Victim Civil Litigation and the Elusive Goal of Corporate Accountability

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Civil litigation by victims might seem the perfect tool for holding corporations accountable for wrongdoing: those who are wronged demand remedies from those who wronged them, and they invoke the power of the state to deliver justice. The capacity of civil litigation to hold corporations accountable for wrongdoing is well documented and widely celebrated.[1] Civil litigation's downsides are widely discussed as well, but often by commentators who seem generally antagonistic to plaintiffs and skeptical of the use of litigation to achieve justice.[2] If we were to look at civil litigation from a perspective that is generally enthusiastic about its use for holding defendants accountable for wrongdoing, but train our attention on where civil litigation falls short of achieving this goal, what would we see? By examining the shortcomings of victim civil litigation, we can better understand not only where civil litigation might be improved, but also where we should rely on regulatory enforcement, market mechanisms, government civil enforcement proceedings, the criminal justice system, and other tools for achieving accountability. In this way, we can seek to achieve accountability for corporate wrongdoing even as we inject a dose of realism about the elusiveness of such accountability through the civil litigation process.

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* Professor of Law, Fordham Law School. Thanks to Andrew King for excellent research assistance, and thanks to DePaul University College of Law and to all of the participants in the Clifford Symposium for valuable discussion about the challenges of holding corporations accountable for wrongdoing.

1. *See, e.g.*, Carl T. Bogus, Why Lawsuits are Good for America (2001); Alexandra Lahav, In Praise of Litigation (2017). For a recent example, consider the litigation seeking compensation for deaths, injuries, and property losses from the collapse of the Champlain Towers South condominium building in Surfside, Florida. *See* Patricia Mazzei, *Lawsuits Over Tragedies Can Drag On. Not in the Florida Condo Collapse*, N.Y. Times, Sept. 3, 2022 (praising the judge for efficient and compassionate handling of a litigation and settlement process that resulted in a settlement of over $1 billion from defendants and insurers and allocated it among victims and families).

2. *See, e.g.*, Lester Brickman, Lawyer Barons: What Their Contingency Fees Really Cost America (2011); Walter K. Olson, The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law (2003).

Accountability for corporate wrongdoing can mean, among other things, penalizing wrongdoers in a way that deters them and others from future misconduct, or it can mean providing victims with recourse against a wrongdoer to obtain compensation for harm. In other words, when one thinks about *accountability*, what is the relevant *account*? While these conceptions of accountability are not mutually exclusive, they suggest different ways of measuring success.

If accountability can mean either punishment or compensation, one might suppose that civil litigation brought by victims would be an ideal way to hold corporations accountable on both measures. Civil litigation, after all, combines private prosecution with a public process, and its typical remedy—money damages—compresses punishment and redress into a single device. Sadly, on either definition of corporate accountability, civil litigation falls short. The very nature of private enforcement of rights, including victims' limited access to information as well as agency problems that accompany private attorney representation of victims, ensures that civil litigation, at best, achieves only partial accountability. But it cannot be said that any other mechanism for holding corporations accountable—such as regulatory enforcement, the criminal justice system, or the market—fares any better. Each is an imperfect tool that achieves only partial accountability. By exploring the challenges of holding corporations accountable through victim civil litigation, this Article aims to shed light on where private enforcement through civil litigation falls short, situating such litigation within the panoply of available mechanisms.

For purposes of this exploration of holding corporations accountable for misconduct, I take the following premises as starting points:

(1) Corporations sometimes engage in misconduct that causes harm.

(2) Some such corporate misconduct involves legally recognized wrongs for which applicable law provides civil claims to victims.

(3) Some such corporate misconduct also constitutes wrongs for which applicable law[3] empowers government agencies and the criminal justice system to penalize corporations.

(4) Notwithstanding the power of government agencies and the criminal justice system to punish some corporate misconduct, these authorities lack the resources and will to deal with most of the misconduct that occurs.

3. As used here, *law* refers to United States law, including both federal and state law, and including both statutory and common law.

(5) Given the inadequacy of other mechanisms for addressing corporate misconduct, the United States legal system relies heavily on civil litigation to achieve this goal.

Although the last two premises may be contestable, I will not attempt to defend them here. My goal is to explore the challenges of using civil litigation to hold corporations accountable notwithstanding our heavy reliance on civil litigation for this function and the substantial infrastructure of civil litigation that has emerged as a result. I take it as a given that, in the United States, we do not rely exclusively on regulatory authorities or on the criminal justice system to control corporate misconduct because the United States lacks the political will to create the sprawling, expensive, intrusive government infrastructure that would be required for such a task. My starting point is that in the United States, we routinely turn to civil litigation to serve the function of holding corporations accountable for misconduct, and we have decades of experience from which we can learn about civil litigation's successes and failures on this front.

Before launching into a discussion of using private civil litigation to hold corporations accountable for wrongdoing, I should define my terms. What do I mean by *victim civil litigation*? What do I mean by *corporate wrongdoing*? And most consequentially, what do I mean by *accountability*?

I will use *victim civil litigation* to refer to lawsuits against corporations by those who claim to have been harmed by corporate wrongdoing. This includes lawsuits by victims of all sorts, whether individuals, corporate entities, unincorporate associations, or government entities. But it excludes proceedings by government authorities to impose fines or other penalties (as opposed to actions to recoup losses), even if such proceedings are civil rather than criminal in nature. In other words, for purposes of this Article, I will put aside not only criminal proceedings, but also regulatory and civil penalty proceedings, thereby allowing an examination of the distinctive role of lawsuits brought by those who have been harmed against those who harmed them.

What do I mean by *corporate wrongdoing* or *corporate misconduct*? The words wrongdoing and misconduct are freighted with moral judgment, but corporations are not human beings. Dangers lurk whenever we treat corporate entities as if they were moral actors or as if they were beings of moral worth. It is often wise to question and resist the law's tendency to treat corporate "persons" as if they held the same rights and duties as human beings.[4] Even so, the personification of the corporation proves useful in certain contexts, and here I will succumb to it when I use the words wrongdoing and misconduct to refer to acts and omissions that are attributable to corporate entities. Where a corporation's human actors engage in acts or omissions that the law attributes to the entity, and where those acts or omissions violate the corporation's legal duties and cause harm to others, I will call it corporate wrongdoing or misconduct. One need not view corporate entities as moral actors to understand that, for purposes of applying *legal* principles concerning wrongdoing and harm, corporate misconduct is both a useful legal concept and a phenomenon that is widely observable in the real world.

Finally, what does it mean to hold a corporation *accountable*? Here, again, we encounter problems of corporate personhood and especially the problem that fictional entities do not feel pain; imposing costs on a corporation means that the losses will be felt by shareholders (who may number in the millions, many of whom are passive investors through retirement accounts, mutual funds, and the like), as well as by employees, customers, community members, and other stakeholders. Further complicating the nature of corporate accountability, one can argue over whether the appropriate accountability is that of the entity or that of individual human actors who have committed wrongs on the entity's behalf.[5]

Beyond questions related to the fact that corporations are legal fictions that act only through the acts of individuals, there is a very basic question about what it means to hold any wrongdoer *accountable* through civil litigation. What account? Accountable to whom? When people speak of corporate accountability, they typically mean some combination of two things but often fail to sort out or even acknowledge the difference. For purposes of this Article, I will attempt to be precise about when I am considering each version of accountability.

Corporate wrongdoing often leads to civil litigation, sometimes on a massive scale, and often results in settlements. But it is not enough that civil litigation occurs and a settlement obtained. The question is

4. *Cf., e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 736 (2014) (permitting a corporation to refuse to provide contraceptive care to employees, based on the corporation's religious freedom); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 888 (2011) (protecting a corporation from litigation where its product caused injury, based on the corporation's personal-jurisdiction due-process rights); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 372 (2010) (protecting corporations from restrictions on political expenditures, based on corporations' free-speech rights under the First Amendment).

5. *See* James J. Park, *Shareholder Wealth Maximization and Securities Fraud*, 72 DEPAUL L. REV. 395 (2023).

whether the wrongdoer faces meaningful liability for the harm caused, whether victims obtain meaningful compensation for the harm suffered, or both. Too often, the answer is no. The Article proposes thoughts on overcoming some of the challenges of civil litigation, as well as ways to think about the complementary roles of civil litigation and other mechanisms to hold corporations accountable for wrongdoing.

The Article proceeds as follows. Part I breaks down the notion of accountability and focuses on deterrence accountability and compensation accountability. Part II considers four types of problems that civil litigation faces as a tool for holding corporations accountable: problems of information asymmetry, problems of collective action, problems of evasive maneuvers and moving targets, and problems of agency costs. These problems make civil litigation a deeply imperfect tool for the task of achieving either deterrence accountability or compensation accountability. As to each category of shortcoming, the Article suggests ways in which civil litigation might be improved. Part III considers where victim civil litigation fits within the array of available tools for holding corporations accountable.

I. Accountable to Whom and Accountable for What?

Corporate accountability refers to many different ideas, only some of which relate to civil litigation's role. One can speak of a corporation's accountability to its shareholders.[6] One can speak of a corporation's accountability to other stakeholders such as employees and members of the community within which the corporation operates,[7] or broadly of a corporation's accountability to advance justice or to protect the environment.[8] These conceptions of corporate accountability do not necessarily line up with conduct that gives rise to legal claims, although they may. If applicable substantive law does not yet permit claims for certain kinds of corporate failures, perhaps it should. This

6. *See* Lenore Palladino & Kristina Karlsson, *Towards "Accountable Capitalism": Remaking Corporate Law Through Stakeholder Governance*, Roosevelt Inst. Issue Brief (Oct. 2018), at 1–4 (discussing shortcoming of dominant model of "shareholder primacy").

7. *See id.* at 5–6 (embracing a view of "corporate accountability to all who contribute to corporate success"—including workers, suppliers, consumers, and communities—and proposing a corporate governance model to include the full range of stakeholders).

8. For an example of framing "corporate accountability" in terms of corporation's accountability for harm to the environment, social justice, other matters beyond the corporation's investors or immediate stakeholders, *see* Corp. Accountability, Annual Report 2021, https://corporateaccountability.org/wp-content/uploads/2021/11/CA_AnnualReport_2021-Final.pdf (describing the organization's mission to hold corporations accountable for water pollution, climate change, unhealthy food, dangerous tobacco products, racial injustice, and harms to democracy).

Article, however, uses *corporate accountability* in a narrower sense to include only accountability for wrongdoing that gives rise to substantive legal claims under current law. This narrower version of accountability is still quite broad, encompassing an enormous range of wrongs for which federal and state law permit victims' claims: discrimination, fraud, negligence, product defects, environmental harms, antitrust, privacy harms, and many more.

Even if we limit our notion of corporate accountability to *legal wrongs* for which the law permits civil claims, the notion encompasses at least two different conceptions of accountability. One version could look at whether the wrongdoer is held to task for its wrongdoing. On this view, a satisfactory outcome is one that deprives the wrongdoer of profit from its wrongdoing and that imposes sufficient costs on the wrongdoer to deter it and others from committing such misconduct in the future. On this view the primary goal of holding corporations accountable is to create a world with less corporate misconduct—a world with less fraud, less danger from products and services, less invidious discrimination, less abuse of employees, and more care and honesty all around.

Another version of accountability could look at whether victims' harms are adequately remedied by wrongdoers. The account is one between wrongdoer and victim. If a corporate wrongdoer is penalized but its victim uncompensated, the solution addresses only one side of the equation.[9] As it relates to acts that give rise to civil litigation, *wrong* as a transitive verb. A wrong is not committed in the abstract; someone was wronged by someone else. While penalizing wrongdoers and thereby deterring others is useful, it is not the only thing that matters; to hold corporations *accountable* is to provide victims with recourse.

II. The Limits of Victim Civil Litigation as an Accountability Tool

At least four significant hurdles stand in the way of achieving either deterrence accountability or compensation accountability through civil litigation. I will call these hurdles the information asymmetry problem, the collective action problem, the whac-a-mole problem, and the agency problem. The first three involve difficulties getting started with civil litigation and difficulties prosecuting civil litigation successfully against corporations with superior information and resources.

9. *See generally* John C.P. Goldberg & Benjamin C. Zipursky, Recognizing Wrongs (Harv. Univ. Press 2020).

These first three challenges relate to both versions of accountability. The fourth challenge—the agency problem—poses more serious problems for compensation accountability than for deterrence accountability, although it arguably affects both. All of these hurdles are well known to observers of (and participants in) civil litigation by individuals against corporations, but it is useful to examine them together as part of our exploration into whether we should be optimistic about the prospect of using civil litigation as a tool for holding corporations accountable.

A. The Information Asymmetry Problem

Civil litigation, as a tool for holding corporations accountable for misconduct, depends upon victims' access to information at several key points. First, if victims do not learn of the corporation's misconduct, then lawsuits do not happen. Second, even if a victim learns of the corporation's misconduct and sues, the victim must obtain sufficient information at the outset to include in a complaint that can survive a motion to dismiss. Third, the victim must produce sufficient evidence after discovery to survive a motion for summary judgment, and fourth, the victim must present sufficient evidence to prevail at trial on a preponderance standard. Along the way, the prospect of settlement depends on the defendant's prediction about the plaintiff's ability to obtain sufficient information to survive each hurdle.

Unfortunately for victims of corporate wrongdoing, the information plaintiffs need at each of these steps is information that is held mostly by the corporation itself. Without access to information, each step is a challenge. The Supreme Court exacerbated the problem in *Bell Atlantic v. Twombly*[10] and *Ashcroft v. Iqbal*,[11] where it diminished the truth assumption on motions to dismiss and added a "plausibility" layer to what had previously been a liberal notice-pleading standard. In effect, this requires plaintiffs, prior to filing a lawsuit, to gain sufficient access to information about corporate wrongdoing to persuade a court that their claim deserves to move forward. The Court's summary judgment jurisprudence, particularly its focus on whether a non-moving party has satisfied its burden of production, requires plaintiffs to gain access to information about corporate wrongdoing.[12] Although the availability of discovery makes imposition of a plaintiff burden to provide difficult-to-access information regarding defendant's wrongdoing far less troubling at the summary judgment stage than at the pleading stage,

10. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).
11. Ashcroft v. Iqbal, 556 U.S. 662, 686 (2009).
12. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

the summary judgment hurdle can intersect with discovery constraints such as privilege in ways that deny plaintiffs the ability to prove their claims at trial.

How can the civil litigation system do a better job dealing with the information asymmetry problem? For one thing, it can avoid dismissing potentially meritorious complaints before giving plaintiffs access to even preliminary discovery. It appears unlikely that the Supreme Court will back off from its treatment of pleadings in *Twombly* and *Iqbal*, and it also appears unlikely for now that Congress will intervene or that Rule 8 will be amended to undo the effect of these rulings.[13] But state courts need not follow the same path.[14] And in federal courts, there is room within the *Twombly-Iqbal* framework for district courts to apply the federal pleading standard with sensitivity to information asymmetry. Courts can permit greater use of early-stage discovery to allow plaintiffs to gather information to respond to a motion to dismiss.[15] They can facilitate sharing of information between government litigation and private litigation.[16] More broadly, greater requirements of corporate transparency could reduce the problem of corporate wrongdoing that goes entirely undiscovered.

But some extent of information asymmetry between corporate wrongdoers and their victims is inevitable, and without information to suggest wrongdoing, victims may not realize they are victims and may not pursue civil litigation at all. This is where government actors are essential. Unlike private civil litigation, which requires a private plaintiff to have filed a lawsuit before the doors of discovery are open, information-gathering can be a routine function of government agencies, and state actors generally have greater access to information than private litigants. Where lack of information is a barrier to private civil litigation, government action can be the door-opener for holding corporations accountable.

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13. *See* Dane Westermeyer, Comment, *Amended Complaints Post-Twiqbal: Why Litigants Should Still Get A Second Bite At The Pleading Apple*, 89 WASH. L. REV. 1467, 1475 (2014).

14. *See* Darcy Jalandoni & David Shouvlin, *Ohio and* Twombly/Iqbal*: Plausible?*, 29 OHIO LAW. 26 (2015) ("Inasmuch as *Twombly/Iqbal* dealt with procedural issues, state courts are not bound to follow their rulings under the Erie Doctrine, and most have not."); Matthew Marino, Comment, *Debunking* Twombly/Iqbal*: Plausibility is more than Plausible in Ohio and Other States*, 89 U. CIN. L. REV. 1066 (2021) (encouraging states to adopt the federal plausibility pleading standard for their own state court procedures).

15. *See* Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 822 (2018); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 67 (2010).

16. *See* Lamya Agarwala, *The Government Shouldn't Keep the Public in the Dark Just Because Private Companies Ask It To*, ACLU (Apr. 22, 2019), https://www.aclu.org/news/national-security/government-shouldnt-keep-public-dark-just-because-private-companies.

B. *The Collective Action Problem*

The most serious forms of corporate misconduct involve wrongdoing with a widescale, potentially massive, scope of harm. Although terrible harms may occur on an individual basis—medical malpractice, automobile accidents, and individual acts of violence leap to mind—the issue of *corporate accountability* more often relates to businesses' uniquely expansive power to cause widespread harm with a single course of conduct. In a world of mass production, mass marketing, mass employment, mass investment, mass media, mass data collection, and every other form of efficient collectivization in modern life, it is unsurprising—indeed inevitable—that when serious corporate wrongdoing occurs, it often affects large numbers of victims.

Mass harms are double-edged as they relate to plaintiffs' ability to pursue civil litigation against corporations. In some ways, litigation based on mass harms is easier for plaintiffs than litigation based on individual harms. Wrongdoing often goes undetected if it causes only isolated harms, whereas widespread harms are more likely to attract attention of news media, social media, public interest organizations, scientific researchers, attorneys, and others. In the case of isolated individual harm, even if wrongdoing is detected and even if it suggests a meritorious civil claim, the affected individual may be unable to afford to pursue litigation. Neither a client paying hourly fees nor a lawyer working on a contingent-fee basis would ordinarily choose to pursue a civil claim unless the anticipated recovery adequately covers the cost of the work taking into account the difficulty of prevailing on the claim. Corporate wrongdoing that causes significant widespread harm, by contrast, presents lawyers with opportunities to recover much larger total sums on behalf of the victims. If lawyers can litigate collectively on behalf of plaintiffs, the massiveness of the harm may cut in plaintiffs' favor in terms of enabling litigation.[17]

In other ways, however, the mass harms that result from serious corporate misconduct can make litigation harder for plaintiffs. Where corporate misconduct has caused massive harm rather than more isolated harm, the corporation treats its risk in terms of the aggregate stakes. In the mass-harm scenario, the corporation's defense lawyers understand that an early loss in an individual lawsuit—even if the lawsuit concerns the claims of only one person among a mass of victims—carries potentially devastating impact. An adverse finding might propel other plaintiffs' claims as a matter of offensive nonmutual issue

17. *See* Deborah R. Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 71–72 (2000).

preclusion.[18] Information generated and tactics explored in an individual case could work to the benefit of future plaintiffs. Media attention or other publicity surrounding an individual case—especially a plaintiff verdict at trial—could generate large numbers of additional lawsuits against the company. Because of these risks, a corporation facing potential mass litigation cannot treat an individual suit lightly but rather must erect a powerful defense that recognizes the full scope of the litigation risk.

What this means for plaintiffs is that the only way they can litigate on a level field against corporate defendants that have caused widespread harm is to find lawyers who similarly will invest in the litigation based on the aggregate stakes. This requires aggregation mechanisms, which may be formal mechanisms such as joinder,[19] class actions,[20] and multidistrict litigation (MDL) transfer,[21] or informal mechanisms for mass collective representation or coordination among counsel.[22] As a practical matter, most litigation involving mass harms involves at least some level of formal aggregation through MDL or other non-class-action tools, but it can be difficult to obtain class certification for purposes of litigation. In sum, the mass harms scenario in theory creates opportunities for collective action by plaintiffs through common representation, but this requires attorneys willing to invest heavily in the litigation and it requires courts willing to deploy the tools of aggregate litigation.

The most powerful of these tools is the class action, but courts and corporations have made it difficult for plaintiffs to access this tool for purposes of litigation. Although the class action remains widely available as a tool for defendants to achieve settlements that release them from further liability, it has become increasingly unavailable to plaintiffs as a tool for litigating claims against an unwilling defendant.[23]

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18. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331–33 (1979).

19. *See, e.g.*, Fed. R. Civ. P. 20(a) (permissive joinder of parties).

20. *See* Fed. R. Civ. P. 23.

21. *See* 28 U.S.C. § 1407.

22. *See* Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 Duke L. J. 381, 386–401 (2000).

23. *See* Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729 (2013) (documenting the ways the Supreme Court and federal courts of appeals had constrained plaintiffs' use of class actions); Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 Notre Dame L. Rev. 859, 861–62 n.8 (2016) (showing that the Supreme Court's recent cases restricting class actions all involved litigation classes rather than settlement classes because "the Supreme Court has shown little interest in controlling class actions as a tool for defendants' closure of liability, even as it has shown great interest in diminishing class actions as a tool for plaintiffs' empowerment."). *But see* Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. Rev. 971 (2017) (showing that courts had not gone as far in restricting class actions as it previously appeared they might).

Courts have made access to class actions difficult in several ways. First, they have applied the class certification requirements—especially commonality and predominance—in ways that prevent certification of litigation class actions in many instances of mass harm. In *Amchem Products v. Windsor*,[24] *Ortiz v. Fibreboard Corp.*,[25] *Castano v. American Tobacco*,[26] *In re Rhone-Poulenc Rorer*,[27] and other cases, the Supreme Court and U.S. Courts of Appeals made it nearly impossible to secure class certification in mass tort disputes involving claims of personal injury or death. In *Wal-mart v. Dukes*[28] and other cases, the Supreme Court and U.S. Courts of Appeals made it difficult to obtain class certification for claims of company-wide discrimination. In both *Wal-mart* and *Comcast Corp. v. Behrend*,[29] the Court took a strict view regarding the burden of proof for class certification.

Second, the Supreme Court has upheld class-action prohibitions in arbitration clauses even when those prohibitions are imposed by corporations on customers or employees, and even when those prohibitions make it impossible for plaintiffs to vindicate their claims. In *AT&T Mobility v. Concepcion*,[30] the Court held that class-action prohibitions in arbitration clauses must be enforced under the Federal Arbitration Act[31] even if they would be considered unconscionable as a matter of state contract law. In *American Express v. Italian Colors Restaurant*,[32] the Court held that a class-action prohibition must be upheld even if it leaves plaintiffs unable as a practical matter to vindicate their federal statutory rights. And in *Epic Systems v. Lewis*,[33] the Court held that class-action prohibitions must be upheld even when they are imposed by employers on their employees, notwithstanding the National Labor Relations Act's general protection of concerted action by employees for their mutual aid.[34] Dissenting in *Italian Colors*, Justice Kagan noted that American Express's arbitration provision foreclosed not only class actions but also every other procedural path that merchant plaintiffs might feasibly use to pursue their antitrust claims. Thus, she explained, the arbitration clause was not really providing a means to resolve disputes: "In the hands of today's major-

24. Amchem Prods. v. Windsor, 521 U.S. 591, 628 (1997).
25. Ortiz v. Fibreboard Corp., 527 U.S. 815, 865 (1999).
26. Castano v. Am. Tobacco, 84 F.3d 734 (5th Cir. 1996).
27. *In re* Rhone-Poulenc Rorer, 51 F.3d 1293 (7th Cir. 1995).
28. Wal-mart Stores v. Dukes, 564 U.S. 338 (2011).
29. Comcast Corp. v. Behrend, 569 U.S. 27, 38 (2013).
30. AT&T Mobility v. Concepcion, 563 U.S. 333, 352 (2011).
31. Federal Arbitration Act, 9 U.S.C. §§ 2.
32. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238–39 (2013).
33. Epic Sys. v. Lewis, 138 S. Ct. 1612, 1632 (2018).
34. National Labor Relations Act (NLRA) §§ 7–8, 29 U.S.C. §§ 157–158.

ity, arbitration threatens to become more nearly the opposite—a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability."[35]

Third, by tightening restrictions on personal jurisdiction, courts have interfered with aggregate litigation by making it more difficult for plaintiffs to litigate nationwide harms in a single forum. In *Bristol-Myers Squibb v. Superior Court (BMS)*,[36] the Supreme Court rejected nationwide mass tort litigation in California against the pharmaceutical company Bristol-Myers Squibb concerning harms allegedly caused by its Plavix medication. The Court held that California lacked personal jurisdiction over Bristol-Myers Squibb for the claims of non-California plaintiffs. Because of *BMS*, plaintiffs seeking to litigate a nationwide mass dispute against a corporation collectively in a single forum may be limited to litigating in the defendant's home state, giving defendant corporations a systematic advantage over nationwide plaintiffs. Some courts have applied the same reasoning to nationwide class actions,[37] and it remains to be seen how the issue will shake out on the class action front.[38] Whether the *BMS* decision applies to class actions or only to non-class mass litigation, it shows that jurisdictional constraints present yet another challenge for plaintiffs who seek to overcome collective action problems by litigating on an aggregate basis against corporate wrongdoers. As Justice Sotomayor explained in dissent, "the Court's opinion in this case will make it profoundly difficult for plaintiffs who are injured in different States by a defendant's nationwide course of conduct to sue that defendant in a single, consolidated action."[39] As to the majority's assertion that plaintiffs may bring nationwide collective litigation in a defendant's home state, Justice Sotomayor pointed out that this is impossible in multi-defendant cases with different home states or against non-U.S. defendants, and

35. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 253 (2013) (Kagan, J. dissenting).

36. Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1778, 1783–84 (2017).

37. *E.g.*, Fischer v. Fed. Express Corp., 42 F.4th 366 (3d Cir. 2022) (applying *BMS* to Fair Labor Standards Act collective action); Canaday v. Anthem Cos., Inc., 9 F.4th 392 (6th Cir. 2021) (same); Carpenter v. PetSmart, Inc., 441 F. Supp. 3d 1028 (S.D. Cal. 2020) (applying *BMS* to Rule 23 class action).

38. *Compare* Fischer v. Fed. Express Corp., 42 F.4th 366 (3d Cir. 2022), *and* Canaday v. Anthem Cos., Inc., 9 F.4th 392 (6th Cir. 2021), *and* Carpenter v. PetSmart, Inc., 441 F. Supp. 3d 1028 (S.D. Cal. 2020), *with* Waters v. Day & Zimmermann NPS, Inc., 23 F.4th 84, 99–100 (1st Cir. 2022) (rejecting application of *BMS* to FLSA collective action); Mussat v. IQVIA, 953 F.3d 441, 443 (7th Cir. 2020) (rejecting application of *BMS* to Rule 23 class action). *See generally* Jones v. DePuy Synthes Prods., Inc., 330 F.R.D. 298, 309–12 (N.D. Ala. 2018) (discussing cases going both ways and declining to decide issue but expressing skepticism regarding applying *BMS* to class actions).

39. Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1789 (2017) (Sotomayor, J. dissenting).

that in any event, it requires litigating in the defendant's home court: "Such a rule hands one more tool to corporate defendants determined to prevent the aggregation of individual claims, and forces injured plaintiffs to bear the burden of bringing suit in what will often be far flung jurisdictions."[40]

How can the civil litigation system do a better job dealing with the collective action problem? First, by reforming federal arbitration law to prevent corporations from imposing contract terms that make aggregate litigation disappear.[41] Second, by applying class certification requirements with sensitivity to the importance of collective litigation.[42] Third, by amending Rule 4 to enable federal courts to overcome the *BMS* problem and to assert personal jurisdiction over corporations in nationwide mass disputes.[43]

But victims of serious corporate wrongdoing inevitably will face challenges overcoming the collective action problem. Even if a corporation's wrongdoing is a single act or omission or a single course of conduct, the harms generated by that wrongdoing may follow diverse causal paths, which diminishes the prospect of class certification or trial consolidation. Where a corporation commits serious wrongdoing on mass scale and causes harms that are too individualized for class certification or other efficient aggregate litigation, collective litigation cannot be expected to hold the corporation fully accountable. This is where it is important to have criminal proceedings if criminal wrongs were committed,[44] and civil fines or other government actions.[45] Unlike private civil litigation by victims, where individual differences in causation and damages come to the fore, government proceedings against wrongdoers more easily focus on the wrongdoer's conduct it-

40. *Id.*

41. *See* text at *supra* notes 30–35. *See, e.g.*, Forced Arbitration Injustice Repeal Act of 2022, H.R. 963, 117th Cong. §2(2) (2022).

42. *See, e.g.*, *In re* Brinker Data Incident Litig., 2021 WL 1405508, at *13 (M.D. Fla. Apr. 14, 2021) ("This case is the classic negative value case; if class certification is denied, class members will likely be precluded from bringing their claims individually because the cost to bring the claim outweighs the potential payout. Thus, not only is a class action a superior method of bringing Plaintiffs' claims, it is likely the *only* way Plaintiffs and class members will be able to pursue their case."); *see also* Klonoff, *Decline*, *supra* note 23, at 828–30 (suggesting possible ways to address the threats to class actions); Klonoff, *Respite*, *supra* note 23, at 996 (noting optimistically that recent cases "do not reflect hostility to class actions").

43. *See* A. Benjamin Spencer, *Rule 4(k), Nationwide Personal Jurisdiction, and the Civil Rules Advisory Committee: Lessons from Attempted Reform*, 73 Ala. L. Rev. 607, 611 (2022); Scott Dodson, *A Negative Retrospective of Rule 23*, 92 N.Y.U. L. Rev. 917 (2017).

44. Press Release, U.S. Dep't of Just., Wells Fargo Agrees to Pay $3 Billion to Resolve Criminal and Civil Investigations into Sales Practices Involving the Opening of Millions of Accounts without Customer Authorization (Feb. 21, 2020) (on file with author).

45. *Id.*

self, and thus may face less of a hurdle based on the widespread nature of the harm.

C. The Whac-a-Mole Problem

Some of the challenges described above appear surmountable. As discussed in the preceding sections, one can imagine plenty of ways to improve the civil litigation process and particularly to make the field more level for those who try to hold corporations accountable for misconduct. Collective action problems could, in theory, be addressed with better access to aggregation mechanisms, especially class certification for litigation. Ways to get there include less stingy judicial application of class certification requirements, congressional action to prevent corporations from imposing class-action waivers on customers and employees, and jurisdictional reform to ensure that courts are available to adjudicate aggregate litigation concerning widespread harms. Information asymmetry problem could, in theory, be addressed with better access to information for customers, employees, and the public, and with pleading reforms to ensure plaintiffs access to discovery for potentially meritorious claims.

But corporations have proved resourceful at finding ways to avoid accountability through civil litigation. Shutting down one defense may achieve nothing if corporations find another way to avoid accountability. To see how this works, let's take a quick look—through the lens of Whac-a-Mole[46]—at the story of corporations' counterattacks to civil litigation that attempts to hold corporations accountable for serious misconduct. Let's start with tobacco litigation. From 1954 through 1994, hundreds of lawsuits were filed against tobacco companies for harms caused by cigarettes, and during those forty years not a penny was paid to any plaintiff in judgment or settlement because the tobacco industry overpowered plaintiffs with its legal firepower.[47] Two developments occurred in 1994, seeming to suggest that tobacco plaintiffs had found ways to fight the tobacco industry on a level field. One was the coordinated effort by a powerful group of plaintiffs' lawyers that resulted in certification of the *Castano* nationwide class action.[48]

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46. *See Whac-a-Mole*, BOB SPACE RACERS, https://www.bobsspaceracers.com/Whac-A-Mole—SE-Arcade-Games—10-348648.html (last visited Feb. 28, 2023) (describing arcade game in which plastic moles pop up and player whacks them with a mallet: "Just when you think you have whacked the last one, here comes another!").

47. *See* Howard M. Erichson, *The End of the Defendant Advantage in Tobacco Litigation*, 26 WM. & MARY ENV'T L. & POL'Y REV. 123, 126–27 (2001); PETER PRINGLE, CORNERED: BIG TOBACCO AT THE BAR OF JUSTICE 7 (1998).

48. Castano v. Am. Tobacco Co., 160 F.R.D. 544, 560 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996); *see* Erichson, *supra* note 47, at 131–32.

The other was the coordinated pursuit of public-nuisance claims by state attorneys general.[49] As to the former, the tobacco industry won reversal of class certification as part of a broader set of corporate appellate victories curtailing the use of class actions in federal courts.[50] As to the latter, a settlement that at first appeared to be a major victory by the attorneys general proved to be, at least in part, a way for the tobacco industry to ensure its continuing viability.[51]

In other mass tort litigation, federal district courts in the 1980s and 1990s had begun to experiment with mass tort class actions to permit plaintiffs to litigate efficiently against corporate defendants in cases involving widespread harm.[52] Defendants pounded the plaintiffs in federal courts of appeals, which were receptive to defendants' arguments and made federal courts a difficult place to obtain class certification. Plaintiffs increasingly turned to state courts for nationwide class actions, particularly in states that were more receptive to class actions.[53] The next step for corporate defendants? They turned to Congress and obtained the Class Action Fairness Act of 2005 (CAFA), which expanded federal jurisdiction for class actions and eliminated nearly all obstacles to removing such actions from state court to federal court.[54] Plaintiffs' lawyers responded in part by filing class actions in federal district courts within circuits with relatively liberal class certification (apparently Whac-a-Mole is a multi-player

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49. *See* Peter Pringle, *The Great Smoke-out*, NATION, Feb. 23, 1998.

50. Castano v. Am. Tobacco Co., 84 F.3d 734, 752 (5th Cir. 1996); *see also* Amchem Prods. v. Windsor, 521 U.S. 591 (1997); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); *In re* Rhone-Poulenc Rorer, 51 F.3d 1293 (7th Cir. 1995).

51. *See* Colleen Walsh, *Learning the Hard Way*, HARV. GAZETTE (Aug. 4, 2021), https://news.harvard.edu/gazette/story/2021/08/applying-lessons-learned-from-the-tobacco-settlement-to-opioid-negotiations/ (Quoting the history of science scholar Allan Brandt on lessons learned from the tobacco settlement: "Another big problem was that the tobacco settlement arrangements were such that states' funding from the companies was tied to the companies' profits. So, the states went from being adversaries to being business partners with the companies." Brandt when on to note that "[i]n a sense, the states disincentivized the tobacco companies from acting better because they realized the amount of money they would get would depend on the tobacco companies' profits.").

52. *See, e.g.*, Jenkins v. Raymark, 782 F.2d 468 (5th Cir. 1986); Cimino v. Raymark Indus., Inc., 151 F.2d 297 (5th Cir. 1998); *In re* N. Dist. of Cal., "Dalkon Shield" IUD Prods. Liab. Litig., 521 F. Supp. 1188 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982); *In re* Silicone Gel Breast Implant Prods. Liab. Litig., 1994 WL 578353 (N.D. Ala. 1994).

53. *See* S. REP. NO. 109-14, at 13–14 (2005) (reporting committee's findings of dramatic increases in state-court class actions from 1995 to 2005, and particularly dramatic growth of class actions during 1998–2003 in Madison County, Illinois, widely viewed as a favorable forum for class action plaintiffs).

54. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1332(d), 1453).

game),[55] but the era of relatively easy access to nationwide class certification in state courts was over.

Of course, even if they could keep class actions mostly in favorable forums, corporations would prefer never to face class action lawsuits at all. In the 2000s, corporations discovered a magical incantation with the power to ward off the evil of class action lawsuits—the individual arbitration clause. Corporations—with the help of a coordinated effort by the Chamber of Commerce[56]—learned to use this magical incantation to protect themselves not only from class actions but also from every other procedural mechanism that plaintiffs could use to overcome the collective action problem for pursuing mass-harm claims. Seeing the power of arbitration clauses to eliminate class actions and other aggregate litigation, corporations imposed these terms on customers, employees, and others with whom they had contractual relationships, which encompasses the most likely victims of serious corporate misconduct.[57] The Supreme Court endorsed this approach with its aggressively pro-arbitration decisions in *AT&T Mobility v. Concepcion*,[58] *American Express v. Italian Colors Restaurant*,[59] and *Epic Systems v. Lewis*.[60] It remains to be seen how long the magic will last. A relatively narrow arbitration reform bill, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act,[61] was signed into law in 2022. A much more comprehensive arbitration reform bill, the Forced Arbitration Injustice Repeal Act of 2022 (FAIR Act),[62] which would broadly prevent companies from using arbitration clauses to avoid class actions and other aggregate litigation, was recently passed by the House of Representatives but will face difficulty in the Senate.

Myriam Gilles has documented the decades-long efforts of the U.S. Chamber of Commerce to reduce corporations' exposure to litigation

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55. Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1607–14 (2008).

56. *See* Myriam Gilles, "*A Force Created": The U.S. Chamber of Commerce and the Politics of Corporate Immunity*, 72 DEPAUL L. REV. 139 (2023).

57. *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L. J. 2680, 2812 (2015); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes *and* Turner v. Rogers, 125 HARV. L. REV. 87, 118–27 (2011).

58. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

59. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

60. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

61. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (2022).

62. Forced Arbitration Injustice Repeal Act of 2022, H.R. 963, 117th Cong. (2022).

and liability.[63] Its efforts have included influencing judicial elections, altering public perceptions of plaintiffs and plaintiffs' lawyers, and reforms of substantive and procedural law.[64] Lobbying for legislative reforms to reduce liability or inhibit litigation is never-ending[65] although by no means always successful.[66]

To whatever extent plaintiffs overcome these challenges and pursue effective litigation against corporations, what is defendants' back-up plan? Bankruptcy. Used appropriately, bankruptcy can be a sensible way to bring a mass dispute to resolution where the anticipated liability and costs exceed a defendant's ability to pay. But if abused, bankruptcy can deprive plaintiffs of the opportunity to pursue recourse against a wrongdoer that does not need such protection. The bankruptcy system offers enormous advantages to defendants facing claims of mass harm, including an automatic stay of litigation[67] and the prospect of a discharge of debts.[68] Some of the most troubling recent developments in mass litigation have occurred on the bankruptcy front. In the litigation over ovarian cancer and mesothelioma allegedly caused by talcum powder, defendants Johnson & Johnson (J&J) and Imerys Talc had seen mixed results but were beginning to feel the weight of liability and litigation expenses. Imerys filed for bankruptcy protection in 2019.[69] Bankruptcy seemed not to be an option for J&J, however, in light of its massive resources. J&J looked for a clever way out. In a tactic derisively called the "Texas Two-Step," J&J in 2021 created a new corporate entity under Texas law and placed its talc liabilities within the new corporation.[70] The new entity filed for bankruptcy protection in the Western District of North Carolina, a court

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63. *See* Gilles, *supra* note 56.

64. *See id.*

65. *See* Howard M. Erichson, *Searching for Salvageable Ideas in FICALA*, 87 FORDHAM L. REV. 19, 19–20 (2018) (discussing a strongly defendant-favorable bill, introduced during the Trump presidency, called the Fairness in Class Action Litigation Act).

66. *See* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 25–62 (2017) (discussing the sustained but largely unsuccessful attempts to reduce liability through federal legislative reforms).

67. 11 U.S.C. § 362.

68. 11 U.S.C. § 727.

69. Maria Chutchian, *Ex-J&J talc supplier considering new path as judge nixes bankruptcy plan votes*, REUTERS (Oct. 13, 2021), https://www.reuters.com/legal/transactional/ex-jj-talc-supplier-considering-new-path-judge-nixes-bankruptcy-plan-votes-2021-10-13/.

70. James Nani, *J&J's 'Texas Two-Step' Talc Bankruptcy Strategy Remains in Doubt*, BL (Apr. 8, 2022), https://news.bloomberglaw.com/bankruptcy-law/j-js-texas-two-step-talc-bankruptcy-strategy-remains-in-doubt; Editorial, *Johnson & Johnson Seeking to Avoid Thousands of Lawsuits with Texas Two-Step*, CORP. CRIME REP. (May 19, 2022), https://www.corporatecrimereporter.com/news/200/johnson-johnson-seeking-to-avoid-thousands-of-lawsuits-with-texas-two-step/.

that had looked favorably on others' use of the tactic.[71] That court, however, transferred the matter to the District of New Jersey, where J&J is headquartered.[72] In 2022, the bankruptcy judge in New Jersey approved J&J's tactic,[73] and the Third Circuit agreed to hear the appeal directly.[74]

While the Texas Two-Step drama plays out in the talc litigation, a different bankruptcy drama is playing out in the opioid litigation. The opioid litigation drove Purdue Pharma, the maker of OxyContin, into bankruptcy in 2019.[75] The biggest question in the Purdue bankruptcy is whether members of the Sackler family, who founded and owned the company, can themselves obtain protection from further liability if they contribute billions of dollars toward the bankruptcy settlement of claims against Purdue.[76] Professor Lindsey Simon has described the phenomenon of "bankruptcy grifters" in which persons or entities other than the bankruptcy debtor seek protection by linking themselves to the bankruptcy.[77] A bankruptcy judge approved the Purdue bankruptcy plan, and the matter is currently on appeal to the Second Circuit.[78]

It remains to be seen what will happen with the bankruptcy two-step tactic and the bankruptcy grifter tactic, just as it remains to be seen where trends will lead on class certification and whether arbitration clauses will retain their magic power to ward off class actions. Only one thing is certain: if plaintiffs find ways to defeat these corporate tactics to evade accountability, the mole will pop up somewhere else.

How can the civil litigation system do a better job dealing with the Whac-a-Mole problem? By definition, Whac-a-Mole is not the sort of problem one *solves*. The whole point is that another mole pops up

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71. Jeremy Hill, *Johnson & Johnson Puts Talc Injury Claims Into Bankruptcy*, Bloomberg Bus. (Oct. 14, 2021), https://www.bloomberg.com/news/articles/2021-10-14/johnson-johnson-puts-talc-injury-claims-in-bankruptcy.

72. Andrew Scurria, *J&J Talc Bankruptcy Case Moved to New Jersey From North Carolina*, Wall St. J., Nov. 11, 2021.

73. *In re* LTL Mgmt., LLC, 637 B.R. 396, 427 (Bankr. D. N.J. 2022).

74. Jonathan Randles, *J&J Talc Claimants Win Appellate Review of Bankruptcy Case*, Wall St. J. (May 11, 2022), https://www.wsj.com/articles/j-j-talc-claimants-win-appellate-review-of-bankruptcy-case-11652281875.

75. Jan Hoffman, *Purdue Pharma, Maker of OxyContin, Files for Bankruptcy*, N.Y. Times, Sept. 15, 2019.

76. Jan Hoffman, *Would a Purdue Bankruptcy Protect the Sacklers? Good Question*, N.Y. Times, Sept. 16, 2019.

77. Lindsey D. Simon, *Bankruptcy Grifters*, 131 Yale L. J. 1154, 1158 (2022).

78. John Russell, *Second Circuit looks askance at $6 billion OxyContin settlement*, Courthouse News Serv. (Apr. 29, 2022), https://www.courthousenews.com/second-circuit-looks-askance-at-6-billion-oxycontin-settlement/.

when you whack one down. But even so, it is worth considering how to whack a few of the moles that are currently interfering with civil litigation to hold corporations accountable.

Courts should reject defendants' Texas two-step attempts to evade liability by creating new entities and invoking bankruptcy under circumstances where the corporate wrongdoer was not entitled to bankruptcy protection.[79] Courts should closely scrutinize attempts by bankruptcy grifters to obtain discharges of liability by contributing to someone else's bankruptcy workout.[80] As stated above, Congress should amend federal arbitration law to eliminate the use of arbitration clauses as a get-out-of-class-actions-free card.

Defendant corporations are resilient. So are plaintiffs' lawyers. The back-and-forth will go on. In the face of never-ending attempts to evade accountability, the single best strategy is to avoid relying on a single best strategy. Approaching corporate misconduct from multiple directions—private civil litigation as well as government enforcement proceedings and criminal proceedings where appropriate—makes it easier to hold corporations accountable by making it harder for wrongdoers to use any one technique to evade accountability.

D. The Agency Problem

In contrast to criminal litigation and administrative enforcement, civil litigation generally depends upon private lawyers to represent the plaintiffs. Indeed, one of the great strengths of civil litigation is that it relies on private resources, market incentives, and entrepreneurial spirit, rather than relying on public resources that tend to be more limited and less nimble.[81] But representation of plaintiffs by private lawyers carries a risk that lawyers' incentives may not align with the interests of the victims.

If claims are litigated to judgment (rather than resolved by settlement), lawyers' incentives on the plaintiffs' side align reasonably well with their clients' interests. If the lawyers are working on a contingent-fee basis typical of tort litigation, fees correspond to the size of recovery so lawyers and clients share an interest in maximizing the recovery. If the lawyers are working on a fee-shifting basis typical of civil rights litigation, the lawyers and clients share an interest in being

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79. *See* J. Maria Glover, *Due Process Discontents in Mass-Tort Bankruptcy*, 72 DePaul L. Rev. (forthcoming 2023).

80. *See* Simon, *supra* note 77 (describing the phenomenon of non-debtor "grifters" that glom onto others' bankruptcies to obtain relief from litigation, and proposing safeguards).

81. *See generally* John C. Coffee, Jr., Entrepreneurial Litigation: Its Rise, Fall, and Future (2015).

the prevailing party. And if the lawyers are working as class counsel with the expectation of court-awarded attorneys' fees, they share an interest with class members in securing a recovery and maximizing the size of the judgment.

Most cases, however, are not litigated to adjudication; they settle. Settlement opens opportunities for plaintiffs' counsel and defendants to serve their mutual self-interest in ways that disserve the claimants. When disputes involve many victims with claims against a corporate defendant, certain interests of claimants' lawyers align with the interests of defendants in settlement.[82] It is sad but perhaps unsurprising that some class action settlements and some non-class aggregate settlements include terms that are favorable for defendants and favorable for the lawyers who negotiated the deal on behalf of plaintiffs, but not so favorable for those who were the victims of the corporate wrongdoing.[83]

One answer to concerns about misalignment of lawyers' and clients' interests in settlement is that the decision to settle belongs to the client. As a matter of legal ethics, clients retain autonomy over the decision to relinquish a claim in exchange for a remedy they find satisfactory.[84] This norm falls apart, however, in the mass-harm scenario that often results from serious corporate misconduct. In class actions, absent class members are bound by a settlement negotiated for them by class counsel and approved by the court. In non-class mass settlements, clients in theory retain control over the settlement decision after disclosure of the aggregate settlement terms.[85] But in practice, control over mass settlements falls heavily to negotiating counsel. Indeed, one of the shared interests of mass plaintiffs' counsel and defendants is to reduce individuals' power to decline participation in a comprehensive settlement.[86]

In what ways do the interests of defendants align with the interests of negotiating plaintiffs' counsel to the potential disadvantage of victims? Defendants in mass disputes seek closure above all, and in class counsel or non-class negotiating counsel they find ready partners in this quest. Closure may appear to both sides as a worthy goal if it helps bring a mass dispute to resolution, but the question should always be whether the victims of wrongdoing are being shortchanged in

82. *See* Erichson, *Aggregation as Disempowerment*, *supra* note 23, at 862–64.

83. *See id.* at 911.

84. Model Rules Pro. Conduct r. 1.2(a).

85. Model Rules Pro. Conduct r. 1.8(g).

86. *See* Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 Cornell L. Rev. 265, 318–19 (2011).

the process. In class actions, expanding the scope of a class definition in settlement or expanding the scope of the release helps defendants maximize their protection from future liability, and helps class counsel maximize the scope of the settlement they can claim to have achieved. Even if additional class members get little benefit and even if additional claims are given little remedy, it is pure upside for class counsel because it brings in parties or claims that counsel otherwise would not have represented. In non-class mass settlement negotiations, defendants similarly crave closure and therefore tend to favor terms that pressure claimants into participating in the deal, and claimants' lawyers similarly benefit from terms that maximize client participation and allow lawyers to move on to other work.

In class settlements, defendants and class counsel share an interest in making the settlement value appear large even if its real value to claimants and its real cost to defendants is much smaller than it appears.[87] By puffing up the apparent size of a settlement without increasing its cost to defendants—for example, by including coupons or credits with face value much higher than their real value to claimants or cost to defendants,[88] by including injunctive relief with no real value to claimants or cost to defendants,[89] or by including monetary relief with a burdensome claims process that claimants will not complete[90]—class counsel hope to secure both defendants' agreement and judicial approval of their proposed settlement, payments for class representatives, and attorneys' fees. In non-class settlements, negotiating counsel may similarly desire the court's blessing for the proposed deal[91] and may similarly depend on the court's say-so for fees, particularly if the negotiating lawyers are serving as common-interest leadership counsel within an MDL or other aggregated multi-counsel litigation.

If serious corporate wrongdoing results in settlement terms that fail to provide adequate relief to victims because of these agency problems, then this presents an obvious problem for compensation accountability. A settlement may appeal to both a defendant and class

87. *See* Erichson, *Aggregation as Disempowerment*, *supra* note 23, at 874.

88. *See, e.g.*, *In re* EasySaver Rewards Litig., 921 F. Supp. 2d 1040, 1047 (S.D. Cal. 2013), *vacated and remanded*, 599 F. App'x 274 (9th Cir. 2015).

89. *See, e.g.*, Marek v. Lane, 571 U.S. 1003, 1004, 1006 (2013) (Roberts, C.J., concurring in denial of certiorari) (expressing deep skepticism about the fairness of a class action settlement in which, among other things, Facebook agreed to discontinue a challenged program but could reinstitute the same program with a different name).

90. *See, e.g.*, Pearson v. NBTY, Inc., 772 F.3d 778, 783–84 (7th Cir. 2014).

91. *See* Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1292 (2017); Howard M. Erichson, *The Role of the Judge in Non-Class Settlements*, 90 WASH. U. L. REV. 1015, 1024 (2013).

counsel or mass counsel without providing true accountability between the corporate wrongdoer and those who were wronged.

What about punishment and deterrence? Proponents of settlements with little compensation for victims may point to the deterrent or disgorgement value their proposed settlement provides, but the heart of the agency problem is that plaintiffs' counsel need defendants' agreement and defendants will not agree to terms that are too costly. Many of the tricks in the mass settlement playbook involve ways to reduce settlement costs to defendants while making the overall terms appear sufficiently rich to secure client participation and judicial approval. The Ninth Circuit put its finger on the problem in *Dennis v. Kellogg Corp.*,[92] a false-advertising class action. The proposed class settlement included distributions of defendant's product to charities, but the proponents' multi-million dollar valuation of this portion of the settlement not only failed to answer how this distribution would benefit the consumer class, but also whether the defendant would make the distribution by using surplus product, whether it would have donated the product anyway, whether it would take a tax deduction for the donation, and whether the valuation was based on retail price rather than cost to the defendant. As the Ninth Circuit saw it, the proposal served neither compensation nor deterrence goals: "Plaintiffs' counsel tells us that settlements like this serve the purposes of 'restitutionary disgorgement and deterrence.' If the product *cy pres* distribution is form over substance and not worth nearly as much to Kellogg as the settlement claims, then these goals are not served."[93]

How can the civil litigation system do a better job dealing with the agency problem? First, by taking seriously the duty to scrutinize proposed class-action settlements. Courts tend to be too strict when applying the class certification requirements of Rule 23(a) and (b) for purposes of litigation, and too lax when applying the class settlement standard of Rule 23(e). Courts should look for red flags that a proposed settlement may be advantageous for defendants and for class counsel but not for class members, and courts seem to be getting better at doing this.[94] Second, courts should be attuned to whether a class settlement was negotiated after the class was certified for litigation (in which case agency risks still exist but at least class counsel had real leverage with which to negotiate on behalf of the class) or whether the deal is being proposed as a settlement class action (in which case the agency problems are at their worst and class counsel lacked the lever-

92. Dennis v. Kellogg Co., 697 F.3d 858 (9th Cir. 2012).
93. *Id.* at 868.
94. *See* Erichson, *Aggregation as Disempowerment*, *supra* note 23, at 870–73.

age of threatening to take the class claims to trial).[95] Third, courts and disciplinary authorities should enforce the aggregate settlement rule to ensure that non-class settlement decisions belong to the clients,[96] and should reject non-class settlement terms that coerce claimants to participate.[97]

Nearly all serious agency risks in civil litigation settlements flow from incentives created by private attorneys' fees. This invites an important question: What sorts of cases are private lawyers well suited to prosecute? If some cases are poorly suited to private lawyering that is driven in part by fee incentives, then these are the sorts of cases where it is most important to deploy government regulatory enforcement or the criminal justice system. Civil litigation pursued by private lawyers is generally well suited for cases involving wrongdoing that has caused sufficiently grave per-victim harms that victims care about compensation. This requires that courts remain vigilant to the risk that lawyers' incentives regarding mass settlements may yield settlement terms that undermine both compensation-accountability and deterrence-accountability. Attention by interested victims somewhat reduces agency risks although it is not a cure. As long as courts remain attentive to the difference between spurious settlement terms and real value for claimants, the claimants' lawyers broadly share the interest of claimants to maximize overall recovery.

But what about cases of corporate wrongdoing where the aggregate harm is large but the per-victim harm is too small for individual victims to care about compensation? In some ways this is the perfect setup for a class action, indeed it is arguably the class action's raison d'être.[98] The negative-value aspect of such claims offers a powerful basis to find that a proposed class action meets the superiority requirement of Rule 23(b)(3).[99] Some argue that in class actions involving small individual damages, compensation does not matter and the point of the class action is to achieve disgorgement and deterrence. Brian Fitzpatrick has written that "small-stakes class actions serve no insurance function. Rather, the only function they serve is deter-

95. *See* Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 Geo. Wash. L. Rev. 951, 957–59 (2014).

96. *See* Model Rules Pro. Conduct r. 1.8(g); Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 Notre Dame L. Rev. 1769, 1796–97 (2005).

97. *See* Erichson & Zipursky, *supra* note 86.

98. *See* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 Harv. L. Rev. 664, 666 (1979) (describing the value of class actions in terms of "the societal benefits derived from deterring socially proscribed conduct and providing small claim rectification").

99. *See* Zinser v. Accufix Rsch. Inst., Inc., 253 F.3d 1180, 1190, *amended by* 273 F.3d 1266 (9th Cir. 2001).

rence."[100] Therefore, he argues, "we should not be concerned about compensating class members in small-stakes class actions and, instead, should be concerned only with fully incentivizing class action lawyers to bring as many cost-justified actions as possible."[101]

It makes sense that for some instances of corporate misconduct, what matters is deterrence-accountability and not compensation-accountability because the per-victim harm is trivial even though the aggregate harm and gravity of the misconduct are serious. But if compensation does not matter, why are these cases pursued as civil litigation by private lawyers purporting to represent private plaintiffs or a plaintiff class with claims against the corporate wrongdoer? If the point of a proceeding is not to settle an account between a wrongdoer and its victims, but rather to achieve accountability of a more public sort, then why embrace the pretense that the lawyers' work is to represent claimants who are the possessors of civil claims under substantive law? Most importantly, when litigation serves only the goal of punishing corporate misconduct, rather than also the goal of providing a remedy to victims, why allow the corporation to negotiate its punishment with private lawyers who stand to make a lot of money by reaching a deal on terms that please the corporation?

In a legal and political system where government regulators lack the resources or the will to identify and pursue corporate wrongdoers, we will continue to rely on civil litigation pursued by private lawyers. We will continue to engage in the distinctly American practice of relying on market incentives to encourage private actors to do what government fails to do. A more rational legal and political system, however, would rely on different sorts of accountability tools for different sorts of accountability. In cases where compensation matters, private lawyers representing private plaintiffs or classes are well positioned to achieve both compensation accountability and deterrence accountability, despite all the challenges. But in cases where compensation does not matter, one has to wonder whether private civil litigation is the best tool for accountability, particularly in light of the information problems, collective action problems, and agency problems presented by private civil litigation. Attention to the agency problem sheds light on both the ineffectiveness and the phoniness of pursuing deterrence accountability while clinging to the pretense of representing the civil claims of victims.

100. Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2047 (2010).

101. *Id.*

III. Achieving Adequate Accountability with Multiple Inadequate Tools

The bottom line(s) from Part II's account of civil litigation problems can be summed up dishearteningly as follows:

> Because of the information asymmetry problem, corporate misconduct often goes unidentified; even if identified it may go unclaimed; and even if claimed it may go unlitigated beyond the pleading stage.
>
> Because of the collective action problem, claims of corporate misconduct may go unpursued for lack of economic viability; and even if pursued, the claims may be organized disadvantageously to plaintiffs because of barriers to aggregation.
>
> Because of the whac-a-mole problem, when plaintiffs use discovery and other means to overcome information barriers and when plaintiffs use class actions and other means to overcome aggregation barriers, defendants find new ways to avoid or reduce their exposure.
>
> Because of the agency problem, even when litigation against corporate defendants occurs and even when it appears to succeed, the success may be more illusory than real both as a matter of compensation and as a matter of deterrence.

Turning toward the hopeful, this account suggests two kinds of questions. One is how to reduce the problems even if none of the challenges can be overcome entirely. The other is how to deploy civil litigation alongside other mechanisms in light of rational pessimism over the prospects of civil litigation to achieve full accountability. In other words, returning to the fourth axiom with which I began, assuming government agencies and the criminal justice system have neither the resources nor the will to deal with all of the corporate misconduct that occurs, where is the need most critical for these other mechanisms to fill the gaps left by civil litigation?[102]

To illustrate the problems described in Part II, but also to see how deployment of multiple legal tools can compensate for the inadequacy of any one tool, let's consider a prominent recent example of corporate wrongdoing and the legal system's attempts to hold the corporation accountable. From 2002 to 2016, Wells Fargo Bank engaged in a practice of pressuring employees to meet unrealistic sales goals, which led thousands of Wells Fargo employees to sell vast numbers of products and additional accounts to customers without the customers' consent or by misleading the customers. According to the U.S. Attorney's

102. One could, of course, ask the question in the opposite direction: given the inadequacies of criminal and regulatory processes to hold corporations accountable for wrongdoing, where is the need most critical for civil litigation to fill the gaps? *See generally* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 Hastings L. J. 1325, 1345–46 (1991).

statement, the massive scheme illustrated "a complete failure of leadership at multiple levels within the Bank."[103] To receive incentive compensation and to avoid reprimand or termination, employees felt the need to meet aggressive sales goals. Employees met these goals by engaging in a set of illegal practices. These practices included creating false records and forging signatures to open accounts that had not been authorized by customers; opening debit cards and creating personal identification numbers for customers without authorization; simulating funding by moving funds among customers' accounts or by injecting their own money; and opening credit card accounts without authorization. The *Wall Street Journal* reported on some of the bank's questionable practices in 2011,[104] and the *Los Angeles Times* conducted a substantial investigation in 2013.[105]

Civil litigation by victims of these fraudulent practices was inevitable. Victims saw that they were incurring fees for accounts that they had not authorized, and they sued for remedies. Plaintiffs filed two class actions against Wells Fargo in 2015 in the Northern District of California, alleging that the bank had opened accounts in their names without their consent,[106] and voluntarily dismissed one to pursue a consolidated class action complaint in *Jabbari v. Wells Fargo*.[107] Wells Fargo moved to compel arbitration of the plaintiffs' claims, and the district judge granted the motion and therefore dismissed the consolidated complaint.[108] Wells Fargo would repeat the arbitration move in other lawsuits, not only because it expected more favorable treatment in arbitration but also because its arbitration clause prohibited class actions.[109] In *Jabbari*, plaintiffs appealed the judge's decision to compel arbitration. While the appeal was pending, Wells Fargo negotiated a settlement class action with the plaintiffs' lawyers.[110] To accomplish the settlement class action, Wells Fargo waived its right to arbitrate the claims individually. The district judge granted final approval of the

103. *See* Press Release, U.S. Dep't of Just., *supra* note 44. *See also* Emily Flitter, *The Price of Wells Fargo's Fake Account Scandal Grows by $3 Billion*, N.Y. Times, Feb. 21, 2020.

104. Randall Smith, *In Tribute to Wells, Banks Try the Hard Sell*, Wall St. J., Feb. 28, 2011.

105. E. Scott Reckard, *Wells Fargo's Pressure-Cooker Sales Culture Comes at a Cost*, L.A. Times, Dec. 21, 2013.

106. Jabbari v. Wells Fargo & Co., No. 15-cv-02159-VC, 2015 WL 13699809, at *4 (N.D. Cal. 2015); Heffelfinger v. Wells Fargo & Co., No. 3:15-cv-02942, at *86 (N.D. Cal. 2015).

107. *See* Jabbari v. Wells Fargo & Co., No. 15-cv-02159-VC, 2017 WL 5157608, at *2 (N.D. Cal. July 8, 2017).

108. Order Granting Defendants' Motions to Compel Arbitration, Jabbari v. Wells Fargo & Co., No. 15-cv-02159-VC (N.D. Cal. Sept. 23, 2015).

109. *See* Michael Corkery & Stacy Cowley, *Wells Fargo Killing Sham Account Suits by Using Arbitration*, N.Y. Times, Dec. 6, 2016.

110. *See* Jabbari v. Wells Fargo & Co., No. 15-cv-02159-VC, 2017 WL 5157608, at *2 (N.D. Cal. July 8, 2017).

$142 million settlement in 2018 and awarded the lawyers over $21 million in fees.[111]

The civil litigation by victims of the Wells Fargo unauthorized account scam illustrates several of the problems identified in Part II. First, it shows the problem of information asymmetry. The practices had been going on for years before customers really understood what was being done to them, and without the investigative reporting of major newspapers, plaintiffs would have had a hard time pursuing their claims.[112]

Next, it shows the problem of collective action. The amounts at stake for any individual customer were small, such as bank fees on unauthorized accounts, but the aggregate harm and scope of wrongdoing were enormous. It is the perfect scenario for a class action that could level the field by allowing plaintiffs to litigate collectively, as the plaintiffs in California were attempting to do, but Wells Fargo had imposed on customers an arbitration clause that prohibited class actions. Ultimately, Wells Fargo waived its arbitration right to give the federal court power to effectuate the settlement class action. But by then, Wells Fargo had obtained exactly the benefit it wanted from the arbitration clause—it was able to negotiate a comprehensive settlement with lawyers who knew that they lacked the leverage of threatening to take the claims to trial as a class action.[113] Indeed, the district judge explicitly referenced the arbitration clause with its class action prohibition as a reason to find the settlement adequate. The judge found the settlement reasonable for the class "when balanced against the probable outcome of further litigation, liability and damages issues, and potential appeals of rulings, in particular given the Parties' dispute over the mandatory arbitration and class action waiver provisions contained in Defendants' Customer Account Agreements."[114] The judge was telling class members that they should be satisfied with this settlement because they would do no better by litigating, given that they lacked the power to take their claims to trial on a class action basis and would have to accept whatever they got individually

111. Revised Order Granting Final Approval of Class Action Settlement, Jabbari v. Wells Fargo & Co., No. 15-cv-02159-VC (N.D. Cal. June 14, 2018).

112. *See* Michael Corkery, *Wells Fargo Fined $185 Million for Fraudulently Opening Accounts*, N.Y. TIMES, Sept. 8, 2016 ("Some customers noticed the deception when they were charged unexpected fees . . . or started hearing from debt collectors about accounts they did not recognize. But most of the sham accounts went unnoticed, as employees would routinely close them shortly after opening them.").

113. *See* Jeff Sovern, *Free-Market Failure: The Wells Fargo Arbitration Clause Example*, 70 RUTGERS L. REV. 417, 421–23 (2018).

114. *Jabbari*, 2017 WL 5157608, at *5.

from arbitrators, if any bank customers even were to pursue individual arbitration.

Finally, the Wells Fargo class settlement illustrates the agency problem. The putative class counsel in *Jabbari* were in a difficult position. Because of the Wells Fargo arbitration clause and the district judge's decision at least preliminarily to dismiss the class action complaint and order the parties to arbitrate their dispute, the lawyers could not expect to go forward with a class action against Wells Fargo. The only way they could win the privilege of representing the class of victims—and earn the fees that come with such representation—was by finding settlement terms that Wells Fargo would agree to. By striking an agreement for a settlement class action, the lawyers were able to win the franchise and its $21 million in fees. In every way, the setup was one that disfavored the class members' interests.

Explaining his finding that the size of the class settlement was adequate, the district judge stated that perhaps the plaintiffs were entitled to more statutory damages under applicable substantive law than the settlement provided, but the settlement was an adequate compromise because the plaintiffs probably would not have the opportunity to pursue their claims as a class action:

> The proposed intervenors' objections to the size of recovery aren't entirely baseless. It is at least conceivable . . . that the sum of statutory damages under [the Fair Credit Reporting Act (FCRA)] could exceed the current value of the settlement fund. It is also conceivable that certain state-law . . . claims could result in recovery separate from that available under FCRA. But the Court finds that the current settlement adequately discounts from the upper limit of feasible recovery. . . . Although the Court has doubts about Wells Fargo's continued ability to enforce its adhesive arbitration agreements and class waivers . . . plaintiffs would face significant risk at the class certification stage.[115]

In other words, even in a case where there was no serious doubt about the merits of the claims, the plaintiffs obtained compensation that likely was less than their claims were worth. Why did this happen? First, if the objectors are correct that plaintiffs had obtained inadequate discovery, it happened in part because of an information asymmetry problem. Second, if the judge is correct that the settlement amount was discounted because the plaintiffs might have been unable to obtain class certification even if they could overcome the arbitration clause class action prohibition, it happened because of a collective action problem. Third, because the deal was negotiated as a settlement class action by putative class counsel who lacked the power to

115. *Id.* at *1.

bring the class claims to trial and who therefore were powerfully motivated to get to yes with the defendant, it happened because of an agency problem. Within the confines of the victim civil litigation of the *Jabbari* class action, Wells Fargo essentially negotiated its own punishment with private lawyers whose pay depended on agreeing to Wells Fargo's terms.

This is not to say that the settlement class action achieved nothing. It created a fund for compensating the class members' losses, it required Wells Fargo to pay a substantial sum, and it publicized the bank's wrongdoing. But there are reasons to be skeptical about whether the nationwide class settlement that resolved the victims' claims against Wells Fargo provided either an adequate remedy for the victims under applicable substantive law, or an adequate punishment for the defendant that could deter similar misconduct by others.

In the meantime, however, federal and state authorities pursued their own legal proceedings against Wells Fargo. In 2016, the Consumer Financial Protection Bureau imposed a $100 million fine on Wells Fargo.[116] Wells Fargo also paid $35 million to the Office of the Comptroller of the Currency, as well as $50 million to Los Angeles city and county.[117] In 2018, the attorneys general of fifty states reached a $575 million settlement with Wells Fargo.[118] Wells Fargo's Chief Executive Officer was hit with a $17.5 million fine and a lifetime ban on working in banking, its Chief Financial Officer similarly received a lifetime ban, penalties were imposed on other executives, and the Federal Reserve imposed harsh penalties on Wells Fargo to limit the bank's growth unless it fixes the problems.[119]

In 2020, the big hit came when the Department of Justice (DOJ) reached a deferred prosecution agreement in which Wells Fargo agreed to pay $3 billion to resolve the DOJ's criminal investigation as well as Securities and Exchange Commission proceedings.[120] It is noteworthy the extent to which government actors involved in these proceedings framed the event in terms of "accountability" for the corporate wrongdoer. The DOJ's press release quoted a Deputy Assistant Attorney General from the Civil Division as saying, "This settlement holds Wells Fargo accountable for tolerating fraudulent

116. *See* Corkery, *supra* note 112; Consent Order, In the Matter of Wells Fargo Bank, N.A., Admin. Proceeding 2016-CFPB-0015 (Sept. 8, 2016).

117. *See* Corkery, *supra* note 112.

118. *See* Imani Moise, *Wells Fargo to Pay $575 Million in Settlement with U.S. States*, Reuters, Dec. 28, 2018.

119. *See* Flitter, *supra* note 103; Emily Flitter et al., *Federal Reserve Shackles Wells Fargo After Fraud Scandal*, N.Y. Times, Feb. 2, 2018.

120. *See* Press Release, U.S. Dep't of Just., *supra* note 44; Flitter, *supra* note 103.

conduct that is remarkable both for its duration and scope, and for its blatant disregard of customer's private information."[121] It quoted the FDIC's Inspector General as saying, "Today's multi-billion-dollar penalty holds Wells Fargo accountable for its unlawful sales practices and pressure tactics in which it deceived millions of clients, thus causing substantial hardship for the very individuals who placed their trust in the institution."[122] And it quoted U.S. Attorney Andrew Murray with an even more emphatic statement regarding accountability: "Today's announcement should serve as a stark reminder that no institution is too big, too powerful, or too well-known to be held accountable and face enforcement action for its wrongdoings."[123] Even if this last pronouncement may be unduly rosy about the prospect of holding powerful institutions accountable as a general matter, and even if each penalty imposed on Wells Fargo was less than it might have been, what is clear is that the multiplicity of proceedings in the Wells Fargo story filled in some of the gaps left by the shortcomings of victim civil litigation in the form of the nationwide settlement class action.

Civil litigation faces many challenges as a tool for holding corporations accountable for wrongdoing; I have explored four sorts of those challenges here. I have suggested ways to mitigate some of the problems, but none of the problems is going to disappear, and civil litigation will remain an imperfect, incomplete tool. Holding corporations accountable requires the deployment of civil litigation alongside the criminal justice system and government regulatory enforcement, with eyes open to where civil litigation falls short.

121. *See* Press Release, U.S. Dep't of Just., *supra* note 44.
122. *Id.*
123. *Id.*