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Indiana Law Journal

Volume 94 | Issue 2 Article 5

Spring 2019

Reforming Institutions: The Judicial Function in Bankruptcy and Public Law Litigation

Kathleen G. Noonan
University of Pennsylvania, knoonan@camdenhealth.org

Jonathan C. Lipson
Temple University, jlipson@temple.edu

William Simon
Columbia University, wsimon@law.columbia.edu

REFORMING INSTITUTIONS: THE JUDICIAL FUNCTION IN BANKRUPTCY AND PUBLIC LAW LITIGATION

KATHLEEN G. NOONAN, JONATHAN C. LIPSON & WILLIAM H. SIMON*

Public law litigation (PLL) is among the most important and controversial types of dispute that courts face. These civil class actions seek to reform public agencies such as police departments, prison systems, and child welfare agencies that have failed to meet basic statutory or constitutional obligations. They are controversial because critics assume that judicial intervention is categorically undemocratic or beyond judicial expertise.

This Article reveals flaws in these criticisms by comparing the judicial function in PLL to that in corporate bankruptcy, where the value and legitimacy of judicial intervention are better understood and more accepted. Our comparison shows that judicial intervention in both spheres responds to coordination problems that make individual stakeholder action ineffective, and it explains how courts in both spheres can require and channel major organizational change without administering the organizations themselves or inefficiently constricting the discretion of managers. The comparison takes on greater urgency in light of the Trump administration's vow to "deconstruct the administrative state," a promise which, if kept, will likely increase demand for PLL.

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* Noonan is Chief Executive Officer, Camden Coalition of Healthcare Providers and Adjunct Faculty, Master in Public Health Program, University of Pennsylvania. Lipson is Harold E. Kohn Professor of Law, Temple University—Beasley School of Law. Simon is Arthur Levitt Professor of Law, Columbia University. We are grateful for the encouragement and advice of Melissa Jacoby, James Liebman, David Marcus, Bruce Markell, Ed Morrison, Margo Schlanger, and Fred Tung. Noonan also thanks Kevin Ryan and his colleagues at Public Catalyst for their shared insights into the problems discussed here.

INTRODUCTION

Large organizations sometimes fail, and when they do, courts may be asked to provide a remedy. Often, the remedy is restructuring. Perhaps the largest categories of judicial restructuring are bankruptcy reorganization and "public law litigation" (PLL)—civil rights or regulatory cases seeking structural relief against a government agency. Both types of intervention occur frequently, and contrary to some claims, there is no evidence that either is in terminal decline.[1]

Bankruptcy and PLL address similar problems in similar ways, but PLL has proved vastly more controversial. No one doubts that bankruptcy courts have the authority to facilitate massive change in troubled corporations. While there are debates at the margins about how best to achieve bankruptcy's goals, most commentators concede the effectiveness of such intervention in a substantial range of cases.[2]

There is, however, much more controversy about both the legitimacy and the efficacy of judicial efforts in PLL to reform prisons, schools, police departments, and other public agencies. Critics assert that judicial efforts to restructure public institutions are categorically undemocratic, or ineffective, or both.[3]

Yet, the rationales for, and the techniques of, intervention are similar in both spheres.[4] Although the details of practice vary, the most characteristic form of

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1. *See infra* notes 35–46 and accompanying text.

2. *See infra* notes 23–24 and accompanying text.

3. *See infra* Part III; *e.g.*, DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT 10–12 (2003); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121 (1996).

4. In his seminal article defining and christening "public law litigation," Abram Chayes

bankruptcy reorganization resembles an increasingly common form of intervention in public law litigation. Specifically, we compare the Chapter 11 "bootstrap" reorganization in which the bankruptcy court supervises the restructuring of an organization that is expected to continue operation as a freestanding entity, with the PLL "framework" decree in which the district court induces fairly comprehensive reform but focuses largely on governance and accountability structures rather than mandates specific practices.

In both types of case, judicial intervention is triggered by the organization's demonstrated failure to satisfy large-scale legal obligations. Both types of relief respond to collective action problems that make individual claim adjudication impossible or inefficient. The courts help parties develop remedial frameworks that are decentralized, experimental, and provisional in order to limit and channel incumbent managers' control over the organization for the benefit of stakeholders whose legal interests have been jeopardized by its operations. In various ways, courts force or persuade managers to account to and engage with the organizations' stakeholders in order to comply with baseline obligations.

Critics mistakenly assume that PLL courts actually "run" the agencies they help to restructure. But this is no more the case in PLL than in bankruptcy. Rather, bankruptcy courts in Chapter 11 cases and district courts in PLL cases typically issue decrees that focus on broad issues of governance and accountability reflected in frameworks negotiated by the parties. Like bankruptcy judges, district judges in PLL do not directly impose practices derived from doctrine or technical expertise. In principle, courts withdraw when the debtor or defendant has given credible assurance that its reconfigured operations will respect the interests of the complaining stakeholders. While PLL and corporate bankruptcy obviously differ in their details, courts and participants in these processes address them in substantially similar ways.

Our comparison seeks to quiet anxieties about public law litigation and to enhance explanations about how it works. By analogizing PLL to a less controversial area of practice, we emphasize that judicially facilitated restructuring is less extraordinary than critics tend to assume. At the same time, the analogy helps develop generalizations about how this kind of judicial intervention works, and how it can be further improved.

Our analysis is also motivated by a sense of urgency. The Trump administration has vowed to "deconstruct . . . the administrative state,"[5] which implies, among other

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pointed out the analogy to bankruptcy, noting that "[f]rom 1870 to 1933, federal judges . . . reorganized over 1,000 railroads." Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1303 n.92 (1976). He didn't develop the analogy, however. *Id.* Theodore Eisenberg and Stephen Yeazell, and later, Susan Sturm, seconded Chayes's observation, but they did not develop it either. Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 485–86 (1980); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1384, 1445 (1991).

5. Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for 'Deconstruction of the Administrative State,'* WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html?tid=a_inl&utm_term=.c045781929a0 [https://perma.cc/V6CW-3763].

things, a reduction in the level and quality of services administered by public agencies. A new wave of institutional reform litigation may be one response, whether to enforce existing decrees, or to address new grievances, or both. In the near term, courts may face new and greater PLL challenges than they have in many years.

Part I gives a brief overview of the two spheres of reorganizational practice. Part II reveals important similarities in these facially different areas of practice. Part III uses the comparison to bankruptcy to challenge major complaints about PLL, to establish affirmative grounds for judicially supervised restructuring in both spheres, and to offer suggestions about further adaptation in PLL practice by analogy to bankruptcy.

I. TWO SPHERES OF COURT-SUPERVISED REORGANIZATION

A. Chapter 11 Reorganizations

Chapter 11 of the Bankruptcy Code is the principal legal mechanism for restructuring troubled but viable business organizations.[6] It prescribes a judicial process overseen by specialized, congressionally created (Article I) courts that are "units" of, and supervised by, United States district (Article III) courts.[7]

Restructuring in this context has no single template but typically involves the refinancing and discharge of debt, sale of certain lines of business, entity reconfiguration, and changes in management and personnel and firm governance.[8] Although there are many variations, we focus chiefly on the traditional "bootstrap" reorganization where incumbents manage the debtor with the goal of gaining stakeholder support for a reorganization plan whereby the company will remain a going concern after bankruptcy.[9]

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6. "Chapter 11" generally refers to 11 U.S.C. §§ 1101–1174 (2012), as well as other provisions of the Bankruptcy Code and Judicial Code. The current version of the Bankruptcy Code was originally enacted in 1978, Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978), and has been amended several times, most recently in 2005, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of titles 11, 18, and 28 of the U.S. Code).

7. 28 U.S.C. § 1334(b) (2012).

8. As LoPucki and Doherty explain, companies in Chapter 11:

> may undergo tumultuous changes during bankruptcy. They may shrink in size, be split into multiple businesses, sell their businesses to new owners, discharge their managers, change their names, and fundamentally change the nature of their businesses. One or more businesses may survive after a bankruptcy, but it may nevertheless be difficult to say whether that survivor is the bankrupt company, a company that acquired the bankrupt company, or a company that acquired elements of the bankrupt company.

Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Survival*, 62 UCLA L. REV. 970, 979 (2015).

9. There is some concern among practitioners and observers that bootstrap reorganizations are passé, and that Chapter 11 is now chiefly used to sell companies. Baird and Rasmussen dramatically opened a 2002 paper: "Corporate reorganizations have all but disappeared." Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L.

Some of the nation's largest and most economically important companies have reorganized under Chapter 11, including General Motors[10] and Chrysler,[11] every legacy commercial airline (e.g., American,[12] United,[13] Delta[14]), most companies with exposure to asbestos liability (e.g., Johns-Manville,[15] W.R. Grace[16]), as well as many "big-box" retailers (e.g., RadioShack[17]), industrial firms (e.g., Lyondell Chemical[18]), and fossil fuel-related businesses (e.g., Energy Future Holdings[19]). For the year ended June 30, 2017, about 5900 companies filed for Chapter 11 relief.[20] Since 1995, over 1000 very large companies—those with more than $100 million in assets and publicly-traded securities—have reorganized in this way.[21]

Wealth maximization is the principal normative justification and metric in such cases. "Congress presumed that the assets of the debtor would be more valuable if

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REV. 751, 751 (2002). Brubaker and Tabb have a more temperate view: "[T]here actually is no clean, clear distinction between reorganization by 'plan' and reorganization by 'sale' —through the wonders of sophisticated transaction engineering, each can be the precise functional equivalent of the other." Ralph Brubaker & Charles Jordan Tabb, *Bankruptcy Reorganizations and the Troubling Legacy of Chrysler and GM*, 2010 U. ILL. L. REV. 1375, 1375. Whether the company is sold or remains independent, the court's intervention involves oversight of the construction of a new organizational framework. Jay Westbrook has more recently observed that sales are common, but perhaps not as common as some may think. Jay Lawrence Westbrook, *Secured Creditor Control and Bankruptcy Sales: An Empirical View*, 2015 U. ILL. L. REV. 831, 835 (reporting empirical study of sales for the benefit of secured creditors in Chapter 11 bankruptcy).

10. *See In re* Gen. Motors Corp., 407 B.R. 463 (Bankr. S.D.N.Y. 2009), *enforcement denied by sub nom. In re* Motors Liquidation Co., 529 B.R. 510 (Bankr. S.D.N.Y. 2015).

11. *See In re* Old Carco LLC, 406 B.R. 180 (Bankr. S.D.N.Y. 2009).

12. *See* Supplement B Pilot Beneficiaries v. AMR Corp. & Am. Airlines Inc. (*In re* AMR Corp.), 523 B.R. 415 (Bankr. S.D.N.Y. 2014).

13. *See* United Air Lines, Inc. v. U.S. Bank Trust Nat'l Ass'n (*In re* UAL Corp.), 346 B.R. 456 (Bankr. N.D. Ill. 2006).

14. *See* Disclosure Statement for Debtors' Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, *In re* Delta Airlines, Inc., No. 05-17923 (Bankr. S.D.N.Y. 2005), http://www.wsj.com/public/resources/documents/delta1-122006.pdf [https://perma.cc/2ZW6-ZRFF].

15. *See* Kane v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 843 F.2d 636, 638 (2d Cir. 1988).

16. *See In re* W.R. Grace & Co., 446 B.R. 96 (Bankr. D. Del. 2011).

17. *See* Salus Capital Partners LLC v. Standard Wireless, Inc. (*In re* RadioShack Corp.), 550 B.R. 700 (Bankr. D. Del. 2016).

18. *See* Lyondell Chem. Co. v. CenterPoint Energy Gas Services, Inc. (*In re* Lyondell Chem. Co.), 402 B.R. 571 (Bankr. S.D.N.Y. 2009).

19. *See* CSC Trust Co. of Del. v. Energy Future Intermediate Holdings Co. (*In re* Energy Future Holdings Corp.), 513 B.R. 651 (Bankr. D. Del. 2014).

20. UNITED STATES COURTS, TABLE F-2 (2017), http://www.uscourts.gov/sites/default/files/data_tables/bf_f2_0630.2017.pdf [https://perma.cc/LZ5K-6LWK].

21. This figure is based on a one-variable study in the UCLA LoPucki Bankruptcy Research Database, selecting for "trend in filings" for years 1995–2018. *A Window on the World of Big-Case Bankruptcy*, UCLA-LOPUCKI BANKRUPTCY RES. DATABASE, http://lopucki.law.ucla.edu/design_a_study.asp?ShowStudies=Flexible [https://perma.cc/58YN-73NX] (adjusting to 1980-dollar valuations).

used in a rehabilitated business than if 'sold for scrap'" in a liquidation, the Supreme Court has stated.[22] Few observers challenge this presumption, or the judicially-centered approach Congress has selected.[23] This may be because in broad terms it is viewed as largely successful. One recent study found that seventy percent of large-company reorganizations succeeded in the sense that these companies remained going concerns, either independently or as identifiable parts of other companies.[24]

Critics have occasionally proposed that the courts' role in business reorganization be transferred to an agency. They argue that the administrative characteristics of bankruptcy would be more appropriate for the executive branch.[25] Indeed, when banks and insurance companies fail, they are not permitted to use bankruptcy.[26] While it is true that bankruptcy is the only major congressional power to be implemented almost entirely through courts,[27] many find that the greater transparency and political independence of the courts offer substantial advantages. Restructuring under Chapter 11 creates opportunities and incentives for stakeholder participation unavailable in other contexts.

Judicially-supervised corporate restructuring is not limited to bankruptcy courts. Several states have receivership and analogous statutes that permit the restructuring of some organizations within that state.[28] When debtors such as banks or insurance companies cannot use bankruptcy, or when a debtor's assets and creditors are concentrated in a single state, such proceedings may be used instead of bankruptcy. While this may be rare, state courts acting in this capacity function much like a federal bankruptcy court in Chapter 11. In the *Ambac* case,[29] for example, a state

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22. United States v. Whiting Pools, Inc., 462 U.S. 198, 203 (1983).

23. This has not always been the case. Some early critics argued that the system was inherently inefficient and should be abandoned. Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043, 1050–52 (1992). More recent studies suggest that the system operates in a reasonably efficient manner. *See* Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 606 (2009).

24. LoPucki & Doherty, *supra* note 8, at 972. Success in reorganization (understood as a confirmed plan) appears to be a function, in part, of size. *See* Jonathan C. Lipson & Christopher Fiore Marotta, *Examining Success*, 90 AM. BANKR. L.J. 1, 37 (2016) (finding in sample of about 1200 cases that ninety percent of cases involving over $100 million in assets confirmed plans while only half of smaller cases did so).

25. The Brookings Study proposed administrative resolution for consumer bankruptcies. DAVID T. STANLEY & MARJORIE GIRTH, BROOKINGS INST., BANKRUPTCY: PROBLEM, PROCESS, REFORM 196–218 (1971). Title II of the Dodd-Frank reforms would have much this effect for the "orderly liquidation" of "systemically important financial institutions." Jonathan C. Lipson, *Against Regulatory Displacement: An Institutional Analysis of Financial Crises*, 17 U. PA. J. BUS. L. 673, 679 (2015) (citing Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010)).

26. 11 U.S.C. § 109(b) (2012).

27. Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 644 (2008).

28. *See* Paul A. Lucey, *The Liquidating "Chapter 11" in State Court*, 20 AM. BANKR. INST. J., Feb. 2001, at 12, 12.

29. *See In re* Rehab. of Ambac Assur. Corp., No. 10 CV 1576, 2013 WL 3466812, at *1 (W.D. Wis. July 10, 2013) ("The rehabilitation proceedings for Ambac Assurance Corporation

court in Wisconsin supervised the restructuring of an insurance company subsidiary and coordinated its efforts with the bankruptcy court in New York, which supervised the Chapter 11 case of the parent holding company.[30]

B. Public Law Litigation

Structural injunctions address a broad range of the operations of government agency defendants. These decrees are most strongly identified with civil rights claims, but they can be found in other areas.[31] Public law litigation is most closely identified with the federal courts, but a substantial number of structural decrees have emerged from state courts, including some of the most ambitious.[32] Since the mid-1990s, when the Supreme Court reversed two structural decrees as abuses of remedial discretion, PLL has sometimes been described as moribund,[33] but as with similar assertions in bankruptcy, such claims are exaggerated.[34]

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were initiated in early 2010 in the Circuit Court for Dane County, the designated state rehabilitation court.").

30. *See* Michael J. de la Merced, *Ambac Files for Bankruptcy*, N.Y. TIMES: DEALBOOK (Nov. 8, 2010, 7:13 PM), https://dealbook.nytimes.com/2010/11/08/ambac-files-for-bankruptcy/?_r=0 [https://perma.cc/9XU9-KXAA].

31. They have occurred in many complex environmental controversies. *E.g.*, CHARLES M. HAAR, MASTERING BOSTON HARBOR: COURTS, DOLPHINS, AND IMPERILED WATERS (2005) (describing the court-induced cleanup of Boston Harbor). They also have a long lineage in antitrust law. *See* RICHARD A. EPSTEIN, ANTITRUST CONSENT DECREES IN THEORY AND PRACTICE: WHY LESS IS MORE (2007). And they have some resemblance to recent practice in which corporations agree to submit to monitoring and adopt compliance procedures in return for deferral of prosecution for violation of, for example, the securities laws or the Foreign Corrupt Practices Act. BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014).

32. *E.g.*, Perez v. Bos. Hous. Auth., 400 N.E.2d 1231 (Mass. 1980) (approving decree reforming the Boston Housing Authority); HAAR, *supra* note 31 (chronicling the judicially supervised cleanup of Boston harbor); CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES (1996) (chronicling the decades-long judicial efforts to induce reform of exclusionary zoning practices in New Jersey).

33. *E.g.*, Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1195 (2009) (characterizing the structural injunction as "a dying breed"); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L. J. 1836, 1860–61 (2015) (doubting the "broad availability of systemic challenges"). The two famous cases reversing systemic relief are *Missouri v. Jenkins*, 515 U.S. 70 (1995), a school desegregation case, and *Lewis v. Casey*, 518 U.S. 343 (1996), a prison case.

34. Since the reversal in *Casey*, the Court has upheld extensive structural relief in the prison context. *See* Brown v. Plata, 563 U.S. 493 (2011) (upholding order likely to require release of thousands of prisoners). Since its reversal in *Jenkins*, it has upheld claims in the education context that foreseeably required a complex remedial response. *See* United States v. Virginia, 518 U.S. 515 (1996) [hereinafter VMI] (holding unconstitutional gender discrimination at Virginia Military Academy); Katharine T. Bartlett, *Unconstitutionally Male?: The Story of* United States v. Virginia, *in* WOMEN AND THE LAW STORIES 133, 166–77 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011) (describing implementation of the VMI ruling). In their critique of structural injunctions, Ross Sandler and David Schoenbrod noted a widespread belief that the practice is "over and done with" but rejected the belief as

The area where the claim of decline has been most thoroughly studied is incarceration. This is the sector in which there has been the strongest pushback against systemic relief, both from appellate decisions heightening proof burdens and a federal statute designed to restrict remedial discretion. Margo Schlanger reports that, while the number of orders has declined and their scope has narrowed in recent decades, structural intervention still plays a prominent role in prison reform.[35] In 2011, the Supreme Court affirmed a population cap order effectively requiring the release of tens of thousands of prisoners in California.[36] In 2006, the latest date for which data is available, about a third of the prisoners in California's local jails and eleven percent of the nationwide jail population were in facilities covered by framework decrees governing inmate populations.[37]

The story is similar in other areas: a decline in number and narrowing in scope of structural orders, but still a substantial number of pending cases and active decrees that are a major influence in many jurisdictions on schools,[38] mental health institutions,[39] police departments,[40] child protection agencies,[41] and environmental regulation and management agencies.[42] For example, a 2006 survey of child protective services litigation reports that in the preceding ten years, class actions against child welfare agencies had been initiated in thirty-two states and consent decrees or settlement agreements were in effect in thirty of those states.[43] Or to take another example, since 1994, when Congress authorized the Department of Justice to seek systemic relief for police misconduct, the Department has achieved broad consent decrees or settlement agreements with the police agencies of more than

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mistaken. SANDLER & SCHOENBROD, *supra* note 3, at 10. Other scholars noting the continued vitality of PLL include Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!*, 58 U. MIAMI L. REV. 143 (2003); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004); and Tracy A. Thomas, *The Continued Vitality of Prophylactic Relief*, 27 REV. LITIG. 99 (2007).

35. Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 576–82, 602–05 (2006).

36. *Plata*, 563 U.S. 493.

37. Margo Schlanger, Plata v. Brown *and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 197–98 (2013).

38. *See, e.g.*, David Rostetter & Katrina Arndt, *Class Action Lawsuits and Consent Decrees in Special Education: Recommendations for Practice*, 23 J. DISABILITY POL'Y STUD. 195 (2012); Lauren Nicole Gillespie, Note, *The Fourth Wave of Education Finance Litigation: Pursuing a Federal Right to an Adequate Education*, 95 CORNELL L. REV. 989 (2010).

39. *See, e.g.*, Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1 (2012).

40. *See, e.g.*, SAMUEL WALKER & CAROL A. ARCHBOLD, THE NEW WORLD OF POLICE ACCOUNTABILITY 48–49 (2d ed. 2014); Charles F. Sabel & William H. Simon, *The Duty of Responsible Administration and the Problem of Police Accountability*, 33 YALE J. REG. 165 (2016).

41. *See, e.g.*, CHILD WELFARE LEAGUE OF AMERICA, CHILD WELFARE CONSENT DECREES: ANALYSIS OF THIRTY-FIVE COURT ACTIONS FROM 1995 TO 2005 (Oct. 2005).

42. *See, e.g.*, HAAR, *supra* note 31; Nathan Matthews, Note, *Rewatering the San Joaquin River: A Summary of the Friant Dam Litigation*, 34 ECOLOGY L.Q. 1109 (2007).

43. CHILD WELFARE LEAGUE OF AMERICA, *supra* note 41, at 2.

twenty cities, including some of the biggest in the country.[44] New York City recently operated under twenty-nine settlement agreements or decrees mandating broad administrative relief.[45]

To be sure, there have been changes over the years in the form judicial intervention takes. As we show below, some of these changes respond to critiques of structural decrees; yet critical discussion has not always acknowledged these changes. Those whose knowledge of the legal system derives from appellate opinions are likely to be underinformed, since appellate discussion is often out of touch with lower court practice. The misapprehension is due in part to the fact that many cases settle and are not appealed (consent decrees can sometimes be challenged on appeal where interveners object or a defendant seeks modification, but such appeals are rare). Misapprehension also arises from the fact that practice has evolved in ways that make some of the concerns expressed in appellate cases irrelevant, as we elaborate below.[46]

II. COMPARING BANKRUPTCY AND PUBLIC LAW LITIGATION

This part compares and contrasts key features of judicially supervised reorganization in bankruptcy and public law litigation, including the rationale for structural intervention, the required prima facie showing, stakeholder representation, formulation and implementation of the remedy, and termination of the court's involvement. In all of these matters, there are important analogies between the work of bankruptcy courts and that of PLL courts.

A. The Rationale for Structural Intervention

Intervention in both spheres is a response to coordination problems presented by multiple individual claim assertions and, in addition, by the need to protect vulnerable stakeholders who would not be able to assert claims effectively as individuals.

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44. WALKER & ARCHBOLD, *supra* note 40, at 48–51.

45. E-mail from Thomas Crane, Chief, Gen. Litig. Div., N.Y.C. Law Dep't, to William H. Simon, Arthur Levitt Professor of Law, Colum. Law School (July 14, 2015, 1:34 PM) (on file with the *Indiana Law Journal*).

46. A 2011 Supreme Court case involving a private damage action against Wal-Mart appears to have prompted courts to take a stricter view of class certification in public law litigation. David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777 (2016) (documenting and criticizing this development). The recent cases require a more extensive preliminary showing than in the past. Nevertheless, most well-prepared and adequately funded public law claims should be able to satisfy the requirement. There are several examples of recently certified public law claims. *See, e.g.*, Parsons v. Ryan, 754 F.3d 657 (9th Cir. 2014) (challenging prison health care); Unknown Parties v. Johnson, 163 F. Supp. 3d 630 (D. Ariz. 2016) (challenging jail conditions); Fish v. Kobach, 318 F.R.D. 450 (D. Kan. 2016) (challenging voting restrictions); DL v. District of Columbia, 312 F.R.D. 1 (D.D.C. 2015) (challenging administration of special education); Gray v. County of Riverside, No. EDCV 13–00444–VAP (OPx), 2014 WL 5304915 (C.D. Cal. Sept. 2, 2014) (challenging jail conditions).

1. Bankruptcy

The basic premise of corporate reorganization under Chapter 11 is that the debtor is or soon will be unable to fulfill its legal obligations on a large scale.[47] The debtor's obligations may arise under contracts (as with bonds or loan agreements), in tort (as with such famous examples as asbestosis and mesothelioma), or otherwise (e.g., tax obligations).[48] In the absence of bankruptcy, debts can be collected only on an individual basis, usually in a state court of general jurisdiction.[49] Large corporate debtors may have hundreds or thousands of creditors[50] and may have defaulted as to many of them. Applicable state law is likely to follow the "race of diligence" model, meaning that the first creditor to obtain a judgment and execute on it will have first priority in the debtor's unencumbered assets.[51] This will generally be true regardless of the size or source of the creditor's claim. Collection is characterized as a race because it is largely a function of speed through the judicial system.[52] For a debtor with many creditors, it is likely to be highly inefficient and distributively arbitrary.

Inefficiencies stem largely from coordination failures and information asymmetries. Absent bankruptcy, claims of unsecured creditors must be prosecuted through a complaint and, assuming no defense, a default judgment which is then used as the basis for seizing property, usually through the ministrations of a sheriff or receiver in the jurisdiction in which the creditor may find the debtor's property.[53] Any given creditor is unlikely to know the position of all (or even many) other creditors in the race of diligence, and thus their respective relative priority in the debtor's assets. Even if they were to obtain this information, it would be difficult to know whether the debtor's assets were sufficient to satisfy all claims or, more plausibly, which claims, since the debtor's assets almost certainly would be insufficient to pay all creditors in full.[54]

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47. *See supra* notes 6–9 and accompanying text.

48. *See supra* notes 10–19.

49. *See* Richard F. Broude, *The Automatic Stay*, C867 ALI-ABA 379, 383 (1993).

50. *See, e.g.*, *In re* RS Legacy Corp., 62 Bankr. Ct. Dec. 94 (Bankr. D. Del. 2016) (29,798 claims according to *RS Legacy Corporation fka RadioShack Corporation (15-10197)*, PRIME CLERK, https://cases.primeclerk.com/radioshack/Home-ClaimInfo [https://perma.cc/Z5MG-E5E2]); *In re* Caesars Entm't Operating Co., 561 B.R. 441 (Bankr. N.D. Ill. 2015) (20,040 claims according to Prime Clerk, *Caesars Entertainment Operating Company, Inc. (15-01145)*, PRIME CLERK, https://cases.primeclerk.com/ceoc/Home-ClaimInfo [https://perma.cc/EV5H-USYA]); *In re* Energy Future Holdings Corp., 513 B.R. 651 (Bankr. D. Del. 2014) (over 66,000 claims according to *Energy Future Holdings Corp., et al.*, EPIQ CASES, https://dm.epiq11.com/#/case/efh/claims [https://perma.cc/9EHV-N2XL]). The number of claims is likely greater than the number of creditors, as creditors may file multiple or duplicative claims.

51. We discuss the rights of secured creditors below and put to one side the effect that statutory liens may have for select creditors (e.g., mechanics' liens).

52. *See* A. Ari Afilalo, Case Comment, *The Impact of* Union Bank v. Wolas *on the Ordinary Course of Business Defense to a Trustee's Avoiding Powers*, 72 B.U. L. REV. 625, 626–27 (1992).

53. *See, e.g.*, PA. R. CIV. P. 3023, 3104 (2002 & Supp. 2018) (regarding judgment liens and execution).

54. Creditors could form groups and pursue their claims collectively. But in cases with

Some creditors may succeed, however, and they would have the power to force a sale of the debtor's assets to satisfy their claims and the attendant administrative costs.[55] Because sheriffs and receivers cannot generally seize or sell property outside of their jurisdictions, creditors of a multijurisdictional debtor (which would be most large corporations) face significant coordination problems. The historic example is the railroad: if "the lines of the road [were] broken up and fragments thereof placed in the hands of various receivers, and the rolling stock, materials, and supplies seized and scattered abroad, the result would be irreparable injury to all persons having any interest in said line of road."[56]

In many cases, it is unlikely that creditors could avoid the inefficiencies of individual collection actions by organizing and renegotiating their relationships without direct or indirect judicial assistance. Most large debtors will have complex capital structures which produce webs of interrelated debts. A single debtor may be composed of many subsidiaries and affiliates, each of which may have separate or shared financial creditors (e.g., banks and bondholders).[57] In many cases, some but not all debtors in a corporate group will also have obligations to general unsecured trade creditors, taxing authorities, and perhaps tort claimants or terminated employees seeking recovery.[58] Bankruptcy exists because it is often difficult for such heterogeneous claimants to coordinate when the debtor encounters financial distress.[59]

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widely dispersed creditors, such as trade creditors, or creditors whose claims may be contingent and unliquidated, such as tort creditors, coordination is likely to be difficult, if not impossible. Given the temporal orientation of state collection law, creditors are likely to view themselves as competitors for the debtor's limited assets, not allies.

55. *See* Afilalo, *supra* note 52, at 628.

56. Oscar Lasdon, *The Evolution of Railroad Reorganization*, 88 BANKING L.J. 3, 7 (1971). Lasdon was discussing the 1884 federal equity receivership of the Wabash, St. Louis & Pacific Railway ("Wabash") where receivers were appointed due to the impending default of one of more than thirty mortgages it had granted. *Id.* at 6–9. Wabash was the first American railway system to do this in federal court on its own initiative. *See* DAVID A. SKEEL JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 63–64 (2001) (discussing precedent-setting nature of the Wabash receivership).

57. General Growth Properties, the largest real-estate-based Chapter 11, had 160 special-purpose subsidiaries. *In re* General Growth Props. Inc., 409 B.R. 43 (Bankr. S.D.N.Y. 2009); Petition of General Growth Properties, Inc. at 23–26.

58. Even debtors that fully encumber their assets prepetition will have unsecured creditors who hope that the debtor's estate may find some unencumbered assets, somehow. For example, property a debtor acquires after commencement of the case is unlikely to be encumbered by a prebankruptcy lien, even if the security agreement had a so-called "after-acquired property" clause purporting to encumber such property. Bankruptcy Code § 552 specifically disables such provisions. 11 U.S.C. § 552(a) (2012). Thus, revenue earned during the case could be unencumbered and may be available to general unsecured creditors under a reorganization plan, free from a prebankruptcy lien.

59. To be sure, there have been interesting proposals to promote ex ante coordination, e.g., through charter or other contractual mechanisms that might effectively cash out all creditors upon general default. *See, e.g.*, Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 STAN. L. REV. 311, 323, 332–33 (1993) (proposing that debt be treated as "chameleon equity" on default). While these models "may have been elegant, their particular proposals seem not to have appealed to the institution contractualists

Market coordination can occur through the renegotiation of major defaulted debt contracts. Although these negotiations often work, they are sometimes precluded by the number and diversity of creditor interests.[60] This has led to a dynamic in which some creditors may be tempted to hold out for a better deal.[61] Bankruptcy addresses these coordination failures directly through the automatic stay, if a case is commenced.[62] Even if a case is not commenced, the threat of bankruptcy is a major factor in bringing recalcitrant parties to the table. Thus, actual or potential bankruptcy is a major factor in coordinating otherwise dispersed and potentially adverse creditors.

The market is also unlikely to correct distributive imbalances in the restructuring process. Such imbalances may arise because some stakeholders are more sophisticated and better resourced than others. The well-endowed can exploit collective action failures to gain relatively greater recovery shares. Professionalized distress investors, sometimes known as "vulture funds," can in some cases manipulate the process to increase their own recoveries at the expense of less sophisticated stakeholders, such as unrepresented employees.[63]

Small public shareholders and employees have been thought especially vulnerable to disproportionate loss of the debtor's going concern value in a liquidation for the benefit of the senior creditors. Shareholders are protected by the possibilities of a representative committee and a vote on a reorganization plan, if the debtor is plausibly solvent.[64] Deeming the interests of employees of "special social importance," Congress has given them enhanced protection.[65] It is, for example, harder for the debtor to escape collective bargaining agreements than other contracts.[66] Wage claims have priority above most other unsecured debts.[67] Debtors may pay in full and immediately (i.e., during the case) prebankruptcy wage claims

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extolled—the market, where they remain largely unused." Jonathan C. Lipson, *Bargaining Bankrupt: A Relational Theory of Contract in Bankruptcy*, 6 HARV. BUS. L. REV. 239, 266 (2016).

60. Although there have been recent developments on this front, courts historically viewed the Trust Indenture Act as requiring strict unanimity among bondholders in prebankruptcy workouts. *See* Marblegate Asset Mgmt. v. Educ. Mgmt. Corp., 846 F.3d 1 (2d Cir. 2017), *vacating and remanding*, 111 F. Supp. 3d 542, 556–57 (S.D.N.Y. 2015) (citing Mark J. Roe, *The Voting Prohibition in Bond Workouts*, 97 YALE L.J. 232 (1987)).

61. The dynamic is exacerbated by provisions of the Trust Indenture Act that prohibit material changes to a bond indenture absent unanimous consent of bondholders, which is usually difficult, if not impossible, to obtain. *See* Roe, *supra* note 60.

62. 11 U.S.C. § 362(a) (2012).

63. Lipson & Marotta, *supra* note 24, at 17–18.

64. *See* 11 U.S.C. §§ 1102(a)(2), 1104 (2012); *see also* Lynn M. LoPucki & William C. Whitford, *Bargaining over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125, 195–96 (1990).

65. S. REP. NO. 95-1106, at 4 (1978).

66. 11 U.S.C. § 1113 (2012).

67. *Id.* § 507(a)(4); *see also* Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 986 (2017) ("Congress established employee wage priority 'to alleviate in some degree the hardship that unemployment usually brings to workers and their families' when an employer files for bankruptcy.") (quoting United States v. Embassy Restaurant, Inc., 359 U.S. 29, 32 (1959)).

that might otherwise be paid fractionally at the end of the case, as well as outstanding claims of so-called "critical vendors."[68]

2. Public Law Litigation

As in bankruptcy, the basic premise of structural relief in public law litigation is that the defendant on its current course is or soon will be unable to fulfill its legal obligations, and individual relief would be inefficient, distributively arbitrary, or unresponsive to some aspects of the claim. In each of these situations, individual relief is "inadequate" in the sense of traditional equity jurisprudence, though the rights at stake often arise from modern welfare and regulatory programs rather than the common law rights around which traditional doctrine developed.

Inadequacy can arise in at least three forms. The second and third are analogous to rationales for bankruptcy.

First, the plaintiffs' claim may directly implicate a collective good or practice that cannot be altered on an individual basis. Many discrimination claims have this quality. Meaningfully equal treatment of a minority person in a public institution may require more than changing the institution's conduct toward her individually. It may require the reconfiguration of general practices that marginalize the plaintiff by excluding others like her or by broadly communicating derogatory messages.[69] Many environmental claims have an analogous quality. The substantive right is defined largely as a right to enjoy a natural environment in a condition untainted by improper practices. Since the good here is indivisible, specific enforcement would not be possible on an individualized basis. In both the desegregation and environmental cases, individual monetary relief would be possible but would have two disadvantages. It would be incommensurate with any nonmaterial dimension of the claim. And it would be hard to calculate even the material damage numerically.

A second reason why legal remedies may be inadequate is that, to the extent that individual harms are foreseeable and preventable, it may be more efficient and more just to intervene preventively than to compensate post hoc. Even if we assume that prison violations of the Eighth Amendment can be fairly compensated monetarily, it might be less costly to do so with systemic relief.[70] If, for example, a court can reliably determine that a prison system that delegates power to favored inmates ("trusties") to discipline their fellow prisoners will cause many more violations than

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68. *See, e.g.*, *In re* Kmart Corp., 359 F.3d 866, 868 (7th Cir. 2004).

69. Owen M. Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 18–24 (1979) (noting that the focus of desegregation suits tends to be, not an "incident of wrongdoing" but a "social condition"). The systemic dimension of nondiscrimination is especially clear with respect to jury discrimination. *See* Strauder v. West Virginia, 100 U.S. 303 (1879). No particular person has a right to sit on a jury, and no defendant has a right to have minority individuals on his jury. The relevant entitlement is the right to a jury selected in a nondiscriminatory manner. Only systemic relief can vindicate the right.

70. *E.g.*, United States v. Ciampitti, 615 F. Supp. 116 (D.N.J. 1984), *aff'd mem.*, 772 F.2d 893 (3d Cir. 1985) (ordering defendant to undertake restoration of waterway polluted by discharges in violation of the Clean Water Act).

an alternative system that serves the defendant's legitimate purposes as well, the most efficient remedy may be to enjoin the trustie regime.[71]

Note that the efficiency calculation in PLL has to consider not only the procedural costs of the individual claims that are likely to be brought but the costs of injuries that, in the absence of systemic relief, will never give rise to claims because the victims lack the information, resources, or security to bring the claims. In prisons, for example, it seems likely that only a fraction of meritorious claims come to the attention of the courts because prisoners lack the ability to identify them, or the ability to advance them, or plausibly fear retaliation by prison personnel. At the same time, many nonmeritorious individual claims are filed in court by prisoners, usually *in propria persona*. Prison officials seem content with this system of individual relief because it rarely results in orders that interfere with their discretion.[72] But they might feel differently if prisoners were able to effectively assert all the valid individual claims that arise. Under those circumstances, they might prefer structural relief to a long series of varying and potentially inconsistent individual orders. Here, PLL resembles bankruptcy's effort to protect employees and small general creditors. The goal is not only to avoid the inefficiencies of individual claim assertion but also to mitigate vulnerabilities that would prevent some stakeholders from asserting claims at all.

Third, individual relief against public agencies can be distributively arbitrary in various respects. To begin, it is at least theoretically possible that, if all claimants with valid claims were able to obtain individual money judgments, the defendant's resources could be exhausted before all claims were paid. This virtually never happens, however. On the other hand, it is not unusual for resources to be diverted away from activities that are not subject to claim pressure in order to satisfy individual claims. It is expensive for school districts to adjudicate and fund relief for special education claims, and it is often asserted that this result reduces resources, and consequently, quality, for regular education programs. If the special education students have stronger claims to these resources than the other students, this result might be justifiable. But general education students have various rights as well that might be jeopardized by a reduction in resources.[73] Like the race of diligence that creditors run before bankruptcy, individualized relief in PLL could produce results harmful to those least able to assert their claims.

The same limitations can arise with class relief that takes the form of very specific directives. An injunction mandating compliance with deadlines for processing applications may result in greater delay in responding to requests from those who are already receiving benefits. Such distributive issues cannot be readily considered in

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71. *See* David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1057–62 (2004) (describing trend in prison cases to prohibit inmate disciplinarians).

72. *See* Margo Schlanger, *Operationalizing Deterrence: Claims Management (in Hospitals, a Large Retailer, and Jails and Prisons)*, J. TORT L., 2008, at 44–50 ("[I]t is rare in corrections that . . . information [from individual claims] is used to strategize harm reduction.").

73. *See* MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES (1997); SANDLER & SCHOENBROD, *supra* note 3, at 91–92.

the context of individual claims. They are more plausibly considered in structural decrees that more generally address the sources and uses of those resources.

The problem of collateral effects, or "polycentricity," is often said to be an objection to structural relief.[74] But individual relief does not avoid the problem of polycentricity. Not only do individual monetary claims potentially draw resources from other activities, but individual injunctive relief creates the possibility of arbitrarily differentiated norms. Bespoke orders might reflect widely varying understandings across different courts or judges. In general, the broader the decree, the more it can potentially address collateral effects. Thus, polycentricity is not considered a problem in bankruptcy because the decree there—the plan of reorganization—is all-encompassing, addressing all of the debtor's operations, as well as its assets and liabilities.

As bankruptcy is commonly seen as a response to market failure, public law litigation might be seen as a response to political failure. Two broad kinds of political failure may produce the kind of systemic noncompliance that calls for structural relief.

The first is that electoral processes may be unfairly hostile or selectively indifferent to vulnerable people and groups. Some constitutional rights may be clear and yet not attract majoritarian support in the electoral process. Or legislatures may find it expedient to enact statutory rights for vulnerable people while neglecting to provide adequate enforcement. Or officials may use their discretion to pursue selfish and idiosyncratic goals.

The second form of political failure arises from the fragmentation of executive authority. The most common collective action problems in PLL, as in bankruptcy, arise among stakeholders, but some PLL cases also present such problems on the agency side. Authority to implement statutory mandates is often divided among multiple governmental units that may have difficulty coordinating. The Boston Harbor cleanup case is an extreme but revealing example.[75] There was a good deal of political mobilization in support of cleaning up the harbor and very little broad-based opposition.[76] Yet, for decades, this mobilization had failed to induce meaningful action.[77] The key reason appears to have been the extreme division of responsibility among federal, state, local, and regional government entities and within each level, among multiple agencies with overlapping subject-matter jurisdictions.[78] Coordination among all these entities was difficult, and responsibility

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74. *E.g.*, SANDLER & SCHOENBROD, *supra* note 3, at 55–56.

75. *See* HAAR, *supra* note 31.

76. *Id.*

77. *Id.* at 20–24, 48–63.

78. *See id.* at 64–78. Some political scientists have argued that excessive fragmentation of executive authority is a key source of American governmental dysfunction. FRANCES FUKUYAMA, POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY 488–505 (2014); Lawrence R. Jacobs & Desmond King, *The Political Crisis of the American State: The Unsustainable State in a Time of Unraveling*, *in* THE UNSUSTAINABLE AMERICAN STATE 3 (Lawrence Jacobs & Desmond King eds., 2009). A study of PLL in Colombia focusing on litigation on behalf of internally displaced people argues that excessive fragmentation of executive implementation authority is an important rationale for judicial intervention. CÉSAR RODRÍGUEZ-GARAVITO & DIANA RODRÍGUEZ-

was diffuse. The key intervention of the court was to facilitate and motivate coordination among these dispersed actors.[79]

Underlying the political dysfunction rationale is the value of the rule of law. This value limits the deference that courts can give legislatures and executive officials in situations of systemic noncompliance. Legislatures have broad discretion with respect to enforcement procedures, and executive officials have broad discretion when they operate within such procedures. But even with respect to rights that are not constitutionally entailed, the legislature is not free to create rights without providing for their enforcement. And executive officials should be accountable for their implementation decisions. The limits of this rule-of-law principle are uncertain, but no one rejects it categorically, and some version of it appears to underlie structural intervention in both PLL[80] and in bankruptcy.[81]

B. The Prima Facie Case

The core of the prima facie case in both spheres is a showing that the defendant organization as presently constituted is failing to fulfill its legal obligations on a widespread basis.

1. Bankruptcy

Financial distress is the heart of the prima facie case for a Chapter 11 bankruptcy. Bankruptcy doctrine and practice sharply distinguish between "voluntary" cases, which are "easy" to commence, and "involuntary" cases, which are not. A voluntary

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FRANCO, RADICAL DEPRIVATION ON TRIAL: THE IMPACT OF JUDICIAL ACTIVISM ON SOCIOECONOMIC RIGHTS IN THE GLOBAL SOUTH 63–75 (2015).

79. *See* HAAR, *supra* note 31, at 154–201.

80. *See, e.g.*, Matthews v. Eldridge, 424 U.S. 319 (1976) (holding that the Constitution requires adequate enforcement procedures for some nonconstitutional rights and that adequacy depends in part on the importance of the right); Marbury v. Madison, 5 U.S. 137, 163 (1803) (stating that the United States government "would cease to deserve th[e] high appellation [of a government of laws], if the laws furnish no remedy for the violation of a vested legal right"). But authority has not always been clear or consistent on this point. *See* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 755–77 (7th ed. 2015) (noting ambiguities in the Supreme Court's commitment to the principle that the Constitution entails that there be practical opportunities to enforce rights). *Compare* Richard A. Epstein, *No New Property*, 56 BROOK. L. REV. 747 (1990) (arguing that constitutional due process does not constrain legislative discretion with respect to enforcement procedures for welfare rights), *with* William H. Simon, *The Rule of Law and the Two Realms of Welfare Administration*, 56 BROOK. L. REV. 777 (1990) (arguing that constitutional due process requires reasonably effective procedures to enforce welfare rights). Recall that the classic statement of the rule-of-law ideal emphasizes the importance of effective enforcement procedures for substantive rules. ALFRED VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 107–22 (8th ed. 1915).

81. Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 986 (2017) (forbidding "rare case" exceptions to deviations from priority rules on rule-of-law grounds); RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 649 (2012) (observing that the "Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law").

bankruptcy is one that managers of the debtor (in particular, directors) choose to commence.[82] The Bankruptcy Code does not require a particular level of financial distress to commence a voluntary reorganization under Chapter 11, such as technical insolvency; it is enough that management believes in good faith that the debtor is, or will soon be, unable to pay its debts.[83]

The task of establishing the prima facie case for corporate reorganization changes when management resists. If corporate managers deny that the debtor is in trouble, but creditors believe that a bankruptcy for the debtor would be in their interest, creditors may commence an involuntary case.[84] The prima facie case for forcing a debtor into bankruptcy is a function of both scale and financial condition. A corporate debtor with more than eleven creditors cannot be forced into bankruptcy unless at least three creditors holding in excess of about $15,000 in unsecured claims join the petition.[85] Those creditors must be prepared to show that the debtor is "generally not paying such debtor's debts as such debts become due."[86]

Creditors may commence an involuntary bankruptcy because they fear that they are about to lose the race of diligence and want to prevent others from levying on the debtor's property.[87] They may also worry that the debtor's management will plunder the debtor or simply continue to mismanage it. Yet, an inappropriate bankruptcy can seriously disrupt a business by distracting managers, diverting resources, and destabilizing relationships with various stakeholders. The vengeful litigant who commences an involuntary bankruptcy against an otherwise solvent debtor may produce a fait accompli, inducing the very failure the plaintiff purports to worry about, destroying an otherwise sound business in the process.[88] Involuntary cases thus are not, and should not be, "easy" to commence.[89]

Whether voluntary or involuntary, the content of the prima facie case is fairly straightforward. Payment-related rights, and their violation, are usually easy to identify.

2. Public Law Litigation

The prima facie case is often more complicated in public law litigation because the substantive legal norms and the nature of the organization's responsibilities are

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82. 11 U.S.C. § 301(a) (2012).

83. *Id.* § 301.

84. *Id.* § 303.

85. *Id.* § 303(b)(1).

86. *Id.* § 303(h) (providing solvency tests to commence an involuntary case).

87. Wade Beavers, Case Comment, Union Bank v. Wolas*: Excepting Long-term Debt Payments from the Trustee's Power to Avoid Preferential Transfers*, 26 GA. L. REV. 993, 998–99, 999 n.25 (1992).

88. They may also find themselves sanctioned, as the Bankruptcy Code penalizes creditors whose involuntary petition fails. 11 U.S.C. § 303(i) (2012); *see also In re* John Richard Homes Bldg. Co., 291 B.R. 727 (Bankr. E.D. Mich. 2003) (awarding compensatory and punitive damages to debtor where creditor commenced improper involuntary case in bad faith).

89. They have also been fairly rare. *See* Susan Block-Leib, *Why Creditors File So Few Involuntary Petitions and Why the Number Is Not Too Small*, 57 BROOK. L. REV. 803 (1991).

more contested there than in bankruptcy. We focus on civil rights cases because the contrast with bankruptcy is sharpest there.

Formally, all public law cases are involuntary; there is no technical analogy to the voluntary Chapter 11 petition. However, defendant administrators are sometimes sympathetic to the plaintiffs, believing that a court's intervention will produce administrative changes, new resources that they cannot generate on their own, or judicial supervision that will mitigate coordination problems. Although some critics find this seeming conflict troubling,[90] it represents an analogy to the voluntary Chapter 11 petition.

With or without sympathetic management, a plaintiff's prima facie case generally involves three elements.

First, the plaintiff has to show some harmful conduct that violates a legal duty. If the duty is specific (say, a statutory prohibition on corporal punishment in schools) or the conduct is egregious enough (say, rape by a guard of a prison inmate), its illegality will not be controversial. Often, however, there will be a dispute as to whether conduct violates some general constitutional standard, such as the Fourth Amendment prohibition on "unreasonable" searches and seizures or the due process requirement that individuals in state custody receive "appropriate" treatment. In elaborating such standards, courts often look to informal social norms connoted by terms such as "shocks the conscience" and sometimes to professional standards. In these cases, expert testimony is common and usually necessary, especially where professional standards are relevant.[91]

Second, if the conduct directly causing the harm was performed by frontline officials, some additional showing of responsibility is required for relief against senior officials or a public entity. Doctrine disclaims respondeat superior in public law cases.[92] It is not enough, as it usually is with private law claims in bankruptcy, that the frontline agent was acting within the scope of his employment. If the defendant has explicit policies furthering the unlawful conduct or its senior officials have ordered or encouraged it, that will be sufficient. If, however, the conduct or conditions that the plaintiffs challenge is not the direct consequence of explicit policies or commands, plaintiffs will have to show "deliberate indifference" by senior administrators, which means knowledge of the conduct and at least tolerance of it.[93] For example, excessive force by police officers may contravene a defendant-agency's express policies but nevertheless be widespread and accepted by management. Similarly, plaintiffs may complain of pollution in a waterway or unsanitary conditions in a jail not because managers cause these conditions directly, but because managers cannot credibly claim ignorance of them or legitimately fail to address them.

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90. *See infra* notes 231–238 and accompanying text.

91. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 324 (1982) (interpreting the right to training and freedom from restraints of involuntarily institutionalized mental health patients in terms of what "an appropriate professional" would deem "necessary"); Martinez v. Cui, 608 F.3d 54, 64 (1st Cir. 2010) (stating that the "shocks-the-conscience test" governs substantive due process challenges to executive conduct).

92. Monnell v. N.Y.C. Dep't of Soc. Servs., 436 U.S. 658, 694–95 (1978).

93. City of Canton v. Harris, 489 U.S. 378, 389 (1989).

Third, the plaintiff must show that the challenged conduct is systemic—that is, more than a series of idiosyncratic incidents. In bankruptcy, the systemic nature of the defendant's wrong—the likelihood of it defaulting on a large but indeterminate range of its obligations—is shown through financial statements. In public law litigation, there is no comparable standard form of proof, at least where the conduct in question is unauthorized or contrary to articulated policy, such as excessive force by police or prison guards.

The plaintiff usually begins with testimony from members of the plaintiff class of episodes of frontline misconduct causing serious harm.[94] This will be followed by evidence of the failure of the defendant to adopt practices assertedly essential to compliance—for example, use-of-force reporting for police, or contracting practices enabling timely response to equipment malfunction by housing authorities, or training in learning disabilities for special education administrators. Sometimes these practices are mandated specifically by statute. More often, they are supported by expert opinion about customary norms or by published standards of professional organizations. In addition, plaintiffs may present data about aggregate outcomes or conditions—for example, racial or gender disparities in arrests, average waiting times for processing applications, or sickness or injury rates for prisoners. Testimony about specific episodes is necessary but usually insufficient. When combined with evidence of systemic practices and evidence that the practices violate customary or professional standards, it can support a finding of systemic violation, but there are no clear lines that define a sufficient showing.[95]

It is arguable that a fourth element of the prima facie case should be political blockage. As we have noted, it is naïve to suppose that the political process will routinely correct the systemic deficiencies in the defendant's activities. However, there may be situations in which politically induced correction seems imminent or under way. Courts do not speak of political blockage as an element of the prima facie case, and they usually do not assess political circumstances beyond ritual acknowledgment of the principle of presumptive deference to executive (and state) authority. However, the likelihood that systemic violations will be corrected without court intervention is relevant to the traditional equitable requirement of irreparable injury. If self-correction is imminent, judicial intervention is not necessary to avoid irreparable injury. Occasionally, courts do recognize recently initiated reforms as a

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94. The plaintiffs must also show standing—a discrete and imminent personal injury that will be remedied by the requested relief. This requirement is easily satisfied in many cases. The most notable exception involves policing, where *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), held that standing to seek injunctive relief against a practice of unlawful choke holds did not arise either from the fact that the plaintiff had been subjected to the hold in the past or that he routinely used the streets patrolled by the police who engaged in the practice. According to the case, the plaintiff would have to show that the plaintiff was distinctively likely to be subjected to the practice in the future. *Id.* at 111. This requirement has made police cases more difficult, but it has not proven insuperable. Moreover, standing is not a problem for the federal government, which has authority under 42 U.S.C § 14141 (2012) to bring cases challenging patterns and practices of unlawful police conduct.

95. For a police case involving all these types of proof, see *Floyd v. City of N.Y.*, 813 F. Supp. 2d 417 (S.D.N.Y. 2011).

reason for denying or deferring systemic relief.[96] This is akin to the implicit requirement that a Chapter 11 case be commenced in "good faith," which is often taken to mean that the debtor's problems are multilateral and cannot readily be resolved by a traditional legal mechanism.[97]

C. The Problem of Representation

Since the basic rationales for both bankruptcy reorganization and PLL assume collective action problems that make direct participation of all affected parties infeasible, the interests of at least some stakeholders in both types of cases must be protected through representation. Thus, both fields have doctrines and structures designed to make representation effective. In general, these representatives are the key participants in formulating reforms for the organization.

1. Bankruptcy

The problems of scale that impede coordination prior to bankruptcy do not vanish when a company enters the process: a corporate debtor will have just as many creditors as before (if not more) after it goes into bankruptcy.[98] Chapter 11 manages this through "official" committees of unsecured creditors (and sometimes other stakeholders)[99] and, in some cases, through unofficial, or ad hoc, committees.[100]

"Official" creditors' committees will be appointed in most large Chapter 11 cases, composed of creditors holding the seven largest unsecured claims willing to serve.[101] In theory, members of the official committee of unsecured creditors are fiduciaries for the debtor's larger body of unsecured creditors and must be "representative" of

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96. *See* Marisol A. *ex rel.* Forbes v. Giuliani, 185 F.R.D. 152, 164 (S.D.N.Y. 1999) (noting as reason for refusing to certify class seeking systemic relief that, even if the plaintiffs established liability at trial, "the Court may not have been in a position to provide for more relief than simply encouraging continued effort and improvement by [the defendant]"); *see also* HAAR, *supra* note 31, at 15–69 (reporting that the judge in the Boston Harbor case repeatedly invited political officials to moot judicial intervention by formulating a remedial plan on their own initiative and entered an injunction only after concluding they were not likely to do so without a court order).

97. *See generally* Jonathan C. Lipson, *Governance in the Breach: Controlling Creditor Opportunism*, 84 S. CAL. L. REV. 1035 (2011).

98. *See* 11 U.S.C. § 501 (2012) (prepetition creditors can file bankruptcy claims).

99. *See id.* § 1102(a).

100. Michelle M. Harner & Jamie Marincic, *Committee Capture? An Empirical Analysis of the Role of Creditors' Committees in Business Reorganizations*, 64 VAND. L. REV. 749, 777 (2011).

101. 11 U.S.C. § 1102(b) (2012). Official committees usually exclude secured creditors as well as shareholders. *See id.* Secured creditors are generally presumed to prefer strategies that maximize the value of their collateral, which may conflict with the debtor's continued use of the collateral. *See* Harner & Marincic, *supra* note 100, at 763. Shareholders, by contrast, are likely to prefer high-risk/reward strategies that may waste the debtor's residual value (although, as noted, if it appears that a debtor's equity has some value, a court may in rare cases appoint a committee of equity security holders to represent shareholders). *See id.* at 757 n.44. Employees may serve on a creditors' committee, although that is somewhat unlikely.

that body.[102] This can be problematic where different creditors may have claims against different debtors in the corporate group or their claims arose in different ways (e.g., contract versus tort, bondholders versus employees). Moreover, it often glosses over differences in the normative salience of the underlying conduct giving rise to claims.[103] Both tort victims and trade creditors are likely to be unsecured creditors of a corporate debtor.

However constituted, an official committee is granted powers under the Bankruptcy Code to investigate the debtor's affairs, participate in the restructuring process, and pursue causes of action against those who may have harmed the corporate debtor if managers of the debtor decline to do so.[104] The debtor's estate—not individual creditors—bears the expenses of the committee members and the fees and expenses of the professionals the committee retains (e.g., lawyers and accountants).[105]

The creditors' committee's most important role is usually in the negotiation of a reorganization plan for the debtor, the key instrument by which the debtor will be restructured.[106] Management of the corporate debtor has the exclusive right to promulgate such a plan for the first 120 days of the case.[107] The committee is expected to review and react to it using confidential information provided by the debtor about its operations and prospects.[108] Prior to plan promulgation, the committee is expected to negotiate with the debtor's management and other major stakeholders (e.g., secured creditors) about major actions in the case, such as requests by the debtor to borrow money during the case or to continue or reject executory contracts.[109]

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102. *See* 11 U.S.C. § 1102(a)(2) (2012); s*ee also In re* Bohack Corp. v. Gulf & W. Indus. Inc., 607 F.2d 258, 262 (2d Cir. 1979) (holding that creditor's committee represents the interest of all creditors and must carry out its fiduciary duty so as to safeguard the rights of the minority as well as the majority of creditors).

103. This has been especially so in the cases of Catholic dioceses confronting significant liability for sexual misconduct by priests. *See* Jonathan C. Lipson, *When Churches Fail: The Diocesan Debtor Dilemmas*, 79 S. CAL. L. REV. 363 (2006). Although not conventional corporate debtors, these religious organizations have used Chapter 11 just as the airlines and asbestos-makers have. *Id.* at 364–65. Yet, as one of us has observed, they present acute examples of the problems of cashing legal claims out: "It may be that other mechanisms of reconciliation and resolution would produce better results than those generated by our system. . . . [O]ur current thinking about bankruptcy fails to account for cases like those involving diocesan debtors." *Id.* at 370.

104. Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548 (3d Cir. 2003) (en banc).

105. *ABI Commission to Study the Reform of Chapter 11*, 23 AM. BANKR. INST. L. REV. 1, 42–43 (2015).

106. Israel Goldowitz, Garth Wilson, Erin Kim & Kirsten Bender, *The PBGC Wins a Case Whenever the Debtor Keeps Its Pension Plan*, 16 MARQ. BENEFITS & SOC. WELFARE L.R. 257, 289 (2015).

107. 11 U.S.C. § 1121(b) (2012).

108. *Id.* § 1103(c).

109. *Id.*; *see supra* text accompanying note 106.

As in all aggregate litigations, a central concern involves the fidelity of those who represent the debtor's body of stakeholders.[110] In the early twentieth century, the reorganization system was plagued with complaints that "protective committees" acted not for the benefit of the widely dispersed bondholders they supposedly protected, but instead the insiders who controlled the debtor corporation.[111] These concerns led to major changes in reorganization practice, such that today the committee structure is policed by the U.S. Trustee, a public official who assures that both committees and the professionals they retain act in the interests of those they represent.[112]

In large Chapter 11 cases, there may be, in addition to (or possibly in lieu of) an official committee, one or more "ad hoc" committees of stakeholders.[113] These are informal groups of stakeholders with a common agenda. For example, holders of certain classes of bonds issued by a debtor may form an ad hoc committee to pursue collectively a position they consider to be advantageous.[114] Because ad hoc committee members are not fiduciaries, observers worry that they may be excessively litigious or, in extreme cases, take opportunistic positions that harm the reorganization effort.[115] Although modern practice includes a number of mechanisms to prevent the abuses of the protective committee, there remain concerns that the aggressive tactics ad hoc committees sometimes take may undermine the effectiveness of the official committees that are expected to be more broadly representative.

Despite these imperfections, representative participation through official and unofficial committees is considered the most effective available means of policing and negotiating with management in order to restructure the debtor. These representatives likely have a better understanding of the debtor's business than would the court, so their participation is critical to restructuring the company.

2. Public Law Litigation

Representation occurs in PLL in two principal ways. First, through the class action mechanism, the named plaintiffs' lawyers purport to represent an entire class of

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110. Harner & Marincic, *supra* note 100, at 764 n.81 ("[T]he individuals constituting a committee should be honest, loyal, trustworthy and without conflicting interests, and with undivided loyalty and allegiance to their constituents.") (quoting Johns-Manville Sales Corp. v. Doan (*In re* Johns-Manville Corp.), 26 B.R. 919, 925 (Bankr. S.D.N.Y. 1983)).

111. SECURITIES & EXCH. COMM'N, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES (1937), http://business-finance-restructuring.weil.com/wp-content/uploads/2011/05/Justice-Douglas-SEC-report.pdf [https://perma.cc/KF3Z-9LBD].

112. *See In re* Revco D.S., Inc., 898 F.2d 498, 500 (6th Cir. 1990) (describing the United States trustee as "a watchdog rather than an advocate" protecting the public interest).

113. *See* Jonathan C. Lipson, *The Shadow Bankruptcy System*, 89 B.U. L. REV. 1609, 1639–45 (2009) (discussing unofficial, or ad hoc committees, in Chapter 11 cases).

114. *Id.*

115. *See* Letter from Hon. Robert E. Gerber to Advisory Comm. on Bankr. Rules 6 (Jan. 9, 2009), http://www.uscourts.gov/sites/default/files/fr_import/BK2009-03.pdf [https://perma.cc/756P-GB24].

similarly interested people, and judges have some responsibility to assess the typicality of the named plaintiffs' claims and the ability of their lawyer to represent the entire class.[116] Defendants can defeat or impede a suit by showing inadequate or biased representation, so they sometimes purport to act as watchdogs for the underrepresented members of the plaintiff class.[117] Once the class is certified, its lawyers have fiduciary duties to both the class representatives with whom they are in personal contact and the unnamed class members.[118]

Second, nongovernmental organizations (NGOs) participate as parties and/or as sponsors and employers of the plaintiffs' lawyers. NGOs have structures designed to make them accountable to their members or beneficiaries.[119] These structures involve a managing board sometimes elected by members, and in any event, with fiduciary duties to serve the organization's purposes.

The class and, *a fortiori*, the NGO structures create only weak and amorphous accountability. Weak accountability may be tolerable to the extent conflicts are not intense. In practice, there is often broad consensus within the plaintiff class, and the representatives are usually altruistically motivated. Yet, major disputes sometimes emerge, and, as with ad hoc committees in Chapter 11 cases, representatives are sometimes accused of bias. In the landmark *Pennhurst* case[120] brought on behalf of institutionalized developmentally disabled children, class counsel advocated single-mindedly for deinstitutionalization despite the fact that many parents of children in the class thought their children would have been better served by improving the institutions.[121] The NAACP Legal Defense and Education Fund, which sponsored many school desegregation cases, pushed for years for racial balancing even in predominantly minority districts where many blacks believed such efforts futile or excessively costly.[122] Blacks who favored a shift to remedies focused on improving the quality of schools in minority neighborhoods felt they were not fairly represented by the NAACP lawyers.[123]

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116. FED. R. CIV. P. 23(a) (prescribing as prerequisites of a class action that the claims of the representatives be "typical" and that they will "fairly and adequately protect the interests of the class").

117. Moreover, decrees are occasionally open to collateral attack by affected unrepresented interests. Such challenges are occasionally mounted by public employee unions. *Compare* Martin v. Wilks, 490 U.S. 755 (1989) (permitting collateral challenge by firefighters' union to consent decree mandating race-based hiring practices), *with* Floyd v. City of N.Y., 770 F.3d 1051 (2d Cir. 2014) (denying motion of police union to intervene after trial to challenge on appeal decree mandating reforms to stop-and-frisk practices judgment on ground of timeliness).

118. *See* Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 280 (7th Cir. 2002).

119. *See* Bob Carlson, *Protection and Regulation of Nonprofits and Charitable Assets*, *in* STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 203 (Emily Myers & Lynne Ross eds., 3d ed. 2013).

120. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984).

121. Robert Burt, *Pennhurst: A Parable*, *in* IN THE INTEREST OF CHILDREN 265, 354 (Robert Mnookin ed., 1985); *see also Pennhurst*, 465 U.S. 89.

122. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 489–93 (1976).

123. *Id.*

In principle, intervention is possible for stakeholders dissatisfied with the lead plaintiffs' positions, and it is possible for plaintiff subclasses to be formed to contend for competing positions. However, intervention requires organization and resources and is therefore not routinely forthcoming. Intervention has sometimes occurred in school desegregation cases,[124] but it is rare in most areas. In some cases, a stakeholder unrepresented in the original action may be able to attack the decree collaterally in a later one.[125] Most stakeholders, however, would not be able to assert a sufficient interest for collateral attack. In addition, like widely dispersed creditors of a corporate debtor, most will lack the resources to pursue it.[126]

A final concern involves conflicts of interest on the defense side. Critics are troubled by the fact that administrators sometimes do not strongly contest the plaintiffs' claims and instead settle quickly. They speculate that such agreement might be motivated by the prospect of expanded resources from the decree or the desire to entrench favored policies against revision.[127] Of course, in principle, defendants are subject to mechanisms of accountability to the public, the very mechanisms to which critics point when they urge courts to defer to officials on grounds of democracy. But such mechanisms are clearly imperfect.

Moreover, administrators' willingness to recognize the legitimacy of plaintiffs' concerns is analogous to corporate managers' recognition that a voluntary bankruptcy will ultimately serve all stakeholders better than individual collection actions when the corporation is in distress. In both spheres, managers may plausibly believe that coordination problems require the aid of the court to bring the parties together to solve issues being pressed by multiple stakeholders.

D. The Formulation of the Remedy

Restructuring troubled organizations requires substantial stakeholder participation. In the kinds of bankruptcy and PLL cases on which we focus, the parties take the primary role in formulating the remedy. In bankruptcy, the role of the court is less to define the remedy than to induce the parties to engage with each other and to police the effectiveness of the process. The court's role is similar in many PLL cases, though it is more often called on in these cases to impose a remedy where the parties fail to reach agreement.

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124. *See* Stephen C. Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 UCLA L. REV. 244 (1977).

125. Martin v. Wilks, 490 U.S. 755 (1989) (permitting collateral attack by white firefighters on a decree remedying racial discrimination in employment). Some PLL proponents oppose collateral attack for reasons partly analogous to the rationale for the prohibition of individual creditor actions in bankruptcy: it aggravates coordination problems and impedes a coherent resolution of the systemic problems. Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965 (1993).

126. Nevertheless, while representation in connection with the formulation of the decree can be limited, there is a tendency for the contemporary framework decrees to provide for increased stakeholder participation in implementation. *See infra* Section II.E.

127. *E.g.*, SANDLER & SCHOENBROD, *supra* note 3, at 122–23; Michael McConnell, *Why Hold Elections?: Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. L. F. 295, 297.

1. Bankruptcy

The overarching remedial goal in bankruptcy is the formulation and confirmation of a "plan" that restructures the debtor.[128] The plan is a comprehensive instrument designed both to correct organizational dysfunction and to assure the likely survival of the reformed debtor.

The Bankruptcy Code contains a fairly elaborate set of rules and standards to approve ("confirm") a reorganization plan, and each step constitutes an opportunity for stakeholder participation. First, the plan must have been presented to creditors in a "disclosure statement" that contains "adequate information" about the plan and the debtor sufficient to enable creditors to vote for or against the plan.[129] As a practical matter, the hearing on the motion to approve the disclosure statement will often channel—and consensually resolve—objections to the plan itself.

Second, the plan must have a minimum level of stakeholder support, generally speaking, two-thirds in dollar amount and more than half in number of creditors entitled to vote.[130] Outside of Chapter 11, debt obligations and associated property rights (e.g., liens) can be modified only if all (or almost all) creditors so agree.[131] In Chapter 11, by contrast, the plan proponent (probably management) must place creditors in classes and then proposes "treatment" for those classes (e.g., payment of a percentage of the claim in cash, issuing new securities, etc.), which each class accepts or rejects by supermajority vote.[132] The logic of Chapter 11 substitutes bargaining and the ballot for strict recognition of all prebankruptcy entitlements.

A court may confirm the plan over the dissent of one or more classes so long as at least one impaired class has approved the plan, and the court finds that the plan does not "discriminate unfairly" and is "fair and equitable."[133] The "unfair discrimination" standard prohibits differences in the treatment of classes that are not justified by legitimate business reasons.[134] "Fair and equitable" is a term of art which operationalizes the so-called "absolute priority rule" (APR).[135] The APR is a core distributional norm, providing that dissenting unsecured creditors may be bound to the plan provided that all junior interests are eliminated.[136] This has the effect of

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128. Lipson & Marotta, *supra* note 24, at 11. In an unsuccessful reorganization, the "remedy" will be conversion to a case under Chapter 7 and hence liquidation, or dismissal of the case, which will in turn most likely result in rapid, piecemeal sale of the debtor's assets. *See id.* at 37.

129. 11 U.S.C. § 1125(b) (2012).

130. *Id.* § 1126(c). As discussed below, this glosses over some complexity.

131. *See supra* text accompanying notes 60–61.

132. 11 U.S.C. § 1123(a)(1) (2012) (requiring plan to "designate, subject to section 1122 of this title, classes of claims").

133. *Id.* § 1129(b).

134. The court has substantial discretion in defining legitimacy. For example, in the Chrysler bankruptcy, certain unsecured creditors complained that superior treatment for union claims was unfairly discriminatory—to no avail. *See* Mark J. Roe & David Skeel, *Assessing the Chrysler Bankruptcy*, 108 MICH. L. REV. 727, 758 (2010).

135. Bruce A. Markell, *Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations*, 44 STAN. L. REV. 69, 84 (1991).

136. *See, e.g.*, LoPucki & Whitford, *supra* note 64, at 130; Markell, *supra* note 135, at 74–84 (describing the absolute priority rule as foundational).

forcing those most likely in historic control of the debtor (shareholders) either to propose a plan that in fact induces widespread support or to give up their rights. The prospect of an imposed plan—a "cramdown"—operates as a penalty default, a rule that threatens a suboptimal outcome in order to induce the better-informed parties to disclose information that might lead to a better result.[137] Consensus often forms in the shadow of cramdown.

Management and committees will usually employ experts to advise them on the business steps needed to achieve a plan that is, among other things, "feasible."[138] These or other experts may be called on to testify at the hearing to confirm the plan in order to enable the bankruptcy judge to assess the plausibility of the proposals contained in the plan.[139]

2. Public Law Litigation

As in bankruptcy, remedies in PLL most often arise from stakeholder participation, in particular negotiation. Many cases settle before a judicial ruling on the merits, and these settlements stipulate remedies which will usually be incorporated in a court order, or "consent decree."[140]

If the case proceeds to judgment and the plaintiff wins on the merits, public law doctrine, like bankruptcy, requires that management be given the first opportunity to propose a remedy.[141] The plaintiffs will invariably have counter-proposals. The court will respond by encouraging settlement. Indeed, anticipating such differences, the parties will usually begin negotiating over the remedy from the point at which liability is established.

For the defendant, the possibility that it can negotiate a remedy more favorable than the one the court would impose is usually a strong incentive to deal with the plaintiffs. From the plaintiff's point of view, a negotiated decree has the advantage that compliance may be more likely with an order that the defendants have influenced

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137. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 97 (1989).

138. 11 U.S.C. § 1129(a)(11) (2012); *see infra* text accompanying notes 147–148.

139. *See, e.g.*, *In re* American HomePatient, Inc., 298 B.R. 152 (Bankr. M.D. Tenn. 2003), subsequently aff'd, 420 F.3d 559 (6th Cir. 2005).

140. Defendants would usually prefer to settle on the basis of agreements subject to contractual enforcement that are not incorporated into decrees. Leonard Koerner, *Institutional Reform Litigation*, 53 N.Y.U. L. REV. 509, 515 (2008) (reporting such a practice in New York City). This course gives the defendants more leverage in the event of later disputes over compliance. The plaintiff cannot respond with a motion for contempt in an ongoing action but must file a new action and obtain an order mandating specific performance. It can seek contempt only when there is failure to comply with the new order. In addition, the plaintiff may have to bring actions to enforce the contract in state court, where defendant state officials would often be more comfortable. Plaintiffs sometimes agree to such arrangements in order to avoid protracted litigation over liability. *See* Anthony DiSarro, *Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation*, 60 AM. U. L. REV. 275 (2010). In some cases, the defendant undertakes some commitments under a consent decree and others under a contract. *Id.* at 318.

141. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 12–14 (1971).

and agreed to. From the court's point of view, a negotiated remedy avoids difficult and costly proceedings.[142]

As in bankruptcy, if the parties cannot agree, the court must impose a remedy. Except in cases involving narrow issues with clear substantive rules, the liability finding will not imply a specific remedy. The court will have to craft one from competing adversarial presentations. The competing presentations tend to be dominated by expert testimony from both defendant officials and experts hired by both sides. The court is likely to mandate practices required by norms in the relevant profession, as described by the experts it finds most credible.[143]

Whether the remedy is negotiated or imposed, it will be strongly influenced by experts, either as witnesses or consultants to the parties. Plaintiffs are often able to retain experts who currently hold or are retired from senior administrative positions in agencies like the defendant. They can also draw on standards codified by professional associations. Like operational assessments in bankruptcy, PLL judges do not make ad hoc judgments about the organization and structure of the agency: they rely on negotiation and expert participation.

E. The Structure of the Decree

The core of the remedy in each sphere typically involves governance and accountability structures negotiated by the parties and their representatives rather than sets of specific rules or practices. In both cases, the instruments creating these structures seek to restabilize the organization while promising better performance through experimental, provisional, and decentralized operating mechanisms.

1. Bankruptcy

The key instruments effectuating the debtor's reorganization will be the reorganization plan and the judicial order confirming it.[144] Although the plan must contain a number of provisions and is likely, as a matter of practice, to contain many optional components, two are central to effectuating bankruptcy's remedial goals.[145]

First, the plan must provide, directly or indirectly, for the debtor's effective management. This may require a change in the composition of the board of directors or top-level managers, or both. Some management changes may have been made during, or even before, bankruptcy. If, however, the major stakeholders have not agreed on acceptable management for the debtor, the plan is unlikely to be confirmed.

The plan will usually provide for governance through ordinary corporate mechanisms. For example, it is not uncommon for creditors to have representatives

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142. Susan Sturm elaborates the conditions and limits of consensus formation in PLL in terms of a "consensual remediation formulation model." Sturm, *supra* note 4, at 1421–27.

143. *E.g.*, Floyd v. City of N.Y., 959 F. Supp. 2d. 668, 681, 683 n.57, 684 (S.D.N.Y. 2013) (noting influence of experts on formulation of remedy in police case).

144. The term "decree" is not commonly used in the bankruptcy context, but a plan, when confirmed by the court, is functionally similar to a PLL decree. A plan "represents a kind of consent decree which has many attributes of a contract." *In re* Stratford of Texas, Inc., 635 F.2d 365, 368 (5th Cir. 1981).

145. *See* 11 U.S.C. § 1123(a) (2012).

sit on the board of directors of the reorganized debtor.[146] They will then be in a position to monitor the debtor's performance under the reorganization plan and to hold management accountable when there are material deviations.

Second, the plan will cleanse the debtor's balance sheet, chiefly through the discharge or adjustment of debt. The discharge effectively makes permanent the temporary injunction against collection actions imposed through the automatic stay upon commencement of the case. It helps to restabilize the debtor by promoting new investment in the firm.

Substantively, the court must find that the plan is "feasible," meaning that the court has determined that "confirmation of the plan is not likely to be followed by . . . liquidation, or the need for further financial reorganization" of the debtor.[147] Feasibility requires the reorganization plan to be based on a plausible business plan—that is, one that suggests that the reforms will last.[148] The business plan need not be explicitly incorporated in the reorganization plan, but it will have been disclosed to (and negotiated with) stakeholders when their vote is solicited, and the court will consider it in assessing feasibility.

Bifurcating the business plan and the reorganization plan permits a level of provisionality that can be important to realizing on the promises embedded in the plan. A postconfirmation change in market conditions will likely require a change to the business plan. Because the business plan is not cemented in the reorganization plan, however, changing the former does not necessarily require a (judicially dependent) change to the latter. This, in turn, permits more efficient postconfirmation adjustment in response to feedback from stakeholders, who will probably have a more direct role in monitoring, and perhaps governing, the reorganized firm after bankruptcy.

Following entry of the confirmation order, the most important work in restructuring the debtor will occur in short order, if it has not already occurred. Thus, there is not a long period after confirmation in which the court is likely to play an

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146. This follows from the fact that debtors who reorganize under Chapter 11 often pay unsecured creditors in part or in full in new shares of stock of the debtor, and those shares must have voting power under the Bankruptcy Code. *See* Michelle M. Harner, *Trends in Distressed Debt Investing: An Empirical Study of Investors' Objectives*, 16 AM. BANKR. INST. L. REV. 69, 103 n.47 (2008) (discussing issuance of shares in Kmart reorganization). Bankruptcy Code section 1123(a)(6) generally prohibits corporate debtors from issuing nonvoting shares under a plan. 11 U.S.C. § 1123(a)(6) (2012).

147. 11 U.S.C. § 1129(a)(11) (2012).

148. *Compare In re* Om Shivai, Inc., 447 B.R. 459 (Bankr. D.S.C. 2011) (Chapter 11 plan proposed by debtor whose principal asset consisted of twenty-seven room motel was not "feasible" and could not be confirmed, where debtor had experienced positive cash flow, and then only in minimal amount, in only four of past eight months while operating as debtor-in-possession, where debtor's plan required it to pay significantly more to its creditors than it had shown ability to pay in past), *with In re* Red Mountain Mach. Co., 448 B.R. 1 (Bankr. D. Ariz. 2011), *stay pending appeal denied*, 451 B.R. 897 (Bankr. D. Ariz. 2011) *and aff'd*, 471 B.R. 242 (D. Ariz. 2012) (projections prepared by Chapter 11 debtors' chief restructuring officer, the same individual whose projections debtors had consistently met and exceeded while operating as Chapter 11 debtors-in-possession, along with the unrebutted testimony of debtors' expert, were sufficient to show that debtors' proposed Chapter 11 plan was "feasible," as required for confirmation).

important, ongoing role in the debtor's reorganization. If the debtor makes the payments or transfers contemplated in the plan, then except as the underlying instruments might provide (e.g., earnings covenants), there will be no basis for judicial assessment. If, instead, the debtor defaults on its plan-created obligations, it is possible that the bankruptcy court would be asked to intercede—but it is just as likely that the entire debt collection process might start again (e.g., with a state-court collection suit, etc.).

2. Public Law Litigation

Key norms hold that the scope of the violation limits the scope of the remedy and that the decree should not require more than is necessary to achieve compliance.[149] These norms provide little guidance, however. Even where the substantive wrong can be defined precisely, the measures needed to prevent its recurrence are not usually deducible from the wrong. The court can enjoin physical assaults on prisoners, but where systemic past violation of this norm has been demonstrated, deterrence will require more. Professional standards may be helpful in specifying the required measures, but they are rarely beyond debate. The matter is further complicated by the precept that, even if a norm is necessary to deter the conduct in question, the court may forego it if it would be too disruptive of other legitimate activities and goals.[150]

Moreover, the issue of whether a given measure is "necessary" involves an ambiguity where, as is usually the case, there are multiple reasonable approaches to prevention. It may be necessary to adopt one of the measures, but not any particular one. Thus, the issue is better described as whether the measures chosen by the parties or the court are "reasonable."[151]

Some decrees may contain only narrowly tailored provisions. For example, a recent consent decree in Mississippi provides that the defendant school system will not use handcuffs as punishment for noncriminal student behavior or for any kind of behavior by students under thirteen years old.[152] Even such a focused decree,

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149. *E.g.*, Lewis v. Casey, 518 U.S. 343, 357–58 (1996); Missouri v. Jenkins, 515 U.S. 70, 88 (1995). This stricture does not apply as a constitutional or common law principle to consent decrees. However, the Prison Litigation Reform Act applies it to all decrees addressing prison conditions. 18 U.S.C § 3626(a)(1) (2012).

150. *See, e.g.*, Peter M. Shane, *Rights, Remedies and Restraint*, 64 CHI.-KENT L. REV. 531, 557 (1983) (noting that mandating immediate release of prisoners would sometimes be the only effective way of immediately remedying unconstitutional detention but that "release is never the remedy of first resort" and that courts balance the prisoner's interests against "other legitimate social concerns").

151. *Frew v. Hawkins*, 540 U.S. 431, 439 (2004), rejected the claim that a remedy cannot go beyond the specific requirements of substantive law. "The decree does implement the Medicaid statute in a highly detailed way, requiring the state officials to take some steps that the statute does not specifically require. The same could be said, however, of any effort to implement the . . . statute in a particular way." *Id.* The Court concluded that the decree should be approved as long as it represents "reasonable and necessary implementations of federal law." *Id.* at 441.

152. Order Approving Settlement, A.M. v. Jackson Pub. Sch. Bd. of Trs., No. 3:11CV344-TSL-MTP (S.D. Miss. May 25, 2012).

however, will usually require elaboration of the duty in written policies, communication of the policies to officials and the public, training of affected public actors, and some monitoring. The Mississippi school decree prescribes measures of these kinds, including an "oversight council" composed of students, parents, advocates, and a mental health professional.[153]

A major category of decrees sweeps more broadly into the administration of the defendant agency. The dominant approach of recent decrees of this kind is a departure from earlier practice. Earlier decrees were often a collection of many specific rules like the Mississippi handcuff rule. A decree with respect to prison conditions might specify the minimum space for cells or the temperature of water in the showers.[154] Modern decrees may still contain some such rules, but they tend to focus on general management functions of self-monitoring and assessment and on transparency and accountability. An important goal of the decrees is a higher-functioning organization, sufficiently stable to self-correct based on a commitment to and investment in ongoing internal quality improvement practices and policies.[155]

Although there is much variation, we can give a general idea by describing typical elements of the most ambitious decrees. Such decrees try to create a framework of ongoing elaboration and adaptation.

They may begin with a general statement of goals or norms (e.g., prison guards should "mak[e] reasonable effort to resolve [inmate encounters] without force,"[156] or "services to [disabled individuals] shall be provided in the most integrated setting appropriate to meet their needs").[157]

They may then mandate some upfront structural investments. These might include enhanced information technology for recording and tracking data and increased personnel.[158] The ecosystem decrees may require important new physical

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153. Joint Motion for Approval of Settlement Agreement, Certification of Settlement Class, and to Set a Date for a Fairness Hearing, A.M. v. Jackson Pub. Sch. Bd. of Trs., No. 3:11CV344-TSL-MTP (S.D. Miss. May 25, 2012).

154. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICYMAKING IN THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 40–41 (1998) (discussing decrees that "specify many requirements in . . . painstaking or excruciating detail [including] the wattage of the light bulbs in the cells, the frequency of showers, and the caloric content of meals").

155. Sabel & Simon, *supra* note 40, at 38.

156. Stipulation of Settlement at 5, Sheppard v. Phoenix, 210 F. Supp. 2d 450 (S.D.N.Y. May 26, 1998) (No. 1:91CV04148), https://www.clearinghouse.net/chDocs/public/PC-NY-0001-0001.pdf [https://perma.cc/R72S-R9W6].

157. Settlement Agreement at 1, United States v. Delaware, No. 1:11-cv-00591-LPS (D. Del. Oct. 26, 2011), https://www.clearinghouse.net/chDocs/public/PB-DE-0003-0002.pdf [https://perma.cc/UX5L-TFQU].

158. *E.g.*, Rosie D. v. Romney, 474 F. Supp. 2d 238 (D. Mass. 2007) (describing planning and infrastructure development provisions to remedy violations of Medicaid statute); Agreement for Effective and Constitutional Policing at 38–41, United States v. Town of East Haven, No. 3:12-cv-01652-AWT (D. Conn. Dec. 21, 2012) [hereinafter East Haven Agreement], https://www.clearinghouse.net/chDocs/public/PN-CT-0001-0004.pdf [https://perma.cc/6XWQ-JLA4] (police case).

infrastructure. For example, the San Joaquin River Restoration Project decree required the construction of new channels and ladders to accommodate fish.[159]

The core requirements of framework decrees concern management practices of policy-making, monitoring, and reassessment. Management must develop explicit policies or plans for matters that may previously have been left to tacit discretion. Police agencies, for example, may be required to develop and implement explicit use-of-force policies.[160] Prisons may be required to have protocols for responding to medical needs of patients. Child welfare agencies may be required to have both general case plans for children in their custody due to abuse or neglect and specific "permanency" plans for each child in their care.[161]

When they are developed, these policies are likely to have as much or more specificity as the highly directive decrees of the past. However, because under current practice the policies are usually not themselves part of the decree, they can be readily revised without approval of the court. Revision typically requires consultation with, or at least notice to, the plaintiffs and/or a monitor. The plaintiffs will have opportunities to object to them, perhaps in some mandated consultation or dispute settlement process, and as a last resort, before the court.[162] But the decree contemplates frequent policy change and often allows defendants to modify the strategies or tactics they employ to reach the goals of the decree. For example, in a child welfare case, "permanency" will be a goal for all children in the state's custody, but the defendant can experiment with different practices to achieve it.

The agency also commits to monitor itself in a transparent fashion. This means collecting and reporting data on both the implementation and the efficacy of the reforms. The decree may specify metrics, or it may order the defendant to develop them, perhaps in consultation with the plaintiffs or with an expert consultant or monitor. Other provisions may require intensive scrutiny of specific cases or incidents. For example, police decrees prescribe routine review of use-of-force episodes and "early warning" procedures that intervene with counseling, training, or discipline where data identifies officers as outliers in terms of such factors as uses of force, vehicle accidents, complaints, or absences. These decrees will often mandate or regulate the procedures of an independent civilian complaint review agency.[163]

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159. Settlement Stipulation at 8–10, Nat. Res. Def. Council v. Rodgers, 381 F.Supp.2d 1212 (E.D. Cal. Sept. 13, 2006) (No. CIV.S-88-1658 LKK), https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=3894 [https://perma.cc/X656-SV2B].

160. *E.g.*, East Haven Agreement, *supra* note 158, at 8–12.

161. *E.g.*, Kathleen Noonan, Charles F. Sabel & William H. Simon, *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 LAW & SOC. INQUIRY 523, 538–41 (2009) (describing Utah child welfare settlement); Compromise and Settlement Agreement at 7–10, D.G. v. Yarbrough, No. 08-CV-074-GKF-FHM (N.D. Okla. 2012) [hereinafter Oklahoma Child Welfare Compromise], https://www.clearinghouse.net/chDocs/public/CW-OK-0001-0001.pdf [https://perma.cc/2XYN-924E].

162. *E.g.*, Oklahoma Child Welfare Compromise, *supra* note 161, ¶ 2.10(g)-(f), at 8–9; East Haven Agreement, *supra* note 158, ¶ 29, at 12, ¶ 197, at 47–48.

163. *E.g.*, East Haven Agreement, *supra* note 158, at 22–38. *See generally* WALKER & ARCHBOLD, *supra* note 40, at 106–08 (discussing consent decrees).

Some procedures, such as the "Quality Service Review," used in the Utah child welfare decree, intensively assess a sample of cases.[164] The quality assurance system developed under the California prison decree reviews data on all medical care and then examines a sample in more detail.[165] These procedures generally track the tendency of modern public administration to appraise frontline practice qualitatively rather than in terms of compliance with specific rules or with documentation requirements. The qualitative data also generates more nuanced case information that enables defendants to adapt frontline practice contemporaneously.

In addition, the defendant must reassess the policies periodically or continuously in the light of experience. For example, the Seattle police settlement prescribes creation of a Community Police Commission, with broad representation, to review performance data and recommend policy changes. It also mandates a Use of Force Committee within the department charged with reviewing reports to determine when practice changes are indicated.[166] Ecosystem decrees sometimes mandate increased use of "adaptive management." For example, the San Joaquin River Restoration decree altered the defendants' water management practices to require more rapid and nuanced response to indications of danger to the fish population. Prior to the decree, managers released water to protect fish in accordance with fixed schedules.[167] The decree required that they monitor the condition of the fish continuously and adjust water release continuously.[168]

The emphasis on provisionality and reassessment leads some courts to mandate explicit experimentation. The New York police decree mandated that the defendant undertake a one-year "pilot project" with patrol officers wearing body-worn cameras in one precinct in each of the city's five boroughs.[169] At the end of the year, the monitor was directed to report on results and deliberate with the parties over whether the practice should be adopted generally.

Decrees often provide for monitors or masters. These judicial officers will be appointed by the court, usually from nominations by the parties, and sometimes pursuant to their agreement.[170] They are typically experts in the field. These officers will have broad access to data on relevant defendant activities. They will periodically

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164. Noonan et al., *supra* note 161, at 542–48.

165. *See* OFFICE OF THE INSPECTOR GENERAL, STATE OF CALIFORNIA, REPORTS: MEDICAL INSPECTIONS, http://www.oig.ca.gov/pages/reports.php# [https://perma.cc/BW7Z-Q4E8].

166. Settlement Agreement and Stipulated (Proposed) Order of Resolution at ¶¶ 3–12, 119–25, United States v. City of Seattle No. 2:12-cv-01282JLR (W.D. Wash. July 27, 2012), https://www.clearinghouse.net/chDocs/public/PN-WA-0001-0002.pdf [https://perma.cc/MDK2-UJJV]. The DOJ's "Principles for Promoting Police Integrity"—a starting point for remedial design in many cases—demand continuous review of various data to determine "whether any revisions to training or practices are necessary." U.S. DEP'T OF JUSTICE, PRINCIPLES FOR PROMOTING POLICE INTEGRITY 6 (2001).

167. *See* Settlement Stipulation, *supra* note 159.

168. Notice of Lodgment of Stipulation of Settlement, Nat. Res. Def. Council v. Rodgers, 381 F. Supp. 2d 1212 (E.D. Cal. 2006) (No. CIV.S-88-1658 LKK), https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=7565 [https://perma.cc/MU5S-BLLM]; SAN JOAQUIN RIVER GRP. AUTH., 2010 ANNUAL TECHNICAL REPORT 3 (2010).

169. Floyd v. City of N.Y., 959 F. Supp. 2d 540, 562–63 (S.D.N.Y. 2013).

170. *See* Susan Sturm, Note, *"Mastering" Intervention in Prisons*, 88 YALE L.J. 1062 (1979).

assess the defendant's progress toward compliance and report it to the court. They may provide information to the plaintiffs and mediate disputes between the defendant and the plaintiffs over compliance issues.[171]

The monitoring provisions will often remain in effect for many years after entry of the decree, and they typically contemplate periodic reports to the court and episodic judicial intervention to resolve disputes about implementation. This feature of PLL differs from bankruptcy. While the boards of corporate debtors may provide a monitoring mechanism for creditors, a formal monitor is unlikely to be appointed during or after plan confirmation.

PLL decrees last longer than Chapter 11 plans and may appear somewhat more directive. But modern decrees have much in common with Chapter 11 plans. Both effect change at the organizational level through adjustments to the defendant's management and governance. Both require some degree of monitoring and flexibility. Both create mechanisms that subject their management and governance structures to enhanced accountability and transparency. These structural adjustments are attractive because they offer greater likelihood of success than traditional adjudication.

F. Financing Reform

In both spheres, the court cannot order the provision of financing (with rare exceptions in PLL). Rather, it is up to the debtor or defendant, sometimes with the help of stakeholders, to find financing either by reallocating funds it controls or by inducing outsiders to invest in the reformed institution.

1. Bankruptcy

In bankruptcy, creditor pressure may free existing resources by reducing unproductive spending that resulted from managerial self-indulgence or inattention. This tighter managerial discipline may also make the enterprise a more attractive investment. At the same time, the discharge of debt and the management changes in the plan will often induce new investment.

As noted above, to gain approval as "feasible," the reorganization plan also must contain credible financing mechanisms. Increasingly, debtors restructure by selling unproductive or nonessential assets under or in connection with a plan.[172] This permits reorganized debtors to concentrate on core operations that, stakeholders hope, will prove more profitable in the future. In some cases, outside investors (e.g., Fiat's acquisition of Chrysler) take an interest in the company and help finance its exit.[173] However a debtor finances its operations postconfirmation, those

171. *Id.* at 1068–72.

172. *See Chrysler Sold to Fiat-Led "New Chrysler" After Historic Court Proceedings*, JONES DAY (Aug. 2009) [hereinafter *Chrysler Sold*], http://www.jonesday.com/chrysler-sells-assets-to-fiat-led-new-chrysler-after-unprecedented-court-proceedings [https://perma.cc/4YJ5-89RJ].

173. *Id.*

arrangements will be subject to contract law and other rules that are largely outside the scope of the bankruptcy process.[174]

2. Public Law Litigation

In public law litigation, courts cannot discharge obligations of the defendant, and public defendants may have less discretion than private ones to shift funds among different uses. Nevertheless, two of the routes by which bankruptcy produces funds—more efficient use of existing resources and new investment attracted by a better operating plan—are often available.

Defendants commonly plead inadequate resources as a reason for the court to forego or minimize intervention. They also often stress that only the legislature has the authority to commit new funds to reform. Courts are sometimes sympathetic, especially to the separation of powers issues.[175] But, just as frequently, they view such claims as inconsistent with the rule of law.[176]

Reform does not always entail increased expense. Ordering decreased incarceration or the cessation of police practices that generate lawsuits may actually reduce expenses (though it might generate less measurable costs in terms of increased crime). Moreover, as in bankruptcy, reformed management practices will sometimes improve use of existing funds or expand access to new funding. In approving a receivership for the Boston Housing Authority, for example, the court noted that the agency had been impaired in seeking funding by its failure to produce meaningful budgets, in part because it had failed for more than eight months to fill a funded budget officer position.[177] Frequently, improved management enables the defendant to increase receipt of resources it is already entitled to under programs such as Medicaid, special education, and the Section 8 housing voucher program.[178]

Where reform requires new resources, courts can order defendants to make their best efforts to find them. Where the defendant agency has taxing or bonding

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174. 28 U.S.C. § 1334(c)(2) (2012).

175. *E.g.*, Horne v. Flores, 557 U.S. 433, 448 (2009) ("When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs."); Conor B. *ex rel.* Vigurs v. Patrick, 985 F. Supp. 2d 129, 157 (D. Mass. 2013) (explaining denial of relief in part by the fact that "redistribution of scarce governmental resources would . . . depriv[e] other state agencies of the means to perform their functions fully"). Even before getting to the question of remedy, considerations of scarce public resources may influence a court in deciding whether to recognize a substantive right. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

176. Watson v. City of Memphis, 373 U.S. 526, 537 (1963) ("[I]t is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them."); Forest Guardians v. Babbitt, 164 F.3d 1261 (10th Cir. 1998) (affirming order requiring official to complete listing of particular endangered species despite his undisputed claim that order would divert resources from enforcement of other duties).

177. Perez v. Bos. Hous. Auth., 400 N.E.2d 1231, 1241 (1980).

178. *See* Eighth Report of the Court Monitor at 1–2, United States v. Delaware, No. 1:11-cv-00591-LPS (D. Del. Dec. 26, 2015), https://www.justice.gov/crt/file/826976/download [https://perma.cc/88C8-ZKD6] (explaining that the defendant had funded much of its reorganization with payments from the federal Medicaid program).

authority, courts have ordered it to exercise the authority.[179] More commonly, they order the defendant to apply to the legislature or perhaps private sources for needed financial support.[180] With perhaps surprising frequency, such support is granted. Many decrees have been supported with large legislative appropriations.[181] Fresh support volunteered by NGOs sometimes plays an important role.[182]

G. Defendant Recalcitrance

In both spheres, courts have difficulty identifying and sanctioning recalcitrance by managers of the institution. In neither sphere do damages or monetary penalties play a strong role. In both, courts can theoretically resort to extreme sanctions, but they rarely do so. Sanctions tend to be indirect. Moreover, informal pressures to comply may arise from decree provisions that make compliance efforts and their results transparent.

1. Bankruptcy

Historically, the bankruptcy process has been preoccupied with concerns about management recalcitrance during a case. Because Chapter 11 of the Bankruptcy Code leaves management presumptively in possession and control of the debtor,[183]

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179. *E.g.*, Missouri v. Jenkins, 495 U.S. 33 (1990) (holding that district court may require school district to raise taxes necessary to implement desegregation order). It has occasionally been suggested that federal courts can directly order a state legislature to appropriate needed resources, or alternatively, bypass state legislative processes and enact a tax itself. Thomas Reed Powell, *Coercing a State to Pay a Judgment:* Virginia v. West Virginia, 17 MICH. L. REV. 1, 17–30 (1918) (arguing in context of suit to enforce an interstate compact that federal courts sometimes have authority to levy and collect taxes). Although the reach and continued validity of this doctrine are unclear, it seems unlikely as a practical matter that a contemporary court would issue such orders in PLL. *See generally* Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PENN. L. REV. 715, 770–71 (1978).

180. *E.g.*, United States v. Bd. of Educ. of Chi., 588 F. Supp. 132, 139–42 (N.D. Ill.), *vacated by* 744 F.2d 1300 (7th Cir. 1984) (describing provision of consent decree obliging both parties to make "every good faith effort to find and provide every available form of financial resources" for implementation).

181. *E.g.*, HAAR, *supra* note 31, at 200–17 (describing the legislative creation of a new agency with borrowing capacity to finance the Boston Harbor clean-up in response to judicial orders); San Joaquin River Restoration Settlement Act, Pub. L. No. 111-11, §§ 1001–10203, 123 Stat. 991 (2009) (appropriating $88 million to support the settlement agreement in *Natural Resources Defense Council v. Rodgers*, 381 F.Supp.2d 1212 (E.D. Cal. 2006)). In Texas and Kentucky education cases based on state constitutional provisions, PLL suits produced comprehensive educational reform legislatively supported by statutes and appropriations. *See* James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003).

182. Morgan v. Kerrigan, 401 F. Supp. 216, 247–48 (D. Mass. 1975) (describing commitments of universities and business groups to assist implementation of Boston school desegregation decree).

183. Lipson & Marotta, *supra* note 24, at 1.

in the early days of Chapter 11, observers worried that debtors would run amok, wasting time and money on professionals, rather than focusing on the reorganization effort. The Eastern Airlines bankruptcy is often invoked as an example of excesses by managers who were feckless, if not "reckless," in "managing" the reorganization of an airline into a fire-sale liquidation that should have been avoided.[184]

Yet, the Bankruptcy Code, and practice under it, offer a variety of tools that can significantly temper management's resistance to improved performance. In some cases, they are personal to management; in others, they affect the debtor directly and thus management indirectly. Perhaps the most draconian power available to a judge is the power to terminate or modify senior management, either by appointing a trustee who would replace management, or an examiner to investigate management.[185] While both events are rare in large cases,[186] the options to do so likely have an *in terrorem* effect that disciplines management.

Chapter 11 also contains other, less direct, mechanisms for dealing with recalcitrant management, perhaps the most important of which is termination of the so-called 120-day "exclusive period" management has to file a plan.[187] After that point, outsiders can file plans, and these plans are likely to propose new management. The threat of losing control in this way disciplines managers who seek to reorganize the company and retain their jobs. Chapter 11 also provides positive incentives to managers who perform well. For example, corporate debtors may adopt so-called "key employee retention programs," which are essentially incentives to remain with the debtor and work toward a successful reorganization.[188]

At the entity level, a court may dismiss a case, or convert it to a liquidation under Chapter 7.[189] This generally has the effect of ending the reorganization effort and, as noted above, is very likely to end the debtor as a going concern.[190]

If a debtor confirms a plan, and emerges from Chapter 11, the question arises whether it will comply with the reorganization plan. Section 1142 of the Bankruptcy

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184. Paul M. Goldschmid, *More Phoenix than Vulture: The Case for Distressed Investor Presence in the Bankruptcy Reorganization Process*, 2005 COLUM. BUS. L. REV. 191, 211 (discussing "repeated extensions of plan exclusivity in Eastern Airlines' Chapter 11 proceedings, which led to the erosion of the firm's asset values and a 93% loss of bondholders' original open market claim value, as largely a preventable, and now a probably unlikely, court error").

185. 11 U.S.C. § 1104 (2012).

186. Lipson & Marotta, *supra* note 24, at 37 ("Although rare in all cases, trustee motions and appointments were also more likely in large cases compared to small cases. Trustees were nearly twice as likely to be sought in large cases (7.6% of small cases; 12.6% of large cases), and were over 1.7 times more likely to be appointed in large cases (2.1% of small cases; 3.7% of large cases).").

187. 11 U.S.C. § 1121(d) (2012).

188. *See* Jonathan C. Lipson, *Where's the Beef? A Few Words About Paying for Performance in Bankruptcy*, 156 U. PA. L. REV. PENNUMBRA 64, 67 (2007) (citing *In re* Dana Corp., 358 B.R. 567, 575 (Bankr. S.D.N.Y. 2006) ("[S]ection 503(c) was not intended to foreclose a chapter 11 debtor from *reasonably* compensating employees, including 'insiders,' for their contribution to the debtors' reorganization.")).

189. 11 U.S.C. § 1112(b)(1), (4) (2012).

190. Conversion and dismissal are rarer among larger than among smaller cases. Lipson & Marotta, *supra* note 24, at 37.

Code provides that the debtor "shall carry out the plan and shall comply with any orders of the court" and that the court may direct the debtor and other parties to "perform any other act," necessary for the "consummation" of the plan.[191] This can create a basis for postconfirmation supervision by the court, although bankruptcy courts tend to view this narrowly. In part, this may be because the business plan that provides the details of the reorganization may not be part of the Chapter 11 plan set out in the formal decree. If a debtor fails directly to comply with a provision of the reorganization plan, it may be a default that is remedied under section 1142. If, however, the debtor defaults on new debt obligations incurred after emerging from bankruptcy, creditors will have to resort to ordinary collection mechanisms or anticipate that the debtor will commence a subsequent Chapter 11 case.

2. Public Law Litigation

Once a PLL decree is in place, there are often significant informal pressures on defendants to comply. Defendants may strive to comply because senior agency managers recognize the legitimacy of prescribed practices, which are often prevalent in peer institutions or supported by professional norms. Few managers, however, welcome the intrusion by the court and the plaintiffs in their day-to-day operations, and the desire to get out from under their supervision may motivate compliance efforts even with demands they resent. State agencies are usually defended by the attorney general's office, and these lawyers will be observing their efforts. In addition, the lawsuit and the decree may attract close attention from governors or mayors or other senior officials. Depending on the sympathies of these officials, their attention may generate added pressures for compliance and exit from the suit. In addition, the proceedings and the decree will likely generate media attention. If the plaintiffs' claims are compelling and they are effective in dealing with the media, publicity may add to compliance pressure. (However, defendants are sometimes successful in inducing countervailing political and media pressure against the court's intervention.)

Nevertheless, willful or reckless failures to comply are not unusual. When the courts conclude that compliance will not follow from its commands alone, it has coercive options. It can hold the officials in contempt and impose fines or, in theory, incarceration. Appellate doctrine tends to disfavor this course.[192] Where the violation constitutes a breach of a condition of federal funding, the court can order cessation of the funding, though such an order is not likely to facilitate compliance. More aggressively, the court can order closure of the program or facility where the offending practices occur. Courts are more likely to threaten such action than to

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191. 11 U.S.C. § 1142 (2012).

192. Spallone v. United States, 493 U.S. 265 (1990) (reversing large contempt fines against individual city council members despite findings of long history of obstruction); *see also* Horne v. Flores, 557 U.S. 433, 442–43 (2009) (noting in the course of reversing on other grounds that the district court-imposed contempt sanctions of up to two million dollars a day).

undertake it, but they have ordered jails or prisons closed[193] and have imposed prison population caps, which are effectively partial facility closures.[194]

Courts can sometimes create pressure for compliance by enjoining collateral activities that the defendants wish to undertake until they have completed the obligations they resist. For example, a court might enjoin a municipality from granting building permits for new construction or a water agency from continuing certain deliveries until they undertake action to remedy environmental damage.[195] At the extreme, where compliance under current management seems hopeless, the courts can displace management and turn over control to a receiver. They have done so in cases involving housing authorities, jails and prisons, mental health and disability institutions, and school systems, among other public institutions.[196] This is, in important respects, analogous to appointing a trustee to run a large corporate debtor in Chapter 11 bankruptcy.

In general, courts seem reluctant to adopt coercive measures both because they put the court most starkly in opposition to a coordinate branch of government and because, if the sanctions prove inadequate to induce compliance, the court will look weak or ineffectual. As with cramdown or liquidation in bankruptcy, courts hope that the threat of sanctions will be sufficient to overcome recalcitrance. They view draconian sanctions as a penalty default designed to induce the defendant to negotiate a better remedy with the plaintiffs.

H. Modifying and Terminating the Decree

Active judicial involvement in bankruptcy after approval of a Chapter 11 plan tends to be minimal, and plans have relatively short terms. Because judicial oversight

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193. Morales Feliciano v. Hernandez Colon, 697 F. Supp. 37 (D.P.R. 1988); Inmates of Allegheny Cty. Jail v. Wecht, 699 F. Supp. 1137 (W.D. Pa. 1988); Jackson v. Gardner, 639 F. Supp. 1005 (E.D. Tenn. 1986); Ramos v. Lamm, 520 F. Supp. 1059 (D. Colo. 1979).

194. *E.g.*, Brown v. Plata, 563 U.S. 493 (2011) (upholding population cap order).

195. *E.g.*, HAAR, *supra* note 31, at 221 (noting that the court in the Boston Harbor case threatened to enjoin sewer hookups for new residences unless effective action was taken to remedy pollution to the Harbor).

196. There are several cases approving receiverships or related remedies. Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976) (imposing receivership of high school in connection with city-wide desegregation effort); Plata v. Schwarzenegger, 556 F. Supp. 2d 1087 (N.D. Cal. 2008) (imposing receiver to supervise prison health care); Perez v. Bos. Hous. Auth., N.E.2d 1231 (1980) (imposing receivership for housing authority); Order Appointing Compliance Director, Allen v. City of Oakland, No. 00–cv–04599 TEH (NC) (N.D. Cal. Mar. 4, 2013), https://www.clearinghouse.net/chDocs/public/PN-CA-0010-0016.pdf [https://perma.cc/SAB7-Q9GV] (imposing police department "compliance director"); Consent Order Appointing Transportation Administrator, Consent Order Appointing Transportation Administrator, Petties v. D.C., 238 F. Supp. 2d 88 (D.D.C. Jun. 25, 2003) (No. CIV.A. 95–0148(PLF), https://www.clearinghouse.net/chDocs/public/ED-DC-0001-0002.pdf [https://perma.cc/CU46-4WPU] (imposing "transportation administrator" for school special needs program); Judge Rotenberg Educ. Ctr., Inc. v. Comm'r of the Dep't of Mental Retardation, 677 N.E.2d 127 (1997) (imposing receiver for residential facility for developmentally disabled); Wayne Cty. Jail Inmates v. Wayne Cty. Chief Exec., 444 N.W.2d 549 (Mich. App. 1989) (imposing receiver for jail).

in PLL is more extensive and long-term, provisions regarding modification and termination of decrees are more important.

1. Bankruptcy

After confirmation, reorganization plans are usually implemented fairly quickly. Important governance changes will usually have been front-loaded into the plan, so that effectuating them will be something of a formality following confirmation. Asset sales and distributions of cash or securities under the plan will likewise usually occur fairly quickly after confirmation. Failures to do so will usually be interpreted as material defaults under the plan, which may have the practical effect of leading a court to conclude that the case should be converted to a Chapter 7 liquidation or dismissed.

For a limited time, a plan can be modified after confirmation, although modifications may not undermine the major procedural or substantive elements of the plan as it was confirmed (e.g., classification, treatment, etc.). More important, plans cannot be modified after "substantial consummation."[197] Substantial consummation focuses on whether the major transactions contemplated by the plan have, in fact, been completed.[198] If so, then absent provisions in the plan or confirmation order specifically retaining jurisdiction,[199] the bankruptcy court's role in the restructuring is, for all practical purposes, at an end.[200]

This is not, however, to say that confirmed plans always work. Rather, a small but important number of companies that have operated after plan confirmation and consummation have required another Chapter 11 restructuring, either to address unsatisfied obligations under the prior plan, or new problems not anticipated at the time the earlier plan was confirmed.[201] Still, Chapter 11 reorganization plans—the

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197. *See infra* note 198.

198. "Substantial consummation" is defined as

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan.

11 U.S.C. § 1101 (2012).

199. *Id.* § 1127(a). In theory, a confirmation order can be appealed. However, U.S. Courts of Appeal have developed a doctrine of "equitable mootness." This holds that an appellate court will not reverse a confirmation order following substantial consummation if doing so would upset settled expectations under the plan. *In re* Tribune Media Co., 799 F.3d 272, 277–78 (3d Cir. 2015).

200. *In re* Johns-Manville Corp., 7 F.3d 32, 35 (2d Cir. 1993). So, for example, an objection to a plan's feasibility is moot where the plan has been substantially consummated. *In re* Chateaugay Corp., 10 F.3d 944, 957 (2d Cir. 1993).

201. *See A Window on the World of Big-Case Bankruptcy*, *supra* note 21. The Bankruptcy Research Database "contains data on all of the more than one-thousand large public companies that have filed bankruptcy cases since October 1, 1979." *Id.* It shows that several companies have gone through Chapter 11 three times: Anchor Glass Container Corporation (1996, 2002 & 2005), Grand Union Company (1995, 1998 & 2000), Harvard Industries, Inc. (1991, 1997 & 2002), and Trans World Airlines, Inc. (1992, 1995, & 2001). The casinos owned and

heart of the restructuring—are confirmed fairly quickly. All told, prebankruptcy negotiations through substantial consummation of the plan may occur in one, and rarely more than two, years. This is obviously quite a bit faster than the period during which public agencies are typically under judicial supervision in PLL, sometimes running into decades.

2. Public Law Litigation

The standard for modification of a decree requires the objecting party to show changed circumstances that make continued enforcement "inequitable" or "not in the public interest."[202] This is uncontroversial in the abstract, but interpretation raises some difficult issues.

On the one hand, it is important that the defendant not be allowed to respond to allegations of noncompliance by relitigating previously settled issues. On the other, it is also important that the agency not be locked into a set of practices that prove costly or dysfunctional in unanticipated ways. Commenters have been particularly concerned that in some settlements, officials may use decrees to immunize controversial policies they favor against change by subsequent administrations.[203]

In *Horne v. Flores*, the Supreme Court reversed a district court's refusal to modify a decree regarding English-as-a-second-language instruction in response to the defendant's claim that it was no longer appropriate in the light of changed circumstances.[204] The new circumstances included recent research indicating that methods other than those contemplated by the decree might be more effective and a new accountability regime required by federal statute that addressed language proficiency.[205] The good faith of the defendant's claims was suspect given its minimal efforts to comply with the decree from the outset, but the Supreme Court remanded with instructions to the lower court to treat the claims with more deference.[206] The opinion clearly signals a more accommodating attitude toward defendant requests for modification. However, it does not explicitly change the requirement of "changed circumstances" making the decree "inequitable" or "not in the public interest" as a condition of revision.

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operated by President Trump appear to hold the record for repeat filings among large corporate debtors, with four sets of Chapter 11 cases, in 1991–92, 2004, 2009, and 2014, respectively. *See* Jonathan C. Lipson, *Making America Worse: Jobs and Money at Trump Casinos, 1997-2010* (Temple University Beasley Sch. of Law, Working Paper No. 2016-47, 2016) (empirical study of employment and revenue patterns at Atlantic City casinos in connection with Trump casino bankruptcies).

202. FED. R. CIV. P. 60(b).

203. Horne v. Flores, 557 U.S. 433, 448 (2009); McConnell, *supra* note 127; H. Peter Metzger & Richard A. Westfall, *The Great Ecology Swindle*, 15 POL'Y REV. 71 (1981) (describing a questionable settlement between the Community Services Administration and environmental activists that allocated money from a low-income energy assistance program to "energy advocacy" activities).

204. 557 U.S. at 443.

205. *Id.* at 467.

206. *Id.* at 459.

When the issue is termination rather than modification, the formal standard is "substantial compliance."[207] This is generally understood to involve both current compliance with substantive obligations and "sustainability"—demonstrated likelihood that the defendant will remain in compliance. Sustainability can be supported by evidence that practices of monitoring and reassessment associated with improvement will remain in place.[208]

Decrees often have a fixed term, though they can be extended if compliance is not achieved by the end of the term. Some decrees contemplate termination when the agency has met specified outcomes. Outcomes might include installation of up-to-date information technology or achievement of specified caseload levels for social workers or the reduction in waiting times following requests to see prison doctors. More ambitious targets are more qualitative: for example, a reduction in sustained use-of-force complaints against police officers or a specified percentage of children in placements deemed "acceptable" by some audit process. Qualitative outcome targets can be risky because unforeseen circumstances often affect what can reasonably be expected by way of outcomes. Another approach emphasizes scores focused on the quality of practice, an "input," as opposed to an outcome, measure.[209]

Courts are sensitive to the negative appellate and public reaction to cases involving decades-long judicial supervision, so they are often wary of requests for extension. There seems to be at least a tacit understanding that the court should terminate the decree when continued intervention seems likely to be fruitless even if substantial compliance has not been attained.

There is some doctrinal dispute as to whether a defendant who is not in compliance with the decree can seek termination on the ground that the agency is nevertheless complying with the relevant substantive law requirements.[210] In the absence of a showing of changed circumstances, such requests amount to a demand to relitigate matters the decree purported to resolve. Yet, the defendant ought to be heard where it says that it has discovered and implemented means to remedy the violations on which the decree is premised other than those specified in the decree. Such claims are suspect where the defendant has not made good faith efforts to comply with the decree, but they ought not to be categorically dismissed.

PLL's "substantial compliance" standard sounds like, and shares important characteristics with, Chapter 11's "substantial consummation" standard. In both cases, the court seeks evidence that the defendant or debtor has not only developed an acceptable plan but also that it has largely been implemented to the satisfaction of most constituencies. Neither standard requires perfection, and both embed an

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207. *See, e.g.*, R.C. v. Walley, 475 F. Supp. 2d 1118, 1123–28, 1134–83 (M.D. Ala. 2007) (providing an exceptionally thorough and thoughtful application of the "substantial compliance" standard).

208. The Supreme Court in *Horne v. Flores* seems to accept the sustainability requirement by referring to a "durable remedy." 557 U.S. at 450; *see also Walley*, 475 F. Supp. 2d at 1123–28.

209. Decrees in cases involving child welfare systems that emphasize an audit process involving qualitative measures of both practice and outcomes are described in *R.C. v. Walley*, 475 F. Supp. 2d at 1160–61; Noonan et al., *supra* note 161, at 533.

210. *See* Mark Kelley, Note, *Saving 60(b)(5): The Future of Institutional Reform Litigation*, 125 YALE L.J. 272 (2015).

expectation of good faith. Both operationalize the rule-of-law values that undergird these spheres. While the details and timing of each differ, both signal that the parties have reformed and restabilized the organization, and thus the remedial effort was likely effective.[211]

III. COMPLAINTS ABOUT PUBLIC LAW LITIGATION IN LIGHT OF THE COMPARISON TO BANKRUPTCY

The foregoing shows that courts and stakeholders approach public law litigation and bankruptcy in similar ways: courts respond to mass default by facilitating negotiated improvements in governance and accountability focused on overall reform rather than inserting themselves into the day-to-day operations of the organization. Public law litigation has been more controversial than bankruptcy reorganization, but many objections to the former would be, if valid, applicable to the latter as well. The comparison to bankruptcy suggests some helpful responses to such objections as well as positive arguments for the role of courts in addressing disputes arising from institutional dysfunction, which we set forth in this Part.

A. Objections to Public Law Litigation

1. *Courts are not authorized or equipped to administer complex organizations*.[212]

A basic challenge to the legitimacy of public law litigation asserts that structural remedies require the court to exercise "executive" powers and hence to violate the separation of powers. A functional variation emphasizes that judges lack the expertise and resources to engage in restructuring and ongoing supervision of organizations.

The legitimacy challenge assumes an implausibly rigid conception of judicial function. Contemporary discussion overlooks the broad range of administrative functions American courts have played. In the nineteenth century, judges superintended a variety of functions now associated with administrative agencies. They oversaw the regulation of ship safety, the distribution of federal land, and the award of veterans' pensions.[213] Then, as now, they administered estates and oversaw business reorganizations.[214] In these activities, judicial personnel were not just reviewing decisions by executive officers, but were often themselves making original decisions about compliance, eligibility, or distribution. Few contended that such activity was inappropriate or outside the "judicial power."[215] Today, both the

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211. Discussions about framework decrees increasingly share bankruptcy's concerns about case duration, although it typically takes public agencies longer to emerge from judicial supervision of a consent decree than a corporation's exit from bankruptcy.

212. *E.g.*, HOROWITZ, *supra* note 3; SANDLER & SCHOENBROD, *supra* note 3; Yoo, *supra* note 3.

213. JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 121–37, 188–204, 256–67 (2012).

214. *Id.*

215. The exception that proves the rule is the controversy around the statute challenged in *Hayburn's Case*, 2 U.S. 409 (1792). Three Supreme Court Justices suggested on circuit that a

increased volume and complexity of claims has forced judges to adopt sophisticated management practices even with respect to conventional private law and criminal cases.[216]

The bankruptcy analogy provides a strong response to the concern about judicial expertise. In neither bankruptcy nor PLL will a court directly manage an organization or, in most cases, specify its operations in detail. Instead, it seeks in the first instance to induce the parties to negotiate the reforms needed to bring the organization into compliance. More often than not, all or part of a PLL decree, like a bankruptcy plan, will reflect broad agreement. After that point, the court's role is to induce compliance with the decree and settle disputes about interpretation and modification—not to prescribe its terms. Where agreement is not achieved, the court may choose among competing proposals by the parties, usually based on expert opinion. As with the bankruptcy plan, the thrust of the PLL framework decree is to set out a managerial framework that promotes responsible and transparent decision-making going forward by the professionals best suited to make those decisions—management. After the decree is entered, the court's role is primarily to enforce the decree, as it would with any order.

2. *Liability findings do not entail any particular remedy; hence, judicial authority. is unconstrained*.[217]

In both bankruptcy and public law litigation, judges may exercise authority over organizational matters not specifically regulated by doctrine. This has led to claims that judges in PLL act outside the rule of law. In fact, judges in both contexts are disciplined in three ways: social norms, stakeholder consensus, and performance measurement.

Some dimensions of the remedy are dictated by business or professional norms. In cases of dispute, norms can be established by expert witnesses or consultants. In bankruptcy, for example, courts draw on established business norms to determine whether a plan is feasible.[218] Comparable norms are often available in public law litigation. For example, in policing, norms have emerged regarding use-of-force reporting, civilian complaint review, and "early intervention" regarding problem officers.[219]

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statute providing for pension applications to be addressed to and decided by judges violated Article III. *Id.* The putative defect, however, was not the conferring of initial decision-making on judges; it was the subjection of the judges' decisions to review by executive officials. *Id.*

216. *See* Eisenberg & Yeazell, *supra* note 4, at 488–91 (emphasizing the administrative dimension in such private law activities as the enforcement of money judgments and family law decrees); Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 441–44 (2007) (discussing instances of administrative reform within the court system of the criminal process); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378–80 (1982) (emphasizing the critical role of judicial case management in a world where most cases settle).

217. Brown v. Plata, 563 U.S. 493, 554–59 (2011) (Scalia, J., dissenting); SANDLER & SCHOENBROD, *supra* note 3, at 104–09, 123.

218. *See* Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 443 (1999).

219. *See* WALKER & ARCHBOLD, *supra* note 40, at 68–207.

In bankruptcy, the most important discipline of judicial remedial authority comes from the need for agreement among stakeholders and bankruptcy's priority rules.[220] Key remedial choices under a plan are made by the parties, subject to judicial approval.[221] In the face of serious recalcitrance either by management or creditors, a court will likely threaten (and perhaps impose) default penalties ranging from appointing a trustee to liquidating the debtor. All have the effect of depriving major stakeholders of the opportunity to negotiate an alternative remedy. When the plan process works—as it usually does in large cases—the court will have helped to induce fair participation by affected interests which, in turn, confers legitimacy on the process and advances the system's underlying welfare-maximization norms. In addition, the success or failure of the plan will be visible, and failure will reflect on the court. Bankruptcy judges tend to be sensitive to the success or failure of large cases, and this sensitivity channels their conduct toward Chapter 11's rehabilitative goals.

There are analogies in PLL. A negotiated plan is not a requirement, but judges tend to facilitate negotiation by the parties and sometimes consultation with other stakeholders. For example, the remedies opinion in the New York police case asserts that "community input is . . . [a] vital part of . . . [the] remedy in this case."[222] Accordingly, the order requires appointment of a facilitator to organize a "remedial process," including "'town hall' type meetings in each of the five boroughs in order to provide a forum in which all stakeholders may be heard."[223] Reformers seek consensus because it makes compliance more likely and because it enhances the legitimacy of judicial intervention.

Finally, some constraint on judicial authority arises from performance measurement. Bankruptcy incorporates basic accounting measures and reporting practices designed to make success or failure visible. Since poor financial performance will tangibly affect stakeholders, its prospect disciplines stakeholder negotiations, and since it will reflect more diffusely on the court, it probably constrains it as well. Courts want salvageable debtors to reorganize successfully and to rapidly liquidate those that are not.

Something similar occurs in PLL. Consistent with emerging public administration norms, reforms typically mandate performance measurement and reporting and may specify metrics. Thus, success or failure should become more visible, even as the restructuring may permit or promote some managerial flexibility. As these measures

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220. Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain*, 99 VA. L. REV. 1235, 1271 (2013) ("Creditors begin by bargaining inside a priority framework. Existing rules reflect and implement that bargain, for the most part."); *see also* Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 978 (2017) ("A distribution scheme . . . cannot, without the consent of the affected parties, deviate from the basic priority rules that apply under the primary mechanisms the Code establishes for final distributions of estate value in business bankruptcies.").

221. 11 U.S.C. § 1129 (2012).

222. Floyd v. City of New York, 959 F. Supp. 2d 668, 686–87 (S.D.N.Y. 2013).

223. *Id.* The Cincinnati police case produced a widely noted process of community engagement. *See* John E. Eck & Jay Rothman, *Police-Community Conflict and Crime Prevention in Cincinnati, Ohio*, *in* PUBLIC SECURITY AND POLICE REFORM IN THE AMERICAS 225 (John Bailey & Lucía Dammert eds., 2006).

make the agency more accountable, they also provide evidence of whether the court's intervention has been beneficial.

3. *Noncompliance is often due to budget inadequacy, and it is either undesirable or infeasible for courts to mandate increased appropriations*.[224]

We have noted that some PLL reforms do not increase expenses, and some increased expenses can be met with resources freed by new management practices. Yet, it is undeniable that many decrees depend on new resources.

Neither in bankruptcy nor in public law litigation do courts produce resources by appropriating them directly. In the bankruptcy context, the parties must convince lenders or investors of the viability of the company and their plan in order to secure any necessary financing.[225] Although courts have some capacity to cajole recalcitrant current lenders to provide more reasonable terms, they cannot force a lender to lend, or a debtor to borrow. Nor could courts otherwise induce outside investors to make new equity infusions in a debtor.

In the public law litigation context, an unusually aggressive decree might order executive officials with taxing or borrowing authority to exercise that authority.[226] But courts often disclaim such authority, and even where it might be available, seem reluctant to exercise it.[227] More often, a decree will require the defendant administrators to make their best efforts to seek resources from the legislature or private organizations. Legislatures have great capacity to resist such requests, and private institutions are usually free to refuse their support, as well.

Thus, it seems likely that the success of public law litigation in inducing enhanced resources for reform rests, as in bankruptcy, substantially on forces other than the coercive power of the courts. One important factor is the persuasive force of the claims and the court's order. The plaintiffs and the court will have mobilized stakeholders, assembled arguments and evidence, focused public attention on the problems, and achieved some measure of agreement on desirable reforms. The pressures on the legislature that arise from such activity are well within our established constitutional framework.

Moreover, like bankruptcy, a public law decree may attract support from both public and private sources by making new investment seem more promising. Like a Chapter 11 plan, a PLL decree may have enhanced safeguards against waste, improve accountability mechanisms, and reflect a more promising operating plan. And to the extent the plan has the support of the parties (and perhaps other stakeholders, such as service providers), it gives some reassurance to the legislature that the new resources will settle the controversy and achieve political acceptance. It is evidence that those affected by the underlying system view the plan favorably.

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224. *See supra* note 175; *see also* HOROWITZ, *supra* note 3, at 257–60; SANDLER & SCHOENBROD, *supra* note 3, at 91–92;

225. *See Chrysler Sold*, *supra* note 172.

226. *See* Missouri v. Jenkins, 495 U.S. 33 (1990) (holding in the context of a desegregation suit that the court may order the defendant school board to increase taxes).

227. *See* Perez v. Bos. Hous. Auth., 400 N.E.2d 1231 (Mass. 1980) (reversing on sovereign immunity grounds an order requiring state officials to borrow money to fund statutorily required improvements in public housing).

4. *PLL decrees ignore the polycentric nature of institutional reform. If you pull on one strand of the spider's web, the pressure will radiate to others. For example, if you mandate strict compliance with welfare application processing deadlines, agencies will shift workers from case maintenance to eligibility determination at the expense of the former.*[228]

This complaint is not made in bankruptcy. The reason for its absence there is equally applicable to public law litigation, at least to the relatively comprehensive framework decrees. Courts do not intervene piecemeal. Rather, they try to intervene broadly, inducing enterprise-wide (or in public law litigation, agency-wide or program-wide) plans.

Moreover, polycentricity is not a problem unique to structural litigation. An individual money judgment or a narrowly tailored injunction will also require resources to implement, and without new appropriations, these resources may come at the expense of other activities. Indeed, corporate debtors sometimes require bankruptcy because, as in the Texaco bankruptcy, the company has suffered an adverse judgment so severe as to impair its ordinary operations.[229] Bankruptcy can be a firm-wide response to a problem that was originally bilateral in nature.

Judges in cases seeking narrow equitable relief are sometimes told to try to take account of collateral effects of their orders on other agency activities.[230] But it may be more difficult for them to do so when the liability determination implicates only a narrow range of the defendant's activities. By putting broad swaths of interconnected activities in issue, structural relief forces attention to the relationships among activities and encourages explicit and systematic articulation of priorities. And the framework approach permits adaptation as new problems are discovered.

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228. Goldberg v. Kelly, 397 U.S. 254, 278–79 (1970) (Black, J., dissenting) (arguing that adding procedural safeguards for welfare terminations will divert resources from processing new applications); HOROWITZ, *supra* note 3, at 35–45; SANDLER & SCHOENBROD, *supra* note 3, at 91–92; Martin R. West & Joshua M. Dunn, *The Supreme Court as School Board Revisited*, *in* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 8–10 (Martin R. West & Joshua M. Dunn eds., 2009). The term polycentricity was popularized among lawyers by Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

229. *In re* Texaco, Inc., 254 B.R. 536, 542 (Bankr. S.D.N.Y. 2000).

230. Olmstead v. L. C., 527 U.S. 581, 597 (1999) ("In evaluating a State's fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably."); Nat. Res. Def. Council, Inc. v. Train, 510 F.2d 692, 712–13 (D.C. Cir. 1975) (holding that, in considering a request for injunctive relief, a court should take account of collateral effects of the requested order on other activities of the defendant). But courts sometimes refuse to consider the collateral effects of narrowly tailored orders. *E.g.*, Forest Guardians v. Babbitt, 174 F.3d 1178, 1193 (10th Cir. 1999) (refusing to consider an administrator's claim that compliance with a court order requiring specified endangered species determination would leave insufficient resources to perform other duties). To the extent that courts refuse to consider collateral effects, judgments in nonstructural cases may have the polycentricity problem critics attribute to PLL.

Note the paradox: if the framework rather than command-and-control approach to structural relief is taken, relatively comprehensive intervention is often more tractable than narrowly focused intervention. Judicial rhetoric emphasizing narrow tailoring of remedy to right is thus misguided. In bankruptcy, the right to payment sounds like it demands a simple remedy: payment. In individual collection, that is what happens. But when a large corporate debtor defaults generally, narrowly tailoring remedies to each creditor's claim would be impossibly wasteful. Coordinating an effective remedy in both Chapter 11 and PLL may require—and reflect—wholesale restructuring rather than retail rights recognition in order to avoid problems of polycentricity.

5. *Plaintiffs and defendants often conspire to entrench preferred policy solutions against political revision and/or to expand agency resources*.[231]

In bankruptcy, managers and senior creditors are sometimes accused of conspiring at the expense of junior creditors. Bankruptcy structures and processes create a variety of checks to minimize this, including committee oversight, priority rules and standards, and the appointment of an examiner or trustee.[232] But bankruptcy doctrine also recognizes that all parties have a shared interest in a successful reorganization, and it does not view collaboration as categorically suspect. Indeed, it seeks to induce collaboration, in large part because collaboration within this framework is likely to advance reorganization's larger policy goals of maximizing wealth in the face of financial distress. As noted above, concerns arise with respect to stakeholder representation in bankruptcy, but courts and administrative adjuncts (the Office of the United States Trustee) have adapted practice to respond.[233]

Concerns about management sympathy for or collaboration with plaintiffs in PLL are more intense. Critical discussion seems inconsistent. On one hand, doctrine often insists on presumptive deference to administrators, even after they have conceded liability or been adjudicated liable, on grounds of political legitimacy.[234] On the other hand, when administrators agree with plaintiffs, they are suspected of acting from nefarious motivations, such as empire-building.[235]

A few PLL decrees have been plausibly accused of policy entrenchment, and to the extent that it is a problem, the Supreme Court's demand in *Horne v. Flores* that district courts take seriously claims for modification based on changed circumstances addresses this problem.[236] However, policy entrenchment is less likely to be problematic in the large range of public law litigation decrees that take the framework approach. The framework decree emphasizes process and accountability and leaves the defendant broad discretion to change practices so long as it does so explicitly and transparently. Disputes can still be brought to a monitor appointed under the decree,

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231. *See* Horne v. Flores, 557 U.S. 433 (2009); McConnell, *supra* note 127.

232. *See supra* notes 101, 186, 220.

233. *See supra* note 112.

234. *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 349 (1996) (stating that it is for the "political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the presentation of claims will not occur").

235. *See* SANDLER & SCHOENBROD, *supra* note 3, at 122; McConnell, *supra* note 127.

236. 557 U.S. at 447–50.

and ultimately the court, but the presumption with respect to such matters is in favor of flexibility. Such decrees are *more* accommodating of change than *Horne v. Flores* requires.[237] Indeed, their general tendency is to induce adaptation rather than entrenchment.

In general, administrative sympathy for or agreement with plaintiffs should not be presumptively suspect. Where managers seem inadequately motivated to oppose plaintiffs on specific contestable matters, that should be treated, as it is in bankruptcy, as a problem of representation, not as a categorical objection to structural remedies. Problems of representation in aggregate litigation are hardly novel, and courts in a variety of contexts have developed means of addressing those problems.[238]

B. Positive Arguments

Courts reform troubled organizations in both bankruptcy and PLL, our study suggests, because they have unique capacities to help the parties restructure them when other institutional choices fail. We summarize here several of the most important capacities common to both spheres.

First, courts are largely independent of market and political forces. While there will sometimes be claims that judicial decisions are politicized in some way, no legal actor is likely to be less burdened by political or market pressures than courts. Thus, courts occupy a special place in relation to the dysfunctions that contribute to the conditions that often produce the need for restructuring in the first place. Courts can induce reforms in both bankruptcy and PLL because they are removed from the causes of system failure and the political and market pathologies that often prevent extrajudicial reform.

Second, judges in both bankruptcy and PLL have developed special operating capacities to facilitate reform that give them a comparative advantage under conditions where more conventional reform mechanisms fail. For example, while judges are not experts in the substantive fields of the institutions they help to reform—whether police departments or airlines—they are experts in delimiting and resolving disputes. Thus, in both bankruptcy and PLL, judges are able to assess the transparency and fairness, including the adequacy of representation, of the process that produced the agreement. At the same time, they are likely to promote agreement where possible to achieve plans of reorganization or settlement agreements that embody large areas of consensus, so long as they appear credibly responsive to the underlying problem.[239] Subjecting these agreements to judicial review provides an independent check on the propriety and feasibility of the agreed restructuring which enhances their persuasive and instrumental force.[240]

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237. *Id.*; *see supra* text accompanying notes 183–191.

238. *See generally* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 (AM. LAW INST. 2010) (discussing ethical issues in aggregate litigation).

239. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1020 (2004) ("[R]egimes of standards and monitoring that commonly emerge from remedial negotiation allow this destabilization, and the learning it generates, to continue within narrower channels.").

240. Chayes anticipated these points in 1976. *See* Chayes, *supra* note 4, at 1307–08 (arguing that the judge's "professional tradition insulates him from narrow political

To the extent courts cannot induce agreement, judges retain the power both to coerce through adjudication and to declare the law in order to help establish norms that will guide future disputes. These more traditional adjudicative functions are not displaced by judges' efforts to facilitate agreement, but they instead work in tandem. No one doubts that judges have a comparative advantage over other market and legal actors in using traditional litigation techniques to decide disputes in other contexts, and the same would appear to be true in bankruptcy and PLL. And, because judges are experts in dispute resolution, their warnings to parties about the costs and benefits of the choice between litigation and settlement are likely to have significant credibility.

Third, courts may have a comparative advantage in their capacities to produce and manage information. Both Chapter 11 cases and the civil litigations in PLL require the production of significant amounts of information, much of which becomes part of the public record, either through the litigation process or through the plans and decrees that resolve these cases. The public character of this work imposes a level of accountability on courts and parties not likely to be found elsewhere. While the negotiations that lead to or implement resolution may not be public, the factual record upon which decisions are made will be.[241] Moreover, the public record thus produced increases the capacity for parties in future cases to gauge their likelihood of success and to learn techniques for resolution that might not otherwise be apparent. Courts have long been understood to play an educative role generally.[242] The transparency of their work in bankruptcy and PLL is no different.

This is not to say that bankruptcy or PLL is perfect. Indeed, observers and practitioners criticize both, and we can imagine future work offering specific examples of developments in bankruptcy that might improve PLL practice. For example, early practice under the Bankruptcy Code was, as noted, challenged for the delay and cost associated with the Chapter 11 process. This led some to argue that Chapter 11 should be eliminated[243]—just as some today argue that we should eliminate PLL. Instead, however, cooler heads prevailed, and the Chapter 11 system adapted. A similar adjustment has been underway in PLL and is likely to continue. The evolution from "command-and-control" PLL decrees to "framework" decrees has been, in part, a response to criticism about the rigidity and duration of the earlier decrees, and their lack of success in producing reformed public systems.

CONCLUSION

Critics have for many years chastised courts supervising public law litigations even though that same role and functionality are the daily diet of courts supervising Chapter 11 bankruptcies. For these critics, the message of this Article is simple: if PLL is an illegitimate judicial activity, then so too is Chapter 11 bankruptcy. Since

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pressures," and the court "is also rather well situated to perform the task of balancing the importance of competing policy interests in a specific situation"). For elaboration, see Sturm, *supra* note 4, at 1382–409.

241. *Cf.* Chayes, *supra* note 4, at 1308.

242. *See, e.g.*, Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 1013 (1992).

243. Bradley & Rosenzweig, *supra* note 23, at 1050.

no one would seriously make the latter claim, critics of PLL should more carefully assess the character and grounds of their opposition.

We do not suggest that PLL or bankruptcy should be immune from criticism. The mere fact that courts in both contexts do substantially similar work does not mean that they always do it well. Indeed, we think there are likely important areas for improvement in both contexts, for example and in particular, the duration of PLL decrees, which we reserve for future work. But arguments about legitimacy merely distract from those more concrete projects. An implication of this Article is that scholarship about PLL should focus not on *whether* we should have it, but how to make it more effective.

We thus recognize that neither PLL nor Chapter 11 are optimal solutions. As in so many contexts, the real choices available to parties confronting large-scale failure are amongst what Neil Komesar would call "imperfect alternatives."[244] No avenue for organizational reform—legislature, market, or court—is ideal. We have shown how and why courts are often a better choice for the difficult work of institutional reform in PLL by reference to the highly analogous work they do in bankruptcy.

Organizational restructuring is an inevitable feature of post-bureaucratic society. Contrary to PLL's critics, we have shown how and why courts do—and should—play a significant role in the difficult and important work of facilitating these reforms.

244. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).