University of Dayton Law Review

Volume 41 | Number 2 Article 2

6-1-2016

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Christopher Knight

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Cover Page Footnote

Special thanks to my wife, Brittany, for her constant support and encouragement. Thanks to Anthony Colangelo and Bryan Clegg for their helpful comments and criticism. All errors are mine.

INTERNATIONAL HUMAN RIGHTS LITIGATION AFTER *BAUMAN*: THE VIABILITY OF VEIL PIERCING TO HALE FOREIGN PARENT CORPORATIONS INTO U.S. COURTS

Christopher R. Knight[*]

[*] J.D., SMU Dedman School of Law, 2015; B.B.A., Abilene Christian University, 2012. Law Clerk, U.S. Court of Appeals. Special thanks to my wife, Brittany, for her constant support and encouragement. Thanks to Anthony Colangelo and Bryan Clegg for their helpful comments and criticism. All errors are mine.

I. INTRODUCTION

The Supreme Court's recent jurisprudence erects significant hurdles for international human rights plaintiffs looking to sue foreign multinational corporations in U.S. courts for human rights violations committed abroad. The first hurdle makes bringing suit more difficult for such plaintiffs by limiting the subject-matter jurisdiction of federal courts. Until 2013, plaintiffs could bring international human rights claims under the Alien Tort Statute ("ATS") and obtain relief for human rights violations in federal court.[1] In *Kiobel v. Royal Dutch Petroleum Co.*, however, the Court held that the presumption against extraterritoriality—a "canon provid[ing] that '[w]hen a statute gives no clear indication of an extraterritorial application, it has none'"—applied to limit the reach of claims authorized under the ATS.[2] *Kiobel*'s application of the presumption to the ATS severely limits suits by foreign plaintiffs against foreign defendants for foreign conduct (referred to as "foreign-cubed" or "f-cubed").[3] But the *Kiobel* Court did not slam the door on such claims completely: a foreign plaintiff could still maintain a claim under the ATS in federal court if it could displace the presumption by showing its claim was sufficiently domestic.[4]

The second hurdle dealt with personal jurisdiction. Building on another recent holding in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Court in *Daimler AG v. Bauman* curtailed the jurisdictional reach of U.S. courts by holding that general jurisdiction over a foreign parent corporation exists only when that parent's contacts "render [it] essentially at home in the forum State."[5] In *Bauman*, the Court held that due process did not permit the exercise of general jurisdiction over a parent foreign corporation in California when the corporation—through its foreign subsidiary—allegedly committed human rights violations abroad, despite the fact that the parent wholly owned and controlled its U.S. subsidiary, which the Court presumed to be "at home" in California.[6] After *Bauman*, a foreign corporation (i.e., one not incorporated in the United States) with only a small percentage of its actual business in any

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[1] 28 U.S.C. § 1350 (2012).

[2] 133 S. Ct. 1659, 1664 (2013) (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 248 (2010)). It is not completely clear whether *Kiobel*'s presumption limits subject-matter or prescriptive jurisdiction, but most courts have treated it as a limit on subject-matter jurisdiction. *See* Anthony J. Colangelo & Christopher R. Knight, *Post*-Kiobel *Procedure: Subject Matter Jurisdiction or Prescriptive Jurisdiction?*, 19 UCLA J. INT'L L. & FOR. AFF. 49, 55 (2015) (discussing lower court treatment).

[3] *See* Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 172 (2d Cir. 2008).

[4] *See, e.g.*, Ralph G. Steinhardt, *Determining Which Human Rights Claims "Touch and Concern" the United States: Justice Kennedy's* Filartiga, 89 NOTRE DAME L. REV. 1695, 1703 (2014); *see also* Bryan M. Clegg, *After* Kiobel*: An "Essential Step" to Displacing the Presumption Against Extraterritoriality*, 67 SMU L. REV. 373, 375 (2014). Moreover, as I will discuss in Section II.A, state court adjudication also seemed to be a promising avenue. *See, e.g.*, Roger P. Alford, *The Future of Human Rights Litigation After* Kiobel, 89 NOTRE DAME L. REV. 1749, 1749–50 (2014) ("[O]ne could say that the future of human rights litigation in the United States depends on refashioning human rights claims as state or foreign tort violations.").

[5] 134 S. Ct. 746, 751 (2014) (citing 131 S. Ct. 2846, 2851 (2011)).

[6] *Id.* at 760.

given state and with no U.S. headquarters might be jurisdictionally homeless in the United States for acts committed abroad. In other words, after *Bauman*, many large, foreign corporations cannot be haled into court absent specific jurisdiction—a tall and maybe insurmountable feat for a plaintiff in an f-cubed case (or even for a U.S. plaintiff suing a foreign corporation for human rights violations committed abroad). This is so regardless of whether the corporation has systematic and continuous contacts with the United States via its U.S. subsidiary.[7]

In light of *Bauman* and *Kiobel*, therefore, international human rights plaintiffs appear to have limited options when it comes to suing foreign entities that are part of multinational corporations. The problem for these plaintiffs is that both jurisdictional hands are tied: the subject-matter jurisdiction hand is tied by the difficultly in overcoming the presumption against extraterritoriality and the personal jurisdiction hand is tied by the curtailment of general jurisdiction that culminated with *Bauman*. Although the subject-matter jurisdiction hand is not the explicit focus of this Article, it is an important piece to understanding what human rights plaintiffs are facing and the nature of their now-limited options for relief. I discuss it to help paint the broader landscape in international human rights claims against corporations, but I do not, as others have, discuss how plaintiffs might overcome the presumption against extraterritoriality.[8]

Instead, I will focus on untangling the personal jurisdiction knot tied in *Bauman*, and specifically will ask whether veil piercing is a potential option for human rights plaintiffs. While rejecting the plaintiffs' claim that the parent was subject to the same jurisdiction as the subsidiary under an agency theory, the *Bauman* Court refused to address whether the parent could be haled into court under other veil-piercing theories.[9] Because jurisdictional veil piercing could alleviate *Bauman*'s apparent immunization of multinational corporate human rights offenders, this Article seeks to examine that option and determine its viability, as well as consider how, in practice, plaintiffs and courts might potentially use it.

As I discuss in-depth in Section II.B, the principle policy of veil-

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[7] *Id.* at 763 (Sotomayor, J., concurring) (noting in *Bauman*, for example, the Court held that although Daimler AG derived significant income (billions of dollars) from its California operations, it was not subject to general jurisdiction there because those operations were under the umbrella of Mercedes-Benz USA, a wholly-owned and controlled yet legally independent subsidiary).

[8] *See supra* note 2 and accompanying text. I will note that until and unless Congress enacts a more specific statute to apply to human rights violations by foreign corporations abroad, *Kiobel*—on its own—will limit or preclude claims in federal court in f-cubed cases. Thus, even once personal jurisdiction is established over a foreign corporation, litigants seeking to pursue ATS claims must show that the presumption against extraterritoriality has been overcome. Notably, as *Kiobel* limits federal court jurisdiction pursuant to the ATS, it will not act to limit human rights cases brought in state court.

[9] *Bauman*, 134 S. Ct. at 758; Donald Earl Childress III, *General Jurisdiction After* Bauman, 66 VAND. L. REV. EN BANC 197, 201 (2014) ("[T]he Court declined to answer whether imputation of contacts is viable for establishing general personal jurisdiction."). This was the second time the Court had refused to address such a theory in recent memory, as it also did so in *Goodyear*. 131 S. Ct. 2846.

piercing law is to prevent injustice by way of the corporate form. And there is a strong policy in federal international human rights law to allow for recovery by human rights victims. In light of these policies, I conclude that it is (at least arguably) reasonable to pierce the veil when the foreign parent (assuming a U.S. subsidiary) would otherwise avoid amenability to U.S. courts and, therefore, liability for human rights violations. After also considering existing veil-piercing jurisprudence, I further conclude that federal courts might reasonably pierce the corporate veil in international human rights cases, even absent the traditional indicia of piercing, by using either the Court's federal interest piercing jurisprudence or single-factor piercing tests.[10] Although I also caution that the fit within the existing piercing jurisprudence is not perfect, I suggest that litigants seeking to pierce the veil when some of the more traditional indicia of piercing are absent do have some viable arguments within existing veil-piercing law.

Aside from fit, there are a few concerns with using alleged human rights violations as a reason to pierce the veil between a foreign parent and its U.S. subsidiary so as to obtain jurisdiction over the foreign parent.[11] First, one could argue, using the allegations of human rights violations to jurisdictionally pierce puts the cart before the horse; that is, if a court lets a plaintiff jurisdictionally pierce because doing so prevents injustice or serves federal policy of providing relief for victims of human rights violations, isn't the court determining—before any discovery—that the foreign parent is guilty of human rights violations? Second, the Court in *Bauman* rejected the Ninth Circuit's agency analysis because, the Court noted, it "stacks the deck, for it will always yield a pro-jurisdiction answer . . . ."[12] Thus, any test that nearly always yields a pro-jurisdiction answer is probably not viable. Finally, the Supreme Court's opinion in *Cannon*, discussed below, arguably controls in jurisdictional veil-piercing cases.[13] If that is the case, then piercing due to alleged human rights violations is likely not a viable option.

As to the first concern, federal courts already have a standard to use in deciding personal jurisdiction that does not decide substantive issues before trial. This standard only requires the plaintiff—the party asserting jurisdiction—to make a "prima facie showing of jurisdictional facts to withstand the [defendant's] motion to dismiss."[14] This low bar, which is considered in the light most favorable to the plaintiff, ensures that there is no cart-before-the-horse problem. As to the second concern, piercing due to alleged human rights violations does not seem to be the type of analysis the *Bauman* Court condemned. Unlike the Ninth Circuit's agency analysis,

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[10] *See infra* Part III (noting that the latter option is far less promising for plaintiffs).
[11] *See infra* Part III (discussing these concerns and solutions more in-depth).
[12] *Bauman*, 134 S. Ct. at 759.
[13] *See infra* Section II.B.
[14] Doe v. Unocal Corp., 248 F.3d 915, 922 (9th Cir. 2001) (quoting Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995)).

piercing to stop corporations from skirting human rights liability would not "stack the deck." It would—like a number of well-accepted standards of piercing—only yield a pro-jurisdiction answer under a narrow set of circumstances—namely, when a plaintiff makes out a prima facie case that a multinational corporation committed human rights violations abroad. As to the final concern, most courts (in light of more recent Supreme Court jurisprudence) have rejected a strict interpretation of *Cannon* and would not interpret it to bar the use of a veil-piercing standard using alleged human rights violations as a reason to pierce. In other words, *Cannon* can most likely be avoided.

This Article will proceed in two main Parts: the first (Part II) describes the background and problem; the second (Part III) explores whether veil piercing might be a potential solution. Part II thus describes the legal background against which international human rights plaintiffs find themselves when looking to hale a foreign corporation into U.S. court by piercing its veil. I first look at the background for international human rights claims in U.S. courts, specifically examining the jurisprudence involving claims brought under the ATS in federal courts. Then I consider the Supreme Court's general jurisdiction caselaw, culminating in *Goodyear* and *Bauman*. I also extensively consider veil-piercing law as it relates to both substantive liability and jurisdiction. Part III looks to whether piercing is a viable option for international human rights plaintiffs. I conclude that piercing a U.S. subsidiary's veil to hale a foreign parent into court when the parent has committed human rights violations abroad (particularly when the plaintiff has a viable claim against the parent arising under the ATS) works reasonably well within the context of existing veil-piercing law, and that it makes sense in light of the policies of both veil piercing and international human rights.

II. BACKGROUND: INTERNATIONAL HUMAN RIGHTS LITIGATION AND VEIL PIERCING

A. International Human Rights Litigation

In the last half-century, human rights litigation in the United States has undergone significant changes. For thirty-three years, droves of foreign plaintiffs sought relief for international human rights violations in U.S. courts by way of the ATS.[15] But in 2013, the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.* applied the presumption against extraterritoriality to claims arising under the ATS, curtailing its use and thus making international human rights claims in U.S. courts generally more difficult (although not impossible) to pursue.[16] Less than a year later, the Supreme

[15] Clegg, *supra* note 4, at 378.
[16] 133 S. Ct. 1659, 1669 (2013).

Court in *Daimler AG v. Bauman* seemingly closed the door on such claims completely—at least those asserted against foreign corporations—by holding no general jurisdiction existed over a foreign parent corporation based on its U.S. subsidiary's contacts, even if the subsidiary was amenable to general jurisdiction in a U.S. court.[17] In an effort to paint the background against which international human rights plaintiffs must now litigate their claims, this Section discusses these recent developments.[18]

1. The ATS

Since at least 1980, the ATS has been a prolific vehicle for international human rights plaintiffs' claims in federal courts.[19] The ATS was passed by the first Congress as part of the Judiciary Act of 1789[20] and originally provided that "new federal district courts 'shall also have cognizance[] . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.'"[21] After a few slight modifications,[22] it now reads in full: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[23]

Despite its early origins, the ATS was practically obscure from 1789 to 1980.[24] That changed, however, when the Second Circuit decided *Filartiga v. Pena-Irala*.[25] *Filartiga* involved a claim by a Paraguayan citizen in federal district court against a former Paraguayan police official for conduct abroad, in which the plaintiff alleged that the official tortured and killed the plaintiff's 17-year-old son.[26] The district court dismissed the plaintiff's claim for lack of subject-matter jurisdiction, but the Second Circuit reversed, holding that torture was unambiguously and universally condemned by international law and therefore that the suit was authorized under the ATS—it was an action "by an alien, for a tort only, committed in violation of the law of nations."[27]

Filartiga "paved the way for international human rights litigation in U.S. courts."[28] Initially, these *Filartiga*-based ATS claims involved mostly

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[17] 134 S. Ct. at 760–61.

[18] This Article will focus on federal court adjudication of international human rights claims. However, although veil piercing and personal jurisdiction might differ in some respects between state and federal courts, the basic analysis and issues wrestled with in this Article would likely hold true in both.

[19] Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 589 (2002).

[20] *Kiobel*, 133 S. Ct. at 1663.

[21] Sosa v. Alvarez-Machain, 542 U.S. 692, 712–13 (2004) (quoting Judiciary Act, ch. 20, § 9, 1 Stat. 77 (1789)).

[22] *Id.* at 713 n.10.

[23] 28 U.S.C. § 1350 (2012).

[24] *See* IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975); Bradley, *supra* note 19, at 588 ("Before 1980, jurisdiction had been upheld under [the ATS] in only two reported cases, one in 1795 and the other in 1961.").

[25] 630 F.2d 876, 884–86 (2d Cir. 1980).

[26] *Id.* at 878.

[27] *Id.* at 887.

[28] Bradley, *supra* note 19, at 589.

foreign plaintiffs suing officials or their home governments for human rights violations abroad.[29] But in 1995, in *Kadic v. Karadzic*, the Second Circuit held "that the law of nations, as understood in the modern era, [did not] confine[] its reach to state action."[30] And in 1997, the Central District of California, later affirmed by the Ninth Circuit, held that the ATS provided jurisdiction over torture and slavery claims against a multinational corporation.[31] These cases, among others, ushered in a new generation of ATS jurisprudence that allowed claims against multinational corporations,[32] especially "when the tortious activities violate norms of 'universal concern' that are recognized to extend to the conduct of private parties—for example, slavery, genocide, and war crimes."[33]

In 2004, in *Sosa v. Alvarez-Machain*, the Supreme Court weighed in on the ATS for the first time, clarifying that the ATS was a jurisdictional grant and limiting the causes of action authorized under it to "a relatively modest set of actions alleging violations of the law of nations."[34] To define the limits of such violations, the Court referred to three 18th century paradigms: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[35] The Court thus imposed a requirement that "any claim based on the present-day law of nations [must] rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court] recognized."[36]

Yet, although *Sosa* gave some substance to the scope of the ATS's jurisdictional grant, it left important questions unresolved. Among them was whether corporations were liable under the ATS, or as the *Sosa* Court recognized, "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[37] As courts continued to find corporate liability under the ATS after *Sosa*,[38] the Court was soon presented with this question in *Kiobel*. In *Kiobel*, Nigerian nationals had sued

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[29] Gregory H. Fox & Yunjoo Goze, *International Human Rights Litigation After* Kiobel, 92 MICH. B.J. 44, 44–45 (2013).

[30] 70 F.3d 232, 239 (2d Cir. 1995).

[31] Doe v. Unocal Corp., 963 F. Supp. 880, 892 (C.D. Cal. 1997), *aff'd in part* sub nom. John Doe I v. Unocal Corp., 395 F.3d 932, 944–46 (9th Cir. 2002).

[32] *See* Fox & Goze, *supra* note 29, at 44–45; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 71 (AM. LAW INST. 1987) ("Individuals may be held liable for offenses against international law, such as piracy, war crimes, or genocide. Corporations frequently are vehicles through which rights under international economic law are asserted.").

[33] Abdullahi v. Pfizer, Inc., 562 F.3d 163, 173 (2d Cir. 2009).

[34] 542 U.S. 692, 720 (2004).

[35] *Id.* at 724.

[36] *Id.* at 725; *see also* Hilao v. Marcos (*In re* Estate of Marcos), 25 F.3d 1467, 1475 (9th Cir. 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory.").

[37] 542 U.S. at 732 n.20.

[38] *See Abdullahi*, 562 F.3d at 169; *see also* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 260–64 (2d Cir. 2007) (holding ATS conferred jurisdiction over multinational corporations purportedly collaborating with South African government).

British and Dutch corporations under the ATS, "alleging that the corporations aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria."[39] The Second Circuit, noting that its decisions in the past had "decided ATS cases involving corporations without addressing the issue of corporate liability," concluded "that the customary international law of human rights has not to date recognized liability for corporations that violate its norms."[40] It thus dismissed the plaintiffs' claims against the corporations for lack of subject-matter jurisdiction.[41] Other circuits, however, quickly and explicitly disagreed with the Second Circuit's conclusion.[42]

The Supreme Court granted certiorari on the question of corporate liability. A week after oral argument, however, the Court directed the parties to file supplemental briefs discussing the question on which it ultimately decided the case: "Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[43] In addressing this question, the Court held that the presumption against extraterritoriality, which provides that "[w]hen a statute gives no clear indication of extraterritorial application, it has none," applied to the ATS.[44] The Court then considered whether anything in the text, history, or purposes of the ATS evidenced a clear intent that it should apply extraterritorially.[45] Finding no clear intent, the Court held that as "nothing in the statute rebuts that presumption," plaintiffs' "case seeking relief for violations of the law of nations occurring outside the United States [was] barred."[46]

However, the Court did not completely close the door on claims brought using the ATS. After finding the claims were barred under the facts of *Kiobel*, where "all the relevant conduct took place outside the United States," the Court observed that "claims [that] touch and concern the territory

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[39] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1662 (2013).

[40] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 124–25 (2d Cir. 2010).

[41] *Id.* at 149–50 (Leval, J., concurring) (noting that the effect of the majority's rule is that "one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form").

[42] *See* Doe v. Exxon Mobil Corp., 654 F.3d 11, 41 (D.C. Cir. 2011) ("Our conclusion differs from that of the Second Circuit . . . because its analysis conflates the norms of conduct at issue in *Sosa* and the rules for any remedy to be found in federal common law at issue here." (internal citations omitted)); Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1017 (7th Cir. 2011) (finding corporate liability under the ATS and noting that "[a]ll but one of the cases at our level hold or assume (mainly the latter) that corporations can be liable"); *Abdullahi*, 562 F.3d at 174 (assuming corporations can be liable); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008) (holding corporations can be liable); Sarei v. Rio Tinto, PLC, 550 F.3d 822, 831 (9th Cir. 2008); Herero People's Reparations Corp. v. Deutsche Bank, 370 F.3d 1192, 1195 (D.C. Cir. 2004) (assuming corporations can be liable); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 93 (2d Cir. 2000) (assuming corporations can be liable); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 164–65 (5th Cir. 1999) (assuming corporations can be liable).

[43] Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (2012) (internal citation omitted).

[44] *Kiobel*, 133 S. Ct. at 1664 (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010)).

[45] *Id.* at 1664–69.

[46] *Id.* at 1669.

of the United States . . . with sufficient force [may nonetheless] displace the presumption . . . ."[47] While it provided no analysis as to what "sufficient force" may be, it did note that "it would reach too far to say that mere corporate presence suffices."[48]

For better or worse, *Kiobel* seriously limits the ATS as an avenue for foreign plaintiffs to pursue international human rights litigation, especially against foreign defendants (including corporations) for foreign conduct. The *Kiobel* presumption apparently limits federal court subject-matter jurisdiction, which means that human rights plaintiffs in federal court will likely have a more difficult time getting to the merits of their claims, even if the defendants somehow fail to argue that *Kiobel* applies.[49] While a handful of lower courts have applied *Kiobel*'s presumption and found it to be displaced, they have done so only upon finding there to be some significant domestic elements in the claim.[50] So although the ATS remains *a potential* vehicle for foreign human rights plaintiffs, *Kiobel* indicates that it no longer a ready one.[51]

Still, there might be "a surprising number of [other] options available under federal, state, and foreign law."[52] Most important among these options, commentators have observed, seems to be state tort law, as "[t]he same facts that give rise to international human rights violations almost always will also constitute a domestic or foreign tort."[53] And since state courts are of general jurisdiction, they can adjudicate claims resting on state or foreign tort laws. Indeed, prior to *Kiobel*, U.S. plaintiffs (who were not "aliens" and thus could not sue under the ATS) successfully sued in state court for human rights violations.[54] Choice-of-law principles would then determine whether foreign

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[47] *Id.*

[48] *Id.*

[49] Colangelo & Knight, *supra* note 2, at 8–9.

[50] *E.g.*, Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 529 (4th Cir. 2014); Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 310 (D. Mass. 2013).

[51] *See* Gwynne L. Skinner, *Beyond* Kiobel*: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-*Kiobel*) World*, 46 COLUM. HUM. RTS. L. REV. 158, 198 (2014) ("Human rights litigation practitioners agree that *Kiobel* presents a barrier to those seeking access to judicial remedies for businesses' involvement in human rights abuses outside the United States. However, not all practitioners agree as to how easily the presumption can be overcome.").

[52] Alford, *supra* note 4, at 1749. Some more obvious alternatives, however, such as the Torture Victim Protection Act ("TVPA") and Racketeer Influenced and Corrupt Organizations Act ("RICO"), suffer from serious shortcomings. *See* Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1708 (2012) (holding TVPA does not apply to corporations or governments); *see also* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2095, 2098–99, 2106 (2016) (holding RICO's private right of action "does not overcome the presumption against extraterritoriality" and that "[a] private RICO plaintiff therefore must allege and prove a *domestic* injury to its business or property" (emphasis in original)).

[53] See Alford, *supra* note 4, at 1761; Skinner, *supra* note 51, at 163; and Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9, 11 (2013), for a thoughtful and more in-depth discussions on the options available to human rights plaintiffs after *Kiobel*.

[54] *See* Hoffman & Stephens, *supra* note 53, at 13–15 (discussing a number of state court human rights claims).

or state law applies; for human rights plaintiffs, either outcome would usually be acceptable. If state law applies, plaintiffs can bring human rights claims as common-law torts—torture as assault and battery, slavery as false imprisonment, etc. Even if foreign law applies, plaintiffs can bring international human rights claims in state courts as violations of international law, which "has been incorporated into the law of most countries around the world."[55]

In sum, after *Kiobel*, although foreign human rights plaintiffs lost a ready vehicle for their claims in the ATS, they were not without recourse against foreign corporations[56] in U.S. courts.[57] They could still bring claims in federal courts by displacing the presumption against extraterritoriality. And they could still bring claims in state courts.[58] This was the backdrop against which plaintiffs found themselves prior to *Daimler AG v. Bauman*, which limited the ability of U.S. courts to reach foreign defendants under the Due Process Clause.[59] To understand *Bauman* (and the analysis in Part III, below), however, it is helpful to understand some of the history and evolution of personal jurisdiction, especially as it relates to general jurisdiction.

2. General Jurisdiction Over Foreign Corporations: Doctrinal History

The Supreme Court's journey to define the contours of personal jurisdiction law has been a long and arduous one.[60] Prior to the mid-20th century, courts viewed jurisdictional issues through a formalist lens, focusing primarily on a state's power over a defendant via presence, property, or

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[55] *See* Alford, *supra* note 4, at 1750. However, there might be unforeseen barriers to recovery in foreign law, even if it recognizes a cause of action for violations of international human rights. *See, e.g.*, Al Shimari v. CACI Int'l, Inc., 951 F. Supp. 2d 857, 871–72 (E.D. Va. 2013), *vacated and remanded on other grounds*, 758 F.3d 516, 520 (4th Cir. 2014) (applying Iraqi law and finding the defendant, a U.S. corporation that had contracts with the United States, immune from suit).

[56] Foreign plaintiffs suing U.S. corporations can probably still bring suit in federal court because they can use diversity jurisdiction rather than the ATS to obtain jurisdiction, using *Sosa*'s federal common-law claims, and will generally be able to obtain general jurisdiction over the corporation. *See* Alford, *supra* note 4, at 1768.

[57] Although most courts recognize corporate liability for international human rights claims, the debate of whether international law recognizes such claims is not a completely settled question. *Compare* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 124–25 (2d Cir. 2010) (no), *with* Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 683–84 (7th Cir. 2012) (yes), *and* Sarei v. Rio Tinto, PLC, 671 F.3d 736, 747 (9th Cir. 2011) (yes), *and* Doe v. Exxon Mobil Corp., 654 F.3d 11, 41 (D.C. Cir. 2011) (yes), *and* Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1263 (11th Cir. 2009) (yes). This Article will not attempt to resolve this dispute. Instead, I will assume human rights claims against corporations are viable.

[58] Although this Article will primarily address federal court adjudication, much of the veil piercing principles applied in federal court would equally apply in state court.

[59] *See generally* 134 S. Ct. 746 (2014).

[60] To exercise personal jurisdiction over an out-of-state defendant, a court asks two questions: (1) whether the state's long-arm statute reaches the defendant; and, if so, (2) whether the exercise of jurisdiction is constitutionally permissible. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 463–64 (1985). For the sake of simplicity, and because many state long-arm statutes extend jurisdiction to the full extent permitted by the Constitution, see, *Bauman*, 134 S. Ct. at 754, I will assume in this Article that the two questions have coalesced into one: whether the exercise of jurisdiction is permitted by the Due Process Clause.

consent.[61] Accordingly, shortly after the enactment of the Fourteenth Amendment, the Court set its course by constitutionalizing personal jurisdiction in the landmark case of *Pennoyer v. Neff*, which exemplified a power-based jurisdictional approach by holding that assertions of jurisdiction by courts lacking legitimate authority over defendants violated the Due Process Clause.[62] The Court in *Pennoyer* held that "no State can exercise direct jurisdiction and authority over persons or property without its territory" and that "no tribunal established by [a State] can extend its process beyond that territory so as to subject either persons or property to its decisions."[63] This power-based approach, with its focus on the territorial limitations of the forum state, worked out relatively well for a time as "business affairs were predominately local in nature and travel between States was difficult, costly and sometimes even dangerous."[64] But times changed: the corporate form proliferated and commerce began to flow more and more often between states and countries. These developments rendered the formal, power-based approach of *Pennoyer* insufficient.[65]

To adapt to these changes, specifically as they related to corporations, courts developed "doing business" tests, which generally held that corporations were "present" and thus amenable to jurisdiction in any state in which they were doing business.[66] Courts (including the Supreme Court) applied this test broadly, subjecting foreign and out-of-state corporations to their jurisdiction when those corporations maintained an office or conducted a certain level of business within the state.[67] In 1945, however, the Court decided a change in the jurisdictional framework was needed and accordingly adjusted the jurisdictional analysis, while arguably retaining the essence of "doing business" and general jurisdiction. In *International Shoe Co. v. Washington*, the Court abandoned *Pennoyer*'s presence requirement and held that for a court to exercise jurisdiction over an out-of-state defendant, due

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[61] *See* Charles W. "Rocky" Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a "Generally" Too Broad, but "Specifically" Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135, 143 (2005); *see, e.g.*, Pennoyer v. Neff, 95 U.S. 714, 722 (1877) ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."); McDonald v. Mabee, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power.").

[62] 95 U.S. at 722–23, 733; *see also* Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. REV. 527, 534 (2012). It is notable that *Pennoyer* was decided shortly after—less than ten years—the Due Process Clause of the Fourteenth Amendment was enacted.

[63] 95 U.S. at 722.

[64] *See* Hanson v. Denckla, 357 U.S. 235, 260 (1958) (Black, J., dissenting).

[65] *See* Daimler AG v. Bauman, 134 S. Ct. 746, 753–54 (2014) (quoting Burnham v. Superior Court, 495 U.S. 604, 617 (1990)) ("In time, however, [the] strict territorial approach [of *Pennoyer*] yielded to a less rigid understanding, spurred by 'changes in the technology of transportation and communication, and the tremendous growth of interstate business activity.'"); *see also* Philip B. Kurland, *The Supreme Court, the Due Process Clause and the* In Personam *Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 585–86 (1958).

[66] *See, e.g.*, Tauza v. Susquehanna Coal Co., 115 N.E. 915, 918 (N.Y. 1917) ("We hold, then, that the defendant corporation is engaged in business within this state[] . . . [and] jurisdiction does not fail because the cause of action sued upon has no relation in its origin to the business here transacted.").

[67] *E.g.*, Barrow S.S. Co. v. Kane, 170 U.S. 100, 108 (1898).

process requires the defendant to "have certain minimum contacts with [a forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[68] The Court there dealt with specific jurisdiction,[69] where the suit "aris[es] out of or relate[s] to the defendant's contacts with the forum."[70] But it also touched on general jurisdiction over corporations, which it noted could exist in "instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."[71] This, in part, reflected the "doing business" jurisprudence that had developed in the wake of *Pennoyer*.

Therefore, although *International Shoe* shifted the focus of personal jurisdiction law to "fair play and substantial justice," it did not go so far as to discard presence, service, and territoriality as important themes when general jurisdiction was in play.[72] Jurisdiction could continue to be found if the corporation or person was present within the state, either by way of "domicile" for natural persons, or by way of headquarters or state of incorporation for corporate entities.[73] Moreover, service of process on a person physically present within the forum state was sufficient to subject that person to a forum court's jurisdiction.[74] And "doing business"—so long as contacts were "continuous" and "substantial"—was still a basis for general jurisdiction over corporations.[75]

Following *International Shoe*, even though the Court weighed in a number of times over the next 70-or-so years as it related to specific jurisdiction,[76] it provided very little guidance on general jurisdiction or the vitality and application of "doing business" jurisprudence.[77] In *Perkins v. Benguet Consolidated Mining Co.*, the Court was confronted with whether a

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[68] 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[69] *See id.*

[70] Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984).

[71] *Int'l Shoe*, 326 U.S. at 318; *see also* Meir Feder, Goodyear*, "Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 672 (2012) ("General jurisdiction is the branch of personal jurisdiction that allows a forum state to assert judicial authority over 'any and all claims' against a defendant that has a sufficiently close connection to the state - even claims arising from conduct elsewhere that is completely unrelated to the state.").

[72] *See* Burnham v. Superior Court, 495 U.S. 604, 617–19 (1990).

[73] *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853–54 (2011).

[74] *E.g.*, *Burnham*, 495 U.S. at 619 ("[J]urisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"). It is unclear whether *Burnham* applies to corporations as well. The Ninth Circuit, however, recently held that *Burnham* does not apply to corporations, and thus service of process on corporate officers within the forum state does not subject the corporation itself to jurisdiction. *See* Martinez v. Aero Caribbean, 764 F.3d 1062, 1064 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2310 (2015).

[75] *See* Feder, *supra* note 71, at 675.

[76] *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108–09 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92 (1980); Hanson v. Denckla, 357 U.S. 235, 251 (1958).

[77] *See* Feder, *supra* note 71, at 675.

company president's maintenance of an office in Ohio during World War II—from which he transacted company business, drew salary checks, maintained company funds, oversaw company policy, and attended board meetings—allowed an Ohio court to exercise general jurisdiction over the company.[78] The Court held that it did: in light of the president's "continuous and systematic supervision of the necessarily limited wartime activities of the company[,] . . . it would not violate federal due process" to exercise jurisdiction over the company.[79] However, "the defendant was basically headquartered in [the forum], if only temporarily, so this was not a situation in which the defendant was merely 'doing business' in the state," and thus *Perkins* shed little light on what contacts were necessary to establish general jurisdiction or what constituted "doing business."[80] And although the Court's next general jurisdiction opinion in *Helicopteros Nacionales de Colombia, S.A. v. Hall*[81] considered whether a foreign corporation's contacts—rather than actual corporate presence—were sufficient to subject a corporation to general jurisdiction, it likewise did fairly little to delineate the reach of the doctrine.[82] The *Helicopteros* Court held that the corporation's contacts—which included millions of dollars in purchases, training of personnel, and contracts in the forum state—were insufficient to subject it to general jurisdiction for an injury unrelated to and not arising out of those contacts.[83]

From *Helicopteros* one could correctly conclude that the "continuous and systematic" contact threshold required for an exercise of general jurisdiction was a demanding one, although the Court did not say what level of contact was necessary to cross it. Dicta in *Keeton v. Hustler Magazine, Inc.*, where the out-of-state defendant sold thousands of copies of its magazine in the forum each month, lends further support to this conclusion.[84] Although it would seem that such sales would qualify as "continuous and systematic," the Court suggested otherwise:

> In the instant case, respondent's activities in the forum *may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities*. But respondent is carrying on a "part of its general business" in New Hampshire, and that is sufficient to support jurisdiction when the cause of action arises out of the very activity being

[78] 342 U.S. 437, 447–488 (1952).

[79] *Id.*

[80] *See* Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, U. CHI. LEGAL F. 171, 184–85 (2001).

[81] 466 U.S. 408, 409 (1984).

[82] *See* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 612 (1988) ("Regrettably, . . . the Court [in *Helicopteros*] gave no guidance as to how courts are to determine the scope of general jurisdiction in the future.").

[83] *Helicopteros*, 466 U.S. at 411, 418–19.

[84] 465 U.S. 770, 781 (1984).

conducted, in part, in New Hampshire.[85]

Thus, from *International Shoe* to the early 21st century, general jurisdiction was somewhat of an enigma. The Court gave clues[86] and bookends, but it did not clearly demonstrate when and how "continuous and systematic" contacts with the forum state would render that state's exercise of jurisdiction over the defendant "reasonable" in light of "traditional notions of fair play and substantial justice."[87] Indeed, scholars surmised that the Court's precedents might have even suggested "something greater than continuous and systematic contacts [was] required for doing-business jurisdiction—perhaps a place of business, or even a principal place of business."[88] They were correct.

In 2011, the Court finally weighed in again. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, two North Carolina boys were killed in a bus accident in France.[89] Their parents brought a product-defect suit against a U.S. tire manufacturer and its European subsidiaries, none of which conducted business in North Carolina, aside from a small percentage of their tires reaching the state.[90] In considering the claim, a unanimous Court first announced a seemingly far-reaching modification to the amorphous "continuous and systematic" standard: "A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."[91] Applying this new standard, the Court held with ease that "[a] connection so limited between the forum and the foreign corporation . . . is an inadequate basis for the exercise of general jurisdiction."[92] Notably, however, the Court declined to address the plaintiffs' jurisdictional veil-piercing argument, which asked the Court "to consolidate [the foreign subsidiaries'] ties to North Carolina with those of Goodyear USA" due to waiver.[93]

Goodyear's "essentially at home" language had the potential to effect a major change in the law—it could very much narrow the reach of general jurisdiction as many lower courts and commentators understood it.[94] Indeed,

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[85] *Id.* at 779–80 (emphasis added).
[86] *See id.* (giving clues).
[87] *Helicopteros*, 466 U.S. at 414; Perkins v. Benguet Mining. Co., 342 U.S. 437, 447 (1952).
[88] Twitchell, *supra* note 80, at 186.
[89] 131 S. Ct. 2846, 2850 (2011).
[90] *Id.* at 2851–52.
[91] *Id.* at 2851 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945)).
[92] *Id.*
[93] *Id.* at 2857.
[94] *See, e.g.*, Lakin v. Prudential Sec., Inc., 348 F.3d 704, 706, 708 n.7 (8th Cir. 2003) (finding general jurisdiction when the defendant had nearly $10 million, or 1%, of its loan portfolio with citizens of the forum state); Mich. Nat'l Bank v. Quality Dinette, Inc., 888 F.2d 462, 465–67 (6th Cir. 1989) (holding defendant subject to general jurisdiction in the forum state where 3% of its total sales were made); Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n, 819 F.2d 434, 436–38 (3d Cir. 1987) (holding that $10 million in loans to the forum's citizens, which amounted to 0.083% of the company's total loan

one commentator suggested that a broad reading was so implausible and far-reaching that "[a] better reading of the case would be to focus on the particular facts of Goodyear and limit its meaning to the conclusion that the stream-of-commerce theory may not be utilized to establish general jurisdiction."[95]

But *Goodyear*'s effect was not an open question for long. Three years later in *Daimler AG v. Bauman*, the Court spoke yet again on general jurisdiction and added some clarity to *Goodyear*'s "essentially at home" standard.[96] *Bauman* was an f-cubed case: it "concern[ed] the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States."[97] The Court was asked to decide "whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State."[98] This seemed to directly implicate the doctrine of veil piercing: "whether a subsidiary's contacts can be imputed to a parent corporation to establish general personal jurisdiction."[99]

The plaintiffs in *Bauman* were Argentinian residents who alleged that Mercedes-Benz Argentina ("MB Argentina") "collaborated with Argentinian state security forces to kidnap, detain, torture, and kill plaintiffs and their relatives during the military dictatorship in place there from 1976 through 1983, a period known as Argentina's 'Dirty War.'"[100] They filed suit in California, asserting claims under the ATS and Torture Victim Protection Act ("TVPA"), as well as for common-law torts such as wrongful death.[101] The plaintiffs named only one corporation as a defendant: Daimler, a German public stock company that manufactured Mercedes-Benz vehicles in Germany, and which wholly owned and was the parent corporation of MB Argentina and Mercedes-Benz USA ("MBUSA").[102]

In the district court, the plaintiffs did not attempt to argue that the court had specific jurisdiction over Daimler, nor did they challenge in the Ninth Circuit the district court's "holding that Daimler's own contacts with California were, by themselves, too sporadic to justify the exercise of

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portfolio, in addition to other contacts, was enough to give rise to general jurisdiction); Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 734 (1988) ("Place of incorporation, however, is not the only affiliation that supports general jurisdiction; a corporation may do sufficient business within a state to give the state general jurisdiction over it.").

[95] *See* Todd David Peterson, *The Timing of Minimum Contacts After* Goodyear *and* McIntyre, 80 GEO. WASH. L. REV. 202, 217 (2011).

[96] 134 S. Ct. 746, 761 (2014).

[97] *Id.* at 750.

[98] Petition for Writ of Certiorari, *Bauman*, 134 S. Ct. 746 (No. 11-965).

[99] *See* Childress III, *supra* note 9, at 198.

[100] 134 S. Ct. at 751.

[101] *Id.*

[102] *Id.* at 752.

jurisdiction."[103] In addition, "[w]hile plaintiffs ultimately persuaded the Ninth Circuit to impute MBUSA's California contacts to Daimler on an agency theory, at no point [did] they maintain[] that MBUSA [was] an alter ego of Daimler."[104] And given that Daimler had waived any argument that MBUSA was not amenable to general jurisdiction in California, the Court assumed MBUSA "qualifie[d] as at home in California."[105]

The Court started its opinion by rebuking the Ninth Circuit's agency analysis, which asked "whether the subsidiary 'performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services.'"[106] But the Court did not go on to wholesale condemn agency or alter-ego tests for finding general jurisdiction over a foreign corporation based on the contacts of an in-state subsidiary, noting that several circuits have utilized the jurisdictional alter-ego analysis.[107] It instead avoided that question altogether: "[W]e need not pass judgment on invocation of an agency theory in the context of general jurisdiction, for in no event can the appeals court's analysis be sustained."[108] The Court said that the fatal flaw of the Ninth Circuit's agency analysis was that it merely focused on whether a subsidiary's services were important to the parent. Such an analysis, the Court said, "stacks the deck, for it will always yield a pro-jurisdiction answer: 'Anything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do "by other means" if the independent contractor, subsidiary, or distributor did not exist.'"[109]

Accordingly, the Court did not address the contact imputation question that the case seemingly presented; instead, it assumed that MBUSA was "at home" in California *and* that MBUSA's contacts were imputable to Daimler.[110] These assumptions allowed the Court to reframe the issue as "whether the Due Process Clause of the Fourteenth Amendment precludes the District Court from exercising jurisdiction over Daimler in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint."[111] It might have appeared, therefore, given the Court's assumptions and the "essentially at home" standard announced in *Goodyear*, that Daimler—with MBUSA's contacts imputed to

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[103] *Id.* at 758.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 759 (quoting Doe v. Unocal Corp., 248 F.3d 915, 928 (9th Cir. 2001)) (explaining that the Ninth Circuit would find imputation appropriate if *either* this agency or the alter ego test were satisfied).
[107] *Id.*
[108] *Id.*
[109] *Id.* (quoting Bauman v. Daimler Chrysler Corp., 676 F.3d 774, 777 (9th Cir. 2011) (O'Scannlain, J., dissenting)).
[110] *Id.* at 760.
[111] *Id.* at 751.

it—was also "essentially at home" so as to be subject to general jurisdiction in California.[112]

But the Court didn't see it that way. Even if MBUSA's contacts in California rendered it at home, the Court said, those same contacts imputed to Daimler were insufficient because as "[a] corporation that operates in many places can scarcely be deemed at home in all of them," general jurisdiction "calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide."[113] Reiterating *Goodyear*'s "essentially at home" standard, the Court held that Daimler's MBUSA California contacts, proportionally considered, comprised only a small percentage of its worldwide activities and operations; thus, those contacts could not render Daimler at home in California.[114]

Following *Goodyear* and *Bauman* it is clear that the bar for general jurisdiction, especially over foreign corporations, is high: plaintiffs hoping to hale foreign corporations into court must show that the *foreign corporation*—not its U.S. subsidiary, if any—is "essentially at home" in the forum state.[115] Given the *Bauman* Court's proportionality approach, this means that contacts sufficient to make a subsidiary at home, even if imputed from the in-state subsidiary to the foreign parent, may not be sufficient to subject that parent to general jurisdiction. With this, the Court also "appears to be calling into doubt whether a subsidiary's contacts can ever be imputed to establish general jurisdiction," although it did not definitively decide as much.[116] Yet, it is also possible that in refusing to comment on general veil-piercing law, the Court is leaving states free to develop substantive agency and alter-ego law, which they remain free to use in jurisdictional analyses, so long as such use comports with constitutional limits on the state's exercise of personal jurisdiction.[117] And to deem a corporation, especially a large one, "at home," *Bauman*

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[112] *See* Childress III, *supra* note 9, at 201–02.

[113] *Bauman*, 134 S. Ct. at 762 n.20.

[114] *Id.* at 760–62. Justice Sotomayor concurred in the Court's result but took issue with its chosen rationale. *Id.* First, she disagreed with the Court's reliance on viewing Daimler's California contacts "in the context of its extensive 'nationwide and worldwide' operations" (the "proportionality approach"), which she argued was the Court deeming "Daimler 'too big for general jurisdiction.'" *Id.* at 764 (Sotomayor, J., concurring). She would have instead found Daimler to be at home, but used the reasonableness prong of personal jurisprudence to refuse to exercise jurisdiction. *Id.*

[115] *See id.* at 761 (majority opinion); Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

[116] Childress III, *supra* note 9, at 199.

[117] *See infra* Section II.B.2; *see also* Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CAL. L. REV. 1, 27 (1986) ("This is a common pattern in situations where the federal Constitution protects rights originally defined by state law."). As Brilmayer and Paisley note, another option would "involve developing a body of federal constitutional law defining the nexus that parties must have before the substantive legal relationship obtains jurisdictional significance." *Id.* at 28; *see* Jennifer A. Schwartz, Comment, *Piercing the Corporate Veil of an Alien Parent for Jurisdictional Purposes: A Proposal for a Standard that Comports with Due Process*, 96 CAL. L. REV. 731 (2008) (advocating the development of defining the jurisdictional veil piercing standard to be in line with the Supreme Court's constitutional due process standard for personal jurisdiction).

strongly suggests that only very strong contacts—such as state of incorporation or headquarters—will suffice.[118]

In her *Bauman* concurrence, Justice Sotomayor noted further potential consequences of the Court's chosen rationale. The Court's proportionality approach, she said, "will treat small businesses unfairly in comparison to national and multinational conglomerates. Whereas a larger company will often be immunized from general jurisdiction in a State on account of its extensive contacts outside the forum, a small business will not be."[119] Moreover, she argued that the decision creates an incongruous result in which individual defendants will be subject to general jurisdiction in a state for one visit under *Burnham*, but a multinational corporation doing billions of dollars of business in that same state will not solely due to its operations elsewhere.[120] This concern, it should be noted, is now especially salient given the Ninth Circuit's recent holding that *Burnham*'s "tag" jurisdiction does not apply to corporations.[121]

Finally, and most importantly for plaintiffs looking to sue for international human rights violations, Justice Sotomayor predicted that "the ultimate effect of the majority's approach will be to shift the risk of loss from multinational corporations to individuals harmed by their actions."[122] In other words, a plaintiff who is injured by a foreign, rather than domestic, corporation may be unable to recover in *any* U.S. jurisdiction even if that company does considerable business and has subsidiaries in various U.S. forums. Justice Sotomayor's first concern is also important here because, like U.S. corporations, smaller businesses may not have the scale to avoid jurisdiction under the proportionality approach; thus, a plaintiff's chance at recovery will vary greatly depending on the bad actor's wealth and scope, with wealthy multinational corporations with broad, worldwide operations benefitting. Beyond Justice Sotomayor's concerns, it appears that the *Bauman* proportionality approach also has the potential to shift the loss to U.S. corporations. If a U.S. corporation harms a plaintiff abroad, that plaintiff can unquestionably hale the corporation into some U.S. court. But under *Bauman*, if that same plaintiff under the same facts sues a foreign corporation—even one with extensive U.S. business operations and subsidiaries—establishing personal jurisdiction seems extremely difficult.

3. Current Law for International Human Rights Plaintiffs

In light of the Court's recent restriction of both general (*Bauman*) and

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[118] *See Bauman*, 134 S. Ct. at 760–62.
[119] *Id.* at 772 (Sotomayor, J., concurring).
[120] *Id.* at 772–73.
[121] *See* Martinez v. Aero Caribbean, 764 F.3d 1062, 1071 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2310 (2015).
[122] *Bauman*, 134 S. Ct. at 773 (Sotomayor, J., concurring).

subject-matter (*Kiobel*) jurisdiction, what legitimate relief can foreign human rights plaintiffs obtain in U.S. courts? One difficulty is that "[c]ivil human rights litigation generally continues to be viewed as a peculiarly U.S. phenomenon,"[123] and thus the U.S. may be the only realistic option for many foreign plaintiffs.[124] For its part, *Kiobel* left an opening for plaintiffs by noting that the presumption could be overcome by claims that were sufficiently domestic,[125] and plaintiffs still had options in state court.[126] And, of course, human rights groups could argue for legislation specifically applying to international human rights violations committed by corporations, which would presumably overcome the *Kiobel* barrier.

Before *Goodyear* and *Bauman*, general jurisdiction's looser formulation "permit[ted] U.S. courts to assert jurisdiction more widely than . . . many [other legal] systems" due to the rule providing "general jurisdiction over . . . corporations that have minimum contacts with the jurisdiction."[127] This formulation made the United States a favorable forum in which plaintiffs could bring *Filartiga*-type claims under the ATS.[128] But *Bauman* obviously limited the options for haling foreign corporations into court by way of general jurisdiction by imposing the requirement that the corporation be "essentially at home."[129] And although the *Bauman* Court did not completely discard agency theory,[130] it significantly limited any potential usefulness of the doctrine by requiring that the imputed contacts be proportionally considered in determining whether they render a foreign parent at home. Importantly, because its standard is constitutional in nature and limits the ability of all courts to reach foreign defendants, *Bauman* arguably creates a more significant hurdle for human rights plaintiffs than *Kiobel*.

Indeed, Gwynne Skinner predicts *Bauman* "will have significant repercussions for victims who have been harmed by businesses that engage in substantial activity in the United States but are headquartered elsewhere—perhaps in a country that is not a sufficient forum or makes it otherwise difficult to bring civil cases."[131] *Bauman*, in combination with the complexity of corporate law, she concludes, "is one of the largest barriers victims of corporate human rights abuses face."[132] Maybe. But within the *Bauman* and *Goodyear* opinions lurks an option the Court has yet to deal with that, as I

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[123] *See* Beth Stephens, *Translating* Filartiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 3 (2002).

[124] Whether or not the United States *should* provide relief for such claims at all is not the focus of this Article, and it is ultimately a question for the lawmaking branches. Notably, under current law, the ATS and TVPA *do* provide avenues of relief.

[125] *See supra* note 4 and accompanying text.

[126] *See supra* Section II.A.1.

[127] Stephens, *supra* note 123, at 11–12.

[128] *See id.* at 12.

[129] *See* Daimler AG v. Bauman, 134 S. Ct. 746, 761 (2014).

[130] *See id.* at 758–59.

[131] Skinner, *supra* note 51, at 213.

[132] *Id.*

will explore, may have the potential to overcome some of *Bauman*'s potentially undesirable effects: veil piercing.

B. Veil-Piercing Law[133]

Veil piercing law is infamous for its incoherency. Commentators have noted that it "seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled."[134] Yet piercing the veil for jurisdictional purposes might be even more perplexing.[135] In part, that's because although the rules for jurisdictional veil piercing arguably should not have the same moorings—or at least the same limits—as those for traditional veil piercing, courts have largely failed to consider the reasoning for their decisions to pierce the veil to obtain jurisdiction.[136] Instead, veil-piercing courts—in both contexts—often rely on conclusory analyses and terminology to produce result-oriented decisions.[137]

The basic question in traditional veil piercing is whether the limited liability of the corporate form should be disregarded so as to subject the shareholders or affiliates of a corporation to liability for that corporation's acts.[138] In the jurisdictional context, on the other hand, the inquiry should arguably be one of due process: "do the contacts of an affiliated corporation 'count' for the purposes of meeting the constitutional tests of 'minimum contacts' and 'fair play and substantial justice'"?[139] As to this, courts disagree, and the Supreme Court itself has not weighed in since before *International Shoe*.[140] Some courts thus seem to ignore the distinction and apply traditional standards—which themselves vary widely—to the jurisdictional context, while others look to *International Shoe* and its progeny to determine whether due process has been satisfied.[141] To provide a background to veil piercing generally, and because courts often apply traditional veil-piercing standards in the jurisdictional context, I will first deal with traditional veil piercing. After laying this (admittedly very bare bones) foundation, I will move on to jurisdictional veil piercing.

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[133] The summary provided in this Article relies heavily on Phillip Blumberg's treatise. *See generally* 1 PHILLIP I. BLUMBERG ET AL., BLUMBERG ON CORPORATE GROUPS 1 *passim* (2d ed. Supp. 2010) (providing a more in-depth look at veil piercing doctrines, including a comprehensive look at some of the caselaw underlying veil piercing analysis).

[134] Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985).

[135] *See* Daniel G. Brown, Comment, *Jurisdiction Over a Corporation on the Basis of the Contacts of an Affiliated Corporation: Do you have to Pierce the Corporate Veil?*, 61 U. CIN. L. REV. 595, 595 (1992) ("When the haze of state jurisdictional law collides with the metaphor-filled fog of the 'piercing the corporate veil' doctrine, the result is, predictably, a smog of the thickest variety.").

[136] *See, e.g.*, *id.* at 617.

[137] *See* BLUMBERG ET AL., *supra* note 133, at 10-6.

[138] *See id.* at 10-5.

[139] *See id.*; *see also* Hoffman v. United Telecomms., Inc., 575 F. Supp. 1463, 1471 (D. Kan. 1983).

[140] *See infra* Section II.B.2.

[141] *See, e.g.*, MGM Studios Inc. v. Grokster, Ltd., 243 F. Supp. 2d 1073, 1098 (C.D. Cal. 2003); *see also Hoffman*, 575 F. Supp. at 1471.

1. Traditional Veil Piercing

Traditional entity law holds that various persons and entities are legally distinct: a corporation is legally distinct from its shareholders and related entities within corporate groups are legally distinct from one another.[142] A subsidiary's rights and liabilities are therefore (in most cases) legally distinct from its parent's and vice versa.[143] This is generally referred to as the principle of limited liability. Although limited liability has a number of apparent justifications, it developed principally as a means to encourage investors to fund new business ventures so that corporations could collect capital and put it to efficient uses.[144]

But, though important, the traditional view of limited liability is not sacrosanct. Sometimes entity law "is so dysfunctional or leads to such unjust results that the law has developed a variety of doctrines supporting the attribution of legal consequences of the acts of one constituent company of a corporate group to another."[145] Thus, when courts find traditional entity law grasping in the context of a corporate group,[146] they will in equity attribute the legal rights or duties of one subpart of the corporation to another. Although there are a number of formulations by which courts do so, such attribution is generally referred to as "veil piercing" or "disregarding the separate corporate entities of the related corporations in issue."[147]

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[142] BLUMBERG ET AL., *supra* note 133, at 10-4 ("Both of these two very different worlds are governed by the same doctrines indiscriminately, both to a controlled corporation and its individual controlling shareholder as well as to a corporate group with its controlling parent corporation and its many controlled subsidiary corporations."); *see* Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573 (1986) (providing a history of limited liability and entity law).

[143] *See* 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 . . . is not liable for the acts of its subsidiaries."). However, commentators have argued that the same limited liability principles should not apply in the parent-subsidiary context. *See* John H. Matheson, *The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context*, 87 N.C. L. REV. 1091, 1101 (2009) ("Many commentators argue that whatever the weaknesses of the current judicial tests for piercing the corporate veil generally, the case for disregarding the corporate entity is more compelling when the shareholder itself is another corporate entity - namely, that corporations exist in the parent-subsidiary context."); *see also* Kurt A. Strasser, *Piercing the Veil in Corporate Groups*, 37 CONN. L. REV. 637, 664 (2005); *see also* Blumberg, *supra* note 142, at 575.

[144] *See* Blumberg, *supra* note 142, at 574–75.

[145] BLUMBERG ET AL., *supra* note 133, at 10-4; *see also Bestfoods*, 524 U.S. at 62 ("But there is an equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally, that the corporate veil may be pierced . . . when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf.").

[146] In this Article, "corporate groups" generally refers to parents and subsidiaries.

[147] BLUMBERG ET AL., *supra* note 133, at 10-5. Veil piercing is recognized in both U.S. and international law as a viable remedy in the event that there is misuse of the corporate form.

> In Case Concerning The Barcelona Traction, Light & Power Co., 1970 I. C. J. 3, the International Court of Justice acknowledged that, as a matter of international law, the separate status of an incorporated entity may be disregarded in certain exceptional circumstances: "Forms of incorporation and their legal personality have sometimes not been employed for the sole purposes they were originally intended to serve; sometimes the corporate entity has been unable to protect the rights of those who have entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as

Veil piercing thus developed as a means by which courts in equity could avoid the use of the corporate form to perpetuate an injustice or wrong. For example, an early veil-piercing case, *United States v. Milwaukee Refrigerator Transit Co.*, held that the corporate entity may be disregarded whenever the "entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime."[148] Similarly, in *Fish v. East*, the Tenth Circuit held that the "[c]orporate entity may be disregarded where not to do so will defeat public convenience, justify wrong or protect fraud."[149] The Pennsylvania Supreme Court has likewise observed that the "legal fiction of a separate corporate entity was designed to serve convenience and justice . . . and will be disregarded whenever justice or public policy demand and when the rights of innocent parties are not prejudiced nor the theory of the corporate entity rendered useless."[150] And the Supreme Court has described veil piercing as an "equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when so to do would work fraud or injustice."[151]

In an effort to avoid the use of the corporate form to perpetuate injustice or commit a wrong, courts crafted what is now considered traditional veil piercing: the "instrumentality" and "alter ego" doctrines.[152] These doctrines, although having different names, are largely the same.[153] Phillip Blumberg has described traditional veil piercing to require three elements: (1) the parent controls the subsidiary such that there is a lack of independent existence; (2) fraudulent, inequitable, or wrongful use of the corporate form;

> elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of 'lifting the corporate veil' or 'disregarding the legal entity' has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations. . . . In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. . . ."

First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 628 n.20 (1983) (internal citations omitted).

[148] 142 F. 247, 255 (E.D. Wis. 1905).

[149] 114 F.2d 177, 191 (10th Cir. 1940).

[150] Ashley v. Ashley, 393 A.2d 637, 641 (Pa. 1978).

[151] Taylor v. Standard Gas & Elec. Co., 306 U.S. 307, 322 (1939).

[152] Unfortunately, some "courts use 'alter ego' as one of the conclusory metaphorical terms so frequently invoked when courts impose liability under piercing jurisprudence—often accompanied by such similar metaphors as 'instrumentality,' 'agent' or 'agency,' or 'tool.'" BLUMBERG ET AL., *supra* note 133, at 11-8 nn.18–20.

[153] *See* Miles v. Am. Tel. & Tel. Co., 703 F.2d 193, 195 (5th Cir. 1983); Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc., 608 F. Supp. 1261, 1264–65 (S.D.N.Y. 1985).

and (3) a causal relationship to the plaintiff's loss.[154]

Yet, however precise and strict the requirements for veil piercing may seem, or however confidently some courts may announce them, the caselaw shows that the doctrine is far from being settled.[155] Some courts actually apply all three factors, or at least do so in most cases.[156] Many courts merely recite a list of factors with little analysis.[157] Blumberg, for example, has identified more than *twenty* common factors courts cite as guidelines to justify their decisions on whether to pierce or not to pierce.[158] These "guidelines" are widely used, but because they "indiscriminately mix elements of vastly unequal importance and lump together issues of readily ascertainable fact with complex issues involving the difficult exercise of judgment and utilizing ultimate standards of a conclusory nature, which presage the outcome of the case," they are of limited utility in actually figuring out whether piercing is appropriate.[159] Thus, courts usually note that these factors are non-exhaustive and, in actuality, consider the totality of the circumstances in deciding whether to pierce.[160]

Perhaps due to dissatisfaction with a formal listing of factors without reference to the equitable bases for veil piercing, many courts have simultaneously (and sometimes in the same jurisdictions) developed and applied single-factor piercing tests where they only require one of the traditional three factors.[161] For example, the Second Circuit, while sometimes purporting to apply the alter-ego test—a traditional three-factor test—simultaneously adopted a single-factor test, which permits piercing whenever *either* a lack of separate existence *or* the parent's wrongful or morally culpable conduct is shown.[162] Texas and Louisiana developed the "single

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[154] *See* BLUMBERG ET AL., *supra* note 133, at 11-5. The alter ego formulation usually only contains two factors, although in practice courts apply it in the same way. *See, e.g.*, Towe Antique Ford Found. v. IRS, 999 F.2d 1387, 1391 (9th Cir. 1993).

[155] BLUMBERG ET AL., *supra* note 133, at 10-7 ("The traditional three-factor doctrine, whether in its instrumentality or alter-ego formulation is typically held out as a transcendental standard applicable across the spectrum of the law and rigidly governing the disregard of entity. In fact, this view is far from accurate. Classic three-factor piercing coexists with an extensive number of complementary, competing, and inconsistent doctrines through which American courts have widely disregarded separate identities and pierced the corporate veil.").

[156] *See* Matheson, *supra* note 143, at 1099 ("Unfortunately, the tests used by the courts to determine the existence of these elements are vague and inconsistent.").

[157] *See id.* at 1099 n.20.

[158] BLUMBERG ET AL., *supra* note 133, at 11-31 to -32.

[159] *Id.* at 11-32 to -33.

[160] *See, e.g.*, Hollowell v. Orleans Reg'l Hosp., 217 F.3d 379, 387 (5th Cir. 2000); Kaycee Land & Livestock v. Flahive, 46 P.3d 323, 325 (Wyo. 2002); Riggins v. Dixie Shoring Co., 590 So. 2d 1164, 1169 (La. 1991).

[161] *Compare* Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int'l, Inc., 2 F.3d 24, 26 (2d Cir. 1993), *with* Thrift Drug, Inc. v. Universal Prescription Adm'rs, 131 F.3d 95, 97 (2d Cir. 1997). *But see* Castleberry v. Branscum, 721 S.W.2d 270, 272 (Tex. 1986) ("Many Texas cases have blurred the distinction between alter ego and the other bases for disregarding the corporate fiction. . . . However, . . . alter ego is only one of the bases for disregarding the corporate fiction." (internal citations omitted)).

[162] *See* Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc., 933 F.2d 131, 138 (2d Cir. 1991); S.M. v. Oxford Health Plans (N.Y.), Inc., 94 F. Supp. 3d 481, 498 (S.D.N.Y. 2015) (quoting *Carte Blanche*, 2 F.3d at 26) ("New York courts will only pierce the corporate veil to 'prevent fraud or other

enterprise doctrine,"[163] which applied "when corporations are not operated as separate entities, but rather integrate their resources to achieve a common business purpose."[164] This is done even though such single-factor tests are "flatly contrary to the fundamental principle of classic piercing."[165] Indeed, "courts have consistently disregarded the separate corporate entity of controlled corporations under circumstances that did not satisfy the classic standards."[166]

Additionally, and importantly for the analysis that will follow, the Supreme Court and other federal courts have fashioned an alternate test to skirt traditional veil piercing when important federal interests might otherwise be thwarted. In a series of holdings, the Court "has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies"[167] or "an overriding public policy."[168] This federal interests piercing doctrine, though derived from the foundational principle that piercing should prevent injustice,[169] took on a distinct form during the Great Depression and New Deal. In *Anderson v. Abbott*, for example, the Court disregarded the corporate veil between a bank holding company and former bank shareholders so as to impose double liability under the National Banking Act, even though there was no proof that the holding company at issue was being used to shield shareholders.[170] The Court noted that it was "dealing . . . with a principle of [limited] liability which is concerned with realities not forms."[171] It therefore reasoned that utilizing piercing to impose liability upon the former shareholders—whose investment in the holding company was really just an investment in the bank—was the only way to satisfy the mandates of the National Banking Act.[172] This was so despite "[t]he fact that Congress did

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wrong, or where a parent dominates and controls a subsidiary.'"); *see also* Capital Tel. Co. v. FCC, 498 F.2d 734, 738 (D.C. Cir. 1974) ("[A] corporate entity may be disregarded in the interests of public convenience, fairness and equity."); BLUMBERG ET AL., *supra* note 133, at 12-49 ("Some [single-factor doctrines] focus on particular conduct that is itself wrongful, unjust, or inequitable, and these require no additional proof either of excessive control and lack of indicia of separate existence or causality.").

[163] The "single enterprise doctrine" is now defunct in Texas. *See* PHC-Minden, L.P. v. Kimberly-Clark Corp., 235 S.W.3d 163, 175 (Tex. 2007).

[164] *E.g.*, Paramount Petroleum Corp. v. Taylor Rental Ctr., 712 S.W.2d 534, 536 (Tex. App. 1986), *abrogated by* SSP Partners v. Gladstrong Invs. Corp., 275 S.W.3d 444 (Tex. 2008).

[165] *See* BLUMBERG ET AL., *supra* note 133, at 12-3. Blumberg notes that the flourishing of single-factor doctrines, although it "may go almost entirely unheralded, . . . are a vital part of the contemporary American scene. This," he comments, "is a striking anomaly." *Id.* at 11-35.

[166] *Id.* at 12-49.

[167] First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 630 (1983) (citing Anderson v. Abbott, 321 U.S. 349, 362–63 (1944)).

[168] Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co., 417 U.S. 703, 713 (1974); *see also* BLUMBERG ET AL., *supra* note 133, at 13-4 ("In determining matters where the public interest is at stake, federal courts have been unwilling to have corporate form rather than substance determine the outcome.").

[169] *See Anderson*, 321 U.S. at 363 (quoting Chi., Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Ass'n, 247 U.S. 490, 501 (1918)) ("'[C]ourts will not permit themselves to be blinded or deceived by mere forms of law' but will deal 'with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.'").

[170] *Id.* at 363–64.

[171] *Id.* at 363.

[172] *Id.*

not outlaw holding companies . . . nor undertake to regulate them," because the fact that holding companies were allowed under the law "hardly impl[ied] that Congress sanctioned their use to defeat the [legislative] policy," and "[t]o allow [the] holding company device to succeed would be to put the policy . . . at the mercy" of the corporation.[173]

While the Court developed this rule in cases where the corporate form would have impeded legislative goals in legislative and regulatory schemes arising during the New Deal,[174] it has also refused to apply traditional veil piercing law and disregarded the entity in other substantive areas, such as antitrust law.[175] And consistent with the Court's lead, "[i]nstead of allowing corporate forms to determine an issue of public importance," courts in these cases seek to implement "the underlying objectives and policies of the statute" and, further, "to prevent frustration of the law and ready avoidance through interposition of a subsidiary or affiliate company."[176] They thus reject lack of compliance with corporate form as essential[177] and instead accept "their responsibility to apply regulatory and remedial statutes generally to prevent frustration of the underlying public policy and avoidance of the statutory objectives by manipulation of the corporate forms."[178]

In sum, traditional veil piercing is a messy and often incoherent area of the law. Yet judicial developments such as the proliferation of single-factor tests, the all-too-common use of conclusory analyses, and relaxed piercing standards when federal interests are at stake may provide some

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[173] *Id.* at 363–64.

[174] *See, e.g.*, Elec. Bond & Share Co. v. SEC, 303 U.S. 419, 434–43 (1938) (disregarding traditional entity law and applying enterprise principles to uphold the Public Utility Holding Company Act of 1935 as constitutional); *Anderson*, 321 U.S. at 368–69 (upholding imposition of statutory liability on shareholders under the National Banking Act even when there was no proof that the holding company was an attempt to shield bank shareholders from liability).

[175] *See, e.g.*, Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 772 n.18 (1984) (noting that traditional entity law was "inadequate to preserve the Sherman Act's distinction between unilateral and concerted conduct"); *see also* United States v. Clinical Leasing Serv., Inc., 982 F.2d 900, 901 n.3 (5th Cir. 1992) (noting, in a suit seeking fees under the Federal Controlled Substances Act, that the "frustration of a legislative purpose[]" is a "well-established" theory with which a court can pierce the corporate veil).

[176] *See* BLUMBERG ET AL., *supra* note 133, at 13-5. Blumberg calls this "federal *modified piercing jurisprudence*." *Id.*

[177] *See, e.g.*, Capital Tel. Co. v. FCC, 498 F.2d 734, 738 (D.C. Cir. 1974) (holding that because "courts have consistently recognized that a corporate entity may be disregarded in the interests of public convenience, fairness and equity," the court "need not pause to consider whether Capital would be Bakal's alter ego under the strict standards of the common law alter ego doctrine which would apply in a tort or contract action"); *see also* United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1091–92 (1st Cir. 1992) (applying the relaxed legislative policies piercing standard in an ERISA case).

[178] BLUMBERG ET AL., *supra* note 133, at 13-5; *see, e.g.*, Papa v. Katy Indus., Inc., 166 F.3d 937, 941 (7th Cir. 1999) (Posner, C.J.) ("[A]n enterprise might split itself up into a number of corporations . . . for the express purpose of avoiding liability . . . in such a way as to avoid creating the conditions in which the corporate veil is normally pierced. Each subsidiary might be adequately funded and comply with all the requisite formalities for separate corporate status . . . . But if the purpose of this splintered incorporation were to elude liability under the antidiscrimination laws, the corporations should be aggregated . . . [because] [t]he privilege of separate incorporation is not intended to allow enterprises to duck their statutory duties.").

insight for predicting a court's treatment of a veil-piercing issue. First, the single-factor tests and legislative policy standard can help one consider the relative weight that should be given to each traditional factor. If a single-factor test is unavailable in a jurisdiction in which a plaintiff is looking to pierce, that plaintiff may at least be able to point to other jurisdictions' single-factor tests as evidence that the particular factor is entitled to greater weight. Second, and maybe more importantly, the proliferation of these tests is evidence that courts have not felt bound to the rigid three-factor formulation, especially when the three-factor analysis would preclude an equitable result. Or, in other words, such developments show that courts, despite sometimes applying rigid three-factor tests, often allow the purpose of veil piercing and the policies of the underlying substantive law to be determinative. Conclusory opinions likewise evidence that some courts—although considering themselves duty-bound to follow precedent—are willing to forgo rigorous analysis in order to accommodate equitable factors.[179]

2. Jurisdictional Veil Piercing

Jurisdictional veil piercing is likewise unsettled, with courts and commentators divided on the proper analysis.[180] This is ostensibly due in part to the tension between the Supreme Court's opinion in *Cannon Manufacturing Co. v. Cudahy Packing Co.*, which applied a single-factor variant of traditional veil piercing standards to a jurisdictional issue, and the personal jurisdictional revolution resulting from *International Shoe*.[181] Due to the nature of modern personal jurisdiction jurisprudence, among other factors, *Cannon*'s continuing authority and relevance has been called into doubt by both courts and commentators.[182] Thus, this Section is divided into two subsections. In the first I will discuss *Cannon* and the cases following it. In the second I will discuss a line of courts holding, and commentators arguing, that *Cannon* is no longer relevant in a post-*International Shoe* world. Other courts and commentators fall somewhere in between these two poles.[183]

a. The *Cannon* Doctrine and Traditional Piercing for Jurisdiction

In *Cannon*, a North Carolina corporation sued a Maine corporation in

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[179] *See, e.g.*, Craig v. Johns-Manville Corp., No. 82-0321, 1987 U.S. Dist. LEXIS 4075, at *36 (E.D. Pa. Apr. 22, 1987) (holding that piercing was appropriate despite failing to formally satisfy elements when the parent underwent reorganization to "defeat[] . . . [the victim's] litigation remedy by corporate decisions, policies and practices which insulate [the corporation] from any liability whatsoever").

[180] See Brown, *supra* note 135, for an analysis of this topic and a collection of cases either following or not following *Cannon*.

[181] 267 U.S. 333, 334–35 (1925).

[182] *See infra* Section II.B.2.

[183] *See generally* John A. Swain & Edwin E. Aguilar, *Piercing the Veil to Assert Personal Jurisdiction Over Corporate Affiliates: An Empirical Study of the* Cannon *Doctrine*, 84 B.U. L. REV. 445 (2004) (discussing the fading of the *Cannon* doctrine and identifying the causes underlying the treatment of *Cannon* by the lower courts).

North Carolina court for breach of contract.[184] Service of process was made on the local agent of an Alabama corporation, which was a wholly owned subsidiary of the Maine corporate defendant.[185] Thus, to sustain the validity of the service, the plaintiff sought to pierce the veil between the Maine parent and its Alabama subsidiary whose agent had been served in North Carolina.[186] The Supreme Court framed the issue as whether the parent was "doing business within [North Carolina] in such a manner and to such an extent as to warrant the inference that it was present there."[187] Citing only federal common law and noting that no constitutional questions were at issue,[188] the Court held that North Carolina could not assert jurisdiction over the Maine corporation because corporate formalities and separation had been neatly maintained, stating:

> Through ownership of the entire capital stock and otherwise, the defendant dominates the Alabama corporation, immediately and completely; and exerts its control both commercially and financially in substantially the same way, and mainly through the same individuals, as it does over those selling branches or departments of its business not separately incorporated which are established to market the Cudahy products in other States. The existence of the Alabama company as a distinct corporate entity is, however, in all respects observed. Its books are kept separate. All transactions between the two corporations are represented by appropriate entries in their respective books in the same way as if the two were wholly independent corporations.[189]

The Court thus refused to find that the presence of the Alabama subsidiary in North Carolina could be imputed to the parent to establish jurisdiction: "[W]e cannot say that for purposes of jurisdiction, the business of the Alabama corporation in North Carolina became the business of the defendant."[190]

On its face, and sometimes as applied, *Cannon* stands for the rigid proposition that so long as formal separation is maintained between a parent and subsidiary, the presence (or "doing business") of one in a state will not determine the jurisdiction of the other.[191] Indeed, in a case involving whether

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[184] 267 U.S. at 334.
[185] *Id.*
[186] *Id.* at 334–35.
[187] *Id.*
[188] *Id.* at 336 ("No question of the constitutional powers of the State, or of the federal Government, is directly presented."). *Cannon* was decided 13 years before the Court in *Erie Railroad v. Tompkins* held that federal courts sitting in diversity must apply state law. 304 U.S. 64, 79–80 (1938); *see also* Swain & Aguilar, *supra* note 183, at 456 (questioning *Cannon*'s authority on the basis that federal court's sitting in diversity must apply state law).
[189] *Cannon*, 267 U.S. at 335.
[190] *Id.* at 338.
[191] *Id.* at 337–38.

the district court had diversity jurisdiction, the Sixth Circuit has so stated the *Cannon* principle: "When formal separation is maintained between a corporate parent and its corporate subsidiary, federal court jurisdiction over the subsidiary is determined by that corporation's citizenship, not the citizenship of the parent."[192] And thus broadly viewed, *Cannon* imposes an even stricter requirement than traditional three-factor piercing, which would entertain disregarding an entity even if there were formal separation if the parent exercised substantial control over the subsidiary.[193]

However, it is important to recognize that *Cannon* was decided in 1925, "when American law still overwhelmingly reflected the formalistic approach of nineteenth-century jurisprudence" and when, due to the relative absence of long-arm statutes, "American courts were still relying on the concepts of presence and its corporate surrogate, doing business, as the analytical standards for determining the existence of jurisdiction."[194] As discussed above, the Court's 1945 decision in *International Shoe* shifted the constitutional jurisdictional analysis away from the type of formalism enshrined in *Cannon*.[195] Moreover, *Cannon* itself presented a narrow issue. It involved the construction of a North Carolina statute that established "doing business" as the standard for determining jurisdiction as it applied in deciding whether the federal courts had diversity jurisdiction over an out-of-state corporation.[196] Finally, because the Court seemingly based its holding on federal common law, it seems that *Cannon* would not have survived *Erie*.[197] Indeed, Blumberg notes that it seems "*Cannon* and formalism have become irrelevant."[198]

Thus, *Cannon* can fairly easily be distinguished on its facts or based upon the shift in the legal landscape since 1925. And it makes sense that although many lower courts (but not all, especially after *Erie* and *International Shoe*) have followed *Cannon*, they have done so with differing levels of vigor.[199] Perhaps surprisingly, then, in a 2004 empirical study, John

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[192] Schwartz v. Elec. Data Sys., Inc., 913 F.2d 279, 283 (6th Cir. 1990). The Sixth Circuit has also held to the contrary: "[T]he law relating to the fictions of agency and of separate corporate entity was developed for purposes other than determining amenability to personal jurisdiction, and the law of such amenability is merely confused by reference to these inapposite matters." Velandra v. Regie Nationale des Usines Renault, 336 F.2d 292, 297 (6th Cir. 1964). *But see* Pro Tanks Leasing v. Midwest Propane & Refined Fuels, LLC, 988 F. Supp. 2d 772, 778 (W.D. Ky. 2013) ("[T]he issue of personal jurisdiction largely turns on whether Midwest was the 'alter ego' of Innovative and Grundy.").

[193] *See* Swain & Aguilar, *supra* note 183, at 455–56; BLUMBERG ET AL., *supra* note 133, at 24-9 to -10.

[194] BLUMBERG ET AL., *supra* note 133, at 24-3; *see also* Brunswick Corp. v. Suzuki Motor Co., 575 F. Supp. 1412, 1418 (E.D. Wis. 1983) (noting *Cannon* was based on "old territorial due process notion" of *Pennoyer*).

[195] *See supra* Section II.A.2.

[196] *See Cannon*, 267 U.S. at 334.

[197] *See* Murray E. Knudsen, Comment, *Jurisdiction Over a Corporation Based on the Contracts of a Related Corporation: Time for a Rule of Attribution*, 92 DICK. L. REV. 917, 924 (1988).

[198] BLUMBERG ET AL., *supra* note 133, at 24-5.

[199] *See, e.g.*, Echeverry v. Kellogg Switchboard & Supply Co., 175 F.2d 900, 903 (2d Cir. 1949) ("In this field, realism, not formalism, should be dominant; the problem must be solved in the light of

Swain and Edwin Aguilar found that *Cannon* had been cited in at least 553 published decisions, which, in conjunction with other findings, led them to conclude that *Cannon* retains validity in modern courts.[200] However, and perhaps less surprisingly, many of the opinions citing *Cannon* do not actually apply *Cannon* strictly, and some courts have rejected its strict approach altogether.[201]

On the other hand, some courts have strictly followed *Cannon*. These courts have applied *Cannon* literally and refused to attribute one related entity's contacts to another to establish jurisdiction so long as the entities have maintained formal separation.[202] Yet other courts, while paying lip service to *Cannon*, have instead applied tests more akin (or in some cases identical) to those applied in the traditional veil-piercing context, such as a three-factor test, some sort of single-factor test, or the legislative policies standard.[203] For example, in *United Electric, Radio and Machine Workers v. 163 Pleasant Street Corp.*, the First Circuit cited *Cannon* as the default rule, noting that "[o]rdinarily, courts respect the legal independence of a corporation and its subsidiary when determining if a court's jurisdiction over the offspring begets jurisdiction over the parent."[204] However, rather than apply *Cannon*'s rigid rule, the court applied the relaxed federal standard for piercing when respecting the corporate form would "stymie legislative policies."[205] Thus, it held that

> a federal court, in deciding what veil-piercing test to apply,

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commercial actuality, not in the aura of juristic semantics."). See Brown, *supra* note 135, at 602–10, for a more in-depth discussion on the lines of cases following *Cannon*.

[200] Swain & Aguilar, *supra* note 183, at 456.

[201] *Id.* at 456–57; Knudsen, *supra* note 197, at 925. The Texas Supreme Court, for example, recently cited *Cannon* but then utilized a slightly less rigid test:

> "To 'fuse' the parent company and its subsidiary for jurisdictional purposes, the plaintiffs must prove the parent controls the internal business operations and affairs of the subsidiary. But the degree of control the parent exercises must be greater than that normally associated with common ownership and directorship; the evidence must show that the two entities cease to be separate so that the corporate fiction should be disregarded to prevent fraud or injustice."

PHC-Minden, L.P. v. Kimberly-Clark Corp., 235 S.W.3d 163, 175 (Tex. 2007) (quoting BMC Software Belg., N.V. v. Marchand, 83 S.W.3d 789, 799 (Tex. 2002)).

[202] *See, e.g.*, Schwartz v. Elec. Data Sys., Inc., 913 F.2d 279, 283 (6th Cir. 1990).

[203] *See, e.g.*, *Hargrave v. Fibreboard Corp.,* 710 F.2d 1154, 1159–60 (5th Cir. 1983) (holding that the degree of control by the parent must be greater than that normally associated with common ownership and directorship); Russell v. Enter. Rent-A-Car Co., 160 F. Supp. 2d 239, 251–52 (D.R.I. 2001) (citing De Castro v. Sanifill, Inc., 198 F.3d 282, 283–84 (1st Cir. 1999)) (noting that "in order to establish jurisdiction over a parent corporation, there must be 'strong and robust evidence' of parental control over the subsidiary rendering the latter a 'mere shell,'" while also noting that alter ego rule would alternatively allow the court to exercise jurisdiction over the parent); Kimble v. DPCE, Inc., No. 91-2290, 1991 WL 236468, at *2 (E.D. Pa. Nov. 5, 1991) (citing *Cannon* but then refusing to pierce because "plaintiff [had] not shown facts which support[ed] the finding of an alter ego relationship between DPCE and Granada"); Barber v. Pittsburgh Corning Corp., 464 A.2d 323, 330–32 (Pa. Super. Ct. 1983) (citing *Cannon* but finding that exercise of control by parent was sufficient for court to exercise jurisdiction).

[204] United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1091 (1st Cir. 1992).

[205] *Id.* at 1091–92; *see supra* Section II.B.1.

> should "look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form, an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine."[206]

In citing *Cannon* as authority, but then instead applying other piercing jurisprudence, courts muddle the distinction between substantive and jurisdictional precedents, which only further confuses this area of law.[207] Yet these precedents seem to indicate that much of the common-law piercing jurisprudence can—whether or not it should—apply to both jurisdictional and substantive issues. Moreover, most of the courts citing and applying *Cannon* do so without engaging in any analysis regarding its continued validity, and without asking whether *Cannon* actually applies in the given context.[208] Still other courts reject *Cannon* completely, instead relying on *International Shoe* and a minimum contacts analysis.[209] And as jurisdiction is really a question of due process rather than corporate law, many commentators have suggested that *Cannon* should be considered irrelevant today.[210]

b. *International Shoe* Applied and Due Process Analysis

Cannon was decided using federal common law (before *Erie*) and formal distinctions between entities rather than due process (before *International Shoe*). Yet, as discussed above, the decision retains what is perhaps surprising validity in modern courts. Nonetheless, other courts and many commentators have noted the limits of *Cannon* and have refused to apply it, instead focusing on *International Shoe*'s minimum contacts analysis.

Energy Reserves Group, Inc. v. Superior Oil Co. is a leading case in this regard. The issue in *Energy Reserves* arose in the context of a contract dispute.[211] Energy Reserves, the plaintiff, entered into a contract with Superior, a Nevada corporation over which jurisdiction was conceded.[212] Under that contract, Superior Overseas, a Nevada corporation with its principal place of business in England, although not party to the contract, incurred certain rights and obligations.[213] After Energy Reserves served

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[206] *United Elec., Radio & Mach. Workers*, 960 F.2d at 1092.

[207] *See* Floyd v. IRS, 151 F.3d 1295, 1299 n.4 (10th Cir. 1998) (noting that jurisdictional piercing precedents should not be relied upon in the substantive context); Rasmussen v. GMC, 803 N.W.2d 623, 641 (Wis. 2011) (Abrahamson, C.J., concurring) ("[T]he circuit court and the majority opinion tread in murky waters when they use indeterminate substantive legal tests, such as piercing the corporate veil, to determine whether general personal jurisdiction lies.").

[208] *See, e.g.*, Alvarado-Morales v. Dig. Equip. Corp., 843 F.2d 613, 616 (1st Cir. 1988) (citing *Cannon* but then saying corporate separateness could be overcome under traditional veil piercing theory without discussing whether or why *Cannon* actually applied).

[209] *See infra* Section II.B.2.b.

[210] *See, e.g.*, Schwartz, *supra* note 117, at 753; Brilmayer & Paisley, *supra* note 117, at 3–4.

[211] 460 F. Supp. 483, 488–89 (D. Kan. 1978).

[212] *Id.*

[213] *Id*

Superior Overseas in Texas pursuant to the Kansas long-arm statute, Superior Overseas contested personal jurisdiction.[214]

Superior and Superior Overseas argued both that "the two corporations have scrupulously maintained their separate corporate identities and that plaintiffs have demonstrated none of those facts necessary for a finding that the corporate veil may be pierced[] [and] that [they] lack[ed] contacts with the form sufficient to render proper [the court's] exercise of jurisdiction."[215] Declining to decide whether the veil could be pierced, the court found jurisdiction over Superior Overseas.[216] Specifically, it concluded "that alter ego principles no longer play any proper role in the analysis of the constitutional propriety of the exercise of jurisdiction properly invoked by service authorized by statute."[217]

In coming to this conclusion, the *Energy Reserves* court extensively examined federal jurisdiction jurisprudence, to which it found *Cannon* inapposite.[218] That was so, the court reasoned, because *Cannon* was both based on the physical presence doctrine of *Pennoyer* and decided during the reign of the "doing business" test for jurisdiction over corporations.[219] Given the fact that *International Shoe* and *Shaffer* had abolished the presence requirement for jurisdiction, the court determined that "doing business" was no longer a necessary analysis.[220]

A number of courts and commentators have reached similar conclusions and thus denounced *Cannon* as controlling, at least in many circumstances.[221] In *Metro-Goldwyn-Mayer Studios v. Grokster*, for example, the Central District of California held that although "[m]any courts conflate the requirements of due process and alter ego liability[,] . . . the 'minimum contacts' approach of *International Shoe* clearly has supplanted

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[214] *Id.* at 489.

[215] *Id.*

[216] *Id.* ("Relying on the concepts of fundamental fairness and substantial justice, this Court is compelled to hold that personal jurisdiction over Superior Overseas is both authorized by statute and properly within the confines of the due process clause of the Fourteenth Amendment.").

[217] *Id.* at 490.

[218] *Id.* ("[Cannon] must no longer be followed. The Court finds Cannon to be limited in scope or modified in holding by International Shoe and its progeny. Reliance on the rule of Cannon is unsound when extraterritorial service is authorized by statute and when personal jurisdiction is predicated on the due process standards of International Shoe.").

[219] *Id.* at 498.

[220] *Id.* at 496.

[221] *See, e.g.*, Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977) (reversing district court's application of *Cannon* and remanding for full jurisdictional analysis); Velandra v. Regie Nationale des Usines Renault, 336 F.2d 292, 297 (6th Cir. 1964) ("[T]he law relating to the fictions of agency and of separate corporate entity was developed for purposes other than determining amenability to personal jurisdiction, and the law of such amenability is merely confused by reference to these inapposite matters."); Alto Eldorado P'ship v. Amrep Corp., 124 P.3d 585, 593 (N.M. Ct. App. 2005) ("This Court is not bound by [*Cannon*'s] restraints."); Brunswick Corp. v. Suzuki Motor Co., 575 F. Supp. 1412, 1419–21 (E.D. Wis. 1983) ("[A]lter ego principles have no place in assessing the constitutionality of an exercise of jurisdiction . . . ."); Brilmayer & Paisley, *supra* note 117.

the mechanical, formalistic approach of cases like *Cannon*."[222] Notably, that court also went on to observe that "[i]n the parent-subsidiary context, several courts have articulated [the minimum contacts analysis] as a requirement that plaintiff show either '(1) *attribution*, that the absent parent instigated the subsidiary's local activity; or (2) *merger*, that the absent parent and the subsidiary are in fact a single legal entity.'"[223] Ultimately, the *Grokster* court found that the entity relationship at issue "include[d] the indicia of both attribution and merger," and thus jurisdiction over the parent was proper.[224]

c. Summary

Jurisdictional veil-piercing law is in flux. Some courts apply *Cannon*, many others purport to apply *Cannon* but instead apply traditional veil-piercing standards, while still others reject *Cannon* as anachronistic and apply *International Shoe*'s minimum contacts analysis. Litigants and courts in this area thus are confronted with varying and often inconsistent precedents, which, while confusing, seemingly also provide additional arguments for plaintiffs seeking to pierce.

III. VEIL PIERCING AS A MEANS TO HALE FOREIGN CORPORATIONS INTO U.S. COURTS

In both *Bauman* and *Goodyear*, the Supreme Court refused to weigh in on the viability of veil piercing to hale foreign corporations into U.S. courts on the basis of their subsidiaries' contacts.[225] In *Goodyear*, the Court found that the plaintiffs had forfeited their veil-piercing argument, leaving few clues as to how the Court might view such a claim and citing a law review article explaining jurisdictional veil piercing.[226] In that article, Brilmayer and Paisley argue that state veil-piercing standards, rather than a unified federal standard, should generally apply to jurisdictional veil piercing: "[D]ue process should take into account only bona fide state substantive relations, and that it should truncate such substantive relations only in certain limited circumstances."[227] The question to be asked, they contend, "ought not to be whether the defendant is protecting itself from suit. Instead, the question should be whether the defendant in so protecting itself is undermining or

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[222] 243 F. Supp. 2d 1073, 1098 (C.D. Cal. 2003).

[223] *Id.* at 1099 (quoting Third Nat'l Bank v. WEDGE Grp. Inc., 882 F.2d 1087, 1094 (6th Cir. 1989) (Keith, J., concurring)). These concepts are explained in-depth in Brilmayer and Paisley's article. *See* Brilmayer & Paisley, *supra* note 117.

[224] 243 F. Supp. 2d at 1100.

[225] Daimler AG v. Bauman, 134 S. Ct. 746, 759 (2014) (discussing, but not passing judgment on, alter ego and agency theories for obtaining general jurisdiction over foreign affiliates); Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2857 (2011) (acknowledging jurisdictional veil piercing theory, but declining to address it because it was not previously raised).

[226] *Goodyear*, 131 S. Ct. at 2857 (citing Brilmayer & Paisley, *supra* note 117, at 29–30).

[227] Brilmayer & Paisley, *supra* note 117, at 28. *But see* Schwartz, *supra* note 117, at 753 (proposing a uniform jurisdictional veil piercing test grounded in federal due process rather than traditional state veil piercing standards).

furthering the underlying policies."[228] One could try to argue that such a citation supports using traditional piercing standards in jurisdictional cases, which also seems to be what courts are doing, but as the Court did not comment on the merits of the article, no strong inferences can be made.

Bauman likewise offers little help. There, the Court gave a slight hint in that it shot down the Ninth Circuit's analysis, but it did not give any view as to whether traditional veil piercing, or any analysis that would *not* always "yield a pro-jurisdiction answer," would be permissible.[229] The question is thus open, and lower courts are left to iron out the details of jurisdictional veil piercing, which, as discussed above, is a particularly muddled area of law.[230] Such opacity likely means that there will be hurdles in veil-piercing law for foreign human rights plaintiffs (or any plaintiffs) attempting to jurisdictionally pierce a U.S. subsidiary to reach a foreign parent. Yet if they can be overcome, veil piercing also seems to present an opportunity for litigants scratching their heads after *Bauman* and the Court's recent curtailment of general jurisdiction. Before getting into *how* these litigants might be able to pierce in line with existing law, however, it is necessary to discuss *why* jurisdictional veil piercing could make sense in the human rights litigation context.[231]

A. Does Veil Piercing Make Sense in Human Rights Claims?

As discussed above, veil piercing is a "tool of equity . . . appropriately utilized 'when the court must prevent fraud, illegality, or injustice, or when the recognition of the corporate entity would defeat public policy or shield someone from liability for a crime.'"[232] Piercing U.S. subsidiaries to reach foreign parent corporations that have committed human rights violations abroad is thus arguably consistent with the broader purposes of veil piercing. As discussed in Part II, because outside of U.S. courts foreign plaintiffs will often have no other recourse against foreign corporations for human rights violations committed abroad, not piercing the veil in such cases to obtain jurisdiction over the foreign parent defeats the broad public policy of providing redress for victims of human rights violations and shields the

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[228] Brilmayer & Paisley, *supra* note 117, at 32.

[229] *See Bauman*, 134 S. Ct. at 759.

[230] *See supra* Section II.B; *see also* Brown, *supra* note 135, at 595 ("When the haze of state jurisdictional law collides with the metaphor-filled fog of the 'piercing the corporate veil' doctrine, the result is, predictably, a smog of the thickest variety.").

[231] *See* Jodie A. Kirshner, *Why Is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30 BERKELEY J. INT'L L. 259, 265 (2012) (noting the consequences of applying limited liability to multinational corporations is such that "[m]ultinationals can exploit [limited liability] to shield parent corporations from liability for human rights abuses committed by their foreign subsidiaries").

[232] Publicker Indus., Inc. v. Roman Ceramics Corp., 603 F.2d 1065, 1069 (3d Cir. 1979) (quoting Zubik v. Zubik, 384 F.2d 267, 272 (3d Cir. 1967)). Former Harvard Dean Robert Clark argues inequitable conduct—or the use of the corporate form to commit a fraud or misrepresentation—is the lynchpin of veil piercing analysis. *See* ROBERT C. CLARK, CORPORATE LAW § 2.1, at 37–38 (1986).

foreign parent for its bad acts.[233] From the broadest policy lens, therefore, relaxed piercing in human rights cases is a reasonably good fit. But the strength of the argument for piercing varies depending on the level of generality at which the public policy is viewed, as well as the policy that is considered. From at least some perspectives, it can be argued that even from a narrower policy lens, piercing to hale foreign parents into U.S. courts furthers the equitable purposes of piercing and of the substantive law of human rights.

To start, the broad goals of veil piercing fit fairly well.[234] The principle justification for limited liability is to encourage investors to fund new investments.[235] This justification, and indeed a number of other justifications advanced for limited liability, has little or no application in the parent-subsidiary context.[236] Thus, "courts have evinced a 'greater willingness to reach the assets of corporate as opposed to personal shareholders.'"[237] However, as commentators have noted, this may not be driving the courts completely, as limited liability "continues to apply to corporate owners within multinational corporations, without distinguishing their incentives from those of human investors."[238] This can have a negative effect in certain human rights cases, as multinational corporations can "strategically insulate dangerous activities within separate entities, [which] ensures that each one remains legally separate in spite of their economic interdependence, and [then] limited liability protects the parent corporations against responsibility."[239] In certain cases (e.g., when a parent sets up a subsidiary in a high-risk area knowing it might engage in human rights violations), allowing the parent corporations to avoid liability by way of the corporate veil seems to be pretty inequitable.

Moreover, the corporate form ought not to be a tool to encourage wrongful conduct.[240] Indeed, it seems that this concern was the impetus for the creation of piercing as an equitable remedy in the first place.[241] In the substantive liability context, it has been observed that "[i]f those in control of

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[233] *See supra* notes 225–31 and accompanying text; *see also* Kirshner, *supra* note 231, at 265.

[234] *See* Brilmayer & Paisley, *supra* note 117, at 32 ("[T]he question should be whether the defendant in so protecting itself is undermining or furthering the underlying policies.").

[235] *See* Blumberg, *supra* note 142, at 574–75.

[236] FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 41–62 (1991) (discussing bases for limited liability, none of which apply to the parent-subsidiary context); Kirshner, *supra* note 231, at 265.

[237] Birbara v. Locke, 99 F.3d 1233, 1237 n.3 (1st Cir. 1996); White v. Winchester Land Dev. Corp., 584 S.W.2d 56, 62 (Ky. Ct. App. 1979). *But see* Matheson, *supra* note 143, at 1091.

[238] Kirshner, *supra* note 231, at 265.

[239] *Id.*

[240] *See* David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1348 (2007) ("It is not at all clear that shareholders who behave opportunistically should . . . enjoy the limited liability shield.").

[241] *See* United States v. Milwaukee Refrigerator Transit Co., 142 F. 247, 255 (C.C.E.D. Wis. 1905) (piercing should be available whenever the "entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime").

a corporation cause it to engage in conduct that is likely to result in injury to third parties, they act irresponsibly if the corporation lacks the means to pay compensation through liability insurance or cash reserves."[242] The concern is that corporate groups or actors will utilize the corporate form to unduly shift the risk of their dangerous activities onto tort victims.[243] In the jurisdictional context this concern, while of a different flavor, is of the same essence. Even if there is no financial irresponsibility, the mere use of the corporate form to shield alien parents or subsidiaries means that those alien entities will not be amenable to jurisdiction and thus will not be held liable, at all, for their wrongful acts. Arguably, to achieve the same equitable goal in the jurisdictional context, piercing should be utilized more liberally.

The policy relating to the vindication of human rights, while intertwined with some of the veil-piercing policy discussed above, also appears to favor relaxed piercing when foreign human rights plaintiffs sue foreign corporations for foreign conduct in U.S. courts. That is because "[a]bsent a cause of action in the United States courts, some of the most egregious cases of human rights violations might go unheard because regimes that commit the most serious human rights abuses often possess the most woefully inadequate legal mechanisms for redressing those abuses."[244] Congress appears to have recognized as much and has responded by enacting the Torture Victim Protection Act of 1991 ("TVPA")—"[a]n Act [t]o carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing."[245] More specifically, the TVPA was enacted to "carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [(the "CAT")], which was ratified by the U.S. Senate" in 1990 "by making sure that torturers and death squads will no longer have a safe haven in the United States."[246] Congress, by enacting the TVPA, has evinced what appears to be a clear federal policy of protecting international human rights.[247] Piercing the veil of

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[242] Millon, *supra* note 240, at 1373.

[243] *Id.* at 1347 (recognizing that while "limited liability is designed to function as a risk allocation device[,] . . . [i]t is not at all clear that shareholders who behave opportunistically should also enjoy the limited liability shield"); *see also* Kirshner, *supra* note 231, at 264 ("Many multinational corporations operate in conflict-affected regions where 'bad things are known to happen,' structuring their risky ventures to avoid liability.").

[244] Arce v. Garcia, 434 F.3d 1254, 1261–62 (11th Cir. 2006).

[245] Torture Victim Protection Act of 1991, H.R. 2092, 102d Cong. (1992); *see also* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as note to 28 U.S.C. § 1350).

[246] S. REP. NO. 102-249, at 3 (1991).

[247] Chavez v. Carranza, 559 F.3d 486, 492 (6th Cir. 2009) ("The TVPA and the ATS share a common purpose in protecting human rights internationally."); *see also* S. REP. NO. 102-249, at 3–4 ("Judicial protection against flagrant human rights violations is often least effective in those countries where such abuses are most prevalent. A state that practices torture and summary execution is not one that adheres to the rule of law. Consequently, the Torture Victim Protection Act (TVPA) is designed to respond to this situation by providing a civil cause of action in U.S. courts for torture committed abroad.").

foreign parent corporations engaged in human rights violations abroad so as to subject them to U.S. court jurisdiction, when victims would otherwise be unable to recover, would arguably further this policy.

But, as to this, the level of generality with which one argues the TVPA's policy is important. Sure, the TVPA was enacted in large part pursuant to the CAT,[248] and that multilateral treaty provides that "[e]ach State Party shall ensure that all acts of torture are offences under its criminal law"[249] and "shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation."[250] To be sure, however, "torture" is confined to acts "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[251] Aside from this "state action"-like requirement, the treaty is pretty broad, and there is support in the legislative history of the TVPA for a similarly broad policy understanding.[252] Yet a narrower focus on the text of the TVPA itself brings to light a few major problems as to its applicability in the piercing context. For starters, like the CAT, the TVPA explicitly limits itself to actions against individuals "under actual or apparent authority, or color of law, of any foreign nation."[253] This is of course a hurdle, but perhaps not an insurmountable one given the fact that in a number of the cases in which companies are alleged to have engaged in torture violations, they were acting in cahoots with the foreign nation's government. The bigger problem, it seems, is that the TVPA establishes "a civil action for recovery of damages *from an individual* who engages in torture or extrajudicial killing."[254] And the TVPA's use of "individual," per the Court's opinion in *anderd v. Palestinian Authority*, means "that the Act authorizes liability solely against natural persons."[255] In short, the TVPA does not apply to corporations.

More generally, however, the broader policy driving the TVPA is that of the CAT and thus is not limited to natural persons.[256] Indeed, the CAT defines torture without reference to whether it is inflicted by an individual or other entity,[257] and requires signatories to ensure redress is available in their

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[248] The CAT has been ratified by the United States. *See* H.R. REP. NO. 102-367(I), at 3 (1991).

[249] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, Apr. 18, 1988, 1465 U.N.T.S. 85 [hereinafter CAT].

[250] *Id.* art. 14.

[251] *Id.* art. 1.

[252] *See id.*; *see also* S. REP. NO. 102-249, at 3–5 (1991).

[253] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as note to 28 U.S.C. § 1350).

[254] *See id.*

[255] 132 S. Ct. 1702, 1707–08 (2012).

[256] *See generally* CAT, *supra* note 249 (enacted "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world" and defining torture broadly).

[257] *See id.* art. 1.

respective legal systems.[258] That policy might be especially strong when asking whether veil piercing is appropriate in the human rights litigation context because veil piercing allows the United States to better comply with its treaty obligations. When the United States ratified the CAT and enacted the TVPA, the ATS was still a viable means of bringing suit against juridical entities for torture violations under *Filartiga*.[259] Thus, at the time, the United States had in place laws that were interpreted to more fully implement the CAT (which is not self-executing). Indeed, the Senate recognized as much when enacting the TVPA, noting that "claims [under the TVPA] do not exhaust the list of actions that may appropriately be covered by [the ATS]" and therefore concluding that "that statute should remain intact."[260]

But *Kiobel* and *Bauman* create a gap in the availability of redress for victims of foreign human rights violations. Under the CAT, assuming the color-of-law requirement is satisfied, the United States is obliged to provide redress for victims of torture.[261] Yet, as discussed above, under current law and without veil piercing, victims of torture at the hands of multinational corporations will often have no redress in U.S. courts, either because they cannot establish subject-matter jurisdiction under *Kiobel* or personal jurisdiction under *Bauman*. Piercing seemingly provides a way to remedy or at least reduce this gap.[262] Accordingly, because piercing the parent-subsidiary veil in order to obtain jurisdiction over foreign corporations that commit human rights violations would serve the purposes of veil piercing, be in line with the objectives of limited liability, and (at least from a broad policy lens) further the federal policy of providing redress for human rights violations, piercing the veil in these cases makes some sense.

B. How Should Litigants Argue?

Preventing use of the corporate form for injustice is the broad policy of veil piercing. Over time, however, courts have applied this policy to produce seemingly incoherent and inconsistent results. Some have even crafted rigid doctrines—such as three-factor piercing—that seem to preclude equitable results in some cases. *Cannon* is one of these doctrines, and it seems to present an insurmountable burden for human rights plaintiffs seeking to pierce the veil between parents and subsidiaries of multinational corporations. Broadly applied, it probably does. But, as discussed in Section II.B, veil-piercing doctrine is far from settled, and most courts do not apply *Cannon* as

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[258] *Id.* art. 14 ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.").

[259] *See* S. REP. NO. 102-249, at 5 (1991) ("[T]he TVPA would extend a civil remedy [beyond that already existing to aliens under the ATS] to U.S. citizens who may have been tortured abroad.").

[260] *Id.*

[261] *See* CAT, *supra* note 249, art. 14.

[262] Judicial gap-filling is neither entirely unobjectionable nor always desirable. I address overcoming such concerns in Section III.B.2 below.

strictly as it may read. Human rights plaintiffs and courts alike should recognize the unsettled state of the law in this area, which presents opportunity to plaintiffs and (for better or worse) flexibility for courts.[263] And plaintiffs have weapons within the arsenal of existing law with which they can argue that the inequities—in human rights cases, the use of the corporate form to avoid liability for the commission of human rights violations—justify piercing.

1. Policy and Purpose

As discussed in Section III.A, the policy underlying veil piercing and human rights gives plaintiffs what is perhaps their strongest argument for piercing. Veil piercing is an equitable check on the principle of limited liability meant to ensure that the corporate form is not used to perpetuate injustice or cause harm. In the context of obtaining jurisdiction over a corporate parent in human rights litigation, especially after *Goodyear* and *Bauman*, veil piercing might be necessary for the plaintiff to recover at all. Absent veil piercing, savvy foreign parent corporations can reap any putative business benefits of dangerous activities without fear of liability by carefully separating the corporation into distinct subparts. As the United States is a primary and favorable forum used by human rights litigants,[264] the corporate form (sans veil piercing) can somewhat easily be used by foreign parents to insulate themselves from being haled into U.S. court altogether.

In addition to the public policy behind veil piercing and human rights, it is interesting to note that Justice Sotomayor's *Bauman* concurrence is relevant here. As discussed above, in addition to criticizing the majority's rationale, she predicted that "the ultimate effect of the [*Bauman*] majority's approach will be to shift the risk of loss from multinational corporations to the individuals harmed by their actions."[265] And further that "the majority's approach would preclude" plaintiffs harmed by multinational corporations abroad "from seeking recourse anywhere in the United States even if no other judicial system was available to provide relief."[266] Though her concerns are legitimate, her prediction need not come true. Without veil piercing, after *Bauman*, the risk will seemingly be shifted to victims of corporate malfeasance. However, veil piercing provides an escape hatch to Justice Sotomayor's dystopia by allowing plaintiffs harmed abroad, who would otherwise be unable to hale a foreign parent into U.S. court via general

[263] *See* Strasser, *supra* note 143, at 639 ("[I]n the context of corporate groups, the veil piercing rules have been sufficiently abstract, malleable, and vague to allow some courts to reach good results.").

[264] *See* Arce v. Garcia, 434 F.3d 1254, 1261–62 (11th Cir. 2006).

[265] Daimler AG v. Bauman, 134 S. Ct. 746, 773 (2014) (Sotomayor, J., concurring) (noting that "[u]nder the majority's rule, for example, a parent whose child is maimed due to the negligence of a foreign hotel owned by a multinational conglomerate will be unable to hold the hotel to account in a single U.S. court, even if the hotel company has a massive presence in multiple States").

[266] *Id.*

jurisdiction alone, to hale that parent into U.S. court by piercing the veil between it and its U.S. subsidiary.[267] By using veil piercing, therefore, these plaintiffs would potentially have relief in the United States.

Moreover, Justice Sotomayor's parity concern—what she called "too big for general jurisdiction"—would be neutralized.[268] She noted that a result of the majority's reasoning would be that multinational corporations could immunize themselves from amenability in U.S. courts, but small multinationals doing significant business in the United States would be haled into court to answer for their wrongs abroad.[269] This rationale likewise shows that *Bauman* favors foreign over U.S. corporations.[270] Under *Bauman*, when a U.S. corporation harms a plaintiff abroad, that plaintiff will be able to bring that corporation into court somewhere in the United States. However, the same plaintiff under the same facts suing a foreign corporation—even one with extensive U.S. business operations and subsidiaries—might find it near impossible to establish personal jurisdiction. Using veil piercing would minimize this disparity, as it would allow the large, multinational corporation to be haled into U.S. courts for its conduct abroad, even if its operations in a given state did not meet *Bauman*'s proportionally test.

2. Legislative Policies Standard: Relief for Human Rights Victims

In terms of established veil-piercing standards, the best fit for international human rights might be within the Supreme Court-sanctioned "legislative policies" veil-piercing test discussed above.[271] The argument for the fit is a simple syllogism: There is an expressed legislative policy to provide relief and a forum for international human rights violations. And courts should disregard the corporate entity "where it is interposed to defeat legislative policies."[272] Therefore, courts should disregard the corporate entity where it is being used to immunize multinational corporations who have engaged in human rights violations from U.S. court jurisdiction, which in turn obstructs international human rights plaintiffs' access to potential relief.

This argument seems to have some normative appeal. It takes into account the policies behind veil piercing in addition to those behind international human rights, which are also, as discussed above, federally expressed policies.[273] And the Court's announcement of this federal

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[267] This applies to multinational corporations that have a U.S. subsidiary, subject to general jurisdiction somewhere in the United States, that the plaintiff could use to hale the parent into court.

[268] *See Bauman*, 134 S. Ct. at 764 (Sotomayor, J., concurring).

[269] *See id.*

[270] *See supra* Section II.A.2.

[271] *See, e.g.*, Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co., 417 U.S. 703, 713 (1974).

[272] First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 630 (1983) (citing Anderson v. Abbott, 321 U.S. 349, 362–63 (1944)).

[273] *See supra* notes 232–35 and accompanying text.

standard—"that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement"[274]—certainly supports relaxed piercing to ensure that the legislative policy of providing relief to human rights victims is not impeded.

Piercing the veil to obtain jurisdiction in international human rights cases also at least reasonably (although not perfectly)[275] fits within the caselaw where the Supreme Court's legislative policies standard has been applied. In *Anderson*, for example, the Court pierced the veil between the bank and holding company and imposed liability on the holding company's shareholders even though it assumed the holding company "was organized in good faith and was not a sham; that it was not organized for a fraudulent purpose or to conceal enterprises conducted for the benefit of the Bank" and "that it was not formed as a means for avoiding double liability on the stock of the Bank . . . ."[276] Moreover, the organization of the holding company had been legal. Yet the Court still found veil piercing appropriate based on legislative policy alone:

> The legislative policy which Congress had long announced was the policy of double liability. It is that policy with which we are here concerned. It is that policy, declared by Congress, which the judicial power may appropriately protect in the way we have indicated, in absence of a choice by Congress of another method.[277]

Like in *Anderson*, the human rights plaintiff would likely be dealing with a corporation split into various parts, although not necessarily one split with a clear purpose of avoiding liability for human rights violations. Under *Anderson*, however, this would not matter. The court could assume good faith and non-fraudulent purposes and yet still find the veil should be pierced because "[t]he legislative policy which Congress had long announced [is] the policy of [relief for human rights victims]" and "the interposition of a corporation [would] . . . defeat [that] legislative policy," even if that was not the aim but only the result of the corporate organization.[278]

Likewise, a plaintiff might look to a case like *General Telephone Co.*

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[274] *Anderson*, 321 U.S. at 363; *see also* Askew v. R & L Transfer, Inc., 676 F. Supp. 2d 1298, 1305 (M.D. Ala. 2009). In 1983, the Court reaffirmed *Anderson*'s standard and, in rejecting an appeal to use alter ego and instrumentality doctrines when national policies were at stake, even warned "against permitting worn epithets to substitute for rigorous analysis." *First Nat'l City Bank*, 462 U.S. at 623.

[275] Some courts have interpreted the legislative policies standard to only relax state common law piercing standards, rather than rejecting them. *See, e.g.*, Seymour v. Hull & Moreland Eng'g, 605 F.2d 1105, 1111 (9th Cir. 1979) (quoting *Bangor Punta Operations Inc.*, 417 U.S. at 713) (noting that the "corporate form may be disregarded where used 'to defeat an overriding public policy,'" but then applying a test more closely resembling a traditional alter ego test); *see also* Zubik v. Zubik, 384 F.2d 267, 272–74 (3d Cir. 1967) (citing *Anderson* but then proceeding to discuss whether formalities were observed).

[276] 321 U.S. at 356.

[277] *Id.* at 365.

[278] *See id.* at 363, 365.

v. United States, where the Fifth Circuit held that the veil could be pierced between non-common-carrier affiliates and their common carrier parent because to hold otherwise would frustrate a statutory purpose of the Communications Act of 1934.[279] There the court noted that "[w]here the statutory purpose could thus be easily frustrated through the use of separate corporate entities," the veil between parents and their subsidiaries could be properly pierced.[280] This holding could support the human rights plaintiff's argument to apply the same piercing standard. And, notably, this standard has applied in a number of other contexts, including in federal tax law, labor law, administrative law, the False Claims Act, and criminal forfeiture.[281]

But this fit is not perfect. Most of the courts applying this federal piercing standard have considered federally regulated areas of law or situations in which the federal government has a financial stake. Unlike some of these cases (e.g., New Deal cases), although the TVPA is a conduct-regulating statute,[282] neither the TVPA nor ATS is part of a broader regulatory scheme.[283] Litigants could thus run into problems because while the "providing relief for human rights violations" policy rationale fits within the general legislative policies standard expressed by the Court, the fit within the relevant caselaw is not seamless.[284] But an imperfect fit is probably not fatal, especially because to disregard the corporate form in such situations would advance the expressed legislative policy of providing relief for human rights victims. Still, plaintiffs should be wary. Courts may reject such arguments and could fairly distinguish cases applying the federal legislative policies standard. Plaintiffs can, in turn, argue for coherency in legislative policies piercing: piercing to prevent a foreign parent that has allegedly committed human rights violations from skirting U.S. jurisdiction supports not only expressed federal international human rights policy, but also the policies

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[279] 449 F.2d 846, 855 (5th Cir. 1971).

[280] *See id.*; *see also* Transcon. Gas Pipe Line Corp. v. FERC, 998 F.2d 1313, 1321 (5th Cir. 1993); MCI Telecomms. Corp. v. O'Brien Mktg., Inc., 913 F. Supp. 1536, 1544 (S.D. Fla. 1995) ("[P]iercing the corporate veil in the instant case furthers a purpose of the [law] . . . .").

[281] United States v. Emor, 850 F. Supp. 2d 176, 205 (D.D.C. 2012).

[282] Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008) ("[T]he [TVPA] provides a cause of action for torture and extrajudicial killing . . . when either the [ATS] or the federal question statute . . . provides jurisdiction.").

[283] The ATS does not regulate conduct; it is merely a jurisdictional statute that authorizes certain claims in federal courts. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004). For its part, the TVPA is not part of the U.S. Code at all; instead, it appears as a note to the ATS. *See* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as note to 28 U.S.C. § 1350). But "[t]hat the TVPA, which was published in the Statutes at Large, appears in the [U.S.] Code as a historical and statutory note to the [ATS] does not make the TVPA any less the law of the land." Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1251 (11th Cir. 2005).

[284] One could additionally argue that the federal policies at issue do not explicitly supplant state law veil piercing standards. *See* Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 857 (1982) (noting that in "these circumstances, some courts have automatically adopted state corporate law standards to fill the statutory gaps," but arguing that the "automatic application of state law in the absence of express statutory guidelines ignores legal realities"). However, "most federal courts have not deferred to state law in the absence of express federal statutory standards; instead, they have resolved corporate veil questions under federal common law." *Id.* at 858.

underlying the doctrine of veil piercing generally.

As discussed above, the level of generality is also important—and potentially determinative. The TVPA does not by its terms apply to corporations, but its broader policy and the text of the CAT does.[285] Together with the ATS (at least as it was interpreted prior to *Kiobel*), the TVPA *used to* more comprehensively implement the CAT.[286] Now, however, there is a gap when it comes to corporations.[287] Plaintiffs should attempt to argue that closing this gap—and thereby implementing the CAT—justifies the utilization of piercing to obtain jurisdiction over corporate human rights offenders who might otherwise skirt not only amenability to suit, but by natural extension, liability.

But doing so is not entirely unobjectionable. In effect, the argument is for judicial gap-filling to implement the terms of a non-self-executing treaty. Congress, however, did not write the TVPA so broadly, and *Kiobel* says the ATS does not apply extraterritorially, which limits the ATS's efficacy in reaching foreign human rights violations. While potentially troublesome, this objection might also provide an important limiting principal to human rights piercing. That is, because the TVPA does not apply to corporations, plaintiffs must find subject-matter jurisdiction elsewhere. If in federal court, the best option might still be the ATS, even as limited by *Kiobel.* Piercing, therefore, should arguably not occur unless the underlying claims over which the U.S. court has subject-matter jurisdiction are at least facially viable. By arguing as much, plaintiffs would use the ATS to both *limit* and *bolster* their veil-piercing argument. The ATS of course *limits* the breadth of the argument because only human rights claims that sufficiently touch and concern the United States permit an ATS claim and therefore—under this limited theory—are viable piercing candidates.[288]

But by limiting, plaintiffs also *bolster* their argument. To start, by incorporating the ATS as it can viably be applied (and not just the general policy underlying it and the TVPA), plaintiffs provide courts with a more concrete policy basis with which to pierce via federal policy piercing. That is, by incorporating the ATS per *Kiobel*, not only do plaintiffs identify an

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[285] *See* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as note to 28 U.S.C. § 1350); S. REP. NO. 102-249 (1991); CAT, *supra* note 249; Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530 (4th Cir. 2014) ("The political branches already have indicated that the United States will not tolerate acts of torture, whether committed by United States citizens or by foreign nationals. . . . [T]he TVPA's broad prohibition against torture reflects Congress's recognition of a 'distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.'" (quoting Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1671 (2013) (Breyer, J., concurring))).

[286] *See* S. REP. NO. 102-249, at 5 (1991).

[287] *See supra* note 262 and accompanying text.

[288] *See Kiobel*, 133 S. Ct. at 1669; *see also* Clegg, *supra* note 4, at 394 ("When a defendant commits conduct within the United States that is an essential step in a scheme to consummate conduct abroad giving rise to a claim under the ATS, the essential step doctrine should be invoked to show that the claim touches and concerns the United States with sufficient force to displace the presumption.").

abstract federal policy, they also provide an applicable statute implementing that policy. Due to the nature of veil piercing, moreover, use of the ATS may assuage some of the discomfort courts may (quite rightly) feel about piercing via a policy for purposes of personal jurisdiction without some assurance that the underlying substantive law will support a viable cause of action. By at least stating a facially viable claim under the ATS, therefore, plaintiffs can provide courts with a more concrete "federal policy" by which to pierce *and* offer some assurance that such piercing will not be for naught. Finally, and relatedly, because common-law courts generally look to effect only incremental changes in the law (if any),[289] a narrower view of federal interests piercing pursuant to the ATS (as supported by the policy underlying the TVPA and CAT) is more likely to gain traction. In other words, the side effects of such a standard are limited by *Kiobel*; only *Bauman* is sidestepped, and only in a narrow set of circumstances.

3. Single-Factor Piercing

Given the disarray in veil-piercing law, courts could also at least plausibly consider using the corporate form to commit human rights violations as inequitable conduct under single-factor piercing tests.[290] While this is not technically a *Cannon* compliant, courts have evinced a willingness to depart from *Cannon* to achieve equitable (or even desirable) results.[291] Single-factor piercing tests have some support in jurisprudence, and thus a variant of single-factor piercing could potentially be an option for courts to pierce the veil on the basis of a multinational corporation's use of formal separation to insulate itself from amenability to jurisdiction in human rights cases.[292]

However, there are a few major concerns with seeking to use single-factor piercing tests. First, not all jurisdictions have a single-factor piercing test that only considers inequitable conduct.[293] Indeed, many single-factor tests instead look to the degree of separation alone, and thus consider only corporate formalities.[294] Second, even if a jurisdiction does recognize a single-factor piercing test based on inequitable conduct, those same courts often simultaneously apply traditional three-factor piercing tests.[295] This means that the court may or may not decide to recognize a single-factor test,

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[289] *Cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U CHI. L. REV. 1175, 1177 (1989) ("The law grows and develops, the [common-law] theory goes, not through the pronouncement of general principles, but case-by-case, deliberately, incrementally, one-step-at-a-time.").

[290] *See supra* notes 152–56 and accompanying text.

[291] *See supra* notes 152–56 and accompanying text.

[292] *See* Strasser, *supra* note 143, at 643 (noting some "single factor cases base[] their decisions to pierce on the fact of wrongful conduct alone[] . . . [and] the potential list of kinds of wrongful conduct is limitless").

[293] *See* BLUMBERG ET AL., *supra* note 133, at 10-29 to -30.

[294] *See, e.g.*, Browning-Ferris Indus. v. Ter Maat, 195 F.3d 953, 960 (7th Cir. 1999); BLUMBERG ET AL., *supra* note 133, at 12-9.

[295] *See supra* Section II.B.

even if recognized in the past, if it has a more widely used three-factor alternative at its disposal. A litigant arguing for a single-factor test would want to focus on the policy behind piercing and the inequity of depriving a human rights plaintiff of relief, but given the uncertainty attendant with single-factor tests, this route—although it might have potential with the right court or judge—seems to be less viable than the legislative policies standard.[296] Nonetheless, the arguments may coalesce into one; that is, even if a court does not want to utilize legislative policies for one defect or another, the broader policy argument might still justify single-factor piercing.

4. *Cannon* Need Not Apply

Whatever approach a litigant argues, it should be noted that it is relatively safe for courts to reject a strict application of *Cannon*. Instead, they can rely on other potentially more flexible piercing doctrines, such as alter ego, to show that the veil can be pierced. As discussed above, there is significant support in the caselaw from which courts can draw on the proposition that *Cannon* need not apply in its strictest form.[297]

5. To Satisfy Due Process

Some courts have declined to treat traditional corporate law principles as dispositive in determining a foreign parent's amenability to jurisdiction, instead relying upon the analysis provided by *International Shoe* and its progeny to determine whether the exercise of jurisdiction comports with due process.[298] Although not every court or jurisdiction seems to be applying minimum contacts in this regard, any exercise of jurisdiction by a court must comport with due process and be reasonable in light of "notions of fair play and substantial justice."[299] Courts and litigants should thus consider the reasonableness of any exercise of jurisdiction, an analysis focusing on the particular "relationship among the defendant, the forum, and the litigation" in each case.[300]

Therefore, courts looking to pierce for jurisdictional purposes should consider two questions: (1) whether the veil can be pierced and the entities treated as one, and (2) whether the assertion of jurisdiction is "reasonable."[301] In many courts, however, this ideal has not been practice, as

federal courts have consistently acknowledged that it is

[296] *See supra* Section III.B.2.

[297] *See supra* Section II.B.2; *see, e.g.*, Patin v. Thoroughbred Power Boats Inc., 294 F.3d 640, 653 n.18 (5th Cir. 2002).

[298] *See supra* Section II.B.2.b.

[299] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945) (establishing the test for when the assertion of jurisdiction over alien corporations comports with due process).

[300] *See* Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

[301] *See* Schwartz, *supra* note 117, at 739; *see also* Daimler AG v. Bauman, 134 S. Ct. 746, 764 (2014) (Sotomayor, J., concurring).

> compatible with due process for a court to exercise personal jurisdiction over an individual or a corporation that would not ordinarily be subject to personal jurisdiction in that court when the individual or corporation is an alter ego or successor of a corporation that would be subject to personal jurisdiction in that court.[302]

This is especially so with general jurisdiction as evidenced by dicta in *Bauman* noting that the reasonableness inquiry is not a "free-floating test" to be used in all personal jurisdiction cases, but instead a check "to be essayed when *specific* jurisdiction is at issue."[303] Additionally, if courts are going to pierce the veil and consider the separate parts of the entity as one, then the court exercising general jurisdiction might view itself as considering a single, merged entity as "essentially at home" in the forum state, rather than two separate defendants.[304]

But one could persuasively argue that "[e]ven if there are grounds to treat affiliated corporations as one entity for jurisdictional purposes, this does not necessarily imply that the reasonableness of asserting jurisdiction over a subsidiary should be imputed to its foreign parent."[305] If that is true, not separately conducting a reasonableness analysis might create situations in which the court's exercise of jurisdiction over the foreign parent violates both public policy and due process.[306] This view, especially when piercing is at issue, has normative appeal. Therefore, regardless of whether courts commonly exercise jurisdiction over foreign parents after piercing for jurisdictional purposes without considering the reasonableness of doing so, plaintiffs would be wise to show why the exercise of jurisdiction over the foreign parent is in fact reasonable.

6. Not Always a "Pro-Jurisdiction Answer"

In *Bauman*, the Court rejected the Ninth Circuit's agency analysis because it found that test would always yield a "pro-jurisdiction answer."[307] Thus, although the Court did not comment further on veil piercing or attribution of contacts between affiliated entities, it did set the outer limit for any sort of future lower court application. Focusing on the policy of veil piercing and piercing when the foreign parent used the corporate form to avoid liability for human rights violations, however, would not always yield a "pro-jurisdiction answer" and is thus within the outer boundary set by

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[302] *Patin*, 294 F.3d at 653.
[303] *See Bauman*, 134 S. Ct. at 762 n.20.
[304] *See* Schwartz, *supra* note 117, at 759.
[305] *Id.* at 760.
[306] *See id.*; *see also* Nat'l Indus. Sand Ass'n v. Gibson, 897 S.W.2d 769, 773 (Tex. 1995) (describing the "ultimate due process inquiry" in jurisdictional veil piercing as "whether the out-of-state defendant's contact with the forum was such that it should reasonably anticipate being haled into a court in the forum").
[307] 134 S. Ct. at 759–60.

Bauman.

The *Bauman* Court was alarmed by the Ninth Circuit's agency test because it essentially merged *every* foreign parent with its subsidiary for the purposes of jurisdiction.[308] The Ninth Circuit's test only asked whether the subsidiary's services were "important" to the parent, "as gauged by [the parent's] hypothetical readiness to perform those services itself if [the subsidiary] did not exist."[309] Thus, the Court noted that "[t]he Ninth Circuit's agency theory . . . appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the 'sprawling view of general jurisdiction' [it] rejected in *Goodyear*."[310]

Using the foreign parent's alleged human rights violations to establish inequitable conduct under veil-piercing analysis does not subject all foreign parents to jurisdiction anywhere they have an in-state subsidiary. Rather, only foreign parent corporations using the corporate form to shield themselves from amenability to U.S. jurisdiction and ultimately liability for human rights violations would be affected. And, per the even narrower analysis discussed in Section III.B.2, only those claims that are sufficiently domestic under *Kiobel* will be sufficient to establish the requisite federal policy to justify piercing.[311] While the inquiry might be "pro-jurisdiction" in that fairly narrow set of cases, such an inquiry does not seem to be the type that the Court condemned in *Bauman*, as it did not condemn traditional veil-piercing standards such as the Ninth Circuit's alter-ego test.[312] Insofar as it relates to the Court's concern about tests that sweep beyond the "sprawling view of general jurisdiction" rejected in *Goodyear*, a test considering human rights violations in determining whether to pierce is no different (and, indeed, probably less sprawling) than one considering corporate separateness under the first factor of traditional three-factor piercing.

7. Cart Before the Horse?

On its face, a potential concern with using inequitable conduct to pierce the veil to determine jurisdiction is that it puts the cart before the horse; that is, it seems to determine that the defendant is substantively liable for the alleged wrongs before the trial, or really pre-trial, has even begun. This is not unique to using human rights as wrongful conduct in the veil-piercing analysis to establish jurisdiction—many, if not most, jurisdictional veil-piercing tests require or consider the alleged wrongful conduct in determining whether to

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[308] *Id.*
[309] *Id.*
[310] *Id.*
[311] *See supra* Section III.B.2.
[312] *See id.* at 759.

pierce for jurisdictional purposes.[313] Importantly, however, the general standard by which courts view and credit jurisdictional facts ensures that liability is not determined at this early stage.[314]

In federal courts, when a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating jurisdiction, but that burden requires the plaintiff to "make only a prima facie showing of jurisdictional facts to withstand the motion to dismiss."[315] This means that the plaintiff must "'adduce evidence of specific facts' that support her jurisdictional claim."[316] Then, whether they are disputed or not, the court takes the specific facts alleged by the plaintiff as true and construes them in the light most favorable to the plaintiff's jurisdictional claim.[317] The defendant can also put forth facts, and the court will accept those facts that are uncontradicted.[318] Although conflicting facts will be resolved in the plaintiff's favor,[319] the court is not required to accept the plaintiff's conclusory allegations.[320]

The current standard is sufficient to ensure there is no significant "cart before the horse" problem. It is very close to the standard for Rule 12(b)(6),[321] and thus the court's resolution of the jurisdictional question in the plaintiff's favor would not decide the substantive issue before trial.

IV. CONCLUSION

Victims of international human rights violations committed by foreign corporations have a number of hurdles to overcome in bringing their claims in U.S. courts. The most significant hurdle for such victims seems to be the Supreme Court's recent curtailment of general jurisdiction in *Bauman*, which apparently shields foreign parents in large, multinational corporations from being haled into U.S. courts even when the corporation at issue has a major U.S. subsidiary. The Court has not yet addressed the viability of piercing the corporate veil as a means to hale the foreign parent into U.S. court

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[313] *See supra* notes 144–47 and accompanying text.

[314] The standard I examine is that of federal courts under Federal Rule 12(b)(2). I do not comment on the standard used by state courts, except insofar as I note that the federal standard seems appropriate to avoid the "cart before the horse" problem in any jurisdiction.

[315] *See* Doe v. Unocal Corp., 248 F.3d 915, 922 (9th Cir. 2001) (quoting Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995)); *see also* O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 316 (3d Cir. 2007); *see also* Sawtelle v. Farrell, 70 F.3d 1381, 1386 n.1 (1st Cir. 1995); *see also* Wyatt v. Kaplan, 686 F.2d 276, 280 (5th Cir. 1982) (noting that a plaintiff "need not[] . . . establish personal jurisdiction by a preponderance of the evidence; *prima facie* evidence of personal jurisdiction is sufficient").

[316] *See* Steir v. Girl Scouts of the USA, 218 F. Supp. 2d 58, 62 (D.N.H. 2002) (quoting Foster-Miller, Inc. v. Babcock & Wilcox Can., 46 F.3d 138, 145 (1st Cir. 1995)).

[317] *See* Mass. Sch. of Law v. ABA, 142 F.3d 26, 34 (1st Cir. 1998); *see also* Wien Air Alaska, Inc. v. Brandt, 195 F.3d 208, 212–13 (5th Cir. 1999).

[318] *See Mass. Sch. of Law*, 142 F.3d at 34.

[319] *See* Kelly v. Syria Shell Petroleum Dev. B.V., 213 F.3d 841, 854 (5th Cir. 2000).

[320] *See* Felch v. Transportes Lar-Mex SA DE CV, 92 F.3d 320, 326 n.16 (5th Cir. 1996); *Mass Sch. of Law*, 142 F.3d at 34.

[321] *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 695–97 (2009).

in such circumstances. Nonetheless, jurisdictional veil piercing in such circumstances fits well within both the policies underlying veil piercing and the framework of existing veil-piercing doctrines. It also serves to implement an expressed legislative policy to provide relief from and a forum for international human rights victims. Plaintiffs therefore appear to have a viable argument that the commission of human rights violations abroad by a foreign parent with a U.S. subsidiary is a good reason for rejecting corporate formalities and piercing the veil. Whether courts will accept such arguments remains to be seen, but they can while remaining within the bounds of current jurisprudence, and doing so (especially within the limits discussed in this Article) would be consistent with both the policy of veil piercing and international human rights law as expressed by Congress.