the crime caused can assist the judge in evaluating the amount of restitution a defendant owes.[283]

The impact of victim impact statements (and whether their benefits outweigh any perceived risks) is a hotly debated topic among scholars and in empirical studies conducted around the world.[284] Some scientists and

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275. *Id.* at 1249.

276. OFF. FOR VICTIMS OF CRIME, U.S. DEP'T OF JUST., ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 7–8 (2005) [hereinafter AG GUIDELINES 2005]; 18 U.S.C. § 3771.

277. 18 U.S.C. § 3771.

278. *Id.* at § 3771(a)(2), (4), (8); AG GUIDELINES 2005, *supra* note 276, at 8; *Victims' Rights*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/pjcc/topics/leadership-and-management/victims (last visited Nov. 15, 2024).

279. NAT'L CRIME VICTIM INST., SURVEY OF SELECT FEDERAL AND STATE LAWS GOVERNING VICTIM IMPACT STATEMENTS AND A VICTIM'S RIGHT TO BE HEARD POST-CONVICTION REGARDING THE IMPOSITION AND COMPLETION OF SENTENCE 1–3 (2018), https://law.lclark.edu/live/files/26753-right-to-be-heard-post-conviction-survey-qr; Cassell, *supra* note 269, at 1384.

280. *Victim Impact Statements*, U.S. DEP'T. OF JUST., https://www.justice.gov/criminal/criminal-vns/victim-impact-statements (Sept. 27, 2023).

281. *Id.*

282. *Id.*

283. *Id.*

284. *See, e.g.*, Kim ME Lens, Antony Pemberton, Karen Brans, Johan Braeken, Stefan Bogaerts, & Esmah Lahlah, *Delivering a Victim Impact Statement: Emotionally Effective or Counter-Productive?*, 12 EUR. J. CRIMINOLOGY 17, 18, 28–31 (2015) (Victims who deliver a victim impact statement may not experience direct "therapeutic" effects. Yet victims who submit victim impact statements are more likely to experience feelings of procedural justice, which tends to reduce anxiety.); Julian V. Roberts, *Victim Impact Statements: Lessons Learned and Future Priorities*, GOV'T OF CANADA, https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr07_vic4/p1.html (Dec. 14, 2021) (In Canada, victims who submit victim impact statements experience increased satisfaction with the judicial outcome.). *But see* Vicky De Mesmaecker, *Antidotes to Injustice? Victim Statements' Impact on Victims' Sense of Security*, 18 INT'L REV. VICTIMOLOGY 133, 145 (2012) (offering a critical perspective of victim impact statements by explaining how victim impact statements may lead to unrealistic expectations); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 405 (1996) (explaining how victim impact statements may further disempower and dehumanize victims).

legal experts argue that victim impact statements contribute to victims' healing processes because providing these statements "serve expressive and communicative functions" and render therapeutic benefits for victims.[285] One criminology scholar noted that many victims who submitted a victim impact statement claimed that they felt relieved or satisfied after providing the information.[286] On the other hand, some research suggests that victim impact statements result in increased punishment, longer and more rigid judicial procedures, and sentencing disparities.[287]

Classifying the effects associated with delivering a victim impact statement to the court cannot simply be described in binary terms.[288] The victim experience is multifaceted and individualized,[289] making it difficult to extrapolate victim impact statements' effectiveness from limited studies to universal statements.[290] However, it appears that victim impact statements render some positive benefit, even if those benefits may vary depending on the individual and the type of crime at issue. This supports the argument that mass tort victims should, at the very least, have the opportunity to deliver a victim impact statement to the court without manufactured restrictions, such as the two-hour time limit placed on opioid victims during the victim statement portion of the bankruptcy settlement hearing.[291]

From a substantive standpoint, victim impact statements may offer useful information to aid courts in reaching a concrete outcome, such as the number of years of imprisonment a defendant should serve or the amount or restitution a defendant should owe.[292] However, more importantly, victim impact statements symbolically promote individual expression.[293] Victim testimony functions as a unique vehicle for incorporating otherwise-silenced voices into the judicial process.[294] Creating a space for victims to voluntarily acknowledge their suffering and share their stories as part of an official, permanent court record signals to individual victims that their experiences are recognized and valued.[295] This perspective places less weight on tangible outcomes and desired results and more on

285. Paul G. Cassell & Edna Erez, *How Victim Impact Statements Promote Justice: Evidence from the Content of Statements Delivered in Larry Nassar's Sentencing*, 107 MARQ. L. REV. 861, 918 (2024).

286. *Id.* (quoting Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, 1999 CRIM. L. REV. 545, 551–52 (1999)).

287. De Mesmaecker, *supra* note 284, at 134.

288. Lens, Pemberton, Brans, Braeken, Bogaerts, & Lahlah, *supra* note 284, at 31.

289. De Mesmaecker, *supra* note 284, at 138 (Victims are a highly heterogenous group. They differ with respect to their age, ethnic background, psychological and physical well-being, religion, social class, previous experiences with the criminal justice system, support needs, moral intuitions about crime and publishment, and understanding of the criminal justice system.).

290. Bandes, *supra* note 284, at 405.

291. *See supra* Section II.C.2.

292. *Victim Impact Statements*, *supra* note 280.

293. *Id.*

294. Bandes, *supra* note 284, at 392.

295. 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, 433 (2008).

the mere fact that victims are able to participate in an official capacity as part of formal court proceedings.[296] When victims submit victim impact statements to the court, they use their voice, exercise their legal right to be heard, and take ownership of a narrative bestowed upon them through the unwanted, harmful acts of another.[297] As referenced in Part I, all of these benefits closely align with the moral theoretical framework of tort law and with the litigation goals expressed by mass tort victims.

From a procedural standpoint, victim impact statements may increase procedural justice, which focuses on how individuals "experience the procedure through which decisions regarding substantive rights are made, rather than its outcomes."[298] Procedural justice is fundamental to respecting human dignity and satisfying due process requirements.[299]

Litigants care about how they are treated throughout the judicial process,[300] so the way an authority or decision-maker reaches a decision matters a great deal to those involved in the dispute.[301] Litigants who are treated as enfranchised members of the community are more likely to emerge from a dispute satisfied, and more likely to accept a judicial decision, even if they disagree with the outcome.[302] Conversely, when litigants experience procedural injustice, confidence in the judicial system deteriorates.[303]

Scholars have discussed the interplay between voice and procedural justice.[304] As one acclaimed torts scholar noted, "Every person has a sense of justice. Every person wants to be treated fairly. In this country fair treatment usually includes the right to be heard in court by a judge and usually a jury."[305] This supports the idea that litigants feel more fairly treated if they are able to present suggestions about what should be done.[306] Interestingly, research shows that litigants value the mere opportunity to speak to decision-makers, even under circumstances in which they believe that *what* they are saying has little to no value on the ultimate outcome.[307] Voice thus plays an important role in evaluating procedural justice.[308]

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296. *Id.*
297. *Id.*
298. Doron Dorfman, *Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process*, 42 L. & SOC. INQUIRY 195, 204–05 (2017).
299. Foohey & Odinet, *supra* note 19, at 1316.
300. Ella Epstein, *The Need for Dignitary Justice for Tort Creditors in Chapter 11 Bankruptcy*, 2022 COLUM. BUS. L. REV. 943, 963 (2023).
301. *See* Foohey & Odinet, *supra* note 19, at 1316–17.
302. Ackerman, *supra* note 80, at 37; Foohey & Odinet, *supra* note 19, at 1316–17; Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCH. 117, 121 (2000) [hereinafter *Social Justice*].
303. Foohey & Odinet, *supra* note 19, at 1317.
304. *Social Justice*, *supra* note 302, at 121; Foohey & Odinet, *supra* note 19, at 1316.
305. WEINSTEIN, *supra* note 13, at 1.
306. *Social Justice*, *supra* note 302, at 121.
307. *Id.* ("For example, victims value the opportunity to speak at sentencing hearings irrespective of whether their arguments influence the sentences given to the criminals involved.").
308. *See* Ackerman, *supra* note 80, at 37; Foohey & Odinet, *supra* note 19, at 1316–17; *Social Justice*, *supra* note 302, at 121.

As illustrated, litigants—particularly victim–litigants—care about how the judicial system treats them.[309] The extent to which an individual is able to exercise their voice influences their perception of fairness and the degree to which they are satisfied with the ultimate outcome.[310] As such, elevating and amplifying victims' voices through victim impact statements plays a pivotal role in victims' perception of the judicial system as an equitable and legitimate institution.[311]

C. Victim Impact Statements in the Modern Era: The Case Against Larry Nassar

The criminal case against Larry Nassar, a former USA Gymnastics team doctor and sports medicine physician at Michigan State University, exemplifies the role of victim impact statements and the means through which they enable litigants to achieve their nonmonetary objectives, including building community and seeking vindication and validation. The following Section provides a brief overview of the criminal case against Nassar before examining a sampling of victim impact statements submitted to the court by survivors. These victim impact statements yielded powerful benefits to survivors, who were harmed by both Nassar's abuse and by the institutional and cultural norms that silenced them. The Section concludes with an acknowledgment that current law only codifies victim impact statements in criminal cases—leaving those who file civil claims, such as mass tort victims, without the ability to similarly recover.

In November 2017, after being sentenced to sixty years of federal imprisonment on child pornography charges, Nassar pled guilty to ten felony counts of criminal sexual assault in two Michigan counties.[312] For some of Nassar's victims, many of whom were minors, the guilty plea marked an official end to a decades-long struggle to hold him accountable for sexually abusing them during routine patient examinations.[313] However, for hundreds of other survivors of Nassar's abuse, his guilty plea prompted the beginning of a new journey: to confront their abuser and vindicate their dignitary rights through victim impact statements.[314]

309. Epstein, *supra* note 300, at 963.

310. Ackerman, *supra* note 80, at 37.

311. Epstein, *supra* note 300, at 962.

312. Gibson, *supra* note 17, at 518; Erica R. Hendry, *Judge Sentences Larry Nassar to 40 to 175 Years in Prison for Sexual Abuse: 'I've Just Signed Your Death Warrant*,*'* PBS NEWS (Jan. 24, 2018), https://www.pbs.org/newshour/nation/judge-sentences-larry-nassar-to-40-to-175-years-in-prison-for-sexual-abuse-ive-just-signed-your-death-warrant.

313. Jen Kirby, *The Sex Abuse Scandal Surrounding USA Gymnastics Team Doctor Larry Nassar, Explained*, VOX, https://www.vox.com/identities/2018/1/19/16897722/sexual-abuse-usa-gymnastics-larry-nassar-explained (May 16, 2018, 2:45 PM) (One-hundred and twenty-five women filed criminal complaints against Nassar and more than 300 people filed civil suits against him and his employers).

314. Gibson, *supra* note 17, at 518 (quoting one victim) ("This army you created? This army doesn't have a white flag to wave . . . . We're 150 strong and counting. And let me tell you, this army isn't going anywhere.").

In January 2018, Judge Rosemarie Aquilina presided over Nassar's sentencing hearing.[315] In an unprecedented move, Judge Aquilina invited Nassar's victims to speak at the hearing for as long as they desired.[316] Initially, Judge Aquilina expected four days of testimony; however, an "army" of Nassar's survivors became emboldened to speak after listening to other survivors deliver powerful victim impact statements to the court.[317] Throughout the next seven days, 156 women exercised their voice as a means of confronting their abuser.[318] The sheer number of victim impact statements broke with tradition, both in terms of typical courtroom practices and with the culture of silence frequently associated with reporting sexual assault.[319]

Judge Aquilina's decision to allow so many survivors to testify garnered national attention.[320] Many celebrated her victim-centered approach, but others criticized her for transforming judicial proceedings into a "circus" and "therapy sessions."[321] But to the survivors, the victim impact statements were invaluable. The statements fulfilled the women's nonmonetary goals (goals similarly expressed by Catholic Church clergy abuse survivors and opioid victims in Part I): to build community, demand accountability, and reclaim their voice.

This was certainly the case for Rachel Denhollander, who was the first woman to publicly accuse Nassar of sexual abuse.[322] In her own victim impact statement, Denhollander explicitly acknowledged the primary objective motivating her testimony. She told the court, "Our voices were taken from us for so long, and I'm grateful beyond what I can express that you have given us the chance to restore them."[323] Later in her testimony, Denhollander further explained the importance of her victim impact statement while providing the public with a fuller picture of Nassar's abuses.

> I believe sometimes, your honor, that when we're embroiled in a legal dispute the words of our legal system designed to categorize and classify and instruct can inadvertently sterilize the harsh realities of what has taken place. They can serve as a shield against the horror of what we are really discussing. And this must not ever happen. Because if

315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.* at 526.
319. *Id.* at 518–19.
320. *Id.*
321. Areva Martin, *The Judge in Larry Nassar's Case Honored Criminal Justice—and Victims*, TIME (Jan. 26, 2018, 4:20 PM), https://time.com/5121265/judge-rosemarie-aquilina-served-justice-larry-nassar/.
322. *Id.* at 532.
323. *Read Rachael Denhollander's Full Victim Impact Statement About Larry Nassar*, CNN, https://www.cnn.com/2018/01/24/us/rachael-denhollander-full-statement/index.html (Jan. 30, 2018, 7:34 AM).

> the truth about what Larry has done must be realized to its fullest depth if justice is to ever be served.[324]

Similarly, Sterling Riethman, a former gymnast,[325] stated the following as part of her victim impact statement:

> As for us [survivors], we are meant to thrive. We are meant to be happy. We are meant to put an end to sexual abuse. And so here we are today doing exactly that. We will not rest. . . . Our words today are simply the start. They are merely excerpts we pulled from an otherwise multi-page story that is being added to every day. We will continue to write the pages of our story and the pages of history as we stand in solidarity against sexual abuse.[326]

Meanwhile, Jade Capua referenced the solidarity among the survivors in her victim impact statement: "To all the girls that have shown so much bravery throughout this, I could not be more proud of each and every one of you. Although I may not know each of you personally, I can stand here and say that you are all my heroes."[327] Stephanie Robinson addressed the therapeutic release associated with addressing the court:

> While I came to the stand as a victim, I leave as a victor because you do not have the authority anymore and because I am one of the many women who are helping to put you behind bars for the countless crimes that you've committed. . . . [T]hank you for your time and for giving me the opportunity to have my voice be heard, to begin the healing in my heart, and to have the truth set us free.[328]

The statements offered by Denhollander, Riethman, Capua, Robinson, and more than 150 others illustrate the role of victim impact statements in providing some form of relief in criminal proceedings.[329] But this relief is typically not available to those, for example, who file civil claims against Purdue Pharma and the Catholic Archdiocese of Boston because federal and state laws do not extend victim impact statements beyond criminal cases.[330] Victim impact statements in the civil context are used sparingly, if at all.[331] If they are used, they may be read or otherwise admitted into the record to assist the judge or jury with the calculation of

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324. *Id.*

325. *Speaking Out Heals Sterling Riethman from Dr. Larry Nassar*, WMUK NEWS (April 11, 2019, 7:50AM), https://www.wmuk.org/wmuk-news/2019-04-11/speaking-out-heals-sterling-riethman-from-dr-larry-nassar.

326. *Sterling Riethman*, IN OUR OWN WORDS (Aug. 29, 2018), https://inourownwords.us/2018/08/29/sterling-riethman/ (quoting Sterling Riethman).

327. *Jade Capua*, IN OUR OWN WORDS (Aug. 6, 2018), https://inourownwords.us/2018/08/06/jade-capua/ (quoting Jade Capua).

328. *Stephanie Robinson*, IN OUR OWN WORDS (Aug. 8, 2018), https://inourownwords.us/2018/08/08/stephanie-robinson/ (quoting Stephanie Robinson).

329. Cassell & Erez, *supra* note 285, at 906.

330. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 2, 96 Stat. 1248 (1982).

331. People v. Holmes, No. 12CR1522, 2013 Colo. Dist. LEXIS 1632, at *116 (Arapahoe Dist. Ct. Aug. 30, 2013) ("[V]ictim impact statements are utilized in both civil and criminal proceedings, though they are significantly more common in the criminal context.").

damages.[332] In addition, the Bankruptcy Code does not explicitly codify the right to submit a victim impact statement in Chapter 11 bankruptcy,[333] which, as noted in Part II, has become a popular forum to resolve mass tort cases.[334] Thus, the guaranteed right to be heard in court depends largely on chosen legal forum and whether the tortfeasor's underlying alleged conduct translates to criminal charges. This insinuates that only certain victims deserve the legal right to speak.

The ability of civil claimants, such as mass tort victims, to be heard thus hinges on prosecutorial discretion and whether the legal case at issue can satisfy the stricter evidentiary burden required in criminal proceedings. For example, prosecutors may not elect to file criminal charges, and some may not even be able to do so due to the complexity of the case, the lack of evidence available, or the expiration of the statutes of limitations. As such, whether a victim can deliver a victim impact statement depends not on the amount of harm the victim experienced but on the viability of pursuing criminal charges against the perpetrator.

IV. RECOMMENDATION: EXTENDING VICTIM IMPACT STATEMENTS TO MASS TORT LITIGATION

This Note has so far highlighted how the Bankruptcy Code has responded to and resolved some of the challenges associated with aggregate litigation. While bankruptcy's procedures bring uniformity and efficiency into the otherwise perilous arena of mass tort litigation, they also preclude mass tort victims from accomplishing the nonmonetary and dignitary goals that motivated their decision to litigate in the first place.

The controversial nature of the Purdue Pharma bankruptcy plan has prompted increased discussion critiquing the use of bankruptcy procedures to resolve mass tort claims.[335] Most of the proposed recommendations suggested thus far do not identify the victim impact statement as a potential means to reconcile the conflicting objectives sought by bankruptcy law and tort law.[336] However, Congress recently recommended the use of victim impact statements in mass tort cases that are litigated in bankruptcy court.[337] The proposed bipartisan federal legislation would amend the Bankruptcy Code and require courts to implement special protections for claims related to the alleged sexual assault of a child.[338] If enacted, the Closing Bankruptcy Loopholes for Child Predators Act mandates that

332. *Id.*

333. 11 U.S.C. §§ 1101–1195. One section of Chapter 11 bankruptcy states that "a party in interest" has the right to "be heard on any issue in a case under this chapter." *Id.* § 1109. However, the weight of this codified protection as currently written is questionable, as the examples in Section II.C show.

334. Organek, *supra* note 1, at 726–27.

335. Foohey & Odinet, s*upra* note 19, at 1279; Simon, *supra* note 8, 1158.

336. Foohey & Odinet, s*upra* note 19, at 1323; Simon, *supra* note 8, at 1205.

337. Press Release, Deborah Ross, Ross, Tenney Introduce Legislation to Support Survivors of Child Sex Abuse Through Bankruptcy Reform (Apr. 18, 2024), https://ross.house.gov/2024/4/ross-tenney-introduce-legislation-to-support-survivors-of-child-sex-abuse-through-bankruptcy-reform.

338. *Id.*

courts allow victims of alleged childhood sexual assault to submit victim impact statements before the confirmation of any Chapter 11 reorganization plan.[339] The Act further states that the "sole purpose" of the victim impact statement "shall be to increase engagement and understanding between the bankruptcy court and victims or survivors of child sexual assault."[340] At the press conference announcing the legislation, Congresswoman Deborah Ross explained the policy underlying the Act:

> Organizations facing costly judgments in sex abuse cases are increasingly seeking refuge in bankruptcy court. When an organization files for bankruptcy, related civil actions are halted, leaving survivors without the opportunity to be heard in court and frequently to receive remedies. Moreover, bankruptcy court does not provide a forum for survivors to tell their stories through victim impact statements, leaving many survivors who want to come forward without an outlet to do so.[341]

This Note builds upon this recommendation by arguing that mass tort victims whose tortfeasors resort to Chapter 11 bankruptcy procedures[342] to resolve mounting litigation should have the opportunity to more actively and meaningfully participate in judicial proceedings by submitting victim impact statements to the court. Granting this right to mass tort litigants would enable the legal system to embrace bankruptcy's procedural and efficiency goals without sacrificing the nonmonetary objectives sought by mass tort victims.

By drawing inspiration from the federal rulemaking process and from *In Our Own Words*, an online platform created to honor Nassar's survivors, the following Sections address the logistics underlying this recommendation before defending it on three grounds.

A. A Fresh Perspective: Embracing Innovation and Change

Aggregate litigation poses unique challenges with respect to promoting and accommodating individual voices.[343] The legal community should not dismiss these challenges as unavoidable and unfixable but rather should view overcoming them as part of a general ethical duty to increase litigants' access to justice. This mindset combined with technological

339. Closing Bankruptcy Loopholes for Child Predators Act of 2024, H.R. 8077, 118th Cong. § 2 (2024).

340. *Id.*

341. Child USA, *Bankruptcy Bill Press Conference with Marci Hamilton and Congresswoman Deborah Ross*, YOUTUBE (Apr. 19, 2024), https://www.youtube.com/watch?v=24ARbQTkwJo.

342. Because this Note specifically evaluates the conflicting interests between bankruptcy law and tort law, the recommendation remains focused on mass torts victims whose claims are litigated through bankruptcy proceedings. However, this Note also acknowledges that the recommendation would also benefit mass tort victims whose claims are litigated through other aggregate litigation devices, such as multidistrict litigation and class actions.

343. Tyler, *supra* note 2, at 721.

innovation may provide solutions to issues that have traditionally been deemed unsolvable.

The Department of Justice (DOJ) is one entity that explicitly embraces technology as a means of ensuring victims' voices are heard and protected throughout criminal justice proceedings.[344] For example, the Attorney General maintains a set of *Guidelines for Victim Witness Assistance*, which Congress directed the Attorney General to promulgate in 1982.[345] This document "establish[es] guidelines to be followed by officers and employees of the U.S. Department of Justice (Department) investigative, prosecutorial, correctional, and parole components in the treatment of victims of and witnesses to crime."[346] Though not explicitly mandated by Congress, the Attorney General typically updates and revises the *Guidelines* about every ten years—most recently in 2022—to reflect changes in the law and identify any technological developments that may foster the DOJ's mission of promoting a victim-centered and trauma-informed approach when working with crime victims and witnesses.[347]

Article III of the *Guidelines* outlines best practices for cases involving a large number of victims.[348] The *Guidelines* concede that cases with a large number of victims "present unique challenges in affording victims' rights and services," but encourage DOJ personnel to "use technology and be creative, with the goal of providing rights and services to the greatest extent possible given the circumstances and resources available."[349] The DOJ urges its personnel to incorporate victims' voices and adequately represent their interests throughout all stages of criminal justice proceedings.[350]

Courts, like the DOJ, should similarly leverage technology and "be creative"[351] to increase victim participation and voice throughout mass tort litigation proceedings. Courts could draw inspiration from the government platform[352] that allows agencies to receive thousands of comments from members of the public as part of the federal rulemaking process.[353] Courts could adopt a similar platform that allows mass tort victims to submit

344. *See* OFF. FOR VICTIMS OF CRIME, U.S. DEP'T OF JUST., THE ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 24 (2022) [hereinafter AG GUIDELINES 2022].

345. *Id.* at 1.

346. *Id.*

347. AG GUIDELINES 2005, *supra* note 276, at 2; OFF. FOR VICTIMS OF CRIME, U.S. DEP'T OF JUST., ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE, at i (2011); AG GUIDELINES 2022, *supra* note 344, at i.

348. AG GUIDELINES 2022, *supra* note 344, at 13, 24.

349. *Id.*

350. *Id.* at i.

351. *Id.* at 24.

352. REGULATIONS.GOV, https://www.regulations.gov/ (last visited Nov. 1, 2024) (choose "Comments" button).

353. *See, e.g.*, *Frequently Asked Questions—Final Rule: Employee or Independent Contractor Classification Under the FLSA*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking/faqs (last visited Dec. 21, 2024) (The U.S. Department of Labor received approximately 55,400 comments from the public in response to its then proposed rule regarding the classification of employees and independent contractors.).

victim impact statements. Doing so would not only alleviate and address concerns about the court's capacity to accommodate thousands of victim impact statements but it would also offer mass tort victims the opportunity to exercise their voice and fulfill their need to vindicate their harms.

Victims should also have the option to anonymize their statements. By providing this choice, reluctant and vulnerable victims, particularly those who experienced sexual abuse, will not be forced to sacrifice their personal privacy at the expense of fulfilling their legal right to speak.[354] In addition, this Note recommends that all victim impact statements become a part of the official court record, which, in turn, sends a strong message to the victim–litigants about their status and value in the proceedings.[355]

A privately created online platform called *In Our Own Words*, which published the victim impact statements of 156 women who survived Nassar's abuse,[356] is one concrete example from which courts may further draw visual inspiration. Seemingly motivated by tort law's dignitary and expressive principles, creators of *In Our Own Words* recognized the value of publishing victim impact statements shared in court to achieve certain goals, such as to build community and belonging among victims and families, to honor those who courageously spoke out against Nassar's crimes, and to give voice to other survivors of abuse.[357] Thus, by using *In Our Own Words* as a reference, courts may similarly implement technology in ways that better facilitate the dignitary and expressive goals of tort law.

B. Defending Victim Impact Statements in Mass Tort Litigation

This Note does not attempt to address, respond to, and resolve every possible critique of the proposal to incorporate victim impact statements into mass tort litigation. Nonetheless, opponents may identify three critiques. Accordingly, the following Subsections discuss and address the recommendation's (1) impact on judicial impartiality and due process, (2) incremental approach, and (3) limitation to only include mass tort victims (and not individual tort victims).

1. What About Alleged Tortfeasors' Due Process Rights?

The admissibility of victim impact statements has undergone intense scrutiny, even by Supreme Court justices.[358] In a span of five years, the Supreme Court changed its position regarding the admissibility of victim

354. Some of Nassar's survivors submitted anonymous statements to the court. *See, e.g.*, *Victim 138*, IN OUR OWN WORDS (Sept. 6, 2018), https://inourownwords.us/2018/09/06/victim-138/; *Victim 177*, IN OUR OWN WORDS (Aug. 29, 2018), https://inourownwords.us/2018/08/29/victim-177/; *Victim 195*, IN OUR OWN WORDS (Aug. 29, 2018), https://inourownwords.us/2018/08/29/victim-195/.

355. Giannini, *supra* note 295, at 433.

356. *About*, IN OUR OWN WORDS, https://inourownwords.us/about/ (last visited Nov. 1, 2024).

357. *Id.*

358. *See* Gregory B. Schneider, *Victim Impact Statement: A Victim's Steam Valve*, 14 CRIM. JUST. J. 407, 408 (1992).

impact statements[359]—insinuating the difficulty of the legal question at issue.

In *Booth v. Maryland*,[360] the Supreme Court held that the Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence.[361] In its reasoning, the Court focused on the prejudicial effect of victim impact statements.[362] More specifically, the Court noted that it would (1) be difficult—if not impossible—to provide the defendant with a fair opportunity to rebut the evidence, and (2) lead to emotionally charged opinions and divert the jury from deciding the case on relevant evidence concerning the defendant and the alleged crime.[363] However, five years later, the Court reversed *Booth* and changed its position regarding the admissibility of victim impact statements.[364] In *Payne v. Tennessee*,[365] the Court held that the Eighth Amendment does not erect a per se bar prohibiting a jury from considering victim impact evidence.[366]

Using this historical framework as a guide, critics of the proposed recommendation are likely to argue that granting mass tort victims the ability to deliver victim impact statements will compromise a tortfeasor's right to fair and impartial punishment. However, this argument glosses over the dignitary and expressive principles underlying the recommendation. As currently proposed, the victim impact statements submitted to the court by mass tort victims are intended to primarily express and validate the harm they experienced, not as evidence considered in the judge's overall calculation regarding the tortfeasor's liability or punishment.[367]

2. Why Not a More Systemic, Comprehensive Solution?

Courts and commentators have described mass tort litigation in the United States as being in a state of "crisis."[368] Critics of the proposed recommendation may thus argue that allowing mass tort litigants to deliver victim impact statements in court falls short of addressing the systematic and procedural issues exhibited in mass tort litigation. Although this bears truth, the objective underlying this Note is to propose a feasible, practical, and innovative recommendation to respond to one of the many issues seen

359. *Id.*
360. 482 U.S. 496 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).
361. *Id.* at 501–02.
362. *Id.* at 502–03 (Victim impact statements create an "unacceptable risk" that a capital sentencing decision is made in an "arbitrary and capricious manner.").
363. *Id.* at 506, 508–09.
364. *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991).
365. 501 U.S. 808 (1991).
366. *Id.* at 827.
367. The Closing Bankruptcy Loopholes for Child Predators Act recently proposed by members of Congress underscores the expressive component of victim impact statements. The proposed Act explicitly states that the "sole purpose" of the victim impact statement is to increase engagement and understanding between the bankruptcy court and victims of child sexual assault. The information offered through victim impact statements, however, "is not, and shall not be used as, evidence by any person in the case." Closing Bankruptcy Loopholes for Child Predators Act of 2024, H.R. 8077, 118th Cong. § 2(d) (2024).
368. Smith, *supra* note 8, at 1616.

in mass tort litigation—specifically here, the lack of voice of mass tort victims in judicial proceedings. As echoed by Professor Marci Hamilton, CEO and founder of Child USA, and Bridget Brainard, a former staff attorney of Child USA,[369] "[t]here is no one *quick fix* to make Chapter 11 a proceeding that is a safe space for victims."[370]

For decades, mass tort scholars and researchers have proposed a myriad of recommendations to respond to the problems exhibited in mass tort litigation.[371] These proposals have encompassed everything from case-management to legislative approaches.[372] Although this scholarship is certainly necessary to prompt improvements in the legal system, this Note's recommendation intends to embrace practicality and feasibility as part of the solution. This strategy thus prompts adamant victims' rights advocates to argue that the recommendation falls short of comprehensively advocating and protecting mass tort litigants.

3. Why Limit Victim Impact Statements to Mass Tort Litigation?

As proposed here, the recommendation only extends to mass tort victims. Some may perceive this limitation as unjustly depriving individual tort victims of the same right to be heard in court. However, mass torts surface complex jurisdictional, scientific, administrative, philosophical, and ethical problems not necessarily seen in the traditional one-plaintiff-one-defendant case.[373] As Judge Jack Weinstein, the "father of mass tort litigation,"[374] stated, "[t]he tort system works fairly well in individual cases. . . . It does not work well with mega-mass tort cases."[375] Thus, the decision to limit the Note's recommendation to mass tort victims is a specific response to the issues exhibited in mass tort litigation.

Scholars have identified "individualized corrective justice" as one of the objectives underlying tort law.[376] In theory, the tort law system "provides a sense that 'justice has been done' through *individualized* consideration of each plaintiff's and defendant's situation.[377] Yet this objective

369. Professor Marci Hamilton and Bridget Brainard co-authored *Rethinking Chapter 11 For Mass Child Sexual Abuse Claims: Shifting the Focus From Debtor Institutions to the Victims*, which argues that the Bankruptcy Code should be amended to allow victim impact statements in Chapter 11 cases involving child sexual abuse claims. Hamilton & Brainard, *supra* note 96, at 14–15.

370. *Id.* at 15 (emphasis added).

371. WILLGING, *supra* note 20, at 22; *see also* ASBESTOS LITIGATION, *supra* note 101, at 130–33 (describing federal reform efforts in the backdrop of asbestos claims). *See generally* Hamilton & Brainard, *supra* note 96, at 12–15 (describing reforms to Chapter 11 bankruptcy in the context of mass child sexual abuse claims); Foohey & Odinet, *supra* note 19, at 1324–30 (describing recommendations as a means of protecting individual voices in mass tort bankruptcy cases).

372. WILLGING, *supra* note 20, at 22.

373. *See* WEINSTEIN, *supra* note 13, at 3.

374. *Moments in History: Judge Jack Weinstein and Mass Tort Litigation*, U.S. CTS. (Nov. 8, 2017), https://www.uscourts.gov/data-news/judiciary-news/2017/11/08/moments-history-judge-jack-weinstein-and-mass-tort-litigation.

375. WEINSTEIN, *supra* note 13, at 163.

376. ASBESTOS LITIGATION, *supra* note 101, at 127.

377. *Id.* (emphasis added).

becomes compromised in the context of mass tort litigation.[378] Roger Cramton, the former dean of Cornell Law School, also questioned whether individualized justice could be provided "when thousands or even millions of claims flow from mass exposure to a product or substance."[379] The legal system's inability to achieve one of the principal objectives of tort law justifies the implementation of special protections in the mass tort context, such as allowing mass tort litigants the opportunity to deliver victim impact statements to the court.

CONCLUSION

In recent years, mass tort litigation and bankruptcy scholarship have focused on the merits of nonconsensual third-party releases of nondebtors. This Note departed from discussion of the nonconsensual third-party releases at issue in *Harrington* to more thoroughly examine and critique the current system used to resolve mass tort litigation. *Harrington* may have resolved one unsettled question but also subtly raised another: how can courts simultaneously embrace bankruptcy's purported procedural and efficacy goals without sacrificing the nonmonetary objectives embodied by tort law when resolving thousands of claims that threaten a company's financial stability?

This Note argues that victim impact statements provide an answer. Because of the unique challenges that otherwise preclude mass tort victims from actively participating in litigation, mass tort victims whose claims are resolved through bankruptcy should have the legal right to submit victim impact statements to the court. Codifying this legal right into the Bankruptcy Code more delicately balances the conflicting objectives sought by bankruptcy law and tort law.

In addition to striking a balance between two diametrically opposed areas of the law, victim impact statements may function as an important mechanism through which individuals who have been wronged are able to more comprehensively build community, seek validation and vindication, and begin their healing journey. Victim impact statements provide a forum through which litigants feel like they are heard, respected, and treated fairly. This, in turn, increases the likelihood that victim–litigants emerge from a dispute more satisfied, even if they disagree with the ultimate outcome. Victim impact statements advance procedural justice, thus playing a pivotal role in the public's perception of the judiciary as an equitable and legitimate institution.

The recommendation to entitle mass tort litigants the legal right to exercise their voice through victim impact statements is a far cry from addressing the more systemic issues inherent in aggregate litigation. However, this Note—instead of repeating the call to overhaul the mass tort

378. *See* Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811, 816 (1995).

379. *Id.*