
Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups

Meredith Dearborn†

INTRODUCTION: THE COST OF THE CORPORATE ENTERPRISE

In the early 1990s, Unocal's fourth-tier subsidiary allegedly engaged in a joint venture with the government of Myanmar² to build a gas line across the country's Tenasserim region in a now-infamous project called the Yadana Pipeline.³ At the time, as now, a military junta known as the State Law and Order Restoration Council (SLORC) controlled the country.⁴ Myanmar Oil, a state-owned company designed to manage the country's natural gas and oil

Copyright © 2009 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

† J.D. candidate, University of California, Berkeley School of Law (2009); B.A., Yale University (2004). I want to extend my heartiest thanks to my advisor in this endeavor, Richard Buxbaum, who guided me through a long semester of research, writing, and editing. Thanks also to Eric Talley, who encouraged me to challenge my own assumptions, and whose provocative corporations class inspired me to write this Comment. I am indebted to the editors the *California Law Review*, whose work has been dogged and invaluable; thanks to Cortelyou Kenney for her aggressive and brilliant comments, Deborah Carillo for her meticulous bluebooking and flexibility, and Justin Hoogs for his careful editing during the final reads. And of course, I am always grateful to my family and community for their love and support.

2. In 1989, the Burmese military junta officially changed the country's English name from "Burma" to "Myanmar." Some opposition groups, several countries (including the United States), and many news outlets continue to use the name "Burma." See *Should it be Burma or Myanmar?*, BBC News Magazine, Sept. 26, 2007, available at http://news.bbc.co.uk/2/hi/uk_news/magazine/7013943.stm (last visited Nov. 11, 2008). I use "Myanmar" because the courts in the cases to which I will refer frequently use "Myanmar," as does the United Nations. *Id.* I do not convey any political sentiment through its usage.

3. See Armin Rosencranz & David Louk, *Doe v. Unocal: Holding Corporations Liable for Human Rights Abuses on Their Watch*, 8 Chap. L. Rev. 135 (2005); see also Unocal Defendants' Phase 1 Trial Brief at 5, *Doe v. Unocal*, Nos. BC 237980 & BC 237679 (Cal. App. Dep't Super. Ct. Dec. 9, 2003).

4. See The Foreign & Commonwealth Office Country Profiles: Burma, <http://www.fco.gov.uk/en/about-the-fco/country-profiles/asia-oceania/burma?profile=history&pg=3>. In 1997, the SLORC renamed itself the State Peace and Development Council. *Id.*

resources,⁵ and a French company, Total, in which two Unocal holding company subsidiaries held 28% interests in different aspects of the project, allegedly contracted with the Myanmar military and other state forces for “security and other services” along the pipeline route in the course of setting up the Yadana joint venture.⁶ Tenasserim villagers later alleged in a series of lawsuits that the military engaged in widespread human rights violations, including theft, enslavement, rape, and torture, against the residents of hundreds of villages in the pipeline’s path.⁷ Instead of suing the SLORC or the subsidiaries alone, however, plaintiffs who filed their claims in U.S. courts also sued the parent company Unocal Corporation, alleging that it was complicit in the human rights violations perpetrated by the military.⁸ The plaintiffs asserted that Unocal and its subsidiaries were part of a unified joint venture and thus should be held jointly liable,⁹ and that Unocal knew or should have known of the military’s abuses in the course of providing pipeline security.¹⁰ The plaintiffs pointed to the subsidiary’s distribution of Unocal-stamped soccer balls and hats to villagers, among other things, as evidence that the entire enterprise benefited the parent company as part of a unified economic scheme and that the entire enterprise should thus be held liable for the human rights violations.¹¹

Doe v. Unocal proceeded in two separate causes of action: one federal and one state. The federal case, based on a claim brought under the Alien Tort Claims Act, proceeded under a different liability regime and so does not concern us here.¹² The state case, however, involved California law related to “piercing the corporate veil,”¹³ an equitable doctrine that allows plaintiffs access to the assets of a shareholder—here, a parent corporation—to satisfy the debts of a corporation—here, a subsidiary—under a limited number of

5. *Doe v. Unocal Corp.*, 395 F.3d 932, 937 (9th Cir. 2002), *appeal dismissed per stipulation en banc*, 403 F.3d 708 (9th Cir. 2005) [hereinafter *Unocal II*].

6. *Id.* at 938. Even without a formal contract or employment agreement, the military undisputedly increased its presence along the route and Unocal was aware that the state forces in the region were providing security and other services for the Yadana pipeline. “A Unocal memorandum . . . reflects Unocal’s understanding that ‘[f]our battalions of 600 men each will protect the [pipeline] corridor’ and ‘[f]ifty soldiers will be assigned to guard each survey team.’ . . . In addition, the Military built helipads and cleared roads along the proposed pipeline route for the benefit of the Project.” *Id.*

7. *Doe v. Unocal Corp.*, 963 F. Supp. 880, 883 (C.D. Cal. 1997) *aff’d in part, rev’d in part*, 395 F.3d 932 (9th Cir. 2002) [hereinafter *Unocal I*].

8. *Unocal I*, 963 F. Supp. at 883.

9. Unocal Defendants’ Phase 1 Trial Brief, *supra* note 3, at 26 *passim*.

10. *Unocal II*, 395 F.3d at 939-42.

11. Unocal Defendants’ Phase 1 Trial Brief, *supra* note 3, at 30.

12. The federal case settled and the parties stipulated to a judgment. *See Unocal I*, 963 F. Supp. 880; Rosencranz & Louk, *supra* note 3, at 135.

13. “Piercing the corporate veil” is a term of art that is interchangeable with other names for the doctrine, including “alter ego” liability. California courts, as well as other state courts, use these terms interchangeably; I will do so as well. *See, e.g., Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1235 (N.D. Cal. 2004).

circumstances.¹⁴ Nearly every state has some version of this doctrine,¹⁵ and California's two-pronged test is typical, and typically vague: plaintiffs must show both that the parent and subsidiary share a unity of interest and control, such that the subsidiary corporation is essentially the "alter ego" of the parent, and that, absent piercing, some form of "injustice" will result.¹⁶ The plaintiffs in the state case endeavored to show that the subsidiary's actions could be imputed to the parent in order to substantiate the villagers' tort and human rights claims, thereby holding Unocal, in addition to its subsidiary, responsible for their harms.¹⁷ The plaintiffs attempted to utilize the imperfect categories provided by California state law to establish that the massive corporate web of subsidiaries actually had the unified purpose of profiting the U.S. parent, Unocal Corporation.

They failed. The case eventually settled, but not before a trial court judge decided that their piercing claim could not proceed on the merits.¹⁸ According to the judge, the plaintiffs did not carry their burden under the California piercing test—which considers the sharing of directors, the commingling of funds, pervasive control, and other factors—to prove that the subsidiary corporations were in effect the "alter egos" of Unocal.¹⁹ The court held that piercing the corporate veil could not be used to hold parent corporations liable for the torts or human rights abuses of their subsidiaries unless the evidence displayed such unity of interest between the corporate entities that they were functionally the same entity.²⁰ To hold otherwise, the judge wrote, would unacceptably "invalidate the corporate forms commonly employed by a large number of U.S. domestic and international corporations . . . [and] initiate a sea of change in the way all American corporations do business."²¹

I begin with the *Unocal* case because it is hardly unique. Parent corporations routinely externalize the risk of tort liability through legally

14. See, e.g., *Apex Oil Co. v. DiMauro*, 744 F. Supp. 53, 57 (S.D.N.Y. 1990).

15. Christopher P. Hall & David B. Gordon, *Enforcement of Foreign Judgments in the United States*, 10 Int'l L. Practicum 57, 57 (1997).

16. In California, the oft-cited case of *Associated Vendors v. Oakland Meat Co.*, 26 Cal. Rptr. 806, 813 (Cal. Dist. Ct. App. 1963) sets forth the test: "The two requirements are (1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow." I will discuss piercing in greater detail below. Although *Associated Vendors* is a contract case, piercing the corporate veil does not doctrinally differentiate between tort and contract creditors. See *Minton v. Cavaney*, 364 P.2d 473, 476 (Cal. 1961) ("There is no merit in defendant's contentions that the 'alter ego' doctrine applies only to contractual debts and not to tort claims . . .").

17. See Unocal Defendants' Phase I Trial Brief, *supra* note 3, at 3.

18. Statement of Decision Regarding the Phase I Trial, *Doe v. Unocal*, Superior Court of the State of California, County of Los Angeles, Case Nos. BC 237980 & BC 237679, April 14, 2004, at 31 (on file with author) [hereinafter Statement of Decision].

19. *Id.* at 12-31.

20. *Id.* at 31.

21. *Id.* at 28.

separate subsidiaries, though they derive profit from the very activities that generate the risk.²² The increasing prevalence of tort liability over the past century has compelled corporations to reorganize in ways that enable them to limit or entirely avoid paying for their harms; evasion methods include sequestering hazardous activities in subsidiary corporations.²³ Though the stories about harm-causing corporate groups are most frequently publicized in situations involving torts by foreign subsidiaries—the Bhopal and Amoco Cadiz disasters, for example, as well as numerous suits against oil companies²⁴—the strategy of limiting liability through subsidiaries also occurs in the United States. Subsidiarization occurred *en masse* in the aftermath of asbestos litigation,²⁵ cigarette manufacturers similarly restructured in reaction to lawsuits over tobacco-induced diseases.²⁶ Indeed, a large proportion of the small firms created over the past twenty-five years in hazardous industries were created in order to limit tort liability.²⁷ As tort damage awards increase and the scale of multinational corporate operations grows, “the threat of tort liability exceeding the net assets of such firms is likely to increase in the future.”²⁸

One of the critical features of corporate law is the principle of entity, or limited liability, which insulates a corporation’s owners (its shareholders) from the debts of the corporation beyond the amount of their investment.²⁹ Limited

22. See Jose Engracia Antunes, *Liability of Corporate Groups* (1994); Mark J. Roe, *Corporate Strategic Reaction to Mass Tort*, 72 Va. L. Rev. 1, 39 (1986). I do not wish to minimize the dramatic harms that are often at issue in these cases by using the dry term “externalize risk.” The suffering in these cases is significant and real. In the words of one plaintiffs’ lawyer, “Decades of development and technological advances have brought great improvements and conveniences but at a significant cost in human life and health. Our industry has left a trail of human misery, diseases, birth defects and cancers which afflict workers, their families, consumers of the products and even innocent bystanders.” Stanley J. Levy, *Toxic Tort and Product Liability Litigation*, in TOXIC TORT CASE ESSENTIALS: STRATEGIES, EXPERTS, MOTIONS, AND ADR, 21, 23 (P.L.I. Litigation and Administrative Practice Course Handbook Series 1992).

23. See Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 Yale L.J. 1879, 1881 & n.4 (1991).

24. See Antunes, *supra* note 22, at 6; see also The Castan Centre for Human Rights Law, Transnational Human Rights Litigation against Companies, <http://www.law.monash.edu.au/castancentre/projects/mchr/trans-hr-litigation.html> (last visited Sept. 5, 2008) (listing cases involving human rights litigation abroad). Many of these cases now involve the Alien Tort Claims Act, 28 U.S.C. § 1350. For a factual description of the Bhopal disaster, see text *infra* accompanying notes 192-205. The Amoco Cadiz was a crude carrier owned by Amoco Corporation through a filter of subsidiaries; the ship split in two off the coast of Brittany, France, and the resulting oil spill was one of the largest in history. *Matter of Oil Spill by Amoco Cadiz Off Coast of France on March 16, 1978*, 954 F.2d 1279, 1285 (7th Cir. 1992).

25. Roe, *supra* note 22, at 39-40.

26. *Id.* Philip Morris actually conceded that it created holding companies in order to “better insulate each business from obligations and liabilities incurred in unrelated activities.” Hansmann & Kraakman, *supra* note 23, at 1881 n.3 (internal citations omitted).

27. See Hansmann & Kraakman, *supra* note 23, at 1881 & n.5 (internal citations omitted). Hansmann and Kraakman conclude that “corporate subsidiaries are among the firms that are most likely to employ limited liability today to externalize tort damages.” *Id.* at 1926.

28. *Id.* at 1895.

29. See, e.g., Adolf A. Berle, Jr., *The Theory of Enterprise Entity*, 47 Colum. L. Rev. 343,

liability extends to situations in which a corporation, rather than a natural person, is the owner of another corporation, regardless of how much stock that corporation owns or how much control that corporation exerts.³⁰ This governing principle of the parent-subsidary relationship has influenced corporate law throughout the fifty states, and most practitioners, judges, and commentators take it for granted.

Piercing the corporate veil is the single exception to the limited liability principle.³¹ It is singular in its ability to penetrate corporate formalities and state-granted limited liability shields to reach an owner's assets, and it is singularly questioned, litigated, and outright scorned by practitioners and commentators.³² Yet, despite a wealth of academic literature on the topic, many commentators and legislators, and some judges, have shied away from either adopting or endorsing enterprise liability—an alternative formulation for parent-subsidary liability sharing that would operate in a more predictable, albeit a more wide-ranging, fashion.

In 1947, Adolf Berle wrote a famous article in which he suggested disregarding legal fictions about separate personhood in favor of a more realistic view of the corporate enterprise.³³ In Berle's view, the corporation's personhood is largely unproblematic when its shareholders are individual investors or corporations holding minor amounts of stock.³⁴ However, Berle argued that the corporate enterprise—a conglomerate of affiliated corporations, including parent and subsidiary groups operating for a common purpose—does not flush with the rationales for separate corporate personhood, because the enterprise behaves as a unified whole from an economic perspective. Thus, in this context, the fiction of the corporation's personhood becomes pure legal formalism at its costliest: a structure that may force society to pay for the harms

343 (1947) (arguing that “[a corporation’s] primary business advantage, of course, was insulation of individual stockholders composing the corporation from liability for the debts of the corporate enterprise.”) Others have disagreed that this was the primary purpose of the corporation at its conception. See David L. Cohen, *Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate Rules for Piercing the Veil, Fiduciary Responsibility and Securities Regulation for the Limited Liability Company?* 51 Okla. L. Rev. 427, 435-38 (1998) (discussing managerial centralization and aggregation of contracts, as well as the role of state regulation).

30. See, e.g., *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474-75 (2003) (“A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities A corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary; and, it follows with even greater force, the parent does not own or have legal title to the subsidiaries of the subsidiary.”). See also 18 Am. Jur. 2d *Corporations* § 65 (1996).

31. *Dole Food Co.*, 538 U.S. at 474-75.

32. See, e.g., *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1042 n.54 (2006) (citing increasing criticism of the practice, including Benjamin Cardozo in *Berkey*, *infra* note 53; Stephen Bainbridge, *infra* note 51; Robert Thompson, *infra* note 55; Frank Easterbrook & Daniel Fischel, *infra* note 52, and others).

33. See Berle, *supra* note 29.

34. See *id.* at 344.

caused by risky subsidiary behaviors. This result is especially expensive when the potential harms are greatest, for example, in industries involving ultrahazardous activities or those that potentially impose large human rights or environmental costs on the public and in areas that lack government safeguards or subsidization.³⁵ To prevent this result, Berle proposed an alternative formulation, “enterprise liability,” which would impose liability on a parent for the risky actions of subsidiaries that profit the corporate enterprise as a whole.³⁶ Essentially, if a parent corporation directly profits from a subsidiary’s conduct—as with Unocal directly profiting from its subsidiary’s construction of the Yadana pipeline—it must pay for that subsidiary’s harms.³⁷

Despite receiving a modicum of support from legal academia, pure “you profit, you pay” enterprise liability³⁸ for corporate torts has not, at least facially, been generally accepted. I will discuss limited liability, piercing the corporate veil, and enterprise liability in Parts I and II of this Comment. I will begin in Part I with the commonly-accepted notion that enterprise liability for corporate torts does not, at least facially, define the law in the United States. In Part II, I will argue that enterprise liability, in at least a limited form, presents a solution

35. See Maurice J. Dix, *The Economic Entity*, 22 *Fordham L. Rev.* 254, 255 (1953); William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 *Yale L.J.* 193 (1929); Daniel W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 *Colum. L. Rev.* 1565 (1991).

36. Berle, *supra* note 29, at 344; Dix, *supra* note 35, at 255.

37. By distinguishing between direct and indirect profit, I mean to draw a distinction between shareholders that are holding shares in a corporation for investment purposes alone, and parent companies, who generally profit from a subsidiary’s actions in more and different ways than a simple *pro rata* share. See Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 *Colum. L. Rev.* 1203, 1252 (2002) (describing controlling shareholders’ advantages over passive shareholders). Unocal, for example, was not merely investing in the pipeline project as a passive shareholder; it had an active business interest in transporting oil, and could feasibly direct the execution of the project, through either direct control over the instrumentalities involved or through indirect allocation of resources and promulgation of basic policies. The distinction between these latter two types of control is nuanced; I will discuss it further in Part V, *infra*.

38. I note that there may be more than one understanding of this term. Some commentators use “enterprise” liability to refer to horizontal piercing claims—where the assets of one subsidiary are accessed to pay the debts of a sister subsidiary. Accord John H. Matheson, *The Limits of Business Limited Liability: Entity Veil Piercing and Successor Liability Doctrines*, 31 *Wm. Mitchell L. Rev.* 411, 422 (2004). However, most commentators agree that “enterprise” refers to the unified economic group of corporations, and “entity” refers to the single, legal form of the corporation. Accord Antunes, *supra* note 22, at 231. I also use the term in order to differentiate it from “unlimited liability,” which abolishes the limited liability principle for all shareholders, whether they are corporate or individual. See Leebron, *supra* note 35, at 1568. In addition, “enterprise liability” has connotations in the employment context that do not concern us here; certain commentators use it to connote a more generalized type of *respondeat superior*, or vicarious, liability where the employer is held liable for the acts of the employee. See, e.g., Harvard Law Review Association, *Fixing Medical Malpractice Through Health Insurer Enterprise Liability*, 121 *Harv. L. Rev.* 1192 (2008). This idea is obviously related to the concept of enterprise liability between parent and subsidiary corporations. However, since I will focus on enterprise liability with respect to parent corporations and their subsidiaries, the employer-employee branch of the concept will not be discussed further in this Comment.

to some of the shortcomings of limited liability, and I will explain some of the economic and normative rationales in support of its adoption. But is this the end of the story? Is enterprise liability only a theory, and not the law? I will argue that the answer to these questions is neither clear-cut, nor uniform.

In Parts III and IV, I will embark on a review of the doctrine's current life abroad and in various enclaves of corporate law. In particular, I will demonstrate that, despite popular belief, enterprise liability for corporate torts does not represent a radical theoretical departure because it already exists in various forms internationally, and in some areas of U.S. law.

First, enterprise liability has surfaced in a few basic forms in foreign jurisdictions and international governance documents. Over the past thirty years, a number of countries, and a few proposed international corporate governance documents, have posited or adopted schemes that impose a unified system of liability on corporate groups. In Part III, I will provide a survey of the countries and international organizations that have adopted or suggested adopting enterprise liability as a basic tenet of corporate law.

Second, enterprise liability is an explicit requirement in several U.S. regulatory statutes. These enclaves reflect explicit policy choices by Congress to impose unified liability on groups of corporations. Moreover, courts have drawn on enterprise principles in several federal and state regulatory contexts where the statutes at issue do not explicitly impose it. This willingness to impose broad, cross-corporate liability in light of a "compelling public policy" is striking; it is enterprise liability in disguise. I will discuss these instances in Part IV.

The survey highlights notable aspects about the panoply of forms that enterprise liability might take. I will focus throughout this Comment on the various tests that currently exist or have been proposed for determining when a parent corporation is part of the same economic enterprise as a subsidiary. Many of these examples discuss control, but they do so in a variety of ways; some hinge liability on the parent's ability to directly control the subsidiary's actions, and others on the parent's economic interest in the subsidiary. Though I will generally discuss these examples under the basic division of "control" enterprise liability, where liability flows from a parent's control over a subsidiary, versus "true" enterprise liability, where the flow of profits and unified economic purpose dictate the imposition of liability, such categories are just guideposts. In Part V, I will argue that the control-based enterprise liability is legally and economically problematic.

Finally, in Part VI, I will synthesize the lessons of this survey in order to inform the construction of a proposed test for enterprise liability in the United States. Ideally, this revitalized enterprise liability framework would restructure the decisional processes within corporate groups to prevent catastrophic harms, while neither encouraging frivolous suits nor causing the end of the investment economy. Drawing from the lessons of enterprise liability's current life abroad

and in various enclaves of U.S. law, I will present some preliminary observations from which a new conversation about the merits and possible shortcomings of enterprise liability can, hopefully, begin.

I

THE PROBLEM OF ENTITY LIABILITY AND PIERCING THE CORPORATE VEIL

A. The Corporate Form

Many legal and economic scholars have masterfully explained the shortcomings of entity, or limited, liability and piercing the corporate veil from both normative and efficiency standpoints.³⁹ This section will synthesize the ideas of these commentators, offering an overview of existing law and scholarship in this area in order to provide a background against which to contrast enterprise liability.

The corporate fiction of limited liability dates back to the nineteenth century.⁴⁰ Two aspects of limited liability theory at its inception are relevant to this Comment. First, when limited liability was a rising norm, its detractors focused primarily on contract, and not tort, creditors.⁴¹ Shielding shareholders from claims by the involuntary victims of corporate misconduct, whether negligent or intentional, was not part of the original justification for limited liability. Second, conceptions of subsidiaries and holding companies were unusual until almost half a century later.⁴² In 1888, New Jersey was the first

39. Professor Blumberg's multi-volume treatise on corporate groups, along with his extensive writings on the subject, comprise an essential body of work in this area. See Philip I. Blumberg, *The Law of Corporate Groups: Procedural Problems in the Substantive Law of Parent and Subsidiary Corporations* (1983) [hereinafter Blumberg, *Procedural Law*]; Phillip I. Blumberg, *The Law of Corporate Groups: Problems of Parent and subsidiary Corporations Under Statutory Law of General Application* (1989) [hereinafter Blumberg, *Statutory Law: General*]; Phillip I. Blumberg & Kurt A. Strasser, *The Law of Corporate Groups: Problems of Parent and subsidiary Corporations Under Statutory Law Specifically Applying Enterprise Principles* (1992) [hereinafter Blumberg & Strasser, *Statutory Law: Specific*]; Phillip I. Blumberg & Kurt A. Strasser, *The Law of Corporate Groups: Problems of Parent and subsidiary Corporations Under State Statutory Law* (1995) [hereinafter Blumberg & Strasser, *Statutory Law: State*]; see also Philip I. Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (1993) [hereinafter Blumberg, *The Multinational Challenge*]; Philip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. Corp. L. 573 [hereinafter Blumberg, *Limited Liability*]; Philip I. Blumberg, *The Law of Corporate Groups*, 37 Conn. L. Rev. 605, 607 (2005) [hereinafter Blumberg, *Corporate Groups*].

40. Antunes, *supra* note 22, at 33.

41. Leebron, *supra* note 35, at 1566. See also Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 Yale L.J. 1, 70 (1980) ("[N]o one would have expected the doctrine to entail any more than protecting investors from unsatisfied claims of the corporation's voluntary creditors, and perhaps from judgments arising from the agents' ordinary negligence within the scope of employment.").

42. Sandra K. Miller, *Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the U.S.: A Comparative Analysis of U.S., German and U.K. Veil-Piercing Approaches*, 36 Am. Bus. L.J. 73, 84-85 (1998).

state to grant permission for any corporation chartered in the state to own stock in any other corporation.⁴³ Until it did so, the parent-subsidary relationship and vast interlocking corporate webs were *de facto* prohibited in every state, with some minor exceptions.⁴⁴

Today, the major contours of the corporate form remain much the same as they existed a century ago. Subsidiaries and holding companies are commonplace, and as for extensive limited liability that extends also to tort creditors, “[n]o principle seems more established in capitalist law or more essential to the functioning of the modern corporate economy.”⁴⁵ This attitude persists despite the doctrine’s historically poor ability to deal with tort creditors and with the parent-subsidary model of the corporate family.

Corporate personhood and limited liability are privileges bestowed by a sovereign (individual states in the United States) under conditions it specifies.⁴⁶ The exception to the limited liability principle is usually referred to as “piercing the corporate veil,” or the “alter ego doctrine,” which is a state common-law exception to the state statutory grant of limited liability.⁴⁷ Piercing has been the exception to the rule of limited liability since its inception.⁴⁸ Most, if not all, states will disregard the corporate fiction of limited liability and hold a shareholder liable for the debts of the corporation only under a constrained set of circumstances.⁴⁹ Although the prongs of the piercing test vary from jurisdiction to jurisdiction, generally, the plaintiff-creditor must show that: (1) the corporate shareholder exercises dominion and/or control over the corporation, such that the separate personalities no longer factually exist; and

43. Antunes, *supra* note 22, at 33; Lonny Sheinkopf Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. Pa. L. Rev. 1023, 1051 (2004). New Jersey actually earned the dubious appellation “The Traitor State” for this legislation. Blumberg, *Corporate Groups*, *supra* note 39, at 607. Nonetheless, New York, Connecticut, Pennsylvania, and Delaware all had enacted similar laws within ten years. Antunes, *supra* note 22, at 33.

44. New York, for example, had legislation against intercorporate ownership. See Act of 3.22.1811, ch. 67, sec. 7 (N.Y. Laws 111). In the absence of express legislation, however, it was unanimously prohibited by the courts in other states. In the words of Justice Brandeis, “[T]he power to hold stock in other corporations was not conferred or implied. The holding company was impossible.” *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 541 (1933). The few exceptions to the general rule that corporations could not hold stock in another corporation were granted by the state to particular corporations. See Antunes, *supra* note 22, at 31.

45. Leebron, *supra* note 35, at 1566.

46. See Robert W. Hamilton, *The Corporate Entity*, 49 Tex. L. Rev. 979, 981 (1970) (“It should be emphasized, however, that a corporation possesses [personhood], not because it is an entity, but because the business corporation acts so provide.”).

47. Leebron, *supra* note 35, at 1567.

48. Richard S. Farmer, *Parent Corporation Responsibility for the Environmental Liabilities of the Subsidiary: A Search for the Appropriate Standard*, 19 J. Corp. L. 769, 773 (1994).

49. See *In re Silicone Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1447, 1452 (N.D. Ala. 1995) (“So far as this court has been able to determine, some variation of this theory of liability is recognized in all jurisdictions.”); Christopher P. Hall & David B. Gordon, *Enforcement of Foreign Judgments in the United States*, 10 Int’l L. Practicum 57, 57 (1997) (“Virtually every state in the U.S. recognizes the concept of piercing the corporate veil.”).

(2) the shareholder has engaged in conduct that suggests that, in the absence of piercing, an injustice will be perpetrated using the corporate form.⁵⁰ This control-plus-injustice test has built-in elasticity, which is perhaps the inevitable consequence of vagueness.⁵¹

This flexibility is what has earned piercing its reputation as one of the most “confusing” areas of corporate law.⁵² While a member of the New York Court of Appeals, Judge Cardozo famously said that piercing is “enveloped in the mists of metaphor.”⁵³ Professors Easterbrook and Fischel elaborated: “‘Piercing’ seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled.”⁵⁴ It is the most litigated area of corporate law.⁵⁵ Though some commentators have suggested that courts are more willing to pierce the corporate veil when the owner is a corporation,⁵⁶ this has proven more or less untrue in practice.⁵⁷ It has been posited that “few areas of the law have been more sharply criticized by commentators.”⁵⁸ There is general accord that the doctrine “neither guide[s] good decision-making nor produce[s] consistent or defensible results.”⁵⁹ At least one commentator has urged abolishing the doctrine altogether, and summarized the problem from a practical standpoint as follows: “Veil piercing thus has costs, but no social payoff.”⁶⁰

B. Piercing the Veil for Corporate Groups in the Context of Torts

I do not wish to challenge fundamentally the notions of limited liability or advocate for abolishing piercing as an equitable doctrine. Others have

50. See Miller, *supra* note 42, at 88-90. I will refer to these steps as prong one and prong two, or the first prong and the second prong.

51. See Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. Corp. L. 479, 481 (2001). Bainbridge advocates abolishing the doctrine altogether due to this inherent vagueness. See *id.*

52. Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 89 (1985).

53. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926).

54. Easterbrook & Fischel, *supra* note 52, at 89.

55. See Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036, 1036 (1991).

56. See, e.g., Easterbrook & Fischel, *supra* note 52, at 110-11.

57. Thompson, *supra* note 55, at 1056 (“When potential defendants against whom liability is sought are grouped as either individuals or corporations, courts pierce the veil to get at individual defendants more often than they pierce to reach corporations. This result is contrary to what some commentators have suggested.”). Thompson did find, however, that when close corporations with one, two or three shareholders are omitted, piercing does seem to happen more often when the owner is a corporation. See *id.*

58. Thomas J. Heiden, *The New Limits of Limited Liability: Differing Standards and Theories for Measuring a Parent/Shareholder’s Responsibility for the Operations of Its Subsidiary*, 823 Practising L. Inst. 7, 17 (1993) (quoting Professor Blumberg). For a review of recent commentary, see Kurt A. Strasser, *Piercing the Veil in Corporate Groups*, 37 Conn. L. Rev. 637, 637 n.1 (2005) (listing articles).

59. Strasser, *supra* note 58, at 637.

60. Bainbridge, *supra* note 51, at 481.

embarked on these projects.⁶¹ Rather, I wish to put pressure on this formulation when it extends to tort creditors, parent and subsidiary corporations, and in particular, the sharpened area of concern in the junction between them—mass torts perpetrated by a subsidiary.

This area of concern is particularly pressing because the parent corporation, while perhaps not in direct control of the events that lead to massive harm, may be in a better position to prevent these catastrophes before they occur through oversight, protections, and allocation of capital resources. Yet, through unreasoned extension of limited liability to subsidiary corporations and to torts, the entity best able to prevent the worst harms is not incentivized to do so, which may foist the costliest harms of corporate conduct onto the public at large.⁶²

Generally, there are two major problems with the entity, or neoclassical, theory of the corporation, with its corollary of piercing the corporate veil. First, the doctrine has dubious social and economic utility in the context of tort creditors. Second, it applies poorly and irrationally to cases of corporate groups. These problems are precisely those that corporate law at its inception did not address.

1. Tort Creditors⁶³

Unlike voluntary, or contract, creditors, who may make independent and informed choices about their risks before they loan to or contract with corporations, involuntary, or tort, creditors have no opportunity to make such choices.⁶⁴ More importantly, limited liability toward tort victims may encourage corporations to take greater, socially harmful risks, externalizing the costs that those risks may impose on the public.⁶⁵ As Easterbrook and Fischel have drawn the distinction, with voluntary creditors “it is unlikely that any rule [of limited liability] will lead to systematically excessive risk taking; indeed, it

61. See, e.g., Bainbridge, *supra* note 51 (advocating abolishing veil piercing altogether); Leebron, *supra* note 35 (advocating unlimited liability).

62. I focus mainly on catastrophic harms such as environmental and human rights disasters both because these are the most troubling and also generally the most expensive. The logic I outline may extend to these areas as well. For further discussion, see text *infra* accompanying notes 342-346.

63. In addition to the authorities cited in this section, a wealth of commentators has exhaustively examined both sides of this issue. See, e.g., Janet Cooper Alexander, *Unlimited Shareholder Liability Through a Procedural Lens*, 106 Harv. L. Rev. 387 (1992); Hansmann & Kraakman, *supra* note 23; S. Shavell, *The Judgment Proof Problem*, 6 Int'l Rev. L. & Econ. 45 (1986); Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 Vand. L. Rev. 1 (1994) [hereinafter Thompson, *Unpacking*]; see also Stone, *supra* note 41, at 39 (noting that preventative laws are appropriate where society has a deep aversion to the harm).

64. See Hamilton, *supra* note 46, at 984. Though this represents a romanticized view of freedom of contract, the theoretical idea remains canonical.

65. Easterbrook & Fischel, *supra* note 52, at 103; Leebron, *supra* note 35, at 1568.

is unlikely that the legal rule will matter much.”⁶⁶ The case is different with tort creditors, however. Where transaction costs and limited liability principles do not impose incentives to compensate tort victims, “[f]irms capture the benefits from such activities while bearing only some of the costs; other costs are shifted to involuntary creditors. This is the real cost of limited liability”⁶⁷

Professors Hansmann and Kraakman expanded on this idea. First, allowing subsidiarization to externalize risk incentivizes the wrong behaviors on the part of managerial teams. Corporate decision-makers twice (or more) removed from the harms they may propagate are doubly incentivized to foist risky behavior onto the public.⁶⁸ This “moral hazard” problem creates outlets for managers to engage in excessively risky activities by outsourcing those activities to a subsidiary, thereby insulating the parent company from direct liability for the riskiest part of the corporate venture—and also decreasing the likelihood that the subsidiary will be adequately insured.⁶⁹

Thus, on the one hand, limited liability creates an incentive for shareholders—especially corporate shareholders, who also often make managerial decisions—to spend too little on precautions against preventable accidents, and to engage in what the public might see as an excessively risky venture in the first place.⁷⁰ On the other hand, it performs the same function, from the perspective of the shareholder or manager, as liability insurance does, thus obviating the need to purchase insurance that would cover the “full range of losses” that the subsidiary might incur, assuming the subsidiary does not have adequate assets to cover the loss it causes.⁷¹ Of course, though limited liability and insurance both serve the same function from a shareholder or manager’s point of view, as they both reduce or eliminate the corporation’s legal responsibility to pay for its own harms, the two are starkly different from the standpoint of a tort claimant: in the latter circumstance, a tort claimant can be compensated, while in the former she cannot.⁷²

More importantly, as Hansmann and Kraakman have noted, an unlimited liability regime for corporate torts turns the shareholder into an insurer. They argue that this is economically and normatively preferable to the status quo because in most cases the shareholder—particularly a corporate parent—is both the cheapest cost avoider and the most efficient risk bearer.⁷³ Though they also

66. Easterbrook & Fischel, *supra* note 52, at 106.

67. *Id.* at 107.

68. *See id.* at 106.

69. *Id.* at 111 (“[T]he moral-hazard problem is probably greater in parent-subsidiary situations because subsidiaries have less incentive to insure.”).

70. *See* Hansmann & Kraakman, *supra* note 23, at 1882.

71. *Id.* at 1889. Although many firms currently do purchase general liability insurance Hansmann and Kraakman suggest that the coverage limit selected by these firms is generally low. *See id.*

72. *See id.* at 1883.

73. *See id.* at 1916-19.

argue that a natural person shareholder would be in as efficient a position as an insurer, Hansmann and Kraakman conclude that when the shareholder is a corporation, it should bear the full cost of its subsidiary's torts.⁷⁴

These tort-based concerns are at their sharpest when mass personal injury torts, environmental harms, and human rights violations are at issue.⁷⁵ These harms carry the most normative weight and impose the greatest costs on society. In addition, they are the most likely causes of bankruptcy for a subsidiary or affiliate tortfeasor, as the subsidiary or affiliate is usually not insured against, nor adequately capitalized for, harms of this magnitude. If the subsidiary cannot pay for the damages caused by the tort or harm, the tort victim's only option is to proceed against the corporate shareholder—the parent corporation. I will therefore focus my inquiry in this Comment on these catastrophic torts for which subsidiaries are neither insured nor adequately capitalized to compensate victims.⁷⁶

2. Corporate Groups

In today's world, globalizing investment patterns have generated massive corporate webs that may involve layers of subsidiaries, loosely affiliated corporations, subcontractors, and other structurally complex corporate arrangements; moreover, corporate groups frequently cross national borders.

74. *See id.* at 1917. Moreover, turning the shareholder into an insurer creates pressures for the party that is in the best position to assess and guard against its tort liabilities and purchase insurance. If the shareholder corporation is fully insured—as most corporations are today, and as many more would be if enterprise liability for corporate torts were accepted as a general principle—the “argument for unlimited liability is further strengthened.” *Id.* at 1888.

75. This category includes not only hazardous industries—which are some of the clearest examples of the problem—but also integrated foreign suppliers or manufacturers of unsafe products, such as those responsible for dangerous toys coming out of China, and sometimes even franchises.

76. This area of heightened concern necessarily spurs a number of observations. First, a cautious observer might wonder whether adequate capitalization or insurance would preclude the need for expanded liability, as the harmed party could recover fully from the subsidiary. Because I am concerned most with preventing catastrophes, rather than compensating victims for them, I will not further address whether adequate capitalization should be sufficient to avoid liability. I do this in part because there is a normative claim that forcing a corporation to internalize its reputational harms as well as its fiscal ones, which would require a parent corporation to absorb the damage to its branding that its subsidiary corporations cause, creates an incentive for parent corporations to influence the activities of their subsidiaries to minimize hazardous risks. Similarly, some might observe that these massive torts are ordinarily perpetrated by a subsidiary outside the direct control of the parent. Rather than focusing on control, I argue that imposing corporate-group liability may be enough to cause the parent corporation to allocate resources, create oversight structures, and refrain from embarking on certain risky projects, that would prevent catastrophic accidents in the first place. *See infra* Part V. Finally, I have excluded from this area of heightened concern economic damage torts, such as accounting fraud. With some notable exceptions (Enron being the primary one), these torts do not generate the same animated argument as catastrophic personal injury or environmental torts do, and might be better addressed under a separate regime. Enterprise principles, however, may play a role in consideration of how best to address and prevent these harms.

The ordinary concepts of piercing and limited liability do not fit easily into this new reality.⁷⁷ Philip Blumberg aptly describes traditional corporate law concepts as “anachronistic and dysfunctional” in the face of these corporate structures.⁷⁸

Limited liability and veil piercing place excessive focus on corporate formalities, so much so that today’s mega-corporations with massive legal teams can carefully guard against liability by establishing subsidiaries and maintaining distinct corporate identities. Forming a corporation is largely a matter of paperwork. Piercing tends to look only slightly deeper. Simply complying with corporate formalities can demonstrate to a court in some jurisdictions that the corporations are, in fact, separate legal entities, such that piercing is unavailable.⁷⁹ Given that in most jurisdictions the two-part piercing test (requiring both alter-ego domination and a fraud or injustice) is a conjunctive one, liability can often be avoided when a court finds separate legal personalities. If a subsidiary and a parent corporation take simple steps, like keeping adequate minutes of meetings and maintaining separate bank accounts, liability in a piercing claim is unlikely. While this structure may be adequately indicative of the classic “sham” close corporation, in which a shareholder sets up a corporation for the sole purpose of shielding his personal assets from liability,⁸⁰ it is well nigh meaningless in the context of a larger corporation with a watchful legal team. In fact, one case has even held that the analogous situation to the “sham” close corporation—in which a larger corporation creates a subsidiary for the express purpose of avoiding liability—is not a sufficient condition for piercing.⁸¹

Entity liability’s focus on formalism might further work to create judgment-proof subsidiaries at the same time as it creates insulated parents. For example, a clever parent corporation might be able to use legally unproblematic transactions, like leases and sales at inflated prices, to both demonstrate to a court that the subsidiary is independent and to shift value out of a risky subsidiary. One commentator who imagined this possibility points out that “the law’s capacity to sort out the facts necessary to control such diversions is

77. See Peter T. Muchlinski, *Multinational Enterprises and the Law* 77 (Oxford University Press 2007) (1995). (“It is clear that existing legal forms of business organization . . . were simply not designed to correspond with such extensive business structures as [multinational enterprises].”).

78. Blumberg, *Corporate Groups*, *supra* note 39, at 608.

79. See, e.g., *d’Elia v. Rice Dev., Inc.*, 147 P.3d 515, 522-23 (Utah Ct. App. 2006) (finding that adequate maintenance of corporate formalities dictated upholding the trial court’s refusal to pierce the corporate veil despite the corporation’s numerous problematic practices such as siphoning funds and misreporting income); see also *Am. Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 n.2 (2d Cir. 1997) (noting that the trial court mistakenly found the test to be disjunctive; in New York, the test is conjunctive.)

80. See, e.g., *Sea-Land Servs., Inc. v. Pepper Source*, 941 F.2d 519 (7th Cir. 1991).

81. See, e.g., *Sayers v. Navillus Oil Co.*, 41 S.W.2d 506 (Tex. Civ. App. 1931).

small.”⁸² In short, the doctrine is so focused on facial formalities and meaningless indicia of “separateness” that it fails to draw normatively appropriate lines.⁸³

Formalism ignores the economic reality of the relationship between parent corporations and their subsidiaries. The economic entity they form is an interconnected web of corporations that function toward a unified goal. This economic reality stands in contrast to the implications of the statutory grant of separate personhood to parents and their subsidiaries.⁸⁴

Finally, the legitimate normative problems associated with shareholder liability for corporate debts, stemming from the general desire to protect individual investment freedom, do not apply in the parent-subsidiary context. “[P]iercing the corporate veil of subsidiary corporations does not create unlimited liability for any *people*.”⁸⁵ The only assets reached for the debts of the subsidiary are corporate assets meaning that no individual investor’s personal property can be reached. Thus, the original goals of limited liability in general would remain unaffected by the internalization of a parent corporation’s risk.

In sum, the entity theory of the corporation is unable to account for the different normative and economic realities presented by the parent-subsidiary relationship or the problem of tort creditors. When these issues arise together and where a subsidiary or affiliated corporation perpetrates a tort, the current normative and economic realities necessitate a different regime of legal inquiry. Importantly, empirical data suggests that courts are less willing to pierce the veil in this precise situation: tort cases within corporate groups are successful approximately 26% of the time; this is less than piercing cases overall (approximately 40%), torts alone (approximately 31%), and corporate groups alone (approximately 37%).⁸⁶ Given the shortcomings of limited liability in the intersection between the corporate group and torts, the necessity for a holistic solution is starkly apparent.⁸⁷

82. Roe, *supra* note 22, at 40.

83. Note that courts have looked a bit deeper in mass tort cases, and that occasionally a parent corporation exercises such pervasive control over a subsidiary that a court will find this prong satisfied. Cf. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1447, 1453 (N.D. Ala. 1995) (finding that Delaware courts do not necessarily require a showing of fraud if the “subsidiary is found to be the mere instrumentality or alter ego of its sole stockholder”). I view this outcome as less an indication of the adequacy of the test in the parent-subsidiary context and more a function of the flexibility of the doctrine.

84. See Berle, *supra* note 29, at 343; see also text *infra* accompanying notes 88-92.

85. Miller, *supra* note 42, at 131 (paraphrasing Easterbrook & Fischel) (emphasis in original).

86. See Thompson, *Unpacking*, *supra* note 63, at 23 & nn.101-02; Thompson, *supra* note 55, at 1048 tbl.1.

87. I note before concluding that I have not here examined the potential benefits of subsidiarization. There are myriad legitimate, efficient, and normatively unproblematic reasons why a company may want to create a subsidiary that do not relate to the externalization of excessive risk. See Douglas & Shanks, *supra* note 35, at 193 (listing as advantages “[t]he

II

THE POTENTIAL OF ENTERPRISE LIABILITY

As the preceding Part makes clear, entity theory, governed by principles of limited liability and piercing the corporate veil, can no longer cabin the realities of a globalized market dominated by mega-corporations in which extensive and fractured subsidiarization is the norm. The major problems with the current regime include its rigid formalism, which ignores the specific problems posed by tort creditors, and its failure to adequately address the unique modern balkanized corporate family. This Part explores enterprise theory as a doctrine that can more effectively deal with the problems that limited liability creates.

In contrast to entity theory's formalism, enterprise liability seeks to marry legal and economic realities. The legal entity of the limited liability corporation has contours that are different from the economic fact of the enterprise—a gap that enterprise liability attempts to close. As one commentator put it:

The economic entity does not have any corporate charter. It is an economic choice of management. It ties in legal entities for operation in a common endeavor or enterprise. The idea behind economic entity is joinder or merger of activity—unity of life—in the goal of the common the undertaking or enterprise. In an economic entity, each legal entity has dedicated itself and its property to the success of the common undertaking.⁸⁸

Enterprise theory views the corporate group as a singular unit, rather than viewing each subsidiary or affiliated corporation as a separate legal entity.⁸⁹ Since subsidiaries (especially wholly-owned subsidiaries) at least theoretically act for the benefit of the corporation as a whole, enterprise theory follows the profit and holds the various corporate actors in a given web accountable for the actions of other actors.⁹⁰ Enterprise principles thus apply liability according to the patterns of the economic enterprise instead of stopping at the contours of the legal fiction. In practice, adopting this theory of the corporation would allow claimants of one actor in a corporate group to recover from another

increased facility in financing; the desire to escape the difficulty, if not the impossibility, of qualifying the parent company as a foreign corporation in a particular state; the avoidance of complications involved in the purchase of physical assets; the retention of the good will of an established business unit; the avoidance of taxation; [and] the avoidance of cumbersome management structures"). There also may be other efficiency reasons indicating that, on balance, subsidiaries add more to the global economy than they detract through risk externalization and moral hazard. I merely wish to problematize the doctrine in order to contrast some of its shortcomings with subsequent observations about enterprise liability, and to provide context for a proposed solution.

88. Dix, *supra* note 35, at 255.

89. L.C.B. Gower, *The Principles of Modern Company Law* 213 (K.W. Wedderburn & O. Weaver eds., 3d ed. 1969).

90. *See generally* Strasser, *supra* note 58, at 638-39.

member of the group under ordinary tort circumstances.⁹¹ While the result may be a parent being held liable for the actions of a subsidiary, so-called “horizontal” piercing through which a claimant may recover for the torts of a subsidiary from a sister subsidiary might result as well.⁹²

I follow in the line of other commentators who have advocated for enterprise liability in only certain preconceived contexts, meaning that it is not my intention to unsettle the notion of limited liability in all situations.⁹³ First, I only advocate for enterprise liability in the context of the parent-subsidiary relationship or within the corporate family—not for individual shareholders.⁹⁴ Enterprise liability prevents risk externalization in the case of mass torts, as in ultrahazardous industries, and in situations where massive environmental or human rights harms are foreseeable, as these represent the most troubling instances of the public’s absorption of the cost of doing business. Thus, in the limited context where these two concerns overlap, and a subsidiary commits costly torts, enterprise liability cures some normative and efficiency problems that the founders of neoclassical corporate law did not consider.⁹⁵

91. See Antunes, *supra* note 22, at 8 (noting that in reimagining the corporate group, the central question focuses on the circumstances under which a parent corporation can be held liable for the debts and liabilities of its subsidiary).

92. Several authors have discussed how liability should be imagined, and what factors should play into the analysis. In particular, two authors have discussed whether the liability of the parent for torts of the subsidiary should be strict, pro rata, or joint and several. See Timo Rapakko, *Unlimited Shareholder Liability in Multinationals* 342-43 (1997) (arguing that unlimited shareholder liability, if imposed, would necessarily be a form of strict liability); Leebron, *supra* note 35, at 1569, 1578. While both of these authors discuss “unlimited liability,” which would not differentiate between corporate and individual shareholders, I only advocate for corporate shareholder liability. Additionally, Professor Blumberg argues that enterprise liability should analyze whether treating the corporate group as a singular economic unit makes sense from a policy standpoint, given the issues at stake in a particular case. See Blumberg, *The Multinational Challenge*, *supra* note 39, at 93. Some of the factors that Blumberg identifies as part of his proposed analysis include “control, economic integration, financial and administrative interdependence, overlapping employment structures, and a common group persona.” Book Note, *Applying Enterprise Principles to Corporate Groups*, 107 Harv. L. Rev. 1455, 1456 (reviewing Blumberg, *The Multinational Challenge*, *supra* note 39, 93-96). As I will discuss later in this Comment, I will disagree that true enterprise liability follows modes of control, so I do not adopt Professor Blumberg’s factored analysis wholesale. See *infra* Part VI.

93. See Leebron, *supra* note 35, at 1614 (advocating abolishing limited liability for wholly owned subsidiaries under some circumstances); Thompson, *Unpacking*, *supra* note 63, at 35-40 (advocating extending liability in the context of the corporate family). See also Roe, *supra* note 22.

94. Kurt Strasser has put it thus: “While traditional corporate law has not articulated different rules for a parent company in its role as a shareholder than for individual investor shareholders, parent companies in fact present different policy issues and their limited liability should be determined by a different analysis. The core idea is that a parent company as a shareholder in its subsidiary companies is in quite a different economic role and performs quite a different management function than individual investor shareholders A parent company creates, operates and dissolves subsidiaries primarily as part of a business strategy in pursuit of the business goals of the larger enterprise, which the parent and all the subsidiaries are pursuing together. The parent is not an independent investor.” Strasser, *supra* note 58, at 638.

95. See text *supra* accompanying notes 40-46. There are many variations on this thesis.

In comparison to limited liability, enterprise liability better addresses the problem of tort creditors because it reallocates risk and forces parent corporations to internalize the risks of their subsidiaries. Under a limited liability regime, parent corporations have no incentive to purchase insurance or adequately capitalize subsidiaries because limited liability artificially removes these operating costs.⁹⁶ Enterprise liability, in contrast, forces the parent corporation to absorb these costs by purchasing insurance or adequately capitalizing the subsidiary. Enterprise liability thus leads to “more efficient investment decision-making, including the allocation of capital”⁹⁷ and removes the moral hazard aspect of limited liability. Furthermore, if an industry is unable to internalize its own costs, it may either cease to exist or may petition public officials for a grant of limited liability or direct subsidization.⁹⁸ This shifts policy and regulatory decisions away from the market and into public decision-makers’ hands, which is a beneficial move since “[a] political decision to subsidize an enterprise that is unable to internalize its expected costs . . . is preferable to a unilateral decision to engage in a possibly overly risky activity under the protective umbrella of limited liability.”⁹⁹

In addition, enterprise liability remedies the deficiencies of limited liability as applied to corporate groups. First, it tracks the expectations of the public more closely. As explained by Christopher Stone, “[T]he outside world remains indifferent to how the enterprise participants—its investors and managers, in particular—adapt to the law’s threats and distribute among themselves the law-driven losses that occur.”¹⁰⁰ Stone’s thesis erodes the notion that society somehow recognizes subsidiaries as separate corporate persons when they bear the same economic personality. Unocal, for example, had thirty-six subsidiaries listed with the U.S. Securities and Exchange Commission (SEC) in 2004 (and 220 not listed for being “insignificant”); twenty-eight of these included “Unocal” somewhere in their name.¹⁰¹ While topical, Unocal’s

Some commentators have advocated unlimited liability for all shareholders in the tort context. See Hansmann & Kraakman, *supra* note 23, at 1880. Others have suggested that *controlling* shareholders, whatever their form, should bear the risks and costs of the corporations they control. See, e.g., Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 Colum. L. Rev. 1203 (2002). I take a more limited approach than either of these proposals and advocate for enterprise liability only in the context of the corporate family. See Part VI, *infra*.

96. Easterbrook & Fischel, *supra* note 52, at 111; Hansmann & Kraakman, *supra* note 23, at 1889.

97. Leebron, *supra* note 35, at 1577.

98. Leebron, *supra* note 35, at 1577-78. Though governmental regulation, and the subsequent lobbying that may privilege certain businesses and industries over others, is an imperfect locus for remedying these harms, shifting decision-making to publicly accountable individuals at least represents a step toward more transparency.

99. *Id.*

100. Stone, *supra* note 41, at 8.

101. See SEC filings of Unocal Corporation, Form 10-K of 12/31/04, <http://www.secinfo.com/d14D5a.z1BK7.v.htm>.

branding indicates that, from a consumer's perspective, each one of these subsidiaries is part of Unocal's corporate enterprise.¹⁰² The adoption of enterprise liability would represent a concerted societal choice to shift costs away from the general public—where they may currently be externalized—and onto the enterprise itself.

Second, enterprise liability is not tethered to a moralistic view of fault, and instead seeks accountability by “threatening corporate profits.”¹⁰³ Enterprise theory speaks an economic language—which corporations and their directors are bound to understand and internalize, as corporations are legally required to maximize shareholder wealth.

I am not alone in advocating for enterprise liability solely in the context of tort-committing subsidiary or affiliate corporations. In the words of Robert Thompson, whose empirical studies in this field have been groundbreaking:

The continuing puzzle is why courts remain so willing to provide limited liability to parent corporations in tort cases. The various arguments for limited liability do not have much impact in the parent-subsidiary situation. There do not appear to be large transaction costs to reach the parent corporation. There is no impact on the public market for shares of the subsidiary. No adverse diversification effects appear that would lead to overdeterrence or excessive monitoring. Yet externalization of some of the costs of the business clearly does occur. Even if piercing would be harsh to a passive parent corporation that did not participate in the wrongful action, it would seem to be outweighed by the harshness to those injured.¹⁰⁴

In this limited context, enterprise liability simply makes more normative and economic sense.

Notwithstanding its well-explored place in academic literature and its potential normative and efficiency benefits, there is little express movement toward revisiting the neoclassical paradigm in the case law—though piercing is a common law doctrine—and none in any legislature.¹⁰⁵ A hundred years after New Jersey was called the “Traitor State” for allowing corporations to own stock in other corporations, subsidiaries and holding companies are the norm, not the exception.¹⁰⁶ And courts almost unanimously respect limited liability and corporate separateness, at least facially. As one commentator succinctly put it, “[E]nterprise liability is simply not the law. Corporate law limits liability at the parameters of legal entities.”¹⁰⁷

102. Branding severs here merely as an example where enterprise theory allocates risks and benefits to the same party and more closely mirrors what seems intuitive from the public's perspective.

103. Stone, *supra* note 41, at 8.

104. Thompson, *Unpacking*, *supra* note 63, at 40.

105. See Strasser, *supra* note 58, at 637.

106. See Blumberg, *Corporate Groups*, *supra* note 39, at 607.

107. Mary Elizabeth Kors, *Altered Egos: Deciphering Substantive Consolidation*, 59 U.

However, I will argue in the next two Parts that enterprise theory, in a range of iterations, has gained an explicit following abroad and in international governance arenas. Moreover, despite the doctrinal hostility to the idea in the United States, enterprise liability has crept into a number of state and federal regulatory contexts, both explicitly in statutes and implied by the courts. This vitality of the principles of enterprise liability suggests that the shortcomings of the neoclassical paradigm are not going unnoticed, and that enterprise liability exists in the shadows of corporate law to cure some of the deficiencies of the dominant system. I will review the areas in which both international jurisdictions and U.S. regulatory regimes have either proposed or adopted some form of enterprise liability. The differences between these instances of enterprise liability showcase a cornucopia of doctrinal possibilities, some of which reflect the principles I have enumerated in this Part better than others. I will ultimately draw conclusions based on the lessons and variations of these differing doctrinal approaches to the enterprise issue.

III

ENTERPRISE LIABILITY IN FOREIGN JURISDICTIONS

This Part will survey some of the countries and international governance bodies that have adopted some version of enterprise liability as part of their statutory or common law, or have drawn on the theory as part of a proposed amendment to existing laws or guidelines. These examples provide context for a discussion of enterprise principles in U.S. law. Collectively, they demonstrate that enterprise liability has many possible forms, from which lessons may be drawn in crafting enterprise principles in the United States. Moreover, these examples show that enterprise principles are beginning to surface in foreign jurisdictions and international governance documents, with significant ramifications for U.S. businesses in a globalizing economy.

As I discuss the various forms that enterprise liability has taken in foreign jurisdictions and international governance, I will focus on two particular axes: protection of outside tort creditors and regulation of the corporate group. These axes are significant because both address the greatest shortcomings of limited liability, as discussed above. The first axis—protection of outside tort creditors—is the more fluid. The enterprise liability doctrines adopted abroad vary in their protection of tort creditors; some do not allow outside creditors a direct cause of action against the parent, others provide a cause of action only in bankruptcy, and still others mandate a direct cause of action regardless of insolvency. The second axis—regulation of the corporate group—shows that these forms either recognize the structure of the group as stemming from the

Pitt. L. Rev. 381, 438 (1998). Professor Blumberg has also argued that enterprise liability exists in various areas of U.S. law. I have listed many of the sources in which he has embarked on this project *supra* in note 39.

economic fact of the enterprise, or, alternatively, from the behavioral fact of the parent's corporate control. I have organized this survey along the second axis. The regimes that apply liability based on whether or not the parent *controlled* the actions of the subsidiary are called "control enterprise liability jurisdictions" for purposes of this Comment, while the much smaller number of systems that seek to impose liability based solely on the *economic fact of the enterprise* are called "true enterprise liability jurisdictions." In Part V, I will challenge the conventional wisdom behind the preference for control-based liability, arguing instead that true enterprise liability is more appropriate.

A. The Control Jurisdictions

1. Germany: The Standard-Setter

Germany has pioneered a statutory system in which a parent and a subsidiary are treated as a single economic unit under certain circumstances.¹⁰⁸ Because many other countries have followed Germany's lead and created similar regimes, I will cover Germany's system first, and in the most depth. Germany's system ties liability to the parent company's ability to exercise control over its subsidiary.¹⁰⁹ Germany's system may not ultimately present a solution to the problem of tort creditors to which U.S. doctrine should aspire, but it is instructive as a model for treating corporate groups, or *Konzerne*, as a unified whole under preordained circumstances. Moreover, Germany provides an empirical example of an industrialized country that has adopted a milder form of enterprise principles without disastrous results for domestic or international investment capitalism.

Germany's legal regulation of corporate groups—the *Konzernrecht*—originated in a reform of the German Stock Corporation Act (GSCA) in 1965.¹¹⁰ The legislature attempted to account for the increasing concentration of fractured business models. More and more corporations, with ostensibly separate legal lives, were in fact dominated by another corporation or bound to them by extensive contracts.¹¹¹ The reform sought to rectify what the legislature viewed as an inherent conflict of interest in this model, since the parent corporation would presumably seek to maximize its own shareholders' welfare at the potential expense of the subsidiary's minority or passive shareholders and creditors.¹¹² Thus, the *Konzernrecht* imposes a system of shared liability that rebalances the conflict of interest in order to protect the

108. See Antunes, *supra* note 22, at 314.

109. See Wahid Shetewy, A Preferable Approach Toward the Parent-Subsidiary Relationship (1984) (unpublished S.J.D. dissertation, University of California, Berkeley, School of Law) (on file with Law Library, University of California, Berkeley).

110. See Gerhard Wirth & Michael Arnold, *Corporate Law in Germany* 181 (2004).

111. See *id.* Notably, this is even more the case now than in 1965.

112. See *id.*

minority shareholders and the subsidiary's creditors. The primary indication of the existence of a *Konzern*,¹¹³ is the fact, or indeed the presumption, of control.¹¹⁴ The result is a system that is "highly regulated" and "significantly more protective of creditors" than the neoclassical model in the United States.¹¹⁵ This system has not deterred German corporations from forming subsidiaries, however; in 2004, an estimated 80% of businesses in Germany were part of interlocking corporate groups.¹¹⁶

The GSCA, which codifies the *Konzernrecht*, regulates the Stock Corporation (*Aktiengesellschaft*, or AG).¹¹⁷ The Stock Corporation form is generally used by large, publicly traded corporations, and is otherwise analogous to the U.S. corporation.¹¹⁸ However, the GSCA does not explicitly regulate the most common form of the corporation used in Germany: the Limited Liability Company (*Gesellschaft mit beschränkter Haftung*, or GmbH). The GmbH, a "flexible form" most suitable for closely held or subsidiary corporations,¹¹⁹ is governed by a separate statute.¹²⁰ The GmbH is most analogous to a close corporation in the United States: there is no supervisory board, fewer capitalization requirements, and perpetual life is assumed. Importantly, even though the GSCA does not apply when the controlled enterprise is a GmbH or a partnership, the far-reaching regulatory goals of the GSCA has prompted German courts to analogize the GmbH to the AG and find a *Konzern*-like enterprise in situations that the statute does not explicitly cover.¹²¹

113. The singular of "Konzerne" is "Konzern."

114. *See id.*

115. Miller, *supra* note 42, at 95.

116. *See* Wirth & Arnold, *supra* note 110, at 181.

117. *See* Hannes Schneider & Martin Heidenhain, *The German Stock Corporation Act 3 (1998)*.

118. *See id.* at 3-4.

119. *See id.* at 3.

120. *See id.*

121. Wirth & Arnold, *supra* note 110, at 181-82. As a general matter, most German practitioners and businesspeople understand that contractual groups, or *Konzerne*, may be created with GmbH subsidiaries as well. *See id.* at 188. In fact, in the famous *Autokran* case, the German Federal Supreme Court directly analogized to the contractual group, or *Konzern*, in a case where the dominated company was a GmbH. Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 9, 1985, 95 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 330 (F.R.G). (hereinafter *Autokran*). The contract at issue in *Autokran* gave the parent company the right to all amounts receivable and profits from the customers of the subsidiary GmbHs in exchange for assuming all the debts of the GmbHs. The Court ordered that the parent company reimburse unsatisfied contract creditors of the bankrupt GmbHs when they defaulted on lease payments. *Id.* Courts have looked in these cases not to a specific detrimental transaction that the parent caused the subsidiary to undertake, but rather to the subsidiary's transactions as a whole in order to determine whether the parent exerted any material influence on the subsidiary. If the parent can influence the subsidiary, the courts have presumed that the exercise of this control was detrimental and require the dominant corporation to compensate the subsidiary for its losses.

Moreover, in general, the majority shareholder of the GmbH cannot compete with the subsidiary, and the dominant corporation has a fiduciary duty not to issue detrimental orders to the

The GSCA regulates several different types of groups of companies, or “affiliated enterprises.” The three that will be discussed here include: (1) subsidiary and parent enterprises (where a subsidiary is a majority-owned enterprise); (2) controlled and controlling enterprises; and (3) members of a group of companies.¹²² While the law differentiates between these types of enterprises in ways described below, all of these categories are subject to a few general provisions that extend corporate rights and duties across the various corporate entities of the group.¹²³ For example, the management of each affiliated company must report to the supervisory boards of every other affiliated company in the group,¹²⁴ shareholders of one corporation have a right to information about their entity’s relationship with affiliated companies,¹²⁵ and auditors of one entity in the group cannot also be in certain types of relationships with any other member of the group.¹²⁶

a. Subsidiary and Parent Enterprises

If a corporation owns a majority share in another corporation—calculated through registered share capital or voting rights—then the relationship is considered to be a parent-subsidiary relationship, and the law presumes that the subsidiary is controlled by the parent.¹²⁷ Though this presumption is rebuttable, the burden of proof of independence is on the party that would benefit from the independence of the subsidiary.¹²⁸ If that burden is not carried, then all of the provisions of the controlled and controlling enterprise group, described next, apply.

b. Controlled and Controlling Enterprises

If either a majority holding share or some other indication that creates a controlling influence despite minority shareholding¹²⁹ is found between legally separate entities, then the group of companies is considered to be in a controlled-controlling relationship. This creates yet another rebuttable presumption that the companies are in a group relationship.¹³⁰ The most

controlled GmbH. More recent cases have suggested that the control over the subsidiary must be “abusive.” Miller, *supra* note 42, at 105-06, 113.

122. See Schneider & Heidenhain, *supra* note 117, at 17.

123. See Wirth & Arnold, *supra* note 110, at 183.

124. German Stock Corporation Act §90, ¶1, cl. 3.

125. German Stock Corporation Act §131, ¶1.

126. German Stock Corporation Act §319, ¶2, no. 3.

127. German Stock Corporation Act §16, ¶1, §17, ¶2.

128. Wirth & Arnold, *supra* note 110, at 183-84.

129. See Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 13, 1977, 69 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 334 (F.R.G). The Federal Supreme Court found control despite a 43.7% shareholding because ordinarily low attendance at shareholder meetings made this number sufficient for majority decisions. See Wirth & Arnold, *supra* note 110, at 184.

130. German Stock Corporation Act §18, ¶1, cl. 3.

important feature of the law for the purposes of this Comment is that the controlling corporation may not force a controlled AG to enter into detrimental legal transactions unless the parent compensates the subsidiary for its actual losses.¹³¹ The idea behind this restriction is to ensure that transactions between a parent and a subsidiary are as arms-length as possible, and to protect the subsidiary's minority shareholders should the subsidiary's shares lose value.¹³²

c. Members of a Group of Companies (Konzern)

This “most important subcategory of affiliated enterprises” represents the closest affiliation relationships in a given enterprise.¹³³ As described above, the law presumes that a majority shareholding creates a control relationship, which in turn creates a group of companies, though each of these presumptions is rebuttable. When a group of companies exists, the GSCA assumes that the entire enterprise is under the common direction of the controlling enterprise.¹³⁴ Once again, the major feature of this scheme is that the dominant company must always compensate the subsidiary for its losses if the dominant company caused the subsidiary to enter into the detrimental transaction. Within the group of companies there are two types of possible corporate groups, depending on whether the companies have executed a contract formalizing their relationship.

i. Contractual Konzerne

Contractual groups occur when one company contractually places itself under the control of another company.¹³⁵ Although the agreement can take varying forms, it must be a matter of public record; this protects contract creditors by making information about the group readily available.¹³⁶ Most importantly, regardless of the form of the agreement, the parent must promise to assume any annual net losses incurred during the course of the domination contract—and must make a reserve for the amounts payable in the event of a loss—in order to protect both external shareholders and potential creditors. If the *Konzern* is contractual, the dominant corporation is liable for the controlled corporation's losses, whether or not they were caused by the dominant corporation.¹³⁷

A particular subcategory of these contracts, called integration agreements, transfer 100% stock ownership to the dominant corporation when at least 95%

131. German Stock Corporation Act §311. Note that the parent compensates the actual subsidiary itself and not the outside creditors; liability is an internal and intergroup provision.

132. See Wirth & Arnold, *supra* note 110, at 184.

133. *Id.* at 185.

134. German Stock Corporation Act §18, ¶1.

135. German Stock Corporation Act §293, ¶1.

136. See German Stock Corporation Act §302; Miller, *supra* note 42, at 103.

137. This is in contrast to controlling-controlled *Konzerne*, where the losses must have been caused or ordered by the dominant company.

was held prior to the agreement.¹³⁸ An integration agreement gives the parent corporation the right to order its wholly owned subsidiary not only to enter into detrimental transactions, but also potentially to endanger the existence of the subsidiary.¹³⁹ In return, the parent is directly liable to all creditors of the integrated AG for all of its liabilities, regardless of whether they were caused by the parent.¹⁴⁰ In practice, integration agreements are extremely rare.¹⁴¹

ii. De Facto Konzerne:

Even if the group of companies has not executed a formal contract, they may still incur obligations if the group has a common direction.¹⁴² A group may acquire common direction if the controlling enterprise has formulated a driving, uniting concept for the group, and then implements it, at least in the area of financial management or through common governing bodies.¹⁴³ If a court determines that a group of companies is a *de facto Konzern*, not only do all of the rules of the controlled-controlling groups apply—including the obligation to compensate the subsidiary for disadvantageous transactions—but the group must compile consolidated financial statements and comply with reporting standards.¹⁴⁴ Because there is no contract, and thus no clear articulation of the terms of control, the controlled entity must prove that the controlling enterprise caused it to be put at a disadvantage in a proceeding to hold the parent company responsible for its losses—a burden of proof that can be onerous.¹⁴⁵

While German law allows for piercing the corporate veil as an alternative means to hold parent corporations liable, the *Konzernrecht* covers most of the situations in which piercing would ordinarily operate in the parent-subsidiary context. It provides an express regime by which voluntary creditors may assess and protect against the risks associated with the subsidiary, for example, through mandatory reporting requirements, independent auditing, and other measures. As a result, there are almost no piercing cases in Germany; the vague standards that haunt U.S. case law have been all but eliminated.¹⁴⁶ Commentators have praised the system for its clarity because it imposes a definite regime of statutory requirements rather than “post-hoc judicial scrutiny in policing careless or opportunistic conduct.”¹⁴⁷

138. See German Stock Corporation Act §319.

139. See German Stock Corporation Act §323.

140. See German Stock Corporation Act §322.

141. See Wirth & Arnold, *supra* note 110, at 187.

142. See *id.* at 185.

143. See *id.* at 186.

144. German Stock Corporation Act §311.

145. See Miller, *supra* note 42, at 105.

146. See *id.* at 164.

147. *Id.* at 149.

2. Other Jurisdictions Following Germany's Model: Variations on the Theme

The German *Konzernrecht* has been more influential than any other regulation of corporate groups in spurring legal reform of the parent-subsidary relationship in other jurisdictions around the world.¹⁴⁸ As one of the first countries to implement a system of liabilities governing corporate groups, Germany has provided an example on which subsequent legislatures could build. This section will review some of the other jurisdictions that have followed Germany's lead—and will highlight some of the doctrinal differences.

a. Brazil

Brazil enacted the *Lei das Sociedades Anónimas* (LSA) in 1976, eleven years after the GSCA. The LSA parallels the *Konzernrecht* in its major contours, but is generally friendlier to corporate interests.¹⁴⁹ Corporations may create contractual groups where “subordination” is the norm, as in the German system, or they may assume a more decentralized structure of affiliated corporations, called “consortium.”¹⁵⁰ Like the *Konzernrecht*, liability is entirely internal in the Brazilian scheme: Article 246 makes the controlling corporation liable for abuse of power and Article 245 prohibits conflict of interest between the dominant corporation and the subsidiary.¹⁵¹

Much like U.S. law, the Brazilian system imperfectly addresses the problem of the tort creditor. Under the LSA, creditors do not accrue a direct cause of action; indeed, the legislature stated that this kind of direct liability was “unnecessary” because “experience shows that the creditor as a rule obtains protection via contractual agreement.”¹⁵² This, of course, only applies to voluntary creditors, and not involuntary tort victims. Even the Brazilian system's extra protections with regard to wholly owned subsidiaries do not create direct liability. Broadly analogous to the integration agreement in the *Konzernrecht*, the LSA requires that when a corporation acquires the entire equity capital of another corporation, the group must construct its own management bodies apart from those of the parent corporation.¹⁵³ Yet, even with this group management body in charge, an individual subsidiary alone is liable for its tort actions.

b. France

Though politically defeated and thus never enacted into law, the French legislature in the 1970s considered a revision to its corporate law that attempted

148. Thomas W. Wälde, *Parent-Subsidiary Relations in the Integrated Corporate System: A Comparison of American and German Law*, 9 J. Int'l L. & Econ. 454, 492-93 (1974).

149. See Antunes, *supra* note 22, at 324-25.

150. *Id.* at 325.

151. See *id.* at 325-26.

152. *Id.* at 325 n.293 (translation presumably belongs to the authors).

153. See *id.* at 325.

to hybridize some more radical notions regarding the protection of subsidiary's creditors into basic elements of the German control regime.¹⁵⁴ The "Cousté Proposition," as it was called, defined a corporate group along lines of dominating influence and unified management, and also required parent corporations to compensate subsidiaries for their annual losses, much like the *Konzernrecht*.¹⁵⁵ However, the legislation pegged a legal presumption of control at a much lower percentage of stock ownership than the *Konzernrecht*—25%.¹⁵⁶ Moreover, the proposal would have enacted a regime of joint and several liability for the parent corporation by which creditors of the subsidiary would obtain a direct cause of action against the parent.¹⁵⁷ Thus, although the Cousté Proposition subscribed to the basic contours of the German law, it also attempted to address some of the major doctrinal concerns of the *Konzernrecht*.

c. Portugal

Portugal's *Código das Sociedades Comerciais*, enacted in 1986, contains similar provisions. If corporations elect to formalize their group status by contract or through the creation of a subsidiary, the parent corporation must both cover the annual losses of the subsidiary and assume joint and several liability for the creditors of the subsidiary for unpaid debts.¹⁵⁸ However, since Portugal's regime is neither mandatory nor otherwise attractive to corporate groups, the rules may not actually change corporate behavior or mitigate against the externalization of risk.¹⁵⁹ Portugal's system thus does not remedy the *Konzernrecht*'s major shortcomings.

d. Italy

Unlike Germany, Italy does not have a comprehensive regime regarding corporate groups. Instead, Italian law contains sporadic regulations concerning the parent-subsidary relationship that take minor cues from the *Konzernrecht*. For example, a 2004 reform created a direct cause of action against a parent corporation by either the shareholders or creditors of a subsidiary if the parent corporation "damages" the subsidiary.¹⁶⁰ That said, the reform does not establish a definition for a parent-subsidary relationship beyond inquiring whether the subsidiary is under the "direction and coordination" of other

154. *Id.* at 290.

155. *See id.* at 290 & n.211.

156. *See id.* at 290.

157. *See id.* at 291.

158. *See id.* at 326-27.

159. *See id.*

160. *See* Marco Ventoruzzo, *Experiments in Comparative Corporate Law: The Recent Italian Reform and the Dubious Virtues of a Market for Rules in the Absence of Effective Regulatory Competition*, 40 *Tex. Int'l L.J.* 113, 143 & n.122 (2004).

corporations.¹⁶¹

e. The European Union

Finally, and most importantly for U.S. businesses, the European Union (EU) has taken some cues from the German control system and prepared several draft proposals calling for harmonized regulation of corporate groups throughout the European Community (EC). The draft proposal calling for the creation and regulation of the “European Company” and the draft Ninth Directive both incorporate control-based systems of definition for corporate groups that are similar to the German model.¹⁶²

First, the EC has attempted to create a set of statutes that would regulate a new kind of multinational corporation—the “European Company,” or *Societas Europaea* (SE).¹⁶³ The drafting has spanned two decades.¹⁶⁴ None of the draft statutes has been enacted, but a tremendous amount of scholarship has ensued from the proposals, indicating their importance in the EC.¹⁶⁵ The SE statutes would have created a public corporation alongside more standard national corporate forms, providing a broader option for entrepreneurs who wished to operate on a more transnational level.¹⁶⁶ The sections pertaining to group definition and regulation (Title VII) would have defined a “group” as “one or more companies dependent on the [controller] . . . [where] all of them are under the unified management of the controlling undertaking and one of them is a SE.”¹⁶⁷ This would have tethered group existence to both control and unified direction, but these terms were ill-defined in the statute: the former was merely the ability to exercise a dominating influence, and the latter lacked any definition at all.¹⁶⁸

However, like the German system, the statutes created a nesting series of presumptions (possibly rebuttable, though the statute does not explicitly state so) that presumes control upon a finding of majority shareholding and unitary management upon a finding of control.¹⁶⁹ Upon the finding of a group of

161. *See id.* at 143 n.122.

162. *See* Antunes, *supra* note 22, at 277 *et. seq.* (grouping the EC proposals among enterprise theories). I generally disagree with Antunes’ focus on control factors as indicative of the existence of an enterprise relationship, and therefore disagree that the EC proposals enact “true” enterprise liability, as I define it as reflective solely of the economic capital structure of the group. However, I agree with Antunes that the EC proposals do reach farther than the German system in imposing liability. Admittedly, they fit uncomfortably within this section.

163. *See id.* at 278-79.

164. The first draft appeared in 1970 when the European Economic Community—now known as the European Union—was just beginning as a formal international governance body, and amendments circulated in 1975, 1989, and 1991. *See id.* at 279.

165. *See id.* at 278 n.174 (citing sources).

166. *See id.* at 279.

167. *Id.* at 281 (quoting art. 223, no. 1 of the Statutes for a European Company).

168. *See id.* (citing Art. 6, no. 1 of the Statutes for a European Company).

169. *See id.*

companies, various regulations would automatically apply, including disclosure mandates, the protection of any minority shareholders of the subsidiary, the right of a parent company to control the subsidiary, and the protection of the subsidiary's outside tort creditors.¹⁷⁰

Regarding the protection of the subsidiary's outside tort creditors, the controlling company would have been directly liable for the debts and liabilities of the subsidiary's creditors, as long as the creditors already tried and failed to recover from the subsidiary.¹⁷¹ This provides an interesting variation on the direct/indirect liability dichotomy: instead of an automatic direct cause of action against the parent corporation, or a cause of action contingent on bankruptcy, the SE system allows a creditor to pursue compensation from the parent company in the event of any inability to collect from the subsidiary—regardless of whether formal bankruptcy proceedings have been filed.

Second, the EU has put forward a similar form of enterprise liability as part of the draft Ninth Directive, a governance document proposing to harmonize the legal structure of corporate groups among the member states. The Ninth Directive circulated in parts between 1970 and 1984.¹⁷² The proposal was never formally adopted—in fact, it never made it past the draft stage.¹⁷³ Had it been adopted, the proposal would have made a parent or otherwise controlling company directly liable for the debts and liabilities of dominated companies or subsidiaries. Like the SE, the proposal would have required a showing that the creditor could not obtain satisfaction from the subsidiary.¹⁷⁴ In terms of group definition, the EU Commission expressed its preference for an “organic model” based on the “economic reality of the group,” defined along the axis of “unified management” and “control.”¹⁷⁵ In sum, the Ninth Directive would have included greater recognition of *de facto* groups of companies, allowing a more direct form of liability for non-contractual groups.¹⁷⁶

3. Critiques of the Control System

Several conclusions can be drawn from the structure of the control system's regulation of the corporate group.¹⁷⁷ Although most of the observations that follow pertain to all *Konzernrecht*-like systems, I will focus

170. *See id.*

171. *See id.* at 282 (quoting art. 239 of the Statutes for a European Company).

172. *See id.* at 286-87; Miller, *supra* note 42, at 76.

173. *See* Antunes, *supra* note 22, at 285-89.

174. *See id.* at 288; Miller, *supra* note 42, at 76.

175. Antunes, *supra* note 22, at 287-88.

176. The Ninth Directive has not been officially rejected by the Commission, but there is no projected movement on reviving its consideration, as the Commission has indicated that it is prioritizing work on the European Company Statute. *See* Alex Roney, EC/EU Fact Book: A Complete Guide 148-49 (6th ed. 2000).

177. These are merely doctrinal, and not empirical, observations. As I make clear at the end of this section, I have chosen to sketch only the contours of these doctrines for the purpose of investigating various means to re-imagine the regulation of the parent-subsidiary relationship.

on German law and the works of German commentators to draw conclusions.¹⁷⁸

First, the reforms to the GSCA may incentivize lack of adherence to the regulatory framework. The legislature intentionally created the tiered structure in the *Konzernrecht* to encourage corporations to streamline and normalize group interactions through contract.¹⁷⁹ The legislature expected groups of companies to view the system as advantageous, presumably because of reduced transaction costs that the legally mandated expectations about group liabilities provided.¹⁸⁰ Today, as expected, the law mostly impacts the choices and contracts of private parties.¹⁸¹ Like the U.S. system, this puts too much emphasis on the actions of the corporate parent, which will doubtless attempt to escape regulation. It is not difficult to imagine a situation in which the potential savings in liability costs eclipse the potential savings of reduced transaction costs. In such a situation, corporations are incentivized to operate outside the regulatory framework.¹⁸²

Second, the German system directly protects the subsidiary and its shareholders from mismanagement and detrimental transactions, but only indirectly protects the subsidiary's creditors. Creditors have only indirect protection because the system of liability is primarily internal to the corporate group.¹⁸³ Creditors do not have standing in a lawsuit against the parent unless the subsidiary is bankrupt.¹⁸⁴ If the parent corporation fails to compensate the subsidiary for detrimental transactions, the parent is directly liable to the subsidiary, but not to the subsidiary's creditors.¹⁸⁵

The problem with this standing requirement is twofold. First, a subsidiary corporation that has not declared bankruptcy may not be sufficiently capitalized to fully compensate its creditors. This leaves creditors without the opportunity to sue either derivatively or directly. Second, the regime has come under criticism from German commentators due to the difficulty that creditors experience in stating a cause of action. This is especially problematic in cases involving a *de facto Konzern*, in which the subsidiary must prove that the

178. I focus on the *Konzernrecht* because there is far more available literature discussing it, particularly literature in English.

179. See Antunes, *supra* note 22, at 330 (quoting Klaus-Peter Martens, *Das Konzernrecht nach dem Referententwurf eines GmbH-Gesetzes* 813 (1970)).

180. See *id.* at 331.

181. See *id.* at 330-332 (paraphrasing the debate).

182. The qualified *de facto Konzern* addresses at least one way in which corporations may attempt to evade the *Konzernrecht*, representing a broader regulatory reach than the four corners of the statute.

183. See Bernd Singhof, *Equity Holders' Liability for Limited Liability Companies' Unrecoverable Debts—Reflections on Piercing the Corporate Veil Under German Law*, 22 *Loy. L.A. Int'l & Comp. L. Rev.* 166, 169 (1999).

184. See *id.* at 169. Accord Carsten Alting, *Piercing the Corporate Veil in American and German Law—Liabilities of Individuals and Entities: A Comparative View*, 2 *Tulsa J. Comp. & Int'l. L.* 187, 237-38 (1995).

185. See Singhof, *supra* note 183, at 166.

disadvantageous transaction stemmed from the parent corporation's control.¹⁸⁶ Even in contractual *Konzerne*, the creditor must prove the existence of a detrimental transaction between the parent and subsidiary. Because German law does not provide for extensive pretrial discovery, it appears impossible to carry these burdens without direct access to all relevant information.¹⁸⁷ The creditor thus carries an onerous burden, which becomes heavier when the wrong for which the subsidiary's creditor seeks redress sounds not in contract, but in tort. When can a tort creditor ever prove that the parent caused the subsidiary to enter into the detrimental transaction, when the "transaction" complained of is a human rights violation? And how is this act anything but indirectly detrimental to the subsidiary, when the party feeling the harm is the creditor? This doctrine does little to address the needs of tort creditors in the parent-subsidiary context.

For almost all purposes, the *Konzernrecht* streamlines business transactions, but does little to ensure that tort creditors will be able to recover against a parent corporation. The sole doctrinal exception to this principle occurs in the case of the rare integration agreement, when outside creditors automatically acquire a cause of action against the parent.¹⁸⁸

Of course, this specific feature of the *Konzernrecht* has been directly addressed by the French, Italian, Portuguese, and EU systems, all of which establish a direct cause of action against the parent corporation for creditors of the subsidiary. These reforms are crucial from a doctrinal standpoint, as they cure the deficiencies of the *Konzernrecht* with regard to creditors—especially tort creditors—and will be informative in the construction of any new standard.

Finally, the liability imposed in these regimes hinges primarily on the parent's control over the subsidiary, with some variation in definitions of control.¹⁸⁹ In statutory *Konzerne*, group status, and thus liability, is triggered by

186. See Alting, *supra* note 184, at 238.

187. See *id.*

188. It is worthwhile to note, however, that German courts have imposed external liability in the *Autokran* case—involving a qualified *de facto Konzern*—but at least one commentator has noted that this was a doctrinal shift. See *id.* at 244-45. There is not, however, total accord on this point. Commentators generally agree that "a subsidiary's creditor is a creditor of the *Konzern*, [and] its only concern has to be whether the *Konzern* is able to meet the subsidiary's obligations." *Id.* at 237. Standing arises from bankruptcy. *Id.* Mainly, the advantage to a parent in externalizing risk to a subsidiary will be in the reputational harms that may incur should the subsidiary cause major torts; cost externalization may not occur in practice.

189. One commentator disagrees with the observation that the German system uniformly depends on control in both *de facto* and contractual *Konzerne*. See Antunes, *supra* note 22, at 322-24. Antunes argues that *de facto* groups err on the side of corporate autonomy, while contractual groups err on the side of centralization. Thus, he thinks that the *de facto* groups adhere to traditional modes of liability in corporate law, preserving the autonomy of the subsidiary, while corporations are alternatively able to bring themselves under the regulatory umbrella for predictability's sake through contract, in which the parent is assumed to control the subsidiary. I agree that some strange incongruities between the contractual and *de facto Konzern* persist—for example, proof of detriment is required in the latter, while it is presumed in the former—however,

a rebuttable presumption of control. The “unified direction” assumed to exist is not merely a product of the economic structure and existence of the corporate group, but rather results from the control and dominance of the parent corporation over its subsidiaries. This formulation was recently refined by the German Supreme Court in a way that seems to impute fault back to the parent’s management of the subsidiary, requiring “objective misuse” of power.¹⁹⁰ Again, with some variation each of the “control” jurisdictions ties liability to a parent’s domination of a subsidiary—a concept I will problematize in Part V.

In sum, the German system and its progeny provide an instructive model of statutory regimes regulating corporate groups. Applying its lessons to the questions this Comment presents—how to correct the deficiencies of the limited liability system as it applies to corporate groups and to tort creditors, particularly where those two problems intersect—makes two lessons apparent. First, as to the problem of corporate groups, Germany’s system illustrates the easy applicability of a statute that regulates the corporate group, and its value in protecting the interests of contract creditors and minority shareholders. Importantly, as an industrialized nation, Germany’s legislation proves that regulation of corporate groups need not cause a meltdown in investment capitalism. The *Konzernrecht* also highlights the difficulties of rooting that system in ideas of control. Second, with regard to tort creditors, the absence of standing for outside creditors in the *Konzernrecht* is one of its major shortcomings. Many of the German system’s progeny have explicitly addressed this lacuna by adding a direct cause of action for outside creditors against the parent corporation.

B. The True Enterprise Liability Jurisdictions

Compared to the more common control-based systems, farther-reaching forms of enterprise liability have not received much institutional or statutory recognition.¹⁹¹ Both the Indian common law and the posited United Nations (U.N.) *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* impose forms of enterprise liability. These examples are unique not only in giving outside shareholders a direct cause of action, but also in applying a revolutionary definition of the corporate group. Further, both of these examples eschew the notion of control as a prerequisite for direct parental liability for the torts of their subsidiaries. Though hardly numerous enough to be called a movement, it is important to

this is simply a difference in burden of proof. Assuming a plaintiff can carry her burden on this matter, control is assumed, and in both cases control is a determinative factor for liability. For this reason, I categorize Germany’s system as a “control” one.

190. Bundesgerichtshof [BGH] [Federal Court of Justice] 122 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 123 (130) (F.R.G).

191. See *European Business Law: Legal and Economic Analyses on Integration and Harmonization* 239 (Richard M. Buxbaum et. al. eds.,1991).

review these examples, as they represent a drift toward more realistic and holistic regulation of the corporate group in the tort context.

1. India

India's approach provides the most compelling example of enterprise liability that solely considers the group status of the multinational enterprise. This approach was borne out by the much-publicized Bhopal disaster. Over two days in 1984, a Union Carbide pesticide plant near Bhopal, Madhya Pradesh, India, leaked forty-seven tons of methyl isocyanate gas, a lethal byproduct of pesticide production, into the surrounding countryside; the wind carried the toxic gas into the most densely populated portion of the city.¹⁹² Somewhere between two thousand and ten thousand individuals died, and two hundred thousand sustained injuries.¹⁹³ The plant was not under the direct management of the parent, Union Carbide Corporation; instead, the plant was run by Union Carbide of India, a 50.99%-owned subsidiary of the New York parent corporation.¹⁹⁴ Plaintiffs' lawyers filed a total of 148 lawsuits against Union Carbide and its subsidiaries soon afterwards in a number of federal courts, which were subsequently consolidated.¹⁹⁵

Prompted by the scale of the catastrophe, the Indian government assumed *parens patriae* responsibility for the cases pending before the U.S. District Court for the Southern District of New York.¹⁹⁶ In its brief for the plaintiffs, it put forward a radical form of enterprise liability that would hold Union Carbide liable for the acts of Union Carbide of India.

The argument premised liability on two types of policy considerations. First, India argued that the separateness of the parent and subsidiary was fictional:

Multinational corporations . . . have it within their power to make decisions and take actions that can result in industrial disasters of catastrophic proportion and magnitude In reality, there is but one entity, the monolithic multinational, which is responsible for the design, development and dissemination of information and technology worldwide, acting through a forged network¹⁹⁷

Second, India argued that the corporation was in a better position to assume the risk and costs of the loss:

Persons harmed by the acts of a multinational corporation are not in a

192. See Upendra Baxi, *Mass Torts, Multinational Enterprise Liability and Private International Law*, 276 Rec. Des Cours 297, 354-55 (1999).

193. See *id.* at 354-55.

194. See *id.* at 355.

195. See *id.*

196. *Parens patriae* actions give a sovereign state standing to prosecute a lawsuit on behalf of one or more of its citizens. Black's Law Dictionary 1144 (8th ed. 2004).

197. Brief of the Plaintiffs, *Union of India v. Union Carbide Corp.*, reprinted in *The Indian Law Inst., Mass Disasters and Multinational Liability: The Bhopal Case 4-5* (1986).

position to isolate which unit of the enterprise caused the harm, yet it is evident that the multinational enterprise that caused the harm is liable for such harms. The multinational must necessarily assume the responsibility, for it alone has the resources to discover and guard against hazards and to provide warnings of potential hazards.¹⁹⁸

Thus, this articulation focuses not on the control of the subsidiary by the parent, but on the mere economic fact of the enterprise. It attempts to locate information costs and distribute risk accordingly. The strategy *in toto* was a radical one; enterprise liability was not the norm in the United States or India at the time.¹⁹⁹ However, the enterprise liability claim was never addressed on the merits, as the case was eventually dismissed on *forum non conveniens* grounds.²⁰⁰

The Supreme Court of India addressed the concept of enterprise liability only a year after the Bhopal disaster in *M.C. Mehta v. Shriram Food and Fertilizer Industries*, a case that involved an oleum gas leak in Delhi.²⁰¹ The leakage occurred in 1985, and only one person was killed; however, at the time the case reached the Supreme Court, the Indian public was reeling from Bhopal and the similarity in fact patterns sparked ample comparisons.²⁰² Thus, probably as a result of the political climate following the Bhopal disaster, the Court adopted an absolute standard of enterprise liability for ultrahazardous activities:

[A]n enterprise . . . engaged in a hazardous or inherently dangerous industry . . . owes an absolute and non-delegable duty to the community that no harm results to any one on account of the dangerous nature of the activity it has undertaken . . . If the enterprise is permitted to carry on the hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident.²⁰³

While the *Shriram* court articulated its major break with precedent as simply being the incorporation of strict liability without exceptions for ultrahazardous industries, most commentators view the case as standing for enterprise liability.²⁰⁴ Despite its articulation of a standard of strict tort liability for

198. *Id.*

199. Charles C. Hileman, *Multinational Enterprise Liability for Ultrahazardous Activities*, 15 Int'l Bus. Law. 66, 67 (1987) ("[I]t appears that both New York and India apply traditional concepts to the question whether a parent corporation will be held liable for the acts of a subsidiary.").

200. Baxi, *supra* note 192, at 356. Baxi's piece in general explores jurisdictional challenges to multinational mass tort cases; he explores the jurisdictional consequences and arguments in the Bhopal case in particular at pages 356-63.

201. *Id.* at 400.

202. *Id.*

203. A.I.R. 1987 S.C. 1086, as reprinted in Baxi, *supra* note 192, at 400-01.

204. See Baxi, *supra* note 192, at 400-01; Usha Ramanathan, *Business and Human Rights: The Indian Paper*, Indian Environmental Law Research Centre, at 12, available at

corporate groups, India's investment economy has not been adversely affected—indeed, direct foreign investment has increased in recent years, and India's gross domestic product has not crashed.²⁰⁵

2. *The United Nations*

India has not been alone in articulating this radical theory, but it has been alone in adopting the enterprise liability approach. The U.N. has also proposed including enterprise principles as part of a larger scheme of regulation of corporate behavior in the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Norms)*.²⁰⁶ Though the U.N. member states have not adopted them, and their definition of “enterprise” is spare, the *Norms* would impose high standards for multinational liability and responsibility, and these principles could be the first step toward significant global changes.²⁰⁷

In general, the *Norms* would require greater corporate responsibility by imposing regulations in areas ranging from labor relations, to environmental protection, to human rights, to technology transfers.²⁰⁸ In so doing, the *Norms* would impose enterprise liability for all corporate groups acting in violation of these articulated norms of social responsibility. The definition of “transnational corporation” in the *Norms* does not distinguish between the distinct legal personalities of corporations—whether affiliated or subsidiary—within a broadly-defined corporate group. A transnational corporation is an “economic entity operating in more than one country or a cluster of economic entities operating in two or more countries—whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.”²⁰⁹ This definition, while spare, apparently encompasses a broad

<http://www.ielrc.org/content/w0102.pdf> (last visited Aug. 15, 2008). The principles in *Shriram* were affirmed in another toxic tort case in 1996. See *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 S.C.C. 212, 242-43. See also Ramanathan, *supra*, at 12. But see Muchlinski, *supra* note 77, at 318 (questioning whether the Mehta doctrine truly goes beyond the logic of separate corporate personhood).

205. Generally, this is due to the liberalization of other investment rules. See *Foreign Direct Investment into India Nearly Tripled to \$16 Billion Last Fiscal Year*, Int'l Herald Trib., Apr. 19, 2007, available at <http://www.iht.com/articles/2007/04/19/news/fdi.php>; see also the International Monetary Fund, World Economic Outlook Database, <http://www.imf.org/external/pubs/ft/weo/2006/01/data/dbcselem.cfm?G=2001&Error=1> (last visited Oct. 20, 2008) (describing India's economic state).

206. U.N. Econ. & Soc. Council (ECOSOC), Sub-Comm. on Promotion & Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/L.8 (Aug. 7, 2003) (prepared by Alfonso Martínez et. al.) [hereinafter *Norms*].

207. See Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 Colum. Hum. Rts. L. Rev. 287, 288 (2006).

208. See *Norms*, *supra* note 206, ¶ 72- 85.

209. *Id.* ¶ 20.

range of inter-corporate organization, regardless of stock ownership percentage or other control factors.

The drafters of the *Norms* envisioned a transnational framework imposing a high bar for corporate behavior as a way to prevent a race to the bottom among member states to attract business and circumvent actions by multinational corporations to exert power over host states.²¹⁰ The main problem with this framework is that it is incompatible with the domestic corporate laws of the member States, which generally follow entity liability principles; this incongruence has posed significant political barriers to the likelihood of the *Norms*' adoption.²¹¹ However, the articulation of broad-ranging obligations of transnational corporations, coupled with an aggressive form of enterprise liability, represents movement toward reform of multinational corporate groups and effectively addresses both of the problems of U.S. corporate law: its inability to countenance the subsidiary's mass tort, and its rigid lack of recognition of the decentralized corporate enterprise.

It is true that the *Norms* are unlikely to be adopted in their current form,²¹² and that the most radical forms of enterprise liability, such as that articulated by India after Bhopal, are still nascent even in international jurisdictions. However, the importance of enterprise principles' appearance at the level of international governance, and in countries that still wish to attract foreign investment, should not be understated. As international efforts to craft cross-jurisdictional norms for corporate behavior, particularly in the realm of social responsibility and human rights, it is likely that enterprise principles will continue to surface as part of the ongoing conversation.²¹³ Moreover, enterprise liability principles of the same ilk also exist in the United States, surviving in various corners of federal and state jurisprudence. The next Part will review enterprise liability's presence in the United States.

IV

ENTERPRISE LIABILITY IN THE UNITED STATES

Though enterprise principles have been more thoroughly explored in international law, the theory is not completely foreign to the United States, where—if present—appears in its milder, control-based form.²¹⁴ Forty years

210. See Backer, *supra* note 207, at 325. In general, European companies have observed this "race of laxity" in U.S. jurisdictions among states, and have attempted to model their corporate laws as a reaction against the "Delaware effect." See Friedrich Kübler, *A Shifting Paradigm of European Company Law?* 11 Colum. J. Eur. L. 219, 220-21 (2005).

211. See Backer, *supra* note 207, at 357, 363-74. (discussing difficulties in compatibility).

212. See *id.* at 288 n.2; see also David Kinley, Justine Nolan & Natalie Zerial, *The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations*, 25 Company & Sec. L.J. 30, 31 (2007) (discussing criticisms of the norms, though not on enterprise liability grounds).

213. See *id.* at 332.

214. Professor Blumberg's work is seminal in identifying areas of law in which U.S. courts

ago, one commentator noted that “courts are suspicious of attempts to divide a single economic enterprise among several different corporations with the intention of minimizing the assets subject to claims of creditors of the enterprise.”²¹⁵ More recently, another suggested that, as existing paradigms are reevaluated in the new global economic era, enterprise law in the United States is moving closer toward the legal mainstream.²¹⁶ This subtle infiltration of enterprise principles into the purportedly bulletproof scheme of entity liability, both through the legislature and the common law, illustrates (1) entity liability’s ill fit in certain areas with heightened regulatory concern and (2) that imposing enterprise liability in constrained areas is possible without damaging investment capitalism.

A. Established Areas of Enterprise Liability: Antitrust, Tax Law, and the Equity Court

1. Antitrust

Antitrust is one of the legal fields where enterprise principles have infiltrated the mainstream, albeit in ways that limit liability for parent corporations. In *Copperweld Corp. v. Independence Tube Corp.*,²¹⁷ the U.S. Supreme Court held under Section 1 of the Sherman Act that there could be no conspiracy between a parent corporation and its subsidiary. The Court reasoned that the two actors were part of the same unitary economic enterprise and it was impossible to enter into a conspiracy with oneself.²¹⁸ The Court noted that

impose liability upon members of corporate groups. For a selected list of Blumberg’s work in this area, see *supra* note 39. While I remain indebted to Professor Blumberg, I respectfully disagree with some of his contentions. First, I think he tends to conflate ordinary but aggressive instances of piercing the corporate veil with enterprise liability. See Rapakko, *supra* note 92, at 5 n.7; Wilson McLeod, *Shareholders’ Liability and Workers’ Rights: Piercing the Corporate Veil Under Federal Labor Law*, 9 Hofstra Lab. L.J. 115, 139 n.100 (1991). Second, he advocates for a control-based form of enterprise liability, while I will align my proposed reforms in this area along the lines of “true” enterprise liability that follows only the economic fact of the enterprise. Thus, I have attempted to embark on a similar project as he has undertaken, but with a more constrained view; this Part will investigate areas of corporate law where courts have explicitly stated that they will not comply with ordinary standards of piercing the corporate veil and imposed enterprise liability due to a particular regulatory or statutory scheme.

215. Hamilton, *supra* note 46, at 985 (citing cases).

216. Michael K. Addo, *Human Rights Perspectives of Corporate Groups*, 37 Conn. L. Rev. 667, 668 (2005) (“[A] speedily converging world economic system necessitates a re-evaluation of its working premises to take account of emerging challenges In these formative years . . . enterprise law maintains its sturdy drift as an exceptional legal regime currently floating at the margins of the law of corporate groups towards the legal mainstream.”).

217. 467 U.S. 752 (1984).

218. *Id.* at 770-71 (“[T]here can be little doubt that the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor Because coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants §1 scrutiny.”).

parents and subsidiaries “share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent’s best interests.”²¹⁹

The Court explicitly chose not to treat as dispositive whether and how the parent controlled the subsidiary. Instead, it simply assumed that, because the two were following a unified economic course, the parent’s interests were the same as the subsidiary’s. In fact, the Court found that “in reality a parent and a wholly owned subsidiary *always* have a ‘unity of purpose or a common design.’”²²⁰ The opinion thus represents a “ringing rejection” of veil-piercing jurisprudence for purposes of antitrust law.²²¹ Of course, the opinion’s holding was confined to the statute in question—finding the absence of agreement for Sherman Act purposes is not the same thing as finding expansive liability for a variety of tortious acts. Unsurprisingly, subsequent cases have expressly limited this enterprise understanding of unitary economic purpose to the context of antitrust.²²² That said, to the extent that the concept of corporate unity seems obvious in the antitrust context, its opposite prevails in the context of tort liability: where antitrust law acknowledges unity in order to shield corporations from liability, tort law ignores unity in order to accomplish the same.

2. Tax Law

Enterprise principles are also a fixture of tax law. In the seminal case *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*,²²³ the Supreme Court held that out-of-state dividends earned by a large, multinational corporation doing business in Vermont could be subject to that state’s income tax without offending the Constitution’s due process and commerce clause constraints.²²⁴ The Court pointed to precedent that established that a corporation may be taxed by more than one state, even if the income’s source may be ascertained by “separate geographical accounting,” as long as “the intrastate and extrastate activities formed part of a single unitary business.”²²⁵ It described a “unitary business” as one displaying features of “functional integration, centralization of

219. *Id.* at 771-72.

220. *Id.* at 771 (emphasis added).

221. See Blumberg, Statutory Law: General, *supra* note 39, §7.02.1.

222. See, e.g., *Drinkwine v. Federated Pubs., Inc.*, 780 F.2d 735 (9th Cir. 1985) (holding that piercing principles still applied with regard to § 2 of the Sherman Act); *Bell Atlantic Bus. Sys. Servs. v. Hitachi Data Sys. Corp.*, 849 F. Supp. 702 (N.D. Cal. 1994) (holding that the fact that parent and subsidiaries were legally incapable of conspiring in violation of federal antitrust laws did not require the court to pierce the corporate veil under California law). I note that *Copperweld* did not answer the question of whether similar unified treatment would apply in the case of a partially-owned, instead of a wholly-owned, subsidiary.

223. 445 U.S. 425 (1980).

224. See *id.* at 441-49.

225. *Id.* at 438.

management, and economies of scale.”²²⁶ The Court noted that because these features “arise from the operation of the business as a whole, it becomes misleading to characterize the income of the business as having a single identifiable ‘source.’”²²⁷

Importantly, the Court rejected the argument that the existence of a parent-subsidiary relationship would break the “unitary business” into separate parts, noting that “[s]o long as dividends from subsidiaries and affiliates reflect profits derived from a functionally integrated enterprise, those dividends are income to the parent earned in a unitary business.”²²⁸ The Court observed that legal separateness mattered less in this instance than the functional separateness, as the separate legal personhood of the subsidiaries and affiliates “works no change in the underlying economic realities of a unitary business.”²²⁹

3. *The Equity Court*

These fissures in an otherwise uniform landscape of entity law appear in other, unclassifiable areas as well—instances that may simply be attributable to various courts’ perceptions of the equities involved in a particular tort case. One example, particularly prescient for purposes of this Comment, involved the disastrous Amoco Cadiz oil spill in the English Channel in 1978. In its opinion finding liability for the U.S. company Standard Oil, the U.S. District Court for the Northern District of Illinois, without explanation, found that “[a]s an integrated multinational corporation which is engaged through a system of subsidiaries in the exploration, production, refining, transportation and sale of petroleum products throughout the world, Standard [the parent] is responsible for the tortious acts of its wholly owned subsidiaries and instrumentalities”²³⁰ By not requiring a finding of control, the court imposed liability across the corporate group in ways that piercing the corporate veil ordinarily never would.

The reasoning displayed by the Court in *Copperweld* and *Mobil Oil* easily expands to encompass the areas of tort liability—mass torts and environmental and human rights disasters—discussed in this Comment. In addition, cases like *Amoco Cadiz* demonstrate that courts are sometimes uncomfortable with traditional piercing principles. Where entity liability seems patently unjust, equity courts periodically turn to enterprise liability principles in idiosyncratic ways to inject flexibility into piercing. However, antitrust and tax law are not

226. *Id.*

227. *Id.*

228. *Mobil Oil Corp. v. Comm’r of Taxes of Vt.*, 445 U.S. 425, 440 (1980).

229. *Id.* at 441.

230. *In re Oil Spill by the “Amoco Cadiz” off the Coast of France on Mar. 16, 1978*, MDL Docket No. 376, 1984 U.S. Dist. LEXIS 17480, at *135-36 (N.D. Ill. Apr. 18, 1984) (finding No. 43), *aff’d*, 4 F.3d 997 (7th Cir. 1993).

the only places in U.S. law where courts have expressly viewed some form of enterprise liability as an integral element of a statutory or regulatory mandate. These more explicit approaches remedy the *ad hoc* nature of courts shoehorning enterprise principles into piercing doctrine, better informing the creation of a new system of liability for corporate groups involved in mass torts and human rights disasters.

The next Parts will review other instances in which federal and some state courts have used principles of enterprise liability to achieve discrete policy goals, such as environmental regulation and retirement benefit guarantees.²³¹ I will conclude that this topical specificity can inform and cabin the construction of a better, albeit more general, statutory mandate for parent corporation liability in the context of certain activities that may foist excessive risks or costs onto the public.

With only few notable exceptions—including antitrust and tax law—nearly all forms of enterprise liability found in U.S. jurisprudence focus on control factors, rather than the fact of the economic enterprise.²³² That is, courts generally investigate the parent’s direct control of the subsidiary when deciding whether to hold the parent liable, instead of looking to less behavioral, more economic standards to determine whether the entities are functionally part of the same enterprise. Thus, these examples do not fall into the realm of true enterprise liability; they represent the softer form of enterprise liability exemplified by the German *Konzernrecht*.

B. Implicit Enterprise Liability: CERCLA, Federal Regulatory Statutes, and Bankruptcy

1. CERCLA

One of the most iconic examples of enterprise principles infiltrating the ordinary landscape of entity law in the United States occurs in the story of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).²³³ Congress enacted CERCLA in 1980 to speed remedial action after, and impose cost liability for, the release of hazardous substances into the environment.²³⁴ CERCLA imposes liability on, *inter alia*, the current “owner

231. See Cindy A. Schipani, *The Changing Face of Parent and Subsidiary Corporations: Enterprise Theory and Federal Regulation*, 37 Conn. L. Rev. 691, 693 (2005) (“[I]t appears that the concept of enterprise liability has infiltrated federal regulation as applied by the courts, although it comes in through a notion of direct liability under the terms of the statute.”).

232. See Miller, *supra* note 42, at 94 (citing Philip I. Blumberg, *The Increasing Recognition of Enterprise Principles Determining Parent and Subsidiary Corporation Liabilities*, 28 Conn. L. Rev. 295, 304 (1996) [hereinafter Blumberg, *Increasing Recognition*]).

233. 42 U.S.C. §§ 9601-9675 (2000).

234. See Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (2000)).

and operator” of the hazardous facility.²³⁵ Liability for purposes of CERCLA is “retroactive, strict, and joint and several,” and can also be severe; the cleanup costs for hazardous waste sites can run in the tens of millions of dollars.²³⁶ However, the statute does not directly address the issue of parent and subsidiary corporations.²³⁷ As a consequence, courts turned to the statutory language itself to decide whether a parent corporation could be an “owner” or “operator” of a subsidiary polluter.²³⁸

Courts’ willingness to find liability in CERCLA cases involving corporate groups was not always consistent. While some courts premised liability on straightforward piercing principles, others applied direct liability for statutory violations of the subsidiary onto the parent corporation,²³⁹ based on either direct parental control of the subsidiary’s environmental operations, or sometimes merely on the parent’s authority to control the subsidiary.²⁴⁰

In applying and justifying this nontraditionally broad liability, courts generally pointed to the broad legislative purpose of CERCLA. For example, in *Schiavone v. Pearce*, the Second Circuit noted that “perceived tension between direct liability and liability based on veil piercing can be reconciled . . . when examined against the overall goals of CERCLA and the uniqueness of its statutory scheme.”²⁴¹ The court couched its holding in CERCLA’s statutory distinction between “owner” and “operator”: the inclusion of both terms implied that the two could be considered separate umbrellas of liability.²⁴² “Owner” liability, according to the court, would require piercing the corporate veil, but “operator” liability could flow from the conduct of the parent corporation in dictating the actions of the subsidiary.²⁴³ *Schiavone*’s reasoning was typical of other cases at the time that eschewed veil-piercing analysis in favor of broad liability based on the remedial language of the statute and its regulatory purpose. Though the federal circuits split as to whether this statutory interpretation of CERCLA was correct,²⁴⁴ the end result was that, in many

235. 42 U.S.C. § 9607(a).

236. Blumberg, *Statutory Law: General*, *supra* note 39, § 18.02.1 (Supp. 2002) (internal citations omitted).

237. *See, e.g., id.* §18.02.1.

238. *See, e.g.,* William B. Johnson, *Private Entity’s Status as Owner or Operator Under § 107(a)(1, 2) of Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C.A. § 9607(a)(1, 2)) (CERCLA)*, 140 A.L.R. Fed. 181 (1997) (listing cases where courts used statutory language to find liability for an owner or operator).

239. *See* Schipani, *supra* note 231, at 695.

240. *See id.* at 695-96.

241. 79 F.3d 248, 253 (1996) (listing other cases following this line of reasoning).

242. *Id.* at 254 (citing cases).

243. *Id.* at 254-55.

244. *See* Blumberg, *Statutory Law: General*, *supra* note 39, § 18.02.1 (Supp. 2002). The Second, Third, Eighth, and Eleventh Circuits would classify a parent corporation as either an owner or an operator, with drastic consequences for liability; the Sixth Circuit, on the other hand, never eschewed piercing. *Id.*; *see also* United States v. Cordova Chem. Co., 113 F.3d 572 (6th Cir. 1997) (applying traditional piercing principles in lieu of control factors).

jurisdictions, “subsidiarization . . . lost much of its value as a tactic for evading liability.”²⁴⁵

In *United States v. Bestfoods*, the Supreme Court resolved the circuit split on the reaches of liability under CERCLA.²⁴⁶ The Court held that a parent corporation could only be held liable as the owner of a subsidiary under ordinary principles of piercing the corporate veil. After reviewing the long history of limited liability between a parent and subsidiary in the absence of control-based factors, the Court observed that “nothing in CERCLA purports to reject this bedrock principle, and against this venerable common-law backdrop, the congressional silence is audible.”²⁴⁷ The Court settled on a standard premised on parent management or direction of “operations specifically related to pollution, that is, . . . having to do with the leakage or disposal of hazardous waste, or . . . compliance with environmental regulations.”²⁴⁸ This fault-based standard focuses on the degree to which the parent company was actively involved in the conduct or instrumentalities that caused the hazardous waste release.²⁴⁹

Despite the fact that *Bestfoods* stymied the application of enterprise principles within CERCLA litigation, some courts’ willingness to subvert entity principles in the face of a compelling federal regulatory statute demonstrated the fissures apparent in the neoclassical doctrine. Moreover, the *Bestfoods* decision seems to have left open some areas of inquiry—for example, considering not necessarily whether a parent did control its subsidiary, but rather whether it *could*. These inquiries, and the story of CERCLA, may inform the creation of a new doctrine, particularly by underscoring the Court’s problematic move away from a more enterprise-like standard and toward notions of direct control.

2. Federal Regulatory Statutes

The trajectory of CERCLA appears in other areas of federal regulation where courts have been willing to imply enterprise principles to vindicate federal regulatory goals. For example, courts have held a parent corporation liable for the actions of a subsidiary pursuant to the regulatory policies of the Federal Water Pollution Prevention and Control Act,²⁵⁰ the Robinson-Patman

245. Hansmann & Kraakman, *supra* note 23, at 1928.

246. 524 U.S. 51 (1998).

247. *Id.* at 61-62.

248. *Id.* at 66-67.

249. *See id.* Professor Blumberg calls this direct operator liability and presumes that the inquiry still hinges on control factors. *See* Blumberg, *Statutory Law: General*, *supra* note 39, § 18.02.2 (Supp. 2002). In my view, however, the court actually focuses less on the parent’s control over the subsidiary—and instead focuses on the parent’s behavior, ascertaining whether the parent actually caused the environmental violation. I view this as a much more severe limitation on enterprise principles. *Accord* Schipani, *supra* note 231, at 701.

250. 33 U.S.C. §§1251-1387; *United States v. Ira S. Bushey & Sons, Inc.*, 363 F. Supp.

Act,²⁵¹ the Federal Trade Commission Act,²⁵² the Packers and Stockyards Act,²⁵³ the Clayton Act,²⁵⁴ and the Commodity Exchange Act,²⁵⁵ among others.²⁵⁶

Some courts do not explicitly ignore entity principles in regulatory cases, and instead hold that veil piercing is simply “easier” in cases involving a federal statute or a particularly important federal policy.²⁵⁷ Even though some of these cases use the language of piercing, calling the subsidiaries “mere

110, 119 (D. Vt. 1973), *aff'd*, 487 F.2d 1393 (2d Cir.), *cert. denied*, 417 U.S. 976 (1974) (“The public interest in preserving the environmental integrity of Lake Champlain, the sixth largest lake in the country and a jewel of nature, is sufficiently paramount that the parent corporation, Bushey, which profits from the operations of its alter-ego subsidiaries, should be accountable for any violation or continuing threat of violations to that integrity.”).

251. 15 U.S.C. §13 (1940); *Reines Distribs., Inc. v. Admiral Corp.*, 256 F. Supp. 581, 585 (S.D.N.Y. 1966) (“[T]he corporate veil between parent and subsidiary distributor will be disregarded when control asserted by the parent is significant and they will be regarded as the same seller for Robinson-Patman purposes . . .”).

252. 15 U.S.C. §§ 41-58 (2000); *P.F. Collier & Son Corp. v. F.T.C.*, 427 F.2d 261, 267 (6th Cir. 1970) (“Manifestly, where the public interest is involved, as it is in the enforcement of Section 5 of the Federal Trade Commission Act, a strict adherence to common law principles is not required in the determination of whether a parent should be held for the acts of its subsidiary, where strict adherence would enable the corporate device to be used to circumvent the policy of the statute.”).

253. 7 U.S.C. §§ 181-229 (2000); *In re G & L Packing Co.*, 20 B.R. 789, 807 (Bankr. N.D.N.Y. 1982) (“The operational distinction between Orange as a slaughterer and the Debtor as a meat processing company is a mere fragmentation of today's predominantly integrated consumer meat processing industry In the case at bar, such planned corporate fragmentation should not defeat the strong protective policy of the P & S Act.” (citation omitted)).

254. 15 U.S.C. §§ 12-27 (2000); *In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13, 18-19 (3d Cir. 1978).

255. 7 U.S.C. §§ 1-27 (2000); *Corn Prods. Refining Co. v. Benson*, 232 F.2d 554, 565 (2d Cir. 1956) (“Any profit earned by the subsidiary inures to petitioner, and likewise any loss incurred by the subsidiary is a loss to petitioner. By entering into these contracts, which are admittedly ‘an attempt to find a form’ coming within the hedging exemption of the Act, petitioner is not shifting the risk of loss, which we think is an essential attribute of hedging. If petitioner can engage in unlimited trading by means of contracts with a wholly-owned subsidiary, every other corporate trader can do likewise. The existence of a separate corporate entity should not be permitted to frustrate the purpose of a federal regulatory statute . . .”).

256. *See, e.g.*, *Elec. Bond & Share Co. v. S.E.C.*, 303 U.S. 419, 440 (1938) (Public Utilities Holding Company Act); *Ala. Power Co. v. McNinch*, 94 F.2d 601, 618 (D.C. Cir. 1937) (Federal Power Act).

257. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 630 (1983) (“[T]he Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies.”); *Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 27 (1st Cir. 2000) (finding veil piercing necessary to fulfill purposes of Railway Labor Act); *Capital Tel. Co. v. F.C.C.*, 498 F.2d 734, 738 (D.C. Cir. 1974) (piercing the veil liberally to fulfill purposes of Communications Act of 1934); *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710, 716-17 (7th Cir. 1965) (finding veil piercing necessary to fulfill purposes of Dealers' Day in Court Act). Interestingly, the same logic can benefit corporations: in *United States v. J.B. Williams Co., Inc.*, Judge Friendly held that a parent and subsidiary corporation should only incur one penalty to the FTC for violation of a cease and desist order in a false advertising case because the two were, in reality, part of the same enterprise. *See* 498 F.2d 414, 436-37 (2d Cir. 1974). Of course, avoiding antitrust liability for intra-enterprise conspiracy is beneficial to corporations. *See Copperweld Corp.*, 467 U.S. at 770-72.

shells” or “alter egos” of the parent corporation, courts deciding these cases do not follow the typical two-pronged piercing analysis, deeming it unnecessary to formally find either strict unity of interest or fraud or injustice.²⁵⁸ Indeed, certain cases—including those involving the Robinson-Patman Act—use mere control factors to ascertain liability.²⁵⁹ Some courts eschew control analysis altogether. Federal regulatory policies thus elicit from courts a broad range of enterprise possibilities.²⁶⁰

Though *Bestfoods* may call into question the decisions rendered before 1998 in these federal regulatory areas, some courts have interpreted *Bestfoods* only to require application of traditional piercing principles if the regulatory statute contains no other language pertaining to cross-corporate liability.²⁶¹ Moreover, the sheer existence and volume of these regulatory cases indicates, however inconsistently, that courts are willing to move beyond state common law in order to vindicate federal regulatory purposes. Enterprise liability thus has crept into the annals of entity law.

3. Bankruptcy

In a field of bankruptcy law called “substantive consolidation,” courts typically disregard the corporate entity through horizontal piercing in spite of the fact that the Bankruptcy Code is silent on the issue. Many commentators have viewed this field of bankruptcy law as an exception to traditional entity principles and a move toward enterprise liability.²⁶² Substantive consolidation is a doctrine by which the assets of a corporate group—usually of sister corporations—are pooled to satisfy the debts of third-party creditors.²⁶³ This

258. See Strasser, *supra* note 58, at 642-45 (discussing single factor piercing); see also *Coleman v. ANR-Advance Transp. Co.*, 34 F.App’x. 223, 225 (7th Cir. 2002) (finding that, in addition to piercing, liability to a parent corporation could ensue if the corporate group “split itself into a number of smaller corporations, for the express purpose of avoiding liability under the discrimination laws”).

259. *Reines Distributions*, 256 F. Supp. at 585 (“[T]he corporate veil between parent and subsidiary distributor will be disregarded when control asserted by the parent is significant and they will be regarded as the same seller for Robinson-Patman purposes . . .”).

260. *In re Oil Spill by the “Amoco Cadiz” off the Coast of France on Mar. 16, 1978*, MDL Docket No. 376, 1984 U.S. Dist. LEXIS 17480, at *135-36 (N.D. Ill. Apr. 18, 1984) (finding No. 43), *aff’d*, 4 F.3d 997 (7th Cir. 1993).

261. See, e.g., *Pearson v. Component Tech. Corp.*, 247 F.3d 471 (3d Cir. 2001) (examining *Bestfoods* in the context of the WARN act, and deciding that the Department of Labor’s factors for determining control, instead of traditional veil-piercing principles, directs WARN Act liability). Some of the cases in which corporate group liability vindicates a federal regulatory purpose were also decided after *Bestfoods*. See, e.g., *Bhd. of Locomotive Eng’rs*, 210 F.3d at 27.

262. See generally Seth D. Amera, *Substantive Consolidation: Getting Back to Basics*, 14 Am. Bankr. Inst. L. Rev. 1, 10-12 (2006) (discussing traditional view that piercing and substantive consolidation are different); Blumberg, *Increasing Recognition*, *supra* note 232, at 326; Timothy E. Graulich, *Substantive Consolidation—A Post-Modern Trend*, 14 Am. Bankr. Inst. L. Rev. 527, 538 (2006) (“Substantive consolidation . . . is the most dramatic and far-reaching exception to corporate separateness.”).

263. See William H. Widen, *Corporate Form and Substantive Consolidation*, 75 Geo.

pooling removes the creditor's cause of action against the individual corporation in favor of a pro-rated proportion of a common pot of assets.²⁶⁴

The doctrine of substantive consolidation has its roots in a case involving a piercing-like analysis. In *Sampsell v. Imperial Paper & Color Corp.*, an individual businessman transferred nearly all of his assets into a closely-held corporation formed just before he declared bankruptcy.²⁶⁵ The Supreme Court affirmed the consolidation of the personal and corporate assets to satisfy the debts of a creditor.²⁶⁶ In most of the subsequent cases, courts used traditional piercing language—"mere pretense,"²⁶⁷ "commingling of assets,"²⁶⁸ and having "affairs . . . so intermingled as to render them indistinguishable"²⁶⁹—in determining that personal and corporate assets should be pooled.

However, as time has progressed, the standards established in *Sampsell* have loosened, sometimes in inconsistent ways. For example, in *Union Saving Bank v. Augie/Restivo Banking Co.*, the Second Circuit announced a disjunctive two-prong inquiry for substantive consolidation: "(i) whether creditors dealt with the entities as a single economic unit and 'did not rely on their separate identity in extending credit'; or (ii) whether the affairs of the debtors are so entangled that consolidation will benefit *all* creditors."²⁷⁰ This inquiry focuses on the perceptions of creditors and thus puts pressure on the corporation's public image. Other circuits have adopted different balancing tests.²⁷¹ Indeed there has been an increasing trend to order substantive consolidation in cases that would basically be "inequitable" to creditors, and where a variety of factors that consider the separate legal existence of companies are present.²⁷²

Reliance on basic factors like commingling of assets, the impossibility of disentangling the entities' assets and liabilities, the administrative cost-saving of substantive consolidation, and the possible misappropriation of assets between the corporations, bears a similarity to piercing doctrine.²⁷³ Thus, courts appear to be applying a slippery version of piercing under broader circumstances. On the other hand, numerous scholars have viewed substantive consolidation as an example of enterprise principles, and noted that the extent

Wash. L. Rev. 237, 238 (2007).

264. See Graulich, *supra* note 262, at 527.

265. 313 U.S. 215 (1941).

266. *Id.* at 219-220.

267. *Soviero v. Franklin Nat'l Bank*, 328 F.2d 446, 448-49 (2d Cir. 1964).

268. *Id.* at 448.

269. *Maule Indus., Inc. v. L.M. Gerstel*, 232 F.2d 294, 296 (5th Cir. 1956).

270. 860 F.2d 515, 518 (2d Cir. 1988) (internal citations omitted).

271. See, e.g., *In re Bonham*, 229 F.3d 750, 771 (9th Cir. 2000) ("Our abecedarian prerequisite to ordering substantive consolidation is that the two factors set forth in *Augie/Restivo* must be satisfied."); *In re Baker & Getty Fin. Serv., Inc.*, 974 F.2d 712, 720 (6th Cir. 1992) ("[T]he interrelationships of the debtors are hopelessly obscured and the time and expense necessary to attempt to unscramble them is so substantial as to threaten the realization of any net assets for all the creditors.")

272. See Graulich, *supra* note 262, at 547-52.

273. See Kors, *supra* note 107, at 409-10.

to which bankruptcy common law departs from traditional veil-piercing doctrine depends on the basic policy behind bankruptcy rules—successful reorganization of the insolvent business being key.²⁷⁴

C. Explicit Enterprise Liability: ERISA, Labor Law, and Bank Holding Companies

Even more strikingly, some federal laws impose explicit statutory enterprise liability, usually based on ownership of a percentage of voting stock. Courts have generally viewed this type of enterprise liability as Congress' concerted effort to ensure that federal regulation trumps state corporate law, including piercing.

One of the first federal acts to impose enterprise liability explicitly was the Public Utility Holding Company Act of 1935,²⁷⁵ which imposed liability on the parent corporation for acts of its subsidiaries to remedy the problems of corruption and insolvency faced by public utility companies during the Great Depression.²⁷⁶ Subsequent legislation has followed its cues.

1. ERISA

Like CERCLA, the Employee Retirement Income Security Act (ERISA)²⁷⁷ is a canonical example of enterprise principles in a federal regulatory context. Enacted in 1974, the statute regulates employer-sponsored retirement income programs by setting, *inter alia*, minimums for funding and participation in the system.²⁷⁸ An employer may incur liability under the statute in a number of ways; the one that concerns us—termination liability—imposes liability on an employer if it terminates its participation in a plan.²⁷⁹ Congress expressly considered the possibility that parent corporations might subdivide in order to avoid the strict requirements of the statute, which force corporations that terminate their participation in retirement income plans to pay the total amount of unfunded benefits, plus interest, to all participants in the program.²⁸⁰ Section 1301(b)(1) provides that “all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades or businesses as a single employer.”²⁸¹ Furthermore, “common control” is defined in the regulations as “one or more chains or organizations conducting trades or businesses connected

274. See Blumberg, *Increasing Recognition*, *supra* note 232, at 326; Strasser, *supra* note 58, at 663.

275. 15 U.S.C. § 79 (1988).

276. See Blumberg, *Increasing Recognition*, *supra* note 232, at 307.

277. 29 U.S.C. §§1001-1461 (2000).

278. See *id.* §1001(a).

279. Blumberg, *Statutory Law: General*, *supra* note 39, § 16.02 (Supp. 2002).

280. H.R. Rep. No. 779, 93rd Cong., 2d Sess. 491 (1974).

281. 29 U.S.C. §1301(b)(1).

through ownership of a controlling interest with a common parent organization.”²⁸² Control is presumed at 80% stock ownership.²⁸³ Thus, parents are directly and statutorily liable for the ERISA debts of their subsidiaries. As the First Circuit has held, “[the] corporate veil was, in effect, pierced by Congress when it enacted the termination liability provisions of ERISA.”²⁸⁴ The strong preemption mandates in the statute buttress such a conclusion, since state limitations on piercing the corporate veil “do not constrict a federal statute regulating interstate commerce for the purpose of effectuating certain social policies.”²⁸⁵

Thus, courts in ERISA cases look to the direct language of the statute, the policy behind it, and the application of its control provisions to find liability, thereby eschewing traditional veil-piercing jurisprudence.²⁸⁶ Although this approach hinges liability on control, rather than the economic fact of the enterprise, it is nonetheless a break with traditional entity theory—and a significant instance of Congress explicitly disregarding traditional piercing doctrine in order to vindicate important federal policies.

2. Labor Law

Certain federal agencies have also utilized explicit enterprise liability in implementing several important labor statutes. The Supreme Court has interpreted the National Labor Relations Act, for example, to require collective bargaining regardless of whether the corporation with which the union is dealing is a parent or affiliated corporation, based on a determination by the National Labor Relations Board (NLRB) that the affiliated corporations are part of an integrated enterprise.²⁸⁷ The NLRB’s regulations treat separate corporations as a single employer when the corporations are “sufficiently integrated.”²⁸⁸ To meet this test, the NLRB evaluates four factors: (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control.²⁸⁹ The NLRB also looks to whether the group presents a “common public persona.”²⁹⁰

282. Temp. Treas. Reg. § 11.414(c)-2(b)(1) (1987).

283. *Id.* § 2(b)(2)(i)(A).

284. Pension Ben. Guar. Corp. v. Ouimet Corp., 711 F.2d 1085, 1093 (1st Cir. 1983) (citations omitted).

285. *Id.*

286. It is important to note that these enterprise principles only apply to multi-employer plans. Courts have explicitly followed entity law when determining liability for single-employer plans, and do not analogize to the statutory provisions. A few courts have noted that piercing standards should be “relaxed” in order to further the regulatory statutory goal. See Blumberg, *Increasing Recognition*, *supra* note 232, at 313.

287. See Blumberg, *Statutory Law: General*, *supra* note 39, § 13.02.

288. See 6 Fed. Reg. Empl. Serv. (Law Co-op) §§ 45:7, 45:93-94 (Supp. 1982); 21 NLRB Ann. Rep. 14 (1956).

289. *Id.*

290. 6 Fed. Reg. Empl. Serv. (Law. Co-op) §§ 45:7 n.14, 46.23 (1977 & Supp. 1982); see

The Supreme Court approved this four-part test in *Radio & Television Broadcast Technicians Local Union v. Broadcast Service of Mobile*.²⁹¹ Subsequent decisions have recognized that this standard exists in labor relations as “an exception to the doctrine of limited liability in corporate law” to “protect the collective bargaining rights of employees and to advance industrial stability.”²⁹² If the NLRB identifies a group of corporations as an integrated enterprise under the single employer test, then the NLRB applies similar tests to determine whether the employees of the affiliated companies have a “community of interests.”²⁹³ Thus, for example, even if a subsidiary corporation is not a signatory to a collective bargaining contract, it may still have a duty to collectively bargain with a union if it is part of an “integrated enterprise” with the parent signatory and its employees have a unity of interest with the employees of the parent corporation.²⁹⁴ Piercing the corporate veil is not appropriate in such circumstances because courts have generally held that the four-part test is better suited to the “implementation of the policies of the federal labor statutes.”²⁹⁵

This is not to say that this instance of enterprise principles has been consistently applied. For example, in *United Paperworkers International Union v. Pentech Papers*, the court found that section 301 of the Labor Management Relations Act—which contains provisions similar to those of the National Labor Relations Act—did not turn to enterprise principles to impose a duty to arbitrate on a successor corporation because the successor corporation only acquired “some assets” instead of effecting a full “merger.”²⁹⁶ Instead, the court gave greater weight to state law’s “view of how separate corporations in these circumstances are to be treated” and refused to find liability under piercing doctrine and entity principles.²⁹⁷ Other courts have been similarly reluctant to extend principles of enterprise liability to the duty to arbitrate.²⁹⁸

3. Bank Holding Companies

Finally, federal laws concerning financial institutions almost uniformly subject bank holding companies and similar entities to enterprise principles.²⁹⁹ Although the regulatory systems in this area are beyond the scope of this

also *NLRB v. Marinor Inns, Inc.*, 445 F.2d 538 (5th Cir. 1971).

291. 380 U.S. 255 (1965) (per curiam).

292. *Carner v. MGS-576 5th Ave. Inc.*, 992 F. Supp. 340, 350 (S.D.N.Y. 1998) (quoting *Murray v. Miner*, 74 F.3d 402, 404 n.1 (2d Cir. 1996)).

293. See Blumberg, *Statutory Law: General*, *supra* note 39, § 13.04 & n.6-8 (citing cases and reviewing tests).

294. *Id.* §§ 13.04-05.

295. *Id.*

296. 439 F. Supp. 610, 617 (D. Me. 1977).

297. *Id.* at 617.

298. See Blumberg, *Statutory Law: General*, *supra* note 39, § 13.10.

299. See Blumberg, *Increasing Recognition*, *supra* note 232, at 308.

Comment, two important statutes that have informed subsequent federal and state laws warrant mention: (1) the Bank Holding Company Act of 1956³⁰⁰ and (2) the Savings and Loan Holding Company Amendments Act of 1967.³⁰¹ Both of these statutes have been in place for nearly half a century, and the broad cross-corporate liability that they impose has not weakened the economic status of banks or detracted from investment in them.

The Bank Holding Company Act provides for a rebuttable presumption of control if a parent or holding company holds 25% of the voting shares of another corporation, controls the election of the corporation's directors, or retains the ability to control the management or policies of the corporation.³⁰² If a holding company meets any of these loose criteria, it must abide by the federal regulations protecting creditors of the bank, including restrictions on mergers and acquisitions.³⁰³ It must also abide by a set of fiduciary duties designed to protect "the financial safety, soundness, [and] stability of an affiliated depository institution," or else risk losing insurance from the Federal Deposit Insurance Corporation.³⁰⁴ Like the Bank Holding Company Act, the Savings and Loan Holding Company Amendments Act provides for a rebuttable presumption of control if the parent or controlling company holds 25% of the subsidiary's voting shares.³⁰⁵ As these examples of enterprise liability—albeit in its milder, control-based form—demonstrate, enterprise principles can vindicate important regulatory goals without causing the sky to fall on investment capitalism. Although both the banking and the savings and loan markets have seen their share of trouble in the past few decades, it would be incongruous to suggest that the broader cross-corporate liability imposed on either has been the cause of the industries' woes. Enterprise principles in the banking and savings and loan areas have not discouraged investment; they simply add a layer of protection to creditors in an area that Congress has viewed as particularly sensitive.

D. Enterprise Liability and State Law

Enterprise principles have arisen in enclaves of state law as well. Most courts use classic piercing language requiring both "alter ego" factors and a fraud or injustice to find liability across the corporate enterprise, but they do so in slippery ways. In *State ex rel. Neidig v. Superior National Insurance Co.*, for example, when sister corporations under common control of a parent went through bankruptcy to avoid paying worker's compensation insurance, the

300. 12 U.S.C. §§ 1841-1850. (1988).

301. Pub. L. 90-255, 82 Stat. 5. (1968).

302. See Blumberg, *Increasing Recognition*, *supra* note 232, at 305, 308; see also 12 U.S.C. § 1841(a)(2)(A-C)(1995).

303. 12 U.S.C. § 1842.

304. See, e.g., *id.* § 1848(a), § 1818.

305. See Blumberg, *Increasing Recognition*, *supra* note 232, at 305.

Oregon Supreme Court found sufficient control and improper conduct by the parent corporation to pierce the corporate veil.³⁰⁶ This case is typical of decisions that do not rely specifically on a statutory mandate to impose liability on the parent corporation, yet find that the parent-subsidiary relationship alone establishes control. Similarly, in *New Hampshire Wholesale Beverage Association v. New Hampshire State Liquor Commission*, the New Hampshire Supreme Court found that the legislative purpose of state liquor laws mandated disregarding separate corporate personhood.³⁰⁷

In addition to these spot references to state legislative purposes and a loosening of veil-piercing jurisprudence, Louisiana, North Carolina, and Texas courts have moved toward a more general application of enterprise principles through an alternative to piercing doctrine known as the “single business enterprise” concept.³⁰⁸ This concept “coexists as a minor but apparently durable tributary to the main stream of veil piercing liability.”³⁰⁹

In Louisiana, a state appeals court set the standard in the early 1990s, finding that the State Insurance Commissioner could exercise authority over a large group of corporations because the group represented a “single business enterprise.”³¹⁰ Subsequent courts have extended the “single business enterprise” concept to areas other than the insurance context, noting that the doctrine exists as an alternative to piercing the corporate veil.³¹¹ Some courts have refined the concept to find that “[i]f one corporation is wholly under the control of another, the fact that it is a separate entity does not relieve the latter from liability.”³¹² Scattered North Carolina cases reflect a similar trend.³¹³

Texas courts also follow the “single enterprise” doctrine, noting that “when corporations are not operated as separate entities but rather integrate their resources to achieve a common business purpose, each constituent

306. 173 P.3d 123 (Or. 2007).

307. 116 A.2d 885 (1955).

308. See Strasser, *supra* note 58, at 646-48.

309. *Id.* at 647.

310. *Green v. Champion Ins. Co.*, 577 So. 2d 249 (La. Ct. App. 1991) (listing eighteen factors for consideration in determining whether the corporate group is a single business enterprise).

311. *Pine Tree Assocs. v. Doctors' Assocs., Inc.*, 654 So. 2d 735, 738 (La. Ct. App. 1995) (noting in contract case that “[w]here two or more corporations operate a single business, the courts have been unwilling to allow affiliated corporations that are not directly involved to escape liability simply because of the business fragmentation”); see also *Sarpy v. ESAD, Inc.*, 968 So. 2d 736 (La. Ct. App. 2007) (sublease contract); *Thibodeaux v. Ferrellgas, Inc.*, 741 So. 2d 34, 35, 42-43 (La. Ct. App. 1999) (tort); *Brown v. Auto. Cas. Ins. Co.*, 644 So. 2d 723 (La. Ct. App. 1994) (insurance rehabilitation).

312. *Grayson v. R.B. Ammon & Assocs., Inc.*, 778 So. 2d 1, 14 (La. Ct. App. 2000).

313. *Glenn v. Wagner*, 313 S.E.2d 832, 844 (N.C. Ct. App. 1984), *rev'd on other grounds*, 329 S.E.2d 326 (N.C. 1985) (“The extension of liability for a corporation’s obligations beyond the confines of its own separate corporate identity is appropriate in those cases where an essentially single business or economic enterprise is nevertheless conducted through several separate corporations.”) (internal citations omitted).

corporation may be held liable for debts incurred in pursuit of that business purpose.”³¹⁴ Texas courts, like Louisiana courts, look to an extensive list of factors to determine whether the enterprise is cohesive and should be treated as such, including factors that are commonly considered in more traditional veil-piercing analyses, such as commingling of assets.³¹⁵ However, as Kurt Strasser has pointed out, “The ‘single business enterprise’ determination looks solely to internal organization and management structure of the enterprise and not to moral culpability or wrongful conduct involved in the case.”³¹⁶

E. Conclusions Regarding Enterprise Liability in the United States

Enterprise liability is not the mainstream of the law in the United States, and it will not become that way anytime soon.³¹⁷ Rather, enterprise principles exist in various enclaves of U.S. law where Congress or the courts have perceived a particularly important regulatory goal that would be thwarted by separate corporate personhood. Moreover, enterprise liability has occasionally arisen in areas purportedly reserved exclusively to entity law, as illustrated by the “single business enterprise” standard employed in Louisiana, North Carolina, and Texas. In addition, the Supreme Court has adopted enterprise principles in both antitrust and interstate tax cases.

These departures from entity liability represent legislatures’ and courts’ fumbling to find a more appropriate standard for applying liability across corporate groups in areas that involve a particularly strong public interest or regulatory issue. To varying degrees, both courts and legislatures are identifying areas where corporate separateness must be subordinated to vital regulatory goals, particularly in cases where corporations are using separate corporate personalities to escape liability. This subtle drift and refusal to favor corporate interests over the public interest, is nonetheless inconsistently applied, and thus highlights the need for a more unified and overt standard.

In addition to the observation that neoclassical principles of separate corporate personhood can be subsumed in the face of compelling public policies, two additional features of enterprise liability’s persistence in enclaves of U.S. law warrant mention. First, where they exist, enterprise principles in the

314. *Paramount Petroleum Co. v. Taylor Rental Ctr.*, 712 S.W.2d 534, 536 (Tex. Ct. App. 1986); *see also* *George Grubbs Enters., Inc. v. Bien*, 900 S.W.2d 337, 339 (Tex. 1995).

315. *See, e.g.*, *Paramount Petroleum Co.*, 712 S.W.2d at 536 (listing “common employees; common offices; centralized accounting; payment of wages by one corporation to another corporation’s employees; common business name; services rendered by the employees of one corporation on behalf of another corporation; undocumented transfers of funds between corporations; and unclear allocation of profits and losses between corporations” as factors to be considered).

316. Strasser, *supra* note 58, at 646.

317. *See, e.g.*, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) (refusing to pierce the corporate veil between subsidiary corporations because the text of the Foreign Sovereign Immunities Act “gives no indication that Congress intended us to depart from the general rules regarding corporate formalities”).

United States follow the doctrine's milder iteration, focusing on control factors rather than the fact of the business enterprise. The statutes imposing explicit enterprise liability follow this rule without exception and operate similarly to the German *Konzernrecht* by creating a rebuttable presumption of control at a preordained percentage of stock ownership, which triggers various kinds of statutory liability. The main exceptions to this principle include the enterprise liability imposed by the Supreme Court in decisions regarding antitrust and interstate taxation. Both *Copperweld* and *Mobil Oil* look simply to the unitary structure of the business organization, irrespective of control factors, to determine liability.

Second, the most successful, and least criticized, instances of enterprise liability have arisen in the context of carefully drafted and explicit federal statutory regulation. ERISA and the Bank Holding Company Act, for example, have not borne the same volume of vitriolic criticism that the bankruptcy laws have. Clear statutory language that subjugates the corporate form to the statute's regulatory goals not only reflects the common law principle announced in many federal regulatory cases, but also avoids vagueness and inconsistency.³¹⁸

As the preceding examples make clear, the line between aggressive piercing and enterprise principles is difficult to draw, though I have endeavored herein to distinguish the two.³¹⁹ As bankruptcy and the "single business enterprise" standard used in Louisiana, North Carolina, and Texas illustrate, findings of broad enterprise liability are often couched in familiar, albeit limited and rigid, terms held over from veil-piercing jurisprudence.

V

PROBLEMS WITH CONTROL-BASED ENTERPRISE LIABILITY

As both the U.S. and international examples illustrate, many of the extant iterations of enterprise principles use control factors to determine liability—as in the *Konzernrecht* and its progeny, in ERISA and bank holding company law, and, less explicitly, in other enclaves of U.S. law. These standards premise finding an "enterprise" on evidence that the parent or affiliate corporation controlled the subsidiary. In contrast, a small minority of standards finds that an "enterprise" exists solely based on a finding of unified economic purpose. In these instances, which I refer to as "true enterprise liability," the economic unit determines the legal consequences. This is the case in the U.N. *Norms*, in India, in the *Copperweld* and *Mobil Oil* Supreme Court decisions, and may have some following in certain U.S. state courts.

318. See generally Robert B. Thompson, *Piercing the Corporate Veil: Is the Common Law the Problem?*, 37 Conn. L. Rev. 619, 624 (2005) (discussing the problems with common law piercing, including that the balancing involved "lack[s] a common metric").

319. See Strasser, *supra* note 58, at 642-45 (discussing single factor piercing).

Of course, even the examples I align together are by no means uniform. There are many instances of enterprise liability's general guiding principles, and my formulation of "control" versus "true" enterprise liability identifies only the poles on a spectrum. Jurisdictions both within and outside the United States have experimented with variations on the theme. All of the approaches I have described may fall under the umbrella term of enterprise liability, as they attempt to impose a tailored regulatory formulation on the corporate group. Moreover, the concept of "control" itself is also variable. Given the panoply of possible options, this Part will expose the problems resulting from emphasizing certain kinds of direct control over the instrumentalities of the subsidiary that cause catastrophic torts.

While control factors feature prominently in the overwhelming majority of the forms of enterprise liability that currently exist, and while there is much agreement among commentators that a "control" approach is the preferable form of enterprise liability,³²⁰ there has not been sufficient clarity about what "control" means, and which instances of control liability would be more likely to prevent torts. "Control" is not monolithic. Some versions of a control test fall into many of the same traps as entity liability, because they investigate certain behaviors to find liability. Others more closely approximate the incentive structure of an economically integrated enterprise, and consider control only to the extent that it determines the contours of the incentive structure within the enterprise.

The more problematic understanding of control focuses on a parent corporation's direct ability to control the instrumentalities of subsidiaries that cause torts. For example, the German Supreme Court has recently hinged liability on the parent corporation's "objective misuse" of its power.³²¹ Similarly, some of the federal regulatory cases discussed above look to whether the parent directly controlled the subsidiary.³²² I will argue in this Part that direct control is an incomplete and anachronistic means by which to impose liability. Though control factors better approximate actual corporate behavior and risk allocation than entity liability does, a new standard should hinge on more economic criteria.

320. See, e.g., Antunes, *supra* note 22, at 494; Blumberg, *Corporate Groups*, *supra* note 39, at 609; Philip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 Del. J. Corp. L. 283, 340 (1990) [hereinafter Blumberg, *Corporate Entity*] (advocating control factors as one among several other factors to be used in determining the existence of a corporate enterprise); Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 Colum. L. Rev. 1203, 1203 (2002); see also Muchlinski, *supra* note 77, at 45-79 (defining corporate structures along control lines, and noting that the problem with most legal structures is that they fail to recognize the unique control structures of modern-day multinational enterprises).

321. Bundesgerichtshof [BGH] [Federal Court of Justice] 122 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 123 (130) (F.R.G.).

322. See *Reines Distributions*, 256 F. Supp. at 585 (assessing whether control exerted was "significant" in order to find Robinson-Patman liability).

In contrast, true enterprise liability only investigates control to the extent that shifting a parent corporation's decision-making processes would prevent costly torts. This type of control eschews the fault-based standards inherent in direct control and instead focuses on the incentive structure within the corporate conglomerate as a lens toward shifting costs and preventing harms. The latter is closer to a true enterprise standard.³²³

Direct, or behavioral, control is inherently suspect because it already goes a long way toward satisfying one of the prongs of piercing the corporate veil: the shareholder may exercise so much control that the corporation is nothing more than her puppet or shell. The language used in *In re Silicone Gel Breast Implants Product Liability Litigation* is illustrative: “[W]hen a corporation is so controlled as to be the alter ego or mere instrumentality of its stockholder, the corporate form may be disregarded.”³²⁴ Moreover, in the CERCLA context, *Bestfoods* ended the lower courts' experiments with owner/operator liability in order to impose a system of direct behavioral control.³²⁵ Thus, the difference between the control test as used in enterprise liability and the control inquiry as used in piercing is merely one of degree. In the former, control is the source of liability; in the latter, the ability to directly control the behavior of the subsidiary as a puppet master is one evidentiary means to arrive at the conclusion of “alter ego” or “mere shell.” The differences between these systems should not be understated, and the control test in enterprise liability still represents a move away from typical piercing principles. However, the problems of piercing—namely, the ease with which corporations may alter their behavior incrementally to avoid liability without actually shifting the costs of the subsidiary's risky activities—continue to haunt this analysis.³²⁶

In addition, pegging liability to direct control has a hint of moralism about it, presuming erroneously that corporations are something other than economic actors. Facially, control-based systems comport with ordinary standards of fairness and justice. If the parent controls the subsidiary, the parent in essence

323. India, for example, merely stated that the economic enterprise should be treated as a single entity because of principles of strict liability for corporate torts in the *Shriram* case, and because plaintiffs could not differentiate among its structures in the Bhopal litigation. See text *supra* accompanying notes 201-205. Additionally, the U.N.'s definition of a transnational enterprise, as an “economic entity operating in more than one country or a cluster of economic entities operating in two or more countries—whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively,” while doctrinally unproblematic, may be difficult to apply in practice because it affords very little direction beyond stating the goal of associating liability with the economic enterprise. Norms, *supra* note 206, ¶ 20; see also text *supra* accompanying notes 206-213.

324. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1447, 1452 (N.D. Ala. 1995).

325. See text *supra* accompanying notes 246-249.

326. An agency determination rests on similar grounds. Cf. *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285 (Minn. 1981) (finding Cargill liable for the acts of one of its contracting partners, Warren Grain & Seed Co., on the basis of Cargill's extensive financial control over Warren).

takes primary operational blame for the subsidiary's activities. This is a behavioral standard; it pegs liability to an affirmative action by the parent corporation—or more accurately, to a series of behaviors that should put the parent on notice that it is acting in a way that may lead to liability.

This moralistic sentiment, however, does not reflect the reality of how corporations actually operate. Corporations do not act moralistically as persons do. In the immortal words of Baron Edward Thurlow, “Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?”³²⁷ Although human beings operate the corporation, they are bound by an alternative regimen of fiduciary duties and are under a duty to maximize shareholder value.³²⁸ In fact, corporate directors are some of the only members of society who may not follow their conscience if it conflicts with the goal of maximizing shareholder value.³²⁹ Corporations are economic actors, full stop. As a consequence, imputing “fault” to a corporation may make normative sense when close corporations and individual shareholders are at issue, but when *another corporation* is a shareholder, the analogy fails. Enterprise principles, rooted in economic reality rather than legal fiction, remedy this disjunction by focusing solely on the profits and unitary purpose of the business when imposing liability.

Furthermore, behavioral control-based liability may incentivize the very type of decentralization, and subsequent risk externalization, that enterprise doctrine seeks to combat. Tying liability to control naturally incentivizes corporations to take a hands-off approach to governance in order to avoid liability—an incentive that is particularly strong in ultrahazardous activities. If a corporation is more likely to be held liable if it does not control the day-to-day operations of the subsidiary, this encourages parent corporations to provide less oversight. As a consequence, if liability is pegged to direct control, corporations will seek to avoid liability through decentralization, allowing subsidiaries to more or less govern themselves. However, presumably, the parent corporation would still financially or logistically support the activities of the subsidiary to a degree that the subsidiary, acting alone, might not obtain. This creates the potential for subsidiaries to engage in risky behavior with a parent's capital while the parent is not held liable for the consequences of the

327. Mervyn King, *Public Policy and the Corporation* 1 (1977).

328. This is the “duty not to waste.” Some commentators have even posited that laws authorizing corporate donations to charity, such as Del. Gen. Corp. Code §122(9), “can be read merely as an authorization to make charitable contributions that serve the basic purpose of business corporations, which is to maximize profit.” William A. Kline, J. Mark Ramseyer, & Stephen M. Bainbridge, *Business Associations* 286 (Foundation Press 2006). Even though courts are deferential to corporate directors in this regard, the directors must still argue to the court that the particular asset had as its goal not the maximization of the public welfare, but the maximization of corporate profits. *Id.* at 287.

329. See *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919) (ordering Henry Ford and Ford Motor Company to pay dividends when the corporation had withheld them to expand production and create jobs, which would benefit society at large).

risk. From a normative standpoint, society might desire just the opposite, because parental oversight of the subsidiary provides more layers of safety and can prevent disasters before they occur.

Additionally, behavioral control factors may suffer from rigidity and formalism. This concern is best exemplified in those standards that peg a rebuttable presumption of control onto ownership of a certain percentage of voting stock of the subsidiary: for example, the *Konzernrecht* at a majority, and the banking holding company laws at 25%.³³⁰ A corporation that can exercise control in a non-voting manner—for example, through selective allocation of resources—can hold an extreme minority percentage of stock and still control the subsidiary.

Parental control of the instrumentalities of a subsidiary that cause torts has been popular among commentators—and, probably, among legislators and judges—in large part because it draws a clear line between “active” and “passive” shareholders.³³¹ A controlling shareholder generally has the ability to benefit from corporate activities in excess of its pro-rata share, either through steering the business in ways that align with its other shareholdings and corporate interests, or through more naked types of self-dealing.³³² Because a controlling shareholder has a greater ability to benefit from corporate behavior by managing a company to its benefit, yet does not incur a corresponding increase in risk, “a controlling shareholder is more likely to find hazardous activities attractive.”³³³ Passive shareholders, on the other hand, cannot act to avoid moral hazard and likely do not have the relevant information required to avoid harms.³³⁴

Of course, these same benefits occur when enterprise, or economic, control, rather than behavioral control, is the characteristic to which liability is pegged. Enterprise theory, as I imagine it in this Comment, would never impose liability on a natural person shareholder, who—at least in the multinational corporation context—is more likely to be a passive shareholder, rather than an active player in corporate affairs with the ability to prevent harms. Enterprise theory also draws a distinction between corporate shareholders whose passive holdings in the corporation represent a simple investment choice, and those for whom the subsidiary or affiliated corporation is part of its functionally and economically integrated business; it only imposes liability in the latter scenario.

This again highlights the difference between behavioral and economic

330. See Blumberg, *Increasing Recognition*, *supra* note 232, at 305-06 (listing regulations that use stock ownership as either the decisive factor, or one among many factors, in determining the existence of an enterprise).

331. See Mendelson, *supra* note 37, at 1203.

332. See *id.* at 1251-58.

333. *Id.* at 1258.

334. *Id.* at 1248-49.

control. Even if a parent corporation does not control the instrumentalities that cause torts, its position at the nerve center of a conglomerate enterprise may allow it to make business decisions and allocate resources that would prevent catastrophic torts in the first place. This need not mean that the parent corporation knew or even should have known that the possibility of a tort would occur. Rather, economic control attempts to restructure the allocation of liability such that the parent corporation has the incentive to prevent torts before they occur. Enterprise liability targets the economic decisions made at the nerve center of the corporation, and forces those with the ability to internalize the costs of doing business to do so. Thus, enterprise liability retains the benefits of moral hazard avoidance and information access that formulations pegging liability to behavioral control provide, while eschewing the control doctrine's problems of formalism, moralization, and incentivized decentralization.³³⁵

VI

A NEW TEST FOR ENTERPRISE LIABILITY

A. Toward a New Test

Since behavioral control factors alone are not dispositive, what test would be preferable to determine the existence of enterprise? How might a court or a legislature thoughtfully restructure liabilities within corporate groups in order to change the decisional processes at the corporate nerve center, while avoiding the pitfalls of a behavioral control standard? Without the bright line of behavioral control, how might a test avoid imposing *overly* broad liability that, instead of preventing catastrophes, limits investment that might be socially beneficial?

These questions are daunting, and it would take a roomful of experts, legislators, and businesspeople to construct the perfect, nuanced test. However, by building off the volume of academic literature in this area, learning from the history of limited liability, and looking to the jurisdictions and areas where enterprise liability has crept into the landscape of corporate law, some conclusions can help inform the construction of a new test for enterprise liability.

As a preliminary matter, the test for enterprise liability should be conjunctive and two-pronged, requiring an economically integrated enterprise (the enterprise prong) *and* a mass tort, human rights violation, or environmental

335. Of course, only some commentators and jurisdictions advocate for behavioral control factors alone as a test for imposing cross-corporate liability. See sources cited *supra* in note 320. For example, Professor Blumberg would primarily look to behavioral control factors, though he would look to non-control factors in a few exceptional circumstances, such as where an integrated enterprise spans a wide range of jurisdictions and markets and thus would be too decentralized for control factors alone to be sufficient.

harm (the tort creditor prong). The history of limited liability indicates that the doctrine was never intended to address involuntary tort creditors or decentralized corporate groups.³³⁶ By narrowing liability to the context of tort creditors, this test would limit freewheeling liability and cabin critics' concerns that enterprise liability would imperil investment capitalism.

1. The Enterprise Prong

With regard to the enterprise prong, the test for finding the existence of an enterprise should have at its basis an inquiry of economic, and not behavioral, control. Some lessons from the legislators, policymakers, and judges that have considered and implemented various tests for enterprise may inform the creation of such a test. As the examples discussed in this Comment demonstrate, the integration of parents and subsidiaries to pursue one economic purpose must be the guiding principle for imposing tort liability. A court may determine the existence of an enterprise through a series of inquiries designed to determine the economic limits of the group. Such a test would necessarily be a fact-specific inquiry, and most likely involve a factored test.

Courts in several jurisdictions have already proven adept at crafting factored tests to determine the existence of enterprise. Texas courts, for example, have developed long lists of factors relevant to determining the existence of an enterprise, which hinge on the organization of the corporate group as a whole, and eschew the language of "moral culpability" or "wrongful conduct" that piercing standards would require.³³⁷ Professor Blumberg, too, has discussed some non-control-based factors that could help inform the inquiry regarding the existence of an enterprise.³³⁸ Drawing from these examples, relevant inquiries might include: (1) Does the subsidiary exist in order to further the economic goals of the parent?; (2) Does the corporate group present itself to the public as a unified enterprise through, for example, common logos, policies, and guiding principles?; (3) Absent the legal formality of separate corporate personhood, are these two corporations functionally part of the same business?; and most importantly, (4) Is the subsidiary or affiliate corporation created, acquired, or utilized to further the business goals of the parent

336. See text *supra* accompanying notes 40-44.

337. Strasser, *supra* note 58, at 646; see *Paramount Petroleum Co. v. Taylor Rental Ctr.*, 712 S.W.2d at 536 (providing the following as a nonexhaustive list of factors for determining the existence of an enterprise: "common employees; common offices; centralized accounting; payment of wages by one corporation to another corporation's employees; common business name; services rendered by the employees of one corporation on behalf of another corporation; undocumented transfers of funds between corporations; and unclear allocation of profits and losses between corporations").

338. Blumberg, *Corporate Entity*, *supra* note 320, at 340. Blumberg's test for such situations would include, *inter alia*, "economic integration of the business or businesses of the constituent companies; administrative interdependence of the constituent companies; financial interdependence of the constituent companies; and the use of a common public persona for the constituent companies of the group." *Id.*

corporation, and is part of its true purpose the externalization of the parent company's risk? The existence of one of these factors alone should not be sufficient to find a unitary enterprise, but rather some combination of several factors would tend to demonstrate the existence of a unified corporate group.³³⁹ The overall inquiry should be *economically* rooted, instead of *behaviorally* rooted—courts should ask questions that determine the functional economic integration of the two corporations. Indeed, this inquiry assumes that an economically integrated enterprise behaves as a unified whole and must absorb the cost of its hazardous activities as a whole. The goal of such a test for enterprise is to reorder the priorities of the nerve center of the corporate group, to restructure liabilities within it such that the parent corporation must account for the debts of its subsidiaries, and thus to incentivize the parent to invest in the prevention of catastrophes.

In addition to the factors proposed by courts and commentators for finding the existence of an enterprise, it is clear that the corporation should carry the bulk of the burden in disproving the existence of an enterprise when liability is in dispute. In other words, it should not be part of the plaintiff's burden to ascertain and prove the economic structure of the corporate group. Rather, after the plaintiff satisfies a preliminary burden, which would demonstrate to the court that she was harmed by an activity of the corporate group and that the parent and subsidiary were both members of that group, the corporation should have to prove it is *not* part of an economic enterprise with its tortfeasor subsidiary in order to avoid liability. This is true for two basic reasons: first, the parent corporation has better access to information about the internal structure of the enterprise than the tort claimant; and second, reasons of equity demand it.

This more plaintiff-friendly approach is informed by several international models. India's approach in the Bhopal case, for example, takes an informative stance from a plaintiff-side view. In its capacity as *parens patriae*, India argued before a New York court that those harmed by the acts of a multinational corporation, however it is internally structured, do not have the resources or information to "isolate which unit of the enterprise caused the harm, yet it is evident that the multinational enterprise that caused the harm is liable for such harms."³⁴⁰ This rationale is useful in light of other, more conservative jurisdictions' approach to corporate group liability, which includes creating a nesting set of rebuttable presumptions leading to liability so long as a certain kind of organizational structure exists.³⁴¹ Germany's approach is the archetypal

339. The necessary versus sufficient distinction may help alleviate some concerns about over-deterrence. For example, branding is an imperfect proxy for enterprise in many instances, including areas where intellectual property intersects with mass torts and human rights. *See supra* note 347.

340. Brief of the Plaintiffs, *Union of India v. Union Carbide Corp.*, reprinted in *The Indian Law Inst., Mass Disasters and Multinational Liability: The Bhopal Case* 4-5 (1986).

341. *See text supra* accompanying note 114, and Part III.A.

example of this structure. Essentially, the function of both of these features—the former an expression of policy, and the latter a feature of procedure—is to ensure that the primary purpose of the law is to protect plaintiffs and vindicate regulatory policy aimed at preventing mass disasters. If a corporation is able to prove that the subsidiary is not part of its business enterprise, it would be relieved of liability—but the corporation should bear the burden of rebutting the presumption of economic control that an ideal test for enterprise liability would impose.

Some corporate groups would, and should, fall outside this formulation. Independent contractors who merely perform scattered or isolated tasks for the corporation would not be part of the same enterprise. Passive shareholder corporations would also not be subject to liability. Similarly, a corporation that holds stock in another corporation as part of an investment strategy would also not be part of an enterprise. This test would only capture corporate groups that function as a unified whole for economic purposes. The unifying principle should be whether the parent company can, through decisional processes entirely within its purview, ensure that catastrophes do not occur by internalizing the cost of the potential liability. Moreover, this test would encompass situations where it is difficult to impose liability under current law—as in more complicated iterations of the corporate family, in which the parent corporation creates multiple layers of subsidiaries, or across a more decentralized corporate enterprise where control factors are not obviously present.

2. *The Tort Creditors Prong*

With regard to the tort creditors prong, two observations that draw from the examples discussed in this Comment are particularly worthwhile. First, the test should provide a direct cause of action against the parent, or “nerve center,” corporation for a victim of corporate-caused mass torts. The most developed of the enterprise systems, the *Konzernrecht*, fails to address the problem of tort creditors because its system of liability is primarily internal, meaning that the subsidiary accrues a cause of action against the parent, but outside creditors do not.³⁴² The ideal test for enterprise liability should follow in the line of jurisdictions that have explicitly remedied this deficiency by providing a direct cause of action to tort creditors, thus acknowledging and remedying limited liability’s deficiency in this area. In particular, an approach similar to the French Cousté Proposition, which provides a system of joint and several liability between the parent corporation and the creditors of a subsidiary, would most directly cause the parent corporation to take affirmative steps to prevent harms.³⁴³

342. See text *supra* accompanying notes 183-188.

343. See text *supra* accompanying note 157.

Second, the definition of “mass tort” should be narrow, encompassing only mass torts, human rights disasters, and environmental harms. Although a substantial volume of literature simply differentiates between tort and contract creditors,³⁴⁴ I would further cabin enterprise liability only to cover the costliest and most disastrous of harms. I draw this distinction for three main reasons.

First, this narrow scope helps alleviate the inevitable concerns of the business community that enterprise liability would cause the end of investment capitalism. The anecdotal evidence presented by the examples of India, the *Konzernrecht*, as well as the regulatory statutes in the United States shows that enterprise principles need not be at odds with a robust investment economy. Limiting the scope of the doctrine helps to ensure that it is merely a tool to check the most egregious and socially harmful of corporate behaviors—not a tool for frivolous litigation.

Second, and more importantly, enterprise liability’s advantage is that it helps to reorder the decision-making structure in the corporate conglomerate’s nerve center in order to prevent foreseeable disastrous harms. The harms that enterprise liability has the best chance of preventing are, therefore, those costly legal judgments that stand to harm the parent corporation from a public relations and economic standpoint, because the larger the threatened judgment and public relations scandal, the more likely that the corporation will wish to prevent the harm in the first place. The imposition of joint and several liability provides an incentive for the corporate nerve center to take preventative measures that ensure these costliest of corporate torts do not occur, and enterprise liability is in a good position to shift those costs.

Third, as the examples of federal regulatory statutes demonstrate, courts have been sympathetic to claims that formal corporate separateness should not allow corporations to thwart important regulatory policies.³⁴⁵ From a perspective of equity and justice, the prevention of mass torts, human rights violations, and environmental harms would provide the type of important regulatory goal that limited liability should not, from a policy perspective, be able to subvert.

A two-pronged test for enterprise liability would impose costs for reparations and cleanup of massive harms—shifting these costs away from the public—and serve as a deterrent, ensuring that corporate groups do not intentionally limit their risk by farming it out to a subsidiary. Thus, such a test improves upon the status quo from the position both of equity and economics. Additionally, it eschews the metaphors and unpredictability of the piercing doctrine, and would follow in the footsteps of other major federal regulatory statutes that impose enterprise liability as part of a public policy scheme.³⁴⁶

344. See text *supra* accompanying notes 63-64, and especially the sources cited in n.63.

345. See text *supra* in Part IV.A.

346. See text *supra* in Parts IV.A. and IV.B. Although there are many conundrums surrounding problems of the multinational corporation and the issue of jurisdiction and choice of

B. Counterarguments

There are many possible counterarguments to an enterprise liability statute in the context of mass torts, human rights violations, and environmental harms, and many of them deserve more space, research, and consideration than I can allot. I will, however, address some of the most important counterarguments in this section and suggest areas where further research could be illuminating.³⁴⁷

1. The Effect on the Investment Economy

The main argument against enterprise theory is that it could be disastrous for the investment economy.³⁴⁸ However, I will suggest here that enterprise liability would not destroy investment capitalism. Moreover, the scope of the liability that I propose—which is limited to corporate groups and the context of mass torts, human rights violations, and environmental harms—would further limit the possible ramifications of expanding liability through enterprise principles, simply by limiting the number of situations in which such a test would be applied.

Several commentators have hypothesized that investment, while admittedly riskier in the case of enterprise liability, would likely still thrive if tort costs were imposed in an enterprise context.³⁴⁹ In particular, Daniel Leebron has concluded that even though “investments under a limited liability regime have greater expected value and are less risky to investors” than investments would be under an enterprise liability scheme, the efficient allocation of tort risk offsets these consequences.³⁵⁰ Indeed, Leebron points out that “there may be no efficiency consequences” from a societal point of view.³⁵¹ Similarly, Hansmann and Kraakman explain that “a well crafted rule of unlimited liability would neither impair the marketability of securities nor impose excessive collection costs.”³⁵² Though the cost of equity might rise, this

law, these issues are beyond the scope of this Comment.

347. Concerns I do not address in this section include whether a broader system of liability for corporate groups would discourage certain types of beneficial economic projects, particularly in the developing world. I also do not discuss the ramifications of a system that imposes liabilities not just on parent corporations, but also on sister subsidiaries, and whether enterprise should cover both. Nor do I address enterprise liability’s applications to particular industries—the standard might apply uneasily, for example, to the intersection of human rights torts and intellectual property. These topics would be rich fodder for further inquiry and research.

348. See Miller, *supra* note 42, at 131 (“Economists argue that limited liability is indispensable to the functioning of an efficient capital market. They maintain that limited liability facilitates business organization, promotes investment in capital, reduces the investor’s need to monitor investments, makes it feasible to invest in multiple business ventures, and generally contains administrative costs associated with investments.”) (citing sources).

349. See, e.g., Leebron, *supra* note 35, at 1577.

350. *Id.* at 1574.

351. *Id.* at 1573-74.

352. Hansmann & Kraakman, *supra* note 23, at 1895. Hansmann and Kraakman note that part of the reason why the securities market will not be “seriously damaged” by a move to unlimited liability for corporate torts is that courts may easily determine “which costs are

increase in the price of securities is actually more efficient, since it causes share prices to reflect the cost of torts.³⁵³ They conclude that “a regime of unlimited liability is administrable and . . . corporations with publicly-traded shares can survive and prosper under it.”³⁵⁴

Importantly, in reaching their conclusions, Professors Leebron, Hansmann, and Kraakman spoke to the economic consequences of *unlimited liability*, not *enterprise liability*.³⁵⁵ The former would not differentiate between corporate and individual shareholders. The investment harms become even more negligible when enterprise liability encompasses only the parent-subsidiary context. “Within corporate groups, the traditional policy concerns supporting limited investor liability mostly do not apply.”³⁵⁶ Moreover, by further narrowing liability to the context of mass torts, human rights violations, and environmental harms, the changes in investment would be even more limited and the resulting changes in corporate behavior based on reallocation of risk would more than pay for themselves in avoiding catastrophe.

Moreover, some versions of enterprise liability, while relatively isolated, are well-established and extant—and have not caused a concomitant crash in investment. Germany, while employing a weaker version of enterprise liability than that espoused in this Comment, is still one of the world’s leading industrial economies. California had a statutory regime of unlimited liability from 1849 until 1931, “evidently without crippling industrial and commercial development.”³⁵⁷ *Mobil Oil* has been the rule in tax for nearly thirty years,³⁵⁸ and bank holding companies have been subject to enterprise liability for half a century,³⁵⁹ without failure in investment in either industry. Enterprise principles have also persisted in India, and have corresponded with increases in foreign

efficiently and equitably borne by a corporation and its shareholders and which are not Shareholders who benefit, for example, from intentional dumping of toxic wastes, from marketing hazardous products without warnings, or from exposing employees without their knowledge and consent to working conditions known by the firm to pose substantial health risks, should not be able to avoid the resulting costs simply by limiting the capitalization of the firm.” *Id.* at 1917. Of course, this kind of decision as to who is the most efficient cost-bearer is what tort law is all about. Moreover, Hansmann and Kraakman make an important observation that the damages imposed by courts could depend on whether the shareholder is a parent corporation, as “the prospect that a judgment might exceed the corporation’s net assets and thus spill over onto its parent shareholder should generally not, in itself, affect the size of the judgment. When the firm’s shareholders are individuals, however, the prospect of shareholder liability might sometimes be a reason to temper the amount of damages assessed.” *Id.*

353. *See id.* at 1903.

354. *Id.* at 1925.

355. *Id.* at 1917 (discussing the difference in impact on individual versus corporate shareholders); Leebron, *supra* note 35, at 1569-87. (discussing limited and unlimited liability with no mention of the parent-subsidiary context).

356. Strasser, *supra* note 58, at 660.

357. Hansmann & Kraakman, *supra* note 23, at 1924.

358. *See supra* note 223.

359. *See supra* text accompanying notes 299-304.

direct investment.³⁶⁰

Finally, this argument does not take into account whether the benefits of subsidiarization—including tax advantages—may outweigh the deterrence costs involved in forcing a parent corporation to absorb the tort costs of its subsidiaries. Though such an inquiry would require more empirical evidence than the anecdotal data I provide here, it is clear that corporations do not only create subsidiaries, including wholly-owned ones, to avoid liability for hazardous operations.³⁶¹ Although parent corporations must weigh potential liability costs as a detriment to subsidiarization, it may not obviate the choice. Moreover, to the extent that liability for catastrophic torts would cause corporations to avoid subsidiarization, this argument does not carry much weight from a perspective of overall social good. The benefit of having subsidiaries for avoiding liability does not outweigh the social costs, for example, of mass human rights disasters.

2. *Unlimited Versus Enterprise Liability*

Another counterargument that deserves acknowledgement is the belief that enterprise liability will not go far *enough* in protecting creditors. Hansmann and Kraakman, for example, advocate for imposing liability on both corporate and natural person shareholders; they argue that holding only corporate parents accountable would “create obvious incentives and opportunities for evasion.”³⁶² Wholly-owned subsidiaries, as noted above, could spin off a small percentage of their stock to the public, and pegging liability to stock ownership at some less clear percentage would lead to uncertainty.³⁶³ And if publicly-traded corporations escape liability, large corporations might sell off their hazardous activities to small, thinly-capitalized public corporations; this, they argue, would lose economies of scale and “distort[] the organization of enterprise while still permitting substantial externalization of costs.”³⁶⁴

I submit that this argument, while meritorious, fails to recognize the myriad other reasons that corporations create subsidiaries.³⁶⁵ Moreover, it rests on a formalistic view of the parent-subsidiary relationship that, while useful to

360. See *supra* note 205.

361. See Mendelson, *supra* note 37, at 1255 (discussing majority shareholders’ tax advantages); see also Douglas & Shanks, *supra* note 35, at 193 (listing as advantages “[t]he increased facility in financing; the desire to escape the difficulty, if not the impossibility, of qualifying the parent company as a foreign corporation in a particular state; the avoidance of complications involved in the purchase of physical assets; the retention of the good will of an established business unit; the avoidance of taxation; [and] the avoidance of cumbersome management structures,” in addition to the limitation of liability, and noting that the latter is just one of many factors).

362. Hansmann & Kraakman, *supra* note 23, at 1931.

363. See *id.*

364. *Id.* at 1932.

365. See *supra* note 361.

incorporate into its definition, is also precisely the reason why enterprise as a concept is preferable to, for example, control systems or piercing: it is more focused on the economic realities of the corporate family. Instead of pegging liability only to high percentage stock ownership, enterprise liability accounts for the evasion strategies that worry Hansmann and Kraakman by allowing courts to determine the contours of the economic enterprise by reference to, for example, public image and unity of economic direction, among other factors. Thus, the enterprise principles I enumerate above place discretion in a factfinder's hands to determine whether the corporations at issue are part of a unified business enterprise, which would trump any obviously shallow conduct by a corporation to avoid liability.

3. *Vagueness*

A final frequent criticism of enterprise liability is that any test would be too vague. "While enterprise liability may offer some appeal, measuring the extent of an 'economic unit' introduces an intolerable level of uncertainty into the question of liability."³⁶⁶ This is because courts will be forced to determine the boundaries of the economic enterprise, which will rarely be clear. Of course, this same criticism applies to the doctrine of piercing the corporate veil.³⁶⁷ There must, however, be *some* law allowing plaintiffs to recover against the primarily responsible party in a corporate web. I submit that, of the two, enterprise liability in a constrained context is preferable because the imposition of a system of economically-rooted liability actually incentivizes corporations to avoid harms in the first place.³⁶⁸

CONCLUSION

The theory of enterprise liability posited in this Comment revitalizes and updates Adolf Berle's groundbreaking theory by imposing joint and several liability on corporate groups in the context of mass torts, human rights violations, and environmental harms. Since 1940, a wealth of commentators have argued that it is economically inefficient and normatively problematic to allow parent corporations to escape liability for the torts of their subsidiaries. Thus, Berle's thesis may be narrowed from its original, more wide-ranging iteration to impose enterprise liability only in the case of a corporate shareholder and only in the context of tort creditors. This tailoring both avoids many of the criticisms that commentators have levied against enterprise theory,

366. Kors, *supra* note 107, at 437-38.

367. See Bainbridge, *supra* note 51, at 481.

368. Many are in disagreement with me on this point. See, e.g., Joseph H. Sommer, *The Subsidiary: Doctrine Without A Cause?* 59 Fordham L. Rev. 227, 268-70 (1990) (arguing that the main problem with enterprise liability, despite being intellectually preferable, is that it "suffers from one enormous flaw: haziness of goals," and concluding that enterprise liability thus "goes both too far and not far enough").

and solves most of the problems associated with limited liability in this context. The ideal test would restrict the application of liability to instances in which no natural person investor must bear the costs of the tort, ensure that the creditors who most need recovery can obtain it, and force corporations to internalize the costs of their major harms.

A new test for enterprise liability would remedy entity liability's deficiencies with regard to tort creditors by providing a direct cause of action against the parent corporation. With regard to the corporate group, the test would address the deficiencies of entity liability's failure to recognize the economic unity of the corporate family by reference to other jurisdictions' experiments in this area. Thus, it takes into account both the prevalence of and problems associated with the control test as applied in various foreign jurisdictions and in the United States. Behavioral control factors are common, likely because of their ease of applicability, but they are problematically formal, disconcertingly moralistic, and not necessarily tethered to the economic reality that true enterprise principles seek to mirror. The new test for enterprise liability would take cues instead from India, the United Nations, and areas of U.S. law where liability is premised on the existence of an enterprise, as defined by unity of economic direction and flow of interests and profits. Thus, although a parent or affiliate corporation's ability to control another tort-causing corporation may be one indicator of the existence of a unified enterprise, a better test would take into account the public's understanding of the corporate group, profit flow, singularity of business, and other factors that are tied more to the economic reality of the corporation than an atavistic and rigid test based on the control doctrine alone.

This Comment's review of the current state of entity and enterprise liability in the United States and abroad demonstrates that a factored test imposing mass tort liability across corporate formalities would make normative, economic, practical, and historical sense. In the short term, this regime of broader cross-corporate liability would ensure that the Tenasserim villagers, who suffered unimaginably at the hands of the Myanmar military as a result of Unocal's pipeline project, could cut through the layers of risk-externalizing subsidiaries and proceed directly against Unocal Corporation in an action for damages. In the long term, enterprise liability in this limited context would, perhaps, through more equitable redistribution of incentives within the corporate structure, ensure that the villagers would not have suffered those harms in the first place. I have intended this review to be comprehensive, but it is in no way exhaustive; rather, the examples reviewed herein simply provide a range of possible options from which a new test can learn and sample. While many open questions remain, this Comment makes clear that enterprise liability is a doctrine whose continuing theoretical and jurisprudential life indicates the viability of adopting its basic principles in a targeted and modern law.

