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The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines

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THE CORPORATE VEIL DOCTRINE REVISITED: A COMPARATIVE STUDY OF THE ENGLISH AND THE U.S. CORPORATE VEIL DOCTRINES

THOMAS K. CHENG*

Abstract: This Article undertakes a comparative study of corporate veil piercing doctrines under U.S. corporation and English company law. The Article highlights some fundamental differences between the doctrines in terms of jurisprudential approaches, treatment of specific case types, and other related issues. The Article demonstrates that despite these substantial differences, many English corporate veil cases in fact share a similar analytical approach to the instrumentality doctrine under U.S. law. Therefore, it is possible to construct an English instrumentality doctrine that will bring structure and clarity to the English corporate veil doctrine. The Article concludes with a revival of the much-maligned single economic unit theory, first propounded by Lord Denning. This reformulated theory will provide a more systematic approach to veil piercing cases involving corporate groups.

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INTRODUCTION

The corporate veil doctrine—and the related rules of separate corporate personality and limited liability—has been a much-studied subject in corporation law since the early part of the twentieth century.¹ A perennial challenge facing the corporate veil doctrine has been the attempt to increase its predictability.² The doctrine—being an exception to the general rule of limited liability—was created to prevent in-

¹ See, e.g., John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 *passim* (1926); William O. Douglas & Carrol M. Shanks, *Insulation from Liability through Subsidiary Corporations*, 39 YALE L.J. 193 *passim* (1929); Warner Fuller, *The Incorporated Individual: A Study of the One-Man Company*, 51 HARV. L. REV. 1373 *passim* (1938); Elvin R. Latty, *The Corporate Entity as a Solvent of Legal Problems*, 34 MICH. L. REV. 597 *passim* (1936).

² See Marc T. Moore, “A Temple Built on Faulty Foundations”: *Piercing the Corporate Veil and the Legacy of Salomon v. Salomon*, 2006 J. BUS. L. 180, 180–81 (noting the conceptual problems underlying the current application of the corporate veil doctrine and recommending a more workable interpretation).

justice.³ As such, the application of the doctrine has always been fact-specific and open-ended.⁴ Justice requires a flexible legal standard that allows room for the weighing of equity and policy considerations. Some degree of open-endedness is thus probably inherent in the doctrine. It is perhaps because of this open-endedness that the corporate veil doctrine has remained fertile ground for academic research.

On the opposite side of the Atlantic, the corporate veil doctrine under English company law has similarly attracted considerable academic attention.⁵ Although the academic discussion in the United States has focused on making sense of the voluminous, and often contradictory, case law⁶—the importance of the doctrine having been firmly accepted in the United States⁷—the debate in the United Kingdom has taken on a different tone.⁸ Although some commentators have argued in favor of the doctrine,⁹ the general perception is that English courts are loathe to apply the doctrine.¹⁰ Only under exceptional circumstances is veil piercing permitted. Judicial attitude toward the doctrine, however, has not always been unaccommodating. Until the late 1970s, English courts demonstrated considerable willingness to pierce the veil when justice so required. Most notably, Lord Denning propounded the single economic unit theory, which allows a court to treat a

³ See LEN SEALY & SARAH WORTHINGTON, *CASES AND MATERIALS IN COMPANY LAW* 51 (8th ed. 2008); Lynn Gallagher & Peter Ziegler, *Lifting the Corporate Veil in the Pursuit of Justice*, 1990 J. BUS. L. 292, 293.

⁴ See Gallagher & Ziegler, *supra* note 3, at 292–93.

⁵ See, e.g., Moore, *supra* note 2, at 182–83; Murray A. Pickering, *The Company as a Separate Legal Entity*, 31 MOD. L. REV. 481, 481 (1968); Michael Whincup, *Inequitable Incorporation—The Abuse of a Privilege*, 2 COMPANY LAW 158, 159–60 (1981). The equivalent concept of a corporation under English law is called a company. See, e.g., Whincup, *supra*. This Article will employ both terminologies, using corporation when referring to the corporate entity in the United States and company when referring to the corporate entity in the United Kingdom. In the United Kingdom, the corporate veil doctrine is generally called lifting of the corporate veil as opposed to piercing of the corporate veil. For simplicity, this Article will use piercing of the corporate veil to encompass both.

⁶ See Douglas & Shanks, *supra* note 1, *passim*.

⁷ See Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1039 (1991) (observing that limited liability and separate corporate personality have been features of U.S. corporate law in many jurisdictions since the mid-19th century).

⁸ Compare Gallagher & Ziegler, *supra* note 3, at 293 (noting the importance of the doctrine in preventing injustice), with Moore, *supra* note 2, at 181 (arguing that current law is “doctrinally unsustainable” and in need of reform).

⁹ See Andrew Beck, *The Two Sides of the Corporate Veil*, in CONTEMPORARY ISSUES IN COMPANY LAW 69, 90–91 (John Farrar ed., 1987) (positing that the doctrine, as employed, promotes justice); Gallagher & Ziegler, *supra* note 3, at 293 (arguing that the doctrine prevents injustice).

¹⁰ See Moore, *supra* note 2, at 180–81; Whincup, *supra* note 5, at 158–59.

corporate parent and its wholly owned subsidiaries as a single entity, a theory that would be considered expansive even under U.S. law.¹¹

What has plagued the English corporate veil doctrine and partly contributed to its lukewarm reception by the English courts is its lack of an overarching analytical framework.¹² Judicial reluctance to pierce the veil can be partly attributed to a perceived haphazardness in the case law. One famous commentator of English company law has described the doctrine as “palm-tree justice.”¹³ Unlike their U.S. counterparts, English courts have not developed a systematic approach to the cases, and have instead largely relied on traditional common law concepts to resolve corporate veil issues.¹⁴ Academic analysis of the doctrine has not proceeded much beyond categorization of cases based on a hodgepodge of criteria, such as the underlying claims and the legal concept invoked in the case.¹⁵ Even the single economic unit theory is poorly conceived, and its rationale unclear.¹⁶ Given the important role played by the corporate veil doctrine as an exception to separate corporate personality and limited liability—general principles which occasionally produce harsh and unjust results—it is important that the doctrine be reconsidered and rejuvenated. This requires a structured analytical framework for the doctrine that is nonetheless consistent with the English cases.

Although the English and the U.S. corporate veil doctrines have been well studied in their respective jurisdictions, little comparative research has been done. In fact, this author is not aware of any compara-

¹¹ See *D.H.N. Food Distribs. Ltd. v. Tower Hamlets London Borough Council*, [1976] 1 W.L.R. 852 (A.C.) at 860 (Eng.); Thompson, *supra* note 7, at 1041 (noting that U.S. courts will disregard the corporate entity when it is used for “illegitimate purposes”).

¹² See Pickering, *supra* note 5, at 483 (noting lack of consensus on categorization of case law and scope of doctrine); K.W. Wedderburn, *Company Law—Member’s Rights—Oppression of Minority*, 1958 CAMBRIDGE L. J. 152, 155 (“What is urgently needed is a principle from which litigants can predict when the courts will, and will not, lift the veil of the corporate entity.”); K.W. Wedderburn, *A Corporation’s Ombudsman?*, 23 MOD. L. REV. 663, 666 (1960) (“There is an urgent need for some principles to be injected into this area of law.”).

¹³ See J. H. Farrar, *Fraud, Fairness and Piercing the Corporate Veil*, 16 CAN. BUS. L.J. 474, 475 (1990) (quoting L.C.B. GOWER, *PRINCIPLES OF MODERN COMPANY LAW* 138 (4th ed. 1979)).

¹⁴ See David H. Barber, *Piercing the Corporate Veil*, 17 WILLAMETTE L. REV. 371, 376 (1980) (summarizing the two-prong test required to pierce the veil in U.S. courts); Whincup, *supra* note 5, at 159. *But see* Gallagher & Ziegler, *supra* note 3, at 292–93 (acknowledging the lack of a settled approach to English corporate veil cases and suggesting a similar confusion in U.S. cases).

¹⁵ See PAUL L. DAVIES ET AL., *GOWER AND DAVIES PRINCIPLES OF MODERN COMPANY LAW* 202–08 (8th ed. 2008); Gallagher & Ziegler, *supra* note 3, at 293.

¹⁶ See SEALY & WORTHINGTON, *supra* note 3, at 66.

tive work that systematically analyzes and contrasts the two doctrines.¹⁷ This is surprising given that the United States and the United Kingdom are the two most important common law jurisdictions, and that U.S. corporation laws and English company law are arguably the two most important bodies of corporation law in the world. In economic terms, the United Kingdom is one of the most important economies in Europe and London continues to be a major financial center.¹⁸ In legal terms, to this day, English company law continues to influence the development of corporation law in a number of jurisdictions, including Hong Kong, Singapore, Australia, New Zealand, India, and to a lesser extent, Canada.¹⁹ This Article aims to fill this void in the academic literature, and in the process, shed light on the English corporate veil doctrine and provide a more formal structure to it. Two recent cases decided by the English courts, *Beckett Investment Management Group v. Hall*²⁰ and *Stone & Rolls Ltd. v. Moore Stephens*,²¹ indicated renewed flexibility toward separate corporate personality on the part of the English courts. They present a good opportunity to reconsider the doctrine.

Part I of this Article begins with a brief overview of the English corporate veil doctrine—including its evolution over time and its current state—to provide background for the U.S. reader.²² Part II provides a detailed comparison between the English and U.S. corporate veil doctrines, focusing on differences in their jurisprudential approaches, treatment of specific case types, and related issues.²³ Drawing on this comparison, Part II discusses the English and U.S. methods of judicial reasoning in the corporate veil piercing context.²⁴ Part III argues that despite the myriad differences between the two doctrines, they in fact share some crucial similarities.²⁵ Notably, evidence of the U.S. instru-

¹⁷ There is only one exception. See KAREN VANDEKERCKHOVE, *PIERCING THE CORPORATE VEIL* 75–76 (English law), 93–94 (U.S. law) (2007). This book is a vast multi-jurisdictional survey of the corporate veil doctrine. *Id.* at 1–2. There was little direct comparison between U.S. and English law, however. See *id.* at 156, 163, 265, 285, 358, 371, 476, 499, 529–30 (discussing independently but rarely comparing the two bodies of law).

¹⁸ See Peter Spufford, *From Antwerp and Amsterdam to London: The Decline of Financial Centres in Europe*, 154 *DE ECONOMIST* 143, 170 (2006).

¹⁹ See Douglas M. Branson, *Teaching Comparative Corporate Governance: The Significance of “Soft Law” and International Institutions*, 34 *GA. L. REV.* 669, 682 (2000) (recognizing the global ubiquity of English-style company law and specifically recognizing its influence in Pacific Rim nations and India).

²⁰ See [2007] EWCA (Civ) 613, [2007] I.C.R. 1539 (A.C.) 1545 (Maurice Kay L.J.) (Eng.).

²¹ See [2009] UKHL 39, [2009] 1 A.C. 1391, [249] (appeal taken from Eng.).

²² See *infra* notes 29–94 and accompanying text.

²³ See *infra* notes 95–342 and accompanying text.

²⁴ See *id.*

²⁵ See *infra* notes 343–406 and accompanying text.

mentality doctrine can be found in a number of important English corporate veil cases.²⁶ Hence, it is possible to construct an English version of the instrumentality doctrine that brings clarity and structure to the English doctrine. Part IV proposes a revival of the single economic unit theory first propounded by Lord Denning.²⁷ Drawing on economic analysis and recent cases in English company law and European Union (EU) competition law, Part IV advances a structured approach to the theory. This approach will allow English courts to analyze veil piercing cases involving corporate groups in a systematic manner.²⁸

I. A BRIEF HISTORY OF THE ENGLISH CORPORATE VEIL DOCTRINE

Unlike its U.S. counterpart, which has enjoyed steady judicial acceptance throughout the years,²⁹ the English corporate veil doctrine has had a topsy-turvy career. The attitude of English courts toward the doctrine has oscillated from enthusiasm to outright hostility. The history of the English doctrine can be roughly divided into three periods. The first period lasted from 1897, when *Salomon v. Salomon* was decided,³⁰ to around the Second World War. This period can be called the early experimentation period, during which English courts experimented with different approaches to the doctrine.³¹ The second period began after the War and continued until 1978, the year when *Woolfson v. Strathclyde Regional Council* was decided.³² This period can be regarded as the heyday of the doctrine. Much of the vitality of the doctrine during this period can be attributed to Lord Denning, who was an enthusiastic advocate and practitioner of veil piercing and one of the most influential English jurists of the second half of the twentieth cen-

²⁶ See *Wallersteiner v. Moir*, [1975] 1 W.L.R. 991 (A.C.) at 1013 (Eng.); *In re F.G. (Films) Ltd.*, [1953] 1 W.L.R. 483 (Ch.) at 486 (Eng.); FREDERICK POWELL, PARENT AND SUBSIDIARY CORPORATIONS 8–9 (1931) (defining the U.S. instrumentality rule).

²⁷ See *infra* notes 407–580 and accompanying text; see also *D.H.N.*, [1976] 1 W.L.R. at 860.

²⁸ See *infra* notes 407–580 and accompanying text.

²⁹ See Thompson, *supra* note 7, at 1049 (charting the success rate for plaintiffs under the doctrine to demonstrate that it has largely remained in the pre-1960s level).

³⁰ [1897] A.C. 22 (H.L.) at 22 (Eng.).

³¹ See, e.g., *Gilford Motor Co. v. Horne*, [1933] Ch. 935 (A.C.) at 956 (Eng.) (piercing the veil for attempting to evade a legal obligation); *In re Darby, Brougham*, [1911] 1 K.B. 95 at 103 (Eng.) (piercing the veil because of misrepresentation).

³² (1978) S.C.(H.L.) 90, 90 (appeal taken from Scot.).

ture.³³ *Woolfson* marked the beginning of the third period, which has lasted to this day and has seen the doctrine fall into disfavor.³⁴

Given *Salomon's* revered status in English law—the 1897 House of Lords decision firmly established the primacy of separate corporate personality and limited liability—one may be excused for forgetting that limited liability was highly controversial at its inception.³⁵ Limited liability was not established in *Salomon* itself. Rather, the British Parliament granted limited liability to English companies in the Limited Liability Act of 1855.³⁶ *Salomon* merely affirmed its availability to so-called one-man companies.³⁷ Limited liability met vociferous opposition when it was first proposed in the mid-nineteenth century.³⁸ In an 1824 editorial, *The Times* of London pronounced that:

Nothing can be so unjust as for a few persons abounding in wealth, to offer a portion of their excess for the formation of a company, to play with that excess—to lend the importance of their whole name and credit to the society, and then, should the funds of the incorporated body prove insufficient to answer all demands, to retire into the security of their unhazarded fortune, and leave the bait to be devoured by the poor deceived fish.³⁹

Even after the passage of the Act, limited liability remained controversial, at least as applied to “one-man companies.”⁴⁰ This is evident from the appellate decision in *Salomon v. Salomon*, where the English Court of Appeal unanimously imposed personal liability on Mr. Salomon for his company’s debts.⁴¹ Although the House of Lords affirmed the separate legal personality of one-man companies in *Salomon*, it did not settle the issue once and for all. English courts began to pierce the

³³ Cf. SEALY & WORTHINGTON, *supra* note 3, at 53 (noting Lord Denning’s “positive enthusiasm” for veil piercing).

³⁴ See *Woolfson*, (1978) S.C.(H.L.) at 96; Moore, *supra* note 2, at 180–81; Whincup, *supra* note 5, at 158–59.

³⁵ See *Salomon*, [1897] A.C. at 42–43; Paul Halpern, Michael Trebilcock & Stuart Turnbull, *An Economic Analysis of Limited Liability in Corporation Law*, 30 U. TORONTO L.J. 117, 118–19 (1980) (discussing the debates surrounding the Limited Liability Act of 1855 and noting the importance of *Salomon*).

³⁶ Halpern et al., *supra* note 35, at 118–19.

³⁷ See *Salomon*, [1897] A.C. at 42–43.

³⁸ See DAVIES ET AL., *supra* note 15, at 194 (referring to “the battle for legislative acceptance of the principle of limited liability in the middle of the nineteenth century”).

³⁹ Editorial, *TIMES* (London), May 25, 1824.

⁴⁰ See Halpern et al., *supra* note 35, at 119.

⁴¹ *Broderip v. Salomon*, [1895] 2 Ch. 323 (A.C.) at 340–41, 347 (Eng.).

veil soon after *Salomon*. These early cases included *Apthorpe v. Peter Schoenhofen Brewing*⁴² and *St. Louis Breweries v. Apthorpe*, both of which were taxation cases involving very similar facts.⁴³ Veil piercing was not confined to single-shareholder companies. The courts regularly pierced the veil of companies with multiple shareholders.⁴⁴

What followed was a period of considerable enthusiasm for the corporate veil doctrine. Successful veil piercing cases in the first half of the twentieth century included *Gilford Motor v. Horne*,⁴⁵ *In re Darby, Brougham*,⁴⁶ *Trebanog Working Men's Club and Institute, Ltd v. MacDonald*,⁴⁷ and *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co.*⁴⁸ The lack of a well-defined approach to the doctrine meant that English courts had to experiment with existing common law concepts such as agency, trusteeship, and tort liability principles to resolve corporate personality issues.⁴⁹ These experiments failed to yield a generally applicable framework. But this lack of a general framework did not prevent the courts from piercing the veil when the circumstances so warranted.⁵⁰ This is not to say that the plaintiffs were always successful. There were instances in which the courts refused to pierce the veil.⁵¹ Nevertheless, the corporate veil doctrine was robust in this period. The sentiment of the time was perhaps best captured in Professor Kahn-Freund's famous 1944 article, in which he characterized *Salomon* as a "calamitous" decision and

⁴² [1899] 15 T.L.R. 245 (A.C.) at 245 (Eng.).

⁴³ [1898] 15 T.L.R. 112 (Q.B.) at 112 (Eng.).

⁴⁴ See *Peter Schoenhofen Brewing*, [1899] 15 T.L.R. at 245; *St. Louis Breweries*, [1898] 15 T.L.R. at 113.

⁴⁵ [1933] Ch. at 943.

⁴⁶ [1911] 1 K.B. at 100.

⁴⁷ [1940] 1 K.B. 576 at 582 (Eng.). In *Trebanog* the court did not pierce the veil to find shareholder liability, but separate corporate personality was set aside nonetheless. Specifically, the court found that the incorporated company was acting as an unincorporated trustee for the alcohol of its members, and therefore did not represent an illegal sale by a distinct (incorporated) legal entity. See *id.*; SEALY & WORTHINGTON, *supra* note 3, at 59–60.

⁴⁸ [1921] 2 A.C. 465 (H.L.) at 466–67 (appeal taken from Eng.).

⁴⁹ Cf. Pickering, *supra* note 5, at 482–83 (recognizing that English courts created a tangled history regarding corporate personality in the pre- and post-WWII eras).

⁵⁰ See, e.g., *Rainham*, [1921] 2 A.C. at 493–94.

⁵¹ See, e.g., *Macaura v. N. Assurance Co.*, [1925] A.C. 619 (H.L.) at 630 (Lord Sumner) (appeal taken from Ir.) (upholding the separate legal personality of Macaura's company despite his complete control and ownership, resulting in his inability to collect on his insurance policy); *Gramophone & Typewriter, Ltd. v. Stanley*, [1908] 2 K.B. 89 (A.C.) at 96 (Eng.) (upholding separate personality of a wholly owned subsidiary, and holding that complete share ownership does not automatically turn a subsidiary into a parent company's agent).

advocated reforms that would dramatically narrow the scope of limited liability.⁵² He even contemplated abrogating *Salomon* by legislation.⁵³

One exception to the lack of systematic approach in this period is *Smith, Stone and Knight v. Birmingham*, which represented the first attempt by an English court to lay down comprehensive criteria for veil piercing.⁵⁴ Judge Atkinson observed that whether a subsidiary can be said to be carrying on a business on behalf of its parent, which would justify veil piercing, depends on the facts of each case. Judge Atkinson proceeded to identify six guiding questions for each case: (1) Who was really carrying on the business?; (2) Were the profits treated as the profits of the parent company?; (3) Was the parent company the head and the brain of the trading venture?; (4) Did the parent company decide what should be done and how much investment to make in the business?; (5) Did the parent company make a profit based on its skill and direction?; and (6) Was the parent company in effectual and constant control?⁵⁵ These guiding questions are indistinguishable from those applied by U.S. courts.⁵⁶ In fact, there is substantial overlap between these criteria and the eleven circumstances identified by Frederick Powell as indicating that a corporation is a mere instrumentality.⁵⁷

Despite their comprehensive scope, these criteria have been largely overlooked in subsequent U.K. cases.⁵⁸ One explanation for this fact is that in applying the corporate veil doctrine, English courts have generally preferred to resort to traditional common law concepts.⁵⁹ This attempt at a comprehensive list of veil piercing criteria probably constituted judicial overreaching in the eyes of English judges. Another explanation is perhaps the unique factual circumstances of that case: it involved the parent company pleading for its own veil to be pierced in

⁵² See Otto Kahn-Freund, *Some Reflections on Company Law Reform*, 7 MOD. L. REV. 54, 54–55 (1944).

⁵³ See *id.* at 57.

⁵⁴ See [1939] 4 All E.R. 116 (K.B.) at 121 (Eng.) (concluding that the parent company did control the business and was entitled to compensation for the compulsory purchase of its business).

⁵⁵ *Id.*

⁵⁶ See Barber, *supra* note 14, at 374–75 (1980) (compiling criteria applied by U.S. courts).

⁵⁷ See *Smith, Stone & Knight Ltd. v. Birmingham*, [1939] 4 All E.R. 116 (K.B.) at 121 (Eng.); Cathy S. Krendl & James R. Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 DENV. L.J. 1, 16–17 (1978) (listing Frederick J. Powell's published indicators that a subsidiary is a mere instrumentality).

⁵⁸ Compare *Smith, Stone & Knight*, [1939] 4 All E.R. at 121 (specifying six factors a court should use in its analysis about whether to pierce a corporate veil), with *Jones v. Lipman*, [1962] 1 W.L.R. at 836–37 (piercing the corporate veil without specifically using *Smith, Stone & Knight*'s factors), and *In re F.G. (Films)*, [1953] 1 W.L.R. at 486 (same).

⁵⁹ See, e.g., *In re F.G. (Films)*, [1953] 1 W.L.R. at 485.

order to obtain compensation from the government.⁶⁰ These facts allowed subsequent courts to distinguish their cases from *Smith, Stone and Knight* and decline to follow its approach.⁶¹

After the Second World War, the English corporate veil doctrine entered its golden era. Notable veil piercing cases in this period included *In re FG (Films)*,⁶² *Jones v. Lipman*,⁶³ *Firestone Tyre and Rubber v. Lewellin*,⁶⁴ and *Merchandise Transport v. British Transport Commission*.⁶⁵ As mentioned earlier, the vigor of the doctrine was in no small part due to Lord Denning. He took part in a string of corporate veil cases between the 1950s and 1970s, including *Scottish Cooperative Wholesale Society v. Meyer*,⁶⁶ *Littlewoods Mail Order Stores v. Inland Revenue Commissioners*,⁶⁷ *Wallersteiner v. Moir*,⁶⁸ and lastly—and most well known of them all—*D.H.N. Food Distributors Ltd. v. Tower Hamlets London Borough Council*.⁶⁹ His enthusiasm for the doctrine was best encapsulated in his judgment in *Littlewoods*, where he warned against blind adherence to *Salomon*:

The doctrine laid down in *Salomon v. Salomon & Co.* [1897] A.C. 22, has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit.⁷⁰

Lord Denning's call for judicial flexibility toward corporate personality is commendable. There is a significant difference, however, between requiring group companies to report their accounts on a consolidated basis, and collapsing group companies for liability purposes (thereby ignoring their separate legal personality). Financial reporting chiefly serves informational purposes and the legislature might have required

⁶⁰ See *Smith, Stone & Knight*, [1939] 4 All E.R. at 118.

⁶¹ Compare *id.* with *Merch. Transp. v. British Transp. Comm'n*, [1962] 2 Q.B. 173 (A.C.) at 180 (Eng.) (relying on *Salomon* while overlooking *Smith, Stone & Knight*), and *In re FG (Films)*, at 485 (ignoring *Smith, Stone & Knight*).

⁶² [1953] 1 W.L.R. at 483.

⁶³ [1962] 1 W.L.R. at 832.

⁶⁴ [1957] 1 W.L.R. 464 (H.L.) at 464 (appeal taken from Eng.).

⁶⁵ [1962] 2 Q.B. at 173.

⁶⁶ [1959] A.C. 324 (H.L.) at 364.

⁶⁷ [1969] 1 W.L.R. 1241 (A.C.) at 1254 (Eng.).

⁶⁸ [1974] 1 W.L.R. 991 (A.C.) at 993, 1013 (Eng.).

⁶⁹ [1976] 1 W.L.R. 852 (A.C.) at 857 (Eng.).

⁷⁰ [1969] 1 W.L.R. at 1254.

account consolidation for reasons that have nothing to do with limited liability. Nonetheless, Lord Denning's call for judicial flexibility toward corporate entities would eventually culminate in his much-criticized decision in *D.H.N.*

As early as 1956, in *Lee v. Sheard*—not itself a corporate veil piercing decision—Lord Denning foreshadowed his logic in *D.H.N.* by analogizing the relationship between a shareholder and his company to a partnership.⁷¹ In *D.H.N.*, a unanimous English Court of Appeal allowed a parent company to claim compensation for disturbance of business under the Land Compensation Act, even though the business and the land on which it sat were owned by different corporate entities.⁷² Lord Denning's judgment opened with these famous words: "This case might be called the 'Three in One.' Three companies in one. Alternatively, the 'One in three.' One group of three companies."⁷³ Lord Denning continued on to describe the single economic unit theory,⁷⁴ declaring that "[t]his group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point."⁷⁵ In the same year, a prominent commentator declared that "modern English company law has abandoned the exaggerated view of *Salomon's* case English law is now prepared to admit qualifications of, and exceptions to, this principle, by lifting the veil of corporateness."⁷⁶ That year marked the height of the corporate veil doctrine. Subsequent development proved that this optimism was misplaced and saw the English judiciary turning increasingly frosty toward the doctrine.

Two years later, the House of Lords openly questioned the reasoning in *D.H.N.* In his judgment in *Woolfson v. Strathclyde Regional Council*, Lord Keith of Kinkel expressed doubt as to "whether in this respect the Court of Appeal properly applied the principle that it is appropriate to

⁷¹ See *Lee*, [1956] 1 Q.B. at 196; see also *D.H.N.*, [1976] 1 W.L.R. at 860. ("[T]his group is virtually the same as a partnership in which all three companies are partners.")

⁷² See *D.H.N.*, [1976] 1 W.L.R. at 857–58, 860–61, 867–68.

⁷³ *Id.* at 857.

⁷⁴ See *id.* at 860. In supporting his description of the single economic unit theory, Lord Denning quotes Professor Gower—a leading authority on English company law at the time—who noted the emerging tendency in English law to treat group companies as a single economic entity. See *id.*

⁷⁵ *Id.* It is important to note that Lord Denning never explicitly referred to the three companies in *D.H.N.* as a single economic entity in his judgment. See *id.* The term "single economic unit" was subsequently coined by commentators and the courts. See, e.g., *Pierelli Cable Holding NV v. Inland Revenue Comm'rs*, [2006] UKHL 4, [2006] 1 W.L.R. 400 (H.L.) [73] (Eng.).

⁷⁶ Clive M. Schmitthoff, *Salomon in the Shadow*, J. Bus. L. 305, 306 (1976).

pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts.”⁷⁷ *Woolfson* signaled the beginning of the decline of the doctrine. Although Lord Keith stopped short of overruling *D.H.N.*, subsequent cases made it clear that the single economic unit theory and the corporate veil doctrine were falling out of favor. In *Bank of Tokyo v. Karoon*, the English Court of Appeal explicitly rejected the single economic unit argument, noting that “we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be abridged.”⁷⁸ The corporate veil doctrine arguably reached its nadir in *Adams v. Cape Industries plc*, in which the English Court of Appeal declared that the use of the corporate structure to limit future liabilities is an inherent feature of English company law and practically ruled out veil piercing in tort cases.⁷⁹

It has not been all gloom and doom for veil piercing plaintiffs after *Adams*. Two years after that case, the court in *Creasey v. Breachwood Motors Ltd.* pierced the veil between two companies after their common owners had transferred the assets of the first company to the second in order to avoid an impending judgment.⁸⁰ Five years later, in a case involving very similar facts, the Admiralty Court, after explicitly endorsing the reasoning in *Creasey*, invalidated the sale of a vessel by one member of a corporate group to another.⁸¹ Unfortunately, *Creasey* was subsequently overruled in *Ord & Anor v. Belhaven Pubs.*⁸²

The current state of the English corporate veil doctrine is best summed up by a leading commentator, who opined that:

The doctrine of lifting the veil plays a small role in British company law, once one moves outside the area of particular contracts or statutes. Even where the case for applying the doc-

⁷⁷ See *Woolfson*, (1978) S.C.(H.L.) at 96.

⁷⁸ [1987] A.C. 45, 64 (Lord Goff L.J.); see also F. G. Rixon, *Lifting the Veil Between Holding and Subsidiary Companies*, 102 L. Q. REV. 415, 415 (1986) (suggesting the demise of the single economic entity in English case law and the piercing of the corporate veil doctrine with respect to group companies).

⁷⁹ See [1990] Ch. 433 (A.C.) at 544 (Eng.). The English Court of Appeal reviewed various grounds for veil piercing, including fraud, agency, and the single economic entity, and rejected them all. See *id.* at 494, 545–47, 532–39.

⁸⁰ See [1992] B.C.C. 638 (Q.B.) at 647–48 (Eng.).

⁸¹ See The “Tjaskemolen” (Now Named “Visvliet”), [1997] 2 Lloyd’s Rep. 465 (Q.B.) at 470–71 (discussing the facts of *Creasey*), 471–73 (comparing the *Creasey* facts to the similar facts of *Tjaskemolen*), 474 (holding that the sale of a vessel by one corporation to another was invalid because the transaction was a sham) (Eng.).

⁸² See [1998] B.C.C. 607 (A.C.) at 616 (Eng.). Although the *Belhaven* court did not overrule *Tjaskemolen*, the continued validity of that case is now in doubt. See *id.*

trine may seem strong, as in the undercapitalised one-person company, which may or may not be part of a larger corporate group, the courts are unlikely to do so.⁸³

After the high-profile cases in the 1990s that came out decidedly against the doctrine, the consensus is that veil piercing has become a rarity under English law.⁸⁴

Nevertheless, two recent cases suggest a possible change of attitude toward veil piercing. In *Beckett Investment Management Group v. Hall*, the English Court of Appeal pierced the veil between the parent company and its subsidiaries to give effect to a covenant not to compete in an employment contract.⁸⁵ The significance of this case for the corporate veil doctrine is underscored by a number of statements in Lord Justice Kay's judgment, which will be discussed below.⁸⁶ Likewise, in *Stone & Rolls v. Moore Stephens*, the sole shareholder and director of a company had set up a fraudulent scheme, which its external auditors failed to detect, and swindled huge sums of money from some banks.⁸⁷ The company subsequently went into liquidation and the liquidator brought claims against the auditors for professional negligence.⁸⁸ At issue was whether the culpable shareholder's intentions should be attributed to the company, which would prevent it from pursuing its claims against the auditors.⁸⁹ The majority of the House of Lords set aside its separate legal personality and imputed the shareholder's fraudulent intentions to the company.⁹⁰ The company's claims against the auditors were hence barred.⁹¹

The future of the English corporate veil doctrine remains to be seen. *Beckett* and *Moore Stephens* may augur a reversal of fortune for the doctrine. Although *Adams* left the applicability of the doctrine to tort claims in doubt,⁹² *Beckett* reaffirmed the availability of veil piercing in

⁸³ DAVIES ET AL., *supra* note 15, at 208–09.

⁸⁴ *See id.*

⁸⁵ *See* [2007] EWCA (Civ) 613, [2007] I.C.R. 1539 (A.C.) at 1546–47.

⁸⁶ *See infra* text accompanying notes 444–447.

⁸⁷ *See* [2009] UKHL 39, [2009] 1 A.C. 1391 at 1447–48 (Eng.). Even though the case was primarily concerned with the attribution of a director's knowledge to the company, it had clear implications for the separate corporate personality principle and the corporate veil doctrine. *See id.* at 1460.

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See id.* at 1455.

⁹¹ *See id.*

⁹² *See* [1990] Ch. at 547 (refusing to pierce the veil of a British parent company for tort liability of its U.S. subsidiary).

contractual cases.⁹³ Moreover, *Moore Stephens* may signal a willingness on the part of the English courts to pierce the veil against fraudulent single-shareholder corporations.⁹⁴ What is needed for a rejuvenation of the doctrine is a more formal analytical framework than currently exists in the case law. Before proposing such a framework, this Article will first turn its attention to a comparative analysis of the corporate veil doctrine on both sides of the Atlantic.

II. SOME GENERAL COMPARISONS BETWEEN THE TWO CORPORATE VEIL DOCTRINES

At first glance, there seems to be an unbridgeable gulf between the corporate veil doctrines on the two sides of the Atlantic. Although courts in both countries have asserted the role of the judiciary in preventing abuses of the corporate entity⁹⁵—and the discussion about limited liability and the corporate veil doctrine in both jurisdictions often starts with *Salomon v. Salomon*⁹⁶—the attitude of the English judiciary is distinctly more conservative.⁹⁷ In contrast, U.S. courts have demon-

⁹³ See [2007] I.C.R. at 1545 (Maurice Kay L.J.).

⁹⁴ See [2009] W.L.R. at 515 (Lord Walker of Gestingthorpe) (indicating willingness to pierce the veil of a company primarily held and controlled by a single fraudulent actor).

⁹⁵ See, e.g., *Anderson v. Abbott*, 321 U.S. 349, 366–67 (1944) (“If the judicial power is helpless to protect a legislative program from schemes for easy avoidance, then indeed it has become a handy implement of high finance. Judicial interference to cripple or defeat a legislative policy is one thing; judicial interference with plans of those whose corporate or other devices would circumvent that policy is quite another.”); *In re a Company*, [1985] 1 B.C.C. 99421 (A.C.) at 99425 (Cumming-Bruce L.J.) (Eng.) (“In our view the cases before and after *Wallersteiner v. Moir* [1974] 1 W.L.R. 991 show that the court will use its powers to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration.”); *In re Polly Peck Int’l plc*, [1996] 2 All E.R. 433 (Ch.) at 447 (Walker J.) (Eng.) (explaining that lifting the corporate veil is justified when the corporate structure is used as a façade “in an unconscionable attempt to evade existing obligations or to practice some other deception”).

⁹⁶ See DAVIES ET AL., *supra* note 15, at 195; Bernard F. Cataldo, *Limited Liability with One-Man Companies and Subsidiary Corporations*, 18 LAW & CONTEMP. PROBS. 473, 478 (1953); Douglas & Shanks, *supra* note 1, at 193–94, 194 n.3; Jonathan M. Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42 U. CHI. L. REV. 589, 618 (1975); Robert B. Thompson, *Piercing the Corporate Veil Within Corporate Groups: Corporate Shareholders as Mere Investors*, 13 CONN. J. INT’L L. 379, 381 (1999). Leading textbooks and casebooks in the United Kingdom all begin their treatment of limited liability with the *Salomon* case. E.g., SEALY & WORTHINGTON, *supra* note 3, at 31–33.

⁹⁷ Compare *Moore*, *supra* note 2, at 180–81 (stating that, with few exceptions, English courts have “steadfastly refused” to disregard the principle of limited liability), with Thompson, *supra* note 7, at 1048 (showing that over several decades of the twentieth century, U.S. courts have pierced the corporate veil approximately forty percent of the time).

strated greater willingness to intervene when the situation so warrants.⁹⁸ The differences between these two jurisdictions, however, go deeper than mere disparities in plaintiff success rate. The divergent attitudes of the English and the U.S. courts reveals fundamental differences in their conceptions of judicial decision making, judicial prerogatives to fashion new legal doctrines, the weight given to policy considerations, and the role of justice and its potential conflict with doctrinal rules.

A. *Jurisprudential Approaches*

1. General Deference to the Separate Corporate Personality Principle

Corporate veil cases come in a great variety. The paradigmatic corporate veil case is one in which the separate corporate personality is disregarded and the shareholders are held liable for the corporation's debts.⁹⁹ In this type of case, both the rule of separate corporate personality and limited liability—which provide that a shareholder's responsibility for a corporation's liabilities is limited to the value of his equity investment—are overridden.¹⁰⁰ Such cases may be called shareholder liability cases because veil piercing results in shareholder liability for corporate debts.¹⁰¹ There are other types of corporate veil cases in which separate corporate personality is disregarded without the imposition of shareholder liability. For example, a subsidiary may be ignored as a separate legal entity to allow a court to exercise jurisdiction over the corporate parent or to compel the production of documents from a subsidiary.¹⁰² Separate corporate personality may be set aside so that proceeds from fraud that have been deposited into a company can be

⁹⁸ Compare Moore, *supra* note 2, at 180–81, with Thompson, *supra* note 7, at 1048. Professor Thompson's survey of U.S. corporate veil cases suggests that U.S. courts have pierced the veil in approximately forty percent of the cases. Thompson, *supra* note 7, at 1048. Meanwhile, the general perception within the English legal academia and profession is clearly that the corporate veil doctrine will not often be invoked by the courts. See Moore, *supra* note 2, at 180–81; Whincup, *supra* note 5, at 158–59.

⁹⁹ VANDEKERCKHOVE, *supra* note 17, at 11 (defining piercing the corporate veil as “the situation where a shareholder is held liable for its corporation's debts despite the rules of limited liability and/or separate personality”).

¹⁰⁰ SEALY & WORTHINGTON, *supra* note 3, at 51.

¹⁰¹ See VANDEKERCKHOVE, *supra* note 17, at 13 (explaining the distinction made by many commentators between corporate veil cases where shareholders are held liable and corporate veil cases where shareholders are not held liable).

¹⁰² See *Lonrho Ltd. v. Shell Petroleum Co.*, [1980] 1 W.L.R. 627 (H.L.) at 634–35 (appeal taken from Eng.); *Multinational Gas & Petrochemical Co. v. Multinational Gas & Petrochemical Servs.*, [1983] Ch. 258 (A.C.) at 268 (Eng.); *Tate Access Floors Inc. v. Boswell*, [1991] Ch. 512 at 515 (Eng.).

recovered.¹⁰³ The corporate entities of the parent and the subsidiary may also be collapsed for the purpose of determining the scope of a managing director's responsibilities.¹⁰⁴ Some commentators have called these "identification" cases,¹⁰⁵ while others have used the more colorful metaphor of "peeping behind the veil."¹⁰⁶

While the bulk of the corporate veil cases in the United States have been shareholder liability cases, shareholder liability is rarely imposed in the English cases. For example, of the seven cases excerpted under the corporate veil doctrine section¹⁰⁷ of a leading text on English company law,¹⁰⁸ only three attempted to impose shareholder liability by lifting the corporate veil.¹⁰⁹ In the remaining four, separate corporate personality was set aside for the following reasons: to prevent a U.S.-produced film from being registered as a British film under a relevant statute,¹¹⁰ to allow a corporate parent to claim compensation for the loss of its business in a compulsory purchase (government takings) proceeding,¹¹¹ to determine the enemy character of a company,¹¹² and to avoid a prohibition on the sale of alcohol without a license.¹¹³ Even among the three cases that attempted imposition of shareholder liability, the two in which the veil was pierced involved companies that had been incorporated with the express purpose of evading an existing le-

¹⁰³ See *Wallersteiner v. Moir*, [1974] 1 W.L.R. 991 (A.C.) at 1016–17 (Eng.); *Gencor ACP Ltd. v. Dalby*, [2000] 2 B.C.L.C. 734 (Ch.) at 734 (Eng.).

¹⁰⁴ See *Harold Holdsworth & Co. v. Caddies*, [1955] 1 W.L.R. 352 (H.L.) at 357–58 (Lord Viscount Kilmuir L.C.) (appeal taken from Scot.).

¹⁰⁵ See VANDEKERCKHOVE, *supra* note 17, at 13. The reason for calling these cases identification cases is that the shareholders are identified with the corporation. *Id.*

¹⁰⁶ See Smadar Ottolenghi, *From Peeping Behind the Corporate Veil, to Ignoring It Completely*, 53 MOD. L. REV. 338, 340 (1990).

¹⁰⁷ *Daimler Co. v. Cont'l Tyre & Rubber Co. (Great Britain) Ltd.*, [1916] 2 A.C. 307 (H.L.) (appeal taken from Eng.); *Adams v. Cape Indus. plc*, [1990] Ch. 433 (A.C.) (Eng.); *D.H.N. Food Distribs. Ltd. v. Tower Hamlets London Borough Council*, [1976] 1 W.L.R. 852 (A.C.) (Eng.); *Gilford Motor Co. v. Horne* [1933] Ch. 935 (A.C.) (Eng.); *Trebanog Working Men's Club & Inst. Ltd. v. MacDonald*, [1940] 1 K.B. 576 (Eng.); *In re Darby, Brougham*, [1911] 1 K.B. 95 (Eng.); *In re FG (Films) Ltd.*, [1953] 1 W.L.R. 483 (Ch.) (Eng.).

¹⁰⁸ SEALY & WORTHINGTON, *supra* note 3, at 51–71.

¹⁰⁹ *Id.* at 61–63, 66–68; see *Adams*, [1990] Ch. 433 (refusing to lift corporate veil to impose shareholder liability); *Gilford Motor*, [1933] Ch. 935 (lifting corporate veil to prevent evasion of contractual obligation); *In re Darby*, [1911] 1 K.B. 95 (lifting corporate veil where company used to perpetrate fraud).

¹¹⁰ See *In re FG (Films)*, [1953] 1 W.L.R. at 486.

¹¹¹ See *D.H.N.*, [1976] 1 W.L.R. at 860.

¹¹² See *Daimler*, [1916] 2 A.C. at 308.

¹¹³ *Trebanog*, [1940] 1 K.B. at 582–83, 585.

gal obligation¹¹⁴ or perpetrating fraud.¹¹⁵ Neither involved a *bona fide* company: a company with an actual business operation, as opposed to a mere shell company. Indeed, *Adams* is the only case listed in this leading text that fits in the paradigmatic corporate veil case, and the veil was left intact in that case.¹¹⁶ In fact, among the thirty-five English corporate veil cases surveyed in this Article, only six involved *bona fide* companies with legitimate business operations.¹¹⁷

There are two main implications from this discussion. First, unlike its U.S. counterpart, the principal focus of the English corporate veil doctrine was never the imposition of shareholder liability. Rather, its focus has been considerably broader, with identification cases forming

¹¹⁴ *Gilford Motor*, [1933] Ch. at 961–62. In *Gilford Motor*, an employee had signed a non-compete agreement with its employer car dealer before leaving the company to start his own business. *Id.* at 953–55. To escape the reach of the non-compete clause, the employee set up a company to operate his car dealership. *Id.* at 954–56. The court pierced the veil to apply the non-compete agreement to his company. *Id.* at 961–62.

¹¹⁵ *In re Darby*, [1911] 1 KB at 101–03.

¹¹⁶ See SEALY & WORTHINGTON, *supra* note 3, at 61–63, 66–68.

¹¹⁷ Compare *Lonrho*, [1980] 1 W.L.R. at 627 (no *bona fide* companies), and *Woolfson v. Strathclyde Reg'l Council*, (1978) S.C.(H.L.) 90 (appeal taken from Scot.) (same), and *Scottish Coop. Wholesale Soc'y Ltd. v. Meyer*, [1959] A.C. 324 (H.L.) (appeal taken from Eng.) (same), and *Firestone Tyre & Rubber Co. v. Lewellin* (Inspector of Taxes), [1957] 1 W.L.R. 464 (H.L.) (appeal taken from Eng.) (same), and *Macaura v. N. Assurance Co.*, [1925] A.C. 619 (H.L.) (appeal taken from Ir.) (same), and *Daimler*, [1916] 2 A.C. at 307 (same), and *Beckett Inv. Mgmt. Grp. Ltd. v. Hall*, [2007] EWCA (Civ) 613, [2007] I.C.R. 1539 (A.C.) (Eng.) (same), and *Ord & Anor v. Belhaven Pubs Ltd.*, [1998] B.C.C. 607 (A.C.) (Eng.) (same), and *In re a Company*, [1985] 1 B.C.C. at 99421 (same), and *D.H.N.*, [1976] 1 W.L.R. at 852 (same), and *Wallersteiner*, [1974] 1 W.L.R. at 991 (same), and *Tunstall v. Steigman*, [1962] 2 Q.B. 593(A.C.) (Eng.) (same), and *Merch. Transp. Ltd. v. British Transp. Comm'n*, [1962] 2 Q.B. 173 (A.C.) (Eng.) (same), and *Ebbw Vale Urban Dist. Council v. S. Wales Traffic Area Licensing Auth.*, [1951] 2 K.B. 366 (A.C.) (Wales) (same), and *Gramophone & Typewriter, Ltd. v. Stanley*, [1908] 2 K.B. 89 (A.C.) (Eng.) (same), and *Apthorpe v. Peter Schoenhofen Brewing Co.*, [1899] 15 T.L.R. 245 (A.C.) (Eng.) (same), and *Yukong Line Ltd. of Korea v. Rendsburg Invs. Corp. of Liberia*, [1998] 1 W.L.R. 294 (Q.B.) (Eng.) (same), and *The "Tjaskemolen" (Now Named "Visvliet")*, [1997] 2 Lloyd's Rep. 465 (Q.B.) (Eng.) (same), and *Trebanog*, [1940] 1 K.B. at 576 (same), and *Smith, Stone & Knight Ltd. v. Birmingham*, [1939] 4 All E.R. 116 (K.B.) (Eng.) (same), and *In re Darby*, [1911] 1 K.B. at 95 (same), and *St. Louis Breweries, Ltd. v. Apthorpe*, [1898] 15 T.L.R. 112 (Q.B.) (Eng.) (same), and *Trustor AB v. Smallbone*, [2001] 1 W.L.R. 1177 (Ch.) (Eng.) (same), and *Gencor*, [2000] 2 B.C.L.C. at 734 (same), and *In re Polly Peck*, [1996] 2 All E.R. at 433 (same), and *Boswell*, [1991] Ch. at 512 (same), and *Multinational Gas*, [1983] Ch. 258 (Eng.) (same), and *Jones v. Lipman*, [1962] 1 W.L.R. 832 (Ch.) (Eng.) (same), and *In re FG (Films)*, [1953] 1 W.L.R. at 483 (same), with *Caddies*, [1955] 1 W.L.R. at 352 (*bona fide* company), and *Rainham Chem. Works, Ltd. v. Belvedere Fish Guano Co.*, [1921] 2 A.C. 465 (H.L.) (appeal taken from Eng.) (same), and *Adams* [1990] Ch. at 433 (same), and *Littlewoods Mail Order Stores Ltd. v. Inland Revenue Comm'rs*, [1969] 1 W.L.R. 1241 (A.C.) (Eng.) (same), and *Gilford Motor*, [1933] Ch. 935 (same), and *Creasey v. Breachwood Motors Ltd.*, [1992] B.C.C. 638 (Q.B.) (Eng.) (same).

the bulk of the English corporate veil cases.¹¹⁸ What brings an English case under the rubric of the corporate veil doctrine is not that shareholder liability was imposed, but that there was an attempt to set aside separate corporate personality.¹¹⁹ Second, it is highly unlikely that attempts to pierce the veil of a *bona fide* company will be successful under English law. One of the tacit premises of the *Adams* court's decision to refuse to pierce the veil was that the U.S. subsidiary was a *bona fide* corporate entity with a full-fledged asbestos operation.¹²⁰ Although the House of Lords did pierce the veil against a *bona fide* company in *Rainham Chemical Works*, the Law Lords' reasoning relied heavily on common law concepts such as occupation rights.¹²¹ Additionally, *Rainham* has since received little attention from both courts and commentators. Meanwhile, U.S. courts have been willing to pierce the veil of a *bona fide* company if elements of the doctrine are met.¹²² At a jurisprudential level, the English approach to the corporate veil doctrine reflects a substantially more deferential attitude toward limited liability compared with the approach taken by U.S. courts.

2. Reliance on Traditional Common Law Concepts

Beyond this general difference in attitude toward the corporate veil doctrine, the English and U.S. courts' approaches to the doctrine diverge in a few specific ways. One striking difference between the judicial approaches of these two jurisdictions is that while U.S. courts have been ready to fashion new doctrines—such as the instrumentality doctrine and the alter ego doctrine¹²³—to analyze corporate veil cases, their English counterparts have often confined themselves to applying traditional common law concepts and principles, such as agency and trust.¹²⁴ In *In re (FG) Films*, the court deemed the British company in-

¹¹⁸ See *supra* text accompanying notes 100–117.

¹¹⁹ See, e.g., *Lonrho*, [1980] 1 W.L.R. at 636–37 (discussing separate corporate personality in parent-subsidiary context and noting that there would be no liability for natural person shareholders); *Multinational Gas*, [1983] Ch. at 269 (piercing the corporate veil without imposing liability on shareholders).

¹²⁰ See *Adams*, [1990] Ch. at 544.

¹²¹ See *Rainham*, [1921] 2 A.C. at 475.

¹²² See Barber, *supra* note 14, at 373–75.

¹²³ See Thompson, *supra* note 7, at 1063 (analyzing plaintiff's likelihood of success after courts invoked instrumentality and alter ego doctrines); see also Barber, *supra* note 14, at 376–77 (outlining two-prong corporate veil test developed by courts); Krendl & Krendl, *supra* note 57, at 11–15 (discussing attempts to adopt systematic approach through instrumentality doctrine and alter ego test).

¹²⁴ See, e.g., *Broderip v. Salomon*, [1895] 2 Ch. 323 (A.C.) at 332, 338 (applying agency and trust concepts to hold Mr. Salomon liable for the company's debts); *Trebanog* [1940] 1

corporated by its U.S. parent for film registration purposes as the latter's agent.¹²⁵ In *Broderip v. Salomon*, the English Court of Appeal characterized Mr. Salomon himself as the beneficiary, and his company as "a trustee improperly brought into existence by him to enable him to do what the statute prohibits."¹²⁶ In both instances, the court set aside the separate legal personality of the companies because of the improper purpose of incorporation.¹²⁷ Although some U.S. courts have also applied agency concepts to corporate veil cases,¹²⁸ the number remains small.¹²⁹ Other common law concepts are rarely employed to decide corporate veil cases.¹³⁰ The English courts made a notable attempt at fashioning a new doctrine in *D.H.N.*¹³¹ This attempt, however, only enjoyed a brief success.¹³² In fact, *D.H.N.* itself was the perfect illustration of the important role played by traditional common law concepts in the English corporate veil cases. In addition to the single eco-

K.B. at 582 (analogizing the company to a trustee holding trust property for its beneficiary members).

¹²⁵ *In re F.G. (Films)*, [1953] 1 W.L.R. at 484, 486.

¹²⁶ *Broderip*, [1895] 2 Ch. at 338. This case was overruled by the House of Lords in *Salomon v. Salomon*. [1897] A.C. 22 (H.L.) at 58 (appeal taken from Eng.). Nevertheless, the House of Lords did not overrule the English Court of Appeal on the grounds that a company could never be its shareholders' trustee, but that in the instance before the court the trustee relationship was not established. *See id.* at 56–57.

¹²⁷ *See Broderip*, [1895] 2 Ch. at 338; *In re F.G. (Films)*, [1953] 1 W.L.R. at 486. In *Broderip*, the improper purpose was to shield Mr. Salomon from liability. [1895] 2 Ch. at 338. In *In re F.G. (Films)*, the improper purpose was to circumvent the restriction on the showing of foreign films under the Cinematograph Films Acts of 1938 and 1948. [1953] 1 W.L.R. at 486.

¹²⁸ *See* House of Koscot Dev. Corp. v. Am. Line Cosmetics, Inc., 468 F.2d 64, 67 n.2 (5th Cir. 1973) (noting that the concepts of agency, instrumentality, and identity are interchangeable); Kingston Dry Dock Co. v. Lake Champlain Transp. Co., 31 F.2d 265, 267 (2d Cir. 1929); Walkovszky v. Carlton, 223 N.E.2d 6, 7–8 (N.Y. 1966); Berkey v. Third Ave. Ry. Co., 155 N.E. 61, 65 (N.Y. 1926); Anderson v. Smith, 398 S.W.2d 635, 637 (Tex. App. 1965).

¹²⁹ *See* Thompson, *supra* note 7, at 1063 (noting that of the more than 1600 cases surveyed, only fifty-two mentioned agency as a consideration—representing roughly three percent of the cases—while 181 applied the alter ego doctrine and 550 mentioned domination and control by the shareholders).

¹³⁰ *See id.* (mentioning neither trust nor any other common law concepts as the bases for veil piercing by U.S. courts in any case in his comprehensive survey).

¹³¹ *See D.H.N.*, [1976] 1 W.L.R. at 860.

¹³² *See Woolfson*, (1978) S.C.(H.L.) at 96. In his judgment, Lord Keith of Kinkel expressed doubts on "whether in this respect the Court of Appeal [in *D.H.N.*] properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts." *Id.* One should not be too quick to announce the demise of the single economic unit theory, however. Litigants have continued to invoke the theory after *Woolfson*, and courts have continued to apply it, with mixed results for plaintiffs. *See, e.g., Adams*, [1990] Ch at 544; *In re Polly Peck*, [1996] 2 All E.R. at 447.

nomic unit theory, the *D.H.N.* court invoked trust law concepts such as constructive and resulting trusts.¹³³ Even Lord Denning felt compelled to buttress the single economic unit theory with more mundane common law concepts such as irrevocable license.¹³⁴ This reliance on existing legal concepts is in keeping with the general sentiment of the English courts, which tend to hold faith in the ability of the existing common law concepts to solve new problems.¹³⁵ To the extent that existing concepts are applied to decide corporate veil cases, one may argue that there is no distinct content in or structure for the English corporate veil doctrine. The doctrine is merely a label for the cases in which separate corporate personality is considered by the courts and for the myriad non-company law concepts that are applied to decide them.

3. Absence of Overarching Theory

Unlike U.S. corporate veil cases, the English doctrine lacks an overarching theory or analytical framework. In the United States, the instrumentality doctrine was first formulated in 1931 by Frederick J. Powell.¹³⁶ Many state courts have since adopted some variation of this doctrine.¹³⁷ In contrast, no general analytical framework can be identified in English cases, nor have the English courts enumerated relevant

¹³³ See *D.H.N.*, [1976] 1 W.L.R. at 859. Property law concepts were called upon because under the relevant statute for the determination of compensation, the corporate parent would have been entitled to more compensation had its interest in the land been more than that of a bare licensee. Two of the judges in the case, Lord Denning and Lord Justice Goff, believed that the parent company had an irrevocable license to the land. *Id.* at 859, 860. Trust concepts were utilized to determine that the parent company had an equitable interest in the land beyond that of a bare licensee. *Id.* at 859, 865.

¹³⁴ See *id.* at 859.

¹³⁵ See, e.g., *id.* at 859, 865. Another example is the equitable subordination doctrine, under which a shareholder's capital contribution to the corporation will be subordinated to its creditors' claims if the shareholder is found to have committed abuses in his or her management of the corporation. See *Taylor v. Standard Gas & Elec. Co.*, 306 U.S. 307, 323-24 (1938) (applying the equitable subordination doctrine in an early bankruptcy case).

¹³⁶ Krendl & Krendl, *supra* note 57, at 11; see *Lowendahl v. Baltimore & Ohio R.R.*, 247 A.D. 144, 145 (N.Y. App. Div. 1936), *aff'd*, 6 N.E.2d 56 (N.Y. 1936) (applying the instrumentality doctrine in an early example).

¹³⁷ Krendl & Krendl, *supra* note 57, at 13 n.40 (listing various state cases adopting the instrumentality doctrine). In addition, the courts have identified a host of relevant factors and considerations for adjudicating veil piercing claims, including lack of substantive separation, failure to comply with corporate formalities, undercapitalization, and overlap of corporate personnel. See Barber, *supra* note 14, at 374-75; Thompson, *supra* note 7, at 1063.

factors or considerations.¹³⁸ The prevailing analytical approach by English courts is to classify cases into a number of categories based on a mix of the legal concepts invoked and the factual circumstances in which the case arises. These categories include agency, trusts, fraud, group enterprises, enemy, revenue (taxation), and cases based on provisions of the Companies Act.¹³⁹ Agency and trusts are categories premised on the legal concepts applied.¹⁴⁰ Fraud, taxation, and Companies Act cases, on the other hand, are based on the nature or the statutory basis of the underlying claims. The group enterprise category consists of cases sharing a common factual circumstance, namely that the shareholder at issue is a corporation and the plaintiff is attempting to impose enterprise liability on a corporate group.¹⁴¹ Enemy is a unique category illustrated by *Daimler v. Continental Tyre and Rubber*.¹⁴² At issue in that case was whether a company incorporated in the United Kingdom, all but one of whose shareholders and directors were German, should be deemed an enemy company during the First World War.¹⁴³

These categories would have been helpful if they were predictive of the outcome of cases. With the exception of fraud, however, this has not been the case.¹⁴⁴ Nor is there any common mode of analysis across cases within the same category. Take the category of group enterprises as an example. A review of the leading cases reveals that there is no common analytical framework.¹⁴⁵ *Lonrho v. Shell Petroleum* was not concerned with

¹³⁸ Beck, *supra* note 9, at 71, 73. Part III.B of this Article will argue that even though the English courts do not explicitly identify factors such as failure to comply with corporate formalities or undercapitalization, these factors do underpin many of their decisions. See *infra* text accompanying notes 359–406.

¹³⁹ See Beck, *supra* note 9, at 72 n.7.

¹⁴⁰ See JOHN H. FARRAR ET AL., COMPANY LAW 57, 77 (1985).

¹⁴¹ See *id.* at 60. In fact, many of the cases in this category, such as *D.H.N.* and *Woolfson*, are not concerned with the imposition of shareholder liability at all. They belong to the group enterprise category merely because the cases involve corporate groups.

¹⁴² *Id.* at 61.

¹⁴³ *Daimler*, [1916] 2 A.C. at 310.

¹⁴⁴ See, e.g., *In re a Company*, [1985] 1 B.C.C. at 99425; *Wallersteiner*, [1974] 1 W.L.R. at 1014 (“[T]o my mind Dr. Wallersteiner was guilty of misfeasance.”); *In re Darby*, [1910] 1 K.B. at 99; *Trustor*, [2001] 1 W.L.R. at [23]; *Gencor*, [2000] 2 B.C.L.C. at [26] (applying equitable principles to lift the veil because the subsidiary was nothing more than a “creature company” used to receive profits).

¹⁴⁵ See, e.g., *Lonrho*, [1980] 1 W.L.R. at 636 (leaving the corporate veil intact in a discovery action); *Meyer*, [1959] A.C. at 343 (reasoning that when a subsidiary is formed with an independent minority of shareholders, the parent must deal fairly with the subsidiary); *Beckett*, [2007] I.C.R. at 1439 (using rules of contract interpretation broadly to pierce the corporate veil); *Ord*, [1998] B.C.C. at 615 (declining to pierce the veil on limited liability grounds and holding that there were no improprieties alleged); *Adams*, [1990] Ch. at 543 (stating that legal precedent provides “rather sparse guidance”); *Multinational Gas*, [1983]

imposition of liability.¹⁴⁶ At issue was whether the corporate parent was required to produce documents possessed by its subsidiaries.¹⁴⁷ The case largely hinged on the interpretation of the word “power” in the relevant rule for discovery in the English High Court.¹⁴⁸ *Gramophone and Typewriter v. Stanley* was a taxation case in which the pivotal issue was the control exercised by the parent over the subsidiary.¹⁴⁹ In *In re Polly Peck*, a bankruptcy case,¹⁵⁰ the court applied a range of concepts, ranging from agency and nomineehip to the single economic unit theory.¹⁵¹ The lack of a common analytical framework is unsurprising given the diversity of facts and issues presented in these group enterprise cases. Even if there was a common approach to these cases, it would most likely require modifications in order to be applied to cases ranging from discovery to bankruptcy and taxation.

The foregoing discussion may give the impression that the U.S. and English approaches to veil piercing are mutually exclusive. This is in fact not the case. Unexpected as it may be, a number of the categories under the prevailing English approach share common concerns and attributes with the U.S. instrumentality doctrine formulated by Powell.¹⁵²

4. The Role of Policy Considerations

A third difference between the U.S. and English judicial approaches to the corporate veil doctrine is the readiness of the former to acknowledge and discuss the policy considerations behind the statute

Ch. at 269 (declining to pierce the veil because the defendants were shareholders of the plaintiff and the plaintiff was not an agent); *D.H.N.*, [1976] 1 W.L.R. at 860 (piercing the veil because the parent company owned all the shares of the subsidiaries); *Merch. Transp.*, [1962] 2 Q.B. at 202 (reasoning that “the fact that two persons are separate in the law does not mean that one may be under the control of the other to such an extent that together they constitute one commercial unit”); *Ebbw Vale*, [1951] 2 K.B. at 370 (declining to pierce the corporate veil because no inference of agency could be drawn without a contract); *Tjaskemolen*, [1997] 2 Lloyd’s Rep. at 474 (setting aside beneficial ownership of a vessel when the transfer was a sham); *Smith, Stone & Knight*, [1939] 4 All E.R. at 121 (reasoning that whether the court would pierce the veil depended on whether the subsidiary was carrying on the parent’s business or its own independent business); *In re Polly Peck*, [1996] 2 All E.R. at 447 (reasoning that piercing the veil is most appropriate where corporate personality is being used as a façade).

¹⁴⁶ *Lomrho*, [1980] 1 W.L.R. at 635.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 633, 635.

¹⁴⁹ *Gramophone*, [1908] 2 K.B. at 95–96.

¹⁵⁰ [1996] 2 All E.R. at 433.

¹⁵¹ *Id.* at 445–48.

¹⁵² See *infra* text accompanying notes 359–406.

or the legal rule at issue.¹⁵³ In cases premised on the interpretation of a statute, U.S. courts have often given explicit recognition to the policy rationale of the statute. In *National Labor Relations Board v. Fullerton Transfer & Storage*, in deciding whether to pierce the veil of the two corporations at issue, the Sixth Circuit Court of Appeals repeatedly referred to federal labor policies and focused on whether there was “a specific attempt to thwart labor law obligations.”¹⁵⁴ In *Walkovszky v. Carlton*, there was an in-depth discussion of the policy considerations behind the minimum liability provisions of the New York Vehicle and Traffic Law and the need for the court to refrain from second-guessing or overriding it.¹⁵⁵ The courts have also acknowledged the special policy concerns behind federal income taxation and bankruptcy laws.¹⁵⁶ Even in cases not premised on specific statutes, U.S. courts paid heed to general public policy. For example, in *Swearngin v. Sears Roebuck & Co.*, the court affirmed the trial court where the trial court had pierced the veil of a two-tier corporate structure that had been set up to obstruct product liability suits against the manufacturer.¹⁵⁷ In doing so, the court specifically noted that the policy reasons for shielding distributors or retailers from product liability claims did not apply to the sales division of an enterprise that also manufactured the product.¹⁵⁸

In contrast, the English courts do not accord the same weight to policy considerations.¹⁵⁹ In *Commissioner of Inland Revenue v. Sanson*, a taxation case, the issue was whether the business at issue belonged to the company or the dominant shareholder, which in turn would affect the tax liability of the respondent.¹⁶⁰ Without relying on relevant taxation policies, the English Court of Appeal decided the case by invoking agency concepts and highlighting the fact that the shareholder had made a loan to the company.¹⁶¹ The court reasoned that if it were to disregard the separate personality of the company, it would have meant

¹⁵³ See Krendl & Krendl, *supra* note 57, at 29–31.

¹⁵⁴ *NLRB v. Fullerton Transfer & Storage Ltd.*, 910 F.2d 331, 338 (6th Cir. 1990).

¹⁵⁵ See *Walkovszky*, 223 N.E.2d at 9.

¹⁵⁶ See Robert W. Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979, 998–1002 (1971).

¹⁵⁷ See 376 F.2d 637, 642–43 (10th Cir. 1967).

¹⁵⁸ *Id.* at 643.

¹⁵⁹ See Whincup, *supra* note 5, at 159. *But see Merch. Transp.*, [1962] 2 Q.B. at 185 (noting that “Parliament [had] decided that it would be in the public interest that public hauliers should be protected against the inroads of private hauliers with spare capacity” unless the latter complies with some special licensing requirements); *Ebbw Vale*, [1951] 2 K.B. at 373 (recognizing the duty of the relevant authority to secure “an efficient, adequate, economical and properly integrated system of public inland transport”).

¹⁶⁰ [1921] 2 K.B. 492 (A.C.) at 496–97 (Eng.).

¹⁶¹ See *id.* at 505, 509, 515.

that the shareholder had made a loan to himself, which would be logically absurd.¹⁶² In *D.H.N.*, Lord Denning did not attempt to justify his decision by the policy rationale of the Land Compensation Act, even though he believed that the parent company was meant to be covered by the statute for the loss of its business.¹⁶³ An even more striking illustration of this de-emphasis of policy considerations in English cases is *Rainham Chemical Works v. Belvedere Fish Guano*.¹⁶⁴ This case featured a direct conflict between the policies of limited liability and tort rules. In his judgment, Lord Buckmaster acknowledged that the objective of limited liability is that “enterprise and adventure . . . be encouraged,”¹⁶⁵ and tacitly recognized the conflict between this and the policy objective of tort law, which is to compensate tort victims.¹⁶⁶ Nevertheless, he proceeded to decide the case by applying the property law concepts of tenancy and occupation rights.¹⁶⁷

This is not to say that the English judges never consider policy arguments. In an area of law in which the cases are as varied as corporate veil cases, generalizations are fraught with difficulty and subject to reservations and qualifications. It remains true, however, that U.S. courts have demonstrated a greater propensity to take into account policy arguments.¹⁶⁸ This is to be expected given the English judiciary’s general aversion to policy arguments.¹⁶⁹ One implication of U.S. courts’ receptiveness to policy arguments is that it allows them to show heightened sensitivity to the factual circumstances and legal considerations of each

¹⁶² See *id.* at 502, 504–05, 509.

¹⁶³ [1976] 1 W.L.R. at 857, 860.

¹⁶⁴ See [1921] 2 A.C. at 467. This case concerned two business people who were operating a plant manufacturing explosives for the British Ministry of Munitions during the First World War. Mindful of the potential for liability of their business, they incorporated a company and transferred the business to it. *Id.* at 474–75. An explosion ensued and caused damages to property adjacent to the plant. *Id.* at 466. The property owner sought to impose liability on both the company and the directors. *Id.*

¹⁶⁵ *Id.* at 475.

¹⁶⁶ *Id.* at 476 (“If the company was really trading independently on its own account, the fact that it was directed by Messrs. Feldman and Partridge would not render them responsible for its tortious acts unless, indeed, they were acts expressly directed by them. If a company is formed for the express purpose of doing a wrongful act or if, when formed, those in control expressly direct that a wrongful act be done, the individuals as well as the company are responsible for the consequences.”).

¹⁶⁷ *Rainham*, [1921] 2 A.C. at 478. In fairness, Lord Buckmaster seemed to have subtly resolved the conflict in favor of limited liability when he stated that “[h]aving contracted for the manufacture of munitions, which in itself does not appear to me that liability could not be displaced by the introduction of an independent contractor.” *Id.* at 477.

¹⁶⁸ See Krendl & Krendl, *supra* note 57, at 29–31 (illustrating where U.S. courts have pierced the corporate veil for companies that are blatantly avoiding a public policy).

¹⁶⁹ See Whincup, *supra* note 5, at 159.

case.¹⁷⁰ This is an appropriate approach in light of the paramount concern behind the U.S. corporate veil doctrine of achieving justice.¹⁷¹ Achieving justice generally requires case-by-case analysis and hence an open-ended standard.¹⁷² In contrast, the consensus within the English judiciary seems to be that justice is but one of many considerations in a corporate veil case and that separate corporate personality should be maintained absent exceptional circumstances.¹⁷³ This consensus means that there is a less pressing need for a tailored approach to the cases. General common law concepts may suffice. In that sense, the English and U.S. courts have both chosen a suitable approach to the corporate veil doctrine given their respective conceptions of its purpose.

5. The Role of Justice

There is consensus that a main purpose of the corporate veil doctrine in the United States is to achieve justice. In *Anderson v. Abbott*, the Supreme Court declared that “the courts will not permit themselves to be blinded or deceived by mere forms of law but will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.”¹⁷⁴ In *Arnold v. Phillips*, the Fifth Circuit Court of Appeals concluded that application of the corporate veil doctrine is premised on the corporate entity being “a sham, a mere obstacle to justice, or instrument of fraud.”¹⁷⁵ In perhaps one of the most famous corporate veil cases in the United States, *Berkey v. Third Avenue Railway*, Justice Cardozo, then sitting on the New York Court of Appeals, similarly noted the importance of justice as a guide in corporate veil cases.¹⁷⁶ The role of justice has been confirmed time and again in recent cases.¹⁷⁷

¹⁷⁰ See *id.* at 160, 161.

¹⁷¹ See *id.* at 161.

¹⁷² See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976).

¹⁷³ See Beck, *supra* note 138, at 91–92.

¹⁷⁴ 321 U.S. 349, 363 (1943) (quoting *Chi., Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Ass'n*, 247 U.S. 490, 501 (1918)) (internal quotations omitted).

¹⁷⁵ *Arnold v. Phillips*, 117 F.2d 497, 502 (5th Cir. 1941).

¹⁷⁶ See *Berkey*, 155 N.E. at 61. When discussing the circumstances under which a subsidiary’s liability will be imputed to its corporate parent, Justice Cardozo observed that “[d]ominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent. Where control is less than this, we are remitted to the tests of honesty and justice.” *Id.*

¹⁷⁷ See *Fullerton Transfer & Storage*, 910 F.2d at 340 (noting that the promotion of justice and the prevention of fraud presented two bases for piercing the corporate veil in the instant case); *Doughty v. CSX Transp., Inc.*, 905 P.2d 106, 110 (Kan. 1995) (“[A]ppellate

In contrast, English judges have demonstrated an ambivalent attitude toward considerations of justice. Some English judges share similar views with their U.S. brethren. In *In re a Company*, Lord Justice Cumming-Bruce asserted that “[i]n our view the cases before and after *Wallersteiner v. Moir* show that the court will use its powers to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration.”¹⁷⁸ In *Atlas-Maritime Co. v. Avalon Maritime Ltd.*, Lord Justice Neill asserted that “in the exercise of a discretion in relation to injunctive relief ‘the eye of equity’ can, I think, look behind the corporate veil in order to do justice.”¹⁷⁹ A number of commentators have similarly endorsed the primacy of justice in corporate veil cases.¹⁸⁰ Despite these sympathetic statements, the current consensus within the English judiciary is that it is not “open to this court to disregard the principle of *Salomon v. A Salomon & Co Ltd* merely because it considers it just to do so.”¹⁸¹ In *Adams*, the court’s refusal to pierce the veil meant that the plaintiff asbestos victims could not enforce their judgments against the English corporate parent of a U.S. subsidiary, which had been shut down by the parent as part of an elaborate scheme to evade liability.¹⁸² Unfortunately for the asbestos victims in that case, *Adams* firmly established that the sanctity of separate corporate personality trumps the judicial prerogative to prevent injustice.¹⁸³

This English perception of the role of justice in corporate veil cases reflects a more formalistic approach to judicial decision-making.¹⁸⁴ It is also consistent with the English courts’ reliance on traditional common law concepts and their aversion to explicit references to public

courts in Kansas and elsewhere exhibit a willingness to look beyond the mere surface features of a business relationship where required in the interests of justice and equity.”); *Seasword v. Hilti, Inc.*, 537 N.W.2d 221, 224 (Mich. 1995) (reasoning that the corporate veil may be pierced where the subsidiary is a mere instrumentality of the corporate parent and the corporate entity is used to subvert justice or to circumvent public policy).

¹⁷⁸ [1985] 1 B.C.C. at 99425 (internal citation omitted). This statement was endorsed in *Creasey*, [1992] B.C.C. at 646. In *D.H.N.*, Lord Justice Shaw similarly emphasized the importance of justice as a basis for veil piercing when he noted that a refusal to grant compensation to D.H.N. for disturbance of its business would have been “a denial of justice.” See [1976] 1 W.L.R. at 854, 867.

¹⁷⁹ [1991] 1 Lloyd’s Rep. 563 (A.C.) at 569 (Eng.).

¹⁸⁰ See Beck, *supra* note 9, at 71; Gallagher & Ziegler, *supra* note 3, at 307; Whincup, *supra* note 5, at 161.

¹⁸¹ *Adams*, [1990] Ch. at 537.

¹⁸² See *id.* at 534, 541.

¹⁸³ See *id.* at 541–44.

¹⁸⁴ See Beck, *supra* note 9, at 91–92.

policies.¹⁸⁵ After all, policy considerations are often invoked to modify existing legal concepts or to substantiate a reinterpretation of precedent so that a more just or fair result can be reached. The English judges' reservations about the overt pursuit of justice may be due to the open-ended nature of the concept. Although there are cases, such as *Adams*, in which there is little doubt about the just outcome,¹⁸⁶ in some close cases, justice can be said to be in the eye of the beholder. For instance, while Lord Justice Shaw believed that it would be an affront to justice to deny D.H.N. compensation for the value of its business,¹⁸⁷ a commentator has argued that allowing a company to "play hot and cold" with incorporation would be grossly unfair.¹⁸⁸ Moreover, acknowledging justice as the ultimate goal of the doctrine is one thing, but applying it as an operational principle is quite another. U.S. courts have fashioned new doctrines—such as the instrumentality doctrine and the alter ego doctrine—to encapsulate the occasional conflict between separate corporate personality and considerations of justice, and to render justice an operational principle for deciding cases.¹⁸⁹ The English judiciary's reluctance to create new doctrines means that they must rely on existing legal concepts, which are often not well-suited for that purpose.¹⁹⁰ Deprived of the better-tailored tools available to their U.S. counterparts, it is not surprising that English judges have shied away from the pursuit of justice in veil piercing cases.

6. Summing Up

The various jurisprudential characteristics of the English corporate veil doctrine are interrelated. The formalistic approach to judicial decision making and the strict adherence to separate corporate personality enshrined in *Salomon*¹⁹¹ means that there is little need to take into account notions of justice and policy considerations. This de-emphasis of justice and policy in turn obviates the need to fashion a new analytical framework, thus allowing English courts to rely on traditional common law concepts which were not created with the corporate veil piercing situation in mind, and are ill-suited for deciding corporate veil cases.¹⁹²

¹⁸⁵ See *id.*

¹⁸⁶ See *Adams*, [1990] Ch. at 434–35.

¹⁸⁷ See *D.H.N.*, [1976] 1 W.L.R. at 867–68.

¹⁸⁸ See Rixon, *supra* note 78, at 420.

¹⁸⁹ See Barber, *supra* note 14, at 377.

¹⁹⁰ See Whincup, *supra* note 5, at 159.

¹⁹¹ See *id.*

¹⁹² See *id.*

The jurisprudential development of the U.S. corporate veil doctrine contrasts with its English counterpart and reflects the different judicial philosophy prevailing in the United States. U.S. courts first analyzed corporate veil issues with traditional common law concepts, but quickly found them deficient.¹⁹³ They proceeded to develop special doctrines such as instrumentality and alter ego, which were necessary because they allowed the courts to focus on the factors that are truly important in corporate veil cases.¹⁹⁴

The use of agency concepts by U.S. courts vividly illustrates this difference. Like their English counterparts, U.S. courts have applied these concepts in corporate veil cases.¹⁹⁵ Nevertheless, U.S. courts appreciated the limitations of agency concepts early on. In *Kingston Dry Dock v. Lake Champlain Transportation*, Judge Learned Hand noted that while agency concepts may be useful in consensual agency relationships expressly contracted for by the parties, they do not focus on considerations such as “the parent’s direct intervention in the transaction, ignoring the subsidiary’s paraphernalia of incorporation, directors and officers” that ultimately drive corporate veil decisions.¹⁹⁶ In *Lowendahl v. Baltimore & Ohio Railroad*, the court similarly observed the following:

[E]xcept in cases of express agency, the use of the term “agent” seems unfortunate and may tend to confuse . . . [and] the “instrumentality” rule seems to furnish the most practical and effectively applicable theory for breaking down corporate immunity where equity requires that this be done to circumvent fraud or other legal wrong.¹⁹⁷

Early U.S. commentators similarly noted the inadequacy of agency concepts for resolving corporate veil claims.¹⁹⁸ Some U.S. courts use the term “agent” interchangeably with instrumentality rather than in the traditional common law sense.¹⁹⁹ Unlike its English counterpart, traditional agency concepts have largely faded into the background in U.S. corporate veil jurisprudence.

¹⁹³ See *id.* at 160–61.

¹⁹⁴ See Barber, *supra* note 14, at 377.

¹⁹⁵ See, e.g., *House of Koscot Dev.*, 468 F.2d at 67 n.2 (noting that the concepts of agency, instrumentality, and identity are interchangeable); *Kingston Dry Dock*, 31 F.2d at 267; *Walkowsky*, 223 N.E.2d at 10; *Berkey*, 155 N.E. at 61; *Anderson*, 398 S.W.2d at 637.

¹⁹⁶ 31 F.2d at 267.

¹⁹⁷ 247 A.D. at 156.

¹⁹⁸ See Douglas & Shanks, *supra* note 1, at 195.

¹⁹⁹ See Barber, *supra* note 14, at 400.

Although the English judges' aversion to the creation of new legal doctrines is consistent with their general judicial philosophy, it is worth remembering that common law concepts were judicial creations in the first place. They originate from precedents that are, in some cases, hundreds of years old. For instance, negligence, which is the dominant basis for tort liability, was a judicially crafted doctrine and only became a fully recognized basis for tort liability in the nineteenth century.²⁰⁰ When the need arose, English judges did not hesitate to create this new doctrine to tackle the pressing problems of the time.²⁰¹ Therefore, their conservatism should not prevent them from coming up with an analytical framework that presents a more systematic approach to corporate veil cases.

B. *Treatment of Specific Types of Cases*

1. Fraud and Misrepresentation

Promotion of justice and prevention of fraud are the main objectives of the U.S. corporate veil doctrine.²⁰² It is important to note that fraud is given a considerably broader meaning in the corporate veil cases than its general usage. When the courts refer to fraud in these cases, the conduct at issue usually falls short of common law fraud, and is more appropriately deemed a misrepresentation.²⁰³ The courts seem to use fraud and misrepresentation to refer to the same class of conduct.²⁰⁴ Plaintiff success rates in the United States are very high when misrepresentation is present.²⁰⁵ Professor Thompson found that U.S. courts had pierced the veil in ninety-four percent of the cases in which misrepresentation was established.²⁰⁶ Perhaps even more revealingly, they had refused to pierce the veil in over ninety-two percent of the cases in which the absence of misrepresentation was noted.²⁰⁷

²⁰⁰ See DAN B. DOBBS ET AL., PROSSER AND KEETON ON LAW OF TORTS § 28 (5th ed. 1984).

²⁰¹ See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780 TO 1860 89 (1977).

²⁰² See Thompson, *supra* note 7, at 1041.

²⁰³ Krendl & Krendl, *supra* note 57, at 31; Thompson, *supra* note 7, at 1044–45 n.53.

²⁰⁴ Krendl & Krendl, *supra* note 57, at 31.

²⁰⁵ See Thompson, *supra* note 7, at 1063. Thompson includes in this category cases in which the defendant made misrepresentations as to the assets and financial condition of the corporation and the party responsible for payment. *Id.* at 1044–45 n.53.

²⁰⁶ *Id.* at 1063. This is hardly surprisingly because once a court has branded certain conduct as misrepresentation, refusal to pierce the veil would be tantamount to tacit endorsement of the conduct.

²⁰⁷ *Id.* at 1064–65 n.141.

As stated earlier, fraud is the only predictive category within the English corporate veil case classification. English judges have often pierced the veil when the defendant is found to have perpetrated a fraud.²⁰⁸ Unlike their U.S. counterparts, most of the English cases that fall within the fraud category have generally involved misappropriation of corporate assets or other outright fraudulent conduct.²⁰⁹ Nevertheless, the English courts have also occasionally expanded the scope of fraud to encompass misrepresentation. This is aptly illustrated by *In re Darby, Brougham*, one of the leading veil piercing cases involving fraud.²¹⁰ That case featured two notorious fraudsters in the United Kingdom at the time, Darby and Gyde, who had set up an elaborate scheme to defraud public investors.²¹¹ To attract public investment in the debentures issued by their sham company, they concealed their connection to the scheme from the public.²¹² They accomplished this through the incorporation of a Guernsey corporation as the parent of the sham company.²¹³ Although the ostensible ground for veil piercing in that case was fraud, Judge Phillimore characterized the fraud involved as “what they did through the corporation they did themselves and represented it to have been done by a corporation of some standing and position, at any rate a corporation which was more than and different from themselves.”²¹⁴ Judge Phillimore also stated that “they represented that some business was being done by or through the corporation and concealed the fact that it was done by and through Darby and Gyde.”²¹⁵

²⁰⁸ See, e.g., *In re a Company*, [1985] 1 B.C.C. at 99425; *Wallersteiner*, [1974] 1 W.L.R. at 1014; *In re Darby*, [1910] 1 K.B. at 99; *Trustor*, [2001] 1 W.L.R. at 23; *Gencor*, [2000] 2 B.C.L.C. at 734.

²⁰⁹ See, e.g., *Wallersteiner*, [1974] 1 W.L.R. at 999, 1001 (involving a financier’s acquisition of a company through circular check transactions, defrauding the company’s other shareholders and creditors in the process); *Trustor*, [2001] 1 W.L.R. at 1179 (involving the misappropriation of corporate funds by one of the officers); *Gencor*, [2000] 2 B.C.L.C. at 734 (involving the misappropriation of corporate funds and business opportunities by officers to themselves or to companies controlled by them).

²¹⁰ See [1911] 1 K.B. at 101. In that case, two notorious fraudsters, Darby and Gyde, had incorporated a company in Guernsey, an island jurisdiction in the English Channel off the coast of France. They then used this company to incorporate yet another company, Welsh Slate Quarries Ltd., to offer debentures to the general public. Welsh Slate never had a viable business and the investors lost all their investment. Meanwhile, Darby and Gyde had made a secret profit from their promotion activities. The liquidator for Welsh Slate sought to pierce the veil of the Guernsey corporation to recover the secret profit. *Id.*

²¹¹ See *id.*

²¹² See *id.*

²¹³ See *id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 101.

Therefore, Judge Phillimore's real objection was to how they concealed their involvement in the scheme and misrepresented that the Guernsey corporation was the entity behind the sham company.²¹⁶ It is noteworthy that the misrepresentation in that case did not concern the amount of assets in support of the company—the usual subject of misrepresentation in U.S. cases²¹⁷—but the general credibility and creditworthiness of its shareholders.²¹⁸

Some commentators argue that from a transaction cost perspective, misrepresentation justifies veil piercing because it induces corporate creditors to expend monitoring costs to a socially wasteful level.²¹⁹ If misrepresentation results in shareholder liability, shareholders will be deterred from engaging in it, and creditors will incur lower costs to detect it.²²⁰ This justification, however, is questionable. A creditor would only investigate if it had grounds for suspicion. If the representation made by the corporation seemed valid and genuine, the creditor would have little reason to investigate it.

Take the example of *In re Darby*. If the investors had no reason to doubt the legitimacy of the Guernsey corporation, they would have little motivation to undertake any investigation, regardless of the availability of shareholder assets for recovery.²²¹ The investigation would have been straightforward: the identity of the shareholders of the corporation should have been available at the Companies Registry in Guernsey.²²² Moreover, the extent to which the investors would have been reassured by shareholder liability is unclear. If they had been aware of Darby and Gyde's role in the sham company, the investors probably would not have been assuaged by the availability of veil piercing to remain in the company. They would have either not invested at all or tried to sell their investments. The incentive to investigate does not arise from the fact that limited liability confines investor recovery to corporate assets. Rather, the incentive derives from the potential inves-

²¹⁶ See *In re Darby*, [1911] 1 K.B. at 101, 103.

²¹⁷ See HARRY G. HENN & JOHN R. ALEXANDER, *LAW OF CORPORATIONS* 432 (3d ed. 1983) (citing *Courtney v. Georger*, 228 F. 859 (2d Cir. 1915); *Rhode v. Dock-Hop Co.*, 194 P. 11 (Cal. 1920); *Hospes v. Northwestern Mfg. & Car Co.*, 50 N.W. 1117 (Minn. 1892); *G. Loewus & Co. v. Highland Queen Packing Co.*, 6 A.2d 545 (N.J. Ch. 1939)).

²¹⁸ See *In re Darby*, [1911] 1 K.B. at 101.

²¹⁹ See Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499, 520–21 (1976).

²²⁰ See *id.* The kind of misrepresentation Posner has in mind is when a parent has represented to a subsidiary that the parent's assets will be available to the subsidiary's creditors. See *id.* at 521.

²²¹ See *In re Darby*, [1911] 1 K.B. at 101.

²²² See *id.*

tors' desire to avoid exposure to fraud in the first place. Contrary to the transaction cost perspective, altering the size of the pool of assets available for recovery will not have significant impact on investor incentives to investigate. Justifying veil piercing in misrepresentation cases on transaction cost grounds is shaky at best.

The obvious response from the transaction cost line of reasoning is that if misrepresentation results in veil piercing, shareholders will refrain from attempting it in the future. There will be no need for potential creditors to investigate. Unfortunately, shareholder liability will not deter potential fraudsters from attempting to defraud creditors. These fraudsters will react to the threat of veil piercing by shifting the proceeds of their fraudulent schemes beyond the reach of the creditors by way of offshore accounts, trusts, or other liability-evading devices.²²³ Shareholder liability will raise the costs of fraud, but it will not eliminate it. Corporate creditors will continue to investigate and monitor the corporation regardless of the existence of a misrepresentation exception to limited liability.

It seems that one can best justify a misrepresentation exception with a combination of estoppel and what one commentator refers to as the ideals of Truth and Respect that govern a debtor's dealing with his creditor.²²⁴ Estoppel refers to the idea that once a shareholder has made the representation that he is responsible for the corporation's debts, and the creditor has reasonably relied on it, the shareholder should be estopped from repudiating the representation.²²⁵ The ideal of Truth requires the corporate debtor to be truthful and honest in its dealing with its creditors, and the ideal of Respect requires it to accord primacy to the creditors' claims when engaging in transfers of corporate assets.²²⁶

The 1961 Texas Court of Appeals case *Moore & Moore Drilling Co. v. White* may illustrate the court's tacit utilization of the principles of Truth

²²³ See Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 14 (1996).

²²⁴ See Robert Charles Clark, *The Duties of the Corporate Debtor to Its Creditors*, 90 HARV. L. REV. 505, 509–11 (1977).

²²⁵ L.C.B. GOWER, *THE PRINCIPLES OF MODERN COMPANY LAW* 381–83 (K.W. Wedderburn et al. eds., 3d ed. 1969).

²²⁶ See Clark, *supra* note 224, at 509–11. Professor Clark defines the ideal of Truth as a requirement that in connection with transfer of property to others, a debtor cannot tell lies that will lead to non-satisfaction of the creditor's claim. *Id.* at 509. The ideal of Respect imposes on the debtor "a moral duty in transferring his property to give *primacy* to so-called legal obligations, which are usually the legitimate, conventional claims of standard contract and tort creditors, as opposed to the interests of self, family, friends, shareholders, and shrewder or more powerful bargaining parties." *Id.* at 510–11.

and Respect.²²⁷ In that case, a Texas state court refused to pierce the veil based only upon the defendant corporation's silence about its financial situation.²²⁸ The court would not impose shareholder liability absent fraud or other active misrepresentation.²²⁹ This result, while sound, is inconsistent with the transaction cost analysis presented above. From the transaction cost perspective, the *Moore* court should have pierced the veil because doing so would have compelled the corporation to come forward with its own financial information, saving the plaintiff creditor substantial investigation costs. Taking this reasoning to its logical conclusion, from a transaction cost perspective there should be no material difference between active misrepresentation and omission to provide information. In either case, transaction costs will be saved if the threat of veil piercing compels the corporation to come forward with relevant information. It thus goes beyond mere sanctioning of active misrepresentation and would impose an affirmative duty on a corporate debtor to provide full disclosure of relevant financial information to its creditors. Nevertheless, courts would likely find this approach too intrusive.²³⁰

A better explanation for the outcome in *Moore* is that the defendant corporation was truthful and respectful in its dealing with the plaintiff creditor and had made no representations of any kind. The defendant did not pursue deceptive conduct that resulted in non-satisfaction of the creditor's claims.²³¹ Nor did it undermine the primacy of the creditor's claims in any asset transfer by favoring its own associates.²³² Moreover, the lack of active representation to the creditor means that the estoppel rationale did not apply.²³³ The *Moore* court was thus correct in refusing to pierce the veil.

2. Tort Cases

Economic analysis of limited liability and the corporate veil doctrine has drawn distinctions between different types of claimants. According to this mode of analysis, judicial readiness to override limited

²²⁷ See 345 S.W.2d 550, 555–56 (Tex. App. 1961).

²²⁸ See *id.*

²²⁹ See *id.*

²³⁰ See *id.* (noting that in the absence of a fiduciary relationship between the parties, there is no affirmative duty to disclose financial information of the corporation).

²³¹ See Clark, *supra* note 224, at 508–09.

²³² See *id.* at 511–12.

²³³ *Moore*, 345 S.W.2d at 555–56; see Clark, *supra* note 224, at 541 n.97 (claiming that in the absence of express agency, estoppel, or tort, three elements must be proved to make a parent corporation responsible for the subsidiary: control, fraud, and proximate causation of injury).

liability should vary according to the claimant at issue. In particular, many commentators have argued that veil piercing should be more readily available to tort claimants than to contractual claimants because of the former's inability to negotiate *ex ante* for compensation or to seek additional credit protection from the corporation.²³⁴ Despite this almost unanimous view within the academic community, U.S. courts have been more sympathetic toward contractual claims than tort claims. Professor Thompson found that the plaintiff success rate in contractual corporate veil cases was forty-two percent, compared to only thirty-one percent for tort cases.²³⁵ Although an eleven percent difference is clearly substantial, a thirty-one percent success rate suggests that tort claimants prevail with sufficient regularity in the United States as well.

The same cannot be said about English tort claimants. The general view in the English judiciary after the *Adams* decision is that the door to tort claimants bringing veil piercing claims is largely closed.²³⁶ In response to the argument that the corporate parent in that case had intentionally located hazardous asbestos operations in an underfunded subsidiary to avoid potential liabilities, the court proclaimed that:

²³⁴ See Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1919 (1991); David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1566–68 (1991); Comment, *Should Shareholders Be Personally Liable for the Torts of Their Corporations?*, 76 YALE L.J. 1190, 1195 (1967); see also Barber, *supra* note 14, at 381–82 (suggesting that because a tort claimant has usually not engaged in prior dealings with the corporation, it seems illogical to require a disregard of corporate formalities before piercing the veil); Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 616–17 (1986) (claiming that the efficiency advantages of limited liability where there are tort claimants disappears as compared to when there are contract claimants); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 112 (1985) (claiming that courts are more willing to disregard the corporate veil in tort than in contract cases); William P. Hackney & Tracey G. Benson, *Shareholder Liability for Inadequate Capital*, 43 U. PITT. L. REV. 837, 867 (1982) (stating that a tort claimant differs from a contract claimant because the tort claimant cannot “select the person he does business with”); Halpern et al., *supra* note 35, at 145–47 (arguing that some unlimited liability be available for tort claimants because of the risk that corporations will shift the risk of business failures to these claimants). *But see* Posner, *supra* note 219, at 519–20 (arguing that piercing the corporate veil for tort claimants would create a negative externality in that investment would be discouraged); Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 VAND. L. REV. 1, 31–32 (1994) (arguing that liability should not be extended to shareholders because it will have a significant negative effect on the ability of shareholders to diversify and therefore will remove the advantage of standardized share-pricing necessary for liquid financial markets for shares).

²³⁵ See Thompson, *supra* note 7, at 1058.

²³⁶ See *Trustor*, [2001] 1 W.L.R. at 1184–85.

[W]e do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law.²³⁷

The English courts have not always held such a staunchly pro-corporation view on this issue. In *Rainham Chemical Works*, Lord Sumner described the two shareholders' attempt to shield themselves from potential tort liabilities through the interposition of a company as "expedient" and "ignoble,"²³⁸ and the House of Lords proceeded to impose shareholder liability for the damages caused by an explosion at their explosives plant.²³⁹ Remarkably, this was done in the absence of any improper conduct or wrongdoing on the part of the shareholders.²⁴⁰ In this sense, the Law Lords were actually more progressive as compared with their U.S. contemporary, Justice Cardozo, in *Berkey v. Third Avenue Railway*, where Justice Cardozo refused to pierce the veil between the parent and the subsidiary in light of the absence of fraudulent conduct.²⁴¹ For whatever reason, *Rainham Chemical Works* has not received much attention in the academic literature or subsequent cases. *Adams* has largely shaped the current view on the applicability of the corporate veil doctrine to tort claims in the United Kingdom.²⁴²

Some U.S. courts have expressed a similar view to that articulated in *Adams*.²⁴³ The underlying premise of these U.S. courts seems to be

²³⁷ *Adams*, [1990] Ch. at 544.

²³⁸ [1921] 2 A.C. at 483. Lord Sumner added that the use of the corporate entity "was excellent if it could be made good, but unfortunately it required that Messrs. Feldman and Partridge should be at the same time occupiers and not occupiers of the premises, which was absurd." *Id.* at 484.

²³⁹ *Id.* at 466.

²⁴⁰ *Id.* at 486. The decision held that the two shareholders had retained their occupation rights with respect to the plant and therefore remained liable to the tort victim under English precedent *Rylands v. Fletcher*. *Id.* at 478, 479.

²⁴¹ See *Berkey*, 155 N.E. at 58, 61; *Rainham*, [1921] 2 A.C. at 486. The degree of control exerted by the corporate parent over the subsidiary in *Berkey* was quite similar to that wielded by the two shareholders over the company in *Rainham Chemical Works*.

²⁴² See, e.g., *Trustor*, [2001] 1 W.L.R. at 1184–85.

²⁴³ See *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 149–52 (3d Cir. 1988); *Harris v. Curtis*, 8 Cal. App. 3d 837, 841–42 (Ct. App. 1970).

that the use of the corporate entity to limit future liabilities is legitimate.²⁴⁴ For these courts, however, the crucial condition is the absence of improper conduct or wrongdoing on the part of the corporation and its shareholders.²⁴⁵ The stance taken by English and U.S. courts on the proper use of the corporate entity to limit future tort liabilities is most aptly illustrated by *Adams*²⁴⁶ and the 1988 Third Circuit Court of Appeals case *Craig v. Lake Asbestos of Quebec*.²⁴⁷ These two cases in fact arose from the same events and involved the same plaintiffs, employees of NAAC, which was the U.S. asbestos-producing subsidiary of Cape Industries in *Adams*.²⁴⁸ There was ample evidence before the English Court of Appeal that the decision to shut down NAAC was calculated to escape a default judgment that had been entered against it by a U.S. court.²⁴⁹ Yet by refusing to pierce the veil, the court tacitly condoned it. In contrast, the Third Circuit acknowledged the fraudulent nature of this liability evasion scheme.²⁵⁰ These two cases show that English courts hold a considerably more permissive view of the exploitation of limited liability protection against tort claims. In comparison, most U.S. courts would have treated Cape Industries' activities as asset stripping.²⁵¹

Nevertheless, it is noteworthy that even before *Adams*, tort claims appeared less frequently among English corporate veil cases. Of the thirty-five prominent English corporate veil cases surveyed in this Article, only one involved tort claims.²⁵² This starkly contrasts with the composition of the corporate veil cases in the United States. Of the 1,600 cases Professor Thompson included in his survey, 226 were tort cases.²⁵³ It is not entirely clear what explains this dearth of tort cases in

²⁴⁴ See *Craig*, 843 F.2d at 150; *Harris*, 8 Cal. App. 3d at 843.

²⁴⁵ See *Craig*, 843 F.2d at 150. After accepting that Cape's liability evasion scheme was fraudulent, the Third Circuit Court of Appeals proceeded to declare that "evasion of tort liability has never, in itself, been sufficient basis to disregard corporate separateness." *Id.*

²⁴⁶ See *Adams*, [1990] Ch. at 544.

²⁴⁷ See *Craig*, 843 F.2d at 150.

²⁴⁸ See *id.* at 146-48; *Adams*, [1990] Ch. at 434-35.

²⁴⁹ See Moore, *supra* note 2, at 182.

²⁵⁰ See *Craig*, 843 F.2d at 149-50 ("We accept for purposes of this appeal the district court's findings and conclusion that Cape's scheme to avoid asbestos-injury liability in the United States constituted the type of 'fraud or injustice' that would satisfy that element of the standard for piercing the corporate veil."). The Third Circuit refused to impose liability on Cape Industries' shareholder, who had no direct involvement in the liability-evasion scheme or NAAC's asbestos operations in the United States. See *id.* at 150-52.

²⁵¹ See Whincup, *supra* note 5, at 162.

²⁵² See *Rainham*, [1921] 2 A.C. at 470 (seeking to pierce the corporate veil in compensation for damage to property following an explosion at a munitions factory).

²⁵³ Thompson, *supra* note 7, at 1058.

the United Kingdom. It is possible that even before *Adams*, potential tort claimants appreciated that avoidance of future liabilities is an inherent feature of the English corporate entity.

3. Asset Stripping vs. Evasion of Existing Legal Obligations

One class of U.S. corporate veil cases involves asset stripping. Asset stripping is shareholder dissipation of corporate assets by way of excessive dividend disbursements, inflated director salaries, or other improper means.²⁵⁴ The corporation is usually rendered insolvent as a result, and hence becomes unable to meet its creditors' claim or to satisfy a judgment.²⁵⁵ Asset stripping may take place before or after a judgment is entered against the corporation, but is usually performed after a legal obligation has been incurred.²⁵⁶ It should not come as a surprise that the U.S. courts have long adopted a hostile attitude toward such conduct. As early as 1939, in *Pepper v. Litton*, the Supreme Court subordinated the debts of the controlling shareholder of a corporation after the shareholder was found to have orchestrated a complex scheme to empty the corporate coffers.²⁵⁷ The company's scheme, which involved voluntary filing of bankruptcy, was executed with the specific intent to evade a judgment debt against the corporation.²⁵⁸ Regardless of whether it happens before or after a judgment has been issued, asset stripping has been roundly condemned by the U.S. courts ever since *Pepper v. Litton*.²⁵⁹

The closest concept to asset stripping in the English corporate veil doctrine is evasion of existing legal obligations, which encompasses some of the best-known English corporate veil cases.²⁶⁰ These cases bring to the forefront one of the most vexing questions in the corporate veil doctrine: how to distinguish between legitimate uses and abuses of

²⁵⁴ See VANDEKERCKHOVE, *supra* note 17, at 178.

²⁵⁵ *See id.*

²⁵⁶ *See id.* at 180.

²⁵⁷ 308 U.S. 295, 310–12 (1939).

²⁵⁸ *See id.* at 299.

²⁵⁹ *See id.* at 305–07; *Laborers' Pension Fund v. Lay-Com, Inc.*, 580 F.3d 602, 611 (7th Cir. 2009); *Brandon v. Anesthesia & Pain Mgmt. Assocs. Ltd.*, 419 F.3d 594, 596–97 (7th Cir. 2005); *Sea-Land Servs., Inc. v. Pepper Source*, 993 F.2d 1309, 1312 (7th Cir. 1993); *FDIC v. Sea Pines Co.*, 692 F.2d 973, 977 (4th Cir. 1962); *Henderson v. Rounds & Porter Lumber Co.*, 99 F. Supp 376, 380 (W.D. Ark 1951); *World Broad. Sys. v. Bass*, 328 S.W.2d 863, 866 (Tex. 1959).

²⁶⁰ *See, e.g., Ord*, [1998] B.C.C at 614–16; *Adams*, [1990] Ch. at 544; *Gilford Motor*, [1933] Ch. at 969; *Tjaskemolen*, [1997] 2 Lloyd's Rep. at 469; *Creasey*, [1992] B.C.C. at 647; *Jones*, [1962] 1 W.L.R. at 836–37.

the corporate entity.²⁶¹ This is related to the earlier discussion about the reluctance of English courts to pierce the veil of a *bona fide* company.²⁶² The English courts have affirmed the legitimacy of using the corporate structure to avoid *future* liabilities.²⁶³ Therefore, the crucial inquiry seems to be the relative timing of the incurrence of legal obligations and the use of corporate structure to avoid them. The best formulation of this inquiry appeared in a Hong Kong case prior to 1997, when English precedents were still binding on the Hong Kong courts. In *China Ocean Shipping v. Mitrans Shipping*, the Hong Kong Court of Appeal declared that:

Using a corporate structure to *evade* legal obligations is objectionable. The courts' power to lift the corporate veil may be exercised to overcome such evasion so as to preserve legal obligations. But using a corporate structure to *avoid* the incurring of any legal obligation in the first place is not objectionable. And the courts' power to lift the corporate veil does not exist for the purpose of reversing such avoidance so as to create legal obligations.²⁶⁴

²⁶¹ See, e.g., *Laborers' Pension Fund*, 580 F.3d at 611 (stating that the rule for analyzing whether the corporate form would sanction fraud is not clear cut).

²⁶² See *supra* notes 117–121 and accompanying text. An English commentator has labeled these evasion cases as fraud cases. See Jennifer Payne, *Lifting the Corporate Veil: A Reassessment of the Fraud Exception*, 56 CAMBRIDGE L.J. 284, 284 (1997). Nevertheless, there are considerable differences between the underlying conduct at issue in these evasion cases compared with the genuine fraud cases discussed above. All the genuine fraud cases featured outright fraudulent conduct. *Gencor ACP* and *Smallbone* both involved misappropriation of company funds and *Wallersteiner* involved so-called “circular cheque transactions” that were used to inflate the corporation’s book assets. See *Wallersteiner*, [1976] 1 W.L.R. at 991–92; *Trustor*, [2001] 1 W.L.R. at 1177; *Gencor*, [2000] 2 B.C.L.C. at 734. Meanwhile, the evasion cases involved the defendant’s attempt to avoid legal obligations that had been created under fully legitimate and lawful circumstances. *Gilford Motor* and *Creasey* involved an unemployment contract, *Jones* involved a conveyance of land, and *Yukong* and *Tjaskemolen* involved charter-parties. See *Yukong*, [1998] 1 W.L.R. at 294; *Gilford Motor*, [1933] Ch. at 935; *Tjaskemolen*, [1997] 2 Lloyd’s Rep. at 465; *Creasey*, [1992] B.C.C. at 638; *Jones*, [1962] 1 W.L.R. at 832. It was only when one of the parties to these legal transactions attempted to evade their legal obligations that the issue of veil piercing arose. See Payne *supra*, at 287–88. Therefore, this Article draws a distinction between these two categories of cases and refers to cases involving evasion of existing legal obligations as “evasion cases.”

²⁶³ *Adams*, [1990] Ch. at 544 (remarking that it is unobjectionable that “the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group . . . will fall on another member of the group rather than the defendant company”).

²⁶⁴ *China Ocean Shipping Co. v. Mitrans Shipping Co.*, [1995] 3 H.K.C. 123, 127 (C.A.).

If the legal obligation existed prior to incorporation, the use of the corporate structure would be considered evasion and the veil would be pierced. If the legal obligation was only created after incorporation, the use would be considered as avoidance and separate corporate personality would be upheld. This formulation of the evasion of existing legal obligations rule in fact explains a majority of the English cases in this category.²⁶⁵

Again, it should come as no surprise that English courts have been more tolerant of asset stripping than their U.S. counterparts. Two cases in particular—*Adams*²⁶⁶ and *Yukong v. Rendsburg Investments Corp.*²⁶⁷—featured the kind of conduct that would most likely have been condemned by U.S. courts.²⁶⁸ Yet English courts refused to pierce the veil. In *Adams*, the English Court of Appeal treated the case as concerning the legitimate incorporation of a subsidiary to limit the asbestos liability exposure of a corporate group.²⁶⁹

In reality, the corporate parent evaded the default judgment that had been entered against the subsidiary by shutting it down and transferring its operations to a newly incorporated subsidiary. To ensure that it would be safely insulated from liability, the parent interposed a Liechtenstein dummy corporation between itself and the new subsidiary.²⁷⁰ The asbestos liabilities had materialized when the second subsidiary was incorporated, which means that its veil should have been pierced under the evasion rule. The court chose to focus on the first subsidiary, however, which means that incorporation preceded the incurrence of liabilities and separate corporate personality was upheld.²⁷¹ The court likely reasoned that because the liabilities were incurred by the first subsidiary, it should be the time of its incorporation—not the second subsidiary's incorporation—that ought to serve as the reference point

²⁶⁵ See, e.g., *Gilford Motor*, [1933] Ch. at 938 (upholding a covenant not to compete because the legal obligation had been created prior to the incorporation of defendant's company); *Tjaskemolen*, [1997] 2 Lloyd's Rep. at 469 (extending liability to the acquiring company because the alleged breach of contract had occurred before the vessel was transferred); *Crasey*, [1992] B.C.C. at 638 (allowing the plaintiff to seek the assets of the acquiring company because the alleged wrongful termination occurred before the takeover); *Jones*, [1962] 1 W.L.R. at 835 (requiring a sham company to convey property pursuant to the purchaser's pre-merger contract with original company).

²⁶⁶ [1990] Ch. at 433.

²⁶⁷ [1998] 1 W.L.R. at 294.

²⁶⁸ See *Craig*, 843 F.2d at 149 (accepting the district court's finding that Cape's liability evasion scheme was fraudulent.)

²⁶⁹ See [1990] Ch. at 544.

²⁷⁰ See *id.* at 450.

²⁷¹ See *id.* at 539–44.

when applying the evasion rule. Although this reasoning may be logically sound, it has essentially left the door wide open for evasion by judgment debtors.²⁷² This dilemma can be sidestepped if the court shows greater flexibility in the choice of reference point. In a case such as *Adams*, given the substantial connection between the first and the second corporations—the latter had received all of the former's assets and hired all of its employees—it would be appropriate to choose the creation of the second corporation as the reference point.

Yukong exposed a further, and perhaps more serious, limitation of the evasion rule as a tool against asset stripping.²⁷³ Just as in *Adams*, the defendant shareholder shifted assets from the first to the second company after a legal obligation had been created.²⁷⁴ Again, the court refused to pierce the veil.²⁷⁵ Unlike the company in *Adams*, the second company in *Yukong* was incorporated before the legal obligation incurred.²⁷⁶

The second company existed when the breach of contract at issue took place. Therefore, no flexibility in the choice of reference point would have resulted in veil piercing. *Yukong* demonstrates how a shareholder can evade liabilities without being subject to veil piercing. The key is to ensure that incorporation precedes the incurrance of the legal obligation. But such ease of evasion is highly unsatisfactory. Therefore, the evasion rule should be modified to reach not only the incorporation of a new company, but also the use of an existing company to evade legal obligations. The reference point should be modified from

²⁷² See *Ord*, [1998] B.C.C. at 615 (demonstrating the impact on evasion post-*Adams*).

²⁷³ See *Yukong*, [1998] 1 W.L.R. at 309–10. *Yukong* concerned a charter-party between Rendsburg, a Liberian company controlled by the defendant shareholder, and Yukong Line, a Korean shipping company. *Id.* at 297–98. Rendsburg repudiated the contract after market conditions had deteriorated, after which Yukong sued for breach of contract. *Id.* at 298. Upon filing of the suit, the shareholder promptly transferred Rendsburg's assets to another company also controlled by him. *Id.* at 298–99. Yukong sought to hold the defendant shareholder personally liable by piercing the veil between him and Rendsburg. *Id.* at 299.

²⁷⁴ *Id.* at 298–99; see *Adams*, [1990] Ch. at 443–44. In fact, the removal of assets took place on the same day that the contract was repudiated. *Yukong*, [1998] 1 W.L.R. at 302. The court refused to accept that this sequence of events was a coincidence, and concluded that “the purpose of the transfer was to put Rendsburg's assets beyond the reach of Yukong in the probable event of litigation.” *Id.*

²⁷⁵ *Id.* at 310. This decision was all the more remarkable given the judge's characterization of Rendsburg as the shareholder's “alter ego.” *Id.* at 302. The judge further found that the shareholder had completely controlled both companies, that his conduct before and during the trial was disreputable, and that he contradicted himself on several key issues of the case. *Id.*

²⁷⁶ Compare *id.* at 298, with *Adams*, [1990] Ch. at 444.

the time of incorporation to the time a corporate entity is utilized. Such use may be by way of incorporation, as in *Adams*,²⁷⁷ or by way of transfer of funds to the company, as in *Yukong*.²⁷⁸

The different approaches to asset stripping on both sides of the Atlantic vividly illustrate the limitations of the English formalistic approach to veil piercing. The emphasis of the evasion rule under English law is on contractual obligations and tort liabilities. What matters is when a contract is breached or when a tort is committed vis-à-vis when a company is incorporated.²⁷⁹ In contrast, the U.S. corporate veil doctrine focuses on the underlying economic reality that justifies veil piercing, notably, the fact that a shareholder has taken deliberate action to impair creditor interests.²⁸⁰ This focus is more in keeping with the policy-driven and justice-conscious approach to veil piercing adopted by U.S. courts.²⁸¹ In light of all the complexities of the evasion rule, it would seem that if the goal was to deter evasion of legal obligations, the U.S. approach to asset stripping should be preferred. By focusing on whether the shareholder has acted deliberately to undermine creditor interests instead of comparing the relative timing of the incurrance of legal obligation and the use of the corporate entity, the U.S. approach focuses the inquiry on the crux of an asset stripping case.

Given the entrenched status of the evasion rule under English law, however, the best one can do is to improve its administrability. In fact, *Adams* raised one further issue concerning its application. Although the asbestos injuries had occurred prior to the incorporation of the second subsidiary, liability was only established after incorporation.²⁸² Therefore, whether the evasion rule should have resulted in veil piercing depends on one's view of when a legal obligation arises. There are a number of possibilities. One of them is that a legal obligation exists once liability is established.²⁸³ Applying this formulation, one commentator endorsed the outcome in *Adams* by arguing that liabilities were merely speculative when the second subsidiary was incorporated.²⁸⁴ One prob-

²⁷⁷ See [1990] Ch. at 443–44.

²⁷⁸ See [1998] 1 W.L.R. at 298–99.

²⁷⁹ See *Adams*, [1990] Ch. at 443–44; *Yukong*, [1998] 1 W.L.R. at 298–99.

²⁸⁰ See Krendl & Krendl, *supra* note 57, at 28.

²⁸¹ See *id.* at 2.

²⁸² See *Adams*, [1990] Ch. at 443–44, 447.

²⁸³ Hansmann & Kraakman, *supra* note 234, at 1896. Hansmann and Kraakman call this the judgment rule. *Id.*

²⁸⁴ Payne, *supra* note 262, at 289. It is not clear that the liabilities were speculative. First, the event that gave rise to liability had already taken place when the corporate structure was used as a liability limiting device. *Adams*, [1990] Ch. at 449–50. Second, Cape had

lem with this approach is that it would create a gaping loophole for shareholders to exploit.²⁸⁵ Considerable time usually elapses between when a company becomes aware of its potential tort liability and when the liability is formally established in court.²⁸⁶ If legal obligations only exist when liability is judicially established, the time elapsed can be used to transfer assets out of the company. The second possibility is that a legal obligation exists when a claim is filed in court.²⁸⁷ Nevertheless, this possibility still leaves much room for strategic behavior on the part of the shareholders. The timeframe for liability evasion strategies would be shorter, but the possibility still exists. The best rule seems to be that a legal obligation is incurred when the event that gives rise to potential liability takes place, and the company knows, or has reason to know, that the event may expose it to liability.²⁸⁸ This formulation would have changed the results in *Adams*. In *Adams*, the corporate parent was clearly aware of the potential for further liability when it set up the second corporation. After all, it had settled similar asbestos claims.²⁸⁹

On the other hand, whether a contractual obligation arises requires a different analysis. A contractual obligation is created when the parties enter into the contract.²⁹⁰ The time of breach is more precisely described as the time when a potential liability arises, and judgment date as the time when liability is established.²⁹¹ When the evasion rule is applied to contractual cases, the more suitable reference point is the time of breach. For contractual claims, the main concern of the evasion rule is that the shareholders will attempt to avoid judgment after they know or have reason to know that liability will be incurred: i.e., the breach. This concern can be adequately addressed by choosing the time of breach as the reference point. Adopting the time of contract formation as the reference point would be the most complete solution as it would cover practically all attempts at evasion.

settled some similar asbestos claims prior to incorporating the second subsidiary. *Id.* at 449.

²⁸⁵ See Hansmann & Kraakman, *supra* note 234, at 1896.

²⁸⁶ See *id.* at 1896–97.

²⁸⁷ *Id.* at 1896.

²⁸⁸ See *id.* at 1897. This is similar to Hansmann and Kraakman's "information-based rule." *Id.* Their rule is more complicated, however, because it is an *ex ante* unlimited liability rule for corporate torts. It thus takes into account issues that are not particularly pertinent to *ex post* veil piercing. See *id.*

²⁸⁹ [1990] Ch. at 449.

²⁹⁰ See RESTATEMENT (SECOND) OF CONTRACTS § 9 (1981).

²⁹¹ See *id.* §§ 243, 346, 357.

Nevertheless, adopting the time of contract formation as the reference point would prove over-inclusive by catching many legitimate uses of the corporate entity. It is important to note that the choice of the reference point should reflect the likelihood that at that point in time, the shareholders had a specific intent to evade liability. Most contractual parties do not contemplate contractual breach or evasion of liability at the time of contract formation. Moreover, choosing contract formation as the reference point would mean that shareholder liability could result from any asset transfer after the contract was entered into regardless of whether the shareholders had a specific intent to evade liability. In fact, using contract formation as the reference point would be tantamount to imposing an obligation on the corporation not to transfer its assets to any affiliated company after the contract was entered into. This would clearly be an excessively burdensome obligation.

A further modification of the evasion rule is needed for contractual obligations. The necessity of this modification is due to the fact that the breaching party can control the timing of the breach. A corporation bent on evading its contractual obligation may incorporate a second company or transfer funds to it just before it repudiates a contract, thereby avoiding veil piercing. To forestall this possibility, if the use of the corporate entity takes place close in time to the breach, there should be a rebuttable presumption of evasion. To avoid veil piercing, the company must rebut this presumption by adducing evidence that the use of the corporate structure was for a legitimate purpose.

Applying this modified evasion rule would have changed the result in *Yukong*. In *Yukong*, the shareholder knew that the contractual repudiation would expose him to liability and he promptly transferred assets from the first to the second company after he had decided to repudiate the contract.²⁹² As the court found, that was why he siphoned funds out of the first company on the day of repudiation.²⁹³ Given that the time when the shareholder knew, or should have learned, about the impending breach preceded the transfer of assets to the second company, the veil would have been pierced under the modified evasion rule.²⁹⁴

²⁹² See *Yukong*, [1998] 1 W.L.R.at 302.

²⁹³ See *id.*

²⁹⁴ See *id.*

4. Voluntary Piercing Cases

One notable feature of the English corporate veil cases is the preponderance of voluntary piercing cases.²⁹⁵ Voluntary piercing is also referred to as reverse piercing.²⁹⁶ This is a misnomer, however, because strictly speaking, reverse piercing refers to the imposition of liability on the corporation for the shareholder's debts.²⁹⁷ This contrasts with the usual piercing situation—forward piercing—in which the shareholders are held liable for the corporation's debts.²⁹⁸ Voluntary piercing, however, refers to the invocation of the doctrine by the shareholders themselves to set aside the corporate entity.²⁹⁹ It is voluntary because it is instigated by the shareholder itself. The typical veil piercing claim is involuntary in that it is filed by a creditor or corporate outsider, and the shareholders are subject to liability against their will.³⁰⁰ Therefore, even though reverse piercing is often voluntary, it need not be so. An example of an involuntary reverse piercing claim is when a corporate parent's creditors seek recovery from its subsidiaries because, perhaps, the latter have more assets in their possession than the parent.³⁰¹

Interestingly, in a majority of English voluntary piercing cases, the veil piercing claims are advanced so that the shareholder can claim

²⁹⁵ See, e.g., *Woolfson*, (1978) S.C.(H.L.) at 90; *Macaura*, [1925] A.C. at 625–28; *Beckett*, [2007] I.C.R. at 1545–46; *D.H.N.*, [1976] 1 W.L.R. at 860; *Tunstall*, [1962] 2 Q.B. at 600–02; *Smith, Stone & Knight*, [1939] 4 All E.R. at 120–22.

²⁹⁶ See Ottolenghi, *supra* note 106, at 351; Michael J. Gaertner, Note, *Reverse Piercing the Corporate Veil: Should Corporation Owners Have It Both Ways?*, 30 WM. & MARY L. REV. 667, 667 (1989).

²⁹⁷ Elham Youabian, *Reverse Piercing of the Corporate Veil: The Implications of Bypassing "Ownership" Interest*, 33 SW. U. L. REV. 573, 574 (2004).

²⁹⁸ *Id.*

²⁹⁹ See Ottolenghi, *supra* note 106, at 351. This is done when the shareholder can somehow benefit from the disregard of separate corporate personality.

³⁰⁰ See Youabian, *supra* note 297, at 577.

³⁰¹ See *Kingston Dry Dock*, 31 F.2d at 267. In this case, the plaintiff attempted to reach for the subsidiary's assets because the parent had failed to satisfy the debts. *Id.*; see also *Floyd v. Internal Revenue Serv.*, 151 F.3d 1295, 1299–1300 (10th Cir. 1998) (remanding case in which IRS sought to reverse-pierce corporation to satisfy individual's debts); *Towe Antique Ford Found. v. Internal Revenue Serv.*, 999 F.2d 1387, 1390–91 (9th Cir. 1993) (allowing United States' levy of corporation's automobiles to satisfy individual taxpayer's liabilities because corporation was individual's alter ego); *LFC Mktg. Group v. Loomis*, 8 P.3d 841, 843 (Nev. 2000) (finding that the alter ego doctrine may be applied to recover an individual debt from the assets of a corporation determined to be the alter ego of the individual debtor); *Zisblatt v. Zisblatt*, 693 S.W.2d 944, 955 (Tex. App. 1985) (finding that most of the assets the corporation acquired during the time of individual's marriage were in fact part of the individual community estate and subject to division upon divorce).

compensation or benefit of some kind.³⁰² These cases may be referred to as compensation cases, three of which, in particular, arose in a compulsory purchase (government takings) context.³⁰³ These cases raise interesting theoretical issues for two reasons. First, the corporations themselves are pleading for veil piercing.³⁰⁴ Second, unlike the typical veil piercing cases, where shareholder liability is at stake, the doctrine is invoked in these cases to obtain financial benefits for the corporation.³⁰⁵ The English courts have expressed almost uniform hostility toward voluntary piercing. In *Tunstall v. Steigman*, Lord Justice Danckwerts stated that “[the owner] cannot say that in a case of this kind she is entitled to take the benefit of any advantages that the formation of a company gave to her, without at the same time accepting the liabilities arising therefrom.”³⁰⁶ Vice-Chancellor Browne-Wilkinson expressed this sentiment pointedly in *Tate Access Floors Inc. v. Boswell*:

If people choose to conduct their affairs through the medium of corporations, they are taking advantage of the fact that in law those corporations are separate entities, whose property and actions are in law not the property or actions of their incorporators or controlling shareholders. In my judgment controlling shareholders cannot, for all purposes beneficial to them, insist on the separate identity of such corporations but then be heard to say the contrary when discovery is sought against such corporations.³⁰⁷

There is greater diversity of views among U.S. courts toward voluntary piercing. Some courts believe that voluntary piercing should be rejected on principle, while some apply the same analysis to both voluntary and involuntary piercing claims.³⁰⁸ Yet other courts apply a more

³⁰² See, e.g., *Macaura*, [1925] A.C. at 625–28; *Smith, Stone & Knight*, [1939] 4 All E.R. at 120–22.

³⁰³ See, e.g., *Woolfson*, (1978) S.C.(H.L.) at 90; *D.H.N.*, [1976] 1 W.L.R. at 854; *Smith, Stone & Knight*, [1939] 4 All E.R. at 117. Compulsory purchase is the equivalent of government takings under eminent domain in the United States. See Ben Beckman, Note, *The Wholesale Decommissioning of Vacant Urban Neighborhoods: Smart Decline, Public-Purpose Takings, and the Legality of Shrinking Cities*, 58 CLEV. ST. L. REV. 387, 392 (2010) (“[C]ompulsory purchase’ [is] primarily used in British, while ‘eminent domain’ [is] exclusively American.”).

³⁰⁴ See *Zisblatt*, 693 S.W.2d at 947.

³⁰⁵ See *LFC Marketing Group*, 8 P.3d at 844.

³⁰⁶ [1962] 2 Q.B. at 601.

³⁰⁷ [1991] Ch. 512 at 531.

³⁰⁸ Gaertner, *supra* note 296, at 681.

open-ended policy analysis to voluntary piercing claims.³⁰⁹ Despite this variety of analytical approaches, voluntary piercing has a considerably lower likelihood of success. In his comprehensive survey, Professor Thompson discovered that only 13.4% of voluntary piercing claims prevailed, while the success rate was 42.3% when the plaintiff was a creditor.³¹⁰ These figures suggest that English and U.S. courts are similarly averse to voluntary piercing.

Although the argument that the shareholders should not be allowed to have it both ways carries considerable intuitive appeal, it is worth pondering whether it admits of exceptions or qualifications. This is illustrated by *D.H.N.*³¹¹ The benefit allegedly obtained by D.H.N. from its corporate structure was savings on a stamp duty.³¹² The cost was the loss of compensation for the disturbance of business.³¹³ Although the opinion contained no information on the amount of compensation in dispute, it is likely to have exceeded the savings on stamp duty.³¹⁴ Given this discrepancy between the realized costs and benefits of incorporation, one may defend voluntary piercing in *D.H.N.* on the grounds that there was a significant mismatch between the realized costs and benefits from incorporation, and that compulsory purchase is not something that D.H.N. could have reasonably foreseen. The argument is that when a potential incorporator considers whether to set up a corporation, it forms expectations of the benefits and costs of incorporation. It weighs these expected benefits and costs, and decides to incorporate if the former exceed the latter. Given that the incorporator cannot anticipate

³⁰⁹ *Id.*

³¹⁰ Thompson, *supra* note 7, at 1057.

³¹¹ See *D.H.N.*, [1976] 1 W.L.R. at 854–55, 857–60. The facts of this case are as follows: D.H.N., the corporate parent, operated a grocery business on a premise in Tower Hamlets, a borough in London. *Id.* at 857. D.H.N. had acquired the premise through a series of rather complex transactions that resulted in the land being owned by one of its wholly owned subsidiaries, Bronze. *Id.* at 854–55. The Tower Hamlets Borough Council issued a compulsory purchase order for the redevelopment of the land and offered compensation for the value of the land to the subsidiary. *Id.* at 854. The Council, however, refused to compensate the parent for the value of the business itself. *Id.* at 858. Under the Land Compensation Act, D.H.N. would only have been entitled to compensation if it had been more than a bare licensee of the land. *Id.* at 857–58. The English Court of Appeal unanimously pierced the veil between D.H.N. and Bronze and allowed compensation for the disturbance of business on a variety of grounds, including that the companies constituted a single economic entity, that D.H.N. had an irrevocable license to the land, and that D.H.N. had an equitable interest in the land. *Id.* at 859–60.

³¹² See *id.* at 858.

³¹³ See *id.* at 857–58.

³¹⁴ See *id.* at 858, 860.

every contingency, it follows that it should not be held accountable for consequences that it should not be expected to have foreseen.

Although this may initially seem like a convincing argument, it is flawed in a number of ways. First, it is difficult to determine what the incorporator should have and should not have foreseen. Likewise, it is very difficult for a court to make this determination *ex post*. Second, and more importantly, while there are unexpected costs, there are also unexpected benefits. Voluntary piercing may permit a court to save an incorporator from a substantial unexpected cost. Nevertheless, no legal doctrines exist to allow a court to remove the unexpected benefits. Therefore, permitting voluntary piercing under these circumstances creates a windfall for the incorporator. In the end, the best rule is to require an incorporator to bear all the costs, expected and unexpected, of incorporation, which means that a court should not sanction voluntary piercing in a compensation case.³¹⁵

C. Issues External to the Doctrine

There are two further differences between the English and the U.S. corporate veil doctrines that do not directly bear on the judicial approaches to the doctrine, but are nonetheless interesting to note.

1. Dearth of Complementary Doctrines

The first difference is the lack of related substitutes for the corporate veil doctrine under English law. One commentator has argued that fraudulent conveyance laws, dividend restraint statutes, the equitable subordination doctrine, and the corporate veil doctrine serve similar purposes, namely, the protection of creditors from shareholder dissipation of corporate assets. This commentator characterizes the latter three as “functional substitutes or technically necessary complements to

³¹⁵ See *id.* at 857–58 (explaining the argument advanced by the party opposing voluntary piercing). Even if one holds the view that a corporation should not bear the unexpected costs of incorporation, it is doubtful whether D.H.N. deserved compensation in this case. Lord Justice Shaw referred to the fact that D.H.N. could have maintained all the benefits of incorporation and conveyed the land to itself the day before the compulsory purchase order was issued, and would have received full compensation. *Id.* at 867. D.H.N. had become aware of the possibility of a compulsory purchase as early as February 1970, and had eight months until October 1970—when the order was finally issued—to convey the land back to itself. See *id.* at 858. No explanation was given for why D.H.N. had failed to do so over this long period of time. See *id.* at 856. Having been given ample opportunity to protect itself and failing to do so, D.H.N.’s voluntary piercing claim should have been rejected. See *id.* at 857–58.

the law of fraudulent conveyances.”³¹⁶ Given the narrow scope of the English corporate veil doctrine, one would expect creditor protection to be taken on by these other doctrines. Veil piercing and equitable subordination, in particular, have substantial overlaps with each other in the United States.³¹⁷ Both doctrines are triggered by a host of similar considerations, such as fraudulent conduct by the controlling shareholder and inadequate capitalization of the corporation.³¹⁸ Courts applying both doctrines have invoked the same language of “instrumentality” or “alter ego.”³¹⁹

Yet there is no equitable subordination under English insolvency law that allows the courts to subordinate a shareholder’s advances to the corporation below the creditors’ claims.³²⁰ In light of the functional equivalence of these two doctrines³²¹ and the English courts’ reservations about veil piercing,³²² the lack of an equitable subordination doctrine in English law is not altogether surprising. There are, however, a host of statutory provisions under English law that perform similar functions as the fraudulent conveyance laws in the United States.³²³ Therefore, the significance of a lack of equitable subordination in English law should not be overstated.³²⁴

³¹⁶ Clark, *supra* note 224, at 505.

³¹⁷ See Landers, *supra* note 96, at 590.

³¹⁸ See Clark, *supra* note 224, at 518; Landers, *supra* note 96, at 597–98.

³¹⁹ See Landers, *supra* note 96, at 598.

³²⁰ JAMES O’DONOVAN, LENDER LIABILITY 504 (2005).

³²¹ See Landers, *supra* note 96, at 590.

³²² O’DONOVAN, *supra* note 320, at 504.

³²³ *Id.* at 458. A number of examples include Sections 238 through 241, and 423 through 425 of the Insolvency Act. Sections 238 through 241 allow the courts to invalidate transactions that constitute an unfair preference for a particular creditor or that are undervalued. *Id.* at 458–59. Sections 423 through 425 set aside transactions that are at an undervalue and entered into for the purpose of putting corporate assets beyond the reach of its creditors. ROY GOODE, PRINCIPLES OF CORPORATE INSOLVENCY LAW 503–05 (2005). These sections replace the fraudulent conveyance provisions in the Law of Property Act, the application of which to the mere payment of money was not clearly established. See SIR KENNETH CORK, INSOLVENCY LAW AND PRACTICE—REPORT OF THE REVIEW COMMITTEE 276 (1982). These provisions seem largely to serve the same purpose as the fraudulent conveyance laws in the United States. See O’DONOVAN, *supra* note 320, at 458.

³²⁴ O’DONOVAN, *supra* note 320 at 504 (“Indeed, with the arsenal of remedies and defences available against lenders for misrepresentation, economic duress, breach of fiduciary duty, wrongful and fraudulent trading, fraudulent and voidable dispositions, [and] transactions at an undervalue, . . . there is scarcely any need for a doctrine of equitable subordination in English law.”).

2. Absence of Federalism Concerns

The second further difference between English and U.S. corporate veil cases is the absence of federalism concerns in the former. One issue that has been raised in some U.S. corporate veil cases, especially those involving the enforcement of a federal statute, is the extent to which the policy considerations behind the federal statute trump state corporation law.³²⁵ It has been argued that in some statutory veil piercing cases, the rule of separate corporate personality frustrates federal regulatory policy.³²⁶ *United States v. Bestfoods* showcases the conflict between state corporation law and federal regulatory policy.³²⁷ *Bestfoods* addressed the extent to which a parent corporation could be held liable for a subsidiary's operation of a polluting facility under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).³²⁸ The Sixth Circuit applied Michigan corporate veil law and absolved the corporate parent in that case from liability in light of the court's finding that the parent had not used the subsidiary to perpetrate fraud or to "subvert justice."³²⁹ The Sixth Circuit further held that direct liability under CERCLA would only apply if the parent had sole or joint venture operation of a polluting facility.³³⁰ This holding is consistent with the traditional state law notion of separate corporate personality.

The Supreme Court, however, overturned the Sixth Circuit's decision, and held that a parent corporation could be liable under CERCLA even when its participation in the polluting facility is short of sole and joint venture operation.³³¹ This decision can be understood as reflecting a recognition that the demarcation of a corporation's boundaries under state law would have obfuscated the federal policy behind CERCLA, which had been characterized as a "remedial statute de-

³²⁵ See *United States v. Bestfoods*, 524 U.S. 51, 63 (1998).

³²⁶ Ronald G. Aronovsky & Lynn D. Fuller, *Liability of Parent Corporations for Hazardous Substance Releases Under CERCLA*, 24 U.S.F.L. REV. 421, 463-67 (1990); Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 871 (1982). But cf. Thompson, *supra* note 96, at 392. Thompson describes federalism as "an example of Latty's triumph of a minor premise," and argues that the alleged conflict between state corporation law and federal regulatory policy is "a conflict which does not exist." *Id.* Thompson's article was written before *Bestfoods* was handed down, however, and he expressly stated that it does not incorporate the *Bestfoods* decision. *Id.* at 379. It is possible that *Bestfoods* would have changed his view on the conflict.

³²⁷ See *Bestfoods*, 524 U.S. at 60.

³²⁸ *Id.*

³²⁹ *United States v. Cordova Chem. Co. of Mich.*, 113 F.3d 572, 582 (6th Cir. 1997).

³³⁰ *Id.* at 81.

³³¹ *Bestfoods*, 524 U.S. at 66-67. The Supreme Court, however, did not rule on the parent corporation's liability and instead remanded the issue to the trial court. *Id.* at 72-73.

signed to protect and preserve public health and the environment.”³³² The Supreme Court circumvented this problem by adopting a more expansive interpretation of the term “operator” in the statute to override separate corporate personality under state law.³³³

The absence of federalism concerns is hardly surprising given that the United Kingdom is not a federalist polity and does not comprise a federal legal system alongside subordinate state legal systems.³³⁴ Although the United Kingdom actually consists of two legal systems—England, Wales, and Northern Ireland, on the one hand, and Scotland, on the other—the two systems function in parallel.³³⁵ Moreover, there is only one body of company law for the entire United Kingdom. The Companies Act (2006) applies to the entire United Kingdom and there is no separate Scottish company law with which statutory policies pursued by Parliament may clash.³³⁶

This is not to say that the notion of separate corporate personality under English company law does not clash with statutory policies. It only means that the interface between company law and statutory policies will often be different from the kind of interaction underpinned by federalism concerns that is seen in U.S. cases. In the United States, the interaction is often that of deference by state law to federal regulatory law.³³⁷ In the United Kingdom, company law need not yield to statutory policies as both are promulgated at the same level in the polity.³³⁸ Even then, given the hesitation of the English courts explicitly to discuss policy considerations in corporate veil cases, whenever a clash between statutory policies and separate corporate personality arises, it is seldom resolved with a direct recognition of the conflict.³³⁹ Instead, it is mediated through traditional common law concepts.³⁴⁰ For instance, *In re (FG) Films* could have been treated as a case featuring a conflict between separate corporate personality and the statutory policy of the

³³² *Cordova*, 113 F.3d at 577.

³³³ See *Bestfoods*, 524 U.S. at 65–67.

³³⁴ See S.H. SMITH ET AL., *THE MODERN ENGLISH LEGAL SYSTEM* 4 (5th ed. 2007).

³³⁵ *Id.* at 4.

³³⁶ Companies Act 2006 c. 46, pt. 47, § 1299 (U.K.); see also Explanatory Notes to Companies Act 2006, at para. 14 (Gr. Brit.) (“Company law is a reserved matter and Companies Acts extend to the whole of Great Britain.”), available at www.legislation.gov.uk/ukpga/2006/46/contents (click “Explanatory Notes”; then click “Scotland”).

³³⁷ See, e.g., *Floyd*, 151 F.3d at 1300 (explaining the problems associated with reverse piercing, but noting that ultimately the decision whether to adopt the doctrine rests with state corporate law).

³³⁸ See CORK, *supra* note 323, at 12–13.

³³⁹ See *In re FG (Films) Ltd.*, [1953] 1 W.L.R. at 486.

³⁴⁰ See *id.*

Cinematograph Films Act to protect the British film market.³⁴¹ There was little recognition of this conflict, however, and the court decided the case applying agency concepts.³⁴²

III. A RECONCILIATION OF THE TWO CORPORATE VEIL DOCTRINES

Part II highlighted a number of important differences between the English and U.S. corporate veil doctrines. In particular, Part II explained that the prevailing approach to the corporate veil doctrine under English law involves classification into common law categories such as agency, trust, and fraud.³⁴³ This approach is distinctly unfamiliar to the U.S. corporation lawyer.³⁴⁴ Despite these differences, the two doctrines are in fact more similar than they seem at first glance. Many English corporate veil cases share the same mode of analysis used by U.S. courts under the instrumentality doctrine and the alter ego doctrine. In these cases, English courts have focused on the lack of economic substance of the company at issue and the presence of improper conduct, which are the two main prongs of the instrumentality doctrine.

A. *The Instrumentality and Alter Ego Doctrines in U.S. Corporate Veil Jurisprudence*

The instrumentality doctrine and the alter ego doctrine are the two most systematic analytical frameworks applied by U.S. courts in corporate veil cases. In Professor Thompson's survey, the instrumentality doctrine was applied in seventy-five cases. Alternatively, the alter ego doctrine was applied in 181 cases.³⁴⁵ One of the most authoritative formulations of the instrumentality doctrine was laid down in *Lowendahl v. Baltimore & Ohio Railroad*.³⁴⁶ The *Lowendahl* court stated that three elements must be satisfied to establish a corporate veil claim:

- (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that

³⁴¹ *See id.*

³⁴² *See id.*

³⁴³ *See supra* text accompanying notes 124–135 (discussing English courts' reliance on principles of agency and trust), 208–223 (discussing English courts' application of fraud to the corporate veil doctrine).

³⁴⁴ *See supra* text accompanying notes 123–130 (discussing U.S. courts' readiness to adopt new doctrines in corporate veil cases).

³⁴⁵ Thompson, *supra* note 7, at 1063.

³⁴⁶ *See* 247 A.D. at 156 (N.Y. App. Div. 1936), *aff'd*, 6 N.E.2d 56 (N.Y. 1936).

the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.³⁴⁷

Accordingly, the instrumentality doctrine involves three elements. First, a corporation must be devoid of independence and economic substance.³⁴⁸ Second, there must be an improper purpose or conduct.³⁴⁹ And third, there must be a showing that the "instrumentalization" of the corporation proximately caused injury to the plaintiff.³⁵⁰ Frederick Powell, who first articulated this doctrine, identified eleven circumstances that tend to show that a corporation is an instrumentality,³⁵¹ and seven situations that qualify as improper purposes.³⁵² The doctrine was originally conceived to apply only to parent-subsidiary relationships, but has since been extended to individual shareholder cases.³⁵³ One commentator has proposed a two-prong test for veil piercing that

³⁴⁷ *Id.*

³⁴⁸ *See id.*

³⁴⁹ *See id.*

³⁵⁰ *See id.*

³⁵¹ FREDERICK J. POWELL, PARENT AND SUBSIDIARY CORPORATIONS 9 (1931). These circumstances are: (1) the parent corporation owns all or most of the capital stock of the subsidiary; (2) the parent and subsidiary corporations have common directors or officers; (3) the parent corporation finances the subsidiary; (4) the parent corporation subscribes to all of the capital stock of the subsidiary or otherwise causes its incorporation; (5) the subsidiary has grossly inadequate capital; (6) the parent corporation pays the salaries and other expenses or losses of the subsidiary; (7) the subsidiary has substantially no business except with the parent corporation or no assets except the ones conveyed to it by the parent corporation; (8) in the papers of the parent corporation or in the statements of the officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own; (9) the parent corporation uses the property of the subsidiary as its own; (10) the directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest; and (11) the formal legal requirements of the subsidiary are not observed. *Id.*

³⁵² *Id.* at 54. These situations are: (1) actual fraud, (2) violation of a statute, (3) stripping the subsidiary of its assets, (4) misrepresentation, (5) estoppels, (6) torts, and (7) other cases of wrong or injustice. *Id.*

³⁵³ Krendl & Krendl, *supra* note 57, at 11.

focuses on “disregard of formalities and fairness.”³⁵⁴ The proposed test is almost identical to the eleven factors identified by Powell.³⁵⁵

The alter ego doctrine focuses on the lack of independence of a corporation from its shareholders. To show that a corporation is an alter ego, a plaintiff must show that the corporation and its shareholders are fundamentally indistinguishable.³⁵⁶ In *Hamilton v. Water Whole International Corp.*, the U.S. Court of Appeals for the Tenth Circuit identified nine relevant factors for determining when a corporation becomes an alter ego.³⁵⁷ These factors largely overlap with the eleven identified by Powell.³⁵⁸ In many ways, the alter ego doctrine replicates the first prong in the instrumentality doctrine.

B. Construction of an Instrumentality Doctrine from the English Corporate Veil Cases

There are traces of the instrumentality and alter ego doctrines in some English corporate veil cases, which similarly focused on the economic substance of the corporation and the presence of impropriety. These cases, however, paid little attention to proximate causation. In cases in which the English courts pierced the veil, there was little doubt that the improper conduct caused the plaintiff’s injury, which largely obviated the need for a separate showing of proximate causation.³⁵⁹

³⁵⁴ Barber, *supra* note 14, at 397.

³⁵⁵ See *id.* at 397–98.

³⁵⁶ *Transition Healthcare Assocs., Inc. v. Tri-State Health Investors*, 306 F. App’x 273, 280 (6th Cir. 2009).

³⁵⁷ 302 F. App’x 789, 793 (10th Cir. 2008). These factors are:

- (1) whether the dominant corporation owns or subscribes to all the subservient corporation’s stock, (2) whether the dominant and subservient corporations have common directors and officers, (3) whether the dominant corporation provides financing to the subservient corporation, (4) whether the subservient corporation is grossly undercapitalized, (5) whether the dominant corporation pays the salaries, expenses or losses of the subservient corporation, (6) whether most of the subservient corporation’s business is with the dominant corporation or the subservient corporation’s assets were conveyed from the dominant corporation, (7) whether the dominant corporation refers to the subservient corporation as a division or department, (8) whether the subservient corporation’s officers or directors follow the dominant corporation’s directions, and (9) whether the corporations observe the legal formalities for keeping the entities separate.

Id.

³⁵⁸ Compare *id.* with POWELL, *supra* note 351, § 6 (sharing most factors in common).

³⁵⁹ See *infra* text accompanying notes 400–403.

In each of the three main categories of English corporate veil cases—agency, fraud, and evasion of existing legal obligations—there are cases in which the analysis parallels the first two prongs of the instrumentality doctrine. Examples among the fraud cases include *Gencor v. Dalby*,³⁶⁰ *Wallersteiner v. Moir*,³⁶¹ and *Trustor v. Smallbone*.³⁶² In these cases, the defendant shareholder committed fraud and therefore impropriety was clearly present.³⁶³ The courts, however, did not base their corporate veil analysis solely on the existence of fraud, even though the conduct at issue in those cases was outright fraudulent.³⁶⁴ In addition to the improper conduct, the courts emphasized the lack of economic substance of the companies.

In *Gencor*, one of the main issues was whether the sham company controlled by one of the officers, Mr. Dalby, was accountable to Gencor ACP for the commission paid to Dalby but deposited into the company.³⁶⁵ The commission could only have been recovered if the veil of the sham company was pierced.³⁶⁶ The court did so with little hesitation, focusing on Dalby's complete control over the company and its lack of genuine business substance such as "sales force, technical team or other employees capable of carrying on any business."³⁶⁷

In *Wallersteiner*, holding the fraudster in the case, Mr. Wallersteiner, liable entailed piercing the veil of a number of sham companies he had formed in Liechtenstein.³⁶⁸ Lord Denning characterized the companies as Mr. Wallersteiner's agents on the grounds that Wallersteiner had eschewed corporate formalities, consummating "contracts of enormous magnitude on their behalf on a sheet of notepaper," and that he had commingled his funds with theirs, using "their moneys as if they were his own."³⁶⁹ Although Lord Denning characterized the company as an agent, he was not using the term in the traditional common law sense, but in the U.S. alter ego sense.³⁷⁰ In *Smallbone*, the court pierced the veil of the company after describing it as "simply a vehicle used for re-

³⁶⁰ *Gencor ACP Ltd. v. Dalby*, [2000] 2 B.C.L.C. 734 (Ch.) at 742–44 (Eng.).

³⁶¹ *Wallersteiner v. Moir*, [1974] 1 W.L.R. 991 (A.C.) at 995–96, 1013 (Eng.).

³⁶² *Trustor AB v. Smallbone*, [2001] 1 W.L.R. 1177 (Ch.) at 1177 (Eng.).

³⁶³ See *Wallersteiner*, [1974] 1 W.L.R. at 995–96; *Trustor*, [2001] 1 W.L.R. at 1180; *Gencor*, [2000] 2 B.C.L.C. at 742–44.

³⁶⁴ See *Wallersteiner*, [1974] 1 W.L.R. at 1013; *Trustor*, [2001] 1 W.L.R. at 1183; *Gencor*, [2000] 2 B.C.L.C. at 742–44.

³⁶⁵ *Gencor*, [2000] 2 B.C.L.C. at 740.

³⁶⁶ *Id.* at 740–42.

³⁶⁷ *Id.* at 744.

³⁶⁸ See [1974] 1 W.L.R. at 1013.

³⁶⁹ *Id.*

³⁷⁰ See *id.*

ceiving money from Trustor,”³⁷¹ again emphasizing its lack of economic substance.

Within the agency category, the English case that best fits into the instrumentality doctrine is *In re (FG) Films*.³⁷² In that case, a British company was created in an attempt to bypass a prohibition against the showing of non-British films in the United Kingdom.³⁷³ This constituted circumvention of a statute and would meet the impropriety prong of the instrumentality doctrine.³⁷⁴ Although the court characterized the English company as the U.S. company’s agent, it was clear that no genuine agency relationship existed between them.³⁷⁵ Meanwhile, the court emphasized the fact that the company had “no place of business apart from their registered office, and . . . did not employ any staff,”³⁷⁶ that it only had a capital of £100 when the film it had purportedly produced had cost £80,000 to make, and that it did not play any role in the production of the film.³⁷⁷ In the eyes of the court, the company was inadequately capitalized and lacked a genuine business operation and physical presence.³⁷⁸ These would likely be sufficient to satisfy the economic substance prong of the instrumentality doctrine.³⁷⁹

Among the evasion of existing legal obligations cases, a number of them also applied analysis that largely parallels the first two prongs of the instrumentality doctrine. In these cases, the improper purpose prong is satisfied because upholding separate corporate personality would allow the defendant to evade its legal obligation, which would result in a wrong or injustice. In *Gilford Motor Co. v. Horne*, Judge Farwell set aside the company incorporated by Mr. Horne to escape his non-compete obligations with his former employer by focusing on the following facts: (1) the company only had two directors and shareholders, Horne’s wife and his former colleague; (2) the company had no physical premise of its own, and was only located in a garage in his home; and (3) the letterheads and notepapers of the company were practically

³⁷¹ [2001] 1 W.L.R. at 1186.

³⁷² [1953] 1 W.L.R. 483 (Ch.) (Eng.).

³⁷³ See *id.* at 484.

³⁷⁴ See *id.*

³⁷⁵ Pickering, *supra* note 5, at 495 (explaining that the term agency “was used descriptively and no attempt was made to define the relationship in question in any precise legal sense”).

³⁷⁶ *In re F.G. (Films)*, [1953] 1 W.L.R. at 486.

³⁷⁷ *Id.*

³⁷⁸ See *id.*

³⁷⁹ See *id.*

the same as those previously used by Horne himself.³⁸⁰ There was further evidence that his wife took no active role in the company's management and that he ran the company as if it were his own.³⁸¹ These facts would support a finding of a lack of economic substance under the U.S. corporate veil doctrine.

In *Jones v. Lipman*, the defendant had contracted to sell property to the plaintiff, but subsequently changed his mind.³⁸² To put the property beyond the plaintiff's reach, the defendant transferred it to a company he had bought for this very purpose.³⁸³ Calling the company "the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity,"³⁸⁴ the court did not hesitate to pierce the veil and ordered specific performance of the contract.³⁸⁵ The non-compliance with corporate formalities was serious. The company did not issue share capital or possess any real physical premise.³⁸⁶ Nor was any director appointed.³⁸⁷ It was obvious that this company had no genuine economic substance and was used solely to evade the defendant's contractual obligation.³⁸⁸

Aside from a wealth of cases in which the English courts employed analysis resembling the instrumentality doctrine, the doctrine also receives tacit support from a leading judgment by the House of Lords. There is a close parallel between the first two prongs of the instrumentality doctrine and Lord Keith's statement in *Woolfson* that veil piercing is only justified if the corporate entity is used as "a mere façade concealing the true facts."³⁸⁹ This is one of the most authoritative formulations of a test under the English corporate veil doctrine, and has been repeatedly invoked by English courts in corporate veil cases.³⁹⁰ By referring to companies whose veil is pierced as a façade, Lord Keith emphasized

³⁸⁰ [1933] Ch. 935 (A.C.) at 943, 954 (Eng.).

³⁸¹ *Id.* at 943.

³⁸² [1962] 1 W.L.R. 832 (Ch.) at 833 (Eng.).

³⁸³ *Id.* at 835.

³⁸⁴ *Id.* at 836.

³⁸⁵ *Id.* at 837.

³⁸⁶ *Id.* at 835.

³⁸⁷ *Id.*

³⁸⁸ *Jones*, [1962] 1 W.L.R. at 835.

³⁸⁹ *Woolfson v. Strathclyde Reg'l Council*, (1978) S.C.(H.L) 90, 96 (appeal taken from Scot.).

³⁹⁰ See *Ord & Anor v. Belhaven Pubs Ltd.*, [1998] B.C.C. 607 (A.C.) at 614 (Eng.); *Yukong Line Ltd. of Korea v. Rendsburg Invs. Corp. of Liberia*, [1998] 1 W.L.R. 294 (Q.B.) at 306 (Eng.); *The "Tjaskemolen" (Now Named "Visvliet")*, [1997] 2 Lloyd's Rep. 465 (Q.B.) at 469 (Eng.); *Creasey v. Breachwood Motors Ltd.*, [1992] B.C.C. 638 (Q.B.) at 647 (Eng.); *Trustor*, [2001] 1 W.L.R. at 1184-85; *In re Polly Peck Int'l plc*, [1996] 2 All E.R. 433 (Ch.) at 447 (Eng.)

their lack of economic substance. A company with a genuine business operation and a high degree of economic independence would not likely be called a façade. The reference to concealment of the true facts at least covers fraud and misrepresentation, two of the seven situations qualifying as an improper purpose under Powell's formulation.³⁹¹ The reference can also be understood more broadly to encompass generally dishonest and deceptive conduct, such as asset stripping and circumvention of a statutory provision.³⁹²

It should be clear by now that there are greater similarities in the approaches to veil piercing on both sides of the Atlantic than was previously assumed. In a way, this parallel is to be expected. If the question is whether the separate legal personality of a corporation should be set aside, it is difficult to avoid assessments of its economic substance and the propriety of the purpose for which the corporation is used. Labeling the corporation an agent, an instrumentality, or an alter ego does not alter the fundamental nature of the analysis.

There is ample support from case law for English courts to fashion their own version of the instrumentality doctrine. Doing so would help English courts provide clearer guidance to future litigants and would sharpen the focus of their analysis. Some modifications will be needed, however. First, given the English courts' demonstrated reluctance to pierce the veil of a *bona fide* company,³⁹³ the economic substance prong of an English instrumentality doctrine should be crafted in such a way that the existence of a *bona fide* business operation precludes finding a lack of economic substance. Second, the preponderance of English cases involving evasion of an existing legal obligation³⁹⁴ means that evasion should be expressly incorporated as one of the improper purposes under the impropriety prong. A determination of whether an evasion has taken place can be made with reference to the modified evasion rule proposed above.³⁹⁵ Third, a decision needs to be made as to whether voluntary piercing should be permissible under this English instrumentality doctrine, and perhaps under the English corporate veil doctrine generally. The instrumentality doctrine was not formulated with volun-

³⁹¹ See POWELL, *supra* note 351, § 13.

³⁹² Concealment of the true facts may be thought to cover circumvention of a statute because the corporate entity is used to conceal factual circumstances that would have called for an application of the statutory provision in question.

³⁹³ See, e.g., *Wallersteiner*, [1974] 1 W.L.R. at 1013; *Yukong*, [1998] 1 W.L.R. at 305–10.

³⁹⁴ See, e.g., *Yukong*, [1998] 1 W.L.R. at 294; *Gilford Motor*, [1933] Ch. at 935; *Tjaskemolen*, [1997] 2 Lloyd's Rep. at 465; *Creasey*, [1992] B.C.C. at 638; *Jones*, [1962] 1 W.L.R. at 832, 835–37.

³⁹⁵ See *supra* text accompanying notes 283–294.

tary piercing in mind, and its focus on improper purposes arguably renders it unsuitable for these cases.³⁹⁶ Voluntary piercing usually entails the company pleading to pierce its own veil to obtain some benefits.³⁹⁷ There is usually no improper purpose or conduct of the kind that Powell enumerated. If English courts decide to continue to allow voluntary piercing claims, a separate analytical framework is probably needed. Nonetheless, in light of the discussion of the demerits of voluntary piercing above,³⁹⁸ there is a strong argument in favor of precluding voluntary piercing claims.³⁹⁹

A remaining difference between the English cases and the U.S. instrumentality doctrine is the absence of discussions of proximate causation in the English cases.⁴⁰⁰ This omission is in some ways unremarkable given that many U.S. courts and commentators do not insist on a proximate causation requirement.⁴⁰¹ Such a requirement was arguably

³⁹⁶ See Krendl & Krendl, *supra* note 57, at 11–14 (discussing the early development of the instrumentality doctrine through involuntary piercing cases); cf. Gaertner, *supra* note 296, at 685–87 (examining cases in which courts apply traditional veil piercing theory in the context of reverse piercing, although factors courts consider generally do not include “improper purpose”).

³⁹⁷ See Gaertner, *supra* note 296, at 681.

³⁹⁸ See *supra* text accompanying notes 310–315.

³⁹⁹ Some U.S. courts have categorically rejected voluntary piercing claims. See *Dusharm v. Elegant Custom Homes, Inc.*, 302 F. App’x 571, 572 (9th Cir. 2008) (“[U]nder Arizona law, a corporation may not pierce its own corporate veil.”); *Love v. Flour Mills of Am.*, 647 F.2d 1058, 1062 (10th Cir. 1981); *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655, 662 (6th Cir. 1979); *Payphone L.L.C. v. Brooks Fiber Commc’ns*, 126 F. Supp. 2d 175, 179 (D.R.I. 2001) (“[A] corporation may not pierce its own veil . . . for its own benefit.”); *Latham v. Technar, Inc.*, 390 F. Supp. 1031, 1037–38 (D. Tenn. 1974).

⁴⁰⁰ See, e.g., *Laborers’ Pension Fund v. Lay-Com, Inc.*, 580 F.3d 602, 610 (7th Cir. 2009); *Hamilton*, 302 F. App’x at 793; *Dusharm*, 302 F. App’x at 572; *Sonora Diamond Corp. v. Superior Court*, 99 Cal. Rptr. 2d 824, 836 (Ct. App. 2000).

⁴⁰¹ For example, Professor Barber’s two-prong test does not contain a proximate causation requirement. Barber, *supra* note 14, at 376–77. Many states likewise do not require proof of causation in a corporate veil case. See, e.g., *Laborers’ Pension Fund*, 580 F.3d at 610 (“Under Illinois law, [t]he standard test for piercing the corporate veil is two-pronged. The plaintiff must demonstrate both that there is such unity of interest and ownership between the individual or entity and the corporation that the separate personalities of the corporation and the individual [or entity] no longer exist, and that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.”); *Hamilton*, 302 F. App’x at 793 (“The Oklahoma Supreme Court has held if a ‘corporation is so organized and controlled and its affairs so conducted that it is merely an instrumentality or adjunct of another corporation’ the two corporations will no longer be considered distinct legal entities.”); *Dusharm*, 302 F. App’x at 572 (To establish a corporate veil claim, “[p]laintiffs must prove . . . that observance of the corporate form would sanction a fraud or promote injustice.”) (quoting *Gatecliff v. Great Republic Life Ins. Co.*, 821 P.2d 725, 729 (Ariz. 1991)); *Sonora Diamond*, 99 Cal. Rptr. 2d at 836 (“In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest

unnecessary in the English cases discussed above. In most of them, there was little doubt that the defendant's control of the company directly contributed to the plaintiff's loss. In *Gencor*, *Wallersteiner*, and *Smallbone*, the company was an integral part of the fraudulent scheme to embezzle funds.⁴⁰² In *Gilford Motor* and *Lipman*, the company played a pivotal role in the defendant's attempt to evade its existing legal obligation.⁴⁰³ The question remains, however, whether such a requirement should be incorporated into an English instrumentality doctrine. Under most circumstances, requiring proof of proximate causation will create additional obstacles to plaintiff recovery and limit the availability of veil piercing. Given the English courts' generally conservative attitude toward veil piercing, the inclusion of a proximate causation requirement of some kind seems appropriate.

If such a requirement is included, what should the causation link consist of? On one side is obviously the plaintiff's loss. On the other side are two possibilities: the company's lack of economic substance or impropriety.⁴⁰⁴ Some commentators argue that the plaintiff should be required to show that the lack of economic substance proximately caused its loss.⁴⁰⁵ This view, however, should be rejected. It would be extremely difficult for a plaintiff to prove that the overlap of corporate personnel or the sharing of physical premises proximately caused its loss. In most cases, the link between the lack of economic substance and the plaintiff's loss is too tenuous to be demonstrated in court. Instead, the plaintiff should only be required to show that the improper conduct caused its loss. This represents a much more reasonable causation requirement.

What remains to be determined is the appropriate stringency of this requirement. Some commentators have criticized Powell's formula-

and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone.”).

⁴⁰² See *Wallersteiner*, [1974] 1 W.L.R. at 996–99; *Trustor*, [2001] 1 W.L.R. at 1179–80; *Gencor*, [2000] 2 B.C.L.C. at 737–39.

⁴⁰³ *Gilford*, [1933] Ch. at 937, 949–50; *Jones*, [1962] 1 W.L.R. at 835–36.

⁴⁰⁴ See Hackney & Benson, *supra* note 234, at 854, 857–58.

⁴⁰⁵ See, e.g., *id.* at 859–60 (“It is only logical that if a business cannot have assets taken out by its owner to the point where what is left is an unreasonably small capital, then the business should not commence activity in corporate form with such an unreasonably small capital.”); Hamilton *supra* note 156, at 986 (“In contract cases the separate existence of a minimally capitalized corporation should usually be recognized [sic].”); Posner, *supra* note 219, at 521 (“In general, a corporation’s creditors should be allowed to reach a shareholder’s assets when the shareholder, whether an individual or another corporation, has represented to the creditor that those assets are in fact available to satisfy any claim that the creditor may assert against the debtor corporation.”).

tion of the third prong—“wrongful acts resulting from the parent’s domination being the proximate cause of the plaintiff’s loss”—as too restrictive. Instead, such commentators have proposed a more liberal standard of “some reasonable connection between plaintiff’s injury and the action of the defendant.”⁴⁰⁶ The stringency of the third prong can be calibrated to reflect the courts’ view of the desirable scope of the corporate veil doctrine. It will need to be determined in future decisions.

IV. REVIVAL OF THE SINGLE ECONOMIC UNIT THEORY

Thus far, the discussion has emphasized the relative conservatism of the English corporate veil doctrine. There is in fact one area within the corporate veil doctrine in which the English courts have demonstrated greater progressiveness than even U.S. courts: the single economic unit theory. Under this theory, the court may impose general enterprise liability on a corporate group, something which even U.S. courts have been hesitant to do.⁴⁰⁷ Despite repeated suggestions of enterprise liability within the academic circle, U.S. courts have not developed distinct approaches for veil piercing within corporate groups.⁴⁰⁸ Professor Berle first proposed enterprise liability—the reassignment and imposition of liabilities within a corporate group based on a reconstruction of the economic boundary of the enterprise—in the 1940s.⁴⁰⁹ Subsequent commentators have further developed Berle’s proposal and called for some version of enterprise liability.⁴¹⁰ Other commentators

⁴⁰⁶ Krendl & Krendl, *supra* note 57, at 27.

⁴⁰⁷ See *D.H.N. Food Distribs. Ltd. v. Tower Hamlets London Borough Council*, [1976] 1 W.L.R. 852 (A.C.) at 860 (Eng.); Thompson, *supra* note 96, at 388–92.

⁴⁰⁸ See Adolf A. Berle, Jr., *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343, 352–54 (1947); Thompson, *supra* note 96, at 388–92.

⁴⁰⁹ Berle, *supra* note 408, at 354.

⁴¹⁰ See Blumberg, *supra* note 234, at 630 (“If a subsidiary corporation constitutes only one of a number of components of a corporate group collectively conducting a fragmented unitary business, the very basis for the establishment of limited liability as a matter of general legal policy disappears.”); Easterbrook & Fischel, *supra* note 234, at 111 (“Allowing creditors to reach the assets of parent corporations does not create unlimited liability for any people. Thus the benefits of diversification, liquidity, and monitoring by the capital market are unaffected.”); Landers, *supra* note 96, at 623 (“Moving beyond the threshold problem of limited liability for the protection of ultimate investors in the enterprise, separate consideration must be given to the application of limited liability to corporate groups. When limited liability is applied to multi-tiered corporate groups, layer upon layer of insulation from liability can result.”). *But cf.* Posner, *supra* note 219 (arguing against Landers’ proposal); Thompson, *supra* note 234, at 38–39 (defending limited liability for corporate groups). Some scholars of English law have also advocated some version of enterprise liability. See Karl Hofstetter, *Parent Responsibility for Subsidiary Corporations*:

have advocated the imposition of shareholder liability on the corporate parent for its subsidiary's torts.⁴¹¹ Notwithstanding these proposals, U.S. courts have largely applied the same analytical framework to corporate and individual shareholders.⁴¹² In fact, Professor Thompson found that U.S. courts appear more hesitant to pierce the veil against a corporate shareholder compared to an individual shareholder.⁴¹³

In contrast, the single economic unit theory was specifically developed to address corporate groups.⁴¹⁴ It was first propounded by Lord Denning in *D.H.N.*⁴¹⁵ Unfortunately, he did not provide further elaboration of the theory in the opinion.⁴¹⁶ His reasoning for treating the three group companies as one entity was thin.⁴¹⁷ Nor did he suggest how to distinguish circumstances where the theory applies from circumstances where it does not.⁴¹⁸ Furthermore, *D.H.N.* was a compensation case, and it was never entirely clear how the single economic unit theory would apply to attempts to impose shareholder liability on the corporate

Evaluating European Trends, 39 INT'L & COMP. L.Q. 576, 577-78 (1990); see also Clive M. Schmitthoff, *The Wholly Owned and the Controlled Subsidiary*, J. Bus. L. 218, 226 (1978) (arguing in favor of presumption that parent company be liable for debts of wholly owned subsidiary).

⁴¹¹ See Hansmann & Kraakman, *supra* note 234, at 1932-34; Leebron, *supra* note 234, at 1649-50. Hansmann and Kraakman's proposal was in fact much broader. See Hansmann & Kraakman, *supra* note 234, at 1932-34. They called for the repeal of limited liability for corporate torts in general. See *id.*

⁴¹² See HENN & ALEXANDER, *supra* note 217, at 355.

⁴¹³ See Thompson, *supra* note 7, at 1055-56. The plaintiff's success rate against corporate parents was found to be thirty-seven percent and that against individual shareholders forty-three percent. See *id.* at 1055.

⁴¹⁴ See *D.H.N.*, [1976] 1 W.L.R. at 860. The single economic unit theory was indirectly inspired by Professor Adolf Berle. To support his treatment of the three companies in a corporate group as one entity, Lord Denning cited Laurence Gower. See LAURENCE GOWER, MODERN COMPANY LAW 216 (3d. ed. 1979). Gower in turn cited Professor Berle's *The Theory of Enterprise Entity*, *supra* note 408.

⁴¹⁵ See *D.H.N.*, [1976] 1 W.L.R. at 850. *D.H.N.* notwithstanding, English judges have asserted on various occasions that there is no presumption that group companies be treated as a single economic unit or an enterprise under English company law. See *Harold Holdsworth & Co. v. Caddies*, [1955] 1 W.L.R. 352 (H.L.) at 363 (appeal taken from Scot.) ("[E]ach company in the group is in law a separate entity."); *In re Southard & Co.*, [1979] 1 W.L.R. 1198 (A.C.) at 1208 (Eng.) ("English company law possesses some curious features, which may generate curious results. A parent company may spawn a number of subsidiary companies, all controlled directly or indirectly by the shareholders of the parent company. If one of the subsidiary companies, to change the metaphor, turns out to be the runt of the litter and declines into insolvency to the dismay of its creditors, the parent company and the other subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary.")

⁴¹⁶ See *D.H.N.*, [1976] 1 W.L.R. at 860.

⁴¹⁷ See *id.*

⁴¹⁸ See *id.*

parent.⁴¹⁹ Two years after *D.H.N.* was decided, the House of Lords openly questioned the validity of the theory, although it stopped short of overruling it.⁴²⁰ And the theory has been repeatedly criticized in subsequent cases.⁴²¹ Despite its theoretical infirmities and questionable validity, the single economic unit theory has continued to feature in English corporate veil cases.⁴²² If the theory can be reformulated with a more clearly defined scope and provided a theoretical foundation, it can be rendered a useful tool for English courts in corporate veil cases.

What follows is an attempt to justify the revival of the single economic unit theory in light of recent case law under both English company law and EU competition law, along with general insights from economic theory. Based on lessons drawn from these sources, Part IV.D proposes a more formal structure for the theory so that it is capable of more predictable application.

A. *A Critique of the Theory*

One needs to look no further than Lord Denning's judgment itself to discern a central flaw in the single economic unit theory. He offered scant guidance on when group companies may constitute a single economic unit. To substantiate his conclusion, he relied on two main arguments. First, *D.H.N.*, the corporate parent, "can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do what the parent company says."⁴²³ Second, the group "is virtually the same as a partnership in which all the three companies are partners."⁴²⁴ Control alone cannot be the deciding factor, for that would mean that the veil will be pierced between every wholly owned subsidiary and its parent.⁴²⁵ Moreover, no justification was

⁴¹⁹ See *id.* at 857, 860.

⁴²⁰ *Woolfson v. Strathclyde Reg'l Council*, (1978) S.C.(H.L.) 90, 95–96 (appeal taken from Scot.).

⁴²¹ See VANDEKERCKHOVE, *supra* note 17, at 72; see also DAVIES ET AL., *supra* note 15, at 202–03.

⁴²² See *Adams v. Cape Indus. plc*, [1990] Ch. 433 (A.C.) at 532–39 (Eng.); *In re Polly Peck Int'l plc*, [1996] 2 All E.R. 433 (Ch.) at 447–48 (Eng.) (Walker J.).

⁴²³ *D.H.N.*, [1976] 1 W.L.R. at 860.

⁴²⁴ *Id.*

⁴²⁵ Lord Denning's basis for concluding that *D.H.N.* controlled the subsidiary was that it had complete ownership of it. See *id.* at 856, 860. This argument was firmly rejected in *Gramophone & Typewriter, Ltd. v. Stanley*. See [1908] 2 K.B. 89 (A.C.) at 95–96 (Eng.). Many U.S. courts have similarly held that control alone does not justify veil piercing. See, e.g., *Towe Antique Ford Found. v. Internal Revenue Serv.*, 999 F.2d 1387, 1393 (2d. Cir. 1993); *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d. Cir. 1929).

provided for applying partnership concepts to veil piercing cases.⁴²⁶ There is in fact an inherent contradiction between Lord Denning's two arguments. Generally, partners are co-equals in a partnership and wield the same management powers. There is no presumption that one partner controls the others.⁴²⁷ By analogizing the three companies as partners, Lord Denning implicitly suggested that they are autonomous entities, which contradicts his first argument that the parent controls the subsidiaries.

B. *Jurisprudential Support for a Revival of the Theory*

For the purpose of reformulating the single economic unit theory, it is important to distinguish between voluntary piercing and involuntary piercing. The doctrinal framework applicable in these two situations will be different. So are the relevant theoretical considerations. In particular, economic analysis of limited liability is only relevant for involuntary piercing cases. Although voluntary piercing implicates separate corporate personality, it almost never bears on limited liability.⁴²⁸ As argued above, there is little theoretical justification for voluntary piercing.⁴²⁹ It was urged that English courts reconsider whether voluntary piercing should be permitted at all.⁴³⁰ Nevertheless, English courts continue to allow it, as was evident in the most recent corporate veil case *Beckett Investment Management v. Hall*.⁴³¹

1. Voluntary Piercing

There has always been firm jurisprudential support for applying the single economic unit theory to voluntary piercing cases. After all, the theory originated in such a case.⁴³² As mentioned above, even though the validity of the theory was openly questioned in *Woolfson*, the House of Lords stopped short of overruling it.⁴³³ *Beckett*, a case decided

⁴²⁶ See *D.H.N.*, [1976] 1 W.L.R. at 860.

⁴²⁷ HENN & ALEXANDER, *supra* note 217, at 70.

⁴²⁸ Cf. *Woolfson*, (1978) S.C.(H.L.) at 95–97 (declining to treat subsidiary and parent company as separate entities in compulsory land acquisition proceedings); *Beckett Inv. Mgmt. Grp. Ltd. v. Hall*, [2007] EWCA (Civ) 613, [2007] I.C.R. 1539 (A.C.) (Eng.) (treating members of a corporate group as a single entity to effectuate non-compete covenant); *D.H.N.*, [1976] 1 W.L.R. at 852 (describing the “single economic entity” theory and conditions under which companies could be treated as separate entities).

⁴²⁹ See *supra* text accompanying notes 310–315.

⁴³⁰ See *supra* text accompanying note 315.

⁴³¹ See *Beckett*, [2007] I.C.R. at 1545–46.

⁴³² See *D.H.N.*, [1976] 1 W.L.R. at 860.

⁴³³ See (1978) S.C.(H.L.) at 95–97.

by the English Court of Appeal in 2007, gave the theory a boost. In that case, the English Court of Appeal treated members of a corporate group as one entity in a voluntary piercing context. Specifically, the veil between group members was pierced at their behest to give effect to a covenant not to compete.⁴³⁴ Mr. Hall, the employee at issue in the case, signed an employment contract with the parent holding company, promising not to solicit its customers within a certain time period after departure from his employment.⁴³⁵ Unfortunately for the group, the parent did not have any customers. All of the group's services were provided by the subsidiaries.⁴³⁶ Nevertheless, the covenant expressly only referred to the holding company's customers.⁴³⁷ A literal construction of the covenant would have rendered it meaningless. This predicament seemed to have been the result of a drafting oversight by the group's lawyers.⁴³⁸ The court came to the employer's rescue, and treated members of the group as one entity for purposes of enforcing the covenant.⁴³⁹

Even though the *Beckett* court did not invoke the single economic unit theory by name, the outcome of the case fits squarely within the theory. The court treated the parent and the two wholly owned subsidiaries as a single entity.⁴⁴⁰ The facts in *Beckett* were similar to those in *D.H.N.* in that both cases required the court to treat members of a corporate group as a single entity in order to allow the group to reap certain benefits.⁴⁴¹ In *D.H.N.*, the benefit was compensation for the disturbance of the parents' business.⁴⁴² In *Beckett*, it was the right to enforce a contractual covenant against a former employee.⁴⁴³ The justification for veil piercing is arguably even weaker in *Beckett* because the group's predicament was entirely of its own making. In *D.H.N.* at least the compulsory purchase was beyond the group's control. The fact that the English Court of Appeal pierced the veil in *Beckett* provides considerable support for the single economic unit theory.

⁴³⁴ See *Beckett*, [2007] I.C.R. at 1545–46.

⁴³⁵ *Id.* at 1541–43.

⁴³⁶ *Id.* at 1544.

⁴³⁷ See *id.*

⁴³⁸ See *id.* at 1545–46. The trial judge had refused to enforce the covenant because it only referred to the company, whereas other parts of the employment contract referred to the company and its subsidiaries. If the employer had intended the covenant to extend to the entire group, the judge reasoned, it would have so stated. *Id.* at 1545.

⁴³⁹ See *id.* at 1545–46.

⁴⁴⁰ See *Beckett*, [2007] I.C.R. at 1545–46.

⁴⁴¹ See *id.*; *D.H.N.*, [1976] 1 W.L.R. at 860.

⁴⁴² [1976] 1 W.L.R. at 860.

⁴⁴³ *Beckett*, [2007] I.C.R. at 1541–42.

This conclusion is further bolstered by a number of statements made by Lord Justice Kay, who decided *Beckett*. These statements indicate that his decision was based on more than mere contractual interpretation. Rather, he treated the companies as a single economic unit.⁴⁴⁴ To substantiate his decision, he cited Lord Denning's judgment in *Littlewoods Organisation Ltd. v. Harris*,⁴⁴⁵ in which Lord Denning reasoned that "the law to-day has regard to the realities of big business. It takes the group as being one concern under one supreme control."⁴⁴⁶ Lord Justice Kay proceeded to declare that "unlike the [High Court] judge, I do not feel inhibited by a purist approach to corporate personality."⁴⁴⁷ One may argue that *Beckett* was not a genuine corporate veil case because there was no imposition of shareholder liability. Nevertheless, the English corporate veil doctrine has always encompassed more than mere shareholder liability cases.⁴⁴⁸ It has been regularly applied to situations similar to that in *Beckett*.⁴⁴⁹ The fact that the English Court of Appeal permitted a voluntary piercing claim—generally disfavored after *Woolfsong*—further underscores the significance of this case and the support it lends to the single economic unit theory.

2. Involuntary Piercing

The support from recent English cases for applying the single economic theory to involuntary piercing is less direct. One case that supports such application is *Stone & Rolls Ltd. v. Moore Stephens*, in which the House of Lords tacitly applied the single economic unit theory to allow the attribution of the controlling shareholder's fraudulent intentions to the company at issue. Outside of the United Kingdom, application of the theory to involuntary piercing finds support in a string of EU competition law cases. In fact, under EU law, there is a presumption of single economic unit if the parent owns all the shares of a subsidiary.

a. *The Stone & Rolls Ltd. v. Moore Stephens Decision*

In the summer of 2009, in its last case before its judicial functions were transferred to the recently constituted Supreme Court of the United Kingdom, the House of Lords handed down a controversial and

⁴⁴⁴ See *id.* at 1545–46.

⁴⁴⁵ [1977] 1 W.L.R. 1472 (A.C.) at 1482.

⁴⁴⁶ See *Beckett*, [2007] I.C.R. at 1546.

⁴⁴⁷ *Id.*

⁴⁴⁸ See *supra* text accompanying notes 100–119.

⁴⁴⁹ See *supra* sources listed in note 119.

sharply divided decision in *Stone & Rolls Ltd. v. Moore Stephens*, in which it pierced the veil between a company and its sole beneficial shareholder to impute his fraudulent intentions to the company.⁴⁵⁰ This imputation meant that the company's professional negligence claims against its external auditors were barred under the tort law principle of *ex turpi causa*.⁴⁵¹ The company at issue was Stone & Rolls (S&R), which was set up by Mr. Stojevic as part of a fraudulent scheme.⁴⁵² The scheme resulted in a loss in excess of £94 million for many bank lenders.⁴⁵³ Stojevic had hired Moore Stephens to audit the company specifically to lend legitimacy to his fraudulent scheme.⁴⁵⁴ After the fraud was uncovered, the company promptly became insolvent and entered liquidation proceedings.⁴⁵⁵ The liquidators brought professional negligence claims against Moore Stephens, arguing that the auditors had performed their external audits negligently.⁴⁵⁶ For the *ex turpi causa* principle to apply to bar these claims, Stojevic's fraudulent intentions must be treated as the company's.

The ownership structure of S&R was complicated. The company had a corporate parent, an Isle of Man company, which in turn was owned by Stojevic's family trust.⁴⁵⁷ The relationship between him and his family trust was shrouded in mystery. What *was* known was that Stojevic did not directly own any shares in S&R.⁴⁵⁸ Applying the *ex turpi causa* principle would require the House of Lords to treat Stojevic as S&R's shareholder, which the majority did.⁴⁵⁹ In fact, the majority deemed him the company's sole controlling shareholder.⁴⁶⁰ In doing so, the House implicitly treated S&R and its parent, Isle of Man company, as one en-

⁴⁵⁰ *Stone & Rolls Ltd. v. Moore Stephens*, [2009] UKHL 39, [54]–[56] [2009] 1 A.C. 1391 (H.L.) [54]–[56] (appeal taken from Eng.). It was a 3–2 decision in which Lord Scott of Foscote and Lord Mance dissented. *Id.* at [88], [206].

⁴⁵¹ *See id.* at [86]. This principle states that a claimant cannot recover under a tort claim if pleading that claim requires the claimant to invoke its own illegal conduct. *Id.* at [20].

⁴⁵² *See id.* at [1].

⁴⁵³ *See id.* at [3].

⁴⁵⁴ *Id.* at [4].

⁴⁵⁵ *Id.* at [3].

⁴⁵⁶ *See Stone & Rolls*, 1 A.C. 1391 (H.L.) at [1], [3] (noting liquidators' argument that had Moore Stephens exercised due care, they would have uncovered the fraud earlier and the company's losses would have been reduced).

⁴⁵⁷ *Id.* at [90].

⁴⁵⁸ *See id.* at [90], [113].

⁴⁵⁹ *See id.* at [20], [51], [86].

⁴⁶⁰ *See id.* at [2]. The minority disagreed with the majority on this point. Lord Mance, for one, thought that the ownership interest of S&R was not entirely clear. *See id.* at [34]. Nevertheless, there was no dispute that Stojevic was the sole director of the company and controlled its affairs. *See id.* at [209].

tity.⁴⁶¹ As Stojevic had no direct ownership interest in S&R, the only way to deem him a shareholder was to collapse the entities at issue into one economic unit. The House of Lords proceeded to impute Stojevic's fraudulent state of mind to S&R and barred its claims against external auditors.⁴⁶² The single economic unit theory was thus tacitly invoked to permit the majority to achieve its desired result.⁴⁶³ What was most surprising, given the English courts' generally strict adherence to separate corporate personality, was how facilely the three Law Lords in the majority treated S&R and its parent company as one entity. After a brief mention of the Isle of Man parent in the beginning of the case, its existence was almost completely ignored for the remainder.⁴⁶⁴

Even though *Stone & Rolls* was primarily concerned with attribution of shareholder intentions to the company,⁴⁶⁵ there was no mistake that separate corporate personality was implicated. The majority set aside the separate legal personalities of the various companies to treat them as one entity. It then pierced the veil of this entity to impute Stojevic's intentions to it.⁴⁶⁶ Interestingly, this is not a case of forward veil piercing—the imposition of shareholder responsibility for corporate liabilities—

⁴⁶¹ See *id.* at [2], [113].

⁴⁶² See *Stone & Rolls*, 1 A.C. 1391 (H.L.) at [54], [86].

⁴⁶³ *Id.* at [86]. The House of Lords clearly appreciated that veil piercing was at stake in the case. What divided the majority and the minority was whether S & R's separate personality was to be respected. Lord Scott characterized the majority's decision as "lifting the corporate veil and treating S & R as if it were Mr Stojevic himself who was seeking to repel the *ex turpi causa* defence" on the basis of his "absolute beneficial owner[ship] . . . coupled with his undoubted absolute managerial control." *Id.* at [118]. Lord Scott proceeded to argue that the veil should not be pierced because it was unclear whether Stojevic was in fact an absolute beneficial shareholder. *Id.* Lord Mance similarly objected to the majority's veil piercing, arguing that:

I am also aware of no "policies or principles", generally understood or not, which might limit a company's recovery for a wrong done to it by reference to whatever loss its innocent shareholders might, if the corporate veil were lifted, be said themselves to have suffered. The suggestion that this could be the measure of a company's recovery again ignores the company's separate legal identity and interests.

Id. at [255]. Lord Scott echoed this sentiment, asserting that "S & R is a legal persona in its own right." *Id.* at [118]. The disagreement over S & R's status as a separate legal entity was highlighted by different characterizations of its role in the fraudulent scheme by the majority and the minority. Lord Phillips and Lord Walker were unequivocal in calling S & R a perpetrator of the fraud, whereas Lord Scott labeled it a co-victim of Mr. Stojevic's conduct. *Id.* at [1], [115], [126].

⁴⁶⁴ See *id.* at [1]–[87].

⁴⁶⁵ See *id.* at [39]–[56].

⁴⁶⁶ See *id.* at [54].

which is the usual type of veil piercing.⁴⁶⁷ It instead involved reverse veil piercing. The company was deemed responsible for its shareholder's conduct.⁴⁶⁸ Reverse piercing is generally considered more controversial than forward piercing because the company's stakeholders must share the company's assets with the shareholder's creditors.⁴⁶⁹ Given that in most cases a company has more stakeholders—including shareholders and creditors—than an individual has creditors, and that a company does not control its shareholders' conduct, reverse veil piercing affects more innocent parties and raises more fairness issues than forward piercing.⁴⁷⁰ The fact that the House of Lords countenanced reverse piercing in this case suggests a renewed readiness to set aside separate corporate personality when the circumstances so warrant.

b. *EU Competition Law Cases*

EU courts have regularly applied the EU's equivalent of the single economic unit theory in competition law (antitrust) cases to pierce the veil against corporate groups. In a recent decision, *Akzo Nobel NV v. Commission*, the European Court of Justice affirmed a line of previous cases, including *Stora Kopparbergs Bergslags AB v. Commission*,⁴⁷¹ which held that complete share ownership establishes a rebuttable presumption that the parent exercise control over the subsidiary.⁴⁷² Absent a rebuttal of this presumption, the parent and the subsidiary will be treated as a single economic entity.⁴⁷³ In *Akzo Nobel*, subsidiaries in the Akzo Nobel group, a Dutch chemical group, were fined for their participation in an international cartel concerning the chemical choline chloride.⁴⁷⁴ Liability of the subsidiaries was not in doubt as they had directly participated in the cartel. The European Commission sought to impose liability on the parent as well.⁴⁷⁵ In *Michelin v. Commission*, the

⁴⁶⁷ See *id.*

⁴⁶⁸ See *Stone & Rolls*, 1 A.C. 1391 (H.L.) at [54]. Recovery was highly probable had the House of Lords not barred the claims, given Moore Stephens' admission of negligence in its audit. See *id.* at [6].

⁴⁶⁹ See Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 *YALE L.J.* 387, 398–405 (2000); see also Youabian, *supra* note 297, at 592–95.

⁴⁷⁰ See Youabian, *supra* note 297, at 593–95.

⁴⁷¹ Case C-286/98, *Stora Kopparbergs Bergslags AB v. Comm'n*, 2000 E.C.R. I-9925, at para. 20.

⁴⁷² Case C-97/08, *Akzo Nobel NV v. Comm'n*, 2009 E.C.R. I-8237, at paras. 55, 58–62.

⁴⁷³ *Id.* at paras. 60–61.

⁴⁷⁴ *Id.* at paras. 12–17.

⁴⁷⁵ *Id.*

then-European Court of First Instance⁴⁷⁶ emphasized that “Community competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Article 81 EC and 82 EC if the companies do not determine independently their own conduct on the market.”⁴⁷⁷ In *Akzo Nobel*, the European Court of Justice echoed this statement and asserted that “the concept of an undertaking, in the same context, must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal.”⁴⁷⁸

The support from these EU cases for the single economic unit theory is unmistakable. Similar to Lord Denning’s reasoning in *D.H.N.*, the European Court of Justice reaffirmed that a parent and its subsidiaries are deemed one economic unit by virtue of the parent’s complete control of the subsidiaries.⁴⁷⁹ In fact, the single economic entity approach under EU competition law goes one step further than its counterpart under English company law in two important ways. First, under the EU approach, complete share ownership establishes a rebuttable presumption that the parent exercises control over the subsidiary. The burden then falls on the parent to demonstrate that the subsidiary possesses commercial autonomy.⁴⁸⁰ No such presumption exists under the English single economic unit theory.⁴⁸¹ Second, under the EU law, not only does the parent become liable for the subsidiary’s fine, its own revenue will also be taken into account for the calculation of the fine.⁴⁸² In other words, the EU single economic entity approach not

⁴⁷⁶ The Court of First Instance was renamed the General Court. See Consolidated Version of the Treaty on the Functioning of the European Union art. 256, Sep. 5, 2008, [2008] O.J. 47.

⁴⁷⁷ Case T-203/01, *Michelin v. Comm’n*, 2003 E.C.R. II-4071, at para. 290.

⁴⁷⁸ *Akzo Nobel*, 2009 E.C.R. I-8237 at para. 55.

⁴⁷⁹ *Id.* at paras. 58–62.

⁴⁸⁰ *Id.* at paras. 60–61.

⁴⁸¹ In fact, in *Gramophone and Typewriter v. Stanley*, the notion that complete share ownership of a subsidiary confers control over the parent was specifically rejected. [1908] 2 K.B. at 93–94, 95–96, 98–100.

⁴⁸² Council Regulation 17, First Regulation Implementing Articles 85 and 86 of the Treaty, art. 15, 1962 J.O. (13) 204 (EC), available at http://eur-lex.europa.eu/RECH_reference_pub.do (type in year as “1962,” OJ number as “13,” and page number as “204”; search for “all OJ series”; click hyperlink to only result). Assume that the subsidiary’s turnover was one hundred million Euros in the relevant time period, and the parent’s turnover was the same. Further assume that the Commission determines the fine to be ten percent of the undertaking’s turnover. After the application of the single economic entity approach, the fine for the group increases from ten million Euros to twenty million Euros as the undertaking’s revenue is now deemed to be two hundred million Euros.

only shifts liability, it actually expands it. As a result, not only is limited liability abrogated, the liability of the group also increases.

C. *Economic Support for a Revival of the Theory*

Economic analysis of limited liability only pertains to involuntary piercing, and specifically to the imposition of shareholder liability. This should be obvious because limited liability, with which economic analysis is concerned, is only implicated in involuntary piercing cases.⁴⁸³ Economic analysis therefore has little relevance for voluntary piercing. The discussion below focuses on the transaction cost implications of the single economic unit theory. It analyzes how application of the theory will affect monitoring costs and risk allocation between the corporate parent of a wholly owned subsidiary and the subsidiary's creditors. The discussion begins by focusing on the imposition of a subsidiary's liabilities on the corporate parent, or forward piercing. It then extends to a possible full-blown enterprise liability theory that covers forward piercing, reverse piercing, and lateral piercing between affiliated corporations.

1. Corporate Parent Liability for Wholly Owned Subsidiaries

From an economic perspective, the optimal corporate liability rule is determined by reference to a number of attributes of the various stakeholder or claimant groups within a firm.⁴⁸⁴ These claimants include the shareholders and the creditors.⁴⁸⁵ The creditors can be categorized into involuntary creditors, who are mainly tort victims, and voluntary creditors.⁴⁸⁶ The voluntary creditors can in turn be subdivided into financial creditors, trade creditors, and employees.⁴⁸⁷ The relevant attributes are their monitoring costs and risk-bearing abilities.⁴⁸⁸ Moni-

⁴⁸³ See Peter B. Oh, *Veil-Piercing* 84 (U. Pitt. Sch. of Law Legal Studies Research Paper Series, Working Paper No. 2010-06, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557972 (noting the assimilation of veil piercing tests into unincorporated business entities).

⁴⁸⁴ See Easterbrook & Fischel, *supra* note 234, at 99–101, 103–07 (describing the varying costs to creditors, shareholders, and other members associated with different liability regimes); Halpern et al., *supra* note 35, at 133–36 (noting the liability regime's impact on the magnitude of information costs, which in turn affects creditors' expected rate of return); Leebron, *supra* note 234, at 1588–1605 (discussing risk allocation among corporate members under different liability regimes); Posner, *supra* note 219, at 507–09 (analyzing risk allocation under different liability regimes).

⁴⁸⁵ See Easterbrook & Fischel, *supra* note 234, at 99.

⁴⁸⁶ See *id.* at 104, 107.

⁴⁸⁷ *Id.* at 104.

⁴⁸⁸ See *id.* at 104–06.

toring costs refer to the costs incurred by a corporate claimant to monitor the management.⁴⁸⁹ Monitoring is necessary to guard against fraud, self-interested transactions, and general mismanagement.⁴⁹⁰ Risk-bearing abilities refer to a corporate claimant's ability to diversify away potential exposure to corporate insolvency through investments in other financial instruments.⁴⁹¹ An efficient corporate liability rule is one that achieves an optimal level of firm-wide monitoring at the lowest aggregate monitoring costs, and that allocates risks to the corporate claimant group with the highest risk-bearing abilities.⁴⁹²

To determine the optimal corporate liability rule for monitoring costs, the analysis must compare the information costs of the various groups of creditors on the one hand and the shareholders on the other hand, and also compare the aggregate monitoring costs of the firm under alternative rules of liability.⁴⁹³ Information costs refer to the costs incurred by a party to obtain and analyze information about the firm.⁴⁹⁴ A claimant group's monitoring costs can be determined by taking into account its information costs and monitoring level.⁴⁹⁵ With respect to information costs, if the shareholders have higher information costs than the creditors as a whole, then it would be more economically efficient to place the burden of monitoring on the creditors. If, on the other hand, the creditors have higher information costs than the shareholders, the shareholders should monitor instead. The optimal liability rule shifts losses in the event of bankruptcy to the claimant group that has lower information costs so that it has the incentive to undertake more monitoring.⁴⁹⁶

With respect to the monitoring level, the choice of liability rule may affect firm-wide monitoring costs in a number of ways. First—and related to information costs—shifting potential losses between shareholders and creditors alters their incentives to monitor.⁴⁹⁷ Second, it affects their scope of monitoring. If, following a change of liability rules, a

⁴⁸⁹ See Leebron, *supra* note 234, at 1605–08; see also Posner, *supra* note 219, at 507–09 (describing the costs associated with obtaining information and supervising a corporation's internal affairs).

⁴⁹⁰ See Leebron, *supra* note 234, at 1606.

⁴⁹¹ See *id.* at 1588–1605.

⁴⁹² See Posner, *supra* note 219, at 507–09.

⁴⁹³ See Easterbrook & Fischel, *supra* note 234, at 99–101.

⁴⁹⁴ See Posner, *supra* note 219, at 508, 514–15.

⁴⁹⁵ See Easterbrook & Fischel, *supra* note 234, at 99–101; Posner, *supra* note 219, at 516–17.

⁴⁹⁶ See Leebron, *supra* note 234, at 1605–07.

⁴⁹⁷ See Easterbrook & Fischel, *supra* note 234, at 115.

claimant group has to monitor a wider range of issues, its overall monitoring level will be higher.⁴⁹⁸ Third, shifting losses changes the information costs of the various corporate claimants. A change of liability rule may alter information costs by shifting the relative bargaining powers between the outside creditors and the firm.⁴⁹⁹ Under a rule of unlimited liability, for example, the outside creditors have the liability rule in their favor. If the shareholders want to contract out of unlimited liability, the creditors will be in a position to demand concessions, such as greater access to information. This reduces the creditors' information costs.

Applying the above concepts and analytical framework, the corporate parent clearly has lower information costs than any creditor. The case of involuntary creditors is easy to dispose of as these creditors rarely have the opportunity to monitor the corporation.⁵⁰⁰ In most tort cases, the victim has no prior knowledge of the identity of the tortfeasor.⁵⁰¹ Even for voluntary creditors—including the most sophisticated ones such as institutional investors and lenders—their access to information is likely to be more limited and costly than that of a corporate parent, which will have practically unfettered access to information from the subsidiary.⁵⁰² In fact, it makes little sense even to speak of monitoring because the parent controls the subsidiary. The same entity is both monitoring and being monitored. Therefore, the optimal liability rule from a monitoring cost perspective is one that imposes liability on the corporate parent for the subsidiary's liabilities.

Many commentators have observed that unlimited liability will increase monitoring costs because it will cause shareholders to monitor the wealth of fellow shareholders.⁵⁰³ This is important information to shareholders because their share of liability will be contingent on fellow shareholders' wealth, should unlimited liability be joint and several.⁵⁰⁴ This observation has little relevance for the single economic unit theory for two reasons. First, many commentators have pointed out that the need to monitor shareholder wealth will be obviated under a pro

⁴⁹⁸ See *id.* at 90–91.

⁴⁹⁹ See *id.* at 99–101.

⁵⁰⁰ See Halpern et al., *supra* note 35, at 145–47.

⁵⁰¹ See Leebron, *supra* note 234, at 1601 n.114.

⁵⁰² See Easterbrook & Fischel, *supra* note 234, at 99–101, 105–06.

⁵⁰³ See *id.* at 99–100; Halpern et al., *supra* note 35, at 130–31.

⁵⁰⁴ See Easterbrook & Fischel, *supra* note 234, at 93–97; Halpern et al., *supra* note 35, at 136–38.

rata rule.⁵⁰⁵ Second, and more importantly, given that the single economic unit theory only applies to wholly owned subsidiaries, there is only one shareholder and no one else's wealth that the corporate parent needs to monitor.⁵⁰⁶

Some commentators argue that unlimited liability will cause the subsidiary's creditors to monitor the shareholders' wealth—or in the case of the single economic unit theory, the corporate parent's credit worthiness.⁵⁰⁷ Although that may be true, a wholly owned subsidiary's creditors only need to monitor the wealth of one shareholder: the corporate parent. The increase in monitoring costs would not be substantial. Therefore, from a monitoring cost perspective, the single economic unit theory would be an efficient rule because it shifts incentives to monitor to the corporate parent, which has the lowest information costs.⁵⁰⁸ It thus reduces the aggregate monitoring costs of the subsidiary.

To determine the optimal corporate liability rule from the perspective of efficient allocation of risks, the analysis entails identifying the corporate claimant group with the greatest ability to diversify away the non-systematic risks of its investment in the firm.⁵⁰⁹ Under the Capital Asset Pricing Model, each investment entails systematic risks, which arise from fluctuations in the general economy. They also entail non-systematic risks, which are peculiar to a particular firm or business sector.⁵¹⁰ Non-systematic risks of a particular investment can be diversified away through the purchase of another investment that tends to move in the opposite direction from the investment at issue.⁵¹¹ Systematic risks, meanwhile, cannot be eliminated through diversification.⁵¹² A corporate claimant's ability to diversify away the non-systematic risks of his or her investment in the firm depends on a number of factors, most notably the proportion of investment in his or her overall asset portfolio.⁵¹³ If an individual has personal assets of one million dollars and invests fifty percent of them in a firm, it is unlikely that diversifica-

⁵⁰⁵ See Halpern et al., *supra* note 35, at 137–38; Leebron, *supra* note 234, at 1581; Stephen B. Presser, Commentary, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 Nw. U. L. REV. 148, 160–61 (1992).

⁵⁰⁶ See Leebron, *supra* note 234, at 1605–08.

⁵⁰⁷ See Halpern et al., *supra* note 35, at 134; Posner, *supra* note 219, at 516–17.

⁵⁰⁸ See Halpern et al., *supra* note 35, at 133–35.

⁵⁰⁹ See Easterbrook & Fischel, *supra* note 234, at 96–97; Leebron, *supra* note 234, at 1595–1600.

⁵¹⁰ STEPHEN A. ROSS ET AL., CORPORATE FINANCE 267–70 (4th ed. 1996).

⁵¹¹ *Id.* at 269–70.

⁵¹² *Id.*

⁵¹³ See *id.* at 269–70, 293–94.

tion will eliminate the non-systematic risks of that investment. If that individual invests one percent of his or her assets to buy the shares of a listed corporation, he should be able to diversify away the non-systematic risks through purchases of other financial assets.

It may seem that the sole shareholder of a corporation is least able to diversify away risks. This is because its investment in the firm is likely to account for a greater proportion of its overall asset portfolio in comparison to the exposure of financial lenders or other creditors to this firm.⁵¹⁴ The logical conclusion would be that the optimal rule from a risk allocation perspective would be to provide limited liability, which may undermine the premise of the single economic unit theory.⁵¹⁵ This argument, however, is invalid for two reasons. First, while the above reasoning may be true for an individual shareholder, it is probably untrue for the parent of a *bona fide* corporate group, which has considerable ability to diversify its portfolio.⁵¹⁶ In fact, in some instances, the *raison d'être* of corporate groups or conglomerates is diversification.⁵¹⁷ Therefore, the corporate parent of a subsidiary is likely to have no less ability to diversify than any outside creditors. Second—and more importantly—is that in the context of the single economic unit theory, the shareholder at issue controls the firm.⁵¹⁸ It has the ability to manage its risk exposure to the subsidiary. If a particular corporate claimant can control its own risk exposure, it would be economically efficient to shift corporate insolvency risks to the corporate claimant.⁵¹⁹ This means that a corporate parent should be liable for its subsidiary's debts, which supports the use of the single economic unit theory as a basis for involuntary piercing within corporate groups.

Another consideration raised in the economic literature is the role of limited liability in attracting corporate investment. It has been argued that one of the most persuasive justifications for limited liability is that without it, investors would shy away from corporate investments for fear of exposing themselves to massive liability payments.⁵²⁰ This would cause corporate investments to dry up, which would be highly detrimental to businesses. These scholars have in mind passive individual

⁵¹⁴ See Leebron, *supra* note 234, at 1627–28.

⁵¹⁵ *See id.*

⁵¹⁶ *See id.* at 1629–30.

⁵¹⁷ *See id.*

⁵¹⁸ *See Akzo Nobel*, 2009 E.C.R. I-8237, at para. 60.

⁵¹⁹ *See* Leebron, *supra* note 234, at 1629–30.

⁵²⁰ *See* Easterbrook & Fischel, *supra* note 234, at 95–96; Halpern et al., *supra* note 35, at 127–29.

investors in publicly traded corporations.⁵²¹ This concern is unlikely to matter in the situations covered by the single economic unit theory. First, the firms covered by the theory are wholly owned subsidiaries. They are not publicly traded.⁵²² Second, the only investor at issue in these companies is the corporate parent, which is anything but passive. If its subsidiary may expose it to shareholder liability, it has the power to prevent such liability from materializing given its complete control over the subsidiary's operations.⁵²³

In sum, transaction cost analysis of limited liability lends strong support to the use of the single economic unit theory to hold a corporate parent liable for its wholly owned subsidiaries' debts. Other commentators have made similar suggestions in the past.⁵²⁴ What remains to be seen is whether economic analysis also supports the introduction of full enterprise liability under the single economic unit theory.

2. Enterprise Liability

The single economic unit theory need not be confined to the imposition of subsidiary liability on a corporate parent. One commentator famously proposed single enterprise liability for a corporate parent and all of its wholly owned subsidiaries.⁵²⁵ The important question is whether the single economic unit theory should be similarly extended to reverse piercing and lateral piercing, in addition to the forward piercing considered above.

Other commentators have argued that separate corporate personality⁵²⁶ is important because it allows economically efficient asset partitioning, which they define as "the designation of a separate pool of assets that are associated with the firm, and that are distinct from the personal assets of the firm's owners and managers . . . [and] the assignment to creditors of priorities in the distinct pools of assets that re-

⁵²¹ See Easterbrook & Fischel, *supra* note 234, at 95.

⁵²² Cf. *Akzo Nobel*, 2009 E.C.R. I-8237, at paras. 59–61 (describing the relationship of a parent company to its subsidiary, distribution of shares, and extent of control).

⁵²³ See *id.* at para. 60; Leebron, *supra* note 234, at 1627.

⁵²⁴ See, e.g., Blumberg, *supra* note 234, at 623–34; see also Hansmann & Kraakman, *supra* note 234, at 1882–90 (arguing for use of single economic unit theory in tort claims); Leebron, *supra* note 234, at 1588–95.

⁵²⁵ See Landers, *supra* note 96, at 590.

⁵²⁶ See Hansmann & Kraakman, *supra* note 469, at 393. In fact, they use a different terminology than "separate corporate personality." For the sake of clarity, however, this Article will continue to use "separate corporate personality," the terminology familiar to most readers.

sult from the formation of a legal entity.”⁵²⁷ Asset partitioning is efficient because it reduces monitoring costs.⁵²⁸ There are two types of asset partitioning: affirmative and defensive.⁵²⁹ Affirmative asset partitioning refers to the assignment “to the firm’s creditors a claim on the assets associated with the firm’s operations that is prior to the claims of the personal creditors of the firm’s owners,” and defensive asset partitioning refers to “granting to the owners’ personal creditors a claim on the owners’ separate personal assets that is prior to the claims of the firm’s creditors.”⁵³⁰ As a result, forward piercing overrides defensive asset partitioning, and reverse piercing trumps affirmative asset partitioning.⁵³¹

According to these commentators, affirmative asset partitioning is the most important attribute of corporation law.⁵³² Without affirmative asset partitioning, the creditor of any shareholder can proceed against the corporate assets and petition for the firm’s liquidation.⁵³³ Therefore, the firm’s creditors will need to monitor each shareholder’s creditworthiness along with the firm’s.⁵³⁴ To make matters worse, the firm’s creditors will also need to monitor the investments made by each shareholder because the firm’s assets may be called upon as a result of a failed investment by any shareholder.⁵³⁵ The firm’s creditors will not be the only ones with incentives to conduct such monitoring. The shareholders will also monitor each other.⁵³⁶ Reverse piercing, which overrides affirmative asset partitioning, will hence result in a substantial increase in monitoring costs. In contrast, defensive asset partitioning, which implicates limited liability, is less essential and the argument for it less conclusive.⁵³⁷ This explains why there are different variations of defensive asset partitioning, while affirmative asset partitioning is fully preserved under practically all circumstances.⁵³⁸

⁵²⁷ *Id.*

⁵²⁸ *Id.* at 398.

⁵²⁹ *Id.* at 393.

⁵³⁰ *Id.*

⁵³¹ See *id.*; Youabian, *supra* note 297, at 574–76 (explaining that in forward piercing cases the stockholders of a corporation may be held personally liable for corporate obligations, whereas in reverse piercing cases the corporation may be held liable for the debts of its shareholders).

⁵³² See Hansmann & Kraakman, *supra* note 469, at 406.

⁵³³ *Id.* at 402.

⁵³⁴ *Id.*

⁵³⁵ *Id.*

⁵³⁶ *Id.* at 402–03.

⁵³⁷ See *id.* at 423, 428–32.

⁵³⁸ See Hansmann & Kraakman, *supra* note 469, at 423.

The implication of the foregoing discussion for the single economic unit theory and the corporate veil doctrine generally is that forward piercing is economically more defensible than reverse piercing.⁵³⁹ Nonetheless, the impact of reverse piercing under the single economic unit theory on the benefits of affirmative asset partitioning may not be as serious as has been suggested. The increase in monitoring costs will be much less substantial in the case of a wholly owned subsidiary. The commentators referred to above have acknowledged this.⁵⁴⁰ Given that there is only one shareholder, there will be no cross-shareholder monitoring.⁵⁴¹ Subsidiary creditors' monitoring of the parent will be more manageable, even though they will still need to monitor the corporate parent's risk exposure, including the finances of affiliated corporations within the group.⁵⁴² A separate justification for allowing reverse piercing, at least under some limited circumstances, is that otherwise corporate parents will simply move their assets to their subsidiaries to avoid liability.⁵⁴³ The parent will itself contract liabilities with outside creditors while keeping its assets in the subsidiaries.⁵⁴⁴ A categorical refusal to sanction reverse piercing would be tantamount to an open invitation for manipulation.

From an economic perspective, whether lateral piercing between two affiliated corporations should be allowed depends on the degree of integration between the two corporations' businesses. With respect to affiliated corporations, one can align them by the degree of integration of their businesses. On one end of the spectrum are corporations that operate in the same line of business, perhaps as producers of different components of the same product. These may be called integrated subsidiaries.⁵⁴⁵ On the other end of the spectrum are members of a conglomerate whose businesses are unrelated to each other. These corporations may be called conglomerate or nonintegrated subsidiaries.⁵⁴⁶

⁵³⁹ See *id.* at 398–405. Hansmann and Kraakman identified additional benefits for defensive asset partitioning, namely decision-making economies, enhanced creditor monitoring, economies of transfer, and risk-bearing economies. *Id.* at 424–27. These benefits are likely to be negligible, however, for a wholly owned subsidiary and its corporate parent. *Id.* at 402.

⁵⁴⁰ See *id.* (“The advantages of asset partitioning, and particularly of affirmative asset partitioning, are far more obvious in the case of a business firm that has numerous individuals as owners.”).

⁵⁴¹ See *id.*

⁵⁴² See Hansmann & Kraakman, *supra* note 469, at 402.

⁵⁴³ See Leebron, *supra* note 234, at 1623.

⁵⁴⁴ See *id.* at 1613–14, 1623.

⁵⁴⁵ See *id.* at 1616–17.

⁵⁴⁶ See Leebron, *supra* note 234, at 1616–17.

General Electric is the quintessential conglomerate.⁵⁴⁷ The disaggregation of a single line of business into distinct legal entities yields few economic benefits in terms of diversification.⁵⁴⁸ Hence, there is a strong argument for lateral piercing between integrated subsidiaries. The argument for limited liability is greater for conglomerate subsidiaries, no less because it will be easier for creditors to monitor affiliated corporations with distinct businesses than for them to monitor one subsidiary operating two businesses.⁵⁴⁹ In the former scenario, the two creditor groups need not spend time to familiarize themselves with another line of business.⁵⁵⁰ As an illustration, the argument for lateral piercing between the two subsidiaries in *D.H.N.* would be strong, given that they had no independent business of their own and merely owned different parts of the same grocery business.⁵⁵¹

In summary, the economic justifications for forward piercing under the single economic unit theory are strong. The theory should be made readily available for the imposition of subsidiary liabilities on a corporate parent. The argument is less conclusive for reverse piercing, in light of the impact it has on the benefits of affirmative asset partitioning.⁵⁵² Still, the need to forestall circumvention means that reverse piercing must be permissible at least under some circumstances. Whether lateral piercing should be permitted depends on the degree of integration between the affiliated corporations.⁵⁵³ Separate corporate personalities should be upheld for affiliated corporations with dis-

⁵⁴⁷ See *id.* For information about General Electric's diverse range of business, which includes aircraft engines, finance, healthcare, security, oil and gas, media, and entertainment, see http://www.ge.com/products_services/index.html.

⁵⁴⁸ See Leebron, *supra* note 234, at 1616–17 (“From a financial and commercial perspective, such entities are not truly independent. Investments in them do not represent a diversification of risk, and thus there is no reason to recognize a regime of limited liability for them, at least with respect to tort claimants.”). Professor Leebron’s proposal was confined to tort claims, hence the caveat at the end of his statement. Nevertheless, his reasoning is equally valid for contractual claims. He also argued that upholding limited liability for contractual claims between a corporate parent and its wholly owned subsidiary serves the purpose of isolation of assets for the purpose of secured borrowing. Therefore, limited liability should continue to apply to the claims of financial creditors. *Id.* at 1614. Although this argument may be valid for financial creditors, it has little applicability for trade creditors and employees. Taking these latter two contractual creditors into account, it is not so clear that limited liability protection for a corporate parent against its wholly owned subsidiary’s contractual claims is economically efficient.

⁵⁴⁹ See Hansmann & Kraakman, *supra* note 469, at 399–401.

⁵⁵⁰ See *id.*

⁵⁵¹ *D.H.N.*, [1976] 1 W.L.R. at 854–56.

⁵⁵² See *supra* notes 532–538 and accompanying text.

⁵⁵³ See Leebron, *supra* note 234, at 1616–17.

tinct lines of business.⁵⁵⁴ Veil piercing should be allowed against integrated subsidiaries.

D. Reformulation of the Theory

1. Involuntary Piercing

Thus far, the discussion of the single economic unit theory has proceeded on the premise that it only applies between a corporate parent and its wholly owned subsidiaries. *D.H.N.* and *Beckett* both featured such groups.⁵⁵⁵ One problem with this narrow scope of application is that it exposes the theory to easy circumvention. There was no concern about circumvention in those two cases because they both involved voluntary piercing.⁵⁵⁶ In an involuntary piercing context, however, a corporate parent bent on avoiding shareholder liability could do so simply by adding a nominal shareholder to the subsidiary.⁵⁵⁷ To preempt such circumvention, the theory needs to be modified so that it continues to apply to cases where the additional shareholders are merely nominal. To escape the reach of the theory, the shareholders other than the corporate parent must evince meaningful independence from the corporate parent.

Complete, or virtually complete, share ownership is only a necessary—but not sufficient—condition for invoking the theory. Only when the corporate parent actually controls the subsidiary can it be fairly deemed responsible for the subsidiary's conduct and liabilities. A requirement of control is consistent with economic analysis. Conclusions about the corporate parent's lower information costs and superior risk-bearing abilities are both premised on its control over the subsidiary, as is the argument that shareholder liability will not deter a corporate parent from investing in its subsidiary.⁵⁵⁸ Without actual control, a corporate parent may no longer be the least-cost monitor or optimal risk-bearer. The economic justifications for applying the single economic unit theory will be weaker. Control must entail more than the mere

⁵⁵⁴ See Hansmann & Kraakman, *supra* note 469, at 399–401.

⁵⁵⁵ See *Beckett*, [2007] I.C.R. at 1545–46; *D.H.N.*, [1976] 1 W.L.R. at 857–58. In *Beckett*, the English Court of Appeal treated the parent and the two subsidiaries as a single entity, without clarifying their ownership structure or specifying that they were wholly owned. See [2007] I.C.R. at 1545–46.

⁵⁵⁶ See *id.* at 1544–46; *D.H.N.*, [1976] 1 W.L.R. at 857–59.

⁵⁵⁷ See Youabian, *supra* note 297, at 594.

⁵⁵⁸ See Easterbrook & Fischel, *supra* note 234, at 99–101; Leebron, *supra* note 234, at 1574–78, 1630.

power to elect directors.⁵⁵⁹ A corporate parent is only deemed to exercise control over a subsidiary if it can command its daily operations.⁵⁶⁰ The mere ability to elect directors may not allow the parent to lower its information costs and control its risk exposure to the subsidiary effectively. Moreover, every corporate parent with complete or close to complete share ownership of its subsidiaries has the power to elect directors.⁵⁶¹ If mere ability to elect directors qualifies as control, it would practically eviscerate the control requirement.

Nevertheless, it remains to be determined which party should bear the burden of proving or negating control. From an evidentiary perspective, the burden of proof should rest on the corporate parent because it will have greater access to evidence that is needed for disproving its control of the subsidiary.⁵⁶² This may be done by showing that the board exercises independent judgment in the daily operations of the subsidiary or that the subsidiary has acted against the parent's wish in the past.⁵⁶³ To invoke the single economic unit theory in involuntary piercing cases according to this theory, then, the plaintiff will first be required to demonstrate the absence of independent shareholders in the subsidiary, which establishes a presumption of actual control by the corporate parent. The burden of proof then shifts to the parent to rebut the presumption of control.

The elements of the theory that have been discussed so far pertain to the independence and integrity of the subsidiary, or to use the terminology of the instrumentality doctrine—the economic substance of the subsidiary. As a variation of the corporate veil doctrine, the single economic unit theory should require an improper conduct or purpose, at least in the involuntary piercing context. This parallels the impropriety prong of the instrumentality doctrine.⁵⁶⁴ Examples of improper conduct include fraud, evasion of existing legal obligations, and cir-

⁵⁵⁹ Cf. *Gramophone*, [1908] 2 K.B.at 95–96 (noting that the power to elect directors alone does not confer corporate control).

⁵⁶⁰ See *United States v. Bestfoods*, 524 U.S. 51, 55 (1998) (holding that a corporate parent that actively exercised control over the operations of a subsidiary's facility may be directly liable as an operator of that facility).

⁵⁶¹ See Douglas & Shanks, *supra* note 1, at 196.

⁵⁶² Cf. *Akzo Nobel*, 2009 E.C.R. I-8237, at paras. 60–61 (holding that the parent company has the burden of rebutting a presumption of liability for fines imposed on its subsidiaries).

⁵⁶³ One example of such independence is found in *Craig v. Lake Asbestos of Quebec Ltd.*, where the parent could not prevent the subsidiary from making acquisitions without the parent's consent. 843 F.2d 145, 152 (3d Cir. 1988).

⁵⁶⁴ See *supra* notes 347–350 and accompanying text.

cumvention of statutes.⁵⁶⁵ The impropriety requirement distinguishes the single economic unit theory from the kind of general enterprise liability proposed by some commentators.⁵⁶⁶ Although the economic analysis presented earlier may lend support to general enterprise liability, imposition of shareholder liability absent impropriety would be a dramatic extension of the English corporate veil doctrine.⁵⁶⁷ Despite some support for this approach in *Rainham Chemical Works*, in which shareholder liability was imposed for a corporate tort in the absence of impropriety,⁵⁶⁸ the weight of English case law clearly indicates that impropriety must be present before shareholder liability can be imposed.⁵⁶⁹ Therefore, once control on the part of the corporate parent is established, the burden of proof shifts back to the plaintiff to demonstrate the presence of impropriety. Lastly, in keeping with an earlier suggestion of incorporating a proximate causation requirement in an English instrumentality doctrine,⁵⁷⁰ the plaintiff should additionally be required to show that the improper conduct by the parent contributes to its loss. Once all these elements are met, the single economic unit theory applies to impose liability on the corporate parent.

Both reverse piercing and lateral piercing should only be permitted under limited circumstances. In particular, they should only be allowed if there is evidence of asset stripping to evade liability. *Yukong Line Ltd. of Korea v. Rendsburg Investments Corp. of Liberia* illustrates how lateral piercing can be crucial for preventing liability evasion.⁵⁷¹ In that case, Rendsburg repudiated a charter-party with Yukong after market conditions had deteriorated.⁵⁷² On the same day, Rendsburg's shareholder transferred its assets to another company controlled by him.⁵⁷³ Although the shareholder at issue was an individual,⁵⁷⁴ one can easily imagine the same sequence of events transpiring with a corporate parent. Without lateral piercing, a corporate parent could do exactly what

⁵⁶⁵ See *Lowendahl v. Baltimore & Ohio R.R.*, 247 A.D. 144, 145 (N.Y. App. Div. 1936), *aff'd*, 6 N.E.2d 56 (N.Y. 1936).

⁵⁶⁶ See, e.g., Blumberg, *supra* note 234, at 621–26; Landers, *supra* note 96, at 651–52.

⁵⁶⁷ See *Stone & Rolls Ltd.*, 1 A.C. 1391 (H.L.) at [104]–[112]. It would also be a dramatic extension of the U.S. doctrine. See Thompson, *supra* note 7, at 1041.

⁵⁶⁸ *Rainham Chem. Works, Ltd. v. Belvedere Fish Guano Co.*, [1921] 2 A.C. 465 (H.L.) at 470–79 (appeal taken from Eng.).

⁵⁶⁹ See *supra* notes 389–392 and accompanying text.

⁵⁷⁰ See *supra* text accompanying notes 400–406.

⁵⁷¹ [1998] 1 W.L.R. 294 (Q.B.) at 306. The shareholder in the case, however, was not a company, but an individual.

⁵⁷² *Id.* at 297–98.

⁵⁷³ *Id.* at 298.

⁵⁷⁴ *Id.* at 302.

was done in *Yukong* to evade liability. One may question why lateral piercing should be confined to asset stripping situations and not be extended to all integrated subsidiaries. Although economic analysis suggests that lateral piercing should be available against integrated subsidiaries, determining the degree of economic integration of affiliated corporations is fraught with difficulty. It requires substantial business expertise on the part of the courts.⁵⁷⁵ Moreover, given English courts' formalistic approach to judicial decision-making and aversion to non-doctrinal considerations,⁵⁷⁶ it is highly unlikely that they would embark on such an inquiry. Therefore, lateral piercing is appropriately confined to asset stripping situations.

2. Voluntary Piercing

One further issue is whether the single economic unit theory should be available for voluntary piercing at all. Given the arguments against voluntary piercing generally, the theory should arguably not be available in voluntary piercing cases. *Beckett*, however, signaled the English courts' continual willingness to entertain voluntary piercing claims.⁵⁷⁷ If the theory is to be made available to voluntary piercing, it should only be under exceptional circumstances. Few extenuating circumstances should be recognized to ensure that voluntary piercing under the single economic unit theory is kept to a minimum. After a finding of an extenuating circumstance, it is then up to the courts to weigh the equity and policy considerations of the situation to decide whether voluntary piercing should be allowed.

Such an open-ended approach seems best suited for voluntary piercing for a number of reasons. First, the burden-shifting framework proposed for involuntary piercing is clearly ill-suited for voluntary piercing. Issues of control, impropriety, and causation linked with plaintiff loss have little to do with whether voluntary piercing should be permitted.⁵⁷⁸ Second, while many involuntary piercing cases implicate the same underlying issue of limited liability, voluntary piercing cases feature such a wide variety of facts that it is probably impossible to

⁵⁷⁵ See Leebron, *supra* note 234, at 1615–17 (remarking on the difficulty a court can encounter when attempting to determine the degree of economic integration of affiliated corporations).

⁵⁷⁶ See Adams, [1990] Ch. at 536–37.

⁵⁷⁷ See *Beckett*, [2007] I.C.R. at 1552.

⁵⁷⁸ See HENN & ALEXANDER, *supra* note 217, at 357–58.

come up with a general framework for deciding them.⁵⁷⁹ Third, every voluntary piercing case will require the court to confront the question of whether the corporate parent should be allowed to set aside its own subsidiary's separate personality after enjoying the benefits of incorporation.⁵⁸⁰ As such, a totality of circumstances approach would likely provide the best solution. Although this will mean that there is little predictability in voluntary piercing cases, the nature of voluntary piercing is such that lack of legal certainty seems inevitable.

CONCLUSION

By undertaking a comparative study of the corporate veil doctrine in the United States and United Kingdom, this Article aims to provide a better understanding of the English doctrine. A comparison between the United Kingdom and the United States is particularly illuminating because although the corporation law of the two countries shares a common lineage, their approaches to the corporate veil doctrine and their modes of judicial reasoning show considerable divergences. It is hoped that some useful insights have been gleaned about judicial treatment of issues of policy and justice and about judicial decision making on both sides of the Atlantic.

As a standard-based exception to the general rule of limited liability, the corporate veil doctrine involves the fundamental choice facing every area of law and every legal system: the choice between legal certainty and the attainment of justice in particular cases. Limited liability promotes legal certainty and encourages investment in business activities. But as many courts have recognized, unyielding protection of it will lead to injustices on particular occasions. It is the responsibility of the corporate veil doctrine to ensure that injustices do not result. Given the United States' emphasis on economic freedom and entrepreneur-

⁵⁷⁹ See, e.g., *Macaura*, [1925] A.C. at 619–21 (involving an insurance claim for assets owned by a corporation but insured under the name of the sole shareholder and creditor as an individual); *Beckett*, [2007] I.C.R. 1541–45 (involving voluntary piercing of veil between group members to give effect to employment contract that prohibited competition with parent company after employment, although the subsidiary provided the group's services); *D.H.N.*, [1976] 1 W.L.R. at 857 (involving voluntary piercing of a corporate parent operating a separate company which was owned by the parent's subsidiary, a third company, where a provision for compensation upon government purchase of company property was involved).

⁵⁸⁰ Cf. *Tate Access Floors Inc. v. Boswell*, [1991] Ch. 512 at 531 (Eng.) (discussing how those who benefit by utilizing the corporation as a medium to conduct affairs should not then be able to set aside corporate personality to their benefit when the corporation is under scrutiny).

ship, and the United Kingdom's relatively more liberal reputation, it is perhaps surprising that U.S. courts have taken a more interventionist approach to veil piercing. What explains this apparent mismatch, however, is beyond the scope of this Article and will probably require a comprehensive study of the judiciaries in these two countries.

This Article highlights a number of crucial differences between the corporate veil doctrines in the United Kingdom and the United States, from jurisprudential approaches to treatment of specific cases. The English formalistic approach to judicial decision making and strict adherence to separate corporate personality means that there is little need to incorporate notions of justice and policy considerations when deciding corporate veil claims. This de-emphasis on justice and policy in turn obviates the need to fashion new analytical frameworks and allows the English courts to rely on common law concepts, many of which are ill-suited for the purpose. Part III argues that despite all the differences between the United Kingdom and United States highlighted in Part II, there are in fact elements in the English corporate veil cases that share substantial commonality with U.S. cases. Revealingly, one can in fact construct an instrumentality doctrine out of the English cases. Having demonstrated the surprising similarities between the two corporate veil doctrines, this Article goes one step further by proposing a revival of the single economic unit theory that will put the English corporate veil doctrine ahead of its U.S. counterpart. It will allow the English courts to craft a more uniform and systematic approach to corporate veil cases arising in the context of corporate groups.