RATIONALIZING CORPORATE DISREGARD

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I. INTRODUCTION

The area of corporate disregard[2] has a poor reputation for certainty of reasoning and is often dismissed as "jurisprudence by metaphor or epithet."[3] In this paper we present results from an empirical study of the relationship between rationale and outcome within UK corporate disregard case law. The paper begins by examining academic and judicial perceptions of the problems within the doctrine of corporate disregard. We then proceed to describe the methodology of our study, which features an initial dataset of 909 UK corporate disregard cases from 1885 up to and including 2014 that was filtered into a final dataset of 213 cases. Each case within our dataset was then read carefully to determine the rationales instrumental to a court's ultimate decision whether or not to disregard the corporate form.

Overall we did not find a fundamental rationale that operated consistently across all applications of corporate disregard. However, Façade/Sham/Shell, Agency, and Deception appear to form a core triad of rationales that amounted to necessary elements in a significant number of disregard adjudications. Control/Domination was also an important rationale in a large number of cases, but notable for the uncertainty of its adjudication. We also observed an

[2] Veil/lifting/parting/tearing/peeping etc are used somewhat indiscriminately at times within the case law to describe an action that affects or arguably affects the principle established in *Salomon v Salomon* [1897] AC 22 concerning the separateness of a corporation and its shareholders. In this paper we use the earlier term 'corporate disregard,' meaning a decision where what is at stake is whether the presumption of separate corporate personality should be upheld or disregarded. E.M. Dodd, 'For Whom Are Corporate Managers Trustees?' (1932) 45 HLR 1145, 1146.

[3] P Blumberg, *The Law of Corporate Groups: Procedural Problems in the Law of Parent and Subsidiary Corporations* (1983) 8; see also *Yukong Line Ltd. of Korea v Rendsburg Inv. Corp. of Liberia* [1998] 1 W.L.R. 294, 305 (Q.B.) ("For metaphor can be used to illustrate a principle; it may also be used as a substitute for analysis and may therefore obscure reasoning . . . .").

important overlapping cluster containing the rationales Façade/Sham/Shell, Agency and Statutory Interpretation legitimized by the Court of Appeal decision in *Adams v Cape Industries* in 1990; specifically, after that decision was issued, Façade/Sham/Shell increased as an instrumental rationale within cases in our dataset, while Injustice, which the *Adams* court dismissed as an illegitimate rationale, is notable for its persistence.

Within our dataset we found that the doctrine's reputation for uncertainty and volatility in judicial adjudication was undeserved in general. Instead, that reputation seems to have more traction with the low frequency rationales and a small number of higher frequency ones. For example, Control/Domination appears frequently within cases but is adjudicated quite uncertainly. Although instrumental on a comparatively less frequent basis, Statutory Interpretation and Injustice are highly unstable in terms of disregard outcomes. While both Statutory Interpretation and Injustice contain an obvious broad discretion for the judiciary in interpreting these rationale, the uncertainty surrounding Control/Domination is puzzling. As a rationale it lends itself strongly to concrete evidence, yet in terms of outcome behaves more like a metaphorical rationale. This may warrant the judiciary developing more certain criteria for establishing Control/Domination.

In analyzing the rationales by jurisdiction we found disregard rates broadly higher at the Intermediate Appellate level than at Trial or Supreme Court level. However, when broken down by frequency of rationale, we found a high degree of certainty focused on upholding the corporate form. That dichotomy is explained by two high frequency rationales, Control/Domination and Deception, that had an unusual degree of uncertainty of adjudication at the

Intermediate Appellate level, while Injustice was also a notable low frequency driver of disregard outcomes at the Intermediate Appellate level. Low frequency rationales were again broadly uncertain but tilted towards disregard. When viewed by substantive claims, apart notably from the *Adams* rationales of Agency and Façade/Sham/Shell, the disregard rates appeared to have a stronger link to the underlying substantive claim than the rationale expressed, which may indicate an obscured rationale is operating which may form part of the areas reputation for obscurity.

If one views corporate disregard as a chameleon-like doctrine in need of a single unifying judicial rationale then this study will disappoint. The doctrine of corporate disregard, perhaps by design and certainly in application, assumes a much more complex form within our dataset. We found a key cluster of rationales that operate with a broad degree of certainty of judicial adjudication and consistency of outcome. Overall, in our opinion, much of the reputation for confusion in the area is unwarranted and may be due to the uncertainty present in Control/Domination, Statutory Interpretation, low frequency rationales, particularly Injustice, and the substantive claim link. If reform is needed this study would point to those areas as the focus for judicial consideration.

II. BACKGROUND

A. *Doctrinal Foundations*

While the beginnings of corporate disregard lie in earlier cases than

Salomon v Salomon[4] the differences in outcome in that decision between the Court of Appeal and the House of Lords is a critical part of the doctrinal foundation of disagreement about the underlying judicial perception of what might justify disregarding the corporate form. In finding that the company was but a 'sham' and a mere 'alias' or agent for Mr Salomon, Kay LJ considered that:

> [t]he statutes were intended to allow seven or more persons …to limit their liability under certain conditions and to become a corporation. But they were not intended to legalise a pretended association for the purpose of enabling an individual to carry on his own business with limited liability in the name of a joint stock company.

In doing so the Court of Appeal read into the statute a "bona fides" requirement at a time when the judiciary could not refer to Parliamentary debates to determine what Parliament intended. When the case went to the House of Lords, Lord Halsbury in a literalist judgment critical of both individual Court of Appeal judges and their overall approach considered:

> My Lords, the truth is that the learned judges have never allowed in their own minds the proposition that the company has a real existence. They have been struck by what they have considered the inexpediency of permitting one man to be in influence and authority the whole company; and, assuming that such a thing could not have been intended by the Legislature, they have sought various grounds upon which they might insert into the Act some prohibition of such a result. Whether such a result be right or wrong, politic or impolitic, I say, with the utmost deference to the learned judges, that we have nothing to do with that question if this company has been duly constituted by law; and, whatever may be the motives of those who constitute it, I must decline to

[4] *Salomon v Salomon* [1897] AC 22. C. Mitchell, 'Lifting the Corporate Veil: An Empirical Study' (1999) 3 Company Financial & Insolvency L Rev 15.,

> insert into that Act of Parliament limitations which are not to be found there.[5]

In the decades leading up to the 1960s the *Salomon* decision firmly embedded itself due to the absence of the possibility of overruling a decision of the House of Lords, and so the differing judicial views as to the legitimate use of the corporate form lay buried. The seeds of later categories of corporate disregard were emerging in *Gilford Motor Co Ltd v Horne*,[6] where a former employee who was bound by a covenant not to solicit customers from his former employers set up a company to do so. The court found that the company was but a front for Mr Horne and issued an injunction. This category would emerge in the 1960s in the case of *Jones v Lipman*[7] as allowing the courts to disregard the corporation where the company was a "mere façade concealing the true facts".[8] Similarly in 1939 in *Smith, Stone & Knight v Birmingham Corp*[9] the court set out a concept of agency as an exception to the *Salomon* principle that would reappear throughout the Century.

By the late 1960s judicial tensions around older established precedents such as *Salomon* began to emerge in the aftermath of the changes to the rules of the Supreme Court in 1966,[10] whereby the House of Lords could overrule its previous decisions. In 1969 the Court of Appeal in *Littlewoods Mail Order Stores v IRC*[11] expressed a clear broad watching brief over the Salomon

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[5] *Salomon v Salomon* [1897] AC 22 at 33-34. See also E McGaughey, 'Donoghue v Salomon in the High Court' (2011) 4 Journal of Personal Injury Law 249

[6] *Gilford Motor Co Ltd v Horne* [1933] Ch. 935.

[7] *Jones v Lipman* [1962] 1 WLR

[8] See also *Re Bugle Press* (1961).

[9] *Smith, Stone, & Knight Ltd. v Birmingham Corp.* [1939] 4 All ER 116.

[10] *The Practice Statement* [1966] 3 All ER 77.

[11] *Littlewoods Mail Order Stores Ltd. v Inland Revenue Commissioners* [1969] 1 WLR 1241. "[t]he doctrine laid down in Salomon's case has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through

principle indicating its inviolability was no longer assured.

Reflecting the differing views of the Court of Appeal and the House of Lords in *Salomon,* one of the most significant features of the development of the corporate disregard case law over the late 20th and early 21st Centuries is the repeated inability of the judiciary to agree as to the rationale they see as justifying it. In *DHN Food Distributors Ltd v Tower Hamlets*[12] for example, Lord Denning argued that a group of companies was in reality a single economic entity and should be treated as one legal entity. His fellow judges Sachs LJ and Karminski LJ carefully shied away from agreeing that broad single economic entity rationale. Two years later the House of Lords in *Woolfson v Strathclyde Regional Council*[13] stated that the veil of incorporation would be upheld unless it was a façade. However, in *Re a Company*[14] the Court of Appeal again asserted a broader notion of veil lifting:

> [i]n our view the cases… show that the court will use its power to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration.[15]

There was, however, a growing disquiet about the uncertainty this back and forth judicial dialogue brought to the concept of corporate personality and limited liability.[16]

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which the courts cannot see. But that is not true. The courts can, and often do, pull off the mask. They look to see what really lies behind."

[12] *D.H.N. Food Distributors Ltd. v Tower Hamlets London Borough Council* [1976] 32 P & CR 240.

[13] *Woolfson v Stratthclyde Regional Council* [1979] 38 P & CR 521.

[14] *Re a Company* [1985] 1 BCC 99421.

[15] See also *Esso Petroleum Co. Ltd. v Mardon* [1976] 2 W.L.R. 583

[16] See J Lowry. 'Lifting the Corporate Veil.' (1993) Journal of Business Law and *National Dock Labour Board v Pinn and Wheeler Ltd* [1989] BCLC 647.

This led in 1990 to a review of disregard precedent in *Adams v Cape Industries*[17] that attempted to provide a fundamental set of rationale for disregarding the corporate form across all areas of law. The Court of Appeal concluded that it could do so in only three narrow circumstances: where the court is interpreting a statute or a document; where the corporation is a "mere façade' (a la *Jones v Lipman*) and where an agency relationship exists. The court stated with echoes of Lord Halsbury:

> [n]either in this class of case nor in any other class of case is it open to this court to disregard the principle of Salomon v. A. Salomon & Co. Ltd. [1897] A.C. 22 merely because it considers it just so to do.…we 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.[18]

However, despite this strong precedent, consistency seemingly remained elusive,[19] and by 2013 we were back to familiar territory again with the Supreme Court attempting to provide a set of rationales for when corporate disregard should occur.

In *Prest v Petrodel Resources Ltd*[20] the case concerned ancillary financial relief following divorce proceedings. The central question in the case was

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[17] *Adams v Cape Industries* [1990] Ch 433.

[18] *Adams* p.538 and 544.

[19] See for example *Creasey v Breachwood Motors Ltd* (1993), *Raja v Van Hoogstraten* (2006), *Kremen v Agrest (No. 2)* [2011] 2 F.L.R. 490.

[20] *Prest v Petrodel Resources Ltd* [2013] 2 AC 415.

whether Michael Prest was entitled to eight residential properties (one was the matrimonial home) owned by two companies in which he held effective controlling shareholdings. A Supreme Court, unusually made up of seven judges, unanimously concluded that the corporation could not be disregarded in this circumstance given the absence of impropriety. The placing of the properties in the companies was unconnected with the breakdown of the marriage. Instead, they held that the properties of the companies should be transferred to Mrs Prest because they were held by the companies on a resulting trust for Mr Prest. However, in discussing the disregard issue agreement on exactly when it might occur escaped the Court. As the Court of Appeal in *Gramsci Shipping Corp v Lembergs*[21] noted afterwards:

> In Prest's case Lord Sumption (at [28]) identified two underlying principles which he called 'the concealment principle' and 'the evasion principle'. But Lord Neuberger was of the view (at [75] that there is a 'lack of any coherent principle in the application of the doctrine of "piercing the corporate veil"', and Lord Walker's view (at [106]) was that it is not a doctrine in the sense of a coherent principle or rule of law but a label. Lady Hale (at [92]) was 'not sure whether it is possible to classify all of the cases in which the courts have been or should be prepared to disregard the separate legal personality of a company neatly into cases of either concealment or evasion'. Absent a principle, further development of the law will be difficult for the courts because development of common law and equity is incremental and often by analogical reasoning.

As a result, cases subsequent to *Adams* and in turn *Prest* have at times followed as best they could the uncertain precedent.[22]

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[21] *Antonio Gramsci Shipping Corporation v Recoletos Ltd (Lembergs)* [2013] EWCA Civ 730.

[22] See for example *IBM United Kingdom Holdings Ltd v Dalgleish* [2018] I.R.L.R. 4.

B. *Academic Treatments*

The fragmented nature of the doctrine is also reflected in the scholarship on corporate disregard. This may of course be because scholars find getting to grips with an area that has such clouded rationales equally as difficult as the judiciary. Important scholarship in the area is often found in what are in effect extended case notes. The best examples of this have served to punctuate major developments and flag future doctrinal paths that are sometimes taken up by the judiciary.[23] Another distinct approach within corporate disregard scholarship are historical papers. Unlike the extended case notes, this form of scholarship often focuses on only one aspect of corporate disregard.[24]

The post-*Adams* period has also seen the emergence or re-emergence of a key type of academic commentary, perhaps the antithesis of the idea of their being a rational judicial approach to corporate disregard, in what could be described as the ”mistake” scholarship.[25] In general this literature views the House of Lords decision in *Salomon* as *ab initio* incorrect. From Kahn–

[23] See, for example, O Kahn-Freund. “Corporate Entity.” *Modern Law Review* no. 3 (1940): 226–28 and Lowry, John. “Lifting the Corporate Veil.” *Journal of Business Law* no. January (1993): 41-42. Other good examples of this type of scholarship are Armour, John, and Simon Deakin. “Recent Case. Commentary: The Rover Case (2) -Bargaining in the Shadow of Tupe.” *Industrial Law Journal* 29, no. 4 (2000): 395-402. Friedman, Paul, and Nick Wilcox. “Piercing the Corporate Veil.” *New Law Journal* 56, (2006).

[24] J Payne. “Lifting the Corporate Veil: A Reassessment of the Fraud Exception.” *Cambridge Law Journal* 56, no. 2 (1997): 284-90, R Austin, *Corporate Groups*, in Ross Grantham and Charles Rickett, (Eds) Corporate Personality in the 20th Century (Oxford: Hart Publishing, 1998), pp. 71 -89. N Hawke and P Hargreaves. “Corporate Liability: Smoke and Mirrors.” *International Company and Commercial Law Review* 14, no. 2 (2003): 75-82; Linklater, Lisa. “Piercing the Corporate Veil -the Never Ending Story.” *Company Lawyer* 27, no. 3 (2006): 65-66.

[25] M Moore. “'A Temple Built on Faulty Foundations': Piercing the Corporate Veil and the Legacy of Salomon V. Salomon.” *Journal of Business Law* no. March (2006): 203

Freund's 1944 description of *Salomon* as a 'calamitous' decision,[26] through Ireland's finding of 'absurdity' and 'ossification',[27] to Moore's 'temple built on faulty foundations',[28] this category has been an important and persistent part of the corporate disregard literature over time.[29]

Perhaps the most challenging analytical scholarly approach strives to find or argue for a single rationale or set of rationales within the corporate disregard scholarship. This approach seeks to argue that, despite the doctrine's vaguery, there is or should be a sizable thread or threads of judicial reason running through the case law that essentially explains everything. This type of scholarship took time to build as early work on corporate disregard tended, because of the lack of case law, to focus on statutory inroads into the *Salomon* principle.[30] By the 1960s, however, enough case law on corporate disregard had built up for Samuels to consider that though separate legal personality has been a fundamental principle of company law, the courts have occasionally 'lifted', 'parted', 'torn', 'rent', breached', or 'pierced' the corporate veil.[31] By the end of that decade Pickering observed that exceptions to corporate personality had begun to be described by commentators as 'lifting the veil' although the phrase was not commonly used by the judiciary to describe their

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[26] See O Kahn–Freund, Otto, *supra* n.__ 54-66.

[27] P Ireland. "The Rise of the Limited Liability Company." *International Journal of the Sociology of Law*, 12 (1984): 239-260. P Ireland. (1999) *Company Law and the Myth of Shareholder Ownership.* Modern Law Review, 62 (1). pp. 32-57.

[28] M Moore, *supra* n.__, 180-203

[29] See also P Muchlinski. "Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review." *Company Lawyer* 23, no. 6 (2002): 168–79 and Collins, Hugh. "Recent Cases. Individual Employment Law. Associated Employers." *Industrial Law Journal* 18, (1989): 109–12.

[30] C Parry. 'The Trading with the Enemy Act and the Definition of the Enemy.' *Modern Law Review* 4, no. 3 (1941): 161-82.

[31] See Samuels, n.__, 107-17.

actions at that point.[32] In the mid-1970s Schmitthoff claimed that the judicial qualifications were so broad that the *Salomon* decision had ceased to be the most important case in company law.[33] In 1986 Rixon concluded that the Court of Appeal were but 'a short step to the proposition that the courts may disregard Salomon's case whenever it is just and equitable to do that'.[34]

By the late 1980s a distinct sense had emerged within this scholarship that the judiciary had lost their way, and attempts began in earnest to provide solutions.[35] Ziegler and Gallagher set about classifying the various decisions and suggested subsuming the categories traditionally proposed for lifting the veil (agency, fraud, avoidance of existing obligations) into the one broad category–'prevention of injustice'.[36] Ottolenghi similarly examined the disregard case law and seemingly found clear categorisations such as: 'peeping', where the veil is lifted to get member information; 'penetrating', where the veil is disregarded and liability is attributed to the members; 'extending', where a group of companies is treated as one legal entity and; 'ignoring', where the company is not recognised at all.[37]

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[32] M Pickering. "The Company as a Separate Legal Entity." *Modern Law Review* 31, no. 5 (1968): 481-511

[33] C Schmitthoff. 'Salomon in the Shadow.' (1976) *Journal of Business Law* 305-12. See also Powles, 'The "See-Through" Corporate Veil' (1977) 40 The Modern Law Review 339 and S Block. 'The Client Who Behaves as Though Salomons Case Was Wrongly Decided.' (1978) 5 *International Business Lawyer* 119 -24.

[34] F G Rixon. 'Lifting the Veil between Holding and Subsidiary Companies.' (1986) *Law Quarterly Review* 415. For a comparative view of the case law in this period see J M Dobson. 'Lifting the Veil in Four Countries: The Law of Argentina, England, France and the United States.' (1986) 35 *International & Comparative Law Quarterly* 839-63.

[35] Lord Wedderburn, 'Multinationals and The Antiquities of Company Law' (1984) 47 *MLR* 87.

[36] P Ziegler and L Gallagher. 'Lifting the Corporate Veil in the Pursuit of Justice.' (1990) *Journal of Business Law* ___.

[37] S Ottolenghi. "From Peeping Behind the Corporate Veil, to Ignoring It Completely." (1990) 53 *The Modern Law Review* 338 -53.

To a large extent this classification literature was narrowed by the important Court of Appeal decision in *Adams v Cape Industries*, which itself forms a part of this literature both as a response to academic criticism and its ability to somehow find from the precedent three clear legitimate rationale (in its view) where the courts can disregard the corporate form (Agency, Façade/Sham/Shell and interpreting a Contract/Statute). *Prest* although a messier precedent similarly links into this core thread of rationale scholarship.

Unfortunately none of these judicial or scholarly efforts has moved us closer to understanding why a consistent set of rationales for corporate disregard seems to escape generations of judges. Our aim in this paper is to examine judicial rationales in this area within an empirical framework to determine how instrumental they were to the outcome. This should allow us to strip away the purely metaphorical and occluded reasoning that seems to be at the centre of so much unhappiness with judicial reasoning in the area.

III. METHODOLOGY

A. *Conceptual Framework*

The network of published decisions that form the core of our common law has been described as a "gold mine for scientific work."[38] Foreshadowed by Oliver Wendell Holmes,[39] scholars have deployed a wide variety of techniques to extract and analyse data from judicial opinions. Quite often these techniques have origins outside of law, and their importation can generate

[38] H Oliphant. 'A Return to Stare Decisis.' (1928) 14 *A.B.A. J.* 161.
[39] O W Holmes. 'The Path of the Law.' (1897) 10 *Harvard Law Review* 469.

challenges that are symptomatic of such interdisciplinary endeavours.[40] Other kinds of challenges emanate from the judicial opinions themselves. As Karl Llewellyn cautiously prescribed, "finding out what the judges *say* is but the beginning of your task. You will have to take what they say and compare it with what they *do*."[41] The problem is not simply a matter of interpretation, because "[w]e have no way of knowing exactly what the facts were that were in sight of the judges who have participated in preparing opinions, nor do we know exactly what was in their minds and hearts."[42] Moreover, even the simplest dispute affords some measure of "weak" discretion to a judge concerning the application of the relevant law to a set of facts.[43] The exercise of such discretion typically transpires in a manner that is beyond the ken of litigants or the public, prompting some to contend that "the judge's art, when greatly practiced, is far too subtle to be measured by any existing behavioural technique."[44] Others have even contended that judicial decisions are simply a quasi-rationalised discretionary story.[45] While one may question whether such a broad, cynical acknowledgement is warranted, it would be naïve to believe that aspects of a case are never omitted or selectively presented within an

[40] See A L Tyree. 'Fact Content Analysis of Case Law: Methods and Limitations.' (1981) 22 *Jurimetrics* 1-3.

[41] K N Llewellyn, *The Bramble Bush: On Our Law and Its Study* (4th ed. 1973): 14.

[42] R C Lawlor. 'Fact Content Analysis of Judicial Opinions.' (1968) 8 *Jurimetrics* 107-08.

[43] R Dworkin, *Taking Rights Seriously* (1977): 31-33.

[44] W Mendelson. 'The Neo-Behavioral Approach to the Judicial Process: A Critique.' (1963) 57 *American Political Science Review* 602-03.

[45] M A Hall and R F Wright. 'Systematic Content Analysis of Judicial Opinions.' (2008) 96 *California Law Review* 100 (quoting A Juliano and S J Schwab. 'The Sweep of Sexual Harassment Cases.' (2001) 86 *Cornell Law Review* 558-59). "[t]here is no reason to expect that . . . opinions should provide complete, objective, and result-neutral statements of all the facts in each case. Instead, there is every reason to think just the opposite. Therefore, content analysts must acknowledge that a "judicial opinion is the judge's story justifying the judgment . . . ."

opinion to support its ultimate holding. The possibility that such undercurrents could be within a dataset thus can compromise its predictive value.

Nevertheless, this type of data from judicial opinions can be valuable. Mark Hall and Ronald Wright, for instance, have asserted that content analysis

> is better suited to studying judicial reasoning itself, retrospectively. Scholars can use the method to learn more, for instance, about how results are justified . . . [and] is perhaps more relevant to...seeking a measurable understanding of substantive law or the legal process.[46]

Classical content analysis typically involves the coding and counting of frequency with which certain phenomena appear in documents.[47] For instance, content analysis of judicial opinions can reveal patterns that may evince whether the law has been applied consistently, judicial discretion has been exercised impactfully, uncertainly or some other aspect about adjudication.

B. *Rationale Analyses*

Within the rapidly expanding universe of empirical legal studies corporate disregard has a singular place. Nowhere has there been more sustained examination of a remedial measure and how it has been applied by courts around the world. This perhaps can be attributed to the doctrine itself, which courts have seemingly struggled to articulate in a clear and consistent manner. In a similar fashion academics have experimented with various ways to

[46] *Id.* at 98.

[47] L Webley. 'Qualitative Approaches to Empirical Legal Research.' *The Oxford Handbook of Empirical Legal Research* (Peter Cane & Herbert M. Kritzer, eds., 2010): 941.

examine corporate disregard, and specifically with respect to the rationales that courts have proffered as justification for their ultimate holdings.

The path to all empirical studies of corporate disregard begins with Robert Thompson's analysis of American cases.[48] The overall results and parameters of his path-breaking work have been canvassed quite thoroughly, but far less attention has been directed to his work compiling the rationales behind the decisions. From an examination of prior research of the fragmented doctrine as well as his own dataset, Thompson created a list of 85 possible rationales, which he organised into the following categories:

> undercapitalization;
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> failure to follow corporate formalities;
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> overlap of corporate records, functions or personnel;
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> misrepresentation;
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> shareholder domination;
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> intertwining and lack of substantive separation;
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> use of the conclusory terms "alter ego" and "instrumentality";
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> the general ground of fairness;
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> assumption of risk;
>
> refusal to let a corporation pierce itself;
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> statutory policy.[49]

[48] R B Thompson. 'Piercing the Corporate Veil: An Empirical Study.' (1991) 76 *Cornell Law Review* 1036.

[49] *Id.* at 1045-46.

Data then were compiled on the number of cases in which a court mentioned either the absence or presence of each factor, as well as the frequency with which that mention correlated with an ultimate decision whether or not to disregard the corporate form.[50] This same approach has been adopted by other studies of American[51] and Australian[52] corporate disregard cases.

While revealing in numerous respects, the frequency data also have limits. For instance, in his own study of English corporate disregard cases, Charles Mitchell elected not to compile any data on judicial rationales.[53] According to Mitchell, in disregard cases, rationales are mentioned primarily to reinforce "the courts' own disinclination to describe a set of principles by reference to which their decisions on the point should be taken," leaving adjudication of corporate disregard claims to the mercy and whims of judicial discretion.[54] Moreover, the court's decision may rest on multiple grounds, which may vary in their weight and whose effects, therefore, can be difficult to disentangle; as Fred McChesney has noted, "[s]imply registering the presence or absence of certain factors in the cases cannot disclose the relative importance of each factor individually."[55]

One option to redress these concerns is to examine all the various rationales with multiple regression analysis. John Matheson, for instance, has

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[50] *Id.* at 1063-64.

[51] See J H Matheson. 'The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context.' (2009) 87 *North Carolina Law Review* 1112-13. J H Matheson. 'Why Courts Pierce: An Empirical Study of Piercing the Corporate Veil. (2010) 7 *Berkeley Business J.* 12-13.

[52] IM Ramsay and DB Noakes, 'Piercing the Corporate Veil in Australia' (2001) 19 C&SLJ 250.

[53] E-mail from Charles Mitchell, (on file with author).

[54] Mitchell, *supra* note __, at 15.

[55] F S McChesney. 'Doctrinal Analysis and Statistical Modeling in Law: The Case of Defective Incorporation.' (1993) 71 *Washington University Law Quarterly* 515-19.

used logistic regression to analyse thousands of American veil-piercing cases.[56] But the technique may not be suitable when, as is the case here, the data pool is considerably smaller; moreover, this sort of statistical analysis still can be limited if the underlying data tabulate mere mentions of factors, rather than when a particular factor was truly instrumental to the court's ultimate decision.

Another strategy that has been proposed is algorithmic text analysis. According to Jonathan Macey and Joshua Mitts, an algorithm can be used to identify the rationales that best predict judicial outcomes.[57] According to them, the use of such automated methods avoids the "substantial subjectivity and arbitrariness" of manual coding, which involves elements of judgment about how certain data should be classified and entered,[58] and instead represents a "more replicable and objective [approach] than prior empirical studies on veil piercing."[59] This of course misses the point that statistical algorithms are the product of human design and coding and simply automate the decisions of Macey and Mitts.[60] Using technology does not produce a neutral truth.[61]

Additionally their algorithmic study represents only a slice of the entire universe of American disregard cases, in particular, because Macey and Mitts acknowledge that they excluded conslusory metaphorical rationales such as

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[56] *See supra* note 39.

[57] J Macey and J Mitts. 'Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil.' (2014) 100 *Cornell Law Review* 113.

[58] *Id.* at 112.

[59] *Id.* at 140.

[60] M Broussard (2018) Artificial Unintelligence, MIT Press pages 1-39.

[61] Dignam, Alan J., Artificial Intelligence: The Very Human Dangers of Dysfunctional Design and Autocratic Corporate Governance (May 3, 2019). Queen Mary School of Law Legal Studies Research Paper No. 314/2019. Available at SSRN: https://ssrn.com/abstract=3382342

alter ego.[62] However sliced, Macey and Mitts' database is constructed differently than those within other American content studies, particularly those that did not use any sampling techniques and instead thoroughly compiled each and every case within a defined timespan.[63]

And these differences matter. As many commentators–including Macey and Mitts themselves–have observed, the domain of corporate disregard is notoriously replete with conclusory, metaphorical language that has become part of the doctrinal tests applied by courts.[64] Precisely because they are proxies for deeper rationales, these metaphors should, in our view, be part of any examination of judicial reasoning; and, indeed, such terms comprise a significant part of the datasets of other common law empirical veil-piercing studies. The decision by Macey and Mitts to "filter out" such phrases at the outset both illustrates the point that technological neutrality was not present and generates a dataset that probably omits large swaths of relevant cases and likely precludes any meaningful comparison of results with other studies.[65]

C. *Our Study*

We have taken a different approach towards analysing judicial rationales. The results here are filtered from an initial data set of 909 cases down to a final

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[62] *Id.* at 147-48.

[63] *See, e.g.*, Thompson, *supra* note __.

[64] D Millon. 'The Still-Elusive Quest to Make Sense of Veil-Piercing.' (2010) 89 *Texas Law Review See Also* 20, 29. "[t]he metaphorical factors are notoriously uninformative. Thus, for example, some cases say that if a corporation is a mere "alter ego" of its shareholder it is a basis for piercing.... Metaphors . . . serve as little more than window dressing for fairness or policy considerations that are rarely articulated clearly"

[65] *Cf.* Hall & Wright, *supra* note __, at 97.

dataset of 213 UK corporate disregard cases ranging from 1885 up to and including 2014.[66] The cases come from Westlaw,[67] LexisNexis,[68] various print sources, and Charles Mitchell's 1999 English study.[69] In drawing the cases from the online sources we used four search phrases: 'disregard! /s (entity entities)', 'pierc! /s veil', 'lift! /s veil', and 'Salomon /s Salomon.'[70]

Cases were then examined by both authors for relevance and only cases with a meaningful disregard outcome were included in the final data set. Within that filtering, preliminary interlocutory matters or jurisdiction issues were not included where they did not reflect reliable outcomes or reasoning.[71] Similarly, cases where corporate disregard was potentially engaged but the judge eliminated it from consideration were not included.[72] Reverse-piercing,[73] successor liability,[74] and transfers within bankruptcy,[75] were also eliminated despite their doctrinal links.

The cases within the final dataset then were coded manually by each author separately and agreed together. A range of factual information about each case was collected, such as the year of decision and whether the corporate form was disregarded. In cases where a court applied separate analysis to different co-defendant corporations or individuals, we created separate entries

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[66] Searches by decade begin in 1885. Cases begin with *Farrar v Farrars Ltd* [1888] 40 Ch D 395.

[67] 'UK Reports All' database, beginning 1865.

[68] 'UK Cases Combined Courts' database, beginning 1558.

[69] See C. Mitchell, *supra* n.__, 24-28.

[70] The exclamation mark within our search terms is a wildcard that nets different permutations of a term.

[71] But see C. Mitchell, *supra* n.__, 24 table 8.

[72] For example *Chandler v Cape Plc* [2012] 1 WLR 3111.

[73] See, *In re H. R. Harmer Ltd* [1959] 3 All ER 689 (Q.B.).

[74] See, *Davis v Elsby Bros* [1959] 1 WLR 170.

[75] See, *Gonville's Trustee v Patent Caramel Co* [1912] 1 KB 599.

for the same opinion,[76] so there are 213 cases within the data set but 216 observations. Information about the specific Court, division, and subdivision were compiled and whether the decision was trial, intermediate appellate, or supreme level.

Information was also collected about the substantive claim as to whether a corporate disregard request lay in contract, criminal, fraud/deception, statutory, or tort law. Where multiple substantive claims were present, any of which may relate to a court's ultimate disposition, we recorded all of the substantive claims within a case on a non-exclusive basis.

As we noted earlier, the area of corporate disregard has over its history been permeated by conclusory, metaphorical terms, such as lifting, peeping, and piercing, which have been used at times by the judiciary in confusing and obfuscating ways.[77] Interpreting the instrumental meaning of a rationale within each case is therefore vital. According to David Millon,

> [i]f the asserted rationales are actually uninformative, the real challenge is to figure out what kinds of acts really motivate courts to pierce the corporate veil. This would require a case-by-case reading of the facts of each piercing decision in order to discern just what it is that triggers the court's belief (or perhaps just intuition) that the corporation's shareholders have acted improperly.[78]

This is the approach that has been taken in one study of American veil-piercing cases,[79] and is the one that we have used here.

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[76] See, for example, *Yukong Lines Ltd of Korea v Rendsburg Investments Corp.* [1998] BCC 870, which involves two different types of shareholders.

[77] See Lord Sumption's view on this in *Petrodel Resources Ltd v Prest* [2013] 2 AC 415, 8.

[78] Millon, *supra* note __, at 23.

[79] P Oh. 'Veil-Piercing.' (2010) 89 *Texas Law Review* 81.

Each case within our dataset was read carefully to determine the rationales that appeared instrumental to a court's ultimate decision whether or not to disregard the corporate form. This encompasses all instances in which the court noted that evidence, a factor, or some other kind of justification was absent or present; and when multiple instrumental rationales were present within a case, they were all recorded. We used a total of fourteen categories of instrumental rationales, selected on the basis of appearance within our UK cases: Agency, Alter Ego, Assumption of Risk, Commingling, Control/Domination, Deception, Façade/Sham/Shell, Informalities, Injustice/Unfairness, Instrumentality, Siphoning of Funds, Statutory Interpretation, Undercapitalization, and Other. For certain rationales, subcategories were used. Commingling was divided into whether it involved assets, employees/officers, records/taxes. Deception was divided into whether it concerned Fraud/Deceit, Assets, or the Identity of the shareholder.

Our rationale data are the product of a subjective process. Unlike Thompson's and Matheson's studies, we did not collect data on whether a rationale was merely mentioned within a corporate disregard opinion. And, unlike Macey and Mitts' study, we did not look for specific textual phrases or use any kind of algorithmic approach. Instead, we did what lawyers seeking to understand the law of corporate disregard would do: read opinions carefully and assess whether reasons cited by a court are instrumental to the corporate disregard outcome. However, as discussed earlier there is no way to discern entirely whether the publicly articulated rationales cited by a court truly are the driving instrumental reasons for the outcome. Metaphors in particular are

by their very nature chosen to provide a shape for an explanation but without providing exact detail. As such, the disregard rationales we capture may operate similarly to a Rorschach test whereby articulated rationales reveal information about judicial deliberation, whether conscious or unconscious; for instance, recurring specific rationales, such as fraud/deception, may indicate preferred evidence, whereas conclusory metaphors, such as alter ego, may indicate a lack of evidence or complete evidence for the ultimate decision.

There are, of course, other limitations to our study's design. Because our dataset concerns only judicial opinions, our results do not capture the dynamics of cases that never reached final disposition, and so the portrait is but a part of the overall population of corporate disregard litigation. Moreover, the cases within our dataset may be susceptible to selection bias,[80] and so we may be presenting results involving issues, litigants, and resources that might not be representative of all potential disputes. But, without access to any non-filed or settled matters, these publicly available cases are currently the best means for acquiring systematic insight into judicial reasoning.

IV. RESULTS

The results presented here should be read with great care. Unlike other studies, the frequency data should not be interpreted as reporting simply the total number of cases in which a rationale was mentioned by a court in our dataset; rather, the frequency data reflect the number of times in which a

[80] *See* G. L. Priest and B. Klein 'The Selection of Disputes for Litigation' (1984) 13 J Legal Stud 1.

rationale was deemed to be *instrumental*–either in its articulated absence or presence within a case– to an ultimate decision whether or not to disregard the corporate form. Further, the disregard rate provided for each rationale should not be compared to the overall corporate disregard rate of 35.65% for our entire case dataset; the disregard rate for each rationale instead reflects its propensity or weight towards whether a corporate disregard claim was successful or not. For example in Table 1A below, the courts articulated Façade/Sham/Shell 69 times as a rationale that was instrumental to an outcome. The disregard rate for Façade/Sham/Shell of 27.54% means that it was articulated by the court as instrumental in disregarding the corporate form in only 27.54% of cases and that conversely in 72.46% of cases the court articulated that its absence was instrumental to a no disregard outcome that upheld the corporate form.

Table 1A presents data on the frequency and disregard rate for each rationale within our UK dataset, with disregard rates in excess of 50.00% appearing in bold.

Table 1A. ***Frequency and Disregard Rate by Rationale***[81]

Rationale	*n*	Disregard Rate
Agency	20	30.00%
Alter Ego	17	**58.82%**
Assumption of Risk	2	0.00%
Commingling	14	**64.29%**
Assets	12	**58.33%**
Employees/Officers	3	**100.00%**
Records/Taxes	3	**66.67%**
Control/Domination	51	**54.90%**
Deception	43	32.56%
Fraud/Deceit	30	26.67%
Assets	3	33.33%
Identity	11	45.45%
Façade/Sham/Shell	69	27.54%
Informalities	1	**100.00%**
Injustice/Unfairness	15	46.67%
Instrumentality[82]	12	**66.67%**
Siphoning of Funds	10	**60.00%**
Statutory Interpretation	35	42.86%
Undercapitalization	3	**100.00%**
Other	36	25.00%

Façade/Sham/Shell is the rationale that was instrumental in the largest number of cases; this is hardly a surprise, given that it is one of the most clearly and consistently articulated categories for corporate disregard over the past century, and is one of the categorical rationales authorised by the *Adams* decision.[83] Interestingly, the rationale also features a low 27.54% disregard rate. That rate is the lowest among any of the rationales except for the Other

[81] The frequency of rationales may differ than that of sub-category rationales, because the presence of multiple sub-category rationale within a case were recorded as only one instance of that rationale being instrumental to the court's decision whether to disregard the corporate form.

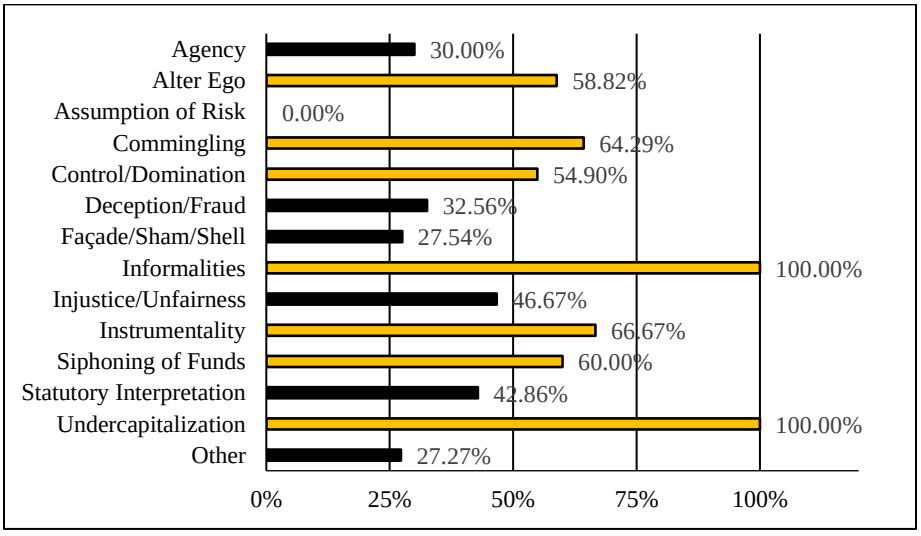
[82] Instrumentality refers to a rationale expressed regarding the corporate form as an "conduit" or "vehicle," or some other means for perpetuating a wrong. The common thread among this rationale revolves around the use of a murky instrumental metaphor that summarily refers to intentional mis-use of the corporate form.

[83] See *Gilford Motor Co Ltd v Horne* [1933] Ch. 935; *Jones v Lipman* [1962] 1 WLR 832; *Prest v Petrodel* [2013]. *See also infra* Fig. 2A.

category, which contains very diffuse rationales that resist generalisation.[84] Despite its apparent diminution in the *Adams* case, Injustice has a persistency within the data and its 46.67% rate suggests that it is not the arbitrary get out of (corporate disregard) jail card suggested in the literature, but rather more finely balanced and uncertain within the case law.[85]

Breaking the data down further, Figure 1 below depicts the disregard rate for each rationale, with the black bars indicating rates below 50.00%, that is, skewing towards the rationale's absence justifying a rejection of the corporate disregard request. Only three other rationales feature disregard rates comparable to that of Façade/Sham/Shell: Agency (30.00%), Assumption of Risk (0.00%), and Deception (32.56%).

FIGURE 1. DISREGARD RATE BY RATIONALE



[84] *See infra* Tbl. 1A.

[85] See F G Rixon. 'Lifting the Veil between Holding and Subsidiary Companies.' (1986) *Law Quarterly Review* 415 and Lowry, John. "Lifting the Corporate Veil." *Journal of Business Law* January (1993): 41-42.

Assumption of Risk may be discounted on the basis of its infrequency, but the other rationales—along with Façade/Sham/Shell—are commonly mentioned by courts to be circumstances when disregard of the corporate form could occur. For example an overall disregard rate for a rationale that leans toward 0.00% suggests a tendency that the rationale's absence should result in no disregard; and when the rationale leans towards 100%, that suggests a high, but not absolute, degree of judicial consensus that the presence of that rationale will result in disregard. The low disregard rates for this cluster of rationale indicate that their absence from a case frequently results in preservation of the corporate form. Put differently, the data suggest that Agency, Deception and Façade/Sham/Shell are considered essential elements in a significant number of corporate disregard requests.

If we take a macro view of the rates in terms of judicial consensus then within the data a 0-40% disregard rate indicates a fair degree of judicial consensus as to how that rational is adjudicated, 41-60% indicates a degree of uncertain adjudication and 61%-100% again indicates a degree of consensus in adjudication. Eliminating rationales with low numbers such as Undercapitalisation (3), Informalities (1) and Assumption of risk (2) leaves 11 rationales with meaningful frequency within the data. Overall in terms of their certainty of adjudication matters look finely balanced with 6 rationales in the certain range and 5 in the uncertain range. Interestingly of the 6 rationales in the certain range 4 tilt towards upholding the corporate form and 2 towards a disregard outcome in terms of their rates. This would seem to accord with the

overall picture of uncertainty within the wider academic and judicial commentaries.

However, dividing the rationales by numerical frequency yields a different picture. We organised the 11 remaining rationales into a spectrum of low frequency (0-19), mid-frequency (20-39), and high frequency (40+) rationales. From that breakdown three high frequency rationales are present, Control/Domination, Deception and Façade/Sham/Shell. Deception and Façade/Sham/Shell have low rates and therefore a high degree of certainty and judicial consensus as to the overall direction of adjudication. Control/Domination is the only high frequency rationale that has an uncertain judicial consensus as to its adjudication. In percentage terms 68.71% of the time a high frequency rationale is instrumental to an outcome it is within the certain range of judicial adjudication and strongly tilts towards a no-disregard outcome. The three categories in the mid frequency range, Statutory Interpretation, Agency and Other similarly have two with low rates indicating judicial consensus and one, Statutory Interpretation, is uncertain but only just. Again within the mid-frequency we can observe that in percentage terms 61.53% of the time a mid frequency rationale is instrumental to an outcome, it is within the certain range of judicial adjudication and strongly tilts towards a no-disregard outcome. Within the five low frequency rationales of Alter Ego, Comingling, Injustice, Instrumentality, and Siphoning only two, Comingling and Instrumentality, have rates that indicate a degree of certainty of judicial adjudication. The other three have rates in the uncertain range. In percentage terms where a low frequency rationale is instrumental to an outcome, it is

within the certain range of judicial adjudication only 38.23% of the time and contrary to the mid and high frequency rationales tilts towards a disregard outcome. Viewed as a whole this is not a picture of uncertainty of adjudication or direction of outcome as there is overall a high degree of certainty of adjudication and direction of outcome in the mid to high frequency rationales which declines in the low frequency range. Given this finding the slippery reputation of disregard adjudication may be overstated. Academic and judicial commentaries of the area may be disproportionally emphasising the uncertainty from minority rationales and perhaps not recognising that a disregard outcome, for example strongly rationalised as a Façade/Sham/Shell or Deception situation is not generally an unstructured messy judicial decision.

Moreover, our dataset confirms that Façade/Sham/Shell and Deception/Fraud have become increasingly prominent rationales, notably since the *Adams* decision.

FIGURE 2A. FREQUENCY OF CASES &

RATIONALES WITH LOW DISREGARD RATES OVER TIME

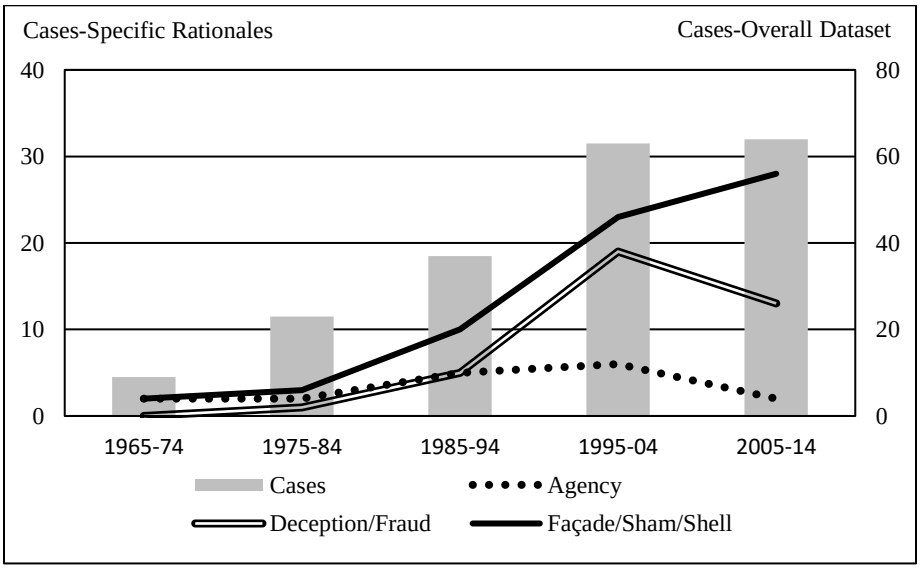
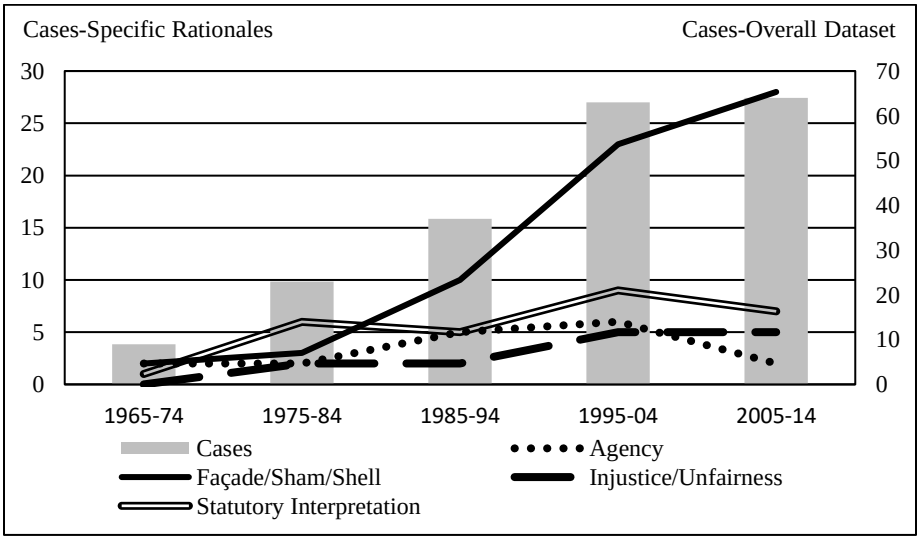


Figure 2A provides a time-based comparison of the frequency with which Agency, Deception, and Façade/Sham/Shell have been instrumental rationales; as a point of reference, the number of cases within our dataset for each decade is supplied in connection with the scale on the right-hand side of the graph. Agency has ebbed and flowed rather steadily over the decades, and thus its presence has diminished given the increase in the number of cases. In contrast Deception and Façade/Sham/Shell mirrored each other in the decade after *Adams v Cape Industries Plc*,[86] steadily increasing in proportion to the number of cases. Deception's rise is puzzling and seems to have been related to the *Adams* decision, where perhaps the narrowing of disregard categories may have caused litigants to place more emphasis on deception elements of an

[86] *Adams v Cape Industries* [1990] Ch 433.

action. However, Deception sharply declines after the new millennium, while FaçadSham/Shell continued to increase. Similarly, as Figures 2A above, and B, C, below illustrate, while Façade/Sham/Shell had been increasing in frequency over the course of the 1980s it accelerates rapidly after the narrowing of other rationales and its legitimisation by *Adams* in 1990. This may also explain its low overall disregard rate as it may be that its frequency increase is partly because with the narrowing of acceptable categories it became a catchall quasi-metaphorical rational for litigants. In simple terms after *Adams* the proposition may have been put more and more that some element of a case fits within the façade rationale and in turn the courts found that while it is a legitimate rationale it is not present in the vast majority of cases where it is claimed to be present.

FIGURE 2B. ADAMS RATIONALES OVER TIME.



The impact of *Adams* can be observed closely in Figure 2B above where we consider the key rationales the case legitimised and one key category it dismissed.[87] As we have noted, Façade/Sham/Shell experiences an extraordinary increase in frequency immediately after *Adams*. But the rationale interestingly has a low 27.54% disregard rate, and thus strongly tends to be instrumental in its absence. By comparison Statutory Interpretation also is cited by courts more frequently after *Adams*, but then declines after the new millennium; and the 42.86% disregard rate indicates that Statutory Interpretation is a more finely balanced rationale which slightly tilts towards being instrumental in its absence. The increase in Statutory Interpretation's frequency may be due to its becoming a specific rationale category after *Adams* within which judges felt safe articulating on disregard, while its fine balance indicates its discretionary nature. Agency as a category of disregard rationale increases slightly in the decade after *Adams* and as with Statutory Interpretation declines in the new millennium. As with Façade/Sham/Shell, Agency is highly instrumental in its absence, with a 30% disregard rate. Unlike the more metaphorical Façade/Sham/Shell, the Agency rationale articulated in *Adams* is very specific, which may explain why, despite its articulated legitimacy in *Adams*, it does not have the explosive growth observed in Façade/Sham/Shell.

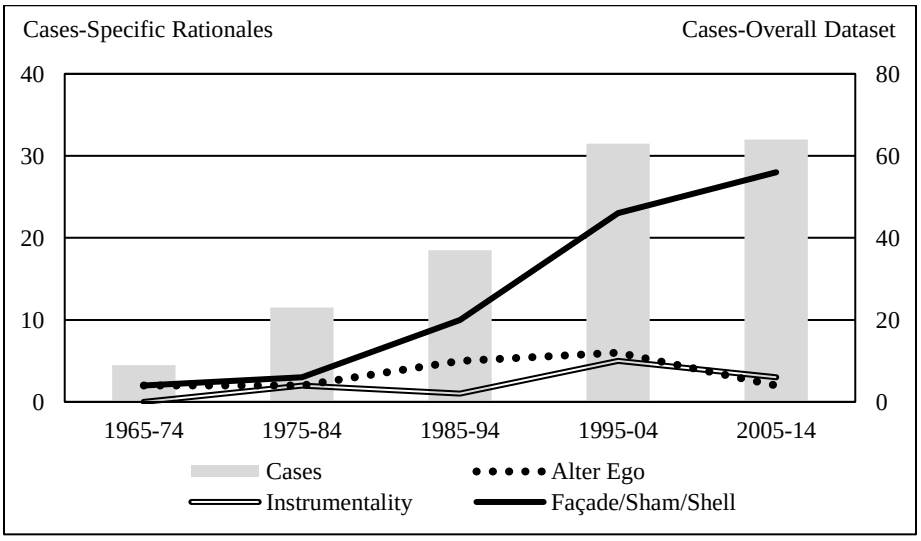
Injustice/Unfairness was a key rationale category that was specifically disapproved of in the *Adams* case and yet rises in frequency over the decade

[87] The Court of Appeal in *Adams* also dismissed Lord Denning's Single Economic Entity proposition for corporate disregard as having never reached a sufficient degree of judicial consensus to have any legitimacy.

after *Adams* and remains an important if low frequency category in the rest of the decade data. Its 46.67% disregard indicates a finely balanced category in terms of injustice being found present or absent by the judiciary and again highlights a discretionary interpretable nature. The fact it is finely balanced and remains a persistent category may, along with the metaphorical categories, contribute to the observations, both judicial and academic, about the ambiguity of rationale present in the area of corporate disregard.

FIGURE 2C. FREQUENCY OF CASES &

"METAPHORICAL" RATIONALES OVER TIME



As compared to other conclusory, metaphorical rationales, Façade/Sham/Shell is the only high frequency one and it enjoys a conspicuous increase over time. In that sense it is unusual both generally and specifically within the metaphorical rationales. This may be because while *Adams* legitimises it as a category it does so with reference to the specific

circumstance present in cases such as *Jones v Lipman* so in effect using a metaphorical wrapper to legitimise a specific set of circumstance that are far from uncertain.

There were, however, some patterns among the rationales that exhibited relatively high disregard rates. When courts focused on specific, concrete evidence, such as the Commingling of Assets (58.33%) and Siphoning of Funds (60.00%), the outcome leaned more towards disregard of the corporate form; but this also applied to the conclusory rationales, Alter Ego (58.82%) and Instrumentality (66.67%). This may indicate that concrete evidence based rationales have high rates of disregard where that evidence is present and that conclusory low frequency highly metaphorical rationales outside the approved *Adams* category of Façade/Sham/Shell, where the metaphorical aspect is reduced, have high rates for exactly the opposite reason that there is no concrete evidence and the metaphor is occluding whatever the real reason is. Again it may be that this contrast is one of the reasons the area is regarded as problematic but again that problematic occluding metaphorical aspect is focused within only two low frequency rationales.[88]

Table 1A below provides the disregard rates for sub-sets of the Statutory Interpretation and Other rationales.

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[88] The dichotomy between Deception and Undercapitalization is also notable. The low disregard rate for Deception (32.56%) applied to most of its sub-sets, Fraud/Deceit (26.67%), Assets (33.33%), and Identity (45.45%). But is to be contrasted with Undercapitalization, which was an infrequent rationale, but featured a 100.00% disregard rate. The discrepancy is notable because of a persistent debate among commentators about whether undercapitalization is a serviceable proxy for Deception that would warrant disregard of the corporate form. UK courts appear to be in agreement that inadequate capitalization alone is an acceptable justification for corporate disregard.

Table 1A. ***Rationale Sub-Category Frequency and Disregard Rate***[89]

Rationale	*n*[90]	Disregard Rate
Statutory Interpretation	35	42.86%
Commercial	2	0.00%
Corporate	2	0.00%
Criminal	5	**80.00%**
Discrimination	1	0.00%
Employment	4	25.00%
Film	1	**100.00%**
Health	1	0.00%
Housing	3	33.33%
Intellectual Property	1	**100.00%**
International	1	0.00%
Marital	2	**50.00%**
Maritime	1	**100.00%**
Real Property	9	33.33%
Tax	2	**100.00%**
Other	36	25.00%
Abuse/Impropriety	1	**100.00%**
Beneficial Owner	10	30.00%
Collateral Proceeding	1	**100.00%**
Consent/Contract	3	33.33%
Constructive Trust	2	0.00%
Director Liability	4	0.00%
Harm	1	0.00%

[89] Neither of these groupings permits any reliable generalisations about the categorical rationale, but a few interesting points are worth noting. The Statutory Interpretation category comprises a diverse range of subject matter which means at the granular level of sub-category there is a small numbers problem. As such, it tells us very little except observing the extreme nature of the disregard rate outcomes where 9 of the 14 sub categories have either a 0% or a 100% disregard rate. This extremity may indicate the extent of the discretion present in this category. The breadth of statutory types, though, may relate to its status as a legitimate rationale in the *Adams* case and indicates that courts entertain corporate disregard requests in a wide swath of rather different cases, and that there does not appear to be any kind of consistent attribute except the broad extent of judicial discretion that the rationale creates.

The Other category skews heavily towards a low disregard rate with 8 out of 14 sub-categories having a 0% disregard rate and 4 others having an approximate low 30% rate. Many of these cases were not decided on solitary grounds, but often in connection with a finding that there was insufficient evidence of the corporate form being a Façade/Sham/Shell.

[90] See *supra* note 85.

Incidental	3	33.33%
Injunctive Policy	3	33.33%
Jurisdiction	2	**50.00%**
Minority Interest	1	0.00%
Sole Proprietor	1	0.00%
Sufficiency of Evidence	2	0.00%
Third-Party Rights	3	0.00%
Trial Court's Decision	1	0.00%

Statutory Interpretation and Other rationales comprise a significant part of our overall dataset. One or both of those rationales appears in 70 cases, or 32.86% of our total dataset. And very few of the rationales within either the Statutory Interpretation or Other category seem to be grounded in reasons that can be analysed or organised in a systematic fashion. Again this may feed the overall perception of an unruly doctrine without perhaps an understanding of the breath of circumstances in which the judiciary are working with corporate disregard claims.

Table 2. ***Disregard Rate for Rationales by Jurisdiction***

Rationale	Trial Court	Intermediate Appellate	Supreme Court
Agency	22.22%	37.50%	33.33%
Alter Ego	**42.86%**	**66.67%**	**100.00%**
Assumption of Risk	0.00%	---	---
Commingling	**62.50%**	**66.67%**	---
Control/Domination	**57.89%**	**60.00%**	28.57%
Deception	20.00%	47.37%	25.00%
Façade/Sham/Shell	30.23%	26.09%	0.00%
Informalities	**100.00%**	---	---
Injustice/Unfairness	41.67%	**100.00%**	**50.00%**
Instrumentality	**50.00%**	**100.00%**	---
Siphoning of Funds	**60.00%**	**50.00%**	---
Statutory Interpretation	**52.94%**	35.29%	0.00%
Undercapitalization	0.92%	**100.00%**	---
Other	22.22%	26.67%	0.00%

The nature of legal appeal processes has been found to be relevant to disregard outcomes in the UK and elsewhere,[91] and particularly at the Intermediate Appeal level within the UK.[92] Similarly we found a pattern of generally higher rates of disregard within the rationale categories at the intermediate appellate level than trial, where rates of disregard were higher in in 9 of the 12 rationale categories where appeals were present. In particular remarkably high rates were observed in the Injustice, Instrumentality and Undercapitalization rationale categories at the Intermediate Appeal Level. Instrumentality and Undercapitalization feature a very small number of observations that account for the high volatility between the Trial Court and Intermediate Appellate Court levels. This leaves Injustice as a notable but low frequency instrumental Intermediate Appellate Court rationale that appears to drive disregard of the corporate form outcomes at that level.

The overall pattern reversed at the Supreme Court level where rates were generally much lower across 7 of the 8 rationale categories, where appeals to the Supreme Court were present, with only Alter Ego breaking that trend with a notable 100% rate. Within the rationale categories Alter Ego, Façade/Sham/Shell and Statutory Interpretation stand out as having unusual patterns of disregard at each appellate level. The disregard rates for Alter Ego rise at the Intermediate Appellate and Supreme Court Levels, which appears

[91] C. Mitchell, 'Lifting the Corporate Veil: An Empirical Study' (1999) 3 Company Financial & Insolvency L Rev 15 at 20, RB Thompson, 'Piercing the Corporate Veil: An Empirical Study' (1991) 76 Cornell L Rev 1036 at 1050, MF Khimji and CC Nicholls, 'Piercing the Corporate Veil in the Canadian Common Law Courts: An Empirical Study' (2015) 41 Queen's LJ 207, IM Ramsay and DB Noakes, 'Piercing the Corporate Veil in Australia' (2001) 19 C&SLJ 250.

[92] See Mitchell above and A. Dignam and PB Oh (2019) Disregarding the *Salomon* Principle: An Empirical Analysis, 1855-2014, Oxford Journal of Legal Studies, Vol. 39, No. 1 (2019), pp. 16–49.

to have some relationship to this being driven by criminal Alter Ego cases in the English Court of Appeal. However, we could find no such correlation at the Supreme Court level that might help explain the 100% disregard rate for Alter Ego.

The disregard rates for both Façade/Sham/Shell and Statutory Interpretation drop at both the Intermediate Appellate and Supreme Court Levels, which may be because they are *Adams* categories that may bring a greater level of exacting scrutiny. This might also be partly true of Agency with its rising and falling pattern. If we return to the disregard rates as indicators of certainty/uncertainty of judicial analysis, we find that the Trial Courts are relatively uncertain in their adjudication of disregard rationales with 6 rationale rates from 11 in the uncertain range.[93] Intermediate Appellate courts have a much higher degree of certainty of adjudication overall with only 3 rationale rates from 11 in the uncertain category. The Supreme Court had the highest level of overall certainty of adjudication with 7 of the 8 rationales adjudicated at the Supreme Court Level falling within the certain range.

If we examine the individual rationale rates by frequency band, as earlier, we find some interesting patterns. Of the three high frequency rationales, Control/Domination, Deception and Alter Ego, again we can observe that Control/Domination is the only one within the uncertain range at the Trial Court level. At the Intermediate Appellate level adjudication becomes more uncertain with Control/Domination and Deception falling within the uncertain range. At the Supreme Court Level all three are within the certain range.

[93] As before eliminating the three low number rationales – Assumption of Risk, Informalities and Undercapitalization.

Within the three categories in the mid frequency range, Statutory Interpretation, Agency and Other, only one, Statutory Interpretation, is in the uncertain range. At the Intermediate Appellate and Supreme Court level all three were within the certain range.

Indeed, the analysis by mid and high frequency rationales indicates that apart from Control/Domination and Deception at the Intermediate Appellate level there is not just a high degree of certainty as to adjudication across jurisdiction level but all the certain rationales rates in the high to mid frequency at all court levels are in the low percentages, indicating a high degree on consensus towards no disregard. In the low frequency rationales of Alter Ego, Comingling, Injustice, Instrumentality, and Siphoning, at Trial level matters were notably different in that 4 of the 5 were in the uncertain range. At the Intermediate Appellate level that switches around with 4 of the 5 in the certain range. Notable in the certain range of low frequency rationale rates at the Trial and Intermediate Appellate range, is that unlike the mid-high frequency rationales all the low frequency rationales in the certain range are high percentage rates indicating a consensus towards disregard. At the Supreme Court level 2 of the 3[94] rationale categories adjudicated are within the certain range but with no consensus as to disregard or no-disregard.

Overall there is a high degree of certainty within the adjudication of rationales across jurisdiction. In the mid-high frequency rationales at all levels of adjudication within the certain rationales there were low disregard rates indicating a consensus towards upholding the corporate form. However, two

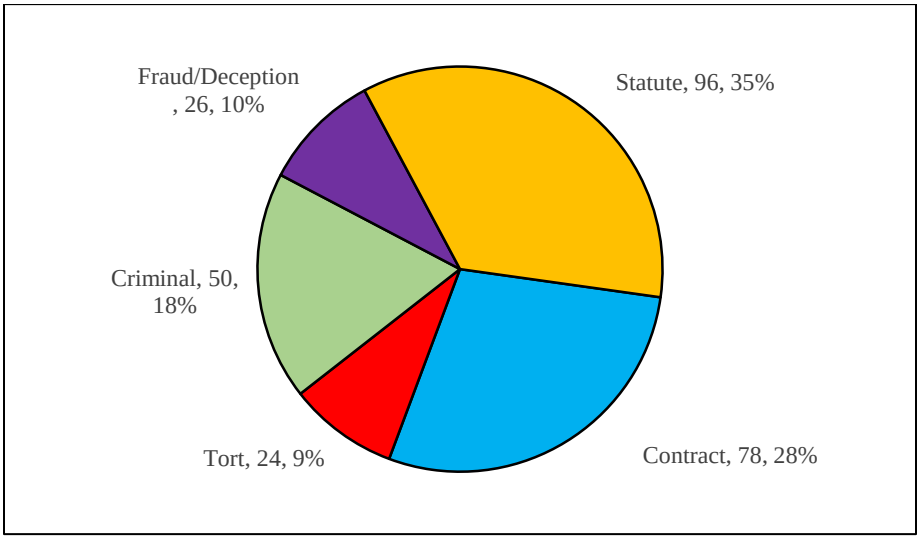
[94] In the low frequency range a small number of cases reached the Supreme Court level.

of the high frequency rationales, Control/Domination and Deception, have an unusual degree of uncertainty about their adjudication at the Intermediate Appellate level which might warrant judicial attention.[95] Similarly in the low frequency rationales matters were different with a high degree of uncertainty at trial court and, apart from the Supreme Court, a tendency within the certain rational rates to disregard the corporate form. As noted earlier the reputation of corporate disregard for obfuscation and confusion may be overstated or at least may only be warranted for rationales such as Control/Domination and Deception and the low frequency rationales at the Trial Court level.

While disregard rationales are expressed within a particular remedial context we were also concerned to examine possible contextual elements that might relate to the substantive claim within the action. Figure 3 depicts how substantive claims were distributed in our dataset.

[95] Solely in the case of Deception the elevated corporate disregard rate for the Intermediate Appellate level is entirely the result of English Court of Appeal decisions, with relative parity between its Civil versus non-Civil Divisions.

FIGURE 3. DISTRIBUTION OF SUBSTANTIVE CLAIMS



Although Charles Mitchell utilised a more fine-grained set of categories for substantive claims,[96] we both find a larger number of Contract rather than Tort claims, with Statutory claims comprising the largest overall category.

These proportions, however, do not hold when examined in relation to the frequency of different types of instrumental rationales where Control/Domination, Deception, and Façade/Sham/Shell form an important cluster across all substantive claims.

[96] Mitchell, *supra* note __, at 24 (reporting 24 Procedural, 35 Contractual, 18 Tortious, 7 Equitable Wrongdoing, 7 Admiralty (in rem), 74 Statutory, and 9 Criminal claims).

Table 3. ***Frequency of Rationales by Substantive Claim***[97]

Rationale	Contract	Tort	Criminal	Fraud/ Deception	Statute
Agency	5	4	4	3	15
Alter Ego	2	3	3	---	13
Assumption of Risk	1	---	---	---	---
Commingling	6	1	2	1	7
Control/Domination	11	7	7	4	38
Deception	20	1	6	10	23
Façade/Sham/Shell	35	5	5	11	30
Informalities	---	---	---	---	1
Injustice/Unfairness	5	1	---	2	10
Instrumentality	6	1	1	2	4
Siphoning of Funds	2	2	---	2	5
Statutory Interpretation	3	1	5	---	35
Undercapitalization	2	---	---	---	1
Other	14	7	1	7	17

As Table 3 above shows, courts cite Agency, Alter Ego, Siphoning of Funds a comparable number of times with respect to all non-Statutory claims; put differently, these rationales appear to be disproportionately *underrepresented* with respect to Contract and Criminal claims. By way of contrast, Control/Domination, Deception, and Façade/Sham/Shell all seem to be cited roughly in proportion to the distribution of substantive claims within our dataset, which may suggest that that these factors tend to be more relevant regardless of what kind of substantive claim underlies a corporate disregard request.

[97] Here we are reporting the number of instances in which rationales appear in relation to different types of claims. For instance, Alter Ego appears in a case with two different claims, and so the table depicts that rationale twice -- once under Contract and once under Statutory Interpretation..

Table 4. ***Disregard Rate for Rationales by Substantive Claim***

Rationale	Contract	Tort	Criminal	Fraud/ Deception	Statute
Agency	20.00%	25.00%	25.00%	33.33%	33.33%
Alter Ego	**50.00%**	**66.67%**	**100.00%**	---	**61.54%**
Assumption of Risk	0.00%	---	---	---	---
Commingling	**50.00%**	**100.00%**	**50.00%**	**100.00%**	**71.43%**
Control/Domination	27.27%	**71.43%**	**100.00%**	**75.00%**	**60.53%**
Deception	10.00%	0.00%	**100.00%**	**50.00%**	39.13%
Façade/Sham/Shell	28.57%	20.00%	40.00%	**54.55%**	20.00%
Informalities	---	---	---	---	**100.00%**
Injustice/Unfairness	**60.00%**	**100.00%**	---	**100.00%**	40.00%
Instrumentality	**66.67%**	**100.00%**	**100.00%**	**100.00%**	**50.00%**
Siphoning of Funds	**50.00%**	**100.00%**	---	**100.00%**	40.00%
Statutory Interp.	0.00%	**100.00%**	**80.00%**	---	**52.94%**
Undercapitalization	**100.00%**	---	---	---	**100.00%**
Other	21.43%	14.29%	**100.00%**	28.57%	27.78%

As Table 4 evinces, the corporate disregard rates for each rationale are not very stable across the types of substantive claims. Agency and Façade/Sham/Shell have an exceptional status within the data, as they have relatively low disregard rates that are roughly consistent across all substantive claims.[98] As we have noted before, this may be because Agency and Façade/Sham/Shell are among the categories established in *Adams*, although this does not hold for another *Adams* rationale, Statutory Interpretation, whose discretionary nature may explain the wide range of disregard rates across substantive claims.

Interestingly, as Table 4 below indicates, the disregard rate seems to bear a stronger relationship with the type of substantive claim than the rationale. The Criminal and Fraud/Deception substantive claim categories have for example comparatively high rates and a high degree of certainty of adjudication tilting strongly towards a disregard outcome broadly across the

[98] The Other category also has a mostly low rate stability. As we noted earlier, it is by its nature a catch-all category that inexplicably is skewed towards a low disregard rate overall.

instrumental rationales regardless of frequency. Statute as a substantive claim has a more mixed picture with a mixed range of rates and a high degree of certainty of adjudication tilting towards a no disregard outcome. By frequency of rationale that mix of rates is also present.

Our dataset also features a higher overall disregard rate for most rationales in Tort versus Contract. Deception, Façade/Sham/Shell, and Other are exceptions in this regard, all of which feature comparatively low disregard rates for Tort and Contract. Tort particularly has a distinctive feature if analyzed by certainty of adjudication. With its distinctive low and high rates it has a remarkable certainty of adjudication across all rationales with a tendency towards disregarding the corporate form. Indeed, it is notable that across all the rationales by substantive claim there are a high number of rationale rates at either end of the certainty of adjudication percentages with not many in the uncertain category. Conversely, Contract stands out for the relatively high number of rationales in the uncertain category. In terms of the Contract v Tort narrative its not just that Tort has an unusually certain relatively uniform disregard outcome oriented approach to the adjudication of disregard rationales but also that disregard rationales operating in Contract have a higher degree of uncertain adjudication.

Analysis by frequency allows us to focus in on the key differences. In Contract in contrast to all the other substantive claims all three high frequency rationales (Façade/Sham/Shell, Deception and Control/Domination) are uniformly certain in adjudication and in terms of their low rates, a strong tendency to uphold the corporate form. In the mid frequency rationales

(Statutory Interpretation, Agency and Other) the pattern is exactly the same. However, a remarkable amount of uncertainty is present with 4 of the 5 rationales in the low frequency rationale category (Alter Ego, Instrumentality, Comingling, Injustice and Siphoning) having rates within the uncertain adjudication range. Overall Contract stands out with its certainty of adjudication focused on low rates tilting strongly towards no disregard in the mid and high frequency rationales and the remarkable uncertainty found in its low frequency rationales. Contrasted with Tort, in terms of mid to high frequency rationales, Tort has a more mixed picture with a high degree of certainty but less uniform direction of outcome as while the majority of rates are at the low end there are also a minority of very high rates. The big difference occurs in the low frequency rationales where Tort has remarkably high disregard rates.

Overall, in Contract, the judiciary are much more reluctant to disregard the corporate form than where the substantive claim is Tort, Criminal or Fraud/Deception, while a more mixed picture exists where Statute is the substantive claim. Perhaps the most striking example is Control/Domination, where the disregard rate is quite low for Contract (27.27%), and yet extremely high for all other remaining substantive claims. Similarly, as we noted above highly elevated corporate disregard rates were present in almost all of the rationales for Criminal and Fraud/Deception claims. These results are difficult to explain in light of the fact that corporate disregard is a remedy whose

rationales should be detached from the nature and dynamics of the underlying substantive claim.[99]

As such the rationales broadly appear to operate differently depending on the nature of the substantive claim, and no overall thread is evident apart again from two of the *Adams* rationale categories of Agency and Façade/Sham/Shell. We were unable to detect any statistical patterns that might provide a possible answer as to why substantive claims were so significant and would suggest that one element the data may be picking up is that some articulated rationales are covering a deeper claim specific element to the outcomes such as the involuntary nature of Tort and the voluntary nature of Contract.[100]

V. CONCLUSION

Our study attempts to establish an empirical foothold within this notoriously slippery area of law. We found that overall there is no empirically detectable thread of rationales that runs through all disregard claims across the vast range of circumstances in which it operates. However, Agency, Deception and Façade/Sham/Shell have, over time, become key elements of disregard outcomes to the point of becoming a quasi-concrete part of a discernible disregard doctrine. In part this is because of the decision in *Adams v Cape Industries Plc*[101] which emphasises these rationales or part thereof, along with Statutory Interpretation, as legitimate categories of rationale in disregard

[99] *See, e.g.*, P Oh. 'Veil-Piercing Unbound. (2013) 93 *Boston University Law Review* 89.
[100] On the broader impact of contextual elements in disregard cases see A. Dignam and PB Oh (2019) above.
[101] *Adams & Ors. v Cape Industries Plc* [1990] BCC 786.

cases. Overall, belying the areas reputation we found a high degree of certainty of judicial adjudication within our data, focused on a no-disregard outcome.

Uncertainty of adjudication, when present, was found when Control/Domination and Statutory Interpretation were instrumental and in the low frequency rationales. Injustice, although infrequent, was notable for its persistence and uncertain adjudication, despite its dismissal as an illegitimate rationale in the *Adams* case. Statutory Interpretation, Injustice and the metaphorical rationales contain by their nature broad discretion or hidden discretion and so Control/Domination's presence in the uncertain category is perplexing given it lends itself to more concrete interpretation and points to an area that warrants judicial attention.

Examining rationales by trial jurisdiction we found disregard rates broadly higher at the Intermediate Appellate level than at Trial or Supreme Court level. This, however, was not the complete picture. When broken down by frequency of rationale we found a high degree of certainty of judicial adjudication focused on upholding the corporate form. That contradiction is explained by two high frequency rationales, Control/Domination and Deception, that were uncertain in adjudication at the Intermediate Appellate level, while Injustice was also a notable low frequency driver of disregard outcomes at the Intermediate Appellate level. Low frequency rationales were again uncertain but tilting towards disregard.

When viewed by substantive claims, apart notably from the *Adams* rationales of Agency and Façade/Sham/Shell, the disregard rates appeared to have a stronger link to the underlying substantive claim than the rationale expressed, which may indicate an obscured rationale is operating. This may

reflect the literature in the area that identifies the often occluded nature of the rationale within the case law and provides an empirical signal that the rationales may hide a deeper unarticulated rationale related to the core circumstance of the substantive claim. As we suggested earlier the broad universe of rationales may function as a Rorschach test in which justificatory choices reveal information about judicial deliberation, whether conscious or unconscious; for instance, recurring specific rationales, such as Deception, may reveal patterns of preferred evidence, while firm authorised categories such as Agency or Façade/Sham/Shell have similar definitive elements. Other conclusory metaphors, such as alter ego, may indicate a lack of sufficient or specific support for the ultimate decision necessitating a metaphorical shield behind which a deeper rationale lies. At the very least, this observation provides insight into what courts believe to be sufficient justifications for the public articulation of a disregard outcome.

Deception was also notably a high frequency rationale, unrelated directly to the *Adams* categories, with remarkable certainty of adjudication that tilted strongly towards no-disregard. This suggests that Deception is a core disregard rationale, which may relate to a shared absolute judicial underlying equitable principle that fraud unravels everything.[102]

The empirical picture of corporate disregard found in our study belies its reputation for confusion and while we did not find a core single rationale that operates universally, we did find a core set of rationale that form the necessary

[102] Originating in *Rochefoucauld v Boustead* [1897] 1 Ch 196 (CA), the principle is discussed extensively with respect to corporate disregard in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 paras 18,83 and 89.

elements of a large number of disregard adjudications and that certainty of interpretation and direction of interpretation towards no-disregard was a feature of these core rationale. Uncertainty and confusion was much less of a feature than the doctrinal/academic picture portrays, with disregard and no-disregard outcomes not generally an unstructured mess of obscured judicial adjudication. Those features were sometimes present but when present were focused on Control/Domination, Statutory Interpretation, the low frequency rationales (including Injustice), and the underlying substantive claim link. If reform is needed this study would point to those areas as the focus for judicial consideration.