To Know a Veil

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To Know A Veil

Douglas C. Michael

I. INTRODUCTION

Lawyers, judges, law students, and law professors have a love-hate relationship with the doctrine of "piercing the corporate veil"—the idea that shareholders might sometimes be personally liable for the debts of the corporation. It is the subject covered more than all others in courses on corporation law. It is widely litigated, being the subject of thousands of opinions. Yet, for all this attention, it is routinely vilified by the experts. Most commentators recognize that it is jurisprudence without substance.

This would be harmless folly if it were not for the disastrous consequences of veil-piercing. Indeterminate standards wreak havoc on the life of the lawyer as counselor, a

* Professor, University of Kentucky College of Law. I gratefully acknowledge the patient attention and helpful comments of my colleagues as I presented this paper in faculty colloquia at the University of Florida and the University of Kentucky Colleges of Law.


2. Professor Robert B. Thompson's recent survey of business associations professors showed that, of 71 respondents, all taught "veil-piercing." This was not true of any other subject; the next most common topics being "formation" and "fiduciary duty." Robert B. Thompson, The Basic Business Associations Course: An Empirical Study of Methods and Content, 48 J. LEGAL EDUC. 438, 440 (1998).


fact never mentioned in court cases. Individuals set up corporations, frequently on the advice of counsel, with the idea that they will face no personal liability for corporate obligations. What counsel does not wince when telling her client that liability is limited except in certain unspecified and unpredictable situations when it is not? How do we advise clients how much capital is enough, how many formalities must be respected, or how fair their conduct must be? Who can be sure what kind of in terrorem effect this doctrine has on everyone who studies it? And the madness is spreading. Once confined to corporation law, veil-piercing is expanding wholesale into otherwise analytically pristine areas. For example, many courts have imported veil-piercing analysis into cases involving limited liability companies (LLCs).5 Many statutes command this result,6 and competing "schools" of LLC veil-piercing are already being established.7 Worse yet, the expansion continues into areas wholly unrelated to corporation law.8

The tragedy is that we have created a mess of the common law in the name of justice, and it does not have to be so. It is only because we have had the veil-piercing doctrine at hand that more principled analysis has gone wanting.9 Despite continuing noble attempts to save this doctrine,10 it must be discarded at once. All the "guilty" parties can be punished and all the "right" results may be had if we would only substitute rigorous analysis in each instance where the incantation of veil-piercing is now made. It is as if we are presented with a shelf of well-designed, well-engineered precision tools to do the job, but yet we reach for the blunderbuss every time. This Article is an attempt to form a basis for rigorous analysis of virtually every veil-piercing case and to rid the law of this wandering benevolent imprecision. We are capable of doing the right thing in a more coherent fashion, and our colleagues, clients, and the public deserve nothing less.

In Part II, I review the origins of veil-piercing analysis, demonstrating how the erroneous, result-oriented approach to veil-piercing began. In Part III, I review the

8. See infra Part III.D.
9. In his assault on the "de facto corporation" doctrine almost 50 years ago, Professor Frey observed in language applicable to the current problem:

[When a judge is officially asked to determine whether or not certain defendants are personally liable, it does not suffice for him merely to declare, with or without resort to Latin, that the defendants are or are not so liable. The parties and their attorneys and the legal profession are properly interested in the real reasoning upon which the judge arrived at his conclusion.

modern analysis which attempts to fully "unpack" veil-piercing into its constituent parts. In Part IV, I propose that modern analysis can adequately explain all cases, and critically examine the faulty invocation of equity as a heritage and a means for deciding the cases otherwise unexplainable. In Part V, I attempt to explain why veil-piercing persists despite its universal derision, and how its demise might be hastened, principally by law professors.

II. THE ORIGINS OF VEIL-PIERCING ANALYSIS

According to Stephen Presser's history of the subject, veil-piercing as a doctrine dates from three events in the first third of the century: Maurice Wormser's works on the subject from 1912 to 1927, Judge Benjamin Cardozo's 1926 opinion in Berkey v. Third Avenue Railway Co., and Frederick Powell's 1931 book on parent and subsidiary corporations. There was even some debate, in the beginning, of whether "veil-piercing" or "disregard of the corporation" is the most appropriate name for the analysis. Wormser shifted between the two terms in his writing, attributing the origin of the "veil" analogy to one court's analysis of an early U.S. Supreme Court case. Powell suggests that "veil-piercing" is a better caption than "disregard," because it shows that shareholder liability for corporate obligations is imposed on a one-time-only basis. However, this distinction between permanent and temporary disregard of the corporate form is not self-evident. The very term veil-piercing seems more suggestive of the result, implying from the outset that the corporation or other limited-liability vehicle is a sham, as a veil hides reality. In this light, the term "disregard of the corporate entity" appears more neutral, and some scholars prefer it.

Wormser's analysis of veil-piercing in 1912 began as a quest to determine what the corporation is as a "juristic concept." Although he recognized at the outset that

11. This imagery comes from Robert B. Thompson, Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for the Torts Enterprise, 47 VAND. L. REV. 1 (1994).
15. FREDERICK J. POWELL, PARENT AND SUBSIDIARY CORPORATIONS: LIABILITY OF A PARENT CORPORATION FOR THE OBLIGATIONS OF ITS SUBSIDIARY (1931). There were earlier sightings, the most frequently mentioned being United States v. Milwaukee Refrigerator Transit Co., 142 F. 247, 255 (E.D. Wis. 1905).
16. I. Maurice Wormser, Piercing the Veil of the Corporate Entity, 12 COLUM. L. REV. 496, 498 (1912). This article bears the "veil-piercing" title, but his later book compiling this and other subjects was captioned in the "disregard of the fiction" mode, suggesting that at least he thought that "disregard" was a larger subject than "veil-piercing." See generally WORMSER, supra note 13.
17. POWELL, supra note 15, § 1, at 1-2 & n.2 (claiming veil-piercing as "the more accurate expression," but noting (even in 1931) that "it is now too late to quarrel with the universal terminology [of disregarding the corporate entity] found in the judicial opinions."). How surprised Powell would be to find "veil-piercing" the predominant label for this doctrine today.
19. WORMSER, supra note 16, at 496.
determining the "true anatomy of the corporate concept" was a "tempting but profitless discussion," \(^\text{20}\) he then posed the following magic question:

When should the concept of corporate entity be adhered to, when should it be disregarded? The concept is not an "open sesame," which will open all gates. When to use it, when to ignore it, is the present day dilemma. The scope and purpose of this article is to seek to supply an answer and to indicate in what classes of cases the "entity concept" should be ignored; incidentally, to demonstrate how the courts, again and again, have frustrated each and every attempt to commit iniquity, to perpetrate fraud, to achieve monopoly, or to accomplish wrongs, under the guise, and hiding behind the veil, of corporate existence. \(^\text{21}\)

Wormser then proceeded to examine cases in each of these categories. First, he turned to cases which, under modern analysis, would be considered fraudulent transfer cases. \(^\text{22}\) Indeed, he described these cases as "instances of judicial impatience with all attempts to hamper, delay or defraud creditors" \(^\text{23}\) perhaps ignorant of the origin of this turn of speech—the Statute of Elizabeth, \(^\text{24}\) the ancestor of modern fraudulent transfer law. \(^\text{25}\)

Next, Wormser examined cases arising under various business regulation statutes, particularly antitrust cases, \(^\text{26}\) all of which could be explained by resort to the words and policies of the statutes at hand. Finally, he examined miscellaneous cases, the most interesting of which for our purposes are those such as modern day "promoter's" cases, where a promoter engages in fraud or self-dealing with the corporation and then passes the stock on to innocent purchasers. \(^\text{27}\) Such cases remain a difficult subject today, but are not approached using veil-piercing analysis. \(^\text{28}\) Wormser then laid down what he called the "general" rule:

When the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate

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20. Id.
21. Id. at 496-97.
22. See id. at 498-506.
23. Id. at 498.
24. 13 Eliz. ch. 5 (1570). The original statute provided in part for the avoidance of:

[F]eigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenaments as of goods and chattels, . . . which . . . have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others of their just and lawful actions. . . .

Id. (emphasis added).
27. See id. at 513-15. The most in-depth discussion is of Home Fire Ins. Co. v. Barber, 93 N.W. 1024 (Neb. 1903), a case involving fraud akin to that described in the text, where the court held that a corporation has no equitable claim if none of the shareholders have such a claim. Barber, 93 N.W. at 1031.
monopoly, or to protect knavery or crime, the courts will draw aside the web of entity, will regard the corporate company as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons.29

He noted later in his 1927 book that this formulation probably was not a true rule. Indeed, he claimed the concept of disregard of the corporate fiction was ultimately incapable of precise statement because of the many forms it takes.30 In this fashion, then, with a summary of cases transferred to an amorphous doctrine, the confusion was first born.

Next upon the scene was Judge Cardozo in Berkey v. Third Avenue Railway Co.,31 a tort case involving injury by employees of a corporation, which was in turn a wholly-owned subsidiary of another corporation.32 The court refused to disregard the separate existence of the subsidiary; Cardozo seized upon the fact that such a combination would be illegal under the New York laws governing street railways.33 Wormser chastised Cardozo's opinion as being too slavish to regularity, that is, to the rule of law, and insufficiently flexible to reach the right result when needed.34 Presser characterized Cardozo's reasoning as circular, moving from imprecision to precise rule and back to imprecision again.35 But the opinion stood, despite the holding, as an endorsement of the general veil-piercing concept, though famously "enveloped in the mists of metaphor."36 Cardozo cautioned against using metaphor too broadly, but its use might be necessary, he cautioned, to defend or uphold "some accepted public policy" or where to do otherwise would "work a fraud upon the law."37

Of the three scholars, Powell, in his 1931 book, is probably most frequently credited with creating and neatly packaging the veil-piercing doctrine. Although technically his work deals only with parent and subsidiary corporations, he freely extended his analysis to "one-man" corporations, indicating the rules applied to those entities "with equal force."38 He stated it would be an "abuse of the privilege" or, using Cardozo's phrase, "a fraud upon the law"39 to allow the separate existence of a corporation to be recognized if the following were true: (1) there was control of the corporation, (2) used to commit

30. In respect of his earlier work, Wormser wrote:

   I am older and less wise—far less wise. I have learned to realize that the formulation of legal propositions which can be applied with meticulous exactitude is a highly dangerous undertaking. You cannot bind up legal principles with baby blue ribbon in orderly little parcels and label them "thus and thus" or "so and so."

WORMSER, supra note 13, at 40.
32. Id. at 58.
33. Id. at 59-60. Presser vividly and aptly characterizes Cardozo's use of this "obscure" statute as a deus ex machina. PRESSER, supra note 12, § 1.03[2], at 1-23 to 1-24.
34. WORMSER, supra note 13, at 23.
35. PRESSER, supra note 12, § 1.03[2], at 1-24 to 1-26.
37. Id.
38. POWELL, supra note 15, § 11, at 37.
39. POWELL, supra note 15, § 1, at 2. As to the source of this phrase "a fraud upon the law," see supra text accompanying note 37.
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"fraud or wrong," causing (3) unjust loss or injury to the complainant. Powell's three-part test is the one now most frequently used as the touchstone for veil-piercing analysis.

III. MODERN VEIL-PIERCING ANALYSIS

Veil-piercing as a doctrine was not upon the scene very long before legal scholars began careful analysis. First, it was recognized that veil-piercing cases could be productively analyzed if divided by the type of case or plaintiff. Then, different groups took on each different category. This part discusses each of these developments in turn.

A. The Origin of Categorization by Type of Case

The trend toward principled analysis probably began with Alexander Hamilton Frey's 1951 discussion of defective incorporation. Although not directly relevant to the veil-piercing issue, Frey's empirical work, coupled with an attempt to provide explanations of the compiled results, provides two important insights. First, he cleaved the cases between those where the plaintiff dealt "on a corporate basis" with the purported corporation, and those where the plaintiff did not so deal. This was the beginning of the separation of "contract plaintiffs" and "tort plaintiffs" that would later emerge, although Frey pointed out that most of the plaintiffs not dealing with the purported corporation "on a corporate basis" were short-term creditors and not tort victims. Second, Frey exposed the circular reasoning of using the result as explanation or doctrine. Searching for deeper meaning where there was none on the surface, he warned, was likely to be futile. In this regard, he stated:

One can ponder upon so-called policy considerations which, although not articulate in the opinions, may have been latent in the judicial mind. But such speculations do not appeal to me as particularly profitable. In arguing a particular case and commenting on prior decisions one may offer "good" reasons for or against certain judgments, even though these may not be the "real" reasons which induced the results. This, however, is largely a matter of personal opinion, unless there is a body of data from which substantiating

40. Powell, supra note 15, § 3, at 4-6.
42. See Frey, supra note 9, at 1153.
44. Frey, supra note 9, at 1157 & n.18.
45. Id. at 1160. Frey's analysis has been criticized for not also recognizing as a dispositive factor "whether the defendants had taken reasonable steps to incorporate and reasonably believed they were incorporated." Norwood P. Beveridge, Corporate Puzzles: Being a True and Complete Explanation of De Facto Corporations and Corporations by Estoppel, Their Historical Development, Attempted Abolition, and Eventual Rehabilitation, 22 Okla. City U. L. Rev. 935, 963 (1997).
support may be drawn. The fact remains that . . . the courts have rarely given either real reasons or good reasons, despite the emptiness of the . . . doctrine upon which they verbally rely.46 Frey's analysis has been criticized47 and his predictions about the demise of the de facto corporation doctrines have not come to pass, but these basic points remain important nonetheless for our study of the development of modern veil-piercing doctrine.

Robert Hamilton's 1971 article48 carried this careful look beyond empty doctrine into the veil-piercing area. His indictment of the doctrine is swift and sure: "The sheer breadth of this [veil-piercing doctrine] renders it almost totally useless."49 He followed with three important observations intended to sharpen veil-piercing analysis. First, individual liability under traditional theories, such as agency or tort law, requires no additional veil-piercing verbiage, which becomes merely confusion masquerading as substance.50 Second, the tort-contract distinction is important, because results do and should turn in many cases on whether the plaintiff dealt voluntarily with the corporation.51 Finally, he noted as relevant, an appeal to general equity or fairness in attempting to deal with entrepreneurs who play too fast and loose with the division of assets of the enterprise into several entities.52

Each of these points is an important advance in veil-piercing analysis. First, it is critical to remember the astonishingly simple rules of individual liability. A defrauder is liable for his fraud whether committed with the aid of a business entity or not. A servant's tort redounds to his master, but this does not relieve the servant of liability.53 Second, the separation of cases into voluntary and involuntary groups is important, although the tort and contract labels can be misleading. For example, notions of fraud can move seamlessly between these two substantive areas. The level of voluntariness of a given plaintiff in dealing with a corporation is best represented on a continuum, with the sophisticated, hard-bargaining lender on one end, and the incidental, accidental tort victim on the other, and trade creditors, fraud victims and a variety of others somewhere in between. Finally, it is important to remember that where notions of fairness are involved, the issue at hand is one of some other substantive body of law:

Courts are likely to avoid answers that lead to results that are unfair or inconsistent with the court's view of policy . . . . These notions of fairness and justice often have little or nothing to do with corporation law; rather, they

46. Frey, supra note 9, at 1179-80.
48. Hamilton, supra note 4, at 979.
49. Id. at 982.
50. Id. at 983.
51. Id. at 984-85.
52. Id. at 985. This latter observation was cleverly restated by Hamilton as follows: "Perhaps the rule of these cases should be that the use of a corporation as a 'cunning device' is prohibited." Hamilton, supra note 4, at 1003.
53. RESTATEMENT (SECOND) OF AGENCY §§ 219, 343 (1958) (liability of master and servant, respectively).
belong to the substantive law of torts or contracts or insurance, or what have you. This again emphasizes the ends to which analysis should be directed.\textsuperscript{54}

This already suggests that much of what courts deal with in the name of veil-piercing is actually only ordinary, albeit mislabeled, analysis in some other substantive fashion. I will discuss each of Frey’s and Hamilton’s groups—contract and tort cases—in turn.

\textbf{B. Contract Cases}

In contract cases, “contract plaintiffs” are those with voluntary claims against the corporation. In general, courts state they will remit contract plaintiffs to the bargain struck, but that certain unfair conduct will not be permitted.\textsuperscript{55} However, Robert Clark in 1977\textsuperscript{56} observed that, in many of these cases, fraudulent transfer law served the same purpose as veil-piercing, but was a better developed and more precise doctrine.\textsuperscript{57} All of the conduct condemned in veil-piercing cases with contract plaintiffs—fraud, conduct akin to fraud, diversion of assets, and self-dealing—is already dealt with in fraudulent transfer law.\textsuperscript{58}

One important difference is the nature of the remedy, as Clark observed.\textsuperscript{59} The remedy for a fraudulent transfer is ordinarily disregard of the transfer or recovery of the property transferred (or its value) from the transferee.\textsuperscript{60} In veil-piercing cases, however, courts may be overwhelmed by the transfers made and find them difficult to trace or identify with precision. The remedy given—personal liability for all the debts—might in some cases exceed that available under fraudulent transfer law. Clark contends that this “shotgun remedy” is “more biased toward a punitive result.”\textsuperscript{61} Nonetheless, this broader, more punitive remedy could nonetheless be justified if the conduct of the defendant amounted to actual fraud, as it does in many cases. There, the measure of damage would not be the property transferred away, but the harm caused by the defendant’s misrepresentation(s),\textsuperscript{62} which is more likely to match the plaintiff’s losses where the transfers are numerous or difficult to trace. None of this is often discussed in veil-piercing opinions, of course, since courts are as likely to ignore the defendant’s direct liability\textsuperscript{63} as they are to ignore the possible application of fraudulent transfer laws.

A final problem with this theory is that fraudulent transfer law requires, of course, a transfer of assets from the corporation. Therefore, it does not deal with the problem of initial inadequate capitalization. Clark observed that courts have developed the so-called

\begin{itemize}
\item \textsuperscript{54} Hamilton, \textit{supra} note 4, at 1008 (emphasis added).
\item \textsuperscript{55} \textit{Id.} at 984.
\item \textsuperscript{56} Robert C. Clark, \textit{The Duties of the Corporate Debtor to its Creditors}, 90 Harv. L. Rev. 505, 540-53 (1977).
\item \textsuperscript{57} \textit{Id.} at 505-06.
\item \textsuperscript{58} \textit{See id.} at 541.
\item \textsuperscript{59} \textit{See id.} at 547-50.
\item \textsuperscript{61} Clark, \textit{supra} note 56, at 547.
\item \textsuperscript{62} \textit{See W. Page Keeton et al., Prosser and Keeton on the Law of Torts} § 105, at 728 (5th ed. 1984).
\item \textsuperscript{63} \textit{See supra} text accompanying note 54.
\end{itemize}
agency or instrumentality theory\textsuperscript{64} to step in where fraudulent transfer doctrines do not really apply. While not explicitly criticizing that theory, Clark observed that the factors relevant under it—commingling of assets, lack of observance of formalities, and the like—"are, upon analysis, singularly lacking in direct relevance to the question of the existence, and the amount, of harm caused the outside creditor by the misbehavior of the controlling shareholder."\textsuperscript{65} In his later reprise of the same theories,\textsuperscript{66} Clark observed that extension of veil-piercing beyond fraudulent transfer law analogies would be an experiment "with the notion of placing upon business creditors an affirmative duty of cooperation with creditors."\textsuperscript{67}

\textbf{C. Tort Cases}

The experiment foreseen by Clark soon began in earnest, as scholars began dealing with the other large and more analytically troubling group—the involuntary claimants, almost always called tort plaintiffs or tort cases.\textsuperscript{68} The initial conceptual stumbling block, is that by definition there can be no misrepresentation to, or reliance by, involuntary plaintiffs. Therefore, any discussion of fraud, or even of undercapitalization couched in reliance or expectation terms, does nothing to advance the analysis here.\textsuperscript{69} Courts' attempts to deal with this problem by means of the instrumentality or "alter ego" doctrine, as previously discussed, have been disappointing primarily because the courts look at factors wholly irrelevant to the cause of the plaintiff's injury.\textsuperscript{70}

Ending the inquiry here is also unsatisfying. "[A]lmost every commentator has paused to note that limited liability cannot be satisfactorily justified for tort victims . . . and then moved on as though there is nothing to do about this unfortunate wrinkle in the economic perfection of the law."\textsuperscript{71} Robert Thompson's 1994 analysis of tort liability\textsuperscript{72} recognized that traditional veil-piercing analysis is primarily focused on contract plaintiffs.\textsuperscript{73} Justification or motivation for extending veil-piercing to tort plaintiffs can be found in the desire to create incentives to avoid injury-causing behavior or to allocate risks to those more able to bear them.\textsuperscript{74} Although certain basic economic arguments can

\textsuperscript{64} Clark, supra note 56, at 552-53. Clark used as the basis for his discussion the famous veil-piercing case of \textit{Walkovsky v. Carlton}, 223 N.E.2d 6 (N.Y. 1966).
\textsuperscript{65} Clark, supra note 56, at 553.
\textsuperscript{66} CLARK, supra note 28, at 71-81.
\textsuperscript{67} Id. at 81. He continued: "But as the near absence of cases basing veil-piercing solely on inadequate initial capitalization suggests, courts have not gone very far toward accepting this notion." \textit{Id.}
\textsuperscript{68} The "tort" label is not meant to be suggestive of a result; indeed, the discussion below examines whether there should be tort liability at all. The term is used here, as most scholars do, to differentiate the voluntariness of the plaintiff's dealings with the corporation. \textit{Id.} The tort group might include many trade creditors. \textit{See} Clark, supra note 56, at 543; supra Part II.A.
\textsuperscript{69} Reliance is an essential element of an actionable misrepresentation—a fundamental, but often forgotten point. KEETON \textit{et al.}, supra note 62, \S 105, at 728.
\textsuperscript{70} \textit{See} supra text accompanying notes 64-67.
\textsuperscript{72} Thompson, supra note 11, at 1.
\textsuperscript{73} \textit{Id.} at 16-17 ("Piercing the corporate veil, the principal legal vehicle used to restrict limited liability, has been described as concerned primarily with fraudulent conveyance law, and the great majority of piercing cases arise in a bargain setting.").
\textsuperscript{74} \textit{Id.} at 14.
be made for extending liability to shareholders of even publicly-traded corporations for torts committed by the corporation. Thompson notes that such rules could be avoided by an efficient market developing other investment instruments, and is, in any event, not "consistent with the prevailing law in the corporate area, nor are the arguments likely to better serve tort purposes."76

One possible solution, discussed by few writers but worthy of further exploration, is to deal with tort plaintiffs with tort law, that is, to recognize, or at least discuss, a duty to adequately capitalize the corporation. This duty, according to this theory, would be imposed on the controlling shareholders or managers77 to make adequate assets available for doing business.78 This is a novel theory, to be sure, but deserves closer examination.

The advantages of this duty to capitalize theory over the existing alter ego doctrine are numerous. First, consider the basis of liability. It is not some manufactured duty to follow corporate formalities, or impart to the corporation some fictional separate existence. Rather, the basis of liability would be determined according to questions of tort policy as applied to the facts at hand. As between this plaintiff and this defendant, who is better able to bear the loss? Would making the defendant liable for inadequate capitalization deter formation of "shell" corporations? Is the defendant better suited to determine the extent of risk and to insure against it, either individually or through the corporation? These are the central questions in a tort analysis,79 but are examined, if at all, only in a cursory fashion by courts using the veil-piercing doctrine.

In addition, explicit consideration of a duty to sufficiently capitalize would make clear other issues left unresolved by current doctrine. First, the measure of damages should follow the breach of duty, so the defendant's liability should be capped at the lesser of the amount of the plaintiff's injury or the level of capital deemed adequate or reasonable. This addresses the problem of windfall damages under the veil-piercing doctrine.80 Second, courts would be required for the first time to explicitly focus in this context on the proper amount of capital to be devoted to the business enterprise. The resulting case law would be enormously helpful to lawyers advising clients on incorporation. The inquiry is new in this context, but neither unprecedented nor difficult.


76. Thompson, supra note 11, at 30.

77. There is normally complete overlap between these groups in a closely-held corporation. As to parent and subsidiary corporations, control can be more difficult to evaluate, see Rands, supra note 75, at 433-48, but the theory here remains the same. See id. at 456 (supporting the requirement that the subsidiary have "a realistic potential for profitability").

78. See Reinier H. Kraakman, Corporate Liability Strategies and the Costs of Legal Controls, 93 YALE L.J. 857, 872-76 (1984); Leebron, supra note 71, at 1633.


80. See Hamilton, supra note 4, at 990. Suppose that a corporation has no available assets, the plaintiff has suffered $1 million in injury, and it is agreed that $100,000 would be a reasonable amount of capital. The defendant's personal liability should be only $100,000, whereas under the veil-piercing doctrine the defendant would be personally liable for the entire $1 million.
It is clear, for example, that the focus should be on equity, that is, net assets after the claims of prior creditors.\textsuperscript{81} Liability insurance should undoubtedly also be considered capital.\textsuperscript{82} The ability of the enterprise to pay its claims out of future earnings should be important,\textsuperscript{83} although this is less likely to be a factor with large, unanticipated injuries of the type frequently encountered in veil-piercing tort cases.\textsuperscript{84} 

A further advantage of tort analysis based on failure to adequately capitalize the corporation is that it focuses exclusively on the one factor—the net assets of the corporation—that is most logically related to the plaintiff’s injury. Current veil-piercing doctrine relies on a list of factors to get beyond the conclusory and content-free rule.\textsuperscript{85} The list is indeterminate both in length and in the conclusiveness of each factor.\textsuperscript{86} However, most writers pare the list down to two broad categories—undercapitalization and some variation of failure to follow corporate formalities.\textsuperscript{87} Of these two, undercapitalization is the only one with any legitimate claim to any causal connection to the plaintiff’s injury. The fact that no meetings of officers or directors were held, minutes not kept, stock not subscribed, and so forth, is clearly irrelevant. Closer would be the fact that personal and corporate assets were intermingled, but only if it shows that corporate assets were wrongly diverted, as in the fraudulent transfer scenario already discussed. Separation of a single economic unit into different parts,\textsuperscript{88} famously dealt with at least in


\textsuperscript{82} See Leebrohn, supra note 71, at 1635; see also Radaszewski v. Telecom Corp., 981 F.2d 305, 309-10 (8th Cir. 1992), cert. denied, 508 U.S. 908 (1993) (equating “capital” with “financial responsibility,” and concluding that liability insurance should count as capital in this context). Of course, the adequacy and availability of the insurance, as well as the ability of the carrier to pay the claim, are all relevant. See id. at 309; Autrey v. 22 Texas Services, Inc., 79 F. Supp. 2d 735, 745 (S.D. Tex. 2000). And some ratios of insurance might be adequate for small companies, but not for large ones. See Lynn M. LoPucki, Virtual Judgment Proofing: A Rejoinder, 107 YALE L.J. 1413, 1421-22 (1998) (using an example of “adequate insurance” for a small firm that seems ridiculously low for a public company).

\textsuperscript{83} See Markell, supra note 81, at 496.

\textsuperscript{84} See, e.g., Autrey, 79 F. Supp. 2d at 744 (rejecting the argument that liabilities could be met out of business earnings where corporations had nominal net assets).

\textsuperscript{85} See supra text accompanying note 40.


\textsuperscript{87} See Hamilton, supra note 4, at 985; Matheson & Eby, supra note 10, at 173-81; Thompson, supra note 3, at 1063. Other longer lists, when shorn of conclusory factors such as instrumentality, alter ego, control and the like, can be pared down to these essential two. A leading treatise refuses to compile any such list, simply noting that “[s]haresholder[s] . . . might be personally liable where formalities are not substantially observed, initial financing was not adequate, etc.” HENN & ALEXANDER, supra note 86, at 349 (emphasis added).

\textsuperscript{88} See Campbell, supra note 41, at 42 (discussing the practice of “[s]plitting a single economic enterprise into smaller corporate units”); Hamilton, supra note 4, at 992.
law school by various taxicab cases, comes closer still. But they are all proxies for one thing—that the corporate defendant is left with insufficient assets.

The one slightly revolutionary aspect of this theory is the free-wheeling treatment of causation, normally a central element of tort liability. The causal connection between the defendant’s actions—undercapitalization—and the plaintiff’s injury is tenuous, though better than current doctrine’s reliance on maintenance of corporate formalities and even more remotely relevant acts. But tenuous causal connections are nothing new in tort law, which recognizes similar causes of action and considers remote, though extant, causation to be sufficient. The causation issue is simpler still if we look at the plaintiff’s injury as the physical harm suffered, but as the inability to recover from the corporation on his or her claim. Although this makes the cause more direct, it creates a broader duty. But this, too, is nothing new; it is nothing less (or more) than the classic Palsgraf problem. Such a broad duty was advocated by Judge Andrews, dissenting in Palsgraf and by Judge Keating, dissenting in Walkovsky v. Carlton, a veil-piercing case with perhaps a stature equal to Palsgraf. In Walkovsky, the New York Court of Appeals held that inadequate capitalization alone was an insufficient basis for piercing the corporate veil. But Keating argued that the defendants should be obliged to “organize [their corporation] with capital [sufficient] to meet liabilities which are certain to arise in the ordinary course of the corporation’s business.” In both cases, there would exist a “duty to the world,” into whose breach a random plaintiff would later step. Prosser and Keeton’s criticism of Andrews’ approach in Palsgraf would apply equally to Keating’s approach in Walkovsky:

A key difficulty with this position is that it proves too much. Unlimited liability is plainly unjustified, and this approach does nothing to solve the problem of a place to stop short of infinite liability. It throws the question of any limitation back into the morass of “proximate cause”...

The real problem, and the one to which attention should be directed, would seem to be one of social policy: whether the defendants in such cases should bear the heavy negligence losses of a complex civilization, rather than the individual plaintiff... So far as policy is concerned, different answers might

89. See HENN & ALEXANDER, supra note 86, at 349 n.25.
91. The reference is, of course, to Palsgraf v. Long Island Railroad Co., 162 N.E. 99, 99 (N.Y. 1928) (“Proof of negligence in the air, so to speak, will not do.”). See KEETON ET AL., supra note 62, at 284-86.
92. See KEETON ET AL., supra note 62, at 285 (quoting Palsgraf, 162 N.E. at 102-03 (Andrews, J., dissenting)).
94. Id. at 14 (Keating, J., dissenting). Also usually considered as a similar case is Minton v. Cavaney, 364 P.2d 473 (Cal. 1961), in which the California Supreme Court declared that shareholders are liable “when they provide inadequate capitalization and actively participate in the conduct of corporate affairs.” Minton, 364 P.2d at 475 (citations omitted). Often forgotten is that the court in Minton held only that the defendant was permitted to relitigate the issue of the corporation’s negligence. Minton, 364 P.2d, at 476. In addition, tort policy concepts were important to the Minton court, which concluded after reviewing the facts that the corporation’s capital “was trifling compared with the business to be done and the risks of loss.” Minton, 364 P.2d at 475 (quoting Automotriz Del Golfo De California S.C. De C.V. v. Resnick, 306 P.2d 1, 4 (Cal. 1957)).
well be given in different communities, according to the view that is taken as to where the loss should fall; but the issue is not to be determined by any talk of "duty" or an assumption of the conclusion.95

Therefore, the problem, if we cast it as one of "duty," is no more or less intractable than if we cast it as one of "causation." It is clear how to solve this problem of an involuntary plaintiff versus an undercapitalized corporation if we do so with the tools of tort law and its twin aims of compensation and deterrence in mind. Embracing the "social policy" issues envisioned by Prosser and Keeton is satisfying analysis, regardless of the ultimate conclusion reached in an individual case, and regardless of the eternal question of whether the real issue is one of duty or causation.96 But attempting to solve this problem with the tools of corporation law yields clumsy discussions of duty to follow formalities, to keep corporate funds separate from personal funds, and the like. These are clumsy because they are an attempt to "dress up" the obligation to capitalize with other obligations that bear no conceivable relationship to the loss suffered by the plaintiff.97

One final aspect of this duty to adequately capitalize is important—identification of the proper plaintiff. Surely this action should be available only to the involuntary creditors,98 otherwise the law will substantially rewrite the contracts between the corporation and its creditors, as well as much of fraudulent transfer law. However, this should not be a large problem now that we have properly cast the action as one sounding in tort. Voluntary creditors can be separated and remitted, as they currently are, to their own vigilance.99 In the tort cases, application of assumption of risk and contributory negligence rules will limit claims, or the doctrine could simply be developed as one only available to involuntary creditors.

**D. Other Cases**

The remaining cases involving personal liability for corporate debts or obligations grow not out of tort or contract, but primarily from some other statutory foundation substantively regulating the conduct in which the corporation engages.100 Not surprisingly, the question as to whether the corporate veil should be pierced is best answered according to the dictates of the statute in question,101 although an overarching

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95. KEETON ET AL., supra note 62, at 287-88.
96. See Wright, supra note 90, at 1738-39.
97. See PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS 163 (1987) ("[V]ery special pressures in tort require a different treatment than cases arising in other areas of law, such as contract. In the process, tort law principles will inevitably receive primary consideration.").
98. This may pose some problem when dealing with cases on the margin, where the level of voluntariness is low, such as trade creditors or employees. See supra note 45 and accompanying text, and supra Part III.A (discussing varying levels of voluntariness).
99. See Hamilton, supra note 4, at 984-85.
100. See Thompson, supra note 3, at 1058. In addition to tort, contract, and statutory cases, Thompson reports a small number of criminal cases, 15 out of a total of 1572 cases (as indicated in Table Nine). Id.
101. See H. Lowell Brown, Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act, 50 BAYLOR L. REV. 1, 18 (1998) (noting that the statute at issue there "mandates a degree of involvement in the subsidiary's operations that may be viewed as being antithetical to the corporate separateness necessary to insulate the parent from liability arising from the crimes of the subsidiary"); Hamilton, supra note 4, at 997-98; Thompson, supra note 3, at 1062; see also PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS:
concern with direct participation by owners has been found in cases arising under different kinds of statutes.102 There is no guarantee, of course, that the statutory purpose will always be clear, but the analysis will be better when done in the statutory context than by looking at the artificial, veil-piercing factors.103

Professors Blumberg and Strasser, in their six-part treatise on corporate groups, predicted the demise of reliance on veil-piercing when questions arise under state or federal statutes.104 However, recent cases have suggested otherwise, looking initially at veil-piercing and then finding statutory analysis unnecessary.105 Furthermore, the Supreme Court has sanctioned application of veil-piercing principles in addition to analysis of liability under substantive statutory law.106 So it seems that even with an adequate statutory basis at hand, courts still refer to veil-piercing principles as somehow relevant.

IV. HOW TO MAKE GOOD LAW WITH HARD CASES

The analyses summarized in Part III provide ample tools to decide veil-piercing cases in a principled fashion. This part details how those decisions should be made, and deals with the troublesome uncertainty that remains.

A. Analysis by Type of Case

From Part III, we see that modern veil-piercing analysis has created at least three types of cases, sorted primarily according to the plaintiff’s cause of action. In contract cases, the decision to hold individuals liable for corporate obligations is akin to, or identical to, fraudulent transfer analysis. In tort cases, the decision should be based on a duty (or absence of a duty) to provide adequate equity capital for the business. Finally, in cases arising under various regulatory statutes, the decision should turn on the policies underlying the statutory scheme at hand.
It is important to step back and observe at this point how far we have strayed from anything involving what is typically called "corporate law." Although the question of individual liability for corporate torts may involve some of the same issues implicated in directors' and officers' duty of care cases, the question is not one of duty to shareholders or even creditors, but to plaintiffs who are the designated beneficiaries of the regulatory scheme. Our modern analysis of veil-piercing has nothing to do with corporation law, other than it involves a corporation. We pose the question—"when should an individual shareholder be liable for a corporate obligation?"—as if there were to ever be a coherent doctrinal answer. It is as if the entire body of tort law were studied as an answer to the question, "When should individuals be liable for their actions?" Such a query would soon swallow up most of the modern curriculum. Moreover, the fact that a corporation is at issue is surely of no moment. Antitrust, bankruptcy, criminal law, and various regulated industries laws do not become corporation law for this reason. This last point seems obvious, but it is important to recognize that the failure to cleave veil-piercing completely from the study of corporation law has left students, scholars, attorneys, and judges in search of a nonexistent and false doctrine. We have come far, but not far enough.

B. The False Invocation of Equity

We remain suspicious that all this principled analysis has left a case here and there to fall through the cracks. Therefore, the power to do justice is always reserved. Veil-piercing is used, so we are often told, to reach the right result, or to prevent clever parties (and their lawyers) from subverting the unstated but true purpose of incorporation. Despite the fact that one of the corporation's central purposes is the limitation of liability for the purpose of avoiding large obligations, we obsess with the ability of the law (or at least the judge) to do the right thing, lest cleverness prevail over justice.

This ability is usually invoked in the name of "equity" in veil-piercing cases. This part examines the two principal sources of equity power: the ability to fashion new remedies, and the newer and wider-ranging ability to fashion new substantive rights. I submit that neither is a legitimate source of judicial power in these cases, and should be abandoned by the courts.

However we might understand the Chancellor’s practice today, it originated primarily as the ability to provide remedies beyond that of money damages available in the courts of law. The practice of equity, that is, the providing of new remedies for legal rights, could lead to the characterization that it included the broad power to define new

107. See Thompson, supra note 11, at 25-27.
108. See id. at 16 ("The story most often told for limited liability in corporations emphasizes its importance in facilitating large aggregations of funds to fuel the growth of industrial America.") (citing James Willard Hurst, The Legitimacy of the Business Corporation in the Law of the United States 1780-1970, at 28 (1970)); Thompson, supra note 3, at 1040.
109. See, e.g., Franklin A. Gevurtz, Corporation Law § 1.5.1, at 70 (2000) ("Piercing is an equitable remedy the court can impose in order to avoid injustice.").
rights apart from those remedies. The Chancellor did in fact create new rights—for example, the laws of trusts and mortgages. But however broad and important, these rights are exceptions, and “many persons are misled into the false notion that this [correcting the law] is the real and peculiar duty of Courts of Equity in England and America.” Thus, we have appealing but incorrect statements such as “equity, less abashed by forms or fictions than a court of law, is more willing to draw aside the [corporate] veil and look at the real parties in interest.”

There is nothing new about the remedy in veil-piercing cases. It is simply a money judgment, one which could have been rendered by the pre-merger law courts. No further rights or remedies are declared by the court. Despite the caption of veil-piercing or corporate disregard, the corporation remains intact for all other purposes. There is no declaratory judgment, no injunction, no reformation, or other extraordinary relief. Veil-piercing is about as “common law” as law gets.

So, if veil-piercing is not equitable because of its remedy, what of the second part of equitable power—the power to declare and define new substantive rights? Indeed, we have received the maxim, among others, that “equity will not suffer a wrong without a remedy.” This is the genius of the law and is required in our judges, law or equity, lest our rules become stale and moribund.

But equally important is the means of exercise of this power. Equity, as well as law, grows from settled principles, and adherence to them is necessary. If the growth is based more on whim than doctrine, is it a legitimate evolution? All the scholars who have decried the lack of content of the veil-piercing doctrine have recognized its illegitimacy. If a judge determines that an individual should be liable for a corporate obligation, but does not or cannot say why, there has been no expansion or adaptation of the law to new circumstances. Because the holding cannot be explained, analyzed, or replicated, it adds nothing. We are left only to look at the facts and surmise the judge’s reasoning, a pursuit as fruitless now as it was when Frey recognized this almost fifty years ago.

111. 1 POMEROY, supra note 110, at 62.
112. See 1 DOBBS, supra note 110, § 2.3(2)-(3), at 75-81.
115. See HAMILTON, supra note 18, at 256-57; see also supra note 17 and accompanying text.
116. See PRESSER, supra note 12, at 1-8.
117. 2 POMEROY, supra note 110, at 185.
119. See 1 POMEROY, supra note 110, at 75-80. Pomeroy ultimately concludes that “it is impossible that any new general principles [of equity] should be added.” Id. at 80.
120. 1 DOBBS, supra note 109, at 117.

The absence of standards invites intuitive decisions which may yield unsuspected truths, but may miss what structured analysis would reveal. Lawyers confronted with discretionary decisions get no guidance about appropriate evidence and arguments, so one of the main advantages of rules and principles is missing. Id.; see also ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 182-83 (1921) (noting that the common law provides both certainty and growth, but only when “reason, not arbitrary will is ... the ultimate ground of decision”).
121. See supra text accompanying notes 42-47.
Thus, we see that the discretion to create and define new substantive rights, whether it be legal or equitable, has never been held to be a broad grant of arbitrary power, but rather, confined within the precedential system that post-merger equity courts now share with the law courts. The judge adheres in any case—legal or equitable—to precedents and principles of decision, though modern equity is occasionally placed on some vaguely delineated higher moral plane.

So what is there that modern equity can point to as a source for the power to pierce the corporate veil? The primary source, according to the opinions, is that limited liability is a privilege granted by the state, which “carries with it the responsibility to operate . . . in accordance with the public interest.” This is an important theme underlying veil-piercing cases, sort of a corporate noblesse oblige. This “privilege” argument has proved durable and even appears to be enjoying resurgent popularity. This is unfortunate because the theory is illogical and incorrect, as I shall demonstrate.

It makes no logical sense to base veil-piercing in a theory of corporate privilege. All commentators have recognized that an owner’s failure to treat the corporation properly—to follow formalities and the like—is never the cause of the plaintiff’s injury. Particularly in the case of tort plaintiffs, it is clearly undercapitalization that offends the court. Although it is often said that undercapitalization alone is not enough to pierce, the additional factors can be composed of so much “make weight” that it is clear to a critical reader of the opinions that it is undercapitalization that matters. The better way to approach undercapitalization is to consider it as an explicit separate duty, apart from corporate formalities and the like. This places the question where it belongs, as one of tort law, not of corporation law.

But logic or illogic aside, whatever privilege that may have attached to corporations or any other limited liability vehicles has disappeared. The scholars widely credited with the first careful laying-down of veil-piercing analysis did so by beginning with the question: when will it be appropriate to disregard the general rule of corporate limited liability? This privilege was considered so remarkable to Wormser, Cardozo, and

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122. Except perhaps in the earliest times, when the Chancellors were “either ecclesiastics or statesmen, neither of whom are supposed to be very scrupulous in the exercise of power.” 1 STORY, supra note 113, at 21; accord 1 POMEROY, supra note 110, at 63-64 (describing the ecclesiastical and high moral setting of equity and the individualistic approach of early chancellors).

123. See 1 DOBBS, supra note 110, at 83-84 (“Although equity developed other substantive rules, most of these can best be considered in connection with particular substantive topics.”).

124. See RALPH A. NEWMAN, EQUITY AND LAW: A COMPARATIVE STUDY 49 (1961) (concluding the “ethical growth of the law” is now limited to actions for extraordinary remedies); id. at 5 (noting that “a moral curtain, heavy with the mold of centuries” separates the main body of law from the “elevated moral principles which we call equity”).

125. PRESSER, supra note 12, § 1.02, at 1-10.

126. Id. § 1.02, at 1-12.

127. See, e.g., GEVURTZ, supra note 109, at 79-82; Hamilton, supra note 4, at 990 (concluding that “[a] judgment against shareholders based on these activities, which are unrelated to the plaintiff’s claim, is a windfall”).

128. See GEVURTZ, supra note 109, at 91 (concluding from Thompson’s empirical work, supra note 3, that undercapitalization, when present, is very useful in predicting the outcome of the case).

129. See supra Part III.C.

130. See WORMSER, supra note 13, at 13-14.

Powell that its use should obviously be limited. Presser notes it is this "abuse of privilege" concept that provides the main and best theoretical grounding for veil-piercing.\footnote{133} What was special or unusual about the corporation in the early days of veil-piercing has long since ceased to be so. Wormser listed six characteristics, which together drew a bright line between a corporation and a partnership, such that the former was an object of great privilege.\footnote{134} These characteristics were: (1) perpetual life, (2) decentralized management, (3) requirement of state acquiescence (a filing), (4) limited powers and purposes, (5) limited liability, and (6) a separate legal existence from its shareholders.\footnote{135} But particularly, when the closely-held corporation is considered, as it is exclusively in all veil-piercing cases,\footnote{136} modern scholars have recognized that none of these attributes are hallmarks of the corporate form. A well-conceived partnership can have these characteristics, and a corporation, conversely, can lack any of them, in any case as the parties and the entity's creditors might so agree.\footnote{137} Furthermore, the number and types of limited liability entities has expanded in the past few years with the LLC and its variants, and state statutes require very little to be done to either create or maintain a corporation or other limited liability entity. If there were some privilege involved here, any of these things could be changed to make obtaining limited liability more difficult, but the trend is in exactly the opposite direction. Not only is most of the privilege gone, but more importantly, the search for abuse of whatever privilege remains is a futile one. New entities can always be developed, and we can manipulate existing ones. Lynn LoPucki has predicted the end of all liability as we know it through the use of agreements and other arrangements which leave entities such as corporations with no assets.\footnote{138} If he is right, we are simply rearranging the deck chairs on the Titanic,\footnote{139} and if he is wrong,\footnote{140} clever debtors and creditors (and their lawyers) will forever be in the chase. LoPucki shows clearly what happens as the chase continues, as we search for juridical groups other than entities (such as corporations) to bear liability. He states:

Liability, however, arises in an almost infinite number of contexts. Each would present the same problem of definition. For the system to accomplish its goal of enforcing liability, those who have it would have to know they have it. Only then could they insure against it, or protect against the acts of others that might impose it on them. Unless the stopping points were fixed on the basis of some generalized principle rather than on ad hoc, industry-specific determinations,

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132. See Powell, supra note 15, § 1, at 2.
133. Presser, supra note 12, at 1-10.
134. See Wormser, supra note 13, at 11-15.
135. Id.
136. Thompson, supra note 3, at 1047 ("Piercing of the corporate veil is limited to close corporations and corporate groups (parent/subsidiary or sibling corporations). ").
137. See Hamilton, supra note 18, at 162-64. As to limited liability even without a filing, see Larry E. Ribstein, Limited Liability and Theories of the Corporation, 50 Md. L. Rev. 80, 112-27 (1991).
139. This is LoPucki's imagery. Id. at 4.
140. LoPucki's thesis has generated significant criticism and response. See generally Lynn M. LoPucki, The Essential Structure of Judgment Proofing, 51 Stan. L. Rev. 147 (1998); LoPucki, supra note 82.
the problem of communication would be overwhelming. For participants in the
system, liability would seem to strike out of nowhere, and there would be little
they could do about it except to harden their own judgment-proof structures.
Without a generalizable principle for determining its stopping point, expanded
liability might lead to chaos.141

There is thus little, if anything, left of any principled or doctrinal grounding of limited
liability as a privilege. There is simply nothing equitable about veil-piercing.

An interesting analogy exists when we consider the non-business parallel situation.
Are individuals ever permitted to conduct their daily lives with insufficient assets? They
are and they do. Are they ever held personally liable (to continue the corporate analogy)
beyond their individual assets? Not if they have heard about the discharge of debts
provided by the bankruptcy laws. It is instructive to examine when this veil of limited
individual liability is permitted to be pierced, that is, when individuals are denied a
discharge of debts in bankruptcy. The list of exceptions to the grant of a discharge is
short and simple: no more than once every seven years,142 and not for debts reflecting
what most of us would agree to be "culpable" conduct, such as fraud, intentional torts,
drunken and drugged driving.143 Although Congress adds to this list occasionally, the list
remains short. And, importantly, it is a statutory list, not judge-made.

V. WHY THE FALSE DOCTRINE PERSISTS

Cases can be decided according to existing principled doctrine, without resort to an
ill-defined and illegitimate judicial power to do the right thing. We could have a
jurisprudence that is sound, manageable, and relatively doctrinal.144 Why, instead of
clear analysis, has the empty and indefensible veil-piercing doctrine persisted for so
long? In order to determine what and who accounts for such robustness, we can consider
and ultimately dismiss all suspects, save one.

We cannot blame the plaintiff's lawyer; she is doing exactly what she is supposed to
do. If her client might prevail by incantation of a veil-piercing theory of liability, then it
would be malpractice not to do so. Such practices fall well to the permissible side of the
Rule 11 standards for non-frivolous claims.145

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141. LoPucki, supra note 138, at 71.
142. 11 U.S.C. § 727(a)(8)-(9) (1994). Other subsections of § 727(a) prevent a debtor from receiving a
discharge under circumstances that suggest an analogy to the abuse of privilege argument, but those are directed
more specifically toward a fraud on the bankruptcy proceeding. See id. § 727(a)(3) (destroying or failing to
preserve records); id. § 727(a)(4) (false testimony or withholding evidence); id. § 727(a)(5) (unexplained
disappearance of assets); id. § 727(a)(6) (failure to obey an order of the court).
143. See, e.g., 11 U.S.C. § 523(a)(2) (1994) (fraud or false statements); id. § 523(a)(6) (willful and
malicious injury); id. § 523(a)(9) (drunken or drugged driving resulting in death or personal injury); id. §§
521(a)(4), 727(a)(2) (various types of fraudulent conduct). This is aside from the more generous discharge, that
is, a more sturdy veil, available under Chapter 13. See id. § 1328.
144. To those who would view the term "relatively doctrinal" as an oxymoron, I would postulate that
realists and doctrinalists can comfortably coexist. See, e.g., ARTHUR AUSTIN, THE EMPIRE STRIKES BACK:
145. Rule 11 of the Federal Rules of Civil Procedure requires that a claim be "warranted by existing law or
by a non-frivolous argument for the extension . . . of existing law." FED. R. CIV. P. 11(b)(2). Veil-piercing may
be many things, but as "existing law" it is certainly firmly set. Given that Rule 11 is usually read permissively,
there should be no problem here. See 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE
We cannot blame the judge, who no doubt sincerely believes that the discretion granted by the veil-piercing doctrine is exercised carefully and properly. Although some have inveighed against judges for using words and doctrines without concrete and objective meaning, judges should not be expected to surrender discretion, especially when precedent permits, if not encourages, its use. The tension between adherence to the rule of law and doing the right thing in an individual case is enduring in our jurisprudence, and that it does and continues to press on judges should be no surprise.

We cannot blame the law students, because they are just doing what has been modeled for them in law school. They are reviewing, compiling, and distinguishing the cases in search of a "black letter" authoritative rule to quote and apply. This is what they are taught to do, for the most part. There is probably some analytical criticism of the veil-piercing theories given in their texts or by their professors or classmates, but they still learn the doctrine. No, the fault is within the academy. Both the curriculum and the classroom are partly to blame. I will discuss each in turn.

The curriculum is partly to blame. Cases rarely use modern analysis because the judges and attorneys shaping doctrine in briefs and opinions are unfamiliar with the substantive law. Fraud is an unknown subject in law school. It is studied as a defense to various actions in contract law, and similarly as an aside in many other courses, but rarely is it a focus of careful study on its own. No wonder the term "fraud" is thrown about so easily, or why opinions often say something "less than fraud" will be adequate to pierce. What of that something less than fraud? Constructive fraud, i.e., fraudulent transfer law, is even more of a mystery. No student outside of the bankruptcy-savvy will likely be familiar with the concept. This is a critical problem, as Clark surely has made clear. Equity as an historical study is unknown, save for what remains in real property and remedies. Thus, it is frequently, but improperly, invoked as a wholly discretionary power of the court to right all wrongs. Finally, students are steeped in the litigation tradition, more concerned with winning the case than establishing coherent doctrine.

AND PROCEDURE § 1335, at 70 (2d ed. 1990) ("[F]ederal courts have been quite tolerant of . . . theories as long as they are not completely lacking in merit."); 2 JAMES WM. MOORE ET AL., MOORE'S FED. PRACTICE § 11.11[7][c] (3d ed. 1998) (noting that Rule 11 "is not intended to impede zealous or creative advocacy").

146. See RUDOLPH J. GERBER, LAWYERS, COURTS, AND PROFESSIONALISM: THE AGENDA FOR REFORM 83 (1989) (arguing that, when courts fail to abide by objectivity where it exists, "[w]e are left to flounder in a sea of surging subjectivity").

147. See GEVURTZ, supra note 109, at 72 (noting that use of a several-factor test "is a godsend to students, litigants, and courts who recognize the weakness of reasoning by pejorative, but still wish to remain aloof from analysis based on policy").

148. See BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 134-35 (1928); POUND, supra note 120, at 182-83.

149. See supra note 2 and accompanying text.

150. The term "fraud" itself is so vague that it requires definition in nearly every case. Further difficulty has been added by a failure to distinguish the requisites of the action in tort at law from those of equitable remedies, and to distinguish the different forms of misrepresentation from one another, and misrepresentation itself from mere mistake. Any attempt to bring order out of the resulting chaos must be at best a tentative one, with the qualification that many courts do not agree.

KEETON ET AL., supra note 62, at 727.

151. See supra text accompanying notes 59-63.
They spend more time in law school preparing for court than preparing to advise and counsel business clients. Thus, they are not sensitized to the need for predictable rules to aid them in what will, for most of them, be their daily practice outside the courtroom.

But the greater problem probably lies in the classroom. Curricular shortcomings could be corrected if students were exposed to these substantive areas when veil-piercing is discussed in their corporations class. How is veil-piercing presented to them? I suspect that, for most of us, veil-piercing is fun and satisfying to teach. It gets the students not only to demonstrate expertise in the traditional amalgamation of cases in the common-law tradition, but also to question case holdings, get behind them to find the real reasons, and be careful, critical thinkers. All this is good. We should expect this kind of more advanced work from students beyond the first year. However, the result will likely be similar to that experienced when teaching legal capital rules, aptly summarized by Manning and Hanks:

[S]tudents who have endured this experience fall into three groups. The first group... believes the subject is very real and very important. It is not. The second group remembers that the end product was the instructor's analytic devastation of the whole topic; this group sneers at the subject as trivial and not to be taken seriously. Later, as lawyers, they will get a client and themselves in trouble. The third group remembers only that the whole matter seemed terribly complicated at the time, they didn't understand any of it, and they haven't thought about it since.

The same could be said for teaching veil-piercing. Some students will remember veil-piercing as a clear and certain rule. They have learned nothing. Some will remember that the rule is flexible and seek to apply it, to find the alter ego or something like that and do justice in the right situations. They will be haphazard and wrong as often as they are right. Still others will remember the rule, recall that it has no analytical basis, and will not be sure what to do with it. They have the most correct learning, but how have we helped them be better lawyers? To ignore or make light of veil-piercing is dangerous. As Manning and Hanks said, "The real problem is that the game is not worth the candle."

My proposed solution is to give students a grounding in the deconstructed old doctrine and the better analysis which provides sound reasons for veil-piercing in nearly every case. This must, of course, be supplemented with learning about law made by judges and their reactions to facts, and some appreciation of, yes, the emotions and

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152. See KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 130-40 (1930) (discussing the exhortation given to "up the stakes" in the second year).
154. Id. at 2.
155. See, e.g., CARDOZO, supra note 148, at 134. Cardozo stated:

[The jurist] will hope indeed that with study and reflections there may develop in the end some form of calculus less precarious than any that philosopher or lawyer has yet been able to develop. In the meantime, amid the maze of contingency and regularity, he will content himself as best he can with his little compromises and adjustments, the expediencies of the fleeting hour.

Id.
sensibilities involved in each case. The old doctrine must also be supplemented with an examination of the different roles of the lawyer as advocate (seeking to win regardless of the shambles made of doctrine, and rightly so) and the counselor (seeking the predictability of sensible rules) and the effect each has on development of the rules. We must teach the old learning, because it is precedent, for whatever it is worth, but it must be sown with the seeds of its own destruction, and then all we can do is wait.

VI. CONCLUSION

The concept of veil-piercing has been shown to be empty but yet enduring. Wormser’s characterization of the whole subject as a “tempting but profitless discussion” has proved ominously accurate. There are better ways to teach, learn, and apply the underlying concepts, to do the fundamental job of distinguishing among cases to find those where it is proper for there to be recovery from individuals despite the existence of the corporation or other new limited-liability entity. To do so, the keepers of the academy must expose students to the old law with a new twist. Veil-piercing must be taught as old doctrine and new, critical, better doctrine, with the hope that evolution will do the rest. This should be appealing to all camps: it is at once doctrinal and realist, rule-based and deconstructionist, analytical and critical. It will work, though the cleansing will take a long time, because good lawyers and good judges will see the good sense of coherent doctrine. Of course, the long run can be exasperating, and whether it will outlive us all remains to be seen. But that the effort may seem at first to be to no avail is no excuse—it is time to get started.

156. Of this, Llewellyn said early on that “we can do more; nay, we are doing more.” LLEWELLYN, supra note 152, at 140. For a recent example, see Angela P. Harris & Marjorie M. Shultz, “A(nother) Critique of Pure Reason”: Toward Civic Virtue in Legal Education, 45 STAN. L. REV. 1773, 1781-83 (noting the virtues and necessity of returning consideration of emotions to the law school classroom).
157. See, e.g., LLEWELLYN, supra note 152, at 71-72.
158. Womser, supra note 16, at 496.