A REVIEW OF CORPORATE LIABILITY IN UNITED STATES LAW

EarthRights International (ERI)[1] submits this review of corporate liability in United States law in response to questions posed by the Office of the High Commissioner for Human Rights of the United Nations. The views expressed below are not those of any of ERI's clients, and ERI makes this submission independently of its position in any contested litigations.

I. APPROACHES TO CORPORATE CRIMINAL LIABILITY UNDER THE LAWS OF THE UNITED STATES[2]

In the United States, a corporation may be held criminally liable for any crime that a natural person can commit unless otherwise specified by statute.[3] Federal criminal statutes are authorized by U.S. Constitutional provisions,[4] codified in statutes adopted by Congress into the U.S. Code,[5] and further specified by administrative regulations that proscribe conduct.[6] In the United States, all crimes require both proof of a criminal act,[7] known as *actus reus*, and proof of an intent[8] to commit a criminal act, known as *mens rea*. *Actus reus* may take the form of an affirmative action or a failure to act where there is a legal duty to do so, but the act or omission must always be voluntary to trigger criminal responsibility.[9] *Mens rea* is complicated by the fact that intent is often concealed and must therefore be inferred,[10] resulting in some degree of ambiguity despite attempts to standardize the test for a "guilty mind."[11] Federal

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[1] This review was principally drafted by Sevren Gourley, with input from ERI's U.S. legal staff.

[2] Unless otherwise noted, the law herein evaluated for the purposes of analyzing corporate criminal liability is under the federal jurisdiction of the United States. Note that there is no federal quasi-criminal law separate and distinct from federal criminal law.

[3] All criminal offenses must be described by statute to provide notice of exactly what behavior has been criminalized. *See United States v. Hudson*, 7 Cranch 32 (1812). This requirement comes from the concept of notice as essential to the due process of law guarantees in the United States Constitution. U.S CONST. Amend. V. The void-for-vagueness doctrine in criminal law holds that a criminal statute that does not describe criminal conduct in a manner sufficient enough to provide adequate notice is unconstitutional—a statute must be clear enough that a person of ordinary intelligence would be aware that contemplated conduct is criminal. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). Note that although most federal crimes specifically mention "persons", 1 U.S.C. § 1 includes legal entities in the definition of persons. 1 U.S.C. § 1 (1970).

[4] *See, e.g.*, U.S. CONST. Art. I § 8, c.10 (endowing Congress with the power to define and punish maritime crimes and offenses against the Law of Nations).

[5] Federal criminal law and procedure is passed by Congress and codified under Title 18 of the United States Code.

[6] Principles of administrative legislative agency are codified under Title 5 of the United States Code.

[7] 2 WAYNE R. LAFAVE, SUBST. CRIM. L. § 6.1 (2d ed. 1986).

[8] *Id.* at § 5.1.

[9] *See Id.* at § 6.1(a)–(c).

[10] *See Id.* at § 5.2(a)–(c).

[11] The Model Penal Code, for example, represents an attempt to remove the ambiguity of intention by establishing four culpability standards based on objective question: did the person act (a) purposely, (b) knowingly, (c) recklessly, or (d) negligently? MODEL PENAL CODE § 2.02 (2001). The Model Penal Code has

criminal law standards of *mens rea* may generally be categorized as (1) strict liability offenses, where there is no explicit requirement of intent, only knowledge;[12] (2) general intent offenses, where one must intend to commit the criminal act;[13] and (3) specific intent offenses, where one must intend to commit the criminal act and further intend harm or to bring about a proscribed criminal consequence.[14]

a. How criminal liability is attributed to corporations

The corporate form complicates criminal liability—liability for legal entities in general is a relatively modern development in the United States[15]—and standards for establishing *actus reus* and *mens rea* in the context of natural persons have had to be adapted by the criminal justice system to apply to corporations.[16] Although it may be more difficult to conceptualize a corporation as having a guilty mind or *mens rea*, there is generally no reduced burden of proof for the criminal prosecution of corporations over natural persons—the intent of the corporation must still be shown beyond a reasonable doubt.[17] Because criminal acts can only be committed through the acts of natural persons, and only natural persons can have criminal intent, tests for establishing the criminal liability of corporations have evolved to focus on the acts and intent of those acting on behalf of corporations.[18] The *actus reus* and *mens rea* of an employee may be imputed to the corporation where the employee acted within the scope of his or her employment and sought to benefit the corporate interest in some way.[19] While ERI believes that the better view is that corporations can be held liable based on "collective intent"—in which the acts and intent of individual employees can

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not been adopted in all jurisdictions within the United States—including the federal government—and has been modified to some extent by all adopting jurisdictions.

[12] *See United States v. Dotterweich*, 320 U.S. 277, 282–84 (1943) (holding officer liable for corporate acts without evidence of criminal intent on the part of the officer because of inferred duty to be apprised of regulatory obligations). *But see Morissette v. United States*, 342 U.S. 246, 252–54 (1954) (inferring intent standard even where not provided by statute for crimes derived from traditional common law offenses). Strict liability offenses are common in the regulatory and public welfare context, like much of environmental law, for example.

[13] *See e.g.*, 18 U.S.C. §§ 2441(a), (d)(1)(C) (2006) (proscribing illegitimate biological experiments on humans as a war crime—the general intent required is the intent to subject a victim to the experiments).

[14] *See e.g.*, 18 U.S.C. § 2340(1) (2004) (defining criminal torture as an "act committed under color of law"—a general intent to commit the act—"intended to inflict severe physical or mental pain or suffering"—a specific intent to bring about consequence).

[15] *See* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1478–84 (1996) (discussing the historical development of corporate criminal liability in England and the United States).

[16] *See, e.g.*, Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 BUFF. CRIM. L. REV. 641, 661–69 (2000) (discussing the an aggregate model of corporate criminal liability to adapt *mens rea* to the legal entity context).

[17] *Cf.* John T. Byam, Comment, *The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582, 602 (1982); Khanna, *supra* note 1 at 1512–16.

[18] *See, e.g.*, *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 635 (11th Cir. 2010) ("Corporations have no state of mind of their own; rather, the scienter of their agents must be imputed to them.").

[19] *See, e.g.*, *United States v. Bank of New England*, 821 F.2d 844, 855 (1st Cir. 1987).

be aggregated and attributed to the corporation—the courts are divided on this issue.[20] The concept of imputation—imposing the acts and intent of corporate employees onto the corporation itself—is central to corporate criminal liability.[21]

b. Modes of criminal liability for corporations

There is no general "vicarious" liability for criminal offenses because of the requirements of *mens rea* and *actus rea*, but anyone who joins a criminal conspiracy[22] may be liable for the crimes of other members of the conspiracy where the crimes of the other were both reasonably foreseeable and in furtherance of the conspiracy.[23] Mere knowledge that the other party to a conspiracy is committing the crimes, however, is not enough to hold the first party liable.[24] Conspiracy is also one circumstance in which employees may face criminal liability even though they themselves did not commit—or know of—the criminal conduct of other employees.[25] Aiding and abetting another in the commission of a federal crime will also allow one party to be held liable for the crime of another[26] provided that the abettor knowingly acted to facilitate the other party's crime.[27] Unlike conspiracy, which requires an agreement between two or more parties, aiding and abetting liability can be committed by a single party knowingly acting to facilitate or conceal the crime of another.[28] Both conspiracy and aiding and abetting liability may be used to hold one corporation liable for the acts of another.

c. Challenges to criminal prosecution of corporations

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[20] Compare *id.*, 821 F.2d at 856 (finding the defendant corporation "to have acquired the collective knowledge of its employees and [holding the corporation] responsible for their failure to act accordingly"), with *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1122 (D.C. Cir. 2009) ("Like Defendants and other courts, we are dubious of the legal soundness of the 'collective intent' theory."), and *Southland Securities v. Inspire Insurance Solutions*, 365 F.3d 353, 366 (5th Cir. 2004) ("For purposes of determining . . . scienter we believe it appropriate to look to the state of mind of the individual corporate official or officials . . . rather than generally to the collective knowledge of all the corporation's officers and employees acquired in the course of their employment."). Note that a corporate employee or officer generally cannot exculpate himself by claiming that he was acting on behalf of the corporation. *United States v. Wise*, 370 U.S. 405, 409 (1962). Note that under the Model Penal Code and some state criminal codes, corporations are only liable where senior officials act, not lower employees—even where the lower employees commit crimes for the benefit of the corporation. *See* MODEL PENAL CODE § 2.07 (1985); *see, e.g.*, ARIZ. REV. STAT. ANN. § 13-305 (1977).

[21] Imputation of corporate officer mental states to the corporation was first established by statute in the Elkins Act of 1903, upheld by the U.S. Supreme Court in *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909). For a further discussion of imputation in the context of corporate criminal liability, see CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY (2d. ed. 2001).

[22] Conspiracy is a separate and distinct crime in which two or more persons agree to commit a crime, it is the agreement itself that is criminal. *See* 18 U.S.C. § 371 (1948).

[23] *United States v. Pinkerton*, 328 U.S. 640, 645–48 (1946).

[24] *United States v. Studley*, 47 F.3d 569, 575 (2d Cir. 1995).

[25] *See, e.g.*, *United States v. Singh*, 518 F.3d 236, 247–50 (4th Cir. 2008) (holding motel operators liable for prostitution ring's money laundering operation because of agreement to supply rooms).

[26] 18 U.S.C. § 2(a) (1948).

[27] *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949).

[28] *United States v. Sain*, 141 F.3d 463, 474–75 (3d Cir. 1998) (holding that stockholder of corporation aided and abetted corporation).

In practice, criminal prosecution of corporations is rare because concepts of corporate separateness, prosecutorial discretion, and a preference for deferred prosecution agreements impede conviction in the United States. Corporate separateness is the idea that separate corporations are regarded as distinct legal entities even where the stock or operation of one is wholly or partly owned by the other, parent, corporation.[29] This means that parent corporations may be insulated from liability for the criminal acts of their subsidiaries or affiliates.[30]

In the U.S., prosecutors have unfettered and unreviewable discretion to choose whom to prosecute.[31] Prosecutors may choose not to pursue corporations because matters of proof can be more difficult than for individuals, or because corporations have more resources to fight a criminal action, or simply because they do not believe prosecuting corporations should be a priority. Moreover, recent judicial decisions have confirmed that corporations are entitled to limitless spending to influence U.S. elections.[32] Given the fact that prosecutors are subject to political pressure, influence-driven incentives may affect efforts to pursue prosecutions of corporate offenders—particularly larger corporations with broad economic influence.[33] Deferred prosecution agreements—court-supervised settlements in which corporations pay a fine and commit to implement compliance programs in exchange for immunity[34]—have recently replaced a large proportion of corporate criminal prosecutions.[35] The prospect of lengthy and expensive criminal trials provides an incentive for prosecutors to enter into these agreements rather than pursue a conviction.[36]

d. Improvements to criminal prosecution of corporations

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[29] WILLIAM MEADE FLETCHER & BASIL JONES, 1 FLETCHER CYC. CORP. § 43 (1984).
[30] *Id.*
[31] *Wayte v. United States*, 470 U.S. 598, 607 (1985) (holding that the decision to prosecute rests with the executive, not the judiciary).
[32] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 348 (2010) (holding that political speech may not be suppressed on the basis of the speaker's corporate identity).
[33] The Department of Justice has been provided guidance instructing prosecutors to consider economic policy concerns when deciding whether or not to prosecute corporations. *See* Memorandum from Deputy Attorney General Eric Holder to all Component Heads and United States Attorneys (June 16, 1999), *available at* http://federalevidence.com/pdf/Corp_Prosec/Holder_Memo_6_16_99.pdf.
[34] These agreements have become common in the context of corporate fraud and anti-trust violations. *See, e.g.*,WILLIAM M. HANNAY, CORP. COMPL. SERIES: FCPA § 1:44 (2014–2015) (guiding corporations to pursue deferred prosecution agreements).
[35] Some commentators have gone so far as to see this exercise of prosecutorial discretion as endowing prosecutors with regulatory authority. Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159 (2008).
[36] Companies have also displayed an increasing willingness to accept deferred prosecution agreements after Arthur Andersen LLP declined to accept an agreement and the U.S. Department of Justice called its bluff and moved ahead with a high profile criminal indictment. For analysis of the rise of deferred prosecution agreements in the wake of the Enron scandal, see Andrew Weissman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 423–27 (2007).

Improving the climate for corporate criminal liability in the United States requires commitments on the part of the legislative, executive and judicial branches of federal and state governments. An executive branch commitment to criminal prosecution that goes beyond deferred prosecution agreements may increase transparency and enhance deterrence. In addition, judicial review of deferred prosecution agreements—and other exercises of prosecutorial discretion—may be appropriate in the human rights context to ensure that political considerations do not lead to impunity for grave abuses.[37] Given the regulatory nature of practical prosecutorial discretion, legislative frameworks are needed to establish standards that prevent offenders from escaping liability under deferred prosecution arrangements.[38] Legislative guidance is also needed to clarify standards for imputation of employee and officer conduct in federal criminal law.[39]

Criminal liability standards in the United States require a showing of *mens rea* and *actus reus* beyond a reasonable doubt. The corporate form—and uncertainties in the evolving imputation doctrine used to attribute intent, knowledge, and actions to corporations—complicate corporate criminal law. Significant improvements can be made by reducing the breadth of discretion that prosecutors have to decline to indict corporations and by codifying imputation standards.

II. CORPORATE CIVIL LAW LIABILITY STANDARDS IN THE UNITED STATES

Under federal law in the United States, private rights of action against corporations—like those against natural persons—may arise from statutory civil remedy provisions[40] or the common law of tort.[41] To hear claims against a corporation, a court must have both personal jurisdiction—power over the corporation by virtue of their presence within the jurisdiction[42]—and subject-matter jurisdiction—power to hear the claims at issue.[43] A court has general personal jurisdiction to adjudicate claims

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[37] For a critique of modern prosecutorial discretion doctrine, see Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: The need for Meaningful Judicial Review*, 145 U. PA. L. REV. 1309 (1997) (arguing against the doctrine put forth in *United States v. Armstrong*, 517 U.S. 456 (1996)).

[38] While some deferred prosecution agreements provide for clear monitoring and compliance requirements, *see, e.g.*, *United States v. Zimmer, Inc.*, Mag No. 07-8130, 2007 WL 2964252 (D.N.J. Sept. 28, 2007), others leave questions as to whether the agreement is a deferred prosecution agreement at all. *See* Leonard Orland, The Transformation of Corporate Criminal Law, 1 BROOK. J. CORP. FIN. & COM. L. 45, 56 n.62 (2006).

[39] *Supra* note 19 and accompanying text.

[40] *E.g.*, 18 U.S.C. § 1595(a) (2015) (providing that a victim of human trafficking may bring a civil action against any profiteer).

[41] A tort is a legal wrong perpetrated either intentionally or negligently against another. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, 1 THE LAW OF TORTS § 1 (2d ed. 2011). Common law tort generally arises from state common law—in the interest of brevity, this response will speak in terms generally applicable to the several states when discussing standards for tort liability.

[42] The personal jurisdiction requirement arises from the due process restrictions in the U.S. Constitution.

[43] The subject-matter jurisdiction requirement arises from the limits of Art. III of the U.S. Constitution, which establishes the federal judicial system. Limits on subject-matter jurisdiction include substantive limitations on federal courts, which principally hear cases arising under federal law or between parties

against corporations that are "'essentially at home'" in the jurisdiction,[44] which includes being headquartered or incorporated in the jurisdiction.[45] A court may have specific personal jurisdiction to adjudicate limited claims against corporations that arise from contacts with the jurisdiction where the corporation is not otherwise "at home."[46]

Establishing liability in common law tort claims depends on establishing fault by a preponderance of the evidence.[47] Fault may be attributed where a defendant acted recklessly, negligently,[48] intentionally, or on an automatic (strict) liability[49] basis and caused the harm.[50] The conduct of corporate employees, officers, and agents may be attributed to the corporation itself for the purposes of a tort action,[51] where the conduct was within the employee's scope of work (and under some circumstances where

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from different states (or countries); the mandate of courts to decide only actual cases or controversies (as opposed to issuing advisory opinions); and the doctrine of standing, which provides that a plaintiff may only sue if he can demonstrate a sufficient connection to the case and the remedies requested. Many statutes that create remedies for internationally recognized human rights violations, such as the Alien Tort Statute, the Torture Victims Protection Act, and the Trafficking Victims Prevention Act, are federal laws that expressly provide a jurisdictional basis to hear claims in federal court. Note that subject-matter jurisdiction is not usually an issue in state courts of general jurisdiction, which may hear cases arising under state, federal, and even international or foreign law.

[44] *Daimler A.G. v. Bauman*, ___ U.S. ___, 134 S. Ct. 746, 749 (2014).

[45] *Hertz Corp. v. Friend*, 559 U.S. 77, 89–90 (2013) (holding that a corporation's "principal place of business" for purposes of personal jurisdiction is its administrative headquarters); *Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 522–25 (holding that incorporation implies physical presence even where a corporation does no business in the jurisdiction of incorporation).

[46] A non-present corporation may be amenable to process by virtue of "minimum contacts" with the jurisdiction if they have targeted the jurisdiction and enjoy the benefits and protections of its laws. *Int'l Shoe v. Wash.*, 326 U.S. 310, 319–20 (1945) ("minimum contacts" are found where corporate activity is regular and deliberate). This gives rise to "stream of commerce" theory that finds such contacts where a corporation purposefully avails itself of the jurisdiction by targeting it for commercial purposes. *See Asahi Metal Indus. Co. v. Sup. Ct. of Cal.*, 480 U.S. 1026, 1031–32 (1987). Non-present corporate contacts are not likely to be sufficient to support general jurisdiction, a problem compounded by corporate separateness. *See Diamler AG v. Bauman*, ___ U.S. ___, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires Op., S.A. v. Brown*, ___ U.S. ___, 131 S. Ct. 2846 (2011).

[47] DOBBS, 1 THE LAW OF TORTS § 2.

[48] FLETCHER & JONES, 3A FLETCHER CYC. CORP. § 1161, *supra* note 28.

[49] Strict liability for corporate actors is limited in common law but has been statutorily broadened in some contexts. *See* Aron M. Bookman, Note, *Transcending Common Law Principles of Limited Liability of Parent Corporations for the Environment*, 18 VA. ENVTL. L.J. 555, 562–65 (1999) (discussing common law limited liability in the context of CERCLA).

[50] *Id.*

[51] *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893) (holding that the corporate form does not absolve a corporation of tort liability).

it was not).[52] Commonly known as *respondeat superior*, this theory allows for corporations to be liable for the conduct of their employees and agents.[53]

a. Establishing liability for the acts of a subsidiary

Establishing parent company liability for acts attributable to a subsidiary is complicated by the concept of corporate separateness and the corporate veil doctrine.[54] The veil doctrine holds that the owners of a corporation are not liable for the debts of the corporation itself, beyond the capital that they put into the corporation. Although there are good arguments that this doctrine should not be applied in the context of a parent-subsidiary relationship, many courts have done so.[55] One way to impose liability on a parent company for the acts of a subsidiary is to "pierce the corporate veil."[56] Piercing the corporate veil generally requires a showing that the corporate form has been used as a sham or fraud, to circumvent the law,[57] that corporate formalities of distinctness have not been observed, or that the subsidiary is so dominated by the parent that it is effectively the alter-ego of the parent.[58] Nonetheless, some courts have

[52] However, participation in the tort is essential for liability, meaning that an employee or officer cannot be held liable for acts attributed to the corporation unless they participated. FLETCHER & JONES, 3A FLETCHER CYC. CORP. § 1137, *supra* note 28. Note that this general rule may not apply where defendants are sued as conspirators. *Id.*

[53] *Denver & R.G. Ry. Co v. Harris*, 122 U.S. 597, 606 (1887). Respondeat superior applies where the legal relationship of master and servant is shown to exist as to the transaction in question, having limited applicability where there is an independent contractor type relationship. 1 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 8:18 (3d 2010).

[54] Note that while corporate civil liability could reasonably be expected to be broader than criminal liability, the Supreme Court has placed more limits on the scope of corporate civil liability. *Cf.* Weissmann, *Rethinking Criminal Corporate Liability*, *supra* note 35 at 433. The corporate veil remains an obstacle for liability under both criminal and civil law. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011) (finding that the presence of a corporation within a jurisdiction does not support personal jurisdiction over another member of the corporate family).

[55] *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries.") (internal quotation marks omitted) (citation omitted).

[56] *See* Neil A. Helfman, Establishing Elements for Disregarding Corporate Entity and Piercing Entity's Veil, 114 AM. JUR. PROOF OF FACTS 403 § 4 (3d ed. 2010).

[57] *United States v. Reading Co.*, 253 U.S. 26, 61–62 (1920) (finding corporate separateness illusory where board of directors were the same for all three companies). The term "alter-ego" refers to a situation in which corporate separateness is illusory to the point that veil-piercing is appropriate. *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1237 (N.D. Cal. 2004).

[58] There is no generally accepted federal alter-ego doctrine, only methods of statutory interpretation and statutory authority for disregarding the corporate form in some instances. Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853 (1982) (arguing that federal common law should look to statutory policy rather than state corporate law when deciding whether to pierce the corporate veil). The Supreme Court has held that the authority for statutory secondary liability must be express and cannot be assumed. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 183–84 (1994) (finding no secondary liability in securities fraud context). *But see* Andrei Takhteyev, *Who is to Blame? (And What is to be Done?): Liability of Secondary Actors Under Federal Securities Laws and the Alien Tort Claims Act*, 74 BROOK. L. REV. 1539, 1558–64 (discussing

rejected efforts to pierce the veil even where the requirements of the doctrine appear to have been met, such as when the parent is the sole owner of the subsidiary and the two companies share directors, officers, and managers.

Regardless of whether the corporate veil is maintained, parent companies are commonly held liable for the actions of their subsidiaries under theories of agency liability.[59] An agency relationship generally requires that there be an express or implicit agreement that the subsidiary would act on behalf of the parent, and the ability of the principal to control the subsidiary's acts.[60] In practice, this doctrine is frequently met, because subsidiaries typically structure their business in order to meet the parent's economic interests, not their own, and because employees of subsidiaries often report direct to employees of parent companies. Some courts, however, have conflated agency liability and the corporate veil, erroneously imposing the requirements for veil-piercing or alter-ego liability in the agency context.

Another doctrine, the "integrated enterprise" test, allows for two or more entities to be treated as one where there are generally interrelated operations, common control over labor relations, common management, and common ownership.[61] This is a sensible theory, but it has only been addressed by a few courts, and its applicability is contested in the employment law context in which it first arose.[62]

b. Challenges to civil liability for corporations

Civil claimants seeking redress for human rights violations face procedural and jurisdictional challenges before they are able to have their claims heard on the merits. Obstacles abound from the very opening stages of the proceedings. In theory, the complaint (the document that a plaintiff files to launch a lawsuit) only needs to provide a "short plain statement"[63] of facts that—if true—would be sufficient for liability and would put the defendant on notice of the claims against him.[64] This rather loose "notice pleading" standard recognizes that many plaintiffs do not have confidential information that the defendant possesses in order to substantiate their claims, but nevertheless have good reason to believe that the defendant is responsible for the

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split decision in the Second Circuit on source of aiding and abetting liability and the potential limits of *Central Bank*).

[59] RESTATEMENT (SECOND) OF AGENCY § 140 (1958); *see also Japan Petroleum Co. (Nigeria), Ltd. v. Ashland Oil, Inc.*, 456 F. Supp. 831, 836 (D. Del. 1978).

[60] RESTATEMENT (SECOND) OF AGENCY § 140.

[61] These doctrinal factors developed in the context of employment law to aid in the identification of employer. *See Richard v. Bell Atl. Corp.*, 976 F. Supp. 40, 43 (D.D.C. 1997); *Sharpe v. Jefferson Dist. Co.*, 148 F.3d 676, 679 (7th Cir. 1998); *Frank v. U.S. West, Inc.*, 3 F.3d 1357 (10th Cir. 1993); *Johnson v. Flowers Indus., Inc.*, 814 F.2d 978, 981 (4th Cir. 1987); *York v. Tenn. Crushed Stone Ass'n*, 684 F.2d 360, 362 (6th Cir. 1982); *Baker v. Stuart Broad. Co.*, 560 F.2d 389, 391–92 (8th Cir. 1977).

[62] *See Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940–43 (7th Cir. 1999) (abrogating the integrated enterprise factors in favor of a more nuanced purpose-driven approach).

[63] Fed. R. Civ. P. 8(a) (2010).

[64] *See Conley v. Gibson*, 355 U.S. 41 (1957).

damages they have suffered. Recent developments in federal civil procedure have raised questions about the notice pleading standard, however; the Supreme Court has stated that the facts alleged in the complaint, if true, must make out a plausible case for the defendant's liability.[65] Some courts seem to have incorrectly interpreted this standard as requiring that the specific facts alleged must be "plausible," even though the Supreme Court has made clear that a complaint still does not need to provide detailed factual allegations.[66] Although it does not appear that the Supreme Court was actually intending to change the "notice pleading" requirements, the interpretation of these recent cases by other U.S. courts does appear to have led to more dismissals of complaints at any early stage, generally without the benefit of formal discovery.[67]

The modern multinational corporate form poses jurisdictional challenges for civil claimants. For example, under recent Supreme Court precedent, statutory grants of jurisdiction—such as the Alien Tort Statute (28 U.S.C. § 1350)—have only limited application to torts committed abroad unless otherwise expressly stated.[68] The fiction of corporate separateness means that jurisdiction does not automatically attach to a parent company by virtue of jurisdiction over a subsidiary.[69] Piercing the corporate veil has been difficult for civil claimants attempting to extend jurisdiction over subsidiaries or parent corporations for acts of others within their corporate family that are located outside the jurisdiction.

Corporations may also avoid having their claims heard at trial by invoking *forum non conveniens* (*FNC*) in cases with a significant foreign component. *FNC* is a common law doctrine that allows federal courts to dismiss claims— even where jurisdiction is proper and the claims would otherwise survive dismissal—when there is a judicial forum in another country that is available and adequate to hear the case, if the U.S. judge believes that it would be more convenient or appropriate to hear the case there.[70] *FNC* requires a showing that an alternate forum is available and adequate as well as a demonstration that continuing in the plaintiff's chosen forum would be a heavy burden on both the defendant and the court. In theory, this is a doctrine that should be used sparingly, even in cases where the foreign aspect is dominant; in practice, however, corporate defendants are often able to use *FNC* strategically to knock out meritorious claims.[71] The vast majority of claims dismissed on *FNC* are not re-filed in the alternate forum. The use of *FNC* is particularly problematic in the context of civil litigation

[65] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).
[66] *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
[67] *See* Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, 96 JUDICATURE 127 (2012).
[68] *See Kiobel v. Royal Dutch Petroleum*, ___ U.S. ___, 133 S. Ct. 1659, 1663 (2013) (holding that 28 U.S.C. § 1350 does not apply to torts committed outside the United States).
[69] Charles Alan Wright et al., 4A FED. PRAC. & PROC. CIV. § 1069.4 (3d ed. 2009).
[70] *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 506 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248–49 (1981).
[71] *See* Brian Springer, Comment, *An Inconvenient Truth: How Forum Non Conveniens Doctrine Allows Defendants to Escape State Court Jurisdiction*, 163 U. PA. L. REV. 833 (2015); David Robertson, *Forum Non Conveniens in America and England: A Rather Fantastic Fiction*, 103 LAW Q. REV. 398 (1987).

against corporate entities for alleged human rights abuses abroad[72] and have given rise to forum-shopping on the part of corporate defendants.[73]

c. Improvements to civil liability for corporations

Improving the climate for civil law claimants seeking to bring human rights claims against corporations in the United States requires enabling claimants to reach parent companies for the tortious acts of their subsidiaries, escape procedural challenges, and establish jurisdiction over corporate defendants. Foreign corporations should be subject to the general personal jurisdiction of U.S. courts when they benefit from the protections and advantages of U.S. law and the U.S. markets by conducting business in the United States. Parent corporations should be liable for the tortious acts of their subsidiaries by virtue of ownership, responsibility, or direction. The Supreme Court should make clear that the "notice pleading" standard[74] has not changed, in order to ensure that plaintiffs' potentially meritorious claims survive until they can reach the evidentiary discovery phase and seek confidential information from corporate defendants that would be necessary to support those claims at trial. *Forum non conveniens* should not apply in the international human rights context, where plaintiffs have often overcome substantial intimidation among other barrier to file actions—generally in the home country of the corporate defendant, where courts should consider the forum presumptively convenient. In addition, defendants seeking *forum non conveniens* dismissal to have claims brought in a foreign tribunal should be required to waive the right to contest the validity of any eventual foreign judgment against them, in order to gamesmanship in which a company successfully moves a case to a foreign forum, and then later seeks to dispute the adequacy of that forum if it rules against them.

The non-financial challenges to human rights claimants seeking redress against corporate defendants in the United States primarily take the form of procedural and jurisdictional battles that prevent claims from being heard on the merits at trial. The corporate form has been used to structure impunity from U.S. courts by evading jurisdiction. Improvements can be made by clarifying pleading standards, limiting

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[72] *See* Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41 (1998).

[73] This tactic featured in litigation over environmental pollution in the Amazon that Ecuadorian plaintiffs pursued against Chevron. Chevron had the case dismissed to Ecuador, arguing that the forum was available, adequate and more suitable. After losing the civil trial and all subsequent appeals in Ecuador, Chevron brought a case against plaintiffs' counsel in the United States, arguing that Ecuador was inadequate and unsuitable, in order to block enforcement of the judgment. For an independent analysis of Chevron's abuse of *forum non conveniens*, see Howard M. Erichson, *The Chevron-Ecuador Dispute, Forum Non Conveniens, and the Problem of Ex Ante Inadequacy*, 1 STAN. J. COMPLEX LITIG. 417 (2013). *See also* Christopher Whytock & Cassandra Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444 (2011) (discussing problems with forum-shoppers' remorse wherein defendants that first sought *forum non conveniens* dismissal later argue that a foreign judgment cannot be enforced due to foreign court deficiencies).

[74] *See Conley v. Gibson*, 355 U.S. 41 (1957).

corporate separateness for jurisdictional purposes, and limiting *forum non conveniens* to more accurately meet its goals of efficiency and the prevention of forum shopping.

III. FINANCIAL CHALLENGE OF BRINGING CIVIL HUMAN RIGHTS ABUSE CLAIMS AGAINST CORPORATIONS

The costs of litigation in the United States can be quite high, and corporate defendants often have disproportionate economic power and access to sophisticated legal resources, especially when compared to human rights claimants.[75] It is almost always a challenge for victims of human rights abuses to finance litigation. Accessible methods for absorbing high litigation costs include contingency fee arrangements, by which counsel bears the expense of litigation and is compensated if a favorable outcome is reached;[76] statutorily guaranteed attorneys fees for prevailing parties, available under some civil rights statutes;[77] and third-party litigation funding, by which a non-party to the case finances litigation.[78] Additionally, the class-action mechanism, which allows multiple plaintiffs to combine claims and distribute costs, may make it more economical to litigate a large number of claims,[79] although class actions still need to be funded from some source. Non-profit organizations may also seek funding from donors to be able to litigate cases in the public interest. In the U.S., each party generally bears its own attorneys' fees associated with litigation, regardless of outcome (with some exceptions). This reduces the risk of litigation on behalf of poor plaintiffs and may make it easier for victims of human rights abuse to find legal counsel.

As a general matter, there is no public funding for corporate accountability litigation.[80] In addition, policy efforts to realign government-sponsored legal aid away from human rights and equal rights issues have reduced the relevance of state-funded organizations.[81] Pro bono projects taken on by attorneys in the private sector may

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[75] Note that out of the 175 largest economic entities in the world, multi-national corporations represented 112 in 2011—outpacing most countries in terms of economic power. Steven White, *The Top 175 Economic Entities, 2011*, FORTUNE MAGAZINE, *All Things Marketing*, available at http://dstevenwhite.com/2012/08/11/the-top-175-global-economic-entities-2011/ (last visited Jul. 7, 2015).

[76] Contingency fees agreements must generally be in writing and are subject to ethical considerations. Donald D. Rotunda & John S. Dzienkowski, LEGAL ETHICS, LAW. DESKBK. PROF. RESP. § 1.5-3 (2013–2014).

[77] *See, e.g.*, 42 U.S.C. § 1988(b) (2000).

[78] Third party litigation raises concerns about champerty—funding litigation with intent to share in relief—which is generally prohibited. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 5.4(a) (2010) ("A lawyer or law firm shall not share legal fees with a nonlawyer."). Like contingency fees, there are also concerns over the influence and motives of third party financiers. *See* Maya Steiniz, *Whose Claim is This Anyway? Third-Party Litigation Funding*, 95 MINN. LAW REV. 1268 (2011) (discussing the rise of third-party litigation funding and its negative implications). *Cf.* LEXSHARES, http//:www.lexshares.com. (the website of a company promising investors a shares of relief afforded if plaintiffs claims are successful).

[80] For a list of the types of claims that receive public assistance from the federal government, see About LSC, Legal Services Corporation, http://www.lsc.gov/about/what-is-lsc (last visited Jul. 7, 2015).

[81] *Cf.* Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 879–82 (2009) (discussing the lack of funding and restrictions on the types of cases and clients eligible for legal aid).

provide supplementary support, but a lack of sufficient resources and potential conflicts with private clients reduces the likelihood that human rights claimants can access free legal services in this way.[82]

a. Challenges to funding civil claims

Financial challenges for human rights claimants have been exacerbated by recent limitations on class actions,[83] procedural challenges that draw out litigation and thereby increase costs,[84] limits on damages,[85] and contingency fee structures that stress the ability of counsel to faithfully represent the interest of the client. In order to certify a class action now, claimants must meet a heightened standard of specificity that effectively forces each individual claimant to show at the outset of the litigation that his or her injuries were rooted in a common practice or policy by the defendant, without the benefit of discovery.[86] In addition, some states—most notably Alaska[87]—have adopted forms of the English "loser-pays" rule for attorneys' fees, which provides disincentives to claimants by threatening to increase the risks that litigating claims will result in substantial debts.[88]

c. Improvements to civil litigation funding for human rights claimants

Mitigating the financial challenges for human rights plaintiffs seeking to bring claims against corporations may take many forms. Legislatively, statutory financial incentives for human rights attorneys should be drafted to attract more interest in litigating these claims—these may take the form of damage multipliers[89] or statutory attorneys' fees provisions[90]—and loser-pays rules should be rejected and rolled back. The judiciary should remove recent barriers to class action certification to allow for plaintiff classes to share in the costs of litigation and have their claims heard at trial. Public funding for corporate accountability in the human rights context should be made available to allow public funding to reach human rights claimants.

The financial resource disparity between human rights plaintiffs and corporate defendants will always be an obstacle to litigating human rights abuse claims on the merits. However, improvements may be made by providing financial incentives to

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[82] For a discussion of the positional conflicts that may arise in the private firm pro bono context, see Esther F. Lardent, *Positional Conflicts in the Pro Bono Context: Ethical Considerations and Market Forces*, 67 FORDHAM L. REV. 2279, 2281–82 (1999).
[83] *See Wal-mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (discussing increasing barriers to class certification).
[84] *See supra*, part II.
[85] *See infra* part IV.
[86] *Wal-mart Stores*, 131 S. Ct. 2541.
[87] Alaska R. Civ. P. 82(a) (2015).
[88] *But see* Walter Olsen & David Bernstein, *Loser Pays: Where Next?*, 55 MD. L. REV. 1161 (1996).
[89] *See, e.g.*, 18 U.S.C. § 1964(c) (2010) (RICO provision allowing recovery of treble damages for RICO violations).
[90] *See, e.g.*, 42 U.S.C. § 1988(b) (2000).

attorneys who take on human rights cases, limiting procedural hurdles to class action certification, and providing public funding—potentially paid for by the corporations themselves—to assist with the resolution of human rights cases.

IV. CRIMINAL SANCTIONS FOR CORPORATE HUMAN RIGHTS ABUSE OFFENDERS

Criminal sanctions against corporations generally take the form[91] of financial penalties or compliance mechanisms.[92] Although imprisonment is a criminal sanction allowed for violation of many federal criminal statutes, the impossibility of incarcerating a legal entity eliminates this as a sentencing consideration.[93] Fines levied against corporations for criminal offenses are by far the most common form of criminal sanction for organizations—giving rise to the view of penalties as a business expense[94]—in part because ongoing compliance mechanisms often entail substantial administrative costs typically born by the regulatory body. The prospect of negative publicity resulting from indictment may serve as a penalty in and of itself in the modern corporate context.[95]

Modern theories of criminal punishment in the United States hold that sanctions should serve to deter future crimes, disable those who are likely to commit future crimes, and/or rehabilitate those who have committed crimes.[96] The policy goals of criminal sanctions become complicated when applied to corporations, and a robust debate exists on what form sanctions should take.[97] For example, the idea of corporate disablement—known popularly as the "corporate death penalty"—has been the target of strong criticism[98] but offers a strong deterrent by offering to disband the most egregious human rights abusers as an accompaniment to the individual incarceration of

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[91] Note that additional equitable remedies include disgorgement of illegal profits, debarment from federal contracts, and excluding a company from capital markets or the banking system, but these remedies are not generally applicable in the human rights context.

[92] U.S.S.C., FCJ SENTENCING GUIDELINES MANUAL § 8D1.1 (2014).

[93] In instances of overt individual criminal conduct, a corporate officer may be incarcerated for a crime committed on behalf of a corporation, but this is relatively rare. *Cf.* Stephen A. Yoder, Comment, *Criminal Sanctions for Corporate Illegality*, 69 J. CRIM. L. & CRIMINOLOGY 40, 48–50 (1978) (discussing barriers to individual incarceration including social reluctance to send white collar criminals to prison). Compare this notion with the theory of the responsible corporate official—one in a position of responsibility is responsible for the knowledge and conduct of a corporation. *United States v. Dotterweich*, 320 U.S. 277, 282–84 (1943).

[94] *See* Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. 129, 136 (2015) (discussing the rise of "settlement mills" to treat liability as a business expense in the civil context); *see also* 1 WHARTON'S CRIMINAL LAW § 49 (15th ed. 1994) (noting that reputational penalties provide a greater incentive than criminal fines in the context of corporations large enough to absorb cost).

[95] *Cf.* Mathew Bender, 1 BUSINESS CRIME: CRIMINAL LIABILITY OF THE BUSINESS COMMUNITY 131 (1992) (discussing the reputational harm that accompanies criminal indictment).

[96] LAFAVE, SUBST. CRIM. L. § 1.5, *supra* note 6. Note that LaFave's treatise puts forth retaliation—or revenge—as an additional policy goal of criminal sanctions, a policy goal that is not only morally indefensible, but nonsensical in the context of corporate offenders. *Id.*

[97] *See* COX & HAZEN, 1 TREATISE ON THE LAW OF CORPORATIONS § 8:21, *supra* note 48.

[98] Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 291 (2008).

corporate officers.[99] Fines serve deterrent purposes by reducing corporate profits and providing a disincentive to investors by depriving them of corporate revenue.[100] Compliance mechanisms—such as mandatory reporting or transparency mechanisms in the securities context—attempt to rehabilitate corporate criminals and prevent recurrence through behavior modification.[101]

a. The efficacy of criminal sanctions for corporate human rights abusers

In practice, a corporation unable to secure a deferred prosecution agreement[102] faces bad publicity and the prospect of fines if indicted. Although corporate criminal fines can be quite substantial—recent fines for major financial or environmental malfeasance have reached upwards of $1 billion—the business nature of corporations means that criminal fines are tax deductible in the United States as a business loss.[103] In other words, the public effectively subsidizes bad behavior by allowing corporations to reduce their tax liability when fined.[104] Mandatory restitution statutes exist to provide compensation to victims of certain crimes,[105] but this mechanism may be inadequate in the human rights context because restitution is typically limited to the victim's demonstrable economic losses.[106] There is little to suggest that the current paradigm of corporate criminal punishment does enough to actually deter, rehabilitate, or disable in the context of human rights offenses. Victims restitution statutes may not go far enough to bring justice for victims of human rights abuses.

b. Improvements to criminal sanctions for corporate human rights abusers

The U.S. could improve the efficacy of criminal sanctions for punishing human rights offenders and providing justice for victims of human rights abuses by eliminating tax deductions for criminal fines, enhancing corporate compliance mechanisms, and enacting statutes that provide for the dissolution of corporate entities convicted of

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[99] "Double jeopardy"—prosecuting a defendant more than once for the same crime—is prohibited in the United States. U.S. CONST. Amend. V. However, an individual corporate officer may be convicted for the same crime as a corporation by virtue of corporate separateness. *See* United States v. Andrews, 146 F.3d 933, 938 (D.C. Cir. 1998) (holding that until the defendant themself has actually been on trial, double jeopardy does not apply).

[100] COX & HAZEN, 1 TREATISE ON THE LAW OF CORPORATIONS § 8:21, *supra* note 50.

[101] Internal compliance programs are seen as analogous to non-malicious *mens rea* in criminal sentencing—they are seen as reducing corporate criminal culpability and provide justification for reduced sentences. *See* ¶ 50,075 *Corporate Compliance Programs–U.S. Views*, CCH TRADE REG. REP. (Feb. 20, 1992).

[102] *See supra* part I.

[103] *See Nacchio v. United States*, 115 Fed. Cl. 195, 200–03 (Fed. Cl. 2014). *Cf.* Patricia Cohen, *When Company is Fined, Taxpayers Often Share the Bill*, N.Y. TIMES (Feb. 3, 2015).

[104] *Cf.* Patricia Cohen, *When Company is Fined, Taxpayers Often Share the Bill*, N.Y. TIMES (Feb. 3, 2015).

[105] Crimes of violence, offenses against property, thefts of medical products, and offenses in which a physical injury or loss has been suffered are subject to mandatory restitution for victims. 18 U.S.C. § 3663A(c) (2015). *See also* 18 U.S.C. § 2259 (2015) (providing more substantial restitution to victims of child abuse).

[106] 18 U.S.C. § 3663A. *But see United States v. Pescatore*, 637 F.3d 128, 142 (2d Cir. 2011) (allowing excess restitution where defendant flouted restitution order).

gross human rights violations. Eliminating tax deductions for criminal fines is relatively straightforward; the public should not subsidize corporate crime. The standards for calculating fines and restitution orders should be adjusted to ensure that victims are adequately compensated and that corporations are adequately deterred from behavior that risks criminal liability for human rights abuses. Corporations themselves should bear the costs of compliance mechanisms and required judicial monitoring. Disablement via the "corporate death penalty" for gross human rights violations should be provided for by statute and provide that corporate wealth be transferred to victims upon dissolution to provide justice for human rights abuse victims and prevent shareholders from profiting from corporate demise. In addition, prosecutors should be encouraged to pursue the incarceration[107] of corporate officers for the crimes of the corporation.

V. CIVIL LAW REMEDIES FOR HUMAN RIGHTS ABUSE VICTIMS

Remedies available for private claimants harmed by corporate human rights abuses fall typically fall into two general categories: compensatory damages and punitive damages.[108] Other remedies, such as an injunction to compel or prohibit action, may also be available, but injunctions are usually only appropriate in cases of ongoing or future harm.[109] Compensatory damages may take the form of compensation for medical expenses, lost earnings and earning capacity, mental and physical pain and suffering supported by evidence, loss of enjoyment of life, loss of consortium and wrongful death (a separate cause of action that is available for family members who were harmed by the death).[110] Punitive damages are separate from compensatory damages and are awarded by courts to punish tortfeasors and deter future conduct.[111] Often, corporations will choose to settle claims out-of-court rather than litigate at trial.[112]

a. Barriers to civil law remedies

Human rights victims must first get to trial before damages can be awarded,[113] and if they successfully get their claims before a jury, challenges persists in obtaining an adequate remedy. Compensatory damages must be adequately demonstrated at trial,

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[107] *See supra* notes 11, 104 and accompanying text.
[108] RESTATEMENT (SECOND) OF THE LAW OF TORTS § 901 (1979).
[109] DOBBS, THE LAW OF TORTS § 479, *supra* note 40. Injunctive relief would only be appropriate where human rights violations are ongoing or imminent.
[110] *Id.*
[111] *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492 (2008) (punitive damages "are aimed not at compensation but principally at retribution and deterring harmful conduct").
[112] Settlement is considered by commentators to be the end goal of civil actions. *See*, Matt Garretson & Guy Kornblum, 1 NEGOTIATING AND SETTLING TORT CASES § 1:4 (2009) ("Settlement is the ultimate victory"); *see also* Richard A. Nagareda, MASS TORTS IN A WORLD OF SETTLEMENT ix (2007) (opining that the end game of all tort litigation is settlement, not trial).
[113] *See supra* part II (describing procedural and jurisdictional challenges facing civil claimants).

often requiring expensive expert testimony.[114] Among other costs of litigation, this creates a cost disparity that may be exploited by corporate defendants,[115] and paid experts may have incentives for questionable testimony.[116] Punitive damages have been capped by the U.S. Supreme Court,[117] restricting the ability of juries to punish corporate human rights abusers.

In addition, corporate families may use corporate separateness to deprive plaintiffs of compensation by making themselves "judgment proof," or insolvent, before trial begins. This can happen when companies preemptively place all assets that could be used to satisfy a judgment in a separate legal entity within the same corporate group from the entity that is responsible for potentially tortious actions, which is then drained of assets. Even if a plaintiff wins a lawsuit, he cannot collect his judgment from the entity that is responsible for the harm, and would need to attempt further litigation to recover from other corporate entities. In a small corporation, its executives might drain the company of assets if they fear substantial tort liability, and then the company can seek to declare bankruptcy and avoid creditors.[118] Where such action is fraudulent and plaintiffs can be proven that it was undertaken to avoid a judgment, courts may pierce the corporate veil or seek to recover from executives who compensated themselves; this is, however, an added step and expense, and can be difficult.

b. Improvements for accessing civil law remedies

Access to civil remedies for human rights claimants may be improved by not requiring expert testimony to establish damages, removing the cap on punitive damages, and eliminating limited liability between parent and subsidiary companies for tort claims. Some of the disparity in resources in civil corporate human rights litigation could be addressed by capping expert witness fees, so that defendants cannot spend unlimited amounts of money on experts without any ability of the victim to respond in kind. The cap on punitive damages should be removed because punitive damages at civil trial do not fall within criminal proportionality doctrine.[119] In addition, civil rights of

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[114] For a discussion of the prohibitive costs of experts in a novel proposal for reform, see Edward V. DiLello, Note, *Fighting Fire with Firefighters: A Proposal for Expert Judges at the Trial Level*, 93 COLUM. L. REV. 473, 467 (1993).

[115] *See* DiLello, 93 COLUM. L. REV. at 477, *supra* note 120.

[116] *See* David J. Damiani, *Proposals for Reform in the Evaluation of Expert Testimony in Pharmaceutical Mass Tort Cases*, 13 ALB. L.J. SCI. & TECH. 513, 533 (arguing for enhanced judicial sanctions to act as a check dubious expert testimony).

[117] *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

[118] For example, Freedom Industries, the company allegedly responsible for a massive chemical spill in West Virginia, was able to sidestep potential adverse civil judgments by filing for bankruptcy. Erik Larson, *Freedom Industries Files Bankruptcy After Elk River Spill*, BLOOMBERG BUS. (Jan. 18, 2014), http://www.bloomberg.com/news/articles/2014-01-17/freedom-industries-files-for-bankruptcy-in-west-virginia.

[119] Cruel and unusual punishment is prohibited by the United States Constitution. U.S. CONST. Amend. VIII. However, this prohibition is a restriction on government action through criminal prosecution, not civil remedies. *Contra* Gore, 517 U.S. 559.

action arising under human rights statutes should provide for enhanced punitive remedies to reflect a zero-tolerance policy for human rights abuse.[120]

Financial barriers to civil remedy for victims of human rights are exacerbated by legislative policy that fails to compensate for the resource disparity between corporate offenders and their victims. Enhanced access should be focused on mitigating the impact of this resource disparity in civil litigation.

CASE STUDIES PROVIDED BY OHCHR

ERI's analysis of the three case studies provided by OHCHR:

Case Study 1:

Company Y is incorporated in the jurisdiction. Company X is incorporated in another state, State A, and is a majority-owned subsidiary of Company Y. Some years ago, Company Y developed a new technology, which, as was widely recognized at the time, had potential applications in the apprehension and restraint of criminal suspects. Through Company X, Company Y developed the technology into a device which Company X then sold to law enforcement agencies in State A. Following a serious terrorist incident, the device was extensively used in a law enforcement "crack down" in State A. The operation continued for several months, despite the growing concerns of observers that it had disproportionately and without justification targeted one minority group in particular. Many arrests are made and suspects were incarcerated for long periods (more than a year in some cases) without trial under what the government of State A described as "emergency legislation". While few details of the operation were publicly available, relatives of the detainees complained at the time that many detainees had been treated harshly, and that they had been subjected to unorthodox and cruel interrogation methods. Eventually, most of the detainees who had been apprehended in the course of this operation were released without charge, although three individuals died whilst in custody. A subsequent government inquiry into the three deaths raised a number of concerns about the use during criminal interrogations of the device that had been purchased from Company X. Several witnesses to the inquiry expressed the view that this amounted to "torture" under international law. Those who had been subjected to these methods, and subsequently released, reported long term mental and physical health problems, in some cases serious, which medical professionals have attributed to their treatment while in custody.

a. Criminal and civil claims

U.S. courts would be able to exercise criminal or civil jurisdiction over Company X only if it could be said to be "at home" in the United States, or it is found to be the alter ego of a company that is at home in the United States. Company Y may be subject to criminal liability if U.S. law controls sale of the technology to State A (or all

[120] The U.S. does provide for enhanced damages for some types of civil wrongs already, but not expressly for human rights cases. *See, e.g.*, 18 U.S.C. 1964(c) (2010) (mandating treble damages for plaintiffs with civil racketeering claims to reflect a policy of zero-tolerance for organized crime).

commerce with that country). Company Y may also be subject to criminal liability if it conspired in, or knowingly aided and abetted, State A's torture—an act in violation of 18 U.S.C. §2340A, a U.S. federal torture statute. Prosecutors would have to show either that Company Y and Company X are alter egos, that Company X was the agent or otherwise acting on behalf of Company Y, or that Company Y had some direct involvement in the technology used for torture.[121] Policy considerations may push the United States to decline to prosecute a company under these circumstances—not wanting to take a position on the sovereign activity of another nation, for example. The U.S. would be particularly unlikely to inquire into these activities if State A is an ally of the United States, especially if State A cooperates with the U.S. on anti-terrorism activities.

These facts may give rise to civil causes of action against both Company Y, such as tort claims for aiding and abetting personal injuries, death, and emotional distress, as well as negligence. Plaintiffs may also sue Company Y under the federal Alien Tort Statute and/or sue its employees under the Torture Victim Protection Act. To prove an aiding and abetting claim, plaintiffs will need to establish that Company Y gave substantial assistance, knowing that the assistance would contribute to the completion of the tortious acts. Each of these causes of action will therefore depend on the companies' respective knowledge of the technology, whether or not it was foreseeable that it would be used for torture, and the degree to which the technology was important in the way that plaintiffs were tortured. The more they knew (or should have known) about how the technology would be applied—and the damage it would cause—the stronger the case will be.

b. Funding for civil claims

Given that any case of this nature is likely to face substantial hurdles, funding sources are likely to be limited. Legal aid is largely non-existent for foreign plaintiffs injured abroad. The complex and difficult nature of the case would decrease the likelihood that private law firms would be willing to litigate the case, even on a contingency basis. The presences of two multinational corporations and a sovereign state makes this case unlikely to receive support from large private firms on a pro bono basis given the possibility of conflicts of interest with current or future clients. The plaintiffs' best option for funding would likely be to solicit help from a non-profit organization; there are a few groups in the U.S. that have a track record of filing suit against U.S. companies for providing technology to abusive regimes that was used to torture or kill dissidents.

c. Civil case trajectory

[121] This has, to date, only been enforced against natural persons, *e.g.*, *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010) (affirming conviction of son of former president of Liberia), but there is no reason that it could not be used to prosecute corporations.

Company X will likely move to dismiss any civil suit by arguing that it is not subject to general personal jurisdiction in the United States. The plaintiffs would need to show that Company X is "at home" in the United States, or an alter ego or agent of another company that is at home in the U.S., such as Company Y.

The claims against Company Y will be hampered by the scarcity of public information about the use of the device and the actual acts of torture, which could lead to dismissal at the pleading stage if plaintiffs are unable to provide enough details to make liability a plausible inference from the facts alleged.

Company Y could also seek dismissal on the basis of *forum non conveniens*. Plaintiffs might defeat the *forum non conveniens* motion if they could show that State A does not have a functional or fair judicial system or that the majority of evidence, witnesses, and necessary parties are in the United States.

The Alien Tort Statute claims would be vulnerable to challenge on the grounds that the case took place in a foreign country and does not have a sufficient connection to the United States to be heard here. There is no judicial consensus on what short of connections are required, but relevant considerations might include whether the defendant is headquartered or incorporated in the U.S., where relevant decisions were made or contracts signed, and the presence of plaintiffs in the United States.

d. Improving access to remedy

Removing key barriers to liability in the U.S. in this case might include:

- A reform of personal jurisdiction doctrine to allow courts to treat all parents and subsidiaries as a single entity, which would allow for claims against Company X.
- A similar reform of corporate separateness doctrines, so that parent and subsidiary corporations are treated as one entity.
- A roll-back of the presumption against extraterritoriality as applied to the Alien Tort Statute.
- Limitations on the *FNC* doctrine in the human rights context.

e. Likely remedy under status quo

In the event civil claims were successful, plaintiffs could pursue compensatory and punitive damages against both companies. However, the extent of compensatory damages depends on the ability of plaintiffs to establish injuries and the extent of punitive damages likely depends on the knowledge and intent of the corporations.

Case Study 2:
Company X and Company Y are both companies incorporated in the jurisdiction. Company X's business premises are all located in the jurisdiction. Company Y is an international dealer in exotic cut flowers. It relies on a number of primary producers for a constant supply of fresh

flowers to its clients around the world. Company X is one such supplier. To protect its crops and to maximise yield, Company X uses a range of insecticides, herbicides and pest controls, some of which pose a serious threat to human health if not used correctly. Last month, in a spot check by a government inspector, children under the age of 15 were found to be working in greenhouses owned by Company X. Further checks showed that these children had been exposed to harmful and potentially dangerous chemicals in the course of their work, and, furthermore, they appear not to have had access to adequate protective clothing and equipment. The authorities and the management of Company X have been informed.

a. Criminal and civil liability

These facts could give rise to criminal liability for both Company Y and X for violations of U.S. laws prohibiting shipment or delivery of goods produced with child labor[122] (note that agricultural exemptions do not apply given these facts)—and Company X may have violated regulatory provisions governing workplace safety conditions or controlling the use of pesticide. The Department of Justice, Department of Labor, and the Environmental Protection Agency Office of Enforcement Compliance may be involved at the federal level.

Criminal sanctions against both companies would likely take the form of fines. However, it is likely that both would pursue deferred prosecution agreements. In addition, Company X may be subject to regulatory penalties under applicable state regulatory frameworks.

A civil cause of action may exist against Company X for personal injuries to the children arising from their employment, but establishing Company Y's liability would be more difficult. Company Y could, however, be held liable if Company X were its agent, or if it were directly responsible for the dangerous conditions because it controlled the working conditions. Potential civil causes of action against company X may include negligence per se, negligence and unjust enrichment. There may be similar claims against Company Y, though it will depend on what the company knew, or should have known. There may also be statutory causes of action against both companies.

b. Funding for civil claims

More funding options may exists for this case. Legal aid organizations may take this on as a domestic labor rights or child abuse case and may receive support from private sector pro bono efforts. This case is also likely a candidate for class-action certification—allowing the plaintiffs to share costs—because their causes of action arise from the same action and are a common complaint. Funding may be more difficult to procure in a case against Company Y because the challenges are greater than in a case against Company X.

[122] *See* 29 U.S.C. § 212.

c. Possible civil case trajectory

Because both companies are incorporated in the U.S. and the tort occurred in the U.S., personal jurisdiction should not pose an obstacle. Company Y would likely move to dismiss the case on the basis that it cannot be held vicariously liable on these facts. On these facts, a civil case against Company X is more straightforward and, if it is clear that litigation will go forward, Company X may attempt to settle in order to minimize reputational and financial harm. If the case against Company Y proceeds, it may also settle in an effort to avoid trial.

d. Improving access to remedy

Legislation holding companies accountable for abuses in the supply chain would increase the chances of success in a case against Company Y, by making it more difficult for companies in this position to escape liability through willful blindness. Allowing vicarious liability to attach for gross human rights violations occurring within the supply chain where the purchasing company knew or should have known about production conditions—incentivizing due diligence within the supply chain—would create a more efficient system of accountability.

e. Likely remedy under status quo

In the event that civil litigation is successful, plaintiffs are entitled to compensatory damages for personal injuries and will likely be able to receive punitive damages from Company X. Punitive damages against Company Y depend on Company Y's knowledge of the activity and intent to facilitate. It is possible that Company X is required to perform remedial action such as the establishment of a medical monitoring framework for victims and may be enjoined from employing minors in the future.

Criminal sanctions against both companies will likely take the form of fines. However, it is likely that both (if indictment is likely) will pursue deferred prosecution agreements to avoid negative publicity. In addition, Company X may be subject to regulatory penalties under applicable state regulatory frameworks.

Case Study 3

Company X and Z Enterprises are both companies incorporated in the jurisdiction. Site A is located in the jurisdiction. Company X is a private security contractor. Company X provides security services to Z Enterprises, a manufacturing company that owns a number of large factories. In 2010, representatives of a prominent trade union raised concerns about serious health and safety failings at one site owned by Z Enterprises ("Site A"). In addition, local community leaders have complained publicly about the lack of consultation between Z Enterprises and local communities about the social and environmental impacts of Z Enterprises' operations at Site A. At the beginning of 2011 a group of protestors staged a "sit-in" at Site A. The organisers of the protest told the media that they wished to draw attention

to Z Enterprises' "poor record as an employer and as a corporate citizen". Within days, the number of protestors at Site A had grown to over a thousand. On 1 February 2011, news reached the protestors of an industrial accident at Site A that had fatally injured three workers. The sit in-protest at Site A, peaceful until now, suddenly became violent. Security personnel (employees of Company X) began firing on protestors, killing sixteen and injuring another twelve people. A further five people died, and a further thirty five were injured, in a crush which developed as people attempted to flee the scene. The security team on duty on 1 February (two of which were in their first week of employment with Company X) have been suspended from duty pending further investigations.

a. Criminal and civil liability

For the security incident: These facts could give rise to criminal liability for both Company X and Z Enterprises as well as individual liability, depending on the results of the pending investigations—for example it is possible that individual security personnel are criminally liable for manslaughter (18 U.S.C. § 1112). Z Enterprises is not likely to be criminally liable for the conduct of Company X without evidence that Z Enterprises directed or controlled Company X's activity because Company X is an independent contractor. The Department of Justice is the government agency likely to bring these charges. Facts regarding the underlying industrial accident are insufficient to determine culpability, but Z Enterprises may additionally be liable for violations of federal regulatory provisions regulating workplace safety and environmental harms. These might be the subject of administrative complaints to the National Labor Relations Board or the Occupational Safety & Health Administration.

These facts would also give rise to civil causes of action against both companies. Company X was at least negligent in arming and deploying inexperienced personnel to a volatile situation—giving rise to liability for injuries to the protestors—and would be liable for assault and battery (among other torts) by its own employees. Z Enterprises would likely also be liable because Company X was acting as its agent. Facts regarding the underlying industrial accident are insufficient to determine liability, but claims for wrongful death may also arise from Z Enterprises conduct if they negligently or intentionally created an unreasonable risk of industrial accident.

b. Funding for civil claims

Given the facts in this case, funding sources are likely to be more plentiful than in international human rights cases against corporations. Legal aid organizations may take on this domestic labor rights case and may receive support from private sector pro bono efforts. This case is also likely a candidate for class-action certification—allowing the plaintiffs to share costs—because their causes of action arise from the same action and are a common complaint to which Company X and Z Enterprises are likely to respond with a common defense. The facts of this case are strong enough that it might appeal to private firms on a contingency basis. Non-profit organizations working on labor rights are also likely to take on this case.

c. Civil case trajectory

The facts are insufficient to predict a civil case trajectory for claims arising from the industrial accident. For claims arising from the security incident: Personal jurisdiction is unlikely to be an issue as both defendants are incorporated in the jurisdiction and the cause of action arose here. Z Enterprises will likely argue against vicarious liability at the outset. If Z Enterprises fails in initial efforts to dismiss the claims, it may argue that liability belongs to Company X and allow the finder of fact—jury or judge—to sort it out. Alternatively, the company may file a cross-claim against Company X for indemnification if the terms of their contractual agreement allow them to do so.

Company X is unlikely to have any strong arguments for dismissal of this case.[123] It may assert defenses to the plaintiffs' claims, such as arguing that the use of force was justified or reasonable, the plaintiffs assumed the risk of deadly force or were contributorily negligent by confronting security personnel in a violent way, and/or that the individual employees themselves were acting outside the scope of their employment, although that argument usually does not apply to acts of violence carried out by security personnel. These are likely to be issues of fact ultimately decided at trial.

d. Improving access to remedy

Z Enterprises should not be allowed to argue against vicarious liability without allowing plaintiffs to discover evidence directly relevant to determining the relationship between Company X and Z Enterprises. Facts are insufficient to further gauge plaintiffs' likelihood of success because it is difficult to determine if the defendants will be able to successfully argue that the use of force was justified.

e. Remedies under the status quo

In the event a civil claim were successful, compensatory damages will almost certainly be awarded. Punitive damages may also be available, although this depends on the knowledge and intent of defendants.

In the event either company was criminally liable, they are both likely to seek deferred prosecution arrangements that allow them to reduce public exposure. If a deferred prosecution agreement cannot be reached and either company is convicted, criminal sanctions will likely be in the form of fines. An additional option may be putting in place rehabilitative frameworks, such as ongoing monitoring and reporting obligations. Incarceration of corporate officers or corporate disablement seems unlikely given the facts presented because it is unclear whether the security personnel were

[123] Note that this case is more likely to be brought in state court, but (for simplicity) only federal standards are addressed here.

responding to a real threat or acted recklessly and corporate disablement is an extremely rare criminal sanction, even where behavior results in fatalities.