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Lynda J. Oswald

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STRICT LIABILITY OF INDIVIDUALS UNDER CERCLA: A NORMATIVE ANALYSIS

*Lynda J. Oswald**

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I. INTRODUCTION

Since the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Act)¹ was enacted in 1980,

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¹ Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C §§ 9601-9675 (1988) [hereinafter CERCLA], as amended by Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 [hereinafter SARA]. The Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 6301, 104 Stat. 1388, 1388-319 (1990)

courts and commentators alike have struggled to understand and apply its obscure and conflicting language. What types of acts should give rise to liability? Who should be held liable for CERCLA violations? What standard or standards should be used to gauge that liability? The answers to these, and other, questions regarding the scope of CERCLA liability remain in dispute. One conclusion that all can agree upon, however, is that the statute is poorly drafted and analytically incomplete.²

In fleshing out CERCLA's sparse and inadequate language, the courts, quite understandably, have often been sidetracked by the deficiencies of the Act's specific provisions and have lost sight of the larger statutory scheme and legislative goals. Nowhere is this problem more readily apparent than in cases addressing individual liability for the CERCLA violations of corporations.³ All too often, courts have concentrated on determining *how* to hold specific parties liable under CERCLA, rather than upon *whether* the Act contemplates such liability. Commentators,⁴ as well, have focused primarily on whether, under current judicial interpretations of CERCLA lia-

(codified at 42 U.S.C. § 9611(a)) reauthorizes the Act until September 30, 1994, and provides \$5.1 billion in funding.

² See, e.g., *United States v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H. 1985) ("CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history."); *United States v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO)*, 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984) ("CERCLA is . . . a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions. . . . The courts are once again placed in the undesirable and onerous position of construing inadequately drawn legislation.") (citations omitted), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); see generally Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

³ These cases are addressed *infra* Section IV.B (discussing current standards of officer liability under CERCLA) and Section V.B (discussing current standards of shareholder liability under CERCLA).

⁴ See, e.g., Tom McMahon & Katie Moertl, *The Erosion of Traditional Corporate Law Doctrines in Environmental Cases*, 3 NAT. RESOURCES & ENV'T 29 (1988); Gregory P. O'Hara, *Minimizing Exposure to Environmental Liabilities for Corporate Officers, Directors, Shareholders, and Successors*, 6 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1 (1990); Harold J. Cronk & Pat Huddleston, II, Comment, *Corporate Officer Liability for Hazardous Waste Disposal: What are the Consequences?*, 38 MERCER L. REV. 677 (1987); Cynthia S. Korhonen & Mark W. Smith, Note, *CERCLA Defendants: The Problem of Expanding Liability and Diminishing Defenses*, 31 WASH. U.J. URB. & CONTEMP. L. 289 (1987); Todd W. Rallison, Comment, *The Threat to Investment in the Hazardous Waste Industry: An Analysis of Individual and Corporate Shareholder Liability Under CERCLA*, 1987 UTAH L. REV. 585.

bility provisions, corporate officers⁵ and shareholders⁶ may be subjected to liability for the CERCLA violations of their corporations in a far wider set of circumstances than corporate law doctrine contemplates.⁷ They worry that case law under CERCLA has somehow eroded the traditional protections of corporate law.

These courts and commentators have skipped the initial, and more pressing, question: *should* these individuals be held personally liable under the statutory language of CERCLA? The Act never refers to the liability of these individuals specifically; instead, the courts have read the statute broadly as encompassing these parties within its provisions. By attempting to explain their holdings in terms of CERCLA's statutory framework, the courts have turned their backs on traditional corporate law doctrines, and have instead forged new grounds for imposing individual liability for corporate environmental violations.⁸ Not surprisingly, given the inadequate drafting and mea-

⁵ I have chosen to analyze only corporate officer liability in this Article because that is the major category of individual liability under CERCLA that courts to date have addressed. *See, e.g., infra* note 99 (discussing dearth of CERCLA cases addressing director liability).

⁶ This Article focuses solely on individual shareholders. A number of cases have also held parent corporations liable for the CERCLA violations of their subsidiaries. *See generally* Lynda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 NW. U. L. REV. 259, 301-15 (1992) (discussing parent corporation liability under CERCLA).

⁷ I use the phrase "corporate law doctrine" loosely in this Article to include the protections customarily extended to both shareholders and to corporate agents, such as officers and employees. This latter group of individuals is more precisely protected by principles of agency and tort law; corporate law, on the other hand, protects corporate owners (shareholders). I have chosen, for the sake of expediency, to use the phrase in its broader, perhaps more colloquial, sense. Although I may have sacrificed some degree of precision, the result is less cumbersome than referring to "corporate, agency, and tort law doctrines" repeatedly throughout the Article.

⁸ Under traditional corporate law doctrine, corporate officers and shareholders are generally immune from liability for the actions of the corporation unless, of course, the officer personally participated in the tortious or illegal acts of the corporation, or the circumstances warrant a piercing of the corporate veil to hold the shareholders liable. *See* Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89-90 (1985) ("The rule of limited liability means that the investors in the corporation are not liable for more than the amount they invest. . . . The managers and the other workers are not vicariously liable for the firm's deeds."). Under traditional principles of tort and agency law, corporate officers can be held personally liable for their own torts, regardless of whether they were acting in an official capacity when they committed the wrongs. *See* RESTATEMENT (SECOND) OF AGENCY § 343 (1958); JOSEPH W. BISHOP, JR., *THE LAW OF CORPORATE OFFICERS & DIRECTORS: INDEMNIFICATION AND INSURANCE* § 3.13 (1982); 3A WILLIAM FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 1135 (perm. ed. rev. vol. 1986). When the officer is held individually liable, the corporation generally is also liable under

ger legislative history of the statute,⁹ the resulting decisions are marked by inconsistent analyses and conflicting standards and interpretations.

While most of the cases decided thus far do not, based upon their facts, indicate an abrogation of traditional doctrines,¹⁰ the sweeping language of the opinions discussing individual liability under CERCLA certainly creates the potential for an expansion of liability beyond traditional dictates. It is not at all clear that Congress intended such an expansion in liability when it enacted CERCLA, nor is it clear that such an expansion is consistent with the rationale of CERCLA's statutory goals of cleaning up contaminated sites and ensuring that, to the extent feasible, those responsible for the con-

the doctrine of respondeat superior. See HARRY G. HENN & JOHN R. ALEXANDER, LAW OF CORPORATIONS § 230, at 608 (3d ed. 1983). Thus, both the corporation and the officer may be held liable for harm arising from a single tortious act. See 3A FLETCHER, *supra*, § 1135. Actual personal participation in the tort, through affirmative actions of direction, sanction, or cooperation in the wrongful acts of commission or omission, is necessary. See BISHOP, *supra*, § 3.13, at 3-50 ("Participation by an officer in a wrongful act of the corporation may be found not solely on the basis of direct action but may also consist of knowing approval or ratification of unlawful acts."); 3A FLETCHER, *supra*, § 1137 ("[A]n officer or director of a corporation is not liable for torts in which he has not participated, of which he has no knowledge, or to which he has not consented."). Liability is not imposed upon the officer merely because of his or her status within the corporation. See *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 852 (N.D. Cal. 1979) ("Courts have, however, consistently stated that a corporate executive will not be held vicariously liable, merely by virtue of his office, for the torts of his corporation."), *aff'd*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); 3A FLETCHER, *supra*, § 1137 (officers are held liable because of their wrongful or negligent acts, not because of their status). Rather, "[w]hat is required is some showing of direct personal involvement by the corporate officer in some decision or action which is causally related to plaintiff's injury." *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 907 (1st Cir. 1980). Likewise, "personal responsibility for corporate liability may attach when the individual's wrongful conduct causes the violation of a statute and accompanying regulations. . . ." *Citronelle-Mobile Gathering, Inc. v. Herrington*, 826 F.2d 16, 25 (Temp. Emer. Ct. App.), *cert. denied*, 484 U.S. 943 (1987).

Generally, a shareholder is not liable for the debts of the corporation beyond his or her investment in the corporation. See REV. MODEL BUS. CORP. ACT § 6.22; Easterbrook & Fischel, *supra*, at 89-90. In appropriate circumstances, however, the "corporate veil" can be "pierced" and the shareholders subjected to personal liability for the corporation's debts. See *infra* notes 158-60 and accompanying text (discussing piercing of corporate veil under traditional doctrine).

⁹ See *supra* note 2 (discussing CERCLA's inadequate drafting and sparse legislative history).

¹⁰ In a recent examination of CERCLA case law, Schipani and I concluded that, generally, the outcomes the courts have reached in these cases are consistent with the outcomes the courts would have reached had they applied traditional corporate law doctrine instead of the statutory language of CERCLA. See Oswald & Schipani, *supra* note 6, at 329. Our research also revealed, however, that while the courts have reached typical corporate law outcomes in CERCLA cases, they have not applied typical corporate law rules in doing so. *Id.* That is the issue that this Article addresses.

tamination bear the costs of that cleanup.¹¹ Imposition of personal liability upon individuals, whether officers or shareholders, has typically been regarded as the exception, not the norm, in corporate law.¹² Before the courts abandon well-established legal principles in favor of a statutory extension of liability, they should be certain that the legislature intended such an extension; likewise, before the legislature mandates such an expansion of liability, it should be certain that expanded liability furthers, rather than hinders, its legislative goals and objectives.

This Article thus addresses a very rudimentary, but overlooked, issue: "*As a normative matter, should corporate officers and individual shareholders be held statutorily liable under CERCLA?*" CERCLA is a strict liability statute;¹³ its language sets forth categories of responsible persons who can be held liable for cleanup costs even where they have not acted intentionally or negligently in creating the harm. Nevertheless, the courts have not yet held all corporate officers and shareholders strictly liable for the CERCLA violations of the corporations with which they are associated. Rather, the courts have held liable only those persons whose egregious behavior would have met the traditional legal standards for intentional or negligent acts.

To reach their results, the courts appear to take the position that although responsible persons are strictly liable under the statute, officers and shareholders meet the statutory definition of "potentially responsible person"¹⁴ only if they have engaged in some form of culpable behavior. Unfortunately, nothing in CERCLA's statutory language or legislative history permits the consideration of culpability in determining liability under the Act; in fact, such a notion is fundamentally at odds with CERCLA's strict liability scheme. Even though most of the cases decided thus far reach intuitively correct outcomes based upon their particular facts, the courts have enunciated broad statements of law that could be applied inappropriately to hold liable officers and shareholders whose actions do not reveal

¹¹ H.R. REP. NO. 253(III), 99th Cong., 1st Sess. 15, *reprinted in* 1986 U.S.C.C.A.N. 3038, 3038 (noting that Congress' goals in enacting CERCLA were: "(1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups").

¹² *See supra* note 8 (discussing personal liability of officers and shareholders under traditional doctrines).

¹³ *See infra* Section III.B (discussing CERCLA's strict liability standard).

¹⁴ *See infra* note 28 (providing statutory definition of "potentially responsible person" (PRP)).

any basis for individual liability. These cases seem to stand for the propositions that: (1) responsible persons are strictly liable under CERCLA; and (2) individual officers and shareholders may be responsible persons. The only logical inference to be drawn from these two statements is that officers and shareholders may be strictly liable under CERCLA; it is small comfort that no court has yet taken the stated rules of law to their inevitable conclusion.

As CERCLA enters its second decade, the time is ripe to step back and reconsider the Act's statutory language, goals, and objectives. The fault-based standards the courts have enunciated have no place within CERCLA's strict liability scheme. This is not to say that officers and shareholders can never be held individually liable for cleanup costs. The courts should recognize, however, that traditional principles of law already provide adequate mechanisms for holding these parties personally liable in appropriate circumstances. Instead of attempting to force a square peg into a round hole, the courts should acknowledge that individual liability for CERCLA violations necessarily arises under traditional doctrine, not under CERCLA's statutory language.

Section II of this Article describes the statutory scheme of CERCLA. Additional background information is provided in Section III, which examines the rationales typically put forth in support of the strict liability standard and which discusses Congress' adoption of strict liability as the operative standard under CERCLA. Section IV analyzes the effect of applying strict liability to officers for the CERCLA violations of their corporations, and evaluates the fault-based standards currently used by courts in assessing officer liability under CERCLA. Section IV concludes that both public policy goals and the statutory objectives of CERCLA are best served by the application of traditional tort and agency law principles to issues of officer liability, and that current judicial attempts to ground officer liability in CERCLA's statutory language are both unnecessary and doctrinally indefensible.

The individual liability of shareholders for cleanup costs is examined in Section V. The result is the same: application of strict liability to shareholders would negate the traditional protections offered to these parties, yet nothing in CERCLA's statutory language or legislative history indicates that Congress intended such a radical result when it enacted this legislation. Moreover, current judicial interpretations of CERCLA's provisions to hold active shareholders personally liable are based upon inaccurate readings of the statute and fundamental misunderstandings regarding the dual, but separate,

roles an active shareholder plays within the corporation. Finally, Section VI concludes with a discussion of the doctrinal, as well as practical, dangers inherent in the current judicial approach of basing individual liability in CERCLA's statutory language.

II. AN OVERVIEW OF CERCLA

At the time of CERCLA's enactment in 1980, the United States Environmental Protection Agency (EPA) estimated that the United States produced 57 million metric tons of hazardous waste per year—about 600 pounds per citizen¹⁵—and that this amount would grow at an annual rate of 3.5 percent.¹⁶ Ninety percent of this waste was being disposed of in environmentally unsound ways.¹⁷ More recent figures are just as disheartening: the EPA estimated that cleaning up the 1,200 sites on the 1989 National Priority List (NPL) would cost 30 billion dollars.¹⁸ Researchers estimate that the NPL may ultimately contain 2,000 to 10,000 sites,¹⁹ which leads commentators to speculate that the entire cleanup bill ultimately will reach hundreds of billions of dollars.²⁰

CERCLA is one of several statutes Congress enacted in an attempt to address the environmental issues that hazardous waste disposal poses.²¹ CERCLA is a remedial statute, designed to rectify the problems presented by hazardous substances produced and aban-

¹⁵ S. REP. NO. 848, 96th Cong., 2d Sess. 3 (1980), *reprinted in* SENATE COMM. ON ENV'T & PUBLIC WORKS, 97TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), vol. I, at 310 (Comm. Print 1983) [hereinafter A LEGISLATIVE HISTORY].

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ EPA, A MANAGEMENT REVIEW OF THE SUPERFUND PROGRAM 3 (1989).

¹⁹ E.W. COLGLAZIER ET AL., ESTIMATING RESOURCE REQUIREMENTS FOR NPL SITES 1 (Dec. 1991) (copies available from the University of Tennessee Waste Management Research and Education Institute).

²⁰ See RICHARD H. GASKINS, ENVIRONMENTAL ACCIDENTS: PERSONAL INJURY AND PUBLIC RESPONSIBILITY 64-65, 231 (1989). A recent study by the University of Tennessee's Waste Management Research and Education Institute estimates that cleanup of Superfund sites is likely to cost between \$106 and \$302 billion over the next 30 years (measured in 1990 dollars). See MILTON RUSSELL ET AL., HAZARDOUS WASTE REMEDIATION: THE TASK AHEAD 16 (Dec. 1991) (copies available from the University of Tennessee Waste Management Research and Education Institute).

²¹ Other major federal environmental statutes include the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-92k (1988); the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988); the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988); the Toxic Substances Control Act, 15 U.S.C. §§ 2601-29 (1988); and the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§ 401-67 (1988).

done in the past.²² Imposition of liability under CERCLA generally requires findings that the contaminated property or site is a facility, a release or threatened release of a hazardous substance from the facility has occurred, response costs have been incurred as a result of the release or threatened release, and the party to be held liable falls within one of the four classes of responsible parties described in section 107 of CERCLA.²³ "Hazardous substance" is defined broadly under the statute,²⁴ as is "facility."²⁵ "Release" is defined to include spills, leaks, dumping, emissions, or any other means by which a hazardous substance is released into surface or subsurface water or land, or the ambient air.²⁶

CERCLA also imposes liability upon a broad range of environmental actors. As the United States Supreme Court has noted, "The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination

²² See, e.g., *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (Congress intended CERCLA to provide EPA with effective means of responding to problems of hazardous waste, and to ensure that those responsible for hazardous waste problems pay for the harm created).

²³ See, e.g., *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1379 (8th Cir. 1989); *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1152-53 (9th Cir. 1989); *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1511-42 (1986) [hereinafter *Developments*].

²⁴ Section 101(14) of CERCLA defines "hazardous substances" to include substances defined as hazardous or toxic under the Clean Water Act § 311, 33 U.S.C. § 1321(b)(2)(A) (1988); CERCLA § 102, 42 U.S.C. § 9602 (1988); RCRA § 3001, 42 U.S.C. § 6921 (1988); Clean Water Act § 307(a), 33 U.S.C. § 1317(a) (1988); Clean Air Act § 112, 42 U.S.C. § 7412 (1988); and Toxic Substances Control Act § 7, 15 U.S.C. § 2606 (1988). CERCLA specifically does not apply to the release of petroleum, crude oil, or natural gas. See 42 U.S.C. § 9601(14) (1988).

²⁵ CERCLA defines "facility" as:

(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9) (1988). "Vessel" is defined as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." *Id.* § 9601(28). The courts have applied the definition of "facility" broadly. See, e.g., *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572-73 (5th Cir. 1988) (residential subdivision is a "facility"); *Washington v. Time Oil Co.*, 687 F. Supp. 529, 532 (W.D. Wash. 1988) (filter cake); *United States v. Bliss*, 667 F. Supp. 1298, 1305 (E.D. Mo. 1987) (stable, road, and spray trucks); *United States v. Ward*, 618 F. Supp. 884, 895 (E.D.N.C. 1985) (roadside); *New York v. General Elec. Co.*, 592 F. Supp. 291, 295-97 (N.D.N.Y. 1984) (dragstrip); *United States v. Metate Asbestos Corp.*, 584 F. Supp. 1143, 1148 (D. Ariz. 1984) (trailer park).

²⁶ 42 U.S.C. § 9601(8), (22) (1988).

may be forced to contribute to the costs of cleanup."²⁷ Section 107 of CERCLA lists four classes of potentially responsible parties (PRPs): (1) the current owner and operator of a hazardous waste vessel or facility; (2) any person who formerly owned or operated a facility at the time of disposal of any hazardous substance; (3) any person who arranged for disposal or treatment of a hazardous substance at any facility owned or operated by another person (an "arranger" or "generator"); and (4) any transporter of hazardous waste to a facility.²⁸ "Person" is defined broadly in the Act to include individuals as well as corporations and other business entities.²⁹

²⁷ *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21 (1989).

²⁸ Section 107 states in relevant part:

(a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

42 U.S.C. § 9607(a) (1988). The defenses are set forth in *id.* § 9607(b) (*quoted in note 39 infra*).

²⁹ "The term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." *Id.* § 9601(21). Although "person" is defined under CERCLA to include individuals, the statute does not specify which individuals may be held liable, nor under what circumstances or in what capacities. *See id.* Some environmental statutes, on the other hand, specifically name officers, agents, and/or shareholders as potentially liable parties, *see, e.g.*, Safe Drinking Water Act, 42 U.S.C. § 300f(12) (1988); Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 1361(b)(4) (1988), while still others refer directly to "responsible corporate officers." *See, e.g.*, Clean Air Act, 42 U.S.C. § 7413(c)(3) (1988); Clean Water Act, 33 U.S.C. § 1319(c)(3) (1988). One commentator has suggested three alternative reasons for these definitional differences. First, Congress may have intended to hold liable corporate officers, agents, and employees under

Congress provided two agency mechanisms and one private mechanism for achieving CERCLA's statutory goals. First, section 104 authorizes the government to clean up a site itself,³⁰ using the resources of "Superfund."³¹ The EPA may recoup its expenses by bringing a cost recovery action against a PRP, provided the cleanup was "not inconsistent with" the National Contingency Plan (NCP),³² which specifies the substantive and procedural requirements for a proper cleanup action.³³ Second, under section 106, the government may issue an order requiring a person to clean up a site.³⁴ Finally, under section 107, private parties may sue PRPs to recover costs incurred in the cleanup of a site.³⁵

statutes where they are specifically named, but not under statutes, such as CERCLA, where they are not. See David W. Tundermann, *Personal Liability for Corporate Directors, Officers, Employees and Controlling Shareholders Under State and Federal Environmental Laws*, 31 ROCKY MTN. MIN. L. INST. 2-1, 2-8 (1985). Alternatively, Congress may have meant to hold officers, agents, and employees to a different standard than proprietors, general partners, or controlling shareholders who act as owners and operators (i.e., the former would be held liable where they personally participated in the violation, but the latter would be held liable even where they did not). *Id.* at 2-8 to 2-9. I am more persuaded by Tundermann's third alternative—that the drafters simply did not consider the implications of the different standards used. *Id.* at 2-8. I believe it is unlikely that Congress meant to convey any important message regarding the extent of individual liability simply through its use of inconsistent terms throughout the various federal environmental statutes.

³⁰ 42 U.S.C. § 9604(a)(1) (1988).

³¹ Superfund is a hazardous substance trust fund created to enable the EPA to finance immediate cleanup of abandoned waste chemical dump sites "where a liable party does not clean up, cannot be found, or cannot pay the costs of cleanup and compensation." S. REP. NO. 848, *supra* note 15, at 13, reprinted in A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 320. Superfund is funded through a tax that falls predominantly on petrochemical companies. The fund is created under 26 U.S.C. ch. 98A, 26 U.S.C. § 9507 (1988). Section 111 of CERCLA, 42 U.S.C. § 9611 (1988), specifies the manner in which the fund may be used.

³² 42 U.S.C. § 9607(a)(4)(A) (1988).

³³ See *id.* § 9605 (EPA is required to promulgate revisions to NCP to establish "procedures and standards for responding to releases of hazardous substances, pollutants and contaminants."). The EPA has published the National Priorities List (NPL), see 40 C.F.R. Pt. 300, app. B (1991); 42 U.S.C. § 9605(8)(b) (1988), a list of the worst sites in the country. As of February, 1992, 1,183 sites were listed on the NPL and the EPA had proposed to add 52 additional sites. See 57 Fed. Reg. 4824, 4825 (1992) (to be codified at 40 C.F.R. Pt. 300) (proposed Feb. 7, 1992). Long-term remedial actions generally can be undertaken only at an NPL site. The National Contingency Plan (NCP) provides that Superfund-financed remedial actions, excluding remedial planning activities pursuant to CERCLA § 104(b), 42 U.S.C. § 9604(b) (1988), may be taken only at NPL sites. 40 C.F.R. § 300.425(b)(1) (1992).

³⁴ See 42 U.S.C. § 9606(a) (1988). These orders are not restricted to sites on the NPL. See *id.*

³⁵ *Id.* § 9607(a)(4)(B). See generally Jeffrey M. Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 ECOLOGY L.Q. 181 (1986). The government is not required to approve a private cleanup plan, and the only precondition to a private recovery action is that the plaintiff must have incurred costs undertaking a cleanup that is consistent with the NCP. See 42 U.S.C. § 9607(a)(4)(B) (1988); 40 C.F.R. § 300.700 (1992).

The courts have determined that joint and several liability is permitted in cases of indivisible harm,³⁶ and that costs may be allocated among PRPs based upon principles of contribution or equitable apportionment.³⁷ More importantly for the purposes of this Article, the courts have construed CERCLA as imposing strict liability upon responsible parties.³⁸ With the exception of some very narrow defenses,³⁹ proof of the defendant's exercise of care or lack of fault is irrelevant.

³⁶ *United States v. Monsanto Co.*, 858 F.2d 160, 171 (4th Cir. 1988) ("While CERCLA does not mandate the imposition of joint and several liability, it permits it in cases of indivisible harm."), *cert. denied*, 490 U.S. 1106 (1989); *see also* *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990); *cert. denied*, 111 S. Ct. 957 (1991); *O'Neil v. Picillo*, 883 F.2d 176, 178-79 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990). *See generally* Alice T. Valder, Note, *The Erroneous Site Selection Requirement for Arranger and Transporter Liability Under CERCLA*, 91 COLUM. L. REV. 2074, 2079-81 (1991) (discussing joint and several liability under CERCLA).

³⁷ *See Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 1003 (D.N.J. 1988). SARA added an express right of contribution among PRPs. *See* 42 U.S.C. § 9613(f)(1) (1988) ("Any person may seek contribution from any other person who is liable or potentially liable" under CERCLA.). *See generally* F. James Handley, *CERCLA Contribution Protection: How Much Protection?*, 22 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,542 (1992); Steven Baird Russo, Note, *Contribution Under CERCLA: Judicial Treatment After SARA*, 14 COLUM. J. ENVTL. L. 267 (1989).

³⁸ *See, e.g.*, *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1418 (8th Cir. 1990) ("CERCLA is a strict liability statute"), *cert. denied*, 111 S. Ct. 1390 (1991); *Monsanto Co.*, 858 F.2d at 167 & n.11 ("We agree with the overwhelming body of precedent that has interpreted section 107(a) as establishing a strict liability scheme."); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985); *Violet v. Picillo*, 648 F. Supp. 1283, 1290 (D.R.I. 1986); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 204 (W.D. Mo. 1985). *See generally infra* Section III.B (discussing CERCLA's strict liability standard).

³⁹ 42 U.S.C. § 9607(b) (1988) provides:

(b) There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

- (1) an act of God;
- (2) an act of war;
- (3) an act or omission of a third party other than an employee or agent of the defendant, other than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
- (4) any combination of the foregoing paragraphs.

In addition, *id.* § 9607(j) provides that liability for a "federally permitted release," as defined

The scope of liability applicable under CERCLA can be viewed on two levels: the liability of the first tier of defendants (assumed, for the purpose of this Article, to be the corporation that actually committed the violation) versus the liability of the second tier of defendants (the officers or individual shareholders who may also be held liable for the corporation's violation). The liability of the corporation is direct and is based upon its involvement in activities that resulted in the CERCLA violation. Under the language of the Act, the applicable standard of liability here is strict liability;⁴⁰ the corporation need not have acted willfully, or even negligently. The question is whether the liability of the second tier of defendants should be direct (i.e., a liability based upon the individual's status as a responsible person within the meaning of CERCLA) or derivative (i.e. a liability based upon the traditional agency or corporate law theories that hold corporate actors responsible for certain acts taken by or on behalf of the corporation). Should corporate officers and shareholders be strictly liable under CERCLA, or should they be liable only for their own culpable acts?

III. THE STRICT LIABILITY STANDARD

CERCLA's legislative history indicates that Congress did not explicitly consider whether these corporate individuals should be held liable, much less what standards should be used in assessing their liability.⁴¹ The legislative history does indicate, however, that Congress intended that the general standard of liability under CERCLA be strict liability.⁴² Thus, an examination of the policy rationales underlying strict liability is helpful in evaluating the scope of CERCLA liability.

A. Rationales Underlying Strict Liability

Strict liability is generally defined as "liability that is imposed on an actor apart from either (1) an intent to interfere with a legally

in *id.* § 9601(10), shall not be extended beyond existing law. For a discussion of these defenses, see generally Grad, *supra* note 2, at 9; *Developments*, *supra* note 23, at 1518.

⁴⁰ See *infra* Section III.B (discussing CERCLA's strict liability standard).

⁴¹ Legislative history reveals that Congress intended the courts to fill in missing pieces of the statute. See, e.g., 126 CONG. REC. 31,965 (1980) (statement of Rep. Florio), *reprinted in* A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 778 ("Issues of joint and several liability not resolved by this shall be governed by traditional and evolving principles of common law."); *id.* at 30,932 (statement of Sen. Randolph), *reprinted in* A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 686 ("It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law.").

⁴² See *infra* Section III.B (discussing CERCLA's strict liability standard).

protected interest without a legal justification for doing so, or (2) a breach of a duty to exercise reasonable care, i.e., actionable negligence."⁴³ Modern strict liability, with its emphasis on public policy objectives such as compensation of victims and social insurance, represents a dramatic shift from the fault-based liability regimes of nineteenth-century tort law.⁴⁴ Although the "fault" earlier courts considered dealt more with a departure from societal norms than with moral blameworthiness,⁴⁵ the adoption of strict liability—where conduct can lead to liability even where the defendant is not morally culpable and has not departed from a reasonable standard of care—has expanded defendants' potential legal liabilities.

Today, the common law employs strict liability to hold defendants liable for certain actions, such as hazardous activities⁴⁶ or the man-

⁴³ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 75, at 534 (5th ed. 1984).

⁴⁴ See *id.* at 535. The earliest forms of tort law were not concerned with notions of "fault" but rather with keeping the peace between individuals. See *id.* at 534. As the nation started to industrialize, however, the negligence standard, as well as other common law doctrines, evolved "to create immunities from legal liability and thereby to provide substantial subsidies for those who undertook schemes of economic development." MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 99-100 (1977).

⁴⁵ See KEETON ET AL., *supra* note 43, § 75, at 535-36.

⁴⁶ Strict liability gained one of its earliest footholds in American law in the context of hazardous activities, although early courts also imposed strict liability in a limited number of other contexts (e.g., for certain harm caused by animals). See generally KEETON ET AL., *supra* note 43, § 76. Hazardous activity strict liability is generally acknowledged as originating in the 1865 English case of *Rylands v. Fletcher*, 3 H. & C. 744, 159 Eng. Rep. 737, *rev'd*, L.R. 1 (Ex. 265) (1866), *aff'd*, L.R. 3 H.L. 330 (1868) (English & Irish Appeals), where the court determined that strict liability should be imposed for injury resulting from a "non-natural" use of the defendant's land, but not for injury resulting from "any purpose for which it might in the ordinary course of enjoyment of land be used." *Id.* at 338. See also John G. Anderson, Comment, *The Rylands v. Fletcher Doctrine in America: Abnormally Dangerous, Ultrahazardous, or Absolute Nuisance?*, 1978 ARIZ. ST. L.J. 99, 102.

The Second Restatement of Torts provides that "[o]ne who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm." RESTATEMENT (SECOND) OF TORTS § 519(1) (1977). Section 520 lists six factors to be considered in determining whether strict liability is the appropriate standard in any given instance:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

Id. § 520. No one factor is determinative, and whether a specific activity is abnormally dangerous must be determined on a case-by-case basis. See *Amland Properties Corp. v. Aluminum Co. of Am.*, 711 F. Supp. 784, 804-05 (D.N.J. 1989) (quoting State Dep't of Envtl.

ufacture and sale of products,⁴⁷ that result in harm to others. Imposition of strict liability is guided by a number of policies and objectives, such as the promotion of fairness, economic efficiency, risk-spreading, and deterrence.⁴⁸ Although these policies have been explored most fully in the context of products liability, courts have enunciated them in the hazardous activities area as well.⁴⁹ Congress relied upon the theories behind both hazardous activity strict liability and strict products liability in defining the standard of liability under CERCLA.⁵⁰ Thus, understanding the principles underlying common law strict liability is essential to understanding and evaluating the goals and objectives of CERCLA's strict liability scheme.⁵¹

Protection v. Ventron, 468 A.2d 150, 159 (N.J. 1983)). The fundamental question, in each instance, is whether the activity's "dangers and inappropriateness for the locality [are] so great that, despite any usefulness it might have for the community, it should be required as a matter of law to pay for any harm it causes. . . ." RESTATEMENT (SECOND) OF TORTS § 520, comment f (1977). See generally Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 270-86 (1987) (discussing judicial application of Second Restatement's abnormally dangerous activity test).

⁴⁷ Strict products liability is intended to ensure that the costs of defective or injurious products are internalized into the cost of the product and are borne by the party best able to spread those costs throughout society, through either risk-spreading or liability insurance, and to discourage the manufacture and distribution of dangerous products while simultaneously encouraging the development of safer products. See William R. Ginsberg & Lois Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859, 905-06 (1981).

⁴⁸ See generally Greenman v. Yuba Power Prod., Inc., 377 P.2d 897 (Cal. 1963); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960); Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1036 n.6 (Or. 1974).

Commentators have explored the implications and ramifications of strict liability in numerous contexts. See, e.g., sources cited in notes 51, 61 & 71 *infra*. Thus, the following discussion is intended only as a general overview of those arguments, and not as an exhaustive critique or explanation.

⁴⁹ See Nolan & Ursin, *supra* note 46, at 286-96 (arguing that many courts have rejected restrictive notions of hazardous activity liability as articulated in First and Second Restatements in favor of social policy goals articulated in products liability area).

⁵⁰ See *infra* note 82 and accompanying text.

⁵¹ Commentators vigorously disagree on whether, as a general policy matter, strict liability or negligence is the most economically efficient and/or just standard for imposing liability upon defendants. For example, Posner has criticized Calabresi's theory, discussed *infra* note 61, arguing that it has the same net effect on safety and economic efficiency as negligence has. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 54-84 (1987); RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.5 (4th ed. 1992); Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 221 (1973). See also Mario J. Rizzo, *Law and Flux: The Economics of Negligence and Strict Liability in Tort*, 9 J. LEGAL STUD. 291 (1980); Steven Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

As interesting as the debate regarding the relative merits of negligence and strict liability may be, it is irrelevant to the purposes of this Article. Congress clearly sided with the proponents of the strict liability standard in adopting that standard as the controlling one for

1. Fairness

One of the most basic rationales given for strict liability is that of fairness: where both parties are blameless, the party who created the risk of harm should bear the burden of loss.⁵² Typically, the party who creates the harm will also derive most, if not all, of the economic benefit from the activity; thus, that party should bear the costs as well as reap the benefits of the activity.⁵³ Many commentators view

purposes of CERCLA liability. *See generally infra* Section III.B (discussing CERCLA's strict liability standard). It is not necessary, for the purposes of this Article, to resolve the debate about whether strict liability in general is a defensible tort liability theory, nor is it necessary to decide whether strict liability is the appropriate standard of liability to apply to corporations that violate CERCLA. If it is not, strict liability is clearly not the appropriate standard to impose upon corporate individuals for CERCLA violations, and instead we should consider a fault-based standard. If it is, then we must consider the validity of those rationales as applied to the liability of corporate individuals, which is the focus of this Article.

⁵² As stated by the Second Circuit in an early case:

The extent to which one man in the lawful conduct of his business is liable for injuries to another involves an adjustment of conflicting interests. The solution of the problem in each particular case has never been dependent upon any universal criterion of liability (such as "fault") applicable to all situations. If damage is inflicted, there ordinarily is liability, in the absence of excuse. When, as here, the defendant, though without fault, has engaged in the perilous activity of storing large quantities of a dangerous explosive for use in his business, we think there is no justification for relieving it of liability, and that the owner of the business, rather than a third person who has no relation to the explosion, other than that of injury, should bear the loss.

Exner v. Sherman Power Constr. Co., 54 F.2d 510, 514 (2d Cir. 1931). Justice Blackburn had articulated a similar thought in *Rylands*:

The person whose . . . mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's . . . privy, or whose habitation is made unhealthy by the fumes or noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues. . . . But for his act in bringing it there no mischief could have accrued.

Rylands v. Fletcher, 3 H. & C.744, 159 Eng. Rep. 737, *rev'd*, L.R. 1 (Ex. 265) (1866), *aff'd*, L.R. 3 H.L. 330 (1868) (English & Irish Appeals).

⁵³ Some commentators view the mutuality of risk creation between the plaintiff and the defendant as an additional "fairness" argument supporting negligence doctrine. *See, e.g.*, George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 542 (1972) ("a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant—in short, for injuries resulting from nonreciprocal risks"); Lawrence Vold et al., *Aircraft Operator's Liability for Ground Damage and Passenger Injury*, 13 NEB. L. BULL. 373, 380 (1935) (without mutuality of risk, negligence doctrine is no longer "inherently fair"). When no such mutuality is present, these commentators see strict liability as a "fairer" standard than negligence. *See Fletcher, supra*, at 546–51; Vold et al., *supra*, at 380–81; *see generally* Nolan & Ursin, *supra* note 46, at 290–91. Commentators disagree on whether strict liability actually promotes "fairness" and indeed, even on how "fairness" should be defined. *See generally* James A. Henderson, Jr.,

strict liability as a means for alleviating the unfairness that results from the traditional Learned Hand test for negligence,⁵⁴ which requires a defendant to compensate injured parties only where the risks outweigh the benefits of the conduct, regardless of where those risks and benefits fall.⁵⁵ As explained by Richard Epstein, strict liability achieves a “fairer” outcome:

[I]f the gains derived from certain activities are indeed as great as the defendant contends, there is all the more reason why he should pay for the harm those activities caused to the person or property of another, for, as against an innocent plaintiff who has nothing to do with the creation of the harm in question, it is only too clear that the defendant who captures the entire benefit of his own activities should, to the extent that the law can make it so, also bear its entire costs.⁵⁶

2. Internalization of Costs

A related argument put forth for holding defendants strictly liable for certain activities is that certain costs should be “internalized.” The theory of internalization of costs rests upon notions of economic efficiency and the workings of a free market economy.⁵⁷ Certain activities give rise to natural, even inevitable, risks of harm. The injuries caused by such an activity should be borne as a cost of that

Coping with the Time Dimension in Products Liability, 69 CAL. L. REV. 919, 934-39 (1981) (discussing arguments for and against “fairness” as rationale for strict liability).

⁵⁴ See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (“[I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P; *i.e.*, whether B [is less than] PL.”).

⁵⁵ Some commentators have criticized the negligence test on just these grounds. See, *e.g.*, RICHARD A. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* 29 (1980) (noting that “something is very wrong with a system” in which even slight outweighing of benefit over risk will result in no recovery to plaintiff); Vold et al., *supra* note 53, at 382-83 (arguing that when benefit falls on defendant and injury falls on plaintiff, defendant ought to bear risk of that injury).

⁵⁶ EPSTEIN, *supra* note 55, at 27. A more recent variation on this theme is the theory of enterprise liability. “In its broadest terms the theory of enterprise liability in torts is that losses to society created or caused by an enterprise or, more simply, by an activity, ought to be borne by that enterprise or activity.” Howard C. Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153, 158 (1976); see generally James A. Henderson, Jr., *The Boundary Problems of Enterprise Liability*, 41 MD. L. REV. 659, 659 n.1 (1982) (“In addition to the emphasis on compensating injured claimants on the basis of strict liability, ‘enterprise liability’ also connotes the shifting of liability from individual actors to the larger enterprises for which those actors engage in risk-creating conduct.”); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

⁵⁷ See A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 87-90 (2d ed. 1989); Barbara Ann White, *Economizing on the Sins of Our Past: Cleaning Up Our Hazardous Wastes*, 25 HOUS. L. REV. 899, 915-17 (1988).

activity; the injury should not be allowed to fall uncompensated upon an innocent victim. Societal welfare is maximized when the price of a good accurately reflects both its true cost and the degree of consumer demand for the product.⁵⁸ In a properly functioning competitive marketplace, prices will correlate closely to the costs of production. If the price is lower than the costs of production, firms will leave the industry. If the price is too far above the costs of production, competitor firms will be attracted to the abnormally high returns, and the resulting increase in supply will lower prices.⁵⁹

This pricing mechanism will not work, however, if firms and consumers are not forced to bear all of the costs associated with the products that they produce or use. If the true costs of the good are not reflected in the price, consumers will demand an excess amount, resulting in an inefficient allocation of resources.⁶⁰ The solution, then, is to force the firm to internalize the externalities associated with its product, i.e., to force the firm to pay all of the costs associated with the good it produces. Because the price charged consumers then reflects the true cost of the good, market distortions and inefficiencies are eliminated.⁶¹ Thus, strict liability results in economic

⁵⁸ See White, *supra* note 57, at 915.

⁵⁹ See *id.* For a general discussion of the economic arguments in favor of internalizing costs, see Carl J. Dahlman, *The Problem of Externality*, 22 J.L. & ECON. 141 (1979).

⁶⁰ See White, *supra* note 57, at 916-17. The economic principle of internalization was espoused by Pigou, in A.C. PIGOU, *THE ECONOMICS OF WELFARE* (4th ed. 1932). See generally Barbara White, *Coase and the Courts: Economics for the Common Man*, 72 IOWA L. REV. 577, 580-83 (1987) (discussing Pigou's theory).

⁶¹ See White, *supra* note 57, at 917. Guido Calabresi formulates this argument in economic terms, arguing that the best way to promote economic efficiency is to place the costs of injury on the "cheapest cost avoider"—the party who can best prevent or lessen accident costs. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 135 (1970). In his view, "[f]ailure to include accident costs in the prices of activities will, according to the theory, cause people to choose more accident prone activities than they would if the prices of these activities made them pay for these accident costs, resulting in more accident costs than we want." *Id.* at 70. Where social costs and benefits cannot be determined with certainty, however, costs should generally be borne by the party best able to make a cost-benefit analysis. In the specific context of pollution, liability for external costs should be borne by the "cheapest cost avoider." If that party cannot be identified, the party who would face the lowest transaction costs in shifting pollution costs to the cheapest cost avoider should bear the costs. See, e.g., Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1096-97 (1972); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 502-08 (1961). Calabresi, in explaining his "resource-allocation" justification for strict liability, argues that efficient resource allocation and economic decision-making require that the actual and full costs of goods or services be known and accounted for. See generally Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060-67 (1972). To achieve this latter goal, the actual cost of an activity must include the cost of the harm it does to society. See Roland N. McKean, *Products Liability: Trends and Implications*, 38 U. CHI. L. REV. 3, 41-42 (1970).

resources being distributed throughout society in a manner that maximizes social welfare.

3. Risk-Spreading/Insurance

A third policy reason asserted for strict liability is that of risk-spreading or, in effect, insurance.⁶² As Justice Traynor stated in his famous concurring opinion in *Escola v. Coca Cola Bottling Co.*:⁶³ "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."⁶⁴

The theory behind risk-spreading is that a loss causes less social and economic disruption if many people share it.⁶⁵ Forcing the defendant to compensate the victim for his or her injuries encourages the defendant to increase the price of the good involved. The consumers of a product can bear a slight increase in price more easily

Forcing manufacturers to bear the costs of the resultant injuries leads to increases in prices, which, in turn, lead to decreased consumption of the goods, and a decrease in injuries.

⁶² See *Becker v. IRM Corp.*, 698 P.2d 116, 123 (Cal. 1985) ("paramount policy of the strict products liability rule remains the spreading throughout society of the cost of compensating otherwise defenseless victims of manufacturing defects").

A different line of economic theory argues that internalization of costs often leads to economic *inefficiency*, and that economic efficiency is achieved instead by maximizing the total product of the parties. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1-18, 39-44 (1960). The merits of the two conflicting views are discussed in Talbot Page, *Responsibility, Liability, and Incentive Compatibility*, 97 ETHICS 240 (1986) and White, *supra* note 60, at 577-611. Coasian theory is premised on the argument that, in the absence of transaction costs and strategic behavior by the participants, the effects of externalities will be eliminated through voluntary bargaining by the participants. Coase, *supra*, at 6. In the context of pollution, however, where each incident generally involves a number of polluters and/or victims, the assumption of no transaction costs seems excessively optimistic. See Maureen L. Cropper & Wallace E. Oates, *Environmental Economics: A Survey*, 30 J. ECON. LITERATURE 675, 680 (1992).

⁶³ 150 P.2d 436 (Cal. 1944).

⁶⁴ *Id.* at 441 (Traynor, J. concurring). Justice Traynor's reasoning was eventually adopted by the California Supreme Court in *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963), where the court stated: "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Id.* at 901. The courts have since applied the theory to hazardous activities as well as products liability actions. See, e.g., *Chavez v. Southern Pac. Transp. Co.*, 413 F. Supp. 1203, 1209 (E.D. Cal. 1976). Although many courts and commentators initially viewed the idea of risk-spreading with skepticism and suspicion, the notion is now widely accepted. See Nolan & Ursin, *supra* note 46, at 287 & n.250.

⁶⁵ See POSNER, *supra* note 51, at 164; Henderson, *supra* note 53, at 934.

than an injured party can bear the full costs of the harm incurred.⁶⁶ To the extent the defendant is unwilling or unable to “self-insure” the product by bearing all of the costs of the injury directly and by passing those costs along to the consumer, the defendant can purchase insurance in the marketplace, which will also serve to spread risk. Economic efficiency demands that the party best able to obtain that insurance—generally the manufacturer—should bear the cost of the insurance, and hence, the liability for the harm.⁶⁷

4. Deterrence

Closely related to the concept of risk-spreading is the notion of deterrence. Strict liability is thought to promote product safety.⁶⁸ This argument takes two forms. First, the risk of harm should be placed upon the party best able to prevent or reduce that harm. Generally speaking, the entity engaged in the activity that causes the harm is in the best position to identify the attendant risks and to minimize their impact.⁶⁹ In the context of products liability, strict liability promotes efficient outcomes because manufacturers, as opposed to consumers or victims, are generally best able to undertake measures to increase product safety.⁷⁰ Imposing strict liability on these manufacturers promotes product safety because it creates a financial incentive for manufacturers to find cost-effective ways to minimize risks associated with their products.⁷¹ Likewise, imposing strict liability on entities engaged in hazardous activities encourages them to reduce the dangers associated with their undertakings.⁷²

⁶⁶ See *Escola*, 150 P.2d at 441 (Traynor, J., concurring); CALABRESI, *supra* note 61, at 39, 51; Richard A. Epstein, *Products Liability: The Gathering Storm*, REG., Sept.–Oct. 1977, at 15, 19–20.

⁶⁷ See Calabresi, *supra* note 61, at 500–02, 543–44.

⁶⁸ See, e.g., *Turner v. General Motors*, 584 S.W.2d 844 (Tex. 1979) (Campbell, J., concurring); CALABRESI, *supra* note 61, at 27; Epstein, *supra* note 66, at 15, 19–20.

⁶⁹ See Calabresi & Hirschhoff, *supra* note 61, at 1067–74; but see Frank I. Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs*, 80 YALE L.J. 647, 667–68 (1971) (Although assumption that “polluters are nearly always the cheapest cost avoiders. . . may have a certain gross plausibility for the whole universe of pollution-nuisance cases, there is no *a priori* reason for believing it to be valid in any particular case.”).

⁷⁰ See, e.g., William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1119 (1960).

⁷¹ See David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 711–13 (1980).

⁷² See CALABRESI, *supra* note 61, at 541–43; POSNER, *supra* note 51, § 6.5, at 177–78 (“[I]f a class of activities can be identified in which activity-level changes by potential injurers appear to be the most efficient method of accident prevention, there is a strong argument for imposing strict liability on the people engaged in those activities.”).

The second deterrence argument is based more upon practical considerations than upon economic ones. As an evidentiary matter, negligence can be hard to prove even where it does exist. Plaintiffs face a difficult burden in demonstrating what a reasonable defendant should have known or done, and in gathering the evidence necessary to demonstrate the defendant's culpability.⁷³ Courts and commentators have offered strict liability as an efficient means of addressing these problems of proof.⁷⁴ Strict liability increases the likelihood that the defendant will be held liable and thus increases the incentive for the defendant to undertake measures to reduce the risks associated with the product or the activity giving rise to the potential liability.

B. *Strict Liability Under CERCLA*

Thus, in evaluating whether strict liability should be imposed upon a defendant, modern tort theory asks who is better able, vis-a-vis the plaintiff and the defendant, to allocate the costs, insure against the risks, and reduce or warn against the inherent dangers of the activity or product?⁷⁵ The legislative history of CERCLA indicates that Congress was concerned with these same questions when it was deciding what standard of liability was appropriate under the Act.

Although the courts uniformly agree that strict liability applies to CERCLA violations,⁷⁶ nowhere in the statute is that standard ac-

⁷³ See, e.g., Aaron D. Twerski & Alvin S. Weinstein, *A Critique of the Uniform Product Liability Law—A Rush to Judgment*, 28 *DRAKE L. REV.* 221, 227–28 (1978–79).

⁷⁴ See, e.g., *Beshada v. Johns-Manville Prod. Corp.*, 447 A.2d 539, 548 (N.J. 1982) (strict liability eliminates “complicated, costly, confusing, and time-consuming” task of proving that defendant knew or should have known of risk); SUPERFUND § 301(E) STUDY GROUP, 97TH CONG., 2D SESS., *INJURIES AND DAMAGES FROM HAZARDOUS WASTES—ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES: REPORT TO CONGRESS IN COMPLIANCE WITH SECTION 301(E) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980* (P.L. 96-510), pt. 2, at 276 (Comm. Print 1982) (strict liability reduces plaintiff's “insuperable burden of proof”) [hereinafter 301(E) STUDY GROUP]. As one treatise notes:

[E]ven if fault or negligence were regarded as the primary justification for the imposition of liability on a manufacturer or other seller for the costs of accidents attributable to defective products, it is often present but difficult to prove, and for institutional reasons and because of the costs of litigation, proof of the existence of fault or negligence in the sale of a defective product should no longer be required. . . .

KEETON ET AL., *supra* note 43, § 98, at 693; see also POSNER, *supra* note 51, § 6.5, at 179 (“The trial of a strict liability case is simpler than that trial of a negligence case because there is one less issue, negligence. . . .”).

⁷⁵ See *supra* Section III.A (discussing rationales underlying strict liability).

⁷⁶ See *supra* note 38.

tually stated.⁷⁷ Rather, section 101(32) of the Act provides that the "standard of liability" under CERCLA shall be the same as the standard of liability under section 311 of the Clean Water Act,⁷⁸ which, although not explicit, has been interpreted by the courts as being strict liability.⁷⁹ Although strict liability originally developed in the common law, statutory imposition of strict liability is by no

⁷⁷ CERCLA was a compromise bill hastily enacted by the 96th Congress in its final hours. CERCLA had three precursors: the Hazardous Waste Containment Act, H.R. 7020, 96th Cong., 2d Sess. (1980); the Comprehensive Oil Pollution Liability and Compensation Act, H.R. 85, 96th Cong., 1st Sess. (1979); and the Environmental Emergency Response Act, S. 1480, 96th Cong., 1st Sess. (1979). H.R. 7020 contained a fault-based standard, imposing liability on "any person who caused or contributed to the release or threatened release" of a hazardous substance. H.R. 7020, *supra*, § 3071(a)(1)(c), *reprinted in* 126 CONG. REC. 26,779 (1980). The accompanying Committee Report stated:

[T]he usual common law principles of causation, including those of proximate causation, should govern the determination of whether a defendant "caused or contributed" to a release or threatened release. . . . Thus, for instance, the mere act of generation or transportation of hazardous waste, or the mere existence of a generator's or transporter's waste in a site with respect to which cleanup costs are incurred would not, in and of itself, result in liability. . . . [F]or liability to attach. . . , the plaintiff must demonstrate a causal or contributory nexus between the acts of the defendant and the conditions which necessitated response action. . . .

H.R. REP. NO. 1016, 96th Cong., 2d Sess. 33 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6136-37.

Both the Senate Bill, S. 1480, 96th Cong., 1st Sess. § 4(a) (1979), and the House Bill, H.R. 85, 96th Cong., 1st Sess. 104 (1979), contained an explicit strict liability standard, but that standard was deleted from the final version of CERCLA in response to opposition from a number of representatives. *See, e.g.*, 126 CONG. REC. 26,786 (1980), *reprinted in* A LEGISLATIVE HISTORY, *supra* note 15, vol. II, at 358-59 (statement of Rep. Stockman) (strict liability is not the proper standard under CERCLA). *See generally* 126 CONG. REC. 30,932 (1980), *reprinted in* A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 686 (statement of Sen. Randolph) (noting that "changes were made in recognition of the difficulty in prescribing in statutory terms liability standards which will be applicable in individual cases," but emphasizing that standard remained strict liability).

Subsequently, H.R. 5640, 98th Cong., 2d Sess. (1985), a precursor to SARA, had explicit statements regarding "strict, joint and several liability." These provisions were omitted from the final version of SARA, however. *See* 132 CONG. REC. 28,414 (1986) (statement of Sen. Stafford) ("Such provisions were deleted from SARA because they are unnecessary given the clear and correct body of case law that has confirmed and developed the doctrine of strict, joint and several liability under Superfund and Section 311 of the Clean Water Act.").

⁷⁸ 33 U.S.C. § 1321 (1988). *See generally* 126 CONG. REC. 31,965 (1980), *reprinted in* A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 778 (statement of Rep. Florio) ("The standard of liability in these amendments is intended to be the same as that provided in section 311 [of the CWA]; that is, strict liability."); *id.* at 30,932, *reprinted in* A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 686 (statement of Sen. Randolph) ("I understand this to be a standard of strict liability."). The Clean Water Act was known as the Federal Water Pollution Control Act prior to its amendment in 1977.

⁷⁹ *See, e.g.*, *United States v. Tex-Tow, Inc.*, 589 F.2d 1310, 1314 (7th Cir. 1978); *United States v. Bear Marine Servs.*, 509 F. Supp. 710, 713 (E.D. La. 1980) (dictum). *See generally* *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985) (discussing background of CERCLA's strict liability standard and its derivation from Clean Water Act).

means rare; Congress had adopted the standard in the environmental context on numerous occasions prior to enactment of CERCLA.⁸⁰ In addition, in the decade preceding CERCLA, a number of commentators had argued that strict liability was the appropriate standard for evaluating liability for injuries caused by environmental contamination, analogizing environmental harm to both hazardous activities and to products liability.⁸¹ Thus, there had been foreshadowings of Congress' decision to incorporate the strict liability standard into CERCLA.

In adopting the strict liability standard for CERCLA violations, Congress drew upon the rationales expressed in both the hazardous activities area and products liability.⁸² For example, CERCLA's legislative history indicates that Congress believed that persons who engage in the manufacture, use, or disposal of hazardous substances are engaged in hazardous activities of the type that normally lead to strict liability.⁸³ Many risks associated with hazardous activities can be reduced or minimized with proper planning.⁸⁴ Imposition of liability on the "factually responsible" party ensures that, to the

⁸⁰ See S. REP. NO. 848, *supra* note 15, at 34-36, *reprinted in* A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 341-43, for a listing of some of these statutes.

⁸¹ See, e.g., Alfred Avins, Comment, *Absolute Liability for Oil Spillage*, 36 BROOK. L. REV. 359 (1970); John C. Esposito, *Air and Water Pollution: What to Do While Waiting for Washington*, 5 HARV. C.R.-C.L. L. REV. 32, 38-39 (1970); Ginsberg & Weiss, *supra* note 47, at 905-20; Milton Katz, *The Function of Tort Liability in Technology Assessment*, 38 U. CIN. L. REV. 587, 616-17 (1969); Michelman, *supra* note 69, at 666-83; Note, *Strict Liability for Generators, Transporters, and Disposers of Hazardous Wastes*, 64 MINN. L. REV. 949, 983-85 (1980).

⁸² See S. REP. NO. 848, *supra* note 15, at 14, *reprinted in* A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 321 ("The most analogous areas of the law are product liability and liability for abnormally dangerous activities."). One pair of commentators has recently speculated that the hazardous activities doctrine is likely to undergo a resurgence in the cleanup area. See generally Jim C. Chen & Kyle E. McSlarrow, *Application of the Abnormally Dangerous Activities Doctrine to Environmental Cleanups*, 47 BUS. LAW. 1031 (1992).

⁸³ See, e.g., 126 CONG. REC. 31,978 (1980), *reprinted in* A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 813 (statement of Rep. Jeffords) ("For purposes of this bill, manufacture, use, transportation, treatment, storage, disposal and release of hazardous substances are ultrahazardous activities justifying the imposition of strict liability under the standards established by section 311(f) of the Clean Water Act."); S. REP. NO. 848, *supra* note 15, at 32-34, *reprinted in* A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 339-41 (noting that "manufacture, use, transportation and disposal of hazardous substances" are hazardous activities "and, therefore, subject to a rule of strict liability"). Nuisance theory provided an additional ground for imposition of strict liability. See S. REP. NO. 848, *supra* note 15, at 14, *reprinted in* A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 321 ("Damage actions involving the maintenance of a public or private nuisance often involve a kind of strict liability standard.").

⁸⁴ See S. REP. NO. 848, *supra* note 15, at 33, *reprinted in* A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 340.

extent possible, risks will be eliminated.⁸⁵ When a risk cannot be reduced or eliminated, however, and harm results, "fundamental fairness"⁸⁶ requires that the party whose acts created the risk of harm bear the costs of that harm, even where both parties are blameless.⁸⁷ Thus, harm resulting from environmental contamination should be borne by the party responsible for the harm's occurrence.⁸⁸

CERCLA's legislative history also reveals an explicit reliance by Congress on the notion of internalization of costs.⁸⁹ Congress saw

⁸⁵ *Id.* at 33-34, reprinted in A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 340.

⁸⁶ *Id.* at 33, reprinted in A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 340.

⁸⁷ *Id.* at 34, reprinted in A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 341.

⁸⁸ *See, e.g., id.* at 98, reprinted in A LEGISLATIVE HISTORY, *supra* note 15, at vol. I, at 405:

[S]ociety should not bear the costs of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dumpsite owner or operator who has profited or otherwise benefited from commerce involving these substances and now wishes to be insulated from any continuing responsibilities for the present hazards to society that have been created. . . . Relieving industry of responsibility establishes a precedent seriously adverse to the public interest.

See also 126 CONG. REC. 26,338 (1980), reprinted in A LEGISLATIVE HISTORY, *supra* note 15, vol. II, at 229 (statement of Rep. Florio) ("It is wholly appropriate and equitable for the industries which have benefitted most directly from cheap, inadequate disposal practices, and which have generated the wastes which imposed the risks on society to contribute a substantial portion of the response costs."); S. REP. NO. 848, *supra* note 15, at 98, reprinted in A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 405 (Sept. 25, 1979 letter of Douglas Costle, EPA Administrator) ("[S]ociety should not bear the costs of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dumpsite owner or operator who has profited or otherwise benefitted from commerce involving the substances and now wishes to be insulated from any continuing responsibilities for the present hazards to society that have been created.").

⁸⁹ The comments made during the Senate proceedings on the day CERCLA was enacted make this clear. For example, Senator Proxmire stated:

I wish to simply state that the polluting firms should be required to pay the full cost of pollution. . . .

If they incur a cost, and heaven knows the disposal of chemicals is a cost, then they should pay for it in full. That is the way the free market should work. . . . If they do pay all of it, then the free market works. If they do not it does not.

If they pay all of it then the customers of those corporations will pay, which they should pay, the full cost of what they buy. We certainly should not have the taxpayers or the victims of this pollution to have to pay any part of the cost of disposing of the chemicals and other effluents that the oil corporations and chemical corporations release into our environment.

126 CONG. REC. 30,879 (1980); *see also id.* at 30,932, reprinted in A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 685 (statement of Sen. Randolph) (strict liability "assures that the costs of chemical poison releases are borne by those responsible for the releases"); *id.* at 30,940, reprinted in A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 706 (statement of Sen. Bradley) ("the real cost of production includes safe disposal"); *id.* at 30,940, reprinted in A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 708 (statement of Sen. Tsongas) (strict liability "puts the costs in the sector most responsible for pollution and which benefits most from chemical production, instead of on the victim or on the Government").

strict liability as a way of “assur[ing] that those who benefit financially from a commercial activity internalize the health and environmental costs of that activity into the costs of doing business.”⁹⁰ In addition to being a fairer standard, strict liability improves economic efficiency by ensuring that all costs associated with the product are internalized so that prices of goods fully reflect the goods’ actual costs to society.⁹¹ According to the legislative history, “[s]trict liability is, in effect, a method of allocating resources through choice in the marketplace.”⁹²

⁹⁰ S. REP. NO. 848, *supra* note 15, at 13, *reprinted in* A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 320. The Report went on to state: “To establish provisions of liability any less than strict, joint, and several liability would be to condone a system in which innocent victims bear the actual burden of releases, while those who conduct commerce in hazardous substances which cause such damage benefit with relative impunity.” *Id.*

Not all commentators agree that economic efficiency is best served by requiring polluters to internalize all costs associated with their activities. *See, e.g.*, Dennis R. Honabach, *Toxic Torts—Is Strict Liability Really the “Fair and Just” Way to Compensate the Victims?*, 16 U. RICH. L. REV. 305, 310–16 (1982) (unclear where incidence of burden actually falls under strict liability scheme); Michelman, *supra* note 69, at 666–86 (strict liability is inefficient where cost to polluter in avoiding damage is greater than costs to neighboring residents). *See generally supra* note 61 (discussing commentators who disagree with internalization theory).

⁹¹ S. REP. NO. 848, *supra* note 15, at 33, *reprinted in* A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 340 (“One additional purpose of [CERCLA’s] strict liability scheme is to assure that the costs of injuries resulting from defective or hazardous substances are borne by the persons who create such risks rather than by the injured parties who are powerless to protect themselves.”). The Senate Report invoked the rationale of *Green v. General Petroleum Corp.*, 270 P. 952 (Cal. 1928), where the court stated:

Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, with knowledge that injury may result to another, proceeds, and injury is done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act and causes the injury should, in all fairness, be required to compensate the other for the damage done.

Id. at 955 (*quoted in* S. REP. NO. 848, *supra* note 15, at 34, *reprinted in* A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 341). The Senate Report stated:

The most desirable system of loss distribution is one in which the prices of goods accurately reflect their full costs to society. This therefore requires, first, that the cost of injuries be borne by the activities which caused them, whether or not fault is involved, because, either way, the injury is a real cost of these activities. Second, it requires that among the several parties engaged in an enterprise the loss be placed on the party which is most likely to cause the burden to be reflected in the price of whatever the enterprise sells.

S. REP. NO. 848, *supra* note 15, at 34, *reprinted in* A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 341. Some commentators argue that CERCLA goes too far in attempting to force polluters to bear the costs of their activities. *See, e.g.*, John J. Lyons, *Deep Pockets and CERCLA: Should Superfund Liability Be Abolished?*, 6 STAN. ENVTL. L.J. 271, 304 (1986–87) (noting that because CERCLA permits joint and several liability, PRP can be forced to bear cleanup costs in excess of harm created by its own activity).

⁹² S. REP. NO. 848, *supra* note 15, at 34, *reprinted in* A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 341. The Report stated more fully:

Finally, Congress was concerned with deterrence. Imposition of strict liability, Congress thought, would "create a compelling incentive for those in control of hazardous substances to prevent releases and thus protect the public from harm,"⁹³ in addition to providing an incentive for those parties to reduce their use of such substances.⁹⁴

In some of these cases the choice is not between an innocent victim and a careless defendant, but between two blameless parties. In such cases the costs should be borne by the one of the two innocent parties whose acts instigated or made the harm possible.

The advantage of this approach is not only that it is fair, but that it will cause the economy to operate better. Strict liability is, in effect, a method of allocating resources through choice in the market place.

The most desirable system of loss distribution is one in which the prices of goods accurately reflect their full costs to society. This therefore requires, first, that the cost of injuries be borne by the activities which caused them, whether or not fault is involved, because, either way, the injury is a real cost of these activities. Second, it requires that among the several parties engaged in an enterprise the loss be placed on the party which is most likely to cause the burden to be reflected in the price of whatever the enterprise sells

. . . [S]ocial and economic resources are more efficiently allocated when the actual costs of goods and services (including the losses they entail) are reflected in their prices to the consumer.

Id.

⁹³ *Id.* at 14, reprinted in A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 321.

⁹⁴ *Id.* As commentators have pointed out, however, the deterrent effect of strict liability under CERCLA is limited by the retroactive nature of CERCLA liability. *See, e.g.,* Lyons, *supra* note 91, at 301 ("[M]any of the actions that are within the reach of § 107(a) and have substantially contributed to the creation of the problem predate the enactment of CERCLA and therefore could not have been influenced by any deterrent effect arising from the liability provisions contained in CERCLA."); *Developments, supra* note 23, at 1541 ("Retroactive liability cannot promote the goal of creating incentives for safe handling and disposal of wastes, because it is not possible to change behavior that has already occurred. . . . Retroactive application of CERCLA must be aimed largely at the goals of compensating the Superfund and spreading cleanup costs among the responsible parties."); *cf. White, supra* note 57, at 918-21 (CERCLA's retroactive liability will not result in efficiency gains). Although strict liability may deter future violations of CERCLA, it has no effect on past behavior. Nonetheless, CERCLA liability extends even to activities predating enactment of the statute. *See, e.g.,* United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 733, 737 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); United States v. Shell Oil Co., 605 F. Supp. 1064, 1073 (D. Colo. 1985); Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1314 (N.D. Ohio 1983). Moreover, liability under CERCLA is determined by current scientific knowledge and understanding of what is hazardous. *See* 42 U.S.C. § 9601(14) (1988) (defining "hazardous substances" as those EPA listed under authority of CERCLA or other specified federal statutes); United States v. Conservation Chem. Co., 619 F. Supp. 162, 183 (W.D. Mo. 1985) (cost recovery actions may be brought only to clean up substances currently considered hazardous under these lists); compliance with prevailing standards at the time of contamination is irrelevant. *See* United States v. Dickerson, 640 F. Supp. 448, 451 (D. Md. 1986) (compliance with existing law and exercise of reasonable care at time of disposal does not relieve a defendant of liability under CERCLA).

Typically, tort law looks only at what a defendant knew or should have known at the time the tort occurred in assessing liability. *See* Lyons, *supra* note 91, at 292-93. Defendants

IV. LIABILITY STANDARDS FOR CORPORATE OFFICERS UNDER CERCLA

CERCLA's legislative history clearly indicates that Congress believed that forcing "persons," as defined in the statute, to bear the full costs of their hazardous substance-producing activities would result in more efficient decision-making processes and less environmental contamination.⁹⁵ The Act's legislative history reveals little or

generally are not held liable for harm that the scientific community was unable to recognize or identify at the time the tort occurred. *See id.* Ex post evaluation of a product defect has been allowed in asbestos cases, but that is a rare exception to the general rule. *See id.* at 293. Epstein argues that the retroactive nature of asbestos liability destroys the rationale underlying the imposition of liability in that context because it "imposes on the firm the impossible task of complying with a liability rule of which it could not have had any knowledge." Richard A. Epstein, *Manville: The Bankruptcy of Product Liability Law*, REG., Sept.-Oct. 1982, at 44. *See also* Gary T. Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 796, 825 (1983) (arguing that it is "senseless" to believe that retroactive liability will promote risk-spreading, cost internalization, or deterrence); Walter M. Rogers, Note, "[I]t's All Right to Kill People, but Not Trees", 66 NOTRE DAME L. REV. 893, 921-22 n.113 (1991) (noting that courts and commentators have criticized the movement to hold manufacturers liable for failure to warn against unknowable hazards). An activity that was considered safe and acceptable in 1979, for example, could give rise to liability in 1992 if scientific advances were now to demonstrate its hazardousness. Thus, while CERCLA's strict liability scheme may deter future activities known or thought to present a risk of harm to the public, it can have no effect on past behaviors.

Congress intended that CERCLA remedy some of the failings of earlier environmental legislation, particularly RCRA, 42 U.S.C. § 6901-92k (1988), which was a prospective statute intended to prevent future open dumping and to convert existing open dumps to safer facilities, in addition to regulating the treatment, storage, and transportation, and disposal of hazardous wastes. *See* H.R. REP. NO. 1016, *supra* note 77, pt. 1, at 22, *reprinted in* 1980 U.S.C.C.A.N. at 6125 (RCRA "is prospective and applies to past sites only to the extent that they are posing an imminent hazard."). CERCLA was the result of congressional concern that a retrospective statute was also needed, to address the issues raised by hazardous waste produced and abandoned in the past. *Id.*, pt. 1, at 17-18, *reprinted in* 1980 U.S.C.C.A.N. at 6120 (noting that RCRA is "clearly inadequate" in addressing "massive problem" of existing hazardous waste sites). Because CERCLA is a remedial statute, as opposed to a prospective one, the deterrence justification for CERCLA is questionable from the outset.

The Supreme Court has stated that while retroactive liability cannot be justified based on grounds of deterrence or blameworthiness, it may nonetheless be a rational means of allocating the costs of an activity. *See* *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 12, 18 (1976); *see generally* Michael P. Healy, *Direct Liability for Hazardous Substance Cleanups Under CERCLA: A Comprehensive Approach*, 42 CASE W. RES. L. REV. 65, 82-85 (1992) (discussing retroactive nature of CERCLA liability).

⁹⁵ *See generally supra* Section III.B (discussing legislative history of CERCLA's strict liability standard). *See also* 301(E) STUDY GROUP, *supra* note 74, pt. 2, at 275-76:

The reasons for shifting the burden of risks and costs due to the dangerous nature of disposal of hazardous wastes are similar to the reasons underlying the imposition of strict liability in product liability cases. . . .

Strict liability is imposed in product liability because it is recognized that without it most plaintiffs would face an insuperable burden of proof, and because the imposition of liability on the manufacturer most readily and efficiently provides for cost

nothing of congressional intent regarding the personal liability of corporate officers, however.⁹⁶ Although CERCLA speaks of "individuals" being liable for statutory violations,⁹⁷ the definitional section does not explicitly include or exclude corporate officers.⁹⁸ Thus, it is impossible to determine from either CERCLA's legislative history or its statutory language whether Congress intended that corporate officers be held liable and, if so, under what circumstances and what standards.

Commentators have devoted most of their attention to date upon the latter issue, i.e., upon trying to determine which standard is most appropriately applied to corporate officers. The initial question that should be addressed, however, is not *how* officers should be held liable under CERCLA, but *whether* they should be held so liable. Because neither the statutory language of CERCLA nor its legislative history reveals whether Congress intended these parties to be individually liable as PRPs, it is necessary to consider whether imposition of liability upon them is compatible with CERCLA's statutory scheme and objectives. The only liability standard available under CERCLA is strict liability. To hold officers statutorily liable under the Act, therefore, the courts must hold them strictly liable. An examination of the policy objectives militating for and against application of strict liability to corporate officers reveals, however,

internalization and for equitable distribution of the costs of product-caused injuries, and ideally, liability on the part of those best able to prevent or reduce the risks. . . . [S]trict liability for hazardous waste disposal would also encourage the reduction of risk, by disposers. So, too, the distribution of costs of injury is most easily passed on by imposing liability on the owner/manager of disposal sites who can spread the costs most easily, passing them along by liability insurance, or by transferring them to the generator of wastes.

CERCLA authorized the creation of the Study Group to make recommendations to Congress regarding compensation for personal injuries caused by toxic waste sites. See 42 U.S.C. § 9651(e). The Group ultimately recommended that strict liability was the appropriate standard. See generally James R. Zazzali & Frank P. Grad, *Hazardous Wastes: New Rights and Remedies?*, 13 SETON HALL L. REV. 446 (1983) (discussing Study Group's report and recommendations).

⁹⁶ Interestingly, the issue of corporate officer liability was raised once in the Senate hearings. Peter H. Weiner, Special Assistant, Governor's Office, State of California, stated: "[T]he bill should provide for piercing the corporate veil of undercapitalized corporations to establish individual liability of officers and directors." SEN. COMM. ON ENV'T & PUBLIC WORKS, Serial No. H9, 96th Cong., 1st Sess., pt. 2, at 155 (1979). Weiner's statement that piercing is a method that may be used to hold liable corporate officers and directors, as opposed to shareholders, is incorrect. See Oswald & Schipani, *supra* note 6, at 274-75.

⁹⁷ 42 U.S.C. § 9601(21).

⁹⁸ Congress has, in some environmental statutes, specifically named officers as potentially liable parties. See *supra* note 29 (discussing environmental statutes that hold individuals personally liable).

that strict liability for officers has no basis in either public policy or in CERCLA's language.⁹⁹

A. *Application of the Strict Liability Standard to Officers*

From the fairness perspective, nothing is to be gained by holding the officer strictly liable in addition to the corporation. Under traditional tort and agency doctrine, corporate officers are not held *strictly* liable for the torts or illegal actions of their corporations. Rather, individual officer liability has always been premised upon an affirmative act of commission or omission on the part of the officer;¹⁰⁰ thus, individual officer liability has always flowed from a negligent or intentional act committed by the officer directly. The reasons for this result are obvious. In the context of a strict liability tort or statute, such as CERCLA, the liability of the primary defendant, the corporation, may well result from morally blameless behavior; in such an instance, the officer, as the secondary defendant, is likewise morally blameless. Notions of justice or fairness would not be served by holding the officer individually liable based merely upon his or her status as an officer, nor would the victim be injured by a refusal to hold the officer so liable. The corporation, as the primary defendant, remains strictly liable to the victim¹⁰¹ for the harm incurred; thus, the victim is not barred from recovery even though the officer is shielded from liability.

The same result follows from application of the argument that strict liability ensures that a defendant that captures the benefit of its own activities likewise bears the costs of those activities.¹⁰² As between the victim and the corporation committing the CERCLA violation, the corporation captures the benefit of the activities that

⁹⁹ I have deliberately excluded corporate directors from the analysis because no court has yet held an individual personally liable in his or her role as a director, although individuals who have held multiple roles within the corporation, including that of director, have been held personally liable based upon their actions undertaken in their roles as corporate officers or employees. *See, e.g.*, *United States v. Carolina Transformer Co.*, 739 F. Supp. 1030 (E.D.N.C. 1989); *United States v. Ward*, 618 F. Supp. 884 (E.D.N.C. 1985). Discussions of "director" liability are misleading because they imply the existence of a liability that has yet to be judicially imposed.

¹⁰⁰ *See supra* note 8 (discussing traditional rules of officer liability).

¹⁰¹ For purposes of CERCLA, the "victim" is society as whole, because everyone will be forced to bear the costs of environmental contamination that is not cleaned up by the responsible party—taxpayers to the extent that they shoulder the burden of cleanup and the public as a whole to the extent that the contamination is not cleaned up and continues to pollute the environment.

¹⁰² *See EPSTEIN, supra* note 55, at 27 (quoted in text *supra* note 56).

resulted in the contamination; thus, the corporation should bear the costs of the cleanup. Imposition of strict liability on the officer can be justified only if the officer is in a position to capture the benefit of the activities that led to the CERCLA violation. To the extent that any such benefits arise, however, they will manifest themselves in increased corporate earnings, which will eventually translate to increased dividends to the shareholders of the firm. The officer, *qua* officer, does not receive any additional direct benefit. Thus, while distributive fairness might be promoted by holding the corporation strictly liable, it is not furthered by holding the officer so liable.¹⁰³

Fairness is by no means the only rationale offered for strict liability. Indeed, economic efficiency arguments predominate in this area. Maximization of societal welfare and efficient allocation of societal resources demand that all of the costs of an activity be fully internalized.¹⁰⁴ Officers, unlike the corporations for which they work, are not in a position to internalize the costs associated with the corporation's activities that gave rise to the injury. Forcing the officer to bear the costs of the injury associated with his or her firm's activities will have no effect upon the pricing of the product involved because it will not be a cost borne by the firm, and therefore will have no impact on the firm's willingness to supply the product or on consumer demand for the goods produced.¹⁰⁵ Thus, inefficient allocation of societal resources will not be reduced by holding an individual liable for the harm that a company's environmental practices creates.

Nor are the goals of risk-spreading¹⁰⁶ served by holding corporate officers strictly liable. Any recovery received from an officer comes directly from that individual's pocket. The officer lacks the corporation's mechanisms for spreading those costs among the consumers

¹⁰³ It is not uncommon, particularly in closely-held corporations, for officers to also be shareholders of the corporation. Thus, some of these benefits may flow through to the officer in his or her capacity as a shareholder. The individual's dual role as officer and shareholder should be kept separate, however, because the bases for liability in each instance are different. See *infra* Section V (discussing liability of shareholders under CERCLA).

¹⁰⁴ See *supra* notes 59-61 and accompanying text (discussing internalization of costs).

¹⁰⁵ An exception might exist if the firm purchases insurance to protect the officer from such claims. The firm could then pass the costs of that insurance along to consumers through its pricing schemes. The unavailability of environmental insurance, however, would prevent this mechanism from working in the CERCLA context. See *generally infra* note 107 (discussing unavailability of environmental insurance). In addition, the corporation would be unable to indemnify fully the officer because, in the event of a cleanup, the firm's assets could well be depleted in paying its own liabilities. See *infra* note 109 (discussing costs of cleanup).

¹⁰⁶ See *supra* notes 62-67 and accompanying text (discussing risk-spreading rationale for strict liability).

of the goods or services involved. Although theoretically the officer could spread the risk of harm by purchasing insurance to cover the risk of individual liability, as a practical matter, environmental insurance is difficult, if not impossible, to obtain.¹⁰⁷ Essentially, applying the strict liability standard to an officer simply sticks some other hapless individual, as opposed to the victim, with the costs of the injury that the corporation's CERCLA violation caused.¹⁰⁸

Even where the corporation is financially unable to pay all of the costs of cleanup,¹⁰⁹ no social policy objective is furthered by holding the officer strictly liable for the remaining costs. Even setting aside the practical constraints raised by the financial inability of most officers to pay the entire costs of cleanups themselves, imposition of liability on the officer in such an instance would force the officer to serve as an insurer of the firm's liabilities. Traditional corporate law has never contemplated such a result, nor does the legislative history of CERCLA indicate that Congress intended that its adoption of the strict liability standard under CERCLA result in such a radical revision of traditional corporate doctrine.¹¹⁰

¹⁰⁷ See GENERAL ACCOUNTING OFFICE, HAZARDOUS WASTE: ISSUES SURROUNDING INSURANCE AVAILABILITY 17 (Oct. 16, 1987) (noting that "the uncertainties created by potentially enormous claim payments and unfavorable legal trends have led most of the insurance industry to perceive pollution as an uninsurable risk," and stating that GAO could find "only one insurer that actively seeks to insure pollution risks"); see generally KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW: AN ANALYSIS OF TOXIC TORT AND HAZARDOUS WASTE INSURANCE COVERAGE ISSUES 195-96 (1991) (noting that environmental liability coverage became "almost completely unavailable" in mid-1980's, and that only "an extremely thin market" provides such coverage today); Peter Huber, *Environmental Hazards and Liability Law*, in LIABILITY: PERSPECTIVES AND POLICY (Robert E. Litan & Clifford Winston, eds.) 128, 146-47 (1988) (discussing unavailability of environmental liability insurance).

¹⁰⁸ If the officer actively participated in the activities that led to the environmental violation and thus to the harm to the victim, we may well prefer that the officer bear the costs of that harm. In such an instance, however, traditional notions of officer liability will achieve this result. See *supra* note 8 (discussing traditional personal participation theory of officer liability). Strict liability, on the other hand, paints with too broad a brush, for it would apply both to the culpable and the nonculpable officer.

¹⁰⁹ The high costs of CERCLA cleanups are prohibitive to most smaller companies. The EPA estimated the average costs (in 1988 dollars) associated with a Remedial Investigation and Feasibility Study (RI/FS) and design and implementation of a remedy at an NPL site to be \$1.3 million for the RI/FS, \$1.5 million for remedial design, \$25 million for remedial action, and \$3.77 million for the present value of operation and management of the site remedy over 30 years. See 57 Fed. Reg. 4824, 4829 (1992).

¹¹⁰ One can well imagine the havoc that would be wreaked on American business if such a rule were adopted. Cf. BISHOP, *supra* note 8, § 1.04, at 1-8 (determination of corporate director liability requires balancing between "on the one hand, fairness to the individual and the need to induce competent people to serve, or at least not to discourage them from serving, as corporate directors" and "on the other hand, the undesirability of immunizing corporate

Moreover, individuals tend to be risk-averse.¹¹¹ If confronted with a remote but potentially devastating liability, many skilled and competent individuals would be discouraged from serving as officers of corporations whose activities could possibly lead to environmental harm. In addition, corporate managers, who would receive only limited benefits from the corporate earnings attributable to hazardous activities but who would face unlimited personal liability for potential harm, would likely direct their firms away from such activities.¹¹² Those individuals and firms most qualified to handle hazardous wastes and most adept at preventing the occurrence of CERCLA violations would be driven out, leaving behind small, unsophisticated firms more likely to lack the capital and technological know-how necessary to ensure that hazardous wastes are handled properly.¹¹³

Finally, applying strict liability to officers will promote deterrence¹¹⁴ only if the officers in question are in positions to minimize the risks associated with the corporation's activities. Clearly,

management, or permitting it to immunize itself, from the consequences of its negligence or misconduct").

¹¹¹ Empirical evidence indicates that most investors are risk averse. See ABRAHAM, *supra* note 107, at 15 (noting that "[i]ndividuals and comparatively small businesses tend to be risk-averse"); Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986, 989 & n.23 (1986) (citing KENNETH J. ARROW, *ESSAYS IN THE THEORY OF RISK-BEARING* 90-120 (1971)) ("most investors are risk averse when a large portion of their wealth is at stake"). In addition, "managers are inherently overinvested in the firm they serve," John C. Coffee, Jr., *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1, 17 (1986), and they, like investors, tend to be risk-averse. See Henry T.C. Hu, *Risk, Time, and Fiduciary Principles in Corporate Investment*, 38 UCLA L. REV. 227, 320-22 (1990).

¹¹² See *infra* note 214 (discussing effect of personal liability upon officer behavior); cf. Cronk & Huddleston, *supra* note 4, at 690 ("A corporate officer faced with the prospect of being personally liable for violation of hazardous waste laws. . . may choose to resign and seek employment in a less risky business.").

¹¹³ In fact, the cases imposing liability upon corporate individuals to date have all involved small, closely-held firms where one or a few individuals held multiple roles within the corporation and were intimately involved with the CERCLA violations in a number of ways. See, e.g., *United States v. Carolina Transformer Co.*, 739 F. Supp. 1030, 1038 (E.D.N.C. 1989) (individuals personally liable were company's presidents, sole shareholder, and directors, and were in charge of day-to-day operations); *United States v. Conservation Chem. Co.*, 628 F. Supp. 391, 416-20 (W.D. Mo. 1986) (individual personally liable was president and majority stockholder, sole technical person, and controlled company's fiscal matters and strategic business decisions); *United States v. Ward*, 618 F. Supp. 884, 885-86 (E.D.N.C. 1985) (individual personally liable was president, chief operating officer, director, and majority stockholder). See also George W. Dent, Jr., *Limited Liability in Environmental Law*, 26 WAKE FOREST L. REV. 151, 175 (1991) (noting that evidence suggests that "an abnormally large number of firms with potential CERCLA liability [are] small and financially weak").

¹¹⁴ See *supra* notes 68-74 and accompanying text (discussing deterrence rationale for strict liability).

not every officer is in such a position—it depends upon the officer's position and role within the corporate structure. Even if the officer is in a position to improve safety and minimize injuries, the officer already is obligated to undertake whatever measures are necessary or appropriate by virtue of his or her obligations and duties owed to the corporation and its shareholders.¹¹⁵ Imposition of strict liability under CERCLA will not, therefore, create a new duty for the corporate officer to minimize environmental violations by the corporation, but will serve only to reinforce existing duties.

The inappropriateness of applying the strict liability standard to corporate officers is best illustrated by an example. Assume that Officer Y, the vice-president and plant manager of Corporation X's widget manufacturing facility, exercises due care¹¹⁶ in hiring Licensed Waste Hauler, Inc. to take away hazardous wastes created in the widget production process. In loading the waste for transport to a licensed disposal site, Licensed Waste Hauler spills some of the hazardous substances on the ground beside Corporation X's loading dock. Five years later, the EPA discovers contamination in the vicinity of Corporation X's plant, and orders a cleanup action that ultimately will cost in excess of \$5 million. As a "site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise came to be located,"¹¹⁷ Corporation X's plant is a "facility" for purposes of CERCLA.¹¹⁸ Moreover, a "release" of hazardous substances has undoubtedly occurred.¹¹⁹ Who should be liable for the costs of cleaning up that facility?

Under the terms of CERCLA, Corporation X is clearly liable for the cleanup costs. As the owner of the physical site, Corporation X is the "owner" of the "facility."¹²⁰ Thus, Corporation X is strictly liable under CERCLA for the cleanup costs incurred; its officer's

¹¹⁵ See generally HENN & ALEXANDER, *supra* note 8, §§ 231-42 (discussing duties of management).

¹¹⁶ By due care, I mean that Officer Y has investigated Licensed Waste Hauler, Inc.'s reputation and safety record, has verified that the company is indeed properly licensed, and has taken whatever other steps a reasonable person would deem appropriate under the circumstances.

¹¹⁷ 42 U.S.C. § 9601(9) (1988) (*quoted in supra* note 25).

¹¹⁸ See *supra* note 25 (discussing CERCLA's broad definition of "facility").

¹¹⁹ Courts have found that "releases" exist where hazardous substances are found in soil or groundwater samples. See, e.g., *Washington v. Times Oil Co.*, 687 F. Supp. 529 (W.D. Wash. 1988); *United States v. Northernair Plating Co.*, 670 F. Supp. 742 (W.D. Mich. 1987).

¹²⁰ See 42 U.S.C. § 9607(a)(1) (1988) (*quoted in supra* note 28).

exercise of due care in selecting a licensed waste hauler to dispose of the product will not relieve the Corporation of liability.¹²¹

As a normative matter, holding Corporation X strictly liable for the cleanup costs is consonant with both the public policy objectives underlying traditional notions of strict liability and the statutory objectives of CERCLA. Corporation X captured the economic gains from the production activities leading to the creation of hazardous wastes; thus, fairness dictates that Corporation X pay for the harm created as a result of those activities. Moreover, forcing Corporation X to bear the costs of cleanup encourages the Corporation to raise the price of the widgets it creates to cover the additional liability, thus ensuring that societal resources will be allocated efficiently and social welfare maximized.¹²² The increase in price resulting from increased liability will likewise ensure that the risk of harm resulting from the widget manufacturing process is spread among all the consumers of Corporation X's widgets.¹²³ The increased liability also creates an incentive for Corporation X to modify its production process to reduce the creation of hazardous wastes and to minimize the possibility for environmental harm. Finally, the strict liability scheme minimizes, in theory at least, the costs of litigating responsibility for the ensuing harm.¹²⁴

¹²¹ See *supra* note 39 (discussing limited defenses available under CERCLA).

¹²² As a practical matter, the internalization of costs need not be captured solely in a price increase; the internalization could be reflected as well in decreased wages to workers or in decreased profits to the firm, or some combination thereof.

¹²³ As this example illustrates, risk-spreading is not a particularly strong rationale for CERCLA strict liability. Unlike the products liability or hazardous activities areas, where the injury falls upon one or a few victims, the injury of an unremedied environmental violation falls upon society as a whole, through either a polluted environment or through government funding of cleanup costs; thus, the risk is already spread. Placing the costs of the activity on the polluter does not serve to further spread the risks, although it does seem to contribute to distributive fairness. See *supra* notes 62–67 and accompanying text (discussing risk-spreading rationale for strict liability).

¹²⁴ See Henderson, *supra* note 56, at 660–61 (noting that strict liability is often assumed to “entail[] comparatively lower administration costs” than negligence); but see STEVEN SHAV-ELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 264 (1987) (noting that “the comparison of the size of administrative costs under [strict liability and negligence] is ambiguous as a theoretical matter”). Recent studies suggest that CERCLA’s expansive liability scheme creates, rather than alleviates, transaction costs. See, e.g., William N. Hedeman et al., *Superfund Transaction Costs: A Critical Perspective on the Superfund Liability Scheme*, 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,413, 10,414 (1991) (noting that “the high-stakes Superfund liability system breeds protracted negotiation and litigation, which in turn, entail significant [transaction] costs”).

More relevant to our inquiry, however, is the liability of Officer Y—the individual who manages the production facility and who selected Licensed Waste Hauler, Inc. as a subcontractor. Should she be held strictly liable for cleanup costs, either as an “operator” of the facility¹²⁵ or as a person who “arranged” for disposal?¹²⁶

The answer clearly is no. Officer Y does not capture the economic benefits of the production activity that led to the creation of the harm, nor will forcing her to bear the costs of cleanup result in an internalization of costs or an efficient allocation of societal resources. Officer Y is unable to spread the costs of the injury among the consumers of the widgets because she is unable to pass her liability through to the consumers in the form of a price increase as can Corporation X. Although the threat of personal liability may well stimulate Officer Y to take whatever measures are within her power to minimize the risk of environmental harm at the production facility, her ability to do so will be constrained by her position and authority within the corporate hierarchy. In this instance, where Officer Y already has exercised due care in hiring a licensed waste hauler to take the hazardous substances to a licensed disposal site, it is hard to imagine what further actions she should or could take to minimize the risk of harm.

Imposing strict liability on Officer Y would not further the policies underlying strict liability. The courts have intuitively recognized that application of strict liability to an officer who acted neither intentionally nor negligently, such as our fictitious Officer Y, would be onerous and overly broad. Nevertheless, when faced with clearly culpable officers, the courts have been unwilling to exonerate such individuals. Instead, they have struggled to find a method of imposing liability upon corporate officers under the statutory language of CERCLA. Unfortunately, as the next subsection illustrates, the

¹²⁵ See 42 U.S.C. § 9607(a)(1) (1988) (quoted in note 28 *supra*).

¹²⁶ See *id.* § 9607(a)(3) (quoted in note 28 *supra*). The United States Court of Appeals for the Eighth Circuit in *United States v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO)*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), held a vice-president individually liable under this section under similar facts, noting that the vice-president, “as plant supervisor, actually knew about, had immediate supervision over, and was directly responsible for arranging for the transportation and disposal of” the hazardous substances. *Id.* at 743. The court stated that “[i]t is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme.” *Id.* The only salient difference between *NEPACCO* and the instant example is that in *NEPACCO*, the vice-president had willfully authorized an illegal disposal of dioxin, whereas our fictitious Officer Y has acted without wrongful intent. Under a strict liability regime, however, Officer Y’s lack of blameworthiness can have no effect on the outcome.

results of their struggle provide little comfort to those who find themselves in Officer Y's position.

B. Current Standards of Officer Liability Under CERCLA

No court has yet held a corporate officer strictly liable for the CERCLA violations of his or her corporation. Some courts have laid the groundwork for the development of such a standard, however, by analyzing corporate officer liability in the context of CERCLA's literal language. The reasoning that these courts offer has suggested that a corporate officer can be held individually liable for the corporation's CERCLA violations merely by virtue of his or her status in the corporation. Careful analysis of the facts of the cases in which this type of language occurs indicates that mere status as an officer was not the sole factor at issue, but that rather, in virtually every instance, the officer had engaged in egregious behavior of a type that under traditional doctrine would lead ineluctably to individual liability.¹²⁷

Although the outcomes of these cases may be satisfactory, the paths the courts have trod in getting there most certainly are not. PRPs are strictly liable under CERCLA.¹²⁸ By holding that an officer may be a PRP, the courts have opened the door to imposition of strict liability on officers. In deciding the specific cases before them, the courts have attempted to limit their holdings by applying one of three fault-based standards in determining whether an officer is considered a PRP: the personal participation theory,¹²⁹ the control theory,¹³⁰ and the prevention theory.¹³¹ Each of these tests focuses upon the acts of the officer vis-a-vis the corporation's CERCLA violations and the degree of "fault" exhibited by the officer involved. However, the statute provides no basis for limiting the definition of PRP to a person who, through negligence or intentional act, was responsible for a CERCLA violation. Thus, none of the theories put forth by the courts adequately restricts the reach of CERCLA officer liability.

¹²⁷ See Oswald & Schipani, *supra* note 6, at 273; see also *infra* note 145 (discussing three cases that may be exceptions to this general rule).

¹²⁸ See *supra* note 38.

¹²⁹ See *infra* Section IV.B.1; see also Oswald & Schipani, *supra* note 6, at 275-82 (discussing cases applying personal participation theory).

¹³⁰ See *infra* Section IV.B.2; see also Oswald & Schipani, *supra* note 6, at 282-91 (discussing cases applying control theory).

¹³¹ See *infra* Section IV.B.2; see also Oswald & Schipani, *supra* note 6, at 291-94 (discussing cases applying prevention test).

1. The Personal Participation Test

CERCLA does not, by its language, require a finding of personal participation by the officer in the violation in order for the officer to be held individually liable. Nonetheless, a number of courts apply a "personal participation" test under CERCLA that stems from traditional tort and agency law principles: a corporate officer who personally participates in a CERCLA violation may be held individually liable for the harm resulting.¹³² A few of the courts that have adopted this theory explicitly ground the liability of the officers in traditional doctrine and not in CERCLA's language.¹³³ Others have purportedly based their results on CERCLA's statutory provisions, but have implicitly applied traditional tort and agency law notions in reaching their decisions.¹³⁴

It is this latter group of cases that gives rise to concern. Although the net effect of the two approaches is the same—the officer is held liable because of his or her personal involvement in the acts leading to the CERCLA violation—their impacts on the development of

¹³² See *supra* note 8 (discussing personal participation theory of traditional doctrine).

¹³³ See, e.g., *United States v. Carolina Transformer Co.*, 739 F. Supp. 1030, 1038 (E.D.N.C. 1989) (noting that "a corporate officer may be held individually liable for the torts of a corporation where the corporate officer participates in the tortious activity" and thus holding officers involved liable "under the common law tort theory of individual liability"). *Carolina Transformer* illustrates the doctrinal struggle that many courts undergo in this area for, in addition to holding the officers liable under traditional theory, the court evaluated factors such as "whether the person or corporation had the capacity to discover in a timely fashion the release or threat of release of hazardous substances; whether the person or corporation had the power to direct the mechanisms causing the release; and whether the person or corporation had the capacity to prevent and abate damages," *id.*, in holding them liable as "operators" under CERCLA. See also *United States v. Mottolo*, 629 F. Supp. 56, 60 (D.N.H. 1984) (noting that officer could be personally liable for arranging for disposal because "an officer of a corporation is liable for torts in which he personally participated, whether or not he was acting within the scope of his authority"); *United States v. Wade*, 577 F. Supp. 1326, 1341-42 (E.D. Pa. 1983) (noting that "[a] corporate officer may be held liable if he personally participates in the wrongful, injury-producing act," but finding that facts did not support imposition of liability in this instance).

¹³⁴ See, e.g., *Riverside Market Dev. Corp. v. International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir. 1991) (stating that "CERCLA prevents individuals from hiding behind the corporate shield when, as 'operators,' they themselves actually participate in the wrongful conduct prohibited by the Act," and noting that "the extent of the defendant's personal participation in the alleged wrongful conduct" is key to determining liability); *United States v. Bliss*, 20 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,879 (E.D. Mo. 1988) (holding personally liable officer who exercised his control or authority over waste disposal in such way as to result in CERCLA violations); *United States v. Conservation Chem. Co.*, 628 F. Supp. 391, 420 (W.D. Mo. 1986) (holding personally liable officer whose "high degree of personal involvement in the operation and decision-making process" of the corporation resulted in CERCLA violations); cf. *United States v. Ward*, 618 F. Supp. 884, 894 (E.D.N.C. 1985) (stating that "officer of a company who exercises authority for the company's operations and participates in arranging for the disposal of hazardous wastes" can be held personally liable as generator).

CERCLA doctrine are very different. A straightforward application of the traditional personal participation theory enables the court to reach the result Congress intended—holding a responsible party liable for cleanup costs—without undermining the traditional protections of tort and agency law, and without requiring the court to engage in twisted readings of CERCLA's statutory language. Application of the traditional theory is independent of the statutory language of CERCLA and thus provides a more doctrinally pure approach to officer liability.

When courts attempt to ground the personal participation standard in CERCLA's statutory language, however, the result is much less analytically sound. In holding officers statutorily liable as PRPs, as opposed to holding them liable under common law for their "personal participation" as evidenced by their affirmative acts of commission or omission, these courts define PRP to include an officer whose negligent or intentional acts led to the corporation's CERCLA violation. By introducing a fault-based standard to define the scope of the term "PRP," these courts create a two-tiered system for determining liability that is contemplated by neither CERCLA's statutory language nor its legislative history. First, the officer must be found to have somehow "personally participated" in the events leading to the environmental contamination, in the sense that the officer must have engaged in negligent or intentional acts of commission or omission that led to the CERCLA violation. Then, once the officer has been found to have so personally participated, he or she is labeled a PRP and held liable for cleanup costs under CERCLA's strict liability statutory scheme.

The courts have not suggested that every violation of CERCLA by a corporation evidences personal participation by an officer of a type that should give rise to individual officer liability. For instance, in our example above, Officer Y did act affirmatively in hiring Licensed Waste Hauler, Inc., and that act did eventually lead to a CERCLA violation. The act of hiring a licensed carrier is not tortious, however, and the cases clearly reflect judicial belief that only truly egregious tortious behavior by a corporate officer—such as active involvement in illegal disposal¹³⁵ or personal supervision over the contaminating practices¹³⁶—should lead to individual liability.¹³⁷

¹³⁵ See *United States v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO)*, 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

¹³⁶ See *United States v. Carolina Transformer Co.*, 739 F. Supp. 1030 (E.D.N.C. 1989).

¹³⁷ See generally Oswald & Schipani, *supra* note 6, at 275–82 (discussing cases applying personal participation theory).

As a practical matter, the courts have determined that the violation giving rise to officer liability must be one in which there is culpability on the part of the corporation *and* the officer.¹³⁸

The most doctrinally sound way to reach this outcome would be to simply apply the personal participation theory of traditional tort and agency law doctrine directly, without attempting to frame it in terms of CERCLA's statutory language. There is nothing fundamentally inconsistent with holding the corporation strictly liable under CERCLA and simultaneously holding the officer liable under a common law fault-based standard where the facts support such individual liability,¹³⁹ nor can such a result be said to be inconsistent with the goals and objectives of CERCLA. Indeed, such a standard would actually promote the goals of CERCLA by ensuring that those held responsible are in fact those whose actions created the need for environmental cleanup.

2. The Control and Prevention Tests

If the courts' attempts to incorporate the traditional personal participation theory into CERCLA's statutory language are problematic, their two attempts to create new standards for determining liability are potentially disastrous. The control and prevention tests reflect judicial desire to effectuate the goals of CERCLA by ex-

¹³⁸ See *id.* Both the retroactivity, see *supra* note 94, and the strict liability standard of CERCLA, see *supra* Section III.B, further complicate the analysis. Under traditional theory, an officer is held liable only where he or she committed affirmative acts that led to the tortious or illegal acts of the corporation. See *supra* note 8 (discussing personal participation theory of traditional doctrine). Ordinarily, violation of a statute is itself a tort. See, e.g., KEETON ET AL., *supra* note 43, § 36, at 230 (violation of statute is generally negligence per se). Logically, this would lead to the inference that an officer whose acts, even if intentional or negligent, led to a CERCLA violation should be personally liable because the violation itself is a tort. Because CERCLA is a strict liability statute, however, the corporation may be in violation even though it did not act intentionally or negligently. Rigid application of traditional theory would thus suggest that the officer too would be liable even though the officer did not commit an intentional or negligent act. Moreover, because CERCLA applies retroactively, see *supra* note 94, the officer could be held liable for affirmative acts taken in the past even though the act was in compliance with all then-applicable legal standards. Conceivably, an officer could be held strictly liable under CERCLA for actions taken in the past that were entirely legal at the time, but that are now illegal under CERCLA. Thus far, no court has reached this result, though certainly the potential for such a result exists. See Dale A. Oesterle, *Viewing CERCLA as Creating an Option on the Marginal Firm: Does It Encourage Irresponsible Environmental Behavior?*, 26 WAKE FOREST L. REV. 39, 47 n.27 (1991) ("Published case law on officer liability typically involves only officers who participated in dumping that was illegal at the time it occurred. Thus, prosecutors may, at present, be using good judgement in refusing to exercise the full power of the statute.").

¹³⁹ This is, in fact, the result normally reached in the context of products liability.

panding officer liability beyond traditional notions to ensure that corporate officers who exercise control over hazardous waste activities or who occupy positions in the corporate structure that would enable them to mitigate or eliminate environmental harms be held individually liable for cleanup costs. Application of these standards again relies upon an interpretation of the categories of PRPs to include officers as well as the corporations that employ them.

Courts applying the "control" theory hold liable those corporate officers who exercise control or authority over the corporation's hazardous waste disposal practices.¹⁴⁰ Although this theory is closely related to the personal participation theory in application, the reasoning underlying it is very different. The control theory focuses on the degree or type of control that the corporate officer exercises over the activities leading to the CERCLA violation,¹⁴¹ as opposed to the officer's actual involvement or participation in those activities.

Every corporate action, however, is the result of a decision by a corporate officer who has the requisite control to decide whether the corporation should act or not act.¹⁴² Thus, every corporate CERCLA violation ultimately can be traced back to an officer or officers whose

¹⁴⁰ See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d. Cir. 1985); *United States v. Carolina Transformer Co.*, 739 F. Supp. 1030 (E.D.N.C. 1989); *United States v. Carolawn Co.*, 14 *Envtl. L. Rep. (Envtl. L. Inst.)* 29,699 (D.S.C. 1984). See generally Oswald & Schipani, *supra* note 6, at 282-91 (discussing cases).

¹⁴¹ See, e.g., *United States v. Carolawn Co.*, 14 *Envtl. L. Rep. (Envtl. L. Inst.)* 20,699, 20,700 (D.S.C. 1984) (noting that "to the extent that an individual has control or authority over the activities of a facility from which hazardous substances are released or participates in the management of such a facility, he may be held liable for response costs incurred at the facility notwithstanding the corporate character of the business"); *United States v. Carolina Transformer Co.*, 739 F. Supp. 1030, 1037 (E.D.N.C. 1989) (noting that "dominant consideration" in assessing personal liability against officers for CERCLA violations is their "significant participation in the running of the company, especially as it relates to waste disposal"); *United States v. Northernair Plating Co.*, 670 F. Supp. 742, 748 (W.D. Mich. 1987) (holding corporate officer liable based not upon his status as corporate officer, but "because of his role in directing the handling of hazardous substances").

The legislative history contains some hints that Congress considered "control" to be a relevant issue in determining liability for CERCLA violations. Senate Report No. 848, for example, stated that strict liability would "create a compelling incentive for those in control of hazardous substances to prevent releases and thus protect the public from harm." S. REP. NO. 848, *supra* note 15, at 14, reprinted in A LEGISLATIVE HISTORY, *supra* note 15, vol. I, at 321 (emphasis added). A complete reading of the Report suggests, however, that the reference to "those in control" meant those corporations in control of the hazardous substances, and not those individual officers within the corporation who could control the corporation's hazardous waste practices. Indeed, my efforts unearthed no official discussion at all in the legislative history regarding the individual liability of corporate officers, other than the statement of Peter Weiner, quoted in note 96 *supra*.

¹⁴² Cf. *United States v. Dotterweich*, 320 U.S. 277, 281 (1943) ("the only way in which a corporation can act is through the individuals who act on its behalf").

exercise of or failure to exercise decision-making authority, whether wrongful or not, resulted in the environmental degradation. CERCLA's strict liability standard provides no statutory mechanism for distinguishing among officers on these grounds—statutorily, the “responsible” officers would have to be held individually strictly liable in every instance. This would hold true even where the CERCLA violation resulted from legally and morally blameless behavior by the corporation.

Thus, in our example of the fictitious Corporation X, Officer Y could be held strictly liable for cleanup costs under the control theory because she was the plant manager, she had the authority to control hazardous waste disposal activities, and she, in fact, exercised that control by hiring Licensed Waste Hauler, Inc. to remove the hazardous substances. The fact that her actions in hiring a licensed hauler were in no way legally or morally culpable would be irrelevant to the imposition of liability, as would be the lack of legal or moral culpability on the part of the Corporation.

Moreover, theoretically, mere possession of control, even in the absence of any affirmative act of commission or omission, could give rise to individual liability under this theory.¹⁴³ As applied by the courts to date, however, the control test edges up against the personal participation test because courts look for *actual* control over hazardous waste practices;¹⁴⁴ mere general managerial control over the corporation has been insufficient to support imposition of personal liability.¹⁴⁵ In addition, in evaluating actual exercises of control

¹⁴³ The statements of some courts suggest that general managerial control is sufficient. *See, e.g.,* New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985) (officer who is in charge of facility may be held liable as operator). The EPA has recently issued a rule rejecting this position in the context of lender liability. *See infra* note 200.

¹⁴⁴ Some courts have explicitly recognized this fact. *See, e.g.,* United States v. Carolina Transformer Co., 739 F. Supp. 1030, 1037 (E.D.N.C. 1989) (“dominant consideration” in holding officers personally liable under CERCLA is their “significant participation in the running of the company, especially as it relates to waste disposal”); United States v. Carolawn Co., 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,699, 20,700 (D.S.C. 1984) (“CERCLA contemplates personal liability of corporate officials. . . who are responsible for the day-to-day operations of a hazardous waste disposal business.”).

¹⁴⁵ For example, in United States v. Northernair Plating Co., 670 F. Supp. 742 (W.D. Mich. 1987), the court held personally liable a corporate president who admitted that he exercised responsibility for arranging for disposal of hazardous wastes. *Id.* at 747. The court noted that the president's “role in directing the handling of hazardous substances,” not merely his status as a corporate officer, was key to his liability. *Id.* at 748.

As Schipani and I discussed, however, three recent cases give rise to concern, not because the courts explicitly held the officers involved liable based upon their general managerial control, but because the courts failed to discuss the fact patterns underlying the cases, thus making it unclear whether the officers were personally involved in the environmental decision-making of the firms. *See* Oswald & Schipani, *supra* note 6, at 289–90 (discussing Vermont v.

over hazardous waste practices, the courts have looked to *wrongful* exercises of or failures to exercise control.¹⁴⁶ Again, the courts are attempting to reach an intuitively “fair” result—of holding personally liable those individuals whose egregious actions led to the environmental contamination. CERCLA, with its strict liability scheme, does not permit such exercises in leniency.

If the courts were to apply the control theory to hold liable those parties who had general managerial control over the corporation, whether exercised or not, the control test would merge into the “prevention” theory. The prevention test is the newest to emerge in the CERCLA arena and was first articulated in *Kelley v. ARCO Industries Corp.*¹⁴⁷ in 1989. The prevention test focuses upon the officer’s ability to prevent the harm from occurring rather than upon the individual’s actual participation in the environmental violation or upon the individual’s exercise of or failure to exercise control over hazardous substances disposal practices.¹⁴⁸

Staco, 684 F. Supp. 822 (D. Vt. 1988), *vacated in part on other grounds*, No. 86–190 (D. Vt. Apr. 20, 1989) (1989 U.S. Dist. LEXIS 17341); International Clinical Laboratories, Inc. v. Stevens, 20 Env’tl. L. Rep. (Env’tl. L. Inst.) 20,560 (E.D.N.Y. 1990); United States v. Mexico Feed & Seed Co., 764 F. Supp. 565 (E.D. Mo. 1991)). The fact that these courts found it unnecessary to address specifically the officers’ level of personal involvement in the violations suggests that these courts may have already started down the slippery slope of strict officer liability.

¹⁴⁶ See, e.g., United States v. Carolina Transformer Co., 739 F. Supp. 1030 (E.D.N.C. 1989) (officers held liable exercised day-to-day control over illegal PCB disposal); United States v. Northern Plating Co., 670 F. Supp. 742 (W.D. Mich. 1987) (officer held liable admitted responsibility for disposal of chemical wastes); see generally Oswald & Schipani, *supra* note 6, at 282–91 (discussing cases).

¹⁴⁷ 723 F. Supp. 1214 (W.D. Mich. 1989). Only one other court to date has adopted this test. See *Quadion Corp. v. Mache*, 738 F. Supp. 270, 274–75 (N.D. Ill. 1990). The United States District Court for the Western District of Michigan has restated the test on two occasions. See *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1542–44 (W.D. Mich. 1989); *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1554, 1560–62 (W.D. Mich. 1989).

¹⁴⁸ Because of the lack of “a more definitive” statutory standard of liability, 723 F. Supp. at 1219, the *ARCO* court articulated the following standard of personal liability for corporate officers:

This Court will look to evidence of an individual’s authority to control, among other things, waste handling practices—evidence such as whether the individual holds the position of officer or director, especially where there is a co-existing management position; distribution of power within the corporation, including position in the corporate hierarchy and percentage of shares owned. Weighed along with the power factor will be evidence of responsibility undertaken for waste disposal practices, including evidence of responsibility undertaken and neglected, as well as affirmative attempts to prevent unlawful hazardous waste disposal. Besides responsibility neglected, it is important to look at the positive efforts of one who took clear measures to avoid or abate the hazardous waste damage.

Id. The court noted that the prevention test is “heavily fact-specific, requiring an evaluation of the totality of the situation.” *Id.* at 1220.

In *ARCO*, the United States District Court for the Western District of Michigan acknowledged that CERCLA is a strict liability statute,¹⁴⁹ yet it hesitated to apply that standard to corporate officers. Application of a strict liability standard to corporate officers would mean that officers would be held liable in every instance based merely upon their status in the corporation, a result the court found “too harsh and broad-sweeping.”¹⁵⁰ Application of traditional tort and agency liability standards, on the other hand, would require a showing of “personal knowledge, direct supervision, or active participation,”¹⁵¹ a standard that the court felt ignored the ability of an officer to prevent harm from occurring. In addition, the court was concerned that under the traditional test, affirmative acts to prevent harm from occurring could actually cause a defendant to be liable (by evidencing active participation in the activities leading to the CERCLA violation), rather than absolving that defendant of liability.¹⁵² Thus, the court looked instead to the individual’s position and authority within the company, the individual’s responsibility for environmental practices, and the actions the individual took or did not take to prevent or minimize environmental harm.¹⁵³

The *ARCO* court was the first court to recognize the dilemma that imposition of officer liability under CERCLA presents. Strict liability is too onerous and oppressive a standard to apply to these individuals, particularly in the absence of any indication that Congress intended such a standard. Nonetheless, the *ARCO* court’s articulation of a new, intermediate standard has no basis in the statute. If we accept the premise that CERCLA is a strict liability statute, and that it applies to corporate officers, the only logical conclusion to be drawn is that corporate officers are strictly liable under CERCLA. The statute provides no room for the fault-based standard the *ARCO* court enunciated.

C. *Selecting the Correct Standard*

The three tests described above are judicial attempts to find a basis for corporate officer liability in CERCLA’s statutory language.

¹⁴⁹ *Id.* at 1219.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1220.

¹⁵² *Id.*

¹⁵³ *See id.* at 1219 (quoted in note 148 *supra*). For an interesting argument that the prevention test promotes economic efficiency, see Kathryn A. Heidt, *Liability of Shareholders Under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)*, 52 OHIO ST. L.J. 133, 172-73 (1991).

What the courts seem to ignore, however, is that nothing in CERCLA's language or legislative history indicates that Congress *intended* that corporate officers be so liable. Broad legislative mandates that "responsible parties" be held liable for cleanup costs¹⁵⁴ do not, without more, support the contention that Congress contemplated a dramatic departure from traditional doctrine to hold officers liable in the absence of culpable behavior.

Moreover, from a policy viewpoint, imposition of such liability is untenable. If PRP status is based upon "control," even narrowly defined as control over environmental decision-making, then officers are potentially strictly liable for the CERCLA violations of their corporations. CERCLA is a strict liability statute, and nothing in its language permits exceptions from liability for corporate officers based upon their degree of fault or blameworthiness. Thus, under the statute, there is no way to distinguish between, say, a corporate officer who willfully authorized the illegal burial of leaking drums of hazardous waste and a corporate officer who authorized a licensed waste hauler to remove hazardous waste to a licensed disposal facility if the hauler then illegally disposed of that waste.

This is not to say that a corporate officer should always be shielded from personal liability for the cleanup costs incurred by his or her corporation. Egregious behavior should lead to liability; however, that liability should be grounded in traditional doctrine, not in CERCLA's nebulous and inexact language. The personal participation theory of traditional agency and tort law doctrine already permits the imposition of personal liability in appropriate cases.¹⁵⁵ A corporate officer whose tortious behavior leads to a CERCLA violation can be held individually liable for the harm that results. Thus, an officer who willfully violates CERCLA provisions, as well as an officer who neglects his or her legal responsibility to ensure safe disposal of hazardous substances, can be held liable for the cleanup costs incurred. Courts need not try to incorporate the personal participation theory into CERCLA in order to apply it to corporate officers. Application of traditional tort and agency law doctrine is adequate to further the legislative goals of CERCLA; expansive readings of the statutory language are unnecessary.

¹⁵⁴ See, e.g., H.R. REP. NO. 253(III), *supra* note 11, at 15, *reprinted in* 1986 U.S.C.C.A.N. at 3038.

¹⁵⁵ See *supra* note 8 (discussing personal participation test).

V. LIABILITY STANDARDS FOR INDIVIDUAL SHAREHOLDERS UNDER CERCLA

Limited liability is the keystone of American corporate law;¹⁵⁶ according to traditional analysis, shareholders invest in corporations precisely because their liability for the corporation's debts is limited to their contribution to capital.¹⁵⁷ Only in "exceptional circumstances"¹⁵⁸ and only where so required by

¹⁵⁶ See, e.g., *Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098, 1102 (5th Cir. 1973), *modified per curiam*, 490 F.2d 916 (5th Cir. 1974):

Basic to the theory of corporation law is the concept that a corporation is a separate entity, a legal being having an existence separate and distinct from that of its owners. This attribute of the separate corporate personality enables the corporation's stockholders to limit their personal liability to the extent of their investment. . . . The corporate form, however, is not lightly disregarded, since limited liability is one of the principal purposes for which the law has created the corporation.

See also HENN & ALEXANDER, *supra* note 8, § 73; Adolf A. Berle, Jr., *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343, 343 (1947).

¹⁵⁷ See, e.g., Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 616 (1986) ("By accomplishing risk-shifting not created in the market place, limited liability encourages business managers to venture into activities that they would otherwise not undertake."); Easterbrook & Fischel, *supra* note 8, at 93-101 (limited liability is an essential characteristic of publicly-held firm, and benefits both voluntary creditors and shareholders); Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499, 502 (1976) ("[U]nlimited liability would discourage investment in business ventures by individuals who wanted to make small, passive investments in such ventures. It would also discourage even substantial entrepreneurial investments by risk-averse individuals. . . ."). As stated by the Fifth Circuit:

Under the doctrine of limited liability, the owner of a corporation is not liable for the corporation's debts. Creditors of the corporation have recourse only against the corporation itself, not against its parent company or shareholders. It is on this assumption that "large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted."

United States v. Jon-T Chems., Inc., 768 F.2d 686, 690 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986) (citations omitted).

¹⁵⁸ 1 WILLIAM M. FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 41.10, at 614-15 ("[T]he imposition of liability notwithstanding the corporate shield is to be exercised reluctantly and cautiously. Some courts speak of disregard of the corporate entity as requiring exceptional circumstances.") (footnotes omitted). Courts generally consider the following types of factors in evaluating whether the corporate form should be ignored:

(1) undercapitalization of a one-man corporation, (2) failure to observe corporate formalities, (3) nonpayment of dividends, (4) siphoning of corporate funds by the dominant stockholder, (5) nonfunctioning of other officers or directors, (6) absence of corporate records, (7) the use of the corporation as a facade for operations of the dominant stockholder or stockholders, and (8) the use of the corporate entity in promoting injustice or fraud.

Ramsey v. Adams, 603 P.2d 1025, 1028 (Kan. Ct. App. 1979); see also 1 FLETCHER, *supra*, § 41.30, at 661-66 (corporate form will be disregarded when used to "defeat public convenience, justify wrong. . . or perpetrate fraud or other reprehensible conduct"); David H. Barber, *Piercing the Corporate Veil*, 17 WILLAMETTE L. REV. 371, 373-75 (1981) (discussing judicial rationales for piercing).

equity¹⁵⁹ will the courts pierce the corporate veil and hold the shareholders personally liable for the corporation's debts and liabilities.¹⁶⁰

¹⁵⁹ See, e.g., *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 987 (Del. Ch. 1987) ("The protection offered by the corporate form, however, is not absolute; equity has long acted to extend a corporate liability to those in control of the corporation in appropriate circumstances.").

¹⁶⁰ A significant body of literature has developed in recent years urging the abolition of limited liability for shareholders. See, e.g., Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879 (1991) (concluding that shareholders of both publicly-held and closely-held corporations should be subjected to unlimited liability for corporate torts); Paul Halpern et al., *An Economic Analysis of Limited Liability in Corporation Law*, 30 U. TORONTO L.J. 117, 148-49 (1980) (concluding that limited liability regime is appropriate for large, widely-held corporations, but that unlimited liability regime is appropriate for closely-held corporations); Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1, 65-76 (1980) (limited liability of shareholders for debts to involuntary shareholders undermines compensation of victims and makes mockery of deterrence). Commentators have postulated that limited liability poses several advantages, such as insulating absentee investors from exposure to risk, permitting diversification of portfolios, minimizing agency and collection costs, promoting efficiency in the marketplace, eliminating the expense of contracting around liability, and encouraging risk-taking. See PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS: SUBSTANTIVE LAW* § 4.02 (1987) (summarizing arguments for limited liability). Other commentators have criticized limited liability, arguing that it creates unfairness and inefficiency for tort and other involuntary creditors and for labor claimants, encourages excessively risky investments, results in increased information and monitoring costs, and impairs the efficiency of the marketplace. *Id.* § 4.03 (summarizing arguments against limited liability). Thus, many of the arguments for unlimited shareholder liability mimic those in favor of strict liability. For example, commentators have argued that limited liability deprives defendants of economic incentives to be prudent and thus results in more negligence than would occur if liability were unlimited. See, e.g., Dent, *supra* note 113, at 165; Alan Schwartz, *Products Liability, Corporate Structure and Bankruptcy: Toxic Substances and the Remote Risk Relationship*, 14 J. LEGAL STUD. 689, 706-14 (1985). "Limited liability also causes allocative distortions by 'encourag[ing] investment in inefficient ventures' and stimulating excessive investment in industries that escape the costs of accidents they cause." Dent, *supra* note 113, at 168 (quoting Note, *supra* note 111, at 989).

Even though it seems highly improbable that the law will abandon limited liability of shareholders at any time in the near future, the theory of unlimited shareholder liability provides a useful analogy for the purposes of this Article. Indeed, unlimited shareholder liability can be viewed as a form of blanket strict liability. Although commentators speak in terms of subjecting the shareholders to "unlimited liability" for the negligent or intentional torts of their corporation, the net effect of that action would be to hold the shareholders strictly liable for those torts. Determinations of fault would be made at the level of the corporation's actions and would be irrelevant at the level of the shareholder.

Many of the commentators writing in this field distinguish between limited liability in the contract context and limited liability in the tort context, arguing that limited liability is less justifiable in tort actions, which involve "involuntary creditors," than in contract claims, which involve "voluntary" creditors. See, e.g., Hansmann & Kraakman, *supra*, at 1919-20; David W. Leeborn, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1604-05 (1991). Commentators disagree on whether courts are more likely to pierce the corporate veil in the contract context or the tort context. Compare Easterbrook & Fischel, *supra* note 8, at 112 ("Courts are more willing to disregard the corporate veil in tort than in contract cases.") with HENN & ALEXANDER, *supra* note 8, § 146, at 348 ("[c]ourts usually cite contract

CERCLA manifests congressional intent that those "responsible" for the contamination pay for its cleanup.¹⁶¹ This statement, standing alone, hardly indicates that Congress intended that CERCLA override the traditional protections of the corporate form in order to hold shareholders personally liable for the CERCLA violations of their corporations in every instance. Nothing in CERCLA's language supports imposition of strict liability upon individual shareholders. Moreover, an examination of the policies underlying traditional notions of limited liability reveals that imposition of strict liability upon the shareholders of a corporation that has violated CERCLA would not further CERCLA's statutory goals.

The courts, in fact, have not held individual shareholders strictly liable in their role as shareholders for the cleanup costs imposed upon their corporations. Rather, it would appear that every case imposing liability upon a shareholder to date has involved an active shareholder of a closely-held corporation.¹⁶² In each case, the individual's liability can more appropriately be traced to his or her actions undertaken in his or her role as an officer or an employee of the firm.¹⁶³ The courts have failed to make clear, however, the distinction between holding the individual liable as an "owner" in his or her role as a shareholder, and holding the same individual personally liable for activities undertaken in his or her role as a corporate officer. The careless language and reasoning that these courts offer creates the impression that shareholders can indeed be held

and tort cases indiscriminately as precedents"); and Stone, *supra*, at 69 n.261 ("[W]hile social policy would seem to support piercing the corporate veil to establish investor liability more in tort. . . than in contract, the doctrine of 'piercing' seems to operate more on behalf of voluntary. . . creditors."); and Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1058 (1991) (empirical analysis indicates "that courts pierce more often in the contract context than in tort"). At least one court has explicitly denied the existence of any such distinction in the context of CERCLA. See *In re Acushnet River & New Bedford Harbor Proceedings: Re Alleged PCB Pollution*, 675 F. Supp. 22, 31-32 (D. Mass. 1987).

Liability under CERCLA is more akin to the tort situation, where the injured party is involuntarily forced into an unwanted relationship and has no bargaining power to alter the governing liability rules. Society does not contract voluntarily with a defendant for environmental contamination, and is not able to negotiate for a better position in advance of the harm arising.

¹⁶¹ See *supra* note 11.

¹⁶² See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *United States v. Carolina Transformer Co.*, 739 F. Supp. 1030 (E.D.N.C. 1989); *United States v. Bliss*, 20 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,879 (E.D. Mo. 1988); *United States v. Northernair Plating Co.*, 670 F. Supp. 742 (W.D. Mich. 1987); *United States v. Conservation Chem. Co.*, 628 F. Supp. 391 (W.D. Mo. 1986); *United States v. Ward*, 618 F. Supp. 884 (E.D.N.C. 1985).

¹⁶³ See *id.*; see generally Oswald & Schipani, *supra* note 6, at 297.

strictly liable in their role as shareholders, and sets the stage for future expansion of CERCLA liability beyond that contemplated by Congress.

A. Application of the Strict Liability Standard to Shareholders

There may be some validity to the argument that imposing strict liability upon shareholders would promote fairness. Even though the shareholders might well be as blameless as the victim in any given scenario of environmental contamination, they capture the benefits of the corporation's activities through their claim on corporate profits, and thus, arguably, they should bear the costs of those activities.¹⁶⁴ Shareholders do bear those costs, however, at least to the extent of their investment in the firm. The question is whether notions of fairness should override the traditional limits on shareholder liability so as to render these parties responsible for cleanup costs exceeding their contribution to the firm's capital. Corporations are created under state statutory law and their activities generally are regulated at that level, not at the federal level.¹⁶⁵ While the federal government has the power to preempt conflicting state legislation,¹⁶⁶ normally the courts look for signs of explicit congressional intent to do so before finding that preemption exists.¹⁶⁷ Nothing in CERCLA's sparse statutory language nor in its muddled legislative history would indicate that Congress intended CERCLA to negate traditional notions of corporate form and shareholder obligations.¹⁶⁸

¹⁶⁴ Commentators have addressed this issue in the context of unlimited shareholder liability. See *supra* notes 52-56 and accompanying text (discussing fairness rationale for strict liability).

¹⁶⁵ See *Cort v. Ash*, 422 U.S. 66, 84 (1975) ("Corporations are creatures of state law. . . ."); 1 FLETCHER, *supra* note 158, § 2.55 at 254 ("The internal affairs of corporations are to be governed by state law unless federal law expressly provides otherwise because corporations are creators of state law.") (footnote omitted).

¹⁶⁶ U.S. CONST. art. VI, cl. 2.

¹⁶⁷ See *Michigan Canners & Freezers Ass'n., Inc. v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (citations omitted)):

First, in enacting the federal law, Congress may explicitly define the extent to which it intends to pre-empt state law. Second, even in the absence of express pre-emptive language, Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government. Finally, if Congress has not displaced state regulation entirely, it may nonetheless pre-empt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible, or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

¹⁶⁸ See Audrey J. Anderson, Note, *Corporate Life After Death: CERCLA Preemption of State Corporate Dissolution Law*, 88 MICH. L. REV. 131, 133-35 (1989) (discussing CERCLA's preemption language and legislative history).

Forcing shareholders to bear strict liability for the injuries that their firms' activities inflict will not further the economic efficiency goals of internalization of costs. Costs borne by shareholders are not equivalent to costs borne by the corporation itself; shareholders, like the officers discussed above,¹⁶⁹ lack a mechanism to ensure that the liability they incur will be passed along to the firm's customers through increased prices.¹⁷⁰ Because the corporation remains strictly liable under CERCLA regardless of whether the shareholders are held so liable, the corporation already has an incentive for treating cleanup costs as a production cost and thus for reflecting those costs in the pricing of its goods or services. Therefore, holding shareholders strictly liable in addition to holding the corporation so liable does not promote efficient resource allocation or maximization of social welfare.

As a practical matter, imposition of strict liability upon shareholders would do little to foster the spreading of risk. In a closely-held corporation, the small number of shareholders will make significant risk-spreading difficult, if not impossible, to achieve. In the context of a publicly-held corporation with numerous shareholders, imposition of strict liability upon the shareholders for the corporation's CERCLA violations might result in some spreading of risk. If each individual shareholder were required to bear a pro rata share of the costs of cleanup, for example, those costs would be spread over a larger group of persons, although such "risk-spreading" is still relatively narrow. As noted above, however, the costs of the liability risks borne by the corporation are already reflected in the prices of the goods.¹⁷¹ Extending that liability to shareholders merely accomplishes limited risk-spreading in the situation in which actual liabilities exceed the projected liabilities reflected in price.¹⁷²

¹⁶⁹ See *supra* note 105 and accompanying text (discussing inability of officers to internalize costs).

¹⁷⁰ See *supra* notes 59-61 and accompanying text (discussing free market pricing mechanism).

¹⁷¹ See *id.*

¹⁷² Cf. Schwartz, *supra* note 160, at 729:

The loss-spreading justification for strict liability cannot support remote risk impositions because firms will not spread the losses associated with remote risks. Firms spread losses by insuring against them and reflecting premium costs in their prices. Because firms are ignorant of remote risks, they do not insure them fully. Consequently, when these risks materialize a court's choices are limited to letting the resultant costs lie or ordering direct wealth transfers from a firm's shareholders to plaintiffs. Neither outcome produces loss spreading.

Id. Schwartz defines a "remote risk" as "the risk that a product is more dangerous than a firm would predict if it had done the cost-effective amount of research into safety." *Id.* at 691.

In addition, imposition of liability upon shareholders raises the question of how that liability should be apportioned—on a pro rata or a joint and several basis. Both methods are problematic. The logistical difficulties and high transaction costs associated with collecting pro rata shares from large numbers of shareholders would likely prove insurmountable.¹⁷³ Although these problems could be minimized by imposing joint and several liability against individual shareholders,¹⁷⁴ the risk-spreading attributes of pro rata liability would be lost as a result.¹⁷⁵

Finally, holding shareholders individually strictly liable for their corporation's CERCLA violations is unlikely to promote the deterrence that proponents of strict liability commonly seek. In a publicly-held firm with hundreds or thousands of shareholders, the ability of any one shareholder to affect corporate decision-making processes through the shareholder ballot box is necessarily weak. Individual shareholders cannot minimize the harm that results from the corporation's actions, nor are they in a position to influence the corporation's day-to-day activities.¹⁷⁶ To have any effect at all on corporate

¹⁷³ See, e.g., Leebron, *supra* note 160, at 1611 ("The transaction costs of collecting the pro rata shares against typical individual shareholders would in almost every case be so high that it would not be worth it."); but see Hansmann & Kraakman, *supra* note 160, at 1900–01 (arguing that collection costs would not be prohibitive because courts could administer collection effort, just as bankruptcy trustees currently collect hundreds or thousands of accounts receivables; further, insurers would likely offer portfolio insurance to risk-averse shareholders). See generally BLUMBERG, *supra* note 160, § 4.05.1 (discussing imposition of pro rata liability on shareholders).

¹⁷⁴ Joint and several liability would be a more logical choice than pro rata liability because CERCLA is a joint and several liability statute. See Valder, *supra* note 36, at 2079–81.

¹⁷⁵ Information costs would rise as shareholders sought increased information about the wealth and financial status of their fellow investors. See Easterbrook & Fischel, *supra* note 8, at 95.

¹⁷⁶ Shareholders' control over policy matters or long-term corporate objectives essentially is limited to their ability to vote for the board of directors. See, e.g., DEL. CODE ANN. tit. 8, § 141(a) (1983) ("business and affairs" of corporation "shall be managed by or under the direction of a board of directors"); see generally HENN & ALEXANDER, *supra* note 8, ch. 9(D) (discussing rights and duties of shareholders). Hansmann and Kraakman argue that unlimited shareholder liability would actually result in greater incentives to management to avoid tort liability because shareholders faced with contingent tort liability would demand, and managers would supply, more data regarding the riskiness of corporate policies because this data would affect share pricing. Hansmann & Kraakman, *supra* note 160, at 1907. Even if this were so (and I am not yet convinced that it is), it does not affect the discussion of whether shareholders should be strictly liable for CERCLA liabilities of their corporations. If firms are subjected to unlimited shareholder liability for all types of torts, the prices of the shares of all firms will be affected in the same manner. If shareholders are only subjected to liability for the environmental debts of their firms, however, the result will be a fundamental shift in the marketplace for shares of corporations whose activities are more likely to give rise to environmental liability.

environmental policy, many, if not most, of the shareholders would have to act in concert to influence the board.¹⁷⁷

Even in a closely-held firm, where the shareholders generally possess greater control over corporate management, imposing strict liability on shareholders is unlikely to promote deterrence. Because the corporation itself is strictly liable, all of the firm's assets, and thus all of the shareholders' investment, are already at stake. It is unclear why this substantial liability should not provide adequate incentive to discourage environmentally risky activities. Moreover, a shareholder's liability is limited by the extent of his or her personal assets; imposition of strict liability upon these individuals will simply encourage investment in environmentally risky firms by less wealthy individuals.¹⁷⁸ Thus, imposition of strict liability upon shareholders of closely-held firms would pressure those individuals into either undertaking a more active role in the corporation's management that would allow them to influence company policy and guard against environmental harm,¹⁷⁹ or into divesting their ownership interest.¹⁸⁰

Holding shareholders strictly liable for the CERCLA violations of their corporations would fundamentally alter traditional notions of shareholder liability, and would work substantial changes on shareholder investment patterns. Imposition of either pro rata or joint and several liability would undoubtedly throw the financial market into disarray¹⁸¹ as shareholders sought to divest themselves of stock

¹⁷⁷ Even then the ability of the shareholder of a large corporation to effect change is relatively minimal. The courts have implicitly recognized this fact, and have declined to pierce the corporate veil to hold shareholders of publicly-held corporations individually liable in any context. See Thompson, *supra* note 160, at 1047.

¹⁷⁸ See SHAVELL, *supra* note 124, at 182 ("Under strict liability, injurers will take no care if their assets are sufficiently low. They will take a positive and increasing level of care as their assets rise, but their level of care will be suboptimal as long as their assets are less than the losses they might cause."); Susan E. Woodward, *Limited Liability in the Theory of the Firm*, 141 J. INSTITUTIONAL & THEORETICAL ECON. 601, 602 (1985) (if shares are freely transferable and shareholders are subject to personal liability for corporate debts, in threat of bankruptcy, wealthy shareholders would have incentive to sell their shares to individuals with few or no assets worth pursuing).

¹⁷⁹ Cf. Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80, 102 (1991) ("Without limited liability, all owners would be forced to either take an active role in management or to suffer severe consequences from poor management decisions.").

¹⁸⁰ In the context of a closely-held firm, this could prove difficult, if not impossible. The market for shares of closely-held corporations is often very limited. Moreover, restrictions may have been placed upon transfer of the stock to prevent it from passing from the hands of a narrowly defined group of persons.

¹⁸¹ Cf. Woodward, *supra* note 178, at 601 ("[T]he most important feature of limited liability is that it accommodates transferable shares. Any extension of liability beyond the assets of the firm to the personal (extra-firm) assets of the shareholders must, in order to be enforceable,

in industries likely to give rise to large potential individual liability for CERCLA violations.¹⁸² Most likely, imposition of strict liability on shareholders would cause risk-averse individuals to divest and reinvest in other, "safer," firms, i.e., firms whose activities posed less risk of environmental contamination.¹⁸³ This result may be preferable in the context of firms whose egregious activities or poor technological processes create the potential for severe and unnecessary environmental harm because the forces of the financial market would discourage these firms from continuing their risky practices. The strict nature of CERCLA liability means, however, that, because of the risk of financial ruin, shareholders will also be discouraged from investing in activities that are undeniably socially beneficial. Even a business as commonplace and as socially necessary as a gas station poses a risk of environment contamination because of leaking underground tanks or spilled fuel.¹⁸⁴ If shareholders are faced with strict liability even where the corporation has acted carefully and reasonably in every way, they will be hesitant to invest in firms of this type.¹⁸⁵

impair transferability of shares."); Ribstein, *supra* note 179, at 99-100 ("Limited liability is a necessary condition of market efficiency because it facilitates free transferability of shares and pricing of shares according to expected cash flows."); *but see* Hansmann & Kraakman, *supra* note 160, at 1895-99 (arguing that rule of unlimited liability could be drafted that would not impair the marketability of securities), 1903-04 (arguing that while joint and several liability would distort market for shares, pro rata liability would not). Thompson suggests that the courts have recognized the potential burden that unlimited liability could present to the securities market, and have acted accordingly: "The willingness [of the judiciary] to sometimes hold shareholders of close corporations liable, but never shareholders of public corporations, suggests that limited liability's positive role in facilitating the public market for shares is strong enough to overcome any justification for piercing." Thompson, *supra* note 160, at 1070-71.

¹⁸² Some commentators have argued that if the objective is simply to spread the costs over as large a group as possible, it would make more sense to have the costs of cleanup borne by the government, which is, after all, the ultimate risk-spreader. *See, e.g.,* Dent, *supra* note 113, at 174 ("The federal government is a better risk-spreader than even the largest firm.").

¹⁸³ *See* Note, *supra* note 111, at 989 ("most investors are risk averse when a large portion of their wealth is at stake") (footnote omitted). *See also supra* note 111 (discussing risk aversion of investors).

¹⁸⁴ *See generally* John A. Chanin, Comment, *LUST on Your Corner: Strict Liability, Victim Compensation, and Leaking Underground Storage Tanks*, 62 U. COLO. L. REV. 365 (1991).

¹⁸⁵ *See, e.g.,* Korhonen & Smith, *supra* note 4, at 315-16 (broad CERCLA liability chills certain types of transactions within chemical and waste industries); Perry E. Wallace, Jr., *Liability of Corporations and Corporate Officers, Directors, and Shareholders Under Superfund: Should Corporate and Agency Law Concepts Apply?*, 14 J. CORP. L. 839, 842 (1989) (broad judicial interpretations of CERCLA liability have created "uncertainties and fears" that "unnecessarily diminish the affected industries' contributions to certain basic economic and business functions in society"); Rallison, *supra* note 4, at 622-23 (broad judicial interpretations of CERCLA liability alter investment and divestment patterns in certain industries).

Returning to our earlier example of the fictitious Corporation X, let us assume that the Corporation is owned equally by two individuals. Shareholder Z receives annual dividends and votes for the board of directors, but has no other connection with the management or operation of the firm. Shareholder/Officer Y, on the other hand, is actively involved in the management and day-to-day operation of the firm as an officer and director. Assume further that Corporation X, with the full knowledge and active participation of Shareholder/Officer Y, illegally dumps toxic wastes on the ground outside of the Corporation's plant. Eventually, this results in an EPA-ordered cleanup under CERCLA. The EPA seeks to hold Shareholders Y and Z individually liable.

Should these two individuals be held strictly liable for cleanup costs because of their status as shareholders of Corporation X? Clearly not. Accurate analysis of this issue depends upon making a careful distinction between holding these individuals liable as "owners" and holding them liable as "operators"—a distinction the courts have been noticeably lax in drawing.¹⁸⁶ The basis for liability under these two categories is quite different: the term "owner" implies that liability can be based solely upon status as an owner, even in the absence of actual participation in the environmental practices or management of the facility, while the term "operator" indicates some degree of involvement in those activities.¹⁸⁷

Neither of these terms can properly be applied to shareholders. First, while the courts have failed to focus on whether a PRP must be the owner of the corporation that owns the facility or the owner of the facility itself,¹⁸⁸ CERCLA itself is quite clear in stating that ownership or operation of the *facility* is key to establishing liabil-

¹⁸⁶ See Heidt, *supra* note 153, at 174-75 (noting that over one-half of courts have confused terms "owner" and "operator"); Oswald & Schipani, *supra* note 6, at 300 ("[A]lthough an individual may be liable under CERCLA as either an owner or an operator, courts typically connect the terms as a single phrase—'owner or operator'—and fail to distinguish between the grounds supporting the imposition of liability upon the two categories of potentially responsible parties.").

¹⁸⁷ See Heidt, *supra* note 153, at 155. The courts have begun to recognize this distinction in the parent corporation context. See, e.g., *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990) (characterizing operator liability as direct liability based upon parent's own activities, as opposed to activities of its subsidiary, while owner liability is indirect liability that falls under traditional corporate law doctrines, such as piercing of corporate veil), *cert. denied*, 111 S. Ct. 957 (1991); *Jacksonville Elec. Auth. v. Eppinger & Russell Co.*, 776 F. Supp. 1542 (M.D. Fla. 1991) (using different standards to evaluate parent's liability as owner versus as operator); *John Boyd Co. v. Boston Gas Co.*, 775 F. Supp. 435 (D. Mass. 1991) (same).

¹⁸⁸ See Heidt, *supra* note 153, at 155.

ity.¹⁸⁹ A shareholder of a firm is an owner of the corporation, which in turn is the owner of the facility giving rise to CERCLA liability. The shareholder has no property interest in the facility, only in the corporation itself; thus, the shareholder is not an "owner" of the facility.¹⁹⁰ Absent a piercing of the corporate veil,¹⁹¹ therefore, shareholders cannot be held liable under CERCLA as "owners."

Second, shareholders cannot be held liable under CERCLA as "operators." It is impossible for a shareholder to engage in behavior that would lead to that individual being held liable as an "operator" under CERCLA. Shareholders are, by definition, investors in the firms and their authority is limited to electing the board of directors and voting on major corporate actions; they have no ability to engage in day-to-day management of the firm, its operations, or its hazardous waste practices.¹⁹²

Does this mean that Shareholder/Officer Y, who has undeniably engaged in egregious and illegal behavior, escapes all liability for his actions? Certainly not. He can be held personally liable under the personal participation theory discussed above¹⁹³ because of his affirmative acts of commission or omission in the activities that led to the CERCLA violation. This liability is based upon his actions undertaken in his role as an officer of the firm, however, not upon his status as a shareholder.¹⁹⁴

Although courts that have analyzed analogous situations in the past have reached essentially this same outcome, they have failed

¹⁸⁹ See 42 U.S.C. § 9607(a) (1988) (quoted in note 28 *supra*).

¹⁹⁰ The Fifth Circuit explicitly recognized this point in *Riverside Market Dev. Corp. v. International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir. 1991) (individual's position as majority stockholder in the corporation that purchased the facility did not make him an owner of the facilities because "[t]he property of the corporation is its property, and not that of the stockholders, as owners") (quoting 1 FLETCHER, *supra* note 158, § 31 at 555), *cert. denied*, 112 S. Ct. 636 (1991). See also HENN & ALEXANDER, *supra* note 8, § 71 (shareholders do not own assets of corporation, although they may exercise limited control over those assets); Heidt, *supra* note 153, at 174 ("A shareholder of a corporation which owns the facility, is not an 'owner' of the facility—unless the corporate veil is pierced."); Oswald & Schipani, *supra* note 6, at 299 ("Shareholders are investors in the corporation engaging in hazardous waste activities; the corporation itself is the 'owner' of the facility.").

¹⁹¹ See *supra* notes 158–60 and accompanying text (discussing piercing doctrine).

¹⁹² See *supra* note 176 (discussing rights of shareholders). See also Oswald & Schipani, *supra* note 6, at 299–300 ("[A]s a practical matter, it is impossible for an individual acting solely in his or her capacity as a shareholder to be an 'operator' of a facility. Shareholders merely hold ownership interests in the corporation, collect distributions, elect directors, and vote on major corporate actions.").

¹⁹³ See *supra* Section IV.B.1 (discussing application of personal participation test to officers).

¹⁹⁴ Shareholder Z, as a passive shareholder, occupies no such position within the corporate hierarchy, and so could not be held liable under this theory.

to carefully distinguish between holding active shareholders liable as officers and holding them liable as shareholders.¹⁹⁵ Only by clarifying that individuals such as Shareholder/Officer Y are liable in their capacity as *officers*, not shareholders, can the courts ensure that legal rules are not articulated that would inappropriately hold passive shareholders, such as Shareholder Z, liable in their capacity as owners of the corporation that owns or operates the facility.

B. Current Standards of Shareholder Liability Under CERCLA

No court has yet attempted to hold an individual shareholder *strictly* liable as an "owner" for the CERCLA violations of the corporation in which that shareholder held stock. Nonetheless, a number of CERCLA opinions indicate that shareholders can, and should, be held personally liable for the CERCLA violations of their corporation.¹⁹⁶ Although the courts have failed to acknowledge this fact explicitly, the key to understanding these opinions is that each of these individuals was an active shareholder in a closely-held corporation. The liability of these individuals was based upon their actions undertaken in their roles as corporate officers, not their status as shareholders. The courts have never held liable under CERCLA a shareholder who was not also an employee or officer of the corporation committing the CERCLA violation, and who was not somehow actively involved in the activities that led to that violation.

Generally, courts have relied upon the statutory definitions of section 101(20)(A) of CERCLA in holding shareholders individually liable for their corporations' environmental violations.¹⁹⁷ This section specifically excludes from the definition of "owner and operator" any person "who, without participating in the management of. . .a

¹⁹⁵ See *infra* note 196 and accompanying text (collecting cases).

¹⁹⁶ See *e.g.*, *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *United States v. Carolina Transformer Co.*, 739 F. Supp. 1030 (E.D.N.C. 1989); *United States v. Bliss*, 20 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,879 (E.D. Mo. 1988); *United States v. Northernaire Plating Co.*, 670 F. Supp. 742 (W.D. Mich. 1987); *United States v. Ward*, 618 F. Supp. 884 (E.D.N.C. 1985); *United States v. Conservation Chem. Co.* 628 F. Supp. 391 (W.D. Mo. 1986); *United States v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO)*, 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). See generally *Oswald & Schipani*, *supra* note 6, at 297-301 (discussing cases involving individual shareholder liability).

¹⁹⁷ *But see United States v. Mottolo*, 695 F. Supp. 615 (D.N.H. 1988) (corporate veil pierced to hold active shareholder individually liable) (discussed in *Oswald & Schipani*, *supra* note 6, at 297-98).

. . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility.”¹⁹⁸ Congress designed this provision to ensure that secured creditors did not become liable for their debtors’ CERCLA violations.¹⁹⁹ Several courts have held, however, that the logical antithesis of this exception is that persons who do hold indicia of ownership and who do participate in the management of the firm—i.e., active shareholders—are liable as owners or operators.²⁰⁰ To find otherwise, in the words of one court, “would frustrate congressional purpose by exempting from the operation of the Act a large class of persons who are uniquely qualified to assume the burden imposed” by CERCLA.²⁰¹

¹⁹⁸ 42 U.S.C. § 9601(20)(A) (1988).

¹⁹⁹ See H.R. REP. NO. 172, 96th Cong., 2d Sess., pt. 1, at 36, reprinted in A LEGISLATIVE HISTORY, *supra* note 15, vol. II, at 546 (secured creditor exception was designed to protect financial institutions that “hold title either in order to secure a loan or in connection with a lease financing arrangement under the appropriate banking laws, rules, or regulations”).

²⁰⁰ See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985) (“The use of this exception implies that an owning stockholder who manages the corporation. . . is liable under CERCLA as an ‘owner or operator.’”); *NEPACCO*, 579 F. Supp. at 848 (“The statute literally reads that a person who owns interest [sic] in a facility and is actively participating in its management can be held liable for the disposal of hazardous waste.”), *aff’d in part, rev’d in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *United States v. Mirabile*, 15 *Env’tl. L. Rep. (Env’tl. L. Inst.)* 20,994, 20,995 (E.D. Pa. 1985) (“Courts have generally concluded that the exemption from liability gives rise to an inference that an individual who owns stock in a corporation and who actively participates in its management can be held liable for clean up costs incurred as a result of improper disposal by the corporation.”).

Although a recent rule issued by the EPA regarding the liability of secured creditors, see 57 *Fed. Reg.* 18382 (Apr. 29, 1992) (to be codified at 40 C.F.R. § 300.1100), does not address shareholder corporation liability, it does address an analogous issue: the liability of secured creditors as owners or operators under CERCLA when property in which they hold a security interest is contaminated with hazardous substances. The rule is intended to relieve the uncertainty felt by lending institutions after the Ninth Circuit held in *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991), that a creditor could be held liable under CERCLA if the extent of the creditor’s participation in the financial management of the debtor’s business indicated that the creditor had the capacity to influence the debtor’s treatment of hazardous waste. The rule defines the key provisions of the secured creditor exemption found in CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A)(1988).

The rule specifically provides that the “mere capacity to influence, or ability to influence, or the unexercised right to control facility operations” does not constitute participation in the management of the facility. 57 *Fed. Reg.* at 18383. Rather, participation in management for purposes of § 101(20)(A) consists of the exercise of decision-making control over the debtor’s environmental compliance, or exercise of control over the overall day-to-day decision-making of the enterprise with respect to either environmental compliance or substantially all of the operational aspects of the enterprise. *Id.* It could be argued by analogy that shareholder liability likewise should be based upon actual exercise of control, as opposed to mere capacity to control. It is too early to tell, however, what position the EPA or the courts will take on this issue.

²⁰¹ *NEPACCO*, 579 F. Supp. at 848–49 (citing *Apex Oil Co. v. United States*, 530 F.2d

This argument fails to hold up upon close examination. As noted above,²⁰² a shareholder holds indicia of ownership in the corporation itself, not the facility. A secured creditor, on the other hand, does have a property interest in the facility in which it holds a security interest.²⁰³ It requires a giant leap of faith and logic to assume that Congress, when it strove to protect inactive secured creditors from liability, intended to hold liable as “owners” or “operators” shareholders who participate in management.

C. *Selecting the Correct Standard*

The courts' attempts to hold active shareholders liable under section 101(20)(A) of CERCLA reflect judicial concern that individuals whose deliberate or negligent acts resulted in environmental contamination not escape liability by hiding behind their status as shareholders. It is not necessary, however, to extend CERCLA's definition of “owner” to such great lengths in order to reach active shareholders who are responsible for the CERCLA violations of their corporations. These individuals can be held liable based upon their activities undertaken in their roles as corporate officers or employees. Moreover, shareholders who abuse the corporate form, through undercapitalization, fraud, etc., can lose the protection of that form.²⁰⁴ The traditional rules of corporate law still apply; under

1291, 1293 (8th Cir. 1976), *cert. denied*, 429 U.S. 827 (1976)). The *NEPACCO* court relied heavily upon the Eighth Circuit's construction of the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1988) in reaching this result:

The owner-operator of a vessel or a vacity [sic] has the capacity to make timely discovery of oil discharges. The owner-operator has power to direct the activities of persons who control the mechanisms causing the pollution. The owner-operator has the capacity to prevent and abate damage. Accordingly, the owner-operator of a facility governed by the [Clean Water Act], such as the Mobil facility here, must be regarded as a “person in charge” of the facility for the purposes of § 1161. A more restrictive interpretation would frustrate congressional purpose by exempting from the operation of the Act a large class of persons who are uniquely qualified to assume the burden imposed by it.

United States v. Mobil Oil Corp., 464 F.2d 1124, 1127 (5th Cir. 1972) (*quoted by Apex Oil Co.*, 530 F.2d at 1293).

²⁰² See text accompanying note 189 *supra*.

²⁰³ Under the Uniform Commercial Code, a security interest is “an interest in personal property or fixtures which secures payment or performance of an obligation.” U.C.C. § 1-201(37) (1978). Under the Bankruptcy Code, a “security interest” is a “lien created by an agreement,” 11 U.S.C. § 101(45) (1988); “lien” is further defined as a “charge against or interest in property to secure payment of a debt or performance of an obligation.” *Id.* § 101(33). See generally Heidt, *supra* note 153, at 156-57.

²⁰⁴ See *supra* note 158 and accompanying text (discussing factors that can lead to piercing of corporate veil).

appropriate circumstances, the court can pierce the corporate veil to hold shareholders individually liable for the corporation's debts²⁰⁵ or hold active shareholders liable for direct involvement undertaken in their roles as officers or employees.²⁰⁶ Mere status as shareholders should not subject individuals to CERCLA liability.

VI. CONCLUSION

In enacting CERCLA, Congress attempted to hold financially liable those parties whose activities and decisions are responsible for environmental hazards. Few would quibble with its goal. Legislative and judicial pronouncements that "the polluter should pay" resonate with deep chords of fairness and justice. Why should the parties responsible for environmental contamination not be the ones liable for cleaning it up?²⁰⁷

But CERCLA's broad definitions of "responsible persons" and its strict liability scheme can result in parties other than the "polluter" bearing at least part of the costs of cleanup. CERCLA's retroactive provisions can reach parties whose activities were entirely legal at the time they were undertaken; its joint and several liability provisions can result in parties being held liable for harm they did not cause. And while holding the corporation strictly liable may well further the public policy goals of CERCLA, holding corporate individuals so liable does not further these goals.

As Sophocles noted, "[t]here is a point beyond which even justice becomes unjust."²⁰⁸ While the courts have recognized that extension of strict liability to individuals would take "justice" too far, in their efforts to modify CERCLA's strict liability provisions to create fault-based standards applicable to individuals, the courts have formulated excessively broad statements of individual liability that could well lead to inappropriate extensions of CERCLA liability in future cases. Although it is easy to sympathize with the courts' intuitive desire to hold liable parties whose egregious and tortious actions have posed environmental hazards for the rest of society, we must also recognize the constraints of the statute that Congress has enacted. CERCLA imposes strict liability; considerations of fault or blameworthiness are, by definition, irrelevant under its terms.

²⁰⁵ See *supra* note 158 and accompanying text (discussing piercing of corporate veil).

²⁰⁶ See *supra* Section IV (discussing liability of officers under CERCLA).

²⁰⁷ See *supra* note 11 and accompanying text (discussing CERCLA's statutory objectives).

²⁰⁸ Sophocles, *Electra*, line 1043.

Moreover, traditional principles of corporate and agency law already provide us with adequate means for holding corporate officers and individual shareholders personally liable in appropriate circumstances. Corporate officers who personally participate in tortious acts may be held personally responsible;²⁰⁹ the corporate veil may be pierced to hold liable shareholders who have abused the corporate form, or who have used it to perpetrate a fraud.²¹⁰ True, these are inexact measures, and they may not impose liability upon corporate individuals in every instance where notions of justice or fairness would seem to dictate that it should fall, but CERCLA is an inexact statute. The problems inherent in CERCLA's poor drafting have been recognized since its enactment, and commentators have repeatedly urged its amendment.²¹¹ Unless and until Congress undertakes that decidedly necessary step, the courts must apply the statute carefully to ensure that corporate individuals are not subjected to inappropriate or excessive liability.

Distinguishing between the courts' efforts to apply statutory liability under CERCLA and liability grounded in traditional corporate or agency law doctrines may seem like little more than an exercise in semantics, but the dangers inherent in confusing the two bases of liability are real, not imagined. The costs of cleaning up hazardous wastes are astronomical;²¹² few individuals have the financial resources to contribute significantly to a CERCLA cleanup action. Thus, the economic benefits of holding individuals personally liable for these costs are relatively minor while the costs of holding officers and shareholders personally liable are high. The threat of individual liability can have an overwhelming chilling effect on the behavior of individuals because of the potential for abuse on the part of the EPA or other administrative bodies, or even private plaintiffs.²¹³ One can

²⁰⁹ See *supra* note 8 and accompanying text (discussing liability of corporate officers under traditional doctrine).

²¹⁰ See *supra* notes 8 & 158 and accompanying text (discussing liability of individual shareholders under traditional doctrine).

²¹¹ See, e.g., Heidt, *supra* note 153 (arguing that Congress should amend CERCLA's liability provisions); Lyons, *supra* note 91 (arguing that CERCLA's liability scheme should be abandoned, and that cleanups should be financed solely through tax revenues); Oesterle, *supra* note 138, at 47 n.27 (arguing that CERCLA's retroactivity is "unconscionable" and should be amended).

²¹² See *supra* notes 18–20 (discussing costs of cleanups).

²¹³ Although the few published opinions addressing individual liability may not, on their facts, raise questions regarding excessive expansions of liability, we can only speculate about the impact of those decisions on disputes that settle without published opinions. In hearings before the Senate Judiciary Committee in 1985, former EPA Administrator Lee M. Thomas

well imagine the pressure an individual feels who must risk personal financial ruin to carry out his or her duty to exercise the legal rights to which his or her corporation is entitled.²¹⁴

When the benefits are so small, and the risks so great, expansion of liability should be undertaken cautiously. Traditional corporate and agency law doctrines provide certainty and ensure that most, if not all, of the corporate actors who engage in culpable and egregious behavior are held liable. Application of CERCLA to corporate individuals, because of its strict liability scheme, vague statutory language, and confused legislative history, creates uncertainty; CERCLA is thus an inappropriate vehicle for the expansion of individual liability.

acknowledged that the EPA uses CERCLA's expansive liability provisions as an incentive to induce settlement:

The strict, joint and several liability, we find, is the only practical liability provision we can use in trying to go forward and have the responsible parties move forward with cleanup. It is a major incentive; it is an extraordinary tool as far as enforcement is concerned. . . . We use strict, joint and several liability as the major tool that forces settlement.

Superfund Improvement Act of 1985: Hearings on S. 51 before the Senate Judiciary Committee, 99th Cong., 1st Sess. 18 (1985). Cf. Robert Tomsho, *Pollution Ploy: Big Corporations Hit by Superfund Cases Find Way to Share Bill*, WALL ST. J., Apr. 2, 1991, at A1 (discussing pressures that large corporations bring to bear on small businesses in seeking contribution for cleanup costs).

²¹⁴ A rational corporate officer, confronted with these sweeping pronouncements of officer liability and faced with potentially ruinous individual liability, would seek to minimize his or her own potential exposure; inevitably, some of that minimization must come at the expense of the shareholders' best interests. The effect of expansive judicial interpretations of officer liability under CERCLA, then, may well be to drive a wedge between corporate managers and the shareholders they are supposed to represent. See, e.g., Oesterle, *supra* note 138, at 51.

It is an open question as to whether expanding liability to operating managers, many of whom do not participate in the waste disposal side of the business, will cause the managers to avoid lines of business that they ought otherwise to enter or to engage in excessive monitoring of environmentally sensitive behavior. Why, for example, would any executive join a firm that engages solely in proper waste disposal or waste cleanup (which itself can generate environmental hazards), when the law may change the applicable standards or an employee may make an operations error? In other words, will managers mollify their personal fear of liability at the expense of their shareholders' interests?

Id.; see also Reiner H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 865 (1984) (noting that even if they are compensated for risk of personal liability, risk-averse managers are likely "to 'cheat' shareholders by surreptitiously choosing business strategies that are less profitable to the firm but less risky for its managers").