Veil-Piercing

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From its inception veil-piercing has been a scourge on corporate law. Exactly when the veil of limited liability can and will be circumvented to reach into a shareholder's own assets has befuddled courts, litigants, and scholars alike. And the doctrine has been bedeviled by empirical evidence of a chasm between the theory and practice of veil-piercing; notably, veil-piercing claims inexplicably seem to prevail more often in Contract than Tort, a finding that flouts the engrained distinction between voluntary and involuntary creditors.

With a dataset of 2,908 cases from 1658 to 2006, this study presents the most comprehensive portrait of veil-piercing decisions yet. Unlike predecessors, this study examines Fraud, a long-suspected accessory to veil-piercing, as well as specific subclaims in Contract, Tort, and Fraud, to provide a fine-grained portrait of voluntary and involuntary creditors. And this study analyzes the rationales instrumental to a piercing decision.

The findings largely comport with our legal intuitions. The most successful civil veil-piercing claims lie in Fraud or involve specific evidence of fraud or misrepresentation. Further, claims not only prevail more often in Tort than Contract, but they also adhere to the voluntary–involuntary creditor distinction. Surprisingly, though, veil-piercing presents a greater risk to individual shareholders than corporate groups.

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Introduction

The origins of corporate veil-piercing are unknown.[1] This is perhaps because the limitation on shareholder liability has never been absolute.[2] For as long as limited liability has existed, courts have disregarded the form of malfeasant corporate entities to access a shareholder's own assets.[3] With characteristic flair, I. Maurice Wormser once declared that "[t]he refusal of the courts to allow quiddits and quillets to stand in the way of justice is nowhere better exemplified" than by veil-piercing, "Our Lady of the Common Law."[4]

Unfortunately, in this venue, Lady Justice measures with metaphors. At the turn of the twentieth century, courts began borrowing from agency law the imagery of a corporate "alter ego"[5] and "instrumentality"[6] to adjudicate veil-piercing claims. The migration, and subsequent mutation,[7] of such

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1. *See, e.g.*, STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 1:3, at 1-12 (2004) ("There is some authority . . . for suggesting that the doctrine that shareholders of corporations were not normally responsible for the corporation's debts found its way into American common law immediately after the Revolution. The precise reach of corporate shareholder limited liability in the early United States is, however, uncertain.").

2. The genesis of American limited liability, like its flip side, is subject to interpretive debate. *See, e.g.*, EDWIN MERRICK DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860, at 84–93 (1954) (suggesting that support for the idea of imposing unlimited liability on shareholders in certain situations existed as early as the 1830s in England and America); Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 587–95 (1986) (contending that "acceptance was far from inevitable" for the idea of limiting liability of shareholders, which thus was not perceived always as an essential principle of American corporate law); Roger E. Meiners et al., *Piercing the Veil of Limited Liability*, 4 DEL. J. CORP. L. 351, 362 (1979) (arguing that the advent of limited liability did not impact immediately the number of incorporations). *But see* PRESSER, *supra* note 1, § 1:3, at 1-17 (arguing that Blumberg's interpretation of Dodd "is flawed, insofar as it minimizes the effects of limited liability on the historical development of American industry").

3. In the United States, "the cradle of piercing of the corporate veil doctrines," KAREN VANDEKERCKHOVE, PIERCING THE CORPORATE VEIL 76 (2007), the earliest general shareholder liability statute preceded the earliest judicial reference to veil-piercing by a mere twelve days. *Compare* Act of Mar. 3, 1809, ch. 65, § 6, 1809 Mass. Acts 464, 466 (requiring officers of manufacturing corporations to pay judgments against their corporation when the corporation lacks sufficient property to pay the judgment), *with* Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 75 (1809) (referring to a saying that "you may raise the veil which the corporate name interposes" in an opinion dated March 15, 1809).

4. I. MAURICE WORMSER, DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATION PROBLEMS 40, 44 (1927).

5. *See, e.g.*, United States v. Milwaukee Refrigerator Transit Co., 142 F. 247, 253 (E.D. Wis. 1905) (describing a firm as the "alter ego" of a "dummy" corporation); Cheeney v. Ocean S.S. Co., 19 S.E. 33, 35 (Ga. 1893) (describing an agent as an "alter ego").

6. HARRY G. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 146, at 250 n.2 (2d ed. 1970).

7. Litigants seeking to pierce the veil have had to establish that a corporate defendant was, *inter alia*, a(n) "adjunct," "agent," "alias," "alter ego," "alter idem," "arm," "blind," "branch," "buffer," "cloak," "coat," "cover," "creature," "curious reminiscence," "delusion," "department," "double," "dry shell," "dummy," "fiction," "form," "instrumentality," "mouthpiece," "name," "nominal identity," "phrase," "puppet," "screen," "sham," "simulacrum," "snare," "stooge," "subterfuge," "tool," *id.*, "conduit," Edwards Co. v. Monogram Indus., Inc., 700 F.2d 994, 995 (5th Cir. 1983),

imagery eventually prompted Justice Cardozo to issue his now famous functionalist caution that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."[8]

Cardozo's fear has proven to be prophetic. To beat the metaphorical veil of limited liability, courts slavishly continue to demand metaphorical proof.[9] The most common veil-piercing test requires a plaintiff to demonstrate that a corporation was an "alter ego" or "mere instrumentality," as evidenced by complete control and domination, of a shareholder used to perpetuate a fraud, wrong, or injustice that has proximately caused unjust loss or injury to the plaintiff.[10] Quite aptly, veil-piercing has been called "jurisprudence by metaphor or epithet."[11]

The inherent imprecision in metaphors has resulted in a doctrinal mess. Courts have resorted to compiling ever-expanding lists of ex post fact-specific factors, no one of which is dispositive or necessarily connected to the underlying harm.[12] And these factors have inflicted damage in collateral contexts. Veil-piercing tests have been assimilated to unincorporated business entities, such as the limited liability company (LLC) and limited liability partnership (LLP).[13] Veil-piercing tests also have been transmitted to

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"curtain," Kinney Shoe Corp. v. Polan, 939 F.2d 209, 212 (4th Cir. 1991), "device," Morris v. N.Y. State Dep't of Taxation & Fin., 623 N.E.2d 1157, 1161 (N.Y. 1993), "marionette," InSITE Servs. Corp. v. Am. Elec. Power Co. (*In re* InSITE Servs. Corp.), 287 B.R. 79, 97 (Bankr. S.D.N.Y. 2002), "monkey's paw," People v. Clauson, 41 Cal. Rptr. 691, 694 (Cal. Dist. Ct. App. 1964), "paraphernalia," Kingston Dry Dock Co. v. Lake Champlain Transp. Co., 31 F.2d 265, 267 (2d Cir. 1929), "shell," Associated Vendors, Inc. v. Oakland Meat Co., 26 Cal. Rptr. 806, 814 (Cal. Dist. Ct. App. 1962), or "umbilication," Berger v. Columbia Broad. Sys., Inc., 453 F.2d 991, 996 (5th Cir. 1972), of a controlling shareholder.

8. Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926). Ironically, Cardozo's eloquence obscured, if not undermined, his own attempt to analyze and fix the doctrine. *See* PRESSER, *supra* note 1, § 1:4, at 1-21, 1-24 ("Shrouding his own analysis irretrievably in the mists of metaphor," Cardozo's "ringing phrases, when analyzed, yield little of substance"); *infra* note 204 and accompanying text; c*f.* FAST TIMES AT RIDGEMONT HIGH (Refugee Films 1982) ("Relax, all right? My old man['s] . . . got this ultimate set of tools. I can fix it." (Jeff Spicoli, played by Sean Penn)).

9. *Cf.* Fred S. McChesney, *Contractarianism Without Contracts? Yet Another Critique of Eisenberg*, 90 COLUM. L. REV. 1332, 1336 (1990) ("[I]t takes a model to beat a model." (citing GEORGE J. STIGLER, THE THEORY OF PRICE 7 (4th ed. 1987))).

10. *See, e.g.*, FREDERICK J. POWELL, PARENT AND SUBSIDIARY CORPORATIONS: LIABILITY OF A PARENT CORPORATION FOR THE OBLIGATIONS OF ITS SUBSIDIARY § 3 (1931) (denoting a three-element test for piercing the corporate veil). Another approach has been to cull from Powell a checklist of factors. *See, e.g.*, PRESSER, *supra* note 1, § 1:6, at 1-30 to 1-34 (detailing a list of questions taken from Powell's work to ask to determine whether to pierce the corporate veil); *infra* note 12 and accompanying text.

11. PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS § 1.02, at 8 (1983).

12. *See, e.g.*, *Associated Vendors*, 26 Cal. Rptr. at 813–15 (listing twenty factors); Cathy S. Krendl & James R. Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 DENV. L.J. 1, 52–55 (1978) (listing thirty-one factors, none of which is necessarily "a logical or preferable measure" for veil-piercing).

13. *See, e.g.*, Robert B. Thompson, *The Limits of Liability in the New Limited Liability Entities*, 32 WAKE FOREST L. REV. 1, 7 (1997) ("[W]e can expect a regular flow of cases seeking to pierce the veil of these new limited liability entities addressed to closely held businesses.").

extracorporate areas of the law, including agriculture, antitrust, arbitration, bankruptcy, civil procedure, criminal, discrimination, employment, environmental, estate and trust, family, pension, tax, and workers' compensation.[14] Not surprisingly, veil-piercing has been decried as an "intellectually disturbing"[15] and "incoherent"[16] doctrine whose "ambiguity and randomness"[17] resembles "lightning, [in that] it is rare, severe, and unprincipled."[18] There even has been a coincidental chorus to eliminate the doctrine altogether.[19]

Moreover, our understanding of veil-piercing has been complicated by empirical analysis. Almost two decades ago, Robert Thompson conducted a pioneering content analysis of approximately 1,600 federal and state veil-piercing cases.[20] Despite the oft-expressed judicial presumption respecting

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14. *See infra* notes 123–32 and accompanying text. For an example of veil-piercing tests being transmitted to criminal law as well as estate and trust law, see *Ex parte Chambers*, 898 S.W.2d 257, 260 (Tex. 1995) (holding that a corporate officer or director can be guilty of criminal contempt even though a court's order is directed solely at the corporation and not the officer or director), and *Henry I. Siegel Co. v. Holliday*, 663 S.W.2d 824, 827 (Tex. 1984) (analogizing the role of a board of directors to the role of trustees when directors transfer property of the corporation to directors of the corporation).

15. ROBERT CHARLES CLARK, CORPORATE LAW 38 (1986).

16. David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1381 (2007).

17. Allied Capital Corp. v. GC-Sun Holdings, 910 A.2d 1020, 1042 (Del. Ch. 2006).

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

19. *See generally* Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479 (2001); Douglas C. Michael, *To Know a Veil*, 26 J. CORP. L. 41 (2000) (both advocating the elimination of the veil-piercing doctrine). Less radical are numerous proposals to codify the veil-piercing test. *See, e.g.*, Rebecca J. Huss, *Revamping Veil Piercing for All Limited Liability Entities: Forcing the Common Law Doctrine into the Statutory Age*, 70 U. CIN. L. REV. 95, 96 (2001) (urging codification to "accomplish[] the goals of veil piercing in a more consistent manner"); John H. Matheson & Raymond B. Eby, *The Doctrine of Piercing the Veil in an Era of Multiple Limited Liability Entities: An Opportunity to Codify the Test for Waiving Owners' Limited-Liability Protection*, 75 WASH. L. REV. 147, 152 (2000) (stressing the necessity of "eliminating free-form decisionmaking" in favor of codification). A century ago, though, Wormser dismissed such codification efforts as "not only impossible but preposterous." WORMSER, *supra* note 4, at 37–38.

Nevertheless, there have been some legislative attempts to control veil-piercing. *See, e.g.*, CAL. CORP. CODE § 300(e) (West 2009) ("The failure of a close corporation to observe corporate formalities relating to meetings of directors or shareholders in connection with the management of its affairs . . . shall not be considered a factor tending to establish that the shareholders have personal liability for corporate obligations."); WIS. STAT. § 180.1835 (2009) ("The failure of a statutory close corporation to observe usual corporate formalities or requirements relating to the exercise of its corporate powers or the management of its business and affairs is not grounds for imposing personal liability on the shareholders for obligations of the corporation."); *infra* note 35 and accompanying text. The Model Business Corporation Act, for instance, provides that "a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct." MODEL BUS. CORP. ACT § 6.22(b) (2002); *see also id.* § 7.32(f) (providing that a shareholder agreement "shall not be a ground for imposing personal liability on any shareholder . . . even if the agreement or its performance . . . results in failure to observe . . . corporate formalities").

20. Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1044 (1991) [hereinafter Thompson, *Empirical Piercing*]; *see also* Robert B.

the separation between a corporation and its shareholders,[21] Thompson found that veil-piercing claims succeeded 40.18% of the time, and exclusively against close corporations.[22] Further, not only did veil-piercing occur far less often against corporate parents than individual shareholders,[23] but success was not highly correlated with evidence of shareholder domination, a failure to observe corporate formalities—such as conducting meetings or keeping records—or inadequate capitalization.[24] Most notably, Thompson found that veil-piercing claims arose and prevailed more often in Contract than Tort.[25]

These results project a broad chasm between the theory and practice of veil-piercing. That litigants apparently enjoy far more success against individual shareholders belies a diverse collection of arguments and predictions about veil-piercing being more compelling against corporate groups.[26] Similarly confounding is the apparently weak relationship between a decision to pierce and evidence of domination or a failure to observe formalities,[27] as well as inadequate capitalization, particularly for claims in Tort.[28]

But it is the asymmetrical result between Contract and Tort that has become one of corporate law's most notorious, counterintuitive puzzles. For almost as long as veil-piercing has existed, commentators have distinguished

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Thompson, *Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors*, 13 CONN. J. INT'L L. 379, 380 & n.4 (1999) [hereinafter Thompson, *Group Piercing*] (providing a limited update on ten additional years of cases).

21. *See, e.g.*, Kashfi v. Phibro-Salomon, Inc., 628 F. Supp. 727, 732–33 (S.D.N.Y. 1986) ("Courts are reluctant to disregard the separate existence of related corporations by piercing the corporate veil, and have consistently given substantial weight to the 'presumption of separateness.'" (citations omitted)); EnduraCare Therapy Mgmt. v. Drake, 681 S.E.2d 168, 171 (Ga. Ct. App. 2009) (maintaining the presumption of separation in the absence of sufficient allegations within the complaint).

22. Thompson, *Empirical Piercing*, *supra* note 20, at 1047–48 & tbl.1.

23. *Id.* at 1056.

24. *Id.* at 1063 tbl.11.

25. *Id.* at 1058. Substantive claims have been capitalized to distinguish them from factors within the veil-piercing test.

26. *See, e.g.*, Easterbrook & Fischel, *supra* note 18, at 110–11 ("Courts' greater willingness to allow creditors to reach the assets of corporate as opposed to personal shareholders is . . . consistent with economic principles."); Jonathan M. Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42 U. CHI. L. REV. 589, 623 (1975) ("[C]ourts may have a greater proclivity to reach corporate, as opposed to individual, stockholders."); *infra* notes 168–69, 172–73 and accompanying text.

27. *See, e.g.*, David H. Barber, *Piercing the Corporate Veil*, 17 WILLAMETTE L. REV. 371, 377–78 (1981) ("Courts nearly always cite disregard of corporate formalities as one prong of the test used to determine when the veil should be pierced. . . . The intent behind the formalities prong of the piercing test . . . is to prevent shareholder-owners from impairing the interests of other parties by carrying this unity of interest too far.").

28. *See, e.g.*, William P. Hackney & Tracey G. Benson, *Shareholder Liability for Inadequate Capital*, 43 U. PITT. L. REV. 837, 867 (1982) ("The courts seem more inclined to hold shareholders liable for the torts of their corporations than for their contracts when . . . inadequate capitalization is present, and the textwriters generally support this position."); *infra* notes 101–06 and accompanying text.

between claims grounded in Contract versus Tort.[29] That distinction is commonly recast as one between voluntary and involuntary creditors, but the fulcrum remains constant: "Contract creditors . . . are compensated ex ante for the increased risk of default ex post. Tort creditors, by contrast, are not compensated."[30] The inability of involuntary creditors to bargain or insure themselves against risk has led "almost every commentator" to conclude that veil-piercing is more compelling in Tort than Contract.[31]

Indeed, prior to Thompson's study, there had been numerous observations to this effect. Commentators believed veil-piercing claims were being adjudicated correctly, citing impressionistic evidence that courts were generally "more likely to disregard the corporate entity in [T]ort cases than in [C]ontract cases."[32] This claim, in turn, started to permeate actual judicial reasoning.[33] And after a controversial decision by its supreme court,[34] Texas even amended its business-corporation statute with a stiffer standard for veil-piercing claims couched in Contract.[35]

All of this was thrown into a lurch by Thompson's findings. According to Thompson, the infrequency of claims in Tort "suggests that piercing law is rooted in concerns of inequitable bargains."[36] But even he is pressed to explain the disparity in veil-piercing rates, merely observing that "[T]ort settings seem to involve different concerns than [C]ontracts cases," or that some exogenous factors may be at work.[37] As he simply acknowledged, the

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29. *See, e.g.*, William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 195 (1929) (bifurcating their analysis of veil-piercing cases into claims in Contract versus Tort).

30. Easterbrook & Fischel, *supra* note 18, at 112.

31. *See* 2 PHILLIP I. BLUMBERG ET AL., BLUMBERG ON CORPORATE GROUPS § 57.04, at 57-8 (2d ed. 2010) ("[V]ery special pressures in [T]ort law require a treatment different from that in [veil-piercing] cases arising in other areas of law, such as [C]ontract."); David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1601 (1991) ("[A]lmost every commentator has paused to note that limited liability cannot be satisfactorily justified for [T]ort victims . . . ."); *infra* note 91 and accompanying text.

32. 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 41.85, at 269–70 (rev. vol. 2006); *see also* Easterbrook & Fischel, *supra* note 18, at 112 ("Courts are more willing to disregard the corporate veil in [T]ort than in [C]ontract cases.").

33. *See, e.g.*, Cascade Energy & Metals Corp. v. Banks, 896 F.2d 1557, 1577 (10th Cir. 1990) ("[T]he analysis of corporate veil issues is different in a consensual transaction, such as a breach of contract case, than in a nonconsensual transaction, such as many tort cases . . . ."); Gray v. Edgewater Landing, 541 So. 2d 1044, 1046 (Miss. 1989) ("Since [C]ontract liability arises from an essentially consensual relationship, courts generally decline to disregard the corporate entity . . . .").

34. *See* Castleberry v. Branscum, 721 S.W.2d 270, 273 (Tex. 1986) (permitting veil-piercing merely upon proof of constructive fraud).

35. *See* Willis v. Donnelly, 199 S.W.3d 262, 272 n.12 (Tex. 2006) ("In response to *Castleberry*, Article 2.21 of the [Texas Business Corporation Act] was amended in 1989 to establish a clear legislative standard . . . [for] the liability of a shareholder . . . in the context of contractual obligations . . . ." (citing TEX. BUS. CORP. ACT ANN. art. 2.21 cmt. (West 2003))).

36. Thompson, *Empirical Piercing*, *supra* note 20, at 1068.

37. *Id.* at 1069; *see also infra* notes 143–51 and accompanying text.

inexplicable results, "more than any other in the project, go against the conventional wisdom."[38]

That was almost two decades ago. The results now "appear to be on their way to becoming the conventional wisdom."[39] Despite Thompson's caution,[40] courts cite his study in adjudicating veil-piercing claims.[41] States utilize his results to attract potential incorporators,[42] and lawyers rely on his findings in providing business guidance.[43] Further, his methodology has been replicated in empirical studies of veil-piercing around the world.[44] The incontrovertible fact is that Thompson's study has influenced how we perceive and engage the doctrine.

Yet to this day, no one has explained the dominance of veil-piercing in Contract over Tort. Some interpret Thompson's findings as evidence of a predisposition toward using Contract as a substantive vehicle for veil-piercing.[45] Others regard the findings as "simply illustrat[ing] how badly the courts have been handling piercing cases,"[46] and thus "yet another black mark against" the doctrine.[47] And one commentator even "cling[s] to the economists' notion that the veil is more likely to be pierced in [T]ort than in [C]ontract cases."[48] With veil-piercing, people seem to see what they want to see.

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38. Thompson, *Empirical Piercing*, *supra* note 20, at 1058.

39. PRESSER, *supra* note 1, § 1:7, at 1-36 n.5; *see also infra* note 73 and accompanying text.

40. *See* Thompson, *Group Piercing*, *supra* note 20, at 392 ("I would discourage devoting too much attention to whether corporate law conflicts with [T]ort law . . . ."). *But see infra* notes 89–92 and accompanying text.

41. *See, e.g.*, Coltec Indus., Inc. v. United States, 62 Fed. Cl. 716, 724 (2004); Theberge v. Darbro, Inc., 684 A.2d 1298, 1303 (Me. 1996); Garcia v. Coffman, 946 P.2d 216, 227 (N.M. Ct. App. 1997) (all referencing Thompson's veil-piercing study).

42. *See, e.g.*, *Nevada v. California*, CORPORATE SERV. CTR., http://corporateservicecenter.com/nevada-california-comparison.html (claiming that "Nevada provides a much stronger corporate veil" by citing Thompson's finding that, "among the states with the largest number of reported veil piercing decisions, California courts pierce the corporate veil at the highest rate—45% of attempted veil piercing cases in California are successful").

43. *See, e.g.*, John Wootton, *Corporation Owner's Survival Guide*, EMPOWEREDWEALTH.COM 1, http://www.empoweredwealth.com/documents/WoottonSurvivalGuideReport_000.pdf ("What's more, over 50 percent of the time, you will lose your protection and the court will hold you personally liable." (citing Thompson, *Empirical Piercing*, *supra* note 20, at 1055)). *Contra* Thompson, *Empirical Piercing*, *supra* note 20, at 1054–55 & tbl.7 (noting that "[a]mong close corporations, those with only one shareholder were pierced in almost 50% of the cases" and reporting a 49.64% veil-piercing rate in that specific context).

44. *See infra* note 74 and accompanying text.

45. *See, e.g.*, Nicholas L. Georgakopoulos, *Contract-Centered Veil Piercing*, 13 STAN. J.L. BUS. & FIN. 121, 127 (2007) ("[C]ourts and litigants demonstrate a bias in favor of piercing in [C]ontract disputes compared to [T]ort disputes. In part, this bias is evidenced in the research of Professor Robert Thompson . . . ."); *infra* note 73.

46. Franklin A. Gevurtz, *Piercing Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil*, 76 OR. L. REV. 853, 859 (1997).

47. Bainbridge, *supra* note 19, at 512 n.159.

48. PRESSER, *supra* note 1, § 1:7, at 1-37 n.5.

Or perhaps what they see is simply incomplete. The controversy about the empirics of veil-piercing, particularly in Contract and Tort, may be akin to the classic fable about the disagreement among a group of blind men over their perception of an elephant.[49] In this case the elephant in the room is not veil-piercing but its long-suspected accessory: Fraud. The omission of this claim from Thompson's study, as well as its progeny, is crucial in light of Fraud's substantively hybrid nature;[50] certain species of Fraud, for instance, can be characterized as a Contract or Tort, or have been regarded by some as a complete substitute for Contract claims.[51] But there has been no investigation into, much less speculation about, whether seepage of Fraud into Contract or Tort could explain the wayward path apparently being taken by courts.

The present study charts a different course. An entirely new dataset is constructed from 1658 up to and including 2006, thus adding twenty-one years to the time frame originally examined by Thompson.[52] This dataset is not only bigger, but broader, as more expansive search terms were used in Westlaw, whose database coverage has become more complete in the two decades since Thompson's study was published.[53] The initial yield of 15,188 cases approximately doubles the number that Thompson's terms would have obtained over the same time frame;[54] after exclusions are applied, the final dataset of 2,908 federal and state cases presents the most comprehensive empirical portrait of veil-piercing decisions yet.[55] Moreover, the present study substantially revises and refines Thompson's methodology. For the first time the dynamics of veil-piercing in Fraud are revealed,[56] and data were collected for specific subclaims in Contract, Tort, and Fraud to provide not only a fine-grained portrait of different types of actions, but also insight into the distinction between voluntary and involuntary creditors. And the *rationes decidendi* of veil-piercing cases are examined to discern how veil-piercing claims are being adjudicated.

The results largely confirm our legal intuitions about veil-piercing. Federal and state courts pierce almost 50% of the time and only the veil of close corporations whose potential for consolidated shareholding permits a

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49. *See generally* MASNAVĪ I MA'NAVĪ, TEACHINGS OF RUMI 122–26 (E.H. Whinfield trans., Octagon Press 1994) ("The eye of outward sense is as the palm of a hand,/The whole of the object is not grasped in the palm."); JOHN GODFREY SAXE, POEMS 259–61 (1868) ("And so these men of Indostan/Disputed loud and long,/Each in his own opinion/Exceeding stiff and strong,/Though each was partly in the right/And all were in the wrong!").

50. *See infra* notes 81–83 and accompanying text.

51. *See infra* notes 81, 87 and accompanying text.

52. This is not an arbitrary time frame. *See infra* notes 111, 113 and accompanying text.

53. *See infra* note 143.

54. *See infra* note 114 and accompanying text.

55. *See infra* note 114 and accompanying text.

56. *See supra* text accompanying notes 49–51; *infra* text accompanying notes 80–100.

requisite finding of control or domination.[57] As expected, the most successful civil veil-piercing claims are grounded in Fraud or supported by specific evidence of fraud or misrepresentation. Moreover, veil-piercing claims prevail more often in Tort than Contract, reversing the counterintuitive asymmetry found by Thompson's study; the superiority of veil-piercing rates in Tort over Contract not only holds but expands when those claims are recast into claims between involuntary and voluntary creditors. Although not as sharp as expected, the disparity in rates for these distinctions squares with what commentators, courts, and practitioners have long believed but thus far been unable to prove.[58] Similarly, quite predictable suspects comprise the most common instrumental rationales: commingling, control or domination, injustice or unfairness, fraud or misrepresentation, and inadequate capitalization. Somewhat surprisingly, though, evidence of inadequate capitalization is comparably frequent and instrumental in Contract, Tort, and Fraud claims; quite unexpectedly, the relative sophistication of bargaining parties yields no appreciable difference in veil-piercing success, while courts reach more often into the assets of individual shareholders than corporate groups.

Part I reviews Thompson's methodology before delineating the hypotheses and methodology of the present study. Part II then systematically presents the study's results from the perspective of the types of courts, the state law applied, the types of substantive claims, and the rationales instrumental to a decision whether to pierce; Part II concludes by reexamining all of these results in terms of voluntary and involuntary creditors.

I. Methodology

Veil-piercing is misdubbed the most litigated issue in corporate law.[59] But as the primary exception to limited liability, the doctrine is a staple of

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57. *See infra* note 165 and accompanying text.

58. *See infra* notes 88–92.

59. *Contra* Robert B. Thompson, *Agency Law and Asset Partitioning*, 71 U. CIN. L. REV. 1321, 1325 (2003); Thompson, *Empirical Piercing*, *supra* note 20, at 1036; Thompson, *supra* note 13, at 1; Robert B. Thompson, *Piercing the Veil: Is the Common Law the Problem?*, 37 CONN. L. REV. 619, 619 (2005) [hereinafter Thompson, *Common Law Piercing*] (all describing piercing the veil as "the most litigated issue in corporate law"). This proposition, which is based on searches Thompson conducted in Lexis and Westlaw with the same terms used in his study versus terms such as "corporate takeover" and "hostile takeover," has been cited by numerous courts, academics, and practitioners. *See, e.g.*, Coltec Indus., Inc. v. United States, 62 Fed. Cl. 716, 741 (2004) ("'[P]iercing claims constitute the single most litigated area in corporate law . . . .'" (alteration in original) (emphasis removed) (quoting FRANKLIN A. GEVURTZ, CORPORATION LAW § 1.5, at 70 (2000))); Darrell D. Dorrell & Gregory A. Gadawski, *Counterterrorism: Conventional Tools for Unconventional Warfare*, U.S. ATT'YS' BULL., Mar. 2005, at 1, 2, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab5302.pdf; Stephen B. Presser, Commentary, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW. U. L. REV. 148, 154 n.21 (1992) (both stating that "'[p]iercing the corporate veil is the most litigated issue in corporate law'" (quoting Thompson, *Empirical Piercing*, *supra* note 20, at 1036)). Searches using Westlaw's Key Search Topics prior to 1986 and to the present, however, reveal that references to

corporate law that impacts virtually every aspect of business planning.[60] And our empirical knowledge of veil-piercing has been shaped indelibly by Robert Thompson's landmark study, which occupies a prominent place within any discussion of the doctrine. Cited in hundreds of articles, briefs, and opinions,[61] the study has spawned numerous derivative studies in the United States and around the world.[62]

However sincere, methodological imitation is not necessarily a form of flattery. Thus far, the critical spotlight has focused almost exclusively on the results, and not the methodology, of Thompson's study. This Part redirects the spotlight, examining that study's design before proceeding to advance some hypotheses and then to delineate the present study's methodology. Part I concludes with some cautionary notes about the limits of both studies.

A. Thompson's Methodological Tree

Thompson's study actually covers two time frames. His original dataset contained approximately 1,600 veil-piercing cases in Westlaw, up to and including 1985;[63] Thompson subsequently expanded the dataset with an additional 2,200 cases from 1986 up to and including 1996.[64] The update yielded results consistent with the original findings:[65]

> 1. Courts pierced the corporate veil in approximately 40% of all reported cases;
> 2. Piercing . . . is a doctrine directed exclusively at close corporations and corporate groups . . . ;

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numerous claims, including "Liabilities of Officers and Directors" ((TO(101x(c)) (TO(101x(d))) /p Liab!) (101k653 /p (officer director))) and "Dissolution" (TO(101x(v))), all yield more hits than Thompson's search terms. *See* Scotland M. Duncan, Lifting the Veil of Misconception About the Most Litigated Issue in Corporate Law 18 (2009) (unpublished manuscript) (on file with author) (noting that from 1986 to 2008, Key Search references to veil-piercing increased more than any other topic with at least 3,000 hits).

60. *See, e.g.*, GEVURTZ, *supra* note 59, § 1.5, at 70 (describing veil-piercing as "the area of corporation law which the attorney seeking to avoid corporate practice is most likely to confront"); Easterbrook & Fischel, *supra* note 18, at 89 ("Limited liability is a fundamental principle of corporate law."); Leebron, *supra* note 31, at 1566 ("No principle seems more established in capitalist law or more essential to the functioning of the modern corporate economy [than limited liability]."); Robert B. Thompson, *The Basic Business Associations Course: An Empirical Study of Methods and Content*, 48 J. LEGAL EDUC. 438, 440 fig.1 (1998) (reporting veil-piercing as the only topic taught by all seventy-one Business Associations/Corporations professors responding to a survey).

61. A search of ((Robert /2 Thompson) /s ("Piercing the Corporate Veil: An Empirical Study")) in Westlaw's ALLCASES, BRIEF-ALL, and TP-ALL databases yielded 245 hits.

62. *See infra* notes 73–74 and accompanying text.

63. *See infra* notes 77–78 and accompanying text.

64. *See* Thompson, *Group Piercing*, *supra* note 20, at 385 ("A preliminary examination of the recent data indicates that these results fit within the pattern of the original study."). *But see infra* text accompanying note 164. The 2,200 cases apparently comprise the initial yield and not the final dataset. By comparison there were only 802 cases in this study's final dataset from 1986 up to and including 1996.

65. Thompson, *Group Piercing*, *supra* note 20, at 385.

> 3. Courts pierce the veil more often to get to an individual who is a shareholder [43.13%, 786 cases] than to reach another corporation who is a shareholder [37.21%, 637 cases] . . . [;]
> 4. Courts are less likely to pierce the veil in cases involving [T]ort claims [30.97%, 226 cases] as opposed to those involving [C]ontractual [41.98%, 779 cases] or [S]tatutory claims [40.58%, 552 cases] . . . ;
> 5. Undercapitalization [53.22%, 171 cases] and corporate informalities [46.46%, 226 cases] often lead to piercing, but appear in a relatively small percentage of all cases in which courts pierce and an even smaller number of the [T]ort cases.[66]

Moreover, "even if we eliminate[d] the [M]isrepresentation cases from the [C]ontracts group, the piercing results [would] still remain higher in [C]ontract cases."[67] According to Thompson, these results suggest that, for close corporations, veil-piercing is "strongly rooted in the bargain setting,"[68] and that "courts interfere when there has been wrongful conduct by the proprietor that inappropriately changes the bargain the parties struck."[69]

For both time frames, Thompson utilized the same methodology.[70] Combinations of two search terms, "piercing the corporate veil" and "disregard! the corporate entity," as well as four unidentified Key Numbers were run in Westlaw.[71] A team of law students then collected data on a decision's year, the court's jurisdiction and type, the type of plaintiff and defendant, the number and type of shareholders, the substantive claims connected to veil-piercing, the frequency with which eighty-five possible rationales were mentioned in all cases, and the court's ultimate decision whether to pierce.[72]

Thompson's study has served as the methodological foundation for all subsequent empirical studies of corporate disregard. In the United States, pairs of Wake Forest law students have sampled the last twenty years of veil-piercing cases in Westlaw, and "[b]ecause [their] method was intended to mirror Professor Thompson's, [they] closely followed his methodology."[73]

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66. *Id.* at 384–85 (citations omitted). The bracketed figures come from Thompson, *Empirical Piercing*, *supra* note 20, at 1055 tbl.7, 1058 tbl.9; *see also* Thompson, *supra* note 13, at 9 ("After additional analysis of that data base, I can make a broader statement. Piercing occurs only within corporate groups or in close corporations with fewer than ten shareholders.").

67. Thompson, *Empirical Piercing*, *supra* note 20, at 1069.

68. *Id.* at 1071.

69. Thompson, *Common Law Piercing*, *supra* note 59, at 629.

70. *Compare* Thompson, *Empirical Piercing*, *supra* note 20, at 1044–47, *with* Thompson, *Group Piercing*, *supra* note 20, at 385–88.

71. Thompson, *Empirical Piercing*, *supra* note 20, at 1036 n.1.

72. *Id.* at 1044 & n.48.

73. Lee C. Hodge & Andrew B. Sachs, Empirical Study, *Piercing the Mist: Bringing the Thompson Study into the 1990s*, 43 WAKE FOREST L. REV. 341, 347 (2008) (analyzing 228 cases

Thompson's methodology also has been replicated by Australian and British studies, both of which incidentally find a similar asymmetry for Contract over Tort.[74]

Far less prevalent, though, has been any critical reflection on Thompson's methodology.[75] His study presents the frequency of and success

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from 1986 to 1995); *see also* Rich McPherson & Nader Raja, Corporate Justice: An Empirical Study of Piercing Rates and Factors Courts Consider When Piercing the Corporate Veil 12 (2009) (unpublished note) (on file with author) (examining 236 cases from 1996 to 2005). Both studies sampled one-sixth of all cases and found that the overall veil-piercing rate apparently declined. *See* Hodge & Sachs, *supra*, at 347, 349–50 (analyzing 483 cases out of 2,901 returned in the initial search and "showing an increasing reluctance of courts to pierce the corporate veil"); McPherson & Raja, *supra*, at 12 (analyzing every sixth case arranged chronologically to create a sample of 638 cases from an initial yield of 3,821 cases). Notably, Hodge and Sachs's sample found that veil-piercing claims prevail more often in Tort (35.71%) than Contract (31.11%). Hodge & Sachs, *supra*, at 354 tbl.8; *see also* PRESSER, *supra* note 1, § 1:7, at 1-37 n.5 ("The review of the cases that I did in preparing this treatise for publication in 1991, particularly with regard to cases decided since 1985, the end of the Thompson study period, does suggest that the idea that courts ought to pierce less frequently in [C]ontract cases is gaining ground."). *But see infra* note 244 and accompanying text. McPherson and Raja's sample, however, found that veil-piercing claims prevail more often in Contract (30.70%) than Tort (15.00%). McPherson & Raja, *supra*, at 21 tbl.10.

Another corporate veil-piercing study drawing on Thompson's methodology is by Nicholas Georgakopoulos. His study simply examines Westlaw Key Number references to veil-piercing in Contract and Tort, from 1947 up to and including 2003, to generate a prediction about the frequency with which litigants pursue these claims. Georgakopoulos, *supra* note 45, at 127–28. Georgakopoulos's study, however, does not involve any coding and, by extension, any veil-piercing rates. Moreover, his study is highly vulnerable to false positives because of the remedial nature of veil-piercing and evidence suggesting asymmetrical settlement rates in Tort versus Contract. *See infra* notes 147, 152 and accompanying text.

Thompson's study also has served as a methodological template for empirical studies examining specific applications and arguable extensions of veil-piercing. *See generally* John H. Matheson, *The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context*, 87 N.C. L. REV. 1091 (2009) (examining 360 parent–subsidiary cases from January 1, 1990, to March 1, 2008); Fred S. McChesney, *Doctrinal Analysis and Statistical Modeling in Law: The Case of Defective Incorporation*, 71 WASH. U. L.Q. 493 (1993) (examining 102 defective incorporation cases from 1818 to 1945); Geoffrey Christopher Rapp, *Preserving LLC Veil Piercing: A Response to Bainbridge*, 31 J. CORP. L. 1063 (2006) (examining sixty-one LLC veil-piercing cases up to and including 2005). *But see* Timothy R. Wyatt, Note, *The Doctrine of Defective Incorporation and Its Tenuous Coexistence with the Model Business Corporation Act*, 44 WAKE FOREST L. REV. 833, 847–51 (2009) (criticizing McChesney's conclusion that defective incorporation is a subset of veil-piercing).

74. *See* Charles Mitchell, *Lifting the Corporate Veil in the English Courts: An Empirical Study*, 3 COMPANY FIN. & INSOLVENCY L. REV. 15, 18 (1999) (examining 290 British cases from 1888 up to and including 1998 with a methodology that "was inspired by the example of two similar studies which have been undertaken, one of a large group of American cases, the other of a smaller group of Australian cases"); Ian M. Ramsay & David B. Noakes, *Piercing the Corporate Veil in Australia*, 19 COMPANY & SEC. L.J. 250 (2001) (examining 104 Australian cases up to and including 1999). *But see generally* Peter B. Oh, Piercing v. Lifting 1, 8–10 (2010) (unpublished manuscript) (on file with author) (examining 188 British cases from 1888 up to and including 2006 with the same methodology used here and finding, *inter alia*, corporate-disregard claims prevail more often in Tort than Contract).

75. Ramsay and Noakes have made one of the few substantive refinements in all subsequent empirical veil-piercing studies, which is to code cases for claims on a nonexclusive basis. *See* Ramsay & Noakes, *supra* note 74, at 264 ("There are 109 cases listed, more than the overall study,

rates for veil-piercing within four substantive claims: Contract, Criminal, Statute, and Tort.[76] But the total number of claims is less than the total number of cases, which indicates that none of the cases contained multiple claims or that they were reduced subjectively to just one type of claim.[77] Similarly, the number of defendant shareholders is dramatically less than the total number of cases, despite the possibility that there may be bundled claims against corporate groups and individuals.[78] Further, his study presents only the frequency with which a rationale is mentioned in cases and the extent to which

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as in some cases the piercing argument was made in more than one context."). One criticism of Thompson's study is that the results are not replicable. *See* David S. Goldman, *Legal Construct Validation: Expanding Empirical Legal Scholarship to Unobservable Concepts*, 36 CAP. U. L. REV. 79, 123 (2007) ("While [Thompson's] article precisely describes the specific searches conducted, it does not completely explain how the results were filtered."). Thompson actually does not specify the four Key Numbers used in connection with his search terms, *see infra* note 114, and he does not provide complete results for combinations of variables, such as the veil-piercing rate for claims and rationales. *See, e.g.*, *infra* note 209 and accompanying text.

Another set of criticisms has been advanced by Fred McChesney:

> [T]he rethinking . . . carried forward by Thompson is not wholly satisfactory methodologically. Merely counting cases and sorting them into various pigeonholes according to expressed judicial rationales . . . suffers from at least two deficiencies. . . .
>
> First, the stated reasons for judges' holdings may not always explain the complete rationale for their decisions. . . .
>
> Second, courts typically designate more than one factor as relevant or important in the ultimate decision, rather than expound a bright-line, single-factor rule.

McChesney, *supra* note 73, at 515. With respect to the second concern, McChesney's constructive suggestion is to use multiple regression, "a statistical technique that can solve the problems of calculating the influence of individual case factors, identifying their relative weights, and accounting for the simultaneous presence of different factors." *Id.* at 519; *see also id.* at 515 n.82 ("Thompson is aware of the methodological shortcomings of merely sorting cases, and reports that he is at work on a multiple regression model for the veil-piercing cases."). This suggestion has been applied productively by John Matheson's recent study of veil-piercing in corporate groups, which notes that "[a]though Thompson recognized the need for a more sophisticated 'logit analysis, a form of statistical regression analysis,' the supposed 'model and the results' have never been reported." Matheson, *supra* note 73, at 1106 n.48 (quoting Thompson, *Empirical Piercing*, *supra* note 20, at 1046 n.62). Thompson actually did perform regression analysis but limited it to statistical differences and presented it on a selective basis. Thompson, *Empirical Piercing*, *supra* note 20, at 1049 nn.77–79, 1052 nn.83 & 87, 1055 n.100, 1057 nn.111 & 114, 1058 n.116. Only summary statistics are presented here, as regression analysis will be part of a future project. As for McChesney's concerns about judicial rationales, this study focuses on a case's *rationes decidendi* rather than their mere mention. *See infra* subpart II(D). Some of his functionalist concerns are addressed here, but there are unavoidable selection effects that apply not only to this study, but also to Matheson's and McChesney's. *See infra* notes 143–51 and accompanying text.

76. Thompson, *Empirical Piercing*, *supra* note 20, at 1044.

77. *Compare* Thompson, *Empirical Piercing*, *supra* note 20, at 1058 tbl.9 (reporting 1,572 Contract, Tort, Criminal, and Statute cases), *with id.* at 1048 tbl.1 (reporting 1,583 cases), *id.* at 1049 tbl.2 (reporting a total of 1,585 cases over time), *and id.* at 1050 tbl.4 (reporting 1,577 cases by court); *compare also* Thompson, *Group Piercing*, *supra* note 20, at 386 tbl.2 (reporting 445 Contract, Tort, and Statute cases), *with id.* at 386 tbl.1 (reporting 547 corporate-group cases).

78. *Compare* Thompson, *Empirical Piercing*, *supra* note 20, at 1055 tbl.7 (reporting 1,423 shareholders), *with id.* at 1048 tbl.1 (reporting 1,583 cases), *id.* at 1049 tbl.2 (reporting 1,585 cases over time), *and id.* at 1050 tbl.4 (reporting 1,577 cases by court). Thompson presented results for only corporate and individual shareholders, but even the addition of governmental owners seems unlikely to account for the difference.

the rationale's absence or presence coincides with decisions to pierce; although useful, those data do not reflect whether a particular rationale's absence or presence played a dispositive role in the court's ultimate decision.[79] Evidence of control or domination, for instance, may appear with equal frequency in Contract and Tort claims, but its absence or presence may serve as dicta in certain situations and a dispositive justification in others.

Moreover, Thompson's study does not recognize Fraud as a distinct substantive claim. Instead, Fraud claims were recharacterized as Contract, Criminal, Statute, or Tort claims on an exclusive basis.[80] But the lines for recharacterization are not always so clear. For instance, although Fraudulent Misrepresentation claims can be characterized as either Contract or Tort,[81] they frequently receive ambiguous treatment in opinions.[82] And courts frequently conflate the distinction between Contract-based warranty and Tort-based deceit claims.[83] The versatility in the characterization of Fraud claims presents a potentially distortive effect on Thompson's findings about the frequency of and rates for veil-piercing in Contract and Tort.

Thompson's omission of Fraud is puzzling given its long-suspected role as an accessory to veil-piercing. Stephen Presser, for instance, has observed

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79. *Id.* at 1063 ("[T]he same reasons seem to appear in cases which pierce the veil and those decisions which do not." (citation omitted)). Although failed and successful attempts to pierce do mention the same four rationales with the most frequency, their proportional representation varies substantially. For instance, more than any other rationale, the absence of fraud or misrepresentation is mentioned in decisions not to pierce, but its presence is far less prominent in successful veil-piercing cases. *Compare id.* at 1063 tbl.11, *with id.* at 1064 n.141.

80. *See supra* note 77 and accompanying text.

81. *See, e.g.*, Thomas C. Galligan Jr., *Contortions Along the Boundary Between Contracts and Torts*, 69 TUL. L. REV. 457, 462–63 (1994) (identifying six considerations for deciding whether to characterize a claim in Contract or Tort). Moreover, as is evident in conflicts of laws, characterization can be a difficult problem. *See, e.g.*, A. H. ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 176–83 (1940) (examining the problem of characterization for Contract and Tort).

82. *See, e.g.*, Moses v. Martin, 360 F. Supp. 2d 533, 543–44 (S.D.N.Y. 2004) (denying a motion to dismiss a Fraud claim that was allegedly a restatement of a breach-of-contract claim on the basis that the defendant owed a fiduciary duty); Ziegler v. Inabata of Am., Inc., 316 F. Supp. 2d 908, 916–17 (D. Colo. 2004) (denying a motion for summary judgment for claims based on an ownership interest, "thereby invoking claims for breach of contract and fraudulent, or at a minimum, negligent misrepresentation").

83. *See, e.g.*, William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 800 (1966) (characterizing warranty as a "freak hybrid born of the illicit intercourse of [T]ort and [C]ontract"); Glenn D. West & W. Benton Lewis, Jr., *Contracting to Avoid Extra-Contractual Liability—Can Your Contractual Deal Ever Really Be the "Entire" Deal?*, 64 BUS. LAW. 999, 1009–10 (2009) ("Even since courts have enforced express warranties as contractual promises, many courts have continued to recognize a separate [T]ort claim for breaches of those express warranties to the extent that such claims also satisfy the culpability, materiality, and reliance requirements of a [M]isrepresentation claim brought in [T]ort."). The economic-loss doctrine represents a judicial attempt to clarify this distinction. *See, e.g.*, United Vaccines, Inc. v. Diamond Animal Health, Inc., 409 F. Supp. 2d 1083, 1094 (W.D. Wis. 2006) ("The economic loss doctrine is intended to keep a party from effecting an end run around [C]ontract law to recover under [T]ort law what it could not recover under [C]ontract law and through [C]ontract remedies." (citation omitted)).

that veil-piercing "often incorporates and bears a strong resemblance to [F]raud."[84] And Robert Clark has gone so far as to argue that most veil-piercing claims may be seen as simply Fraudulent Transfers disguised.[85] Even Stephen Bainbridge, who despises veil-piercing, believes that "[F]raud and [M]isrepresentation asks the right questions and seems far more likely to lead to correct outcomes."[86] In a similar vein, Richard Posner has suggested that, "[s]ince [F]raud is independently actionable, one may question the need for a doctrine of piercing the corporate veil in [C]ontract cases."[87]

Posner's skepticism presumes that the orthodox economic distinction between voluntary and involuntary creditors is judicially compelling.[88] In theory limited liability does not present a moral-hazard problem of externalizing risk to voluntary creditors because they can and will take optimal precautions.[89] But when the transaction costs of precautions are prohibitively high, the probability that a corporation will engage in risk-shifting activity increases.[90] Imposing Tort liability compensates involuntary creditors while also creating incentives for corporations to engage in an efficient amount of care.[91] This distinction should be obviated only when there is fraudulent

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84. PRESSER, *supra* note 1, § 1:1, at 1-7.

85. *See* Robert Charles Clark, *The Duties of the Corporate Debtor to Its Creditors*, 90 HARV. L. REV. 505, 540–53 (1977) (excepting veil-piercing of corporations with inadequate initial capitalization from his assertion).

86. Bainbridge, *supra* note 19, at 519.

87. Torco Oil Co. v. Innovative Thermal Corp., 763 F. Supp. 1445, 1451 (N.D. Ill. 1991) (Posner, J., by designation). *But see* Krendl & Krendl, *supra* note 12, at 31 ("Fraud cases are difficult to prove, and the quantum of evidence available in most corporate veil cases is considerably smaller than would be required to carry the burden on a fraud claim.").

88. *But see infra* note 287 and accompanying text.

89. *See, e.g.*, Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499, 503 (1976) (contending that lenders will exact higher interest rates on limited liability corporations as a risk premium); *cf.* PRESSER, *supra* note 1, § 1:7, at 1-37 to 1-38 ("Posner's veil-piercing article . . . is simply developing an argument . . . already advanced by [Frederick] Powell.").

90. *See, e.g.*, Easterbrook & Fischel, *supra* note 18, at 105 ("This is a simple application of the Coase Theorem."); *id.* at 104–09 (explaining that some of a firm's costs for risky activities are shifted to involuntary creditors when high transaction costs prevent affected parties from charging an appropriate risk premium).

91. *See generally* Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1879–81 (1991) [hereinafter Hansmann & Kraakman, *Unlimited Liability*] (suggesting a rule of pro rata shareholder liability for corporate Torts); Leebron, *supra* note 31, at 1568–69 (arguing that the justifications for limited liability do not apply to noncontractual creditors). Hansmann and Kraakman's suggestion has been criticized on essentially enforcement grounds. *See, e.g.*, Janet Cooper Alexander, *Unlimited Shareholder Liability Through a Procedural Lens*, 106 HARV. L. REV. 387, 388–90 (1992) (contending that Hansmann and Kraakman's proposal would encounter too many procedural barriers and might not be implementable); Joseph A. Grundfest, *The Future of Unlimited Liability: A Capital Markets Perspective*, 102 YALE L.J. 387, 389–91 (1992) (criticizing a pro rata rule for shareholder liability because it does not account for how capital markets actually would react to that rule). *But see generally* Henry Hansmann & Reinier Kraakman, *A Procedural Focus on Unlimited Shareholder Liability*, 106 HARV. L. REV. 446 (1992) [hereinafter Hansmann & Kraakman, *Procedural Focus*] (responding to Alexander's criticisms); Henry Hansmann & Reinier Kraakman, *Do the Capital*

conduct, as it impedes the ability of parties to assess accurately the optimal level of precautions.[92]

Thompson's methodology permits only a crude assessment of this account's validity. His study does provide limited insight into the success of veil-piercing claims in Contract and Tort, as well as the frequency with which courts mention rationales.[93] But a more fine-grained analysis would examine the relative sophistication of contracting parties to see whether veil-piercing truly "is rooted in concerns of inequitable bargains."[94] And one would want to examine intentional, negligent, and quasi-contractual Torts to see whether "[T]ort settings seem to involve different concerns than [C]ontracts cases."[95]

Moreover, one would want to examine the rationales that seem instrumental to a court's ultimate decision whether to pierce. As Frank Gevurtz has pointed out,

> The question is not what sort of creditor more deserves piercing in the abstract. Rather, the question is what specific facts justify piercing in favor of either type of creditor. The utility of the [T]orts versus [C]ontracts distinction is that the facts which should justify piercing may be different when dealing with the different types of claimants.[96]

Although not a prerequisite in most tests, evidence of "fraud or something like it" is demanded by Delaware courts[97] and is often given significant weight in other jurisdictions;[98] if veil-piercing indeed concerns inequitable bargains, Thompson has suggested that, in those settings, "the role of the court will be similar to that in other [C]ontract contexts—has there been fraud or some other reason why the bargain struck by the parties should not be respected by the court?"[99] Alternatively, if fraud or misrepresentation is absent or insufficient, evidence of commingled assets or a failure to observe

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Markets Compel Limited Liability? A Response to Professor Grundfest, 102 YALE L.J. 427 (1992) [hereinafter Hansmann & Kraakman, *Capital Markets*] (rebutting Grundfest's criticisms). For an analysis of the origins of this carve out, see Daniel R. Kahan, Note, *Shareholder Liability for Corporate Torts: A Historical Perspective*, 97 GEO. L.J. 1085, 1102–03 (2009).

92. *See, e.g.*, Easterbrook & Fischel, *supra* note 18, at 112 ("Th[e] distinction between [C]ontract and [T]ort creditors breaks down when the debtor engages in fraud or misrepresentation . . . [because] the creditor will not demand adequate compensation.").

93. Thompson, *Empirical Piercing*, *supra* note 20, at 1063 tbl.11, 1068–70.

94. *Id.* at 1068.

95. *Id.* at 1069.

96. Gevurtz, *supra* note 46, at 859.

97. *See, e.g.*, Mobil Oil Corp. v. Linear Films, Inc., 718 F. Supp. 260, 268 (D. Del. 1989) ("Fraud or something like it is required." (citations omitted)).

98. *See, e.g.*, Associated Vendors, Inc. v. Oakland Meat Co., 26 Cal. Rptr. 806, 813 (Cal. Dist. Ct. App. 1962) ("[W]hile the doctrine does not depend on the presence of actual fraud, it is designed to prevent what would be fraud or injustice, if accomplished."). Not surprisingly, this requirement has mutated. *See, e.g.*, Kuibyshevnefteorgsynthez v. Model, Civ. A. No. 93-4919, 1995 WL 66371, at *15 (D.N.J. Feb. 6, 1995) ("'[I]njustice or the like' will suffice." (citation omitted)).

99. Thompson, *Common Law Piercing*, *supra* note 59, at 622.

basic corporate formalities might assert itself more when veil-piercing litigants succeed in Contract than in Tort.[100]

One other rationale meriting specific attention is undercapitalization. For years commentators and courts have debated how such evidence should be weighed for veil-piercing cases. Early commentators argued that undercapitalization was a serviceable proxy for fraud or misrepresentation that warranted veil-piercing in all contexts,[101] and, despite difficulties in determining the amount and sufficiency of capital possessed by a defendant corporation,[102] this evidence seemed to command judicial attention.[103] In particular, courts focused on the amount of initial capital supplied by an incorporator, grounded in the fact that minimum statutory requirements had replaced individual legislative scrutiny over when to grant a corporate charter.[104] But the gradual relaxation of these statutory requirements to a nominal, if any, amount over the course of the twentieth century has eroded the utility of initial capital for veil-piercing purposes.[105] As a result, the focus has expanded to include whether there was sufficient capital at the time of the alleged misconduct or, alternatively, if assets had been siphoned for a

100. *See, e.g.*, Millon, *supra* note 16, at 1335 (acknowledging that veil-piercing may be justified "if shareholders have deliberately ignored corporate formalities to mislead creditors into believing they were dealing with the shareholders directly rather than with agents of a corporation").

101. *See, e.g.*, ELVIN R. LATTY, SUBSIDIARIES AND AFFILIATED CORPORATIONS § 36, at 128 (1936) ("[I]n the case of the inadequately financed corporation . . . the creditor [can] be said to rely on the capital or financial resources reasonably to be expected of an owner . . . . The law cannot compel business success; it can compel fair dealing."); Adolf A. Berle, Jr., *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343, 349 n.15 (1947) ("In all cases insufficient capitalization is persuasive evidence that the enterprise was not separate."). *But see* Tex. Indus., Inc. v. Dupuy & Dupuy Developers, Inc., 227 So. 2d 265, 269 (La. Ct. App. 1969) ("Inadequate capitalization is not of itself a badge of fraud.").

102. *See, e.g.*, Radaszewski v. Telecom Corp., 981 F.2d 305, 309–10 (8th Cir. 1992) (interpreting "properly capitalized" as including "financial responsibility" on the way to assessing the sufficiency of a defendant's liability insurance); James R. Gillespie, *The Thin Corporate Line: Loss of Limited Liability Protection*, 45 N.D. L. REV. 363, 386–87 (1969) ("Courts are . . . hard pressed to indicate what they actually mean by inadequate capitalization in the absence of predetermined statutory or legal standards and perhaps the paucity of economic evidence and evaluation in the individual cases.").

103. *See, e.g.*, Douglas & Shanks, *supra* note 29, at 214 ("[A]n analysis of the cases seems to indicate that the courts are more impressed by an obvious inadequacy of capital on the part of the subsidiary than they are by the presence of any of the other indicia of identity between the corporations . . . ."); Hackney & Benson, *supra* note 28, at 859 ("There is no question today but that inadequate capital is considered by all courts to be one of the most important factors in cases imposing liability on shareholders for corporate obligations.").

104. *See, e.g.*, Hackney & Benson, *supra* note 28, at 851–52 (describing how state legislatures shifted from granting corporate charters by scrutinizing individual operational plans to "adopt[ing] general conditions to be met by all who sought to incorporate, including minimum capitalization requirements").

105. *See, e.g.*, Millon, *supra* note 16, at 1337 ("[T]aken by itself initial capitalization should be of limited relevance to the question of shareholder liability for corporate obligations. Corporation statutes no longer include requirements for minimal initial capitalization or ongoing levels of capital.").

shareholder's own use.[106] Whatever the relevant time, the sufficiency of capital would seem to bear more directly on the moral-hazard problem and thus have more relevance in Tort.[107]

Thompson's study seems to suggest otherwise. Undercapitalization appears in only a small fraction of veil-piercing cases in Tort (as well as Contract), and its mention is correlated with a modest overall veil-piercing rate of 53.22%.[108] According to Thompson, these findings paint undercapitalization's role in Tort as "an issue that appeals to commentators for reasons other than its predictive significance."[109] Merely examining the frequency of a rationale's mention in cases, however, tells only part of the story. Undercapitalization may not appear often with Tort, but it may nevertheless play a disproportionately more instrumental role in an ultimate decision to pierce there than with Contract. Without such data, the predictive value of this or any other rationale seems unclear, at best.

B. A New Methodological Leaf

This study examines veil-piercing cases in Westlaw from 1658 up to and including 2006.[110] Combinations of two search phrases, "pierc! /s veil" and "disregard! /s (entity entities)," were run in two comprehensive Westlaw databases whose coverages both begin in 1658.[111] The same searches also

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106. *See, e.g.*, Pierson v. Jones, 625 P.2d 1085, 1089 n.1 (Idaho 1981) (Bistline, J., dissenting) ("As to the issue of undercapitalization, the issue is not whether the corporation was initially undercapitalized, but whether [the defendant] drained the corporate assets for his own use."). *But see, e.g.*, Secon Serv. Sys., Inc. v. St. Joseph Bank & Trust Co., 855 F.2d 406, 416 (7th Cir. 1988) ("A requirement to provide continuing capitalization, as [plaintiff] urges, probably would injure noncontrolling creditors, rather than helping them, by precipitating unnecessary forced sales."); Douglas G. Smith, *Piercing the Corporate Veil in Regulated Industries*, 2008 BYU L. REV. 1165, 1174 ("[G]enerally one must look to the capitalization of the corporation when it is formed—not during subsequent periods of operation.").

107. *See, e.g.*, Robert E. Dye, Note, *Inadequate Capitalization as a Basis for Shareholder Liability: The California Approach and a Recommendation*, 45 S. CAL. L. REV. 823, 836 (1972) ("The case for inadequate capitalization as a basis for shareholder liability is perhaps strongest where the corporate creditor is a [T]ort victim with an unpaid judgment."). *But see* Hackney & Benson, *supra* note 28, at 869 ("It should, however, be noted that in almost every [T]ort case . . . where undercapitalization was stressed in the denial of limited liability, the court has found additional factors constituting misuse of the corporate form . . . .").

108. *But see* Thompson, *Empirical Piercing*, *supra* note 20, at 1066 n.149 (reporting undercapitalization present in 12 Torts cases with a 75.00% veil-piercing rate versus 87 Contracts cases with a 70.11% veil-piercing rate); *id.* at 1063 tbl.11 (reporting a total of 120 cases with a 73.33% veil-piercing rate).

109. *Id.* at 1067.

110. *Cf.* Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 WIS. L. REV. 107, 134 (examining summary judgment cases and finding that "Lexis and Westlaw were highly consistent in the cases they reported" and "[t]he agreement between the services was statistically strong").

111. *Scope of ALLCASES*, WESTLAW, http://web2.westlaw.com/scope/default.aspx?db=ALLCASES&RP=/scope/default.wl&RS=WLW10.08&VR=2.0&SV=Split&FN=_top&MT=208&MST=; *Scope of ALLCASES-OLD*, WESTLAW, http://web2.westlaw.com/scope/default.aspx?db=

were performed in specialized Westlaw databases and then cross-checked to ensure the dataset's completeness.[112] The dataset terminates at 2006 to determine whether veil-piercing rates vary in "published" versus "unpublished" dispositions, a distinction within federal courts that was implemented around 1973 and effectively terminated as of January 1, 2007.[113]

The searches yielded an initial dataset of 15,188 cases.[114] I discarded cases without any relevant or meaningful reference to veil-piercing and then coded the remaining dataset of 11,546 cases. I collected data for a decision's year, publication status, and precedential value; the court's jurisdiction and type; the source of the law applied; the type of defendant and shareholder; all of the substantive claims connected to veil-piercing; and all of the rationales that appeared instrumental to the court's decision whether to pierce.

Five groups of cases then were set aside. The first group comprises cases against only an unincorporated business entity, such as an LLC or LLP.[115] The second group comprises direct liability,[116] director or officer

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ALLCASES-OLD&RP=/scope/default.wl&RS=WLW10.08&VR=2.0&SV=Split&FN=_top&MT=208&MST=.

112. The specialized databases are ALLFEDS, SCT, CTA, DCT, DCT-OLD, ALLSTATES, and ALLSTATES-OLD.

113. *See* FED. R. APP. P. 32.1 (permitting citations of all decisions "designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like"); David R. Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61, 85, 94 (2009) (discussing the history of the precedential value of unpublished decisions). Numerous states, however, continue to permit unpublished or nonprecedential decisions. *See* Shenoa L. Payne, *The Ethical Conundrums of Unpublished Opinions*, 44 WILLAMETTE L. REV. 723, 754 (2008) ("[S]tate courts are still free to promulgate their own rules of court regarding unpublished state court decisions.").

114. The broader search terms yield almost twice as many cases as Thompson would have collected over his initial time frame. By comparison, Thompson's search terms would have yielded 7,148 cases over the same time frame. Thompson also used four unidentified Westlaw Key Numbers, Thompson, *Empirical Piercing*, *supra* note 20, at 1036 n.1, but searches using the four most likely candidates (101k1.4!, 101k1.5!, 101k1.6!, 101k1.7!) yield only an additional 1,379 cases, for a total just over half the amount obtained here.

115. *E.g.*, Faulkner v. Kornman (*In re* The Heritage Org.), 413 B.R. 438, 514 n.64 (Bankr. N.D. Tex. 2009) ("It is unclear if the alter ego theory applies to limited partnerships in Delaware."); Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n, 77 S.W.3d 487, 499 (Tex. App.—Texarkana 2002, pet. denied) ("The theory of alter ego, or piercing the corporate veil, is inapplicable to partnerships."). Courts in most jurisdictions, in agreement with most commentators, permit veil-piercing of LLCs. *See, e.g.*, Ditty v. CheckRite, Ltd., 973 F. Supp. 1320, 1335 (D. Utah 1997) ("While there is little case law discussing veil piercing theories outside the corporate context, most commentators assume that the doctrine applies to limited liability companies."). But a number of relevant substantive differences between LLCs and corporations militate against unified analysis. *See, e.g.*, Hollowell v. Orleans Reg'l Hosp., No. Civ.A. 95-4029, 1998 WL 283298, at *9 (E.D. La. May 29, 1998). In *Hollowell*, the court noted,

> Professor Kalinka cautions that the analyses between corporate veil piercing and limited liability company veil piercing may not completely overlap, noting that "[b]ecause the Louisiana LLC law requires fewer formalities such as annual elections of directors, keeping minutes, or holding meetings, failure to follow these formalities should not serve as grounds for piercing the veil of an LLC."

Id. (alteration in original) (quoting 9 SUSAN KALINKA, LOUISIANA LIMITED LIABILITY COMPANIES AND PARTNERSHIPS § 1.32, at 64 (1997)); *see also* Stephen M. Bainbridge, *Abolishing LLC Veil*

participation,[117] or successor liability cases,[118] all of which are often conflated with veil-piercing.[119] The third group comprises cases involving reverse-piercing or triangular-piercing, both of which are substantively distinct from orthodox veil-piercing.[120] The fourth group comprises cases that were decided subsequently by a higher court, those remanded or vacated without instructions, and those not decided by trial, such as motions to dismiss, for judgment notwithstanding the verdict, or for summary judgment.[121] And the final group comprises so-called attribution cases[122] in which a shareholder's action or status is imputed to the defendant corporation for the purposes of, *inter alia*, agriculture,[123] arbitration,[124] bankruptcy,[125]

Piercing, 2005 U. ILL. L. REV. 77, 77 ("This extension of a seriously flawed doctrine into a new arena is not required by statute and is insupportable as a matter of policy.").

116. *E.g.*, Wicks v. Milzoco Builders, Inc., 470 A.2d 86, 89 (Pa. 1983) ("There is a distinction between liability for individual participation in a wrongful act and an individual's responsibility for any liability-creating act performed behind the veil of a sham corporation.").

117. *E.g.*, Advanced Constr. Corp. v. Pilecki, 901 A.2d 189, 195 (Me. 2006) ("Corporate officers who participate in wrongful acts can be held liable for their individual acts, and such liability is distinct from piercing the corporate veil.").

118. *E.g.*, Explosives Corp. of Am. v. Garlam Enters. Corp., 615 F. Supp. 364, 368 (D.P.R. 1985) ("[T]he doctrine of disregarding the corporate entity is distinct from the question of a successor's liability . . . .").

119. *See, e.g.*, *Wicks*, 470 A.2d at 88–90 (discussing the Superior Court's erroneous conflation of direct liability with veil-piercing).

120. *See, e.g.*, Nursing Home Consultants, Inc. v. Quantum Health Servs., Inc., 926 F. Supp. 835, 840 n.12 (E.D. Ark. 1996). In *Nursing Home Consultants*, the court described triangular-piercing and reverse-piercing as follows:

> Conceptually, a triangular pierce results from a sequential application of the traditional piercing doctrine and the 'reverse piercing' doctrine[,] which is itself controversial in that it allows corporations to be held liable for the acts of their shareholders, . . . permits two related, though independent, corporate entities . . . , corporations which hold no ownership interest in each other, to be held liable for the malfeasance of the other.

Id.

121. *See, e.g.*, Carte Blanche (Sing.) PTE., Ltd. v. Diners Club Int'l, Inc., 758 F. Supp. 908, 914 (S.D.N.Y. 1991) ("The Second Circuit has noted that the question of piercing the corporate veil is a fact-intensive issue that generally must be submitted to the jury." (citing Am. Protein Corp. v. AB Volvo, 844 F.2d 56 (2d Cir. 1988))). Segregating summary judgment cases is also justified because of the asymmetrical standard and the different meanings to be ascribed to an outcome based on overwhelming evidence versus a genuine issue of material fact. *See, e.g.*, Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 886–89 (2007) (finding that 72% of motions in 2000 were filed by defendants (with a 49% success rate) versus 28% by plaintiffs (with a 36% success rate)); Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1941 (2009) ("[I]t is easier to obtain summary judgment against the party who will bear at least the burden of production at trial . . . .").

122. *See, e.g.*, Sternberg v. O'Neil, 550 A.2d 1105, 1126 n.45 (Del. 1988) ("Under the attribution theory, only the precise conduct shown to be instigated by the parent is attributed to the parent; the rest of the subsidiary's actions still pertain only to the subsidiary. The two corporations remain distinct entities." (citation omitted)).

123. *See, e.g.*, Morris Okun, Inc. v. Harry Zimmerman, Inc., 814 F. Supp. 346, 348 (S.D.N.Y. 1993) ("PACA [The Perishable Agricultural Commodities Act] establishes a statutory trust for the benefit of sellers and suppliers. . . . This legal framework is to be distinguished from the piercing the veil doctrine . . . .").

discrimination,[126] environmental,[127] ERISA/Social Security,[128] jurisdiction,[129] labor,[130] tax,[131] and workers' compensation claims.[132]

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124. *See, e.g.*, Laborers' Int'l Union v. Foster Wheeler Corp., 868 F.2d 573, 576 (3d Cir. 1989) ("The requirement for a judicial determination of the [contractual] obligation to arbitrate may not be circumvented in this case by relying on the parent-subsidiary relationship . . . .").

125. *See, e.g.*, Zubik v. Zubik, 384 F.2d 267, 273 (3d Cir. 1967) ("Cases in bankruptcy . . . call for an entirely different evaluation of 'fraud' or 'injustice' than cases of controlled corporate subsidiaries, or as in this instance, a case of corporate tort." (citations omitted)).

126. *See, e.g.*, Dearth v. Collins, 441 F.3d 931, 933 (11th Cir. 2006) ("[T]here is nothing in Title VII that supports [the] claim that individual capacity liability can be imposed on the basis of the alter ego doctrine, and the only circuit that we found to have addressed the issue rejected the argument."); Worth v. Tyer, 276 F.3d 249, 262 (7th Cir. 2001) ("Our rejection of the 'alter ego' theory is further supported by Congress' aversion to individual liability under Title VII."). *But see* Papa v. Katy Indus., Inc., 166 F.3d 937, 940–41 (7th Cir. 1999) (abrogating the "integrated enterprise" test for corporate parents under the Americans with Disabilities Act, Age Discrimination in Employment Act, and Title VII in favor of certain possibly justified scenarios). In *Papa*, Judge Posner reasoned,

> If because of neglect of corporate formalities, or a holding out of the parent as the real party . . . a parent (or other affiliate) would be liable for the torts or breaches of contract of its subsidiary, it ought equally to be liable for the statutory torts created by federal antidiscrimination law. . . .
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> . . . [W]e cannot think of a good reason why the legal principles governing affiliate liability should vary from statute to statute, unless the statute, or the particular policy that animates the statute, ordains a particular test.

Id. at 941. But "[t]he primary purpose of the Civil Rights Act, and Title VII in particular is remedial. . . . To effectuate its purpose of eradicating the evils of employment discrimination, Title VII should be given a liberal construction." Armbruster v. Quinn, 711 F.2d 1332, 1336 (6th Cir. 1983), *abrogated on other grounds*, Arbaugh v. Y&H Corp., 546 U.S. 500 (2006). This conflicts with the common law presumption against corporate disregard, which also involves an inquiry into control or domination that is substantively distinct from whether a parent constitutes an "employer" under the various statutes. *See, e.g.*, *Worth*, 276 F.3d at 259–61 (analyzing separately a defendant's qualification as an employer under Title VII and its status as an alter ego of another corporation).

127. *See, e.g.*, Comm'r v. RLG, Inc., 755 N.E.2d 556, 563 (Ind. 2001) ("The responsible corporate officer doctrine is distinct from piercing the corporate veil, and explicitly expands liability beyond veil piercing.").

128. *See, e.g.*, Lumpkin v. Envirodyne Indus., Inc., 933 F.2d 449, 461 (7th Cir. 1991) ("[T]he corporate veil may be pierced more easily in ERISA cases than in pure [C]ontract cases in order to promote the federal policies underlying the statute . . . .").

129. *See, e.g.*, Marine Midland Bank v. Miller, 664 F.2d 899, 903 (2d Cir. 1981) ("In deciding whether the corporation is a real or a shell entity, the appropriate standard should not be the very stringent test, normally applied in other contexts, for piercing the corporate veil. . . . The fiduciary shield doctrine . . . is not concerned with liability. It is concerned with jurisdiction . . . .").

130. *See, e.g.*, UA Local 343 of the United Ass'n of Journeymen v. Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1475 (9th Cir. 1994) ("The alter ego doctrine as developed in labor law is analytically different from the traditional veil-piercing doctrine as developed in corporate law.").

131. *See, e.g.*, Norman v. Murray First Thrift & Loan Co., 596 P.2d 1028, 1031 (Utah 1979) ("[T]here are two separate and independent doctrines which act as a basis for the disregard of the corporate fiction. The one is the equitable alter ego doctrine; the other involves disregarding the corporate fiction whenever it serves the purposes of the tax statute.").

132. *See, e.g.*, Crissman v. Healthco Int'l, Inc., No. 89 C 8298, 1992 WL 223820, at *7 (N.D. Ill. Sept. 2, 1992) ("The traditional definition of a corporation's alter ego . . . springs from an

These exclusions resulted in a final dataset of 2,908 cases. Whenever a court applied separate veil-piercing analyses to different codefendant shareholders, the decision was split into separate entries.[133] There are thus a total of 2,929 observations in the final dataset. And whenever multiple claims, shareholders, or rationales appeared in a case, all of them were coded on a nonexclusive basis, and thus the totals for those observations exceed the total number of cases.

To obtain a more fine-grained portrait, I collected data on specific subclaims. Fraud claims were classified as Common Law Deceit or Fraud, Fraudulent Misrepresentation, Fraudulent Transfer, Innocent Misrepresentation, or Negligent Misrepresentation.[134] Using Meir Dan-Cohen's scheme for measuring bargaining power, Contract claims were classified as bargains between individual(s) and organization(s), or between organization(s) and organization(s).[135] And using Prosser and Keeton's architecture, Tort claims were classified as Intentional Tort Against a Person, Intentional Tort Against Property, Negligence, Strict Liability, or Tortious Interference with Contract.[136]

I also collected data on the rationales that seem instrumental to a court's ultimate decision whether to pierce. Fifteen categories were used: agency, alter ego, assumption of risk, commingling, control or domination, fraud or misrepresentation, informalities, injustice or unfairness, instrumentality, procedure, sham or shell, siphoning of funds, statutory policy, undercapitalization, and other.[137] Subcategories also were used for certain rationales. Commingling was divided into whether it involved advertising, accounts or assets, contracts, directors, employees, officers, records, retirement plans, stationery, or taxes. Fraud or misrepresentation was divided into

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entirely different context having little bearing upon the concerns underlying the Workers' Compensation Act.").

133. This virtually tracks the distinction between corporate and individual shareholders.

134. Also included within the Common Law Deceit or Fraud group were cases with an ambiguous reference to some kind of fraud claim.

135. *See* MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS 83 (1986) ("If organizations are to be acknowledged as distinctive legal actors, . . . the law has to deal with interactions among organizations (O-O relations), and with 'mixed' interactions, in which individuals interact with organizations (O-I relations)."). Dan-Cohen's scheme actually comprises three types of relations, *id.*, but bargains as between individual(s) and individual(s) are not applicable here as one of the parties in a veil-piercing situation must be a corporation.

136. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 7, at 31–32 (5th ed. 1984) (noting that "[t]here are many possible approaches to the law of [T]orts, and . . . [b]y some odd coincidence, the classifications usually have gone by threes, and nearly everyone has found some 'tripartite division,'" and proceeding to divide the area into three parts, based on the Restatement of Torts: intent, negligence, and strict liability). But their treatise actually is organized around the five classic types of torts that are used here. *Id.* at xv.

137. *But cf.* Thompson, *Empirical Piercing*, *supra* note 20, at 1044 (using a universe of eighty-five possible rationales organized into "several major categories"). Thompson, however, presented select results for only twelve different rationales. *See id.* at 1063 tbl.11, 1064–65 n.141. Many of these rationales were used here to facilitate comparison, along with a few others based upon a survey of the cases.

whether it concerned a defendant corporation's assets, ultimate shareholder's identity, or some ambiguous reference. Informalities was divided into a failure to conduct meetings, failure to maintain records, or some other irregularity. Procedure was divided into whether it involved a failure to raise veil-piercing, inadequate pleading, or a jurisdictional defect.[138] And undercapitalization was divided into whether there was inadequate capital at incorporation or some later time.

The instrumental rationale data are the product of a subjective process. Thompson's study collected data on whether a rationale simply was mentioned in connection with the decision whether to pierce.[139] In contrast the present study's data on instrumental rationales merely may indicate what courts choose to cite in support of their ultimate decision.[140] To an extent this functionalist concern is constrained by the evidence available to a court as well as the court's integrity in articulating a justification.[141] More importantly, extracting a case's *ratio decidendi* is fundamental to our precedent-based system, and publicly available cases are the only insight into judicial reasoning accessible to entrepreneurs, litigants, and other courts.[142] Accordingly, the present data most directly reflect what actually informs these parties' deliberations.

Thompson's and this study's results are subject to selection bias. Both studies ran particular search phrases within Westlaw's electronic database of cases over a certain time frame.[143] Although Westlaw does feature

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138. The procedure rationale concerns the nature of the reason cited by a court in disposing of a case and not the issue in which veil-piercing was couched. Thompson does not include procedure as a rationale for which data were collected, but he does devote a separate subsection to cases involving procedural questions, such as the fiduciary shield doctrine, that were included in his dataset. *See id.* at 1059–60.

139. *See id.* at 1044 ("[T]he reasons courts gave to explain their decision to either pierce or not pierce the corporate veil were collected. These were less objective than the inquiries made above and reflected a judgment by the court to cite the presence or absence of certain factors.").

140. *See, e.g.*, JEROME FRANK, LAW AND THE MODERN MIND 104 n.* (1930) ("'I saw where justice lay, and the moral sense decided the court half the time; I then sat down to search the authorities . . . but I almost always found principles suited to my view of the case . . . .'" (emphasis removed) (quoting a personal letter from "a great American judge," Chancellor Kent)).

141. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 238–40 (1986) (articulating his theory of adjudication, "Law as [I]ntegrity").

142. *See, e.g.*, Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1195 (1991) ("Published opinions are all most of us ever work from."); Alan L. Tyree, *Fact Content Analysis of Case Law: Methods and Limitations*, 22 JURIMETRICS J. 1, 2 (1981) ("[U]sing the reported facts of the judgment . . . is precisely what every lawyer does when reading a case for the purpose of applying it to, or distinguishing it from, the case which is currently being argued."). *But cf.*, Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 97 (2008) ("As the quip goes in the world of computers: garbage in, garbage out.").

143. Thompson deserves considerable credit for his use of Westlaw, which had been introduced only about fifteen years prior to the completion of his study. *See, e.g.*, William G. Harrington, *A Brief History of Computer-Assisted Legal Research*, 77 LAW LIBR. J. 543, 543 (1985) (stating, in 1985, that twenty years ago "[l]egal research by computer was unknown"). Some, including this author, may recall the excruciating experience of working with user-unfriendly Westlaw-only

"unpublished" and "nonprecedential" dispositions, even these represent only a fraction of matters involving veil-piercing.[144] Some matters arise and are resolved before even reaching a court.[145] Further, after a complaint has been filed, some matters are arbitrated, mediated, settled, dismissed, or summarily adjudged prior to a trial,[146] and there is evidence suggesting that settlement rates may vary based on the type of claim.[147] Litigants' attorney-fee arrangements, estimated probabilities of success, perceived significance of the dispute, and resources all also can affect a matter's outcome.[148] Moreover, the decision to make a case available to Westlaw can be the product of selective discretion.[149] Accordingly, publicly available decisions may reflect a myriad of dynamics independent of a matter's merits. Indeed, Thompson has speculated that some of these selection effects may explain the asymmetry of veil-piercing in Contract versus Tort:

> There may be some selection bias in this area or the parties may have different stakes in the outcome. The change in [P]roduct-[L]iability

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computer terminals and waiting for tortoise-paced printouts. More relevantly, ever since its debut, Westlaw has been expanding its databases' coverage. *See, e.g.*, Peter W. Martin, *Reconfiguring Law Reports and the Concept of Precedent for a Digital Age*, 53 VILL. L. REV. 1, 21 (2008) ("It was not until the mid- to late 1990s that [Lexis and Westlaw] attained sufficient scope and functionality to become comprehensive research environments—virtual libraries—rather than simply places to begin case research."). The databases at Thompson's disposal thus may have featured much narrower coverage than what was available for this study.

144. *See, e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 125–26 (2002) ("On the one hand, judicial decisions represent only the very tip of the mass of grievances. . . . On the other hand, published decisions are a skewed sample of that tip of judicial decisions."); David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 710 (2007) (examining dockets from four federal district courts and finding only 3.10% of judicial actions that resulted in an opinion).

145. *See, e.g.*, David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 85–87 & fig.2 (1983) (conducting a survey of 5,000 households and finding that only about 5% of grievances, albeit only in excess of $1,000, result in a court filing).

146. *See, e.g.*, Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 8 (reporting that, from 1962 to 2004, the number of terminated civil cases increased 400% while trials fell 32%).

147. *See, e.g.*, Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 133 (2009) (examining two federal district court jurisdictions and finding that Tort cases settle at a higher rate than Contract cases).

148. *See generally* Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990); Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEXAS L. REV. 1943 (2002); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (all discussing how various factors impact what disputes are litigated).

149. *See, e.g.*, Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 107 (2002) ("While this [selection] rule commands that judges publish only those opinions that are 'of general precedential value,' a rather large body of literature suggests that the rule is sufficiently vague to permit circuit court judges to publish or not as they see fit." (citations omitted)); Kimberly D. Krawiec & Kathryn Zeiler, *Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-theories*, 91 VA. L. REV. 1795 app. A at 1883–87 (2005) (detailing limitations of Westlaw's databases and the possibility of systematic differences between federal and state court decisions); Karen Swenson, *Federal District Court Judges and the Decision to Publish*, 25 JUST. SYS. J. 121, 136 (2004) (finding that federal judges tend to publish opinions in which large corporations and other members of the "economic upper class" are parties).

> law and [T]ort law generally in recent decades may have led plaintiffs to bring suits that go beyond prior law. Additionally, the large number of corporate defendants may mean that they have more to lose than plaintiffs have to gain, pushing the results in the direction of less piercing.[150]

As a result, the findings in both studies may present a rather skewed portrait of veil-piercing claims.[151]

But this does not undermine the validity or utility of either study. As a preliminary matter, veil-piercing is a remedial instrument for satisfying a judgment that stands apart from a matter's substantive cause(s) of action;[152] a veil-piercing request is thus among the last things courts tend to hear within a dispute. This delayed ripeness would seem to mute selection effects somewhat, as the bulk of matters disposed by dismissal, summary judgment, or settlement will concern the substantive claim, and not veil-piercing; accordingly, the population of cases may be more representative here than for ordinary causes of action. Further, the undeniable impact that publicly available cases have on the behavior of courts, firms, and litigants would seem to be quite stable, as the overall pattern of veil-piercing cases in the present study has remained relatively constant over time.[153] Certainly, this study's results should be understood as limited in scope and treated with appropriate care. But the continuing importance of Thompson's study and its puzzling results within any discussion of veil-piercing provide sound reasons for conducting a new study with a comparable yet refined methodology.

II. Findings

Apparently the "mists of metaphor" envelop an empirical puzzle about veil-piercing.[154] Thompson's study suggests that veil-piercing claims are being adjudicated in unpredicted and inexplicable ways.[155] We thus are presented with a puzzle involving commentators, courts, and the empirical

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150. Thompson, *Empirical Piercing*, *supra* note 20, at 1069–70.

151. This is the premise of Christina L. Boyd and David Hoffman's project, *Disputing Limited Liability*, 104 NW. U. L. REV. (forthcoming 2010), *available at* http://ssrn.com/abstract=1483278, which uses dockets to follow a sample of veil-piercing claims as they move through federal district courts over a five-year period; notably, they find that 66% of cases containing a veil-piercing claim ultimately settle and obtain results largely consistent with Thompson's study. *Id.*

152. *See, e.g.*, Kern v. Gleason, 840 S.W.2d 730, 736 (Tex. App.—Amarillo 1992, no writ) ("The piercing of the corporate veil is not a separate cause of action . . . . The various doctrines for disregarding the corporate entity are only remedial, for they only expand the potential sources of recovery.").

153. *See infra* Table 2.

154. *See* Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926) ("The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor.").

155. *See* Thompson, *Empirical Piercing*, *supra* note 20, at 1038 ("The results [of this study] suggest that the factors affecting the judicial outcome are not necessarily as suggested by previous commentary.").

evidence. Determining which of these key pieces are amiss may suggest how to diagnose the problems that plague veil-piercing. And until this positive account of veil-piercing is resolved, engaging the normative question of what to do with the doctrine seems aimless.

This study reexamines the empirical piece of veil-piercing. Although basic statistics can reveal only so much, the doctrine's complex nature necessitates categorical reduction. This Part sifts through all the data and analyzes the most notable results as they pertain to a court's jurisdiction, the law applied, the supporting substantive claims, and the cited instrumental rationales; when valuable, results for combinations of these categories also are presented.[156] This Part concludes with the results of recasting all of the data in terms of voluntary and involuntary creditors.

A. Navigating the Jurisdictional Waters

The present study finds an overall veil-piercing rate of 48.51%. This is substantially higher than the 40.18% rate found by Thompson's study[157] and comports with George Priest and Benjamin Klein's hypothesis that plaintiffs and defendants will prevail with equal frequency in tried cases.[158] The overall rate vacillated until the 1960s, an amount of volatility that is not surprising given the relative paucity of cases up to that point.

Since the 1970s, the number of veil-piercing cases has increased markedly, and the rate has stabilized. The increase roughly coincides with the advent of unpublished and nonprecedential opinions, which comprise 20.70% of the final dataset but whose veil-piercing rates do not deviate considerably from the overall dataset.[159]

156. In the interest of economy, the discussion and tables do not present all the results for the numerous possible combinations of data.

157. Thompson, *Empirical Piercing*, *supra* note 20, at 1048 tbl.1.

158. *See* Priest & Klein, *supra* note 148, at 20 (noting that "the model has demonstrated a *tendency* toward 50 percent plaintiff victories in litigation"). *But see* Clermont & Eisenberg, *supra* note 144, at 140 ("[O]ur work has shown that one should not expect 50% win rates.").

159. *See infra* Tables 1A–B.

Table 1A. Veil-Piercing by Publication Status and Jurisdiction[160]

Status	*n*	V-P Rate (%)
Unpublished	605	**48.60**
Federal	194	**53.09**
State	411	46.67
Partially Published	12	8.33
Federal	12	8.33
State	0	--
Published	2312	**48.70**
Federal	647	46.68
State	1665	**49.49**

Table 1B. Veil-Piercing by Precedential Status and Jurisdiction

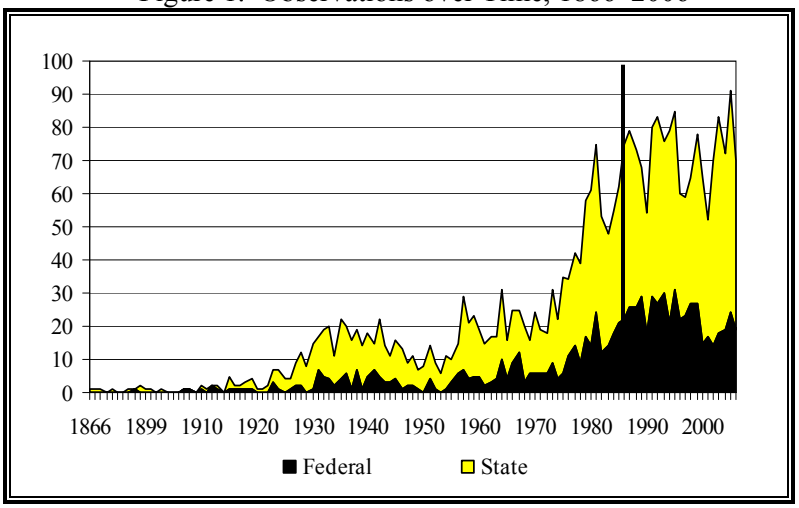
Status	*n*	V-P Rate (%)
Precedential	2323	**48.64**
Federal	647	46.68
State	1676	**49.50**
Non-Precedential	606	48.02
Federal	206	**50.49**
State	400	46.75

Veil-piercing cases then exploded during the 1980s at a rate lower than the nationwide trend for all filings.[161] All of these trends in the initial dataset are reflected in the number of final observations per year:

160. Veil-piercing rates in bold exceed the overall rate of 48.51%.

161. Prior to 1980 there was an average of 9.29 veil-piercing cases per year, which increased to 63.4 cases per year from 1980 to 1989. The highest number of veil-piercing cases for that entire decade came in 1989 and represents a 2.52% increase over the mean; 1989 also saw the highest number of federal and state filings for that entire decade and represents a 28.29% increase over the mean. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS (1980–1993) ("United States District Courts—National Judicial Caseload Profile"); ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY (1994–2006) ("Table C-2, U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit During the Twelve Month Period Ended March 31"); COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS (1981–1982, 1985–2007) (no data were collected for 1983 and 1984).

Figure 1. Observations over Time, 1866–2006[162]



The line marks 1986, the end point of Thompson's original study.[163] Over the same time frame, there are 1,415 observations in this study;[164] from 1986 up to and including 2006, there are 1,514 observations.[165]

Table 2. Veil-Piercing by Decade

Decade	*n*	% of Total	V-P Rate (%)
1860–1869	1	0.03	0.00
1870–1879	1	0.03	**100.00**
1880–1889	1	0.03	0.00
1890–1899	6	0.20	**66.67**
1900–1909	4	0.14	**75.00**
1910–1919	23	0.79	**60.87**
1920–1929	55	1.88	47.27
1930–1939	173	5.91	**52.02**
1940–1949	136	4.64	42.65
1950–1959	145	4.95	**57.93**
1960–1969	199	6.79	**50.25**
1970–1979	319	10.89	**49.53**
1980–1989	646	22.06	46.75
1990–1999	718	24.51	46.38
2000–2006	502	17.14	**49.40**

162. *See infra* Table 2.

163. *See* Thompson, *Empirical Piercing*, *supra* note 20, at 1044 ("This project includes all Westlaw cases through 1985 concerning the issue of piercing the corporate veil.").

164. *Cf. id.* at 1049 tbl.2 (reporting 1,585 cases up to and including 1985).

165. *But see supra* note 64 and accompanying text.

Veil-piercing claims prevail exclusively against close corporations.

Table 3. Veil-Piercing by Corporation Type

Corporation	*n*	V-P Rate (%)
Close	2925	**48.58**
Public	4	0.00

This is easily explained by the tendency of public corporations to feature disperse shareholding that in turn precludes a sufficient level of control or domination to justify veil-piercing.[166] There are some successful piercing claims against close corporations held by a public corporate affiliate or parent, but the total data are incomplete given the failure of some decisions to specify the shareholder's status.

More difficult to explain is that veil-piercing clearly presents a greater risk to individual shareholders than corporate parents.

Table 4. Veil-Piercing by Shareholder Type and Jurisdiction

Shareholder	*n*	V-P Rate (%)
Entity	889	41.17
Federal	377	37.14
State	512	44.14
Person	2047	**51.69**
Federal	482	**55.60**
State	1565	**50.48**

These results not only comport with Thompson's[167] but hold across federal and state courts, as well as for each and every type of substantive claim.[168]

166. *See, e.g.*, GEVURTZ, *supra* note 59, § 1.5.3, at 78–79 ("[R]equiring control screens out piercing against the shareholders of a publicly traded corporation . . . . This provides a doctrinal underpinning to explain the fact that there never has been a case in which the court pierced to hold shareholders in a public corporation liable for the company's debts.").

167. *Cf.* Thompson, *Empirical Piercing*, *supra* note 20, at 1055 tbl.7 (reporting a 43.13% rate for 339 individual-shareholder cases versus 37.21% for 237 corporate-parent cases); Thompson, *Group Piercing*, *supra* note 20, at 386 tbl.1 (reporting a 34.00% rate for 547 corporate-group cases up to and including 1996). Matheson's study finds a 20.56% veil-piercing rate: "This difference is substantial: substantive piercing in the parent-subsidiary context occurs approximately half as often as piercing does generally, and more than one-third less often than the most comparable database explored by other studies." Matheson, *supra* note 73, at 1114. Matheson's comparison with Thompson's as well as Hodge and Sachs's studies, however, makes the surprisingly simple error of mismatching time frames. Thompson's results concern *all* cases in his study up to and including 1996. Thompson, *Group Piercing*, *supra* note 20, at 385. Hodge and Sachs's sample consisted of cases from 1986 up to and including 1995. Hodge & Sachs, *supra* note 73, at 347. Matheson's study, in contrast, examines cases from January 1, 1990 up to March 1, 2008. Matheson, *supra* note 73, at 1108 n.51. The problem is that the veil-piercing rate for corporate groups may have declined over Matheson's time frame. And this is in fact the case. The present dataset finds a

The data collectively rebut a broad conviction that veil-piercing is more judicially compelling in the parent–subsidiary context.[169] This chasm may be due to a multilevel misunderstanding. There is apparently a prevailing belief and criticism that courts apply essentially the same test to corporate and individual shareholders.[170] While this was true at the turn of the twentieth century, when states began to permit corporate groups,[171] courts now seem to have shifted their view:

> An individual shareholder, by virtue of his ownership of shares, does not own the corporation's assets and, as a result, does not own subsidiary corporations in which the corporation holds an interest. . . . A corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the

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42.63% rate for corporate-parent cases prior to 1990, versus a 38.96% rate for such cases from 1990 up to and including 2006. *Cf.* McPherson & Raja, *supra* note 73, at 18 (reporting a 16.46% veil-piercing rate against corporate parents from a sample of cases from 1996 up to and including 2005). The decline is not very steep and the rate is considerably higher than Matheson's, but this may be attributed to some considerable differences in the construction of the respective studies' datasets. *Compare* Matheson, *supra* note 73, at 1109–12 (detailing Matheson's methodology), *with supra* subpart I(B). Far more important is that all of the empirical studies using nonsampled data find that individual shareholders are much more vulnerable to veil-piercing than corporate parents.

168. *See infra* Figure 5; *cf.* Matheson, *supra* note 73, at 1122 tbl.7 (reporting specific results for claims against corporate groups).

169. *See, e.g.*, PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT, AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS, at xl (1987) ("[M]ost of the presumed advantages of limited liability are simply irrelevant where corporate groups are involved."); *supra* note 26 and accompanying text. Stephen Presser presents an interesting argument that a commitment to democratic individualism may explain the diverse coalition of scholars who are critical of extending broader limited liability protection to corporate groups. *See* PRESSER, *supra* note 1, § 1:11, at 1-67.

170. Kurt Strasser, for instance, has expressed this view succinctly:

> While traditional corporate law has not articulated different rules for a parent company in its role as a shareholder than for individual investor shareholders, parent companies in fact present different policy issues and their limited liability should be determined by a different analysis. The core idea is that a parent company as a shareholder in its subsidiary companies is in quite a different economic role and performs quite a different management function than individual investor shareholders . . . . The parent is not an independent investor.

Kurt A. Strasser, *Piercing the Veil in Corporate Groups*, 37 CONN. L. REV. 637, 638 (2005). There is yet another level, of no consequence here, with regard to the use of agency principles:

> It is useful to distinguish situations in which liability is imposed on a parent because of the existence of the agency relation . . . from cases in which the corporate veil of the subsidiary is pierced for other reasons of policy. Unfortunately, however, the courts have not always observed the distinction between these two separate bases for parent's liability. . . . The erroneous language, however, has not resulted in unjust decisions in most cases.

RESTATEMENT (SECOND) OF AGENCY § 14M reporter's note (1958). Interestingly, this language did not survive revision. RESTATEMENT (THIRD) OF AGENCY § 1.01 reporter's note (2006).

171. *See, e.g.*, BLUMBERG, *supra* note 168, at xxxix–xl ("When . . . corporate groups became possible . . . courts applied the same standard to a shareholder that was in fact a parent corporation even though ultimate investors were not involved at all."); HENN, *supra* note 6, § 148, at 258 ("Generally-speaking, the principles governing one-man, family, and other close corporations are applicable to subsidiary and other affiliated corporations."). *But see supra* note 169.

> subsidiary; and, it follows with even greater force, the parent does not own or have legal title to the subsidiaries of the subsidiary.[172]

This sweeping generalization contrasts with the academic debate, which has focused on the structure of economic incentives. Some regard corporate shareholders as presenting a potentially greater moral-hazard problem,[173] while others view veil-piercing as a potential threat to stimulating investment in corporate parents.[174] That courts reach into the assets of individual shareholders more frequently does not mean the commentary is incorrect, merely that the antithetical positions seem to proceed from different premises.

Far more congruous are the federal and state veil-piercing rates. Federal litigants enjoy considerably more success in district court than in the court of appeals,[175] which suggests that trial defendants may have an added incentive to seek reversal of an unfavorable decision.[176]

Table 5. Veil-Piercing by Jurisdiction and Court

Court	*n*	V-P Rate (%)
Federal	853	47.60
Trial	413	**54.72**
Intermediate Appellate	432	40.74
Supreme	8	**50.00**
State	2076	**48.89**
Trial	192	44.79
Intermediate Appellate	1318	48.48
Supreme	566	**51.24**

172. Dole Food Co. v. Patrickson, 538 U.S. 468, 475 (2003) (citations omitted).

173. *See, e.g.*, Easterbrook & Fischel, *supra* note 18, at 111 ("[T]he moral-hazard problem is probably greater in parent-subsidiary situations because subsidiaries have less incentive to insure.").

174. *See, e.g.*, PRESSER, *supra* note 1, § 1:11, at 1-67 ("Presumably, those who profit by reducing the risk to the parent are the parent's shareholders, and, presumably, the more we reduce their risk and thereby raise the potential profit to them the more we will encourage their investment.").

175. The high veil-piercing rate in Supreme Court cases should be discounted given their miniscule number. Not easily dismissed, however, is that the veil-piercing rate in federal district courts is higher than that in any other level of federal or state court. This raises a potential representativeness concern with Boyd and Hoffman's exclusively federal sample. *See* Boyd & Hoffman, *supra* note 151 (manuscript at 27).

176. *But see, e.g.*, Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 359–63, 360 figs.2 & 3 (2005) (reporting an increase in the affirmance rate of the courts of appeals from 72% in 1945 to 91% in 2003, in contrast to a steady rate for the Supreme Court). To be clear, this study does not establish whether there is a weaker "affirmance effect" for veil-piercing cases, as only the highest relevant decision from a case was coded and information on affirmances or reversals was not collected. For instance, one possibility may be that losing plaintiffs pursue futile appeals on a disproportionate basis.

Although a federal common law does exist,[177] veil-piercing is predominantly a creature of state law. Consistent with the nature of corporation statutes as well as the most common types of substantive claims, state courts produced 70.88% of the total observations. Surprisingly, unlike their federal peers, state litigants appear to experience increasing veil-piercing success at successively higher levels of the judicial system.[178] This, however, may reflect wrinkles within the original database's scope, as Westlaw does not feature comprehensive coverage of state trial and intermediate appellate court decisions;[179] the problem seems most pronounced at the trial court level, which accounts for only 9.25% of the total state observations.[180] Nevertheless, these results roughly comport with the rates for all other federal and state court levels as well as the overall rate; accordingly, if the state trial court results can be regarded as somewhat representative, then they suggest that plaintiffs with stronger cases tend to pursue appeals.[181]

B. Exploring the State of Veil-Piercing

Veil-piercing claims are susceptible to some forum shopping. Potential defendants can exert some control by deciding where to incorporate and then attempting to invoke the internal-affairs doctrine, which applies the law of the state of incorporation to resolve certain choice-of-law disputes.[182] Not all jurisdictions, however, apply the doctrine to veil-piercing disputes, either because a superior interest belongs to a nonincorporating state, or the traditional province of "internal affairs" concerns shareholder disputes with

177. *See, e.g.*, Bergesen v. Lindholm, 760 F. Supp. 976, 986 (D. Conn. 1991) ("[This] court applies federal common law, importing into its decision those principles of state law which it finds both persuasive and appropriate to subsume.").

178. The standard of review for veil-piercing cases varies among federal circuits as well as states. *See, e.g.*, Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145, 148 (3d Cir. 1988) (citing cases that variously apply either a "clearly erroneous" or a plenary/de novo standard of review to veil-piercing decisions).

179. *See, e.g.*, Morris L. Cohen, *Researching Legal History in the Digital Age*, 99 LAW LIBR. J. 377, 386 (2007) ("Historical coverage of state court decisions in LexisNexis and Westlaw is still limited. Both systems cover the highest court of most states back to their published beginnings, but retrospective coverage of lower courts is much less extensive.").

180. *Cf.* Thompson, *Empirical Piercing*, *supra* note 20, at 1050 tbl.4 (reporting only 401 trial court versus 860 intermediate appellate court decisions).

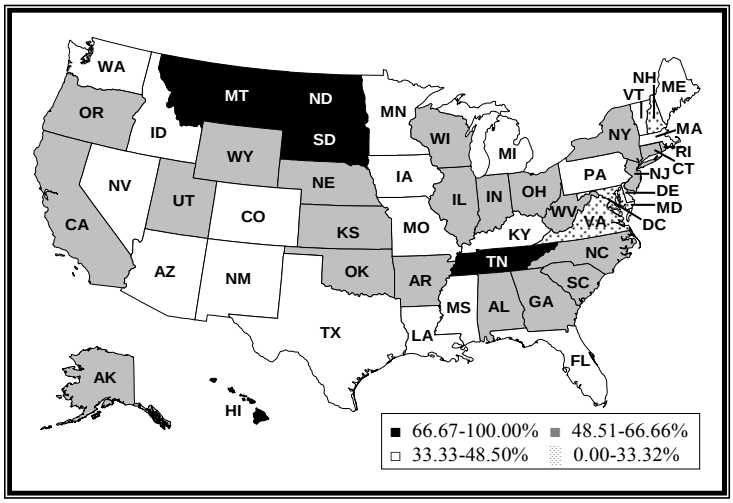
181. *But cf.* Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38 J. LEGAL STUD. 121, 138 (2009) (finding that the reversal rates for state jury trials and appeals by defendants exceed those for plaintiffs).

182. *See, e.g.*, CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89 (1987) ("No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations . . . ."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 304 (1971) ("The local law of the state of incorporation will be applied to determine the right of a shareholder to participate in the administration of the affairs of the corporation . . . except in the unusual case where . . . some other state has a more significant relationship . . . ."); *id.* §§ 145, 186–88 (indicating different choice-of-law rules for Tort versus Contract claims).

managers, not external creditors.[183] Comparatively clearer is the choice afforded to prospective plaintiffs, whether voluntary or involuntary,[184] by the opportunity to evaluate where to commence a suit. In this regard, one important consideration might be whether a jurisdiction exhibits a relatively lax stance towards piercing.

Veil-piercing rates vary substantially based on which state's law is applied.[185] Litigants prevail at least 50.00% of the time under the law of twenty-five different jurisdictions:

Figure 2. Overall v. State Law Veil-Piercing Rates[186]



183. *Compare* Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 94 n.311 (2006) ("Personal liability of officers, directors, and shareholders to the corporation and its creditors falls squarely within the traditional understanding of internal affairs."), *with* Jennifer J. Johnson, *Risky Business: Choice-of-Law and the Unincorporated Entity*, 1 J. SMALL & EMERGING BUS. L. 249, 272–73, 273 n.91 (1997) (observing that, while "[t]here is a general consensus that the doctrine . . . extends to the personal liability of shareholders for corporate debts," a few courts "have applied other conflicts theories to piercing issues").

184. *But cf.* Hansmann & Kraakman, *Procedural Focus*, *supra* note 91, at 450–51 (arguing for application of the internal-affairs doctrine only to voluntary creditors, versus traditional conflicts rules for involuntary creditors).

185. As with Thompson's study, the data here were not organized by jurisdiction as some cases may apply foreign law, and the origin of the relevant test has a more direct bearing on the ultimate decision to pierce. *See* Thompson, *Empirical Piercing*, *supra* note 20, at 1044 (stating that the factual data presented include which jurisdiction's law was applied in the case, not the jurisdiction in which the case was litigated).

186. *See infra* Table 6. Due to a lack of space, Table 6 omits data for cases applying the law of foreign jurisdictions (0.00%, 1 case), Guam (100.00%, 3 cases), Northern Mariana Islands (50.00%, 2 cases), Puerto Rico (50.00%, 6 cases), and the Virgin Islands (0.00%, 1 case). Of these jurisdictions Thompson reported data only from Puerto Rico. *See* Thompson, *Empirical Piercing*, *supra* note 20, at 1051 tbl.6. For the curious, using the 2000 Presidential Electoral College results, the veil-piercing rate was 49.75% in "Blue States" versus 45.77% in "Red States." *See 2000 Presidential Electoral and Popular Vote Table*, FED. ELECTION COMM'N, http://www.fec.gov/pubrec/fe2000/elecpop.htm (displaying the 2000 electoral college results broken up by Red States going to George Bush and Blue States going to Al Gore).

All of the shaded states have a veil-piercing rate above the overall rate of 48.51%, with the five darkest states featuring a rate in excess of 66.66%. The remaining states have a veil-piercing rate below the overall rate, with the three dotted states—Maryland, New Hampshire, and Virginia—featuring a rate less than 33.33%.

Table 6. Veil-Piercing by Jurisdiction Law Applied

State Law	*n*	% of Total	V-P Rate (%)
Alabama	40	1.37	**50.00**
Alaska	14	0.48	**57.14**
Arizona	30	1.02	33.33
Arkansas	44	1.50	**56.82**
California	232	7.92	**50.86**
Colorado	34	1.16	44.12
Connecticut	74	2.53	**54.05**
Delaware	35	1.19	34.29
District of Columbia	23	0.79	**52.17**
Federal	111	3.79	44.14
Florida	105	3.58	40.95
Georgia	86	2.94	**59.30**
Hawaii	8	0.27	**75.00**
Idaho	20	0.68	40.00
Illinois	80	2.73	**52.50**
Indiana	39	1.33	**61.54**
Iowa	33	1.13	39.39
Kansas	39	1.33	**61.54**
Kentucky	25	0.85	48.00
Louisiana	112	3.82	38.39
Maine	7	0.24	42.86
Maryland	31	1.06	25.81
Massachusetts	62	2.12	43.55
Michigan	83	2.83	39.76
Minnesota	51	1.74	47.06
Mississippi	17	0.58	47.06
Missouri	87	2.97	48.28
Montana	16	0.55	**68.75**
Nebraska	36	1.23	**61.11**
Nevada	16	0.55	43.75
New Hampshire	10	0.34	30.00
New Jersey	57	1.95	**49.12**
New Mexico	16	0.55	37.50
New York	269	9.18	**49.81**
North Carolina	32	1.09	**53.13**
North Dakota	7	0.24	**85.71**
Ohio	179	6.11	**55.87**

(continued)

Table 6 (cont.). Veil-Piercing by Jurisdiction Law Applied

State Law	*n*	% of Total	V-P Rate (%)
Oklahoma	27	0.92	**51.85**
Oregon	35	1.19	**65.71**
Pennsylvania	162	5.53	44.44
Rhode Island	15	0.51	**53.33**
South Carolina	25	0.85	**60.00**
South Dakota	6	0.20	**83.33**
Tennessee	47	1.60	**68.09**
Texas	211	7.20	40.76
Utah	26	0.89	**53.85**
Vermont	5	0.17	40.00
Virginia	55	1.88	29.09
Washington	69	2.36	44.93
West Virginia	14	0.48	**50.00**
Wisconsin	34	1.160	**61.76**
Wyoming	21	0.72	**61.90**

One might expect a sizable number of cases to apply Delaware law, as the jurisdiction is an epicenter of corporate law.[187] But this is not the case, perhaps because Delaware seems to be the preferred choice of relatively sophisticated incorporators that may have a keener awareness of the veil-piercing standard.[188] Despite the sea of ink spilled on the race for corporate charters, there has been a curiously limited amount of focus on whether a stiffer veil-piercing standard may enhance a jurisdiction's appeal to prospective incorporators.[189] In this regard, Delaware law does not disappoint, with a very low 34.29% veil-piercing rate and litigants prevailing a mere 21.43% of the time against corporate parents, as compared to 40.91% against

187. *See* David Rosenberg, *Supplying the Adverb: The Future of Corporate Risk-Taking and the Business Judgment Rule*, 6 BERKELEY BUS. L.J. 216, 239 (2009) (discussing factors that have "made Delaware a center of American corporate law for generations").

188. *See, e.g.*, Jens Dammann & Matthias Schündeln, *The Incorporation Choices of Privately Held Corporations* 9 tbl.2 (The Univ. of Texas Sch. of Law, Law & Econ. Research Paper No. 119, 2008), *available at* http://ssrn.com/abstract=1049581 (finding that 53.10% of corporations that incorporate outside of the state of their principal place of business choose Delaware).

189. While the Cary–Winter debate has raged for decades, *see generally* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 14–31 (1993), veil-piercing has become involved only recently. *See, e.g.*, Dammann & Schündeln, *supra* note 187, at 18 tbl.4 (finding the risk of veil-piercing to be a statistically significant consideration in where to incorporate for corporations with at least 1,000 employees); Douglas G. Smith, *A Federalism-Based Rationale for Limited Liability*, 60 ALA. L. REV. 649, 669 (2009) ("To the extent limited liability is preserved, so is shareholder wealth. Thus, all other things being equal, one would expect that shareholders and corporate managers would be attracted to states with strong doctrines of limited liability."). *But see, e.g.*, Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 437–41 (2003) (arguing from history that limited liability may not have been a primary consideration for incorporators); Presser, *supra* note 59, at 159 ("[I]t is the quality of the investment opportunity itself, and not the elimination of possible personal liability, that leads an investor to commit his or her capital.").

individuals. These results suggest that the state's purported reputation for engaging in a "race to the bottom" remains intact.[190] And that reputation has roots within substantive law, as a long-standing strict requirement of "fraud or something like it" coheres with the observation that piercing the veil under Delaware law is "comparatively difficult."[191]

The distinction of being the most difficult jurisdiction in which to pierce belongs to Maryland. Veil-piercing claims prevailed a paltry 25.81% of the time and never against a corporate parent.[192] This appears to be the conscious product of Maryland's courts, which have described attempts to pierce the veil under their state law as a "[H]erculean task."[193] Like Delaware, this may be attributed to a "markedly restrictive approach" that requires proof of actual common law fraud or evasion of a statute to justify veil-piercing.[194]

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190. Guhan Subramanian, *The Disappearing Delaware Effect*, 20 J.L. ECON. & ORG. 32, 56–57 (2004) (explaining that the promanagement trajectory of Delaware law is consistent with a "race to the bottom"). *But see, e.g.*, Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 279 (1985) (finding positive cumulative abnormal returns for firms that reincorporate in Delaware, suggesting that the state is actually leading a race to the top). By comparison, Thompson found absolutely no successful veil-piercing in eleven cases applying Delaware law prior to 1986. *See* Thompson, *Empirical Piercing*, *supra* note 20, at 1051 tbl.6. *Contra* Equitable Trust Co. v. Gallagher, 99 A.2d 490, 493 (Del. 1953) ("But the corporate entity is here of no importance. . . . We have here . . . the important facts that the defendant owned a clear majority of the stock . . . and that he personally dominated the corporation in all its operations . . . ."); Ford v. Harris Moving & Storage, Inc., C.A. No. 6359, 1981 WL 15151, at *1 (Del. Ch. June 16, 1981) ("Mr. Harris' manipulation of his corporation for his own benefit calls for a disregard of the corporate entity, the piercing of the corporate veil and the imposition of personal liability . . . ."); Ne. Loan v. Furniture Mart, C.A. No. 4901, 1977 WL 9536, at *6 (Del. Ch. Sept. 21, 1977) (holding that the "corporate identity will be disregarded if its purpose is to shield fraud, as I am satisfied was the case here"). Thompson also reported no successful veil-piercing in three cases applying Puerto Rican law. *See* Thompson, *Empirical Piercing*, *supra* note 20, at 1051 tbl.6, 1053 n.91. *Contra* Forastieri v. E. Air Lines, Inc., No. Civ. 79-2544(PG), 1983 WL 364564, at *7 (D.P.R. July 5, 1983) ("[W]hen the result was to cause the corporation to default before the principals of the corporation . . . it is fully justifiable for a court to pierce and disregard the corporate veil and find plaintiffs to be one with the corporation . . . .").

191. PRESSER, *supra* note 1, § 2:8, at 2-73; *see also supra* note 97 and accompanying text. Recent decisions relaxing the "fraud or something like it" requirement, however, suggest to Presser that "the days of Delaware as a state where it was exceptionally difficult to pierce the corporate veil may be numbered." PRESSER, *supra* note 1, § 2:8, at 2-88. From 1986 up to and including 2006, 38.46% of veil-piercing claims under Delaware law prevailed.

192. *But see* Thompson, *Empirical Piercing*, *supra* note 20, at 1051 tbl.6 (finding a comparatively liberal 40.00% rate in 15 pre-1986 cases).

193. Dixon v. Process Corp., 382 A.2d 893, 895 (Md. Ct. Spec. App. 1978) ("[W]oe unto the creditor who seeks to rip away the corporate facade in order to recover from one sibling of the corporate family what is due from another in the belief that the relationship is inseparable, if not insufferable, for his is a [H]erculean task.").

194. Ice. Telecom, Ltd. v. Info. Sys. & Networks Corp., 268 F. Supp. 2d 585, 591 (D. Md. 2003); *see also* G. Michael Epperson & Joan M. Canny, *The Capital Shareholder's Ultimate Calamity: Pierced Corporate Veils and Shareholder Liability in the District of Columbia, Maryland, and Virginia*, 37 CATH. U. L. REV. 605, 637 (1988) (describing Maryland's approach as a "bright-line test" that affords little judicial discretion).

Indeed, attempts to expand the standard to permit a mere showing of a need "to enforce a paramount equity" apparently have failed.[195]

If Maryland resembles Hercules, then North and South Dakota are the Scylla and Charybdis of veil-piercing.[196] Although there is a miniscule number of cases in these jurisdictions, North Dakota's 85.71% and South Dakota's 83.33% are two of the highest veil-piercing rates within the dataset.[197] And these states share more than just geographical proximity. Neither jurisdiction requires a showing of actual fraud, instead permitting proof of injustice or unfairness to suffice.[198] Further, both states find evidence of inadequate capitalization to be important, if not compelling.[199] Based on his comprehensive state-by-state review, Stephen Presser describes North Dakota as producing "one of the purest undercapitalization cases ever decided in the United States," that seems to "squarely fit within [Henry Winthrop] Ballantine's . . . theory that undercapitalization alone could support piercing the veil."[200]

Not surprisingly, California law is among the most frequently applied to veil-piercing cases and features a 50.86% rate.[201] Ballantine's "optimistic

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195. Residential Warranty Corp. v. Bancroft Homes Greenspring Valley, Inc., 728 A.2d 783, 789 (Md. Ct. Spec. App. 1999) ("Despite the proclamation that a court may pierce the corporate veil to enforce a paramount equity, arguments that have urged a piercing of the veil 'for reasons other than fraud' have failed in Maryland courts." (quoting Travel Comm., Inc. v. Pan Am. World Airways, Inc., 603 A.2d 1301, 1317 (Md. Ct. Spec. App. 1992))). Whether veil-piercing lies within law or equity, though, is a matter of dispute among some courts. *See, e.g.*, G-I Holdings, Inc. v. Bennet (*In re* G-I Holdings, Inc.), 380 F. Supp. 2d 469, 476 (D.N.J. 2005) ("A circuit split exists as to whether the nature of the relief in an action to pierce the corporate veil is legal or equitable.").

196. *Cf.* HOMER, THE ODYSSEY 217 (Robert Fitzgerald trans., Vintage Classics 1990) ("And all this time,/in travail, sobbing, gaining on the current,/we rowed into the strait—Skylla to port and on our starboard beam Kharybdis, dire/gorge of the salt sea tide.").

197. *Cf.* Thompson, *Empirical Piercing*, *supra* note 20, at 1051 tbl.6 (finding a 75.00% rate for 4 North Dakota cases and a 62.50% for 8 South Dakota cases). Guam's 100.00% rate is the highest, but the mere 3 cases in the dataset apply a test lifted from California law. *See, e.g.*, Associated Ins. Underwriters, Inc. v. Guam Int'l Insurers, Inc., Civ. No. 90-00059A, 1991 WL 336911, at *2 (D. Guam June 18, 1991) (applying the Ninth Circuit's alter-ego test, which is derived from California law).

198. *See, e.g.*, Jablonsky v. Klemm, 377 N.W.2d 560, 563–64 (N.D. 1985) ("We . . . follow the generally accepted rule that proof of fraud is not a necessary prerequisite for disregarding the corporate entity. . . . [T]here must exist an element of injustice or fundamental unfairness . . . ."); Mobridge Cmty. Indus., Inc. v. Toure, Ltd., 273 N.W.2d 128, 132 (S.D. 1978) (finding a sufficient reason for veil-piercing to be "when retention of the corporate fiction would 'produce injustices and inequitable consequences'").

199. The Dakotas, however, appear to take different approaches to the Contract–Tort distinction. *Compare Jablonsky*, 377 N.W.2d at 565 (embracing "the attitude toward judicial piercing of the corporate veil [that] is more flexible in [T]ort, as opposed to ordinary [C]ontract actions"), *with* Glanzer v. St. Joseph Indian Sch., 438 N.W.2d 204, 209 (S.D. 1989) (suggesting disagreement with the view that "some courts are more hesitant to pierce the corporate veil in [C]ontract cases than [T]ort cases").

200. PRESSER, *supra* note 1, § 2:38, at 2-443; *see also infra* notes 201–03 and accompanying text.

201. *Cf.* Thompson, *Empirical Piercing*, *supra* note 20, at 1051 tbl.6 (finding a 44.94% rate for 89 pre-1986 cases).

reading of prior cases"[202] about the sufficiency of undercapitalization arguably has contributed to California's reputation "as one of the jurisdictions most likely to pierce the corporate veil."[203] Robert Clark, however, has pointed out that undercapitalization alone is insufficient to justify veil-piercing in California.[204] Rather, the jurisdiction's relatively high veil-piercing rate may be attributable to an amorphous and liberal standard from that supreme court of which Cardozo would be proud:

> As the separate personality of the corporation is a statutory privilege, it must be used for legitimate business purposes and must not be perverted. When it is abused it will be disregarded and the corporation looked at as a collection or association of individuals, so that . . . the stockholders [will be] liable for acts done in the name of the corporation.[205]

This standard might suggest that individual shareholders are more vulnerable to veil-piercing than their corporate peers under California law,[206] but the results indicate that the distinction bears no difference. Courts reach into the assets of an individual shareholder 50.28% of the time, as compared to 51.79% of the time for corporate parents, which is among the more notable exceptions to the overall results in this regard.[207]

New York and Ohio law also rank among the most prominent producers of veil-piercing cases with a rate exceeding the total dataset.[208] As a

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202. Clark, *supra* note 85, at 547 n.108 ("California courts have emphasized the importance of inadequate capitalization. . . . These cases relied heavily on Ballantine's rather optimistic reading of prior cases . . . .").

203. PRESSER, *supra* note 1, § 2:5, at 2-31; *see also id.* § 1:9, at 1-51 to 1-52. *But see* Thompson, *Empirical Piercing*, *supra* note 20, at 1052 (speculating that California's relatively extended retention of a corporate statute providing for shareholder liability until 1931 "probably contributed to a perception that public policy in California favored piercing the corporate veil").

204. *See* CLARK, *supra* note 15, at 81 n.10 ("[A]t least in recent years, inadequate capitalization per se does not trigger veil piercing in California . . . .").

205. Mesler v. Bragg Mgmt. Co., 702 P.2d 601, 606 (Cal. 1985). In *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58 (N.Y. 1926), Justice Cardozo proposed his own opaque alternative to the metaphorical alter ego test:

> The logical consistency of a juridicial conception will indeed be sacrificed at times, when . . . essential to the end that some accepted public policy may be defended or upheld. . . . At such times unity is ascribed to parts . . . for the reason that only thus can we overcome a perversion of the privilege to do business in a corporate form.

Id. at 61. In essence Cardozo's test relies on basic agency principles unless there is insufficient evidence of control by a corporate parent; in that circumstance, a judicially identified public policy (that arguably requires some kind of statutory source) may be used to thwart a perceived "perversion" of concessionary privilege. *Id. But see* Michael, *supra* note 19, at 57 ("It makes no logical sense to base veil-piercing in a theory of corporate privilege.").

206. *See* PRESSER, *supra* note 1, § 2:5, at 2-46 (observing that California courts "seem to have adopted a more conservative approach to piercing the veil in recent cases involving parent-subsidiary corporations, [but] they may occasionally pierce the veil with less hesitation in cases involving individually-owned corporations").

207. *See infra* Table 4.

208. The top five producers of veil-piercing cases are, in order: New York, California, Texas, Ohio, and Pennsylvania. *But see* Larry E. Ribstein & Erin Ann O'Hara, *Corporations and the*

prominent rival to Delaware for corporations, New York has a veil-piercing doctrine described as "nearly impregnable."[209] This characterization would seem to be at odds with the 49.81% veil-piercing rate, but federal and state courts apply somewhat different tests for New York.[210] Federal courts in New York, which pierce 56.41% of the time, appear to apply the common alter ego test that requires proof of control or domination, as well as fraud or inequity;[211] in contrast, New York's state courts, which pierce 42.76% of the time, appear to require an additional prong of "perversion of the privilege to do business in a corporate form" that is a seeming tribute to their legendary jurist, Cardozo.[212] Ohio's 55.87% veil-piercing rate is considerably simpler to explain, as courts apply a fairly liberal standard that does not require proof of actual or constructive fraud.[213] What is perhaps most notable about the jurisdiction is the discrepancy between the mere fourteen cases applying

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Market for Law, 2008 U. ILL. L. REV. 661, 679–80 ("California, Delaware, Florida, Illinois, New York, and Texas each have statutes that provide for the automatic enforcement of choice-of-law clauses that designate the state's law in high value contracts."). Pennsylvania and Texas both feature a rate lower than the total dataset. When Pennsylvania law is applied, 44.44% of claims prevail, which suggests the "strong presumption" against veil-piercing professed by the state's Supreme Court may be aspirational. Lumax Indus., Inc. v. Aultman, 669 A.2d 893, 895 (Pa. 1995). *Cf.* Thompson, *Empirical Piercing*, *supra* note 20, at 1051 tbl.6 (finding a comparatively paltry 30.77% rate in 65 pre-1986 Pennsylvania cases). Moreover, the jurisdiction features an unsettled and unclear test, which has been described as "somewhat obscure." PRESSER, *supra* note 1, § 2:42, at 2-496; *see also* Good v. Holstein, 787 A.2d 426, 430 (Pa. Super. Ct. 2001) ("[T]here appears to be no clear test or well settled rule in Pennsylvania . . . as to exactly when the corporate veil can be pierced . . . ."); First Realvest, Inc. v. Avery Builders, Inc., 600 A.2d 601, 604 (Pa. Super. Ct. 1991) ("[T]here is no definitive test for piercing the corporate veil."). When Texas law is applied, 40.76% of claims prevail, although that jurisdiction has taken distinct approaches over time. *See infra* notes 214–28 and accompanying text; *cf.* Thompson, *Empirical Piercing*, *supra* note 20, at 1051 tbl.6 (finding a 34.91% rate in 106 pre-1986 Texas cases).

209. William D. Harrington, *Business Associations*, 43 SYRACUSE L. REV. 25, 65 (1992); *see also* William Wrigley Jr. Co. v. Waters, 890 F.2d 594, 600 (2d Cir. 1989) ("It is well settled that New York courts are reluctant to disregard the corporate entity.").

210. By comparison, Thompson found a 34.91% rate in 212 pre-1986 cases, but he does not provide federal and state splits. Thompson, *Empirical Piercing*, *supra* note 20, at 1051 tbl.6. The difference in New York federal and state courts also is manifest in their piercing rates based on the type of the shareholders. New York federal courts reach into the assets of an individual shareholder (70.49%) far more frequently than those of corporate parents (46.43%); these rates are both considerably higher than those of the state courts, which also reach into the assets of individual shareholders (48.67%) far more frequently than those of corporate parents (25.64%).

211. *See, e.g.*, David v. Glemby Co., 717 F. Supp. 162, 166 (S.D.N.Y. 1989) (describing New York's two-part test).

212. *See, e.g.*, Guptill Holding Corp. v. State, 307 N.Y.S.2d 970, 973 (N.Y. App. Div. 1970) ("Incorporations are, however, subject to 'tests of honesty and justice' and will be ignored if a 'perversion of the privilege to do business in a corporate form.' . . . Another factor looked to . . . is complete dominion and control . . . ."); *supra* note 204.

213. *See, e.g.*, Belvedere Condo. Unit Owners' Ass'n v. R.E. Roark Cos., 617 N.E.2d 1075, 1086 (Ohio 1993) (adopting the rule announced in Bucyrus–Erie Co. v. Gen. Prods. Corp., 643 F.2d 413, 419 (6th Cir. 1981) (holding that "[t]hough fraud is a frequent ground for application of the alter ego doctrine, it is not essential")). The veil-piercing rate for individual versus corporate shareholders approximates the overall dataset.

Ohio law in Thompson's study and the fifty-two observations in this dataset over the same time frame.[214]

Finally, Texas provides an interesting case study of different approaches to veil-piercing. Prior to 1986, Texas courts applied essentially an alter ego test, plus a catchall "exceptional situations"[215] provision that was criticized as so "difficult to describe"[216] as to be "almost totally useless,"[217] not to mention interpreted expansively by courts.[218] At the same time, courts also seemed to place inordinate emphasis on whether a defendant corporation had failed to follow basic formalities[219] or commingled affairs or assets,[220] contributing to the jurisdiction's overall reputation as relatively "lenient" for veil-piercing plaintiffs.[221]

In 1986 this leniency reached its apex. The Supreme Court of Texas ruled in *Castleberry v. Branscum*[222] that veil-piercing would be justified when there was evidence of an inequitable result, even when corporate formalities had been observed and commingling was absent.[223] Alternatively, and more significantly, a request for veil-piercing grounded in either Contract or Tort could prevail by demonstrating that the defendant corporation was a sham used to perpetuate merely constructive, and not

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214. *See* Thompson, *Empirical Piercing*, *supra* note 20, at 1051 tbl.6 (finding a 57.14% rate in 14 pre-1986 cases). The veil-piercing rate for Ohio law in the present study is roughly comparable over Thompson's time frame (55.77%) as well as the remaining period (55.91%), but the considerably larger number of Ohio observations (among other jurisdictions) in this dataset certainly contributes to the two studies' different overall rates.

215. *See, e.g.*, Bell Oil & Gas Co. v. Allied Chem. Corp., 431 S.W.2d 336, 339 n.3, 340 (Tex. 1968) (observing that "'individual officers, directors or stockholders'" will not be held liable "'except where it appears that the individuals are using the corporate entity as a sham to perpetuate a fraud, to avoid personal liability, avoid the effect of a statute, or in a few other exceptional situations'" (quoting Pace Corp. v. Jackson, 284 S.W.2d 340, 351 (Tex. 1955))).

216. 1 IRA P. HILDEBRAND, THE LAW OF TEXAS CORPORATIONS 43 (1942).

217. Robert W. Hamilton, *The Corporate Entity*, 49 TEXAS L. REV. 979, 982 (1971).

218. *See, e.g.*, *Bell*, 431 S.W.2d at 340 (noting that an arrangement that "in all probability will result in prejudice to those dealing with one or more of the units . . . or one which has actually resulted in the complaining party's having been placed in a position of disadvantage" easily would suffice); First Nat'l Bank v. Gamble, 132 S.W.2d 100, 103 (Tex. 1939) (finding that "an adherence to the fiction of the separate existence . . . would, under the particular circumstances, sanction a fraud or promote injustice").

219. *See, e.g.*, Coastal Shutters & Insulation, Inc. v. Derr, 809 S.W.2d 916, 921 (Tex. App.—Houston [14th Dist.] 1991, no writ) (listing "the degree to which the corporate formalities are followed" as the first of four factors used to establish an "alter ego" claim).

220. *See, e.g.*, State v. Swift & Co., 187 S.W.2d 127, 131–32 (Tex. Civ. App.—Austin 1945, writ ref'd n.r.e.) (describing the role of the courts in policing commingled stock ownership and corporate management as protecting "public convenience" and enforcing laws).

221. *See, e.g.*, Minchen v. Van Trease, 425 S.W.2d 435, 437 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd) (observing that Texas courts are more lenient than other jurisdictions as to veil-piercing).

222. 721 S.W.2d 270 (Tex. 1986).

223. *Id.* at 271 (citing *Bell*, 431 S.W.2d at 340, as well as analogous applications to fiduciary duties, fraudulent transfers, and trust funds). Notably, the cited portion of *Bell* contains absolutely no mention of corporate formalities.

actual, fraud.[224] The ensuing "uproar in the business community"[225] eventually triggered a nullificatory reaction by the state legislature, which amended Article 2.21A of the Texas Business Corporation Act, effective August 28, 1989, to reinstate a requirement of actual fraud against only Contract creditors.[226]

These events have had a significant impact on veil-piercing cases. Prior to *Castleberry* 38.83% of all veil-piercing opinions under Texas law resulted in success, which indicates that the jurisdiction's reputation for leniency was unfounded.[227] But this overall rate exploded to 60.00% during the three years after the decision, and has retreated to 40.22% since the enactment of Article 2.21A up to and including 2006.

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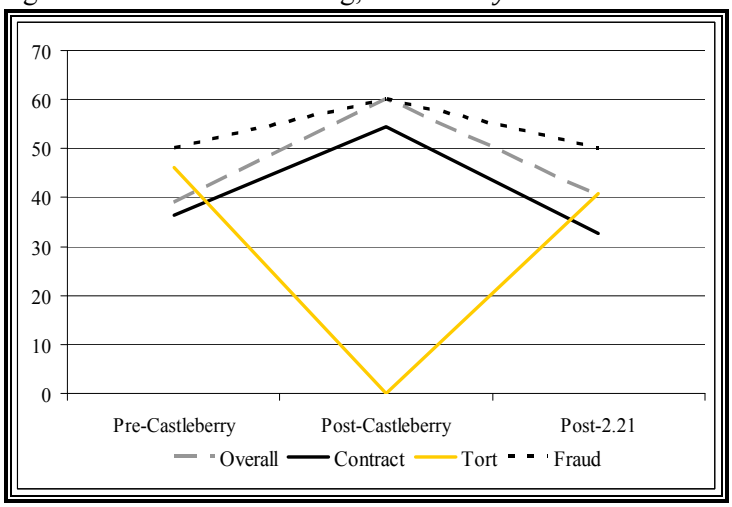
224. *Id.* at 273. The court had previously distinguished constructive fraud from actual fraud: "Actual fraud usually involves dishonesty of purpose or intent to deceive, whereas constructive [F]raud is the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests." Archer v. Griffith, 390 S.W.2d 735, 740 (Tex. 1964). *But see Castleberry*, 721 S.W.2d at 277–78 (Gonzalez, J., dissenting) ("This standard is so broad that it is not a standard. It fails to provide any guidance on the necessary elements to assert a cause of action under this theory. . . . *In his attempt to disregard the corporate entity in this case, Castleberry only pleaded an alter ego theory*."). According to the slim majority, the failure to plead a sham theory was not fatal because "the purpose in disregarding the corporate fiction . . . 'should not be thwarted by adherence to any particular theory of liability.'" *Id.* at 273 (majority opinion) (quoting Gentry v. Credit Plan Corp., 528 S.W.2d 571, 575 (Tex. 1975)).

225. Farr v. Sun World Sav. Ass'n, 810 S.W.2d 294, 296 (Tex. App.—El Paso 1991, no writ).

226. Act of May 12, 1989, 71st Leg., R.S., ch. 217, § 1, 1989 Tex. Gen. Laws 974, 974–75. Due to some apparent confusion about the applicability of Article 2.21 to theories that were not identified explicitly, the Texas legislature further amended 2.21(A)(2) in 1993 to include "the alter ego of the corporation" or some "other similar theory" as invalid grounds for imposing shareholder liability. Act of May 7, 1993, 73rd Leg., R.S., ch. 215, § 2.05(A)(2), 1993 Tex. Gen. Laws 418, 446; *see also* W. Horizontal Drilling, Inc. v. Jonnet Energy Corp., 11 F.3d 65, 69 n.5 (5th Cir. 1994) ("[T]he Texas Supreme Court seems to be ignoring the amendments to article 2.21 and continues to permit a failure to observe corporate formalities as a means of proving alter ego."). Further, even though explicitly concerned with only Contracts, the provision also was applied to certain Torts. *See, e.g.*, Menetti v. Chavers, 974 S.W.2d 168, 174 (Tex. App.—San Antonio 1998, no pet.) ("[T]he actual fraud requirement should be applied, by analogy, to [T]ort claims, especially those arising from contractual obligations."). In an effort to "curb the creativity of the bench and the bar," Alan W. Tompkins & Ted S. O'Neal, *Corporations and Limited Liability Companies*, 51 SMU L. REV. 817, 825 (1998), the legislature again amended 2.21 by adding "any matter relating to or arising from the obligation" to "any contractual obligation." Act of May 13, 1997, 75th Leg., R.S., ch. 375, § 7(A)(2), 1997 Tex. Gen. Laws 1516, 1522.

227. *See supra* note 220 and accompanying text.

Figure 3. Texas Veil-Piercing, *Castleberry* to Article 2.21A[228]



Most interestingly, the post-*Castleberry* rate of veil-piercing claims in Contract is lower than before the decision. During the three years between the decision and Article 2.21A there was only one case involving a Tort claim. *Castleberry*'s liberalization of the requirements for veil-piercing in Contract thus may have incentivized litigants to recharacterize Tort claims when possible, but the overall paucity of cases combined with an extremely short time frame limits the reliability of the data for Tort, and, to an extent, for all other claims during that span.[229] Nevertheless, the data support a story of how changes to a jurisdiction's veil-piercing standard can affect litigant behavior and success.

C. Reclaiming the Substantive Divide

Due to its remedial nature, a veil-piercing request must be couched in a substantive cause of action.[230] Particular caution should be exercised with any data about substantive claims, however, as they feature a layer of ambi-

228. There are only two veil-piercing claims grounded in the corporation statute. *See* TEX. BUS. ORGS. CODE § 21.223(a)(1), (b) (West, Westlaw through 2009 Regular and First Called Sessions) (codifying Article 2.21A as effective January 1, 2010).

229. Between *Castleberry* and Article 2.21A there were only fifteen veil-piercing observations, of which eleven were in Contract and four were in Fraud. Ironically, *Castleberry* appears to have elevated the prominence of fraud or misrepresentation as an instrumental rationale. Prior to the decision, that rationale was relied upon infrequently, with only 45 observations and a 26.67% success rate. During the three years after the decision, however, the frequency of the rationale disproportionately increased to 8 observations with a 75.00% success rate. And after Article 2.21A's enactment, courts found fraud or misrepresentation to be instrumental in 38 cases, with litigants prevailing 44.74% of the time; when an ambiguous or general reference to fraud or deceit was instrumental, piercing occurred in 29.63% of cases, versus 66.67% or 100.00% when specific evidence of fraud concerning assets or identity, respectively, was instrumental.

230. *See supra* note 152 and accompanying text.

guity in addition to selection effects.[231] Not only are substantive claims subject to discretionary selection and characterization by litigants, but their sources can vary across jurisdictions. Specifically, certain kinds of Contract, Criminal, Fraud, and Tort claims can originate from, and even coexist in, the common law or statutes.[232] To an extent this issue has been addressed by coding all types of claims connected to veil-piercing, but no attempt has been made here to control even basic jurisdictional differences.

In line with the overall trend,[233] the frequency of each type of substantive claim increased over time, with a sharp rise beginning in the 1970s. As in Thompson's study, veil-piercing claims arise in Contract more than in any other substantive claim.[234]

Table 7. Veil-Piercing by Claim and Jurisdiction

Claim	*n*	V-P Rate (%)
Contract	1730	46.24
Federal	408	42.65
State	1322	47.35
Criminal	48	**66.67**
Federal	10	**50.00**
State	38	**71.05**
Fraud	400	**61.00**
Federal	157	**53.50**
State	243	**65.84**
Statute	897	**49.50**
Federal	383	**50.65**
State	514	**48.64**
Tort	377	47.75
Federal	129	48.06
State	248	47.58

This comports with available data on nationwide filings for all types of claims, veil-piercing or otherwise.[235] Since 1990, however, a surge in all

231. *See supra* notes 143–51 and accompanying text.

232. *See, e.g.*, Egudin v. Carriage Court Condo., 528 So. 2d 1043, 1044 (La. Ct. App. 1988) (addressing fraud); People *ex rel.* Potter v. Mich. Bell Tel. Co., 224 N.W. 438, 438–40 (Mich. 1929) (addressing public utility contracts); Covelli v. Jackson, 700 N.Y.S.2d 341 (N.Y. App. Div. 1999) (addressing negligent automotive repair); *Ex parte* Chambers, 898 S.W.2d 257, 258 (Tex. 1995) (addressing criminal contempt).

233. *See supra* note 160 and accompanying text.

234. Thompson, *Empirical Piercing*, *supra* note 20, at 1058 tbl.9.

235. *See supra* note 160.

such Tort filings within federal court has resulted in their outnumbering Contract claims, which have been declining.[236]

Civil veil-piercing claims prevail most often when couched in Fraud. The veil-piercing rate for Fraud exceeds that of any other type of civil substantive claim, in federal or state court as well as across all levels of courts.

Table 8. Veil-Piercing by Claim and Court

Claim	*n*	V-P Rate (%)
Contract	1730	46.24
Trial	281	48.04
Intermediate Appellate	1119	45.13
Supreme	336	47.02
Criminal	48	**66.67**
Trial	5	**60.00**
Intermediate Appellate	31	**58.06**
Supreme	12	**91.67**
Fraud	400	**61.00**
Trial	97	**57.73**
Intermediate Appellate	239	**56.49**
Supreme	67	**79.10**
Statute	897	**49.50**
Trial	271	**53.51**
Intermediate Appellate	452	46.24
Supreme	176	**51.14**
Tort	377	47.75
Trial	91	**53.85**
Intermediate Appellate	224	44.20
Supreme	63	47.62

Indeed, when Fraud is paired with another civil substantive claim, there is markedly more veil-piercing success than with that claim alone.[237] And, notably, subclaims for Fraud that can be characterized as Contract, such as Fraudulent Misrepresentation, feature lower veil-piercing rates than their counterparts for Tort, such as Deceit.[238]

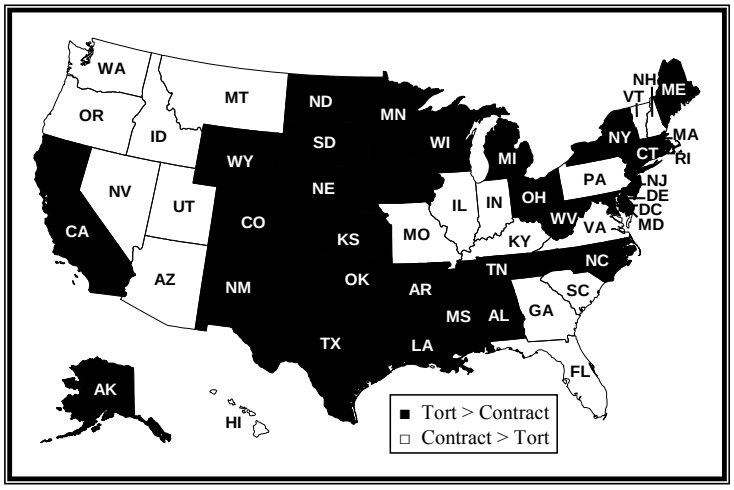
236. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 160.
237. *See infra* Table 9.
238. *See infra* Table 10.

Table 9. Veil-Piercing by Combinations of Claims

Claim	*n*	V-P Rate (%)
Contract	1393	45.37
Criminal	1	**100.00**
Fraud	77	**83.12**
Statute	707	47.95
Tort	215	44.65
Contract-Criminal	1	**100.00**
Contract-Fraud	155	**57.42**
Contract-Statute	125	42.40
Contract-Tort	44	45.45
Criminal-Fraud	6	**66.67**
Criminal-Statute	38	**63.16**
Criminal-Tort	2	**100.00**
Fraud-Statute	99	**53.54**
Fraud-Tort	51	**56.86**
Statute-Tort	53	**52.83**
Contract-Fraud-Tort	12	41.67

Veil-piercing claims prevail more often in Tort than Contract. Although slight, the disparity also holds in federal and state courts.[239] And this result is produced by the law in 60.78% of all jurisdictions.

Figure 4. Tort v. Contract Veil-Piercing Rates[240]



239. *See infra* Table 7. The disparity also holds true for both trial and supreme courts. *See infra* Table 8. The results for intermediate appellate courts should be discounted, as they depend heavily on state cases from an incomplete database. *See supra* note 178 and accompanying text.

240. Puerto Rico is the only nonstate whose rate in Tort (66.67%) exceeds Contract (50.00%).

The law from all the shaded states produces higher veil-piercing rates in Tort than Contract. There is no apparent connection between overall laxity in veil-piercing and whether that jurisdiction's law results in more success in Tort than Contract; the proportion of jurisdictions whose law results in piercing in excess of the overall rate is almost evenly divided between shaded and nonshaded states.[241]

These results do not square with Thompson's findings. Over his original time frame the veil-piercing rate for Tort was 52.94% versus 45.90% for Contract. And these disparities cannot be explained by Thompson's omission of Fraud. When the various subclaims for Fraud are recharacterized as either a Contract or Tort claim,[242] the gap between the veil-piercing rates prior to 1986 becomes even greater: 61.68% for Tort versus 47.23% for Contract; that gap remains over this entire dataset's time frame: 54.34% for Tort versus 47.23% for Contract.[243] The identity of rates in Contract across these time frames makes clear that veil-piercing litigants have been experiencing less success in Tort over the past two decades.[244]

This trend in Tort is apparent even in the main dataset, where Fraud claims are segregated. From 1986 up to and including 2006, veil-piercing claims actually prevail less in Tort, 43.48%, than Contract, 46.56%.[245] One plausible explanation is that Thompson's findings have altered litigation patterns, but only a handful of reported cases have cited the perplexing asymmetry, much less relied upon it, in deciding whether to pierce in Contract or Tort.[246] Another possibility is that Thompson's time frame coincides with some inflection point, but there is no discernable fork over the past three decades in the veil-piercing rates for Contract or Tort. A large part of this puzzle may lie in Fraud, whose veil-piercing rate has decreased con-

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241. The most interesting state in this regard is Virginia, which features an extremely low piercing rate and yet favors piercing in Contract over Tort. Because of the paucity of cases, "[i]t is clearly more difficult in Virginia than in its neighboring jurisdictions to grasp the state's piercing doctrine." Epperson & Canny, *supra* note 193, at 632.

242. *See supra* note 80 and accompanying text. Material Misrepresentation and Innocent Misrepresentation subclaims were recharacterized as Contract, while Common Law Fraud or Deceit and Negligent Misrepresentation subclaims were recharacterized as Tort; Fraudulent Misrepresentation and Fraudulent Transfer subclaims were equally divided into Contract and Tort. To be sure, this is an imprecise way to reverse engineer Thompson's coding, particularly because of the presumed indifference between Fraudulent Misrepresentation and Fraudulent Transfer claims; recalibrating the allocation, however, seems unlikely to alter the gap, given its considerable size.

243. For these recharacterized claims, the veil-piercing rate for Tort exceeds the rate for Contract in federal or state court, as well as against an individual or corporate shareholder.

244. This is not inconsistent with Thompson's speculation that "change in [P]roduct-[L]iability law and [T]ort law generally in recent decades may have led plaintiffs to bring suits that go beyond prior law." Thompson, *Empirical Piercing*, *supra* note 20, at 1069.

245. *But cf. supra* Figure 4 (indicating that veil-piercing claims prevail more often in Tort than in Contract in the majority of jurisdictions).

246. *See* Theberge v. Darbro, Inc., 684 A.2d 1298, 1303 (Me. 1996) ("The distinction between [C]ontract and [T]ort creditors . . . breaks down when the debtor engages in fraud or misrepresentation.").

siderably over the past few decades.[247] The reason for this decrease is not clear and bears further investigation. At the very least, veil-piercing in Fraud does seem to correlate more strongly with that in Tort, as compared to Contract, and thus seems to have some distortive effect on Thompson's finding.

Moreover, veil-piercing is not rooted within inequitable bargains.[248] Comparing types of contracting parties as a proxy for relative sophistication reveals no appreciable difference in veil-piercing when a bargain involves only organizations, versus an organization with an individual.[249]

Table 10. Veil-Piercing by Claim and Subclaim

Claim	*n*	V-P Rate (%)
Contract	1730	46.24
Individual-Organization	678	45.43
Organization-Organization	1052	46.77
Criminal	48	**66.67**
Fraud	400	**61.00**
Fraud/Deceit	111	**68.47**
Fraudulent Misrepresentation	104	**53.85**
Fraudulent Transfer	161	**67.08**
Innocent Misrepresentation	2	0.00
Material Misrepresentation	5	20.00
Negligent Misrepresentation	17	17.65
Statute	897	**49.50**
Antitrust	21	42.86
Arbitration	3	33.33
Bankruptcy	107	**49.53**
Commercial	49	**61.22**
Constitution	15	33.33
Corporation	38	44.74
Criminal	35	**68.57**
Discrimination	7	14.29
Environmental	26	**61.54**
ERISA/Social Security	33	**66.67**

(continued)

247. *See, e.g.*, *supra* text accompanying notes 222–27; *supra* Figure 3. Certainly, another part of the puzzle may lie in the choice of exclusions, multiplicity of claims, and coding of cases.

248. *See infra* Table 10 (indicating that the veil-piercing rates for Contract claims between organizations, and between individuals and organizations, are 46.77% and 45.43% respectively).

249. To be sure, interorganizational contracting does not necessarily involve less disparate sophistication levels than those between organizations and individuals. A better measure would be to discern the amount of financial resources, quality of business expertise and legal counsel, as well as the specific contract terms; even if such data could be obtained, a reliable metric would be difficult to formulate. In any event, the endgame suggests no material difference.

Table 10 (cont.). Veil-Piercing by Claim and Subclaim

Claim	*n*	V-P Rate (%)
Fraudulent Transfer	38	**60.53**
Health	3	33.33
Housing	19	36.84
Insurance	15	40.00
Intellectual Property	34	47.06
Labor	48	37.50
Licensing	28	46.43
Liquor	16	43.75
Marital	46	**56.52**
Maritime	13	30.77
Other	22	45.45
Real Property	22	**54.55**
Remedial	49	44.90
Securities	19	42.11
Tax	42	42.85
Trust & Estate	35	42.86
Unfair/Deceptive Trade	58	**68.97**
Usury	12	41.67
Utility	27	40.74
Workers' Compensation	32	46.88
Tort	377	47.75
Intentional Tort-Person	15	20.00
Intentional Tort-Property	72	**59.72**
Negligence	242	45.04
Products Liability	22	36.36
Tortious Interference w/ K	44	**54.55**

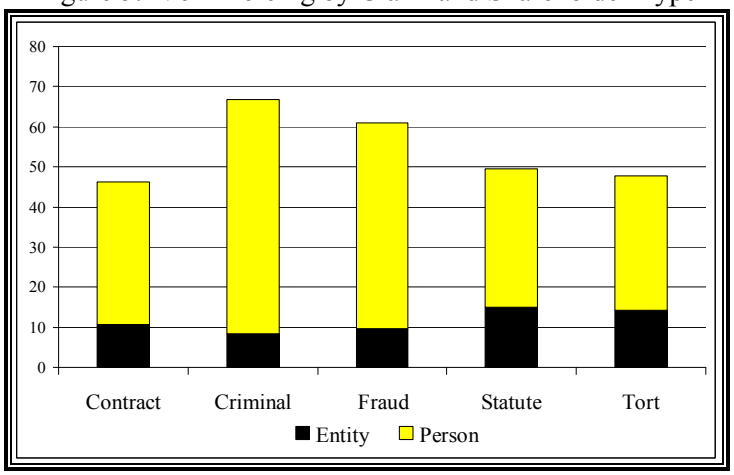
Indeed, piercing occurs more often against interorganizational bargains not only overall, but also across federal and state courts, and irrespective of whether the controlling shareholder is an individual or a corporate parent; this seems to dispel any sort of judicial predisposition to utilizing veil-piercing as an equitable shield for individual creditors from corporate wrongs. This, however, may somewhat reflect that parties with potentially superior stakes and resources will seek an advantage, such as higher quality legal services; although the veil-piercing rates are quite comparable overall for the different types of bargains, corporate parents do enjoy a bit more success defending themselves against claims by an individual Contract creditor than by another organization.[250]

250. Piercing occurs against corporate parents 40.91% of the time with interorganizational bargains versus 36.37% with individual–organization bargains. The rates against individual shareholders are comparable for the different types of bargains.

The results for specific subclaims in Tort are mixed. By a large margin, veil-piercing claims most frequently were couched in Negligence,[251] but that veil-piercing rate was considerably lower than that for Torts against Property or Tortious Interference with Contract, both of which require proof of intent.[252] The disparity in rates can be traced to the type of shareholder. As with the overall dataset, Negligence claims far more often result in judicial reaching into the assets of individual shareholders than those of corporate parents.[253] In contrast, when presented with an Intentional Tort against Property or Interference with a Contract, courts pierce with comparable frequency against both types of shareholders;[254] one plausible explanation may be that requiring evidence of deliberate tortious activity quells judicial concern about whether a corporate parent has an interest in or control over its subsidiary.[255]

Individual shareholders, though, remain more vulnerable than corporate parents for each and every substantive claim overall.

Figure 5. Veil-Piercing by Claim and Shareholder Type



The bars represent the overall veil-piercing rate for each type of claim, each of which is divided by the proportion due to piercing of corporate parents

251. *Cf.* KEETON ET AL., *supra* note 136, § 105, at 725 ("A great many of the common and familiar forms of negligent conduct . . . are in their essence nothing more than misrepresentation . . . .").

252. The distinction is not crisp as Intentional Torts Against Person feature a paltry 20.00% veil-piercing rate, but that result is quite unreliable given the miniscule number of cases.

253. Veil-piercing claims in Negligence succeed 51.88% against individuals versus 31.33% against corporate parents.

254. For Torts against Property, veil-piercing claims prevail slightly more often against an individual (62.00%) than against an entity (54.55%); for Tortious Interference with a Contract, claims prevail 54.55% of the time against either type of shareholder.

255. *See supra* notes 168–69 and accompanying text.

versus individuals; Statute and Tort claims thus feature a comparatively higher proportion of success against corporate parents. In absolute terms, though, the veil-piercing rate against corporate parents is slightly higher in Contract than Tort.[256]

Table 11. Veil-Piercing by Claim and Shareholder Type[257]

Claim	*n*	V-P Rate (%)
Contract	1730	46.24
Entity	458	39.96
Person	1268	**48.58**
Criminal	48	**66.67**
Entity	8	**50.00**
Person	40	**70.00**
Fraud	400	**61.00**
Entity	71	**54.93**
Person	328	**62.50**
Statute	897	**49.50**
Entity	318	41.51
Person	573	**53.93**
Tort	377	47.75
Entity	144	37.50
Person	233	**54.08**

This seems in line with economic arguments about veil-piercing generating potentially perverse incentives in Tort for corporate parents that can organize as separate ventures.[258] But such arguments may be imputing too much to

256. *See infra* Table 11.

257. This Table omits government shareholders.

258. *See, e.g.*, Easterbrook & Fischel, *supra* note 18, at 111 (presenting a hypothetical about taxi firms apparently inspired by the classic enterprise liability case, *Walkovszky v. Carlton*, 223 N.E.2d 6 (N.Y. 1966), in which veil-piercing would favor smaller, unaffiliated firms that have an incentive to carry minimal insurance: "[p]otential victims of torts would not gain from a legal rule that promoted corporate dis-integration"). If this account is correct, the results are not inconsistent with there being a considerable number of veil-piercing claims in Tort concerning that type of competitive context. *But see* Harvey Gelb, *Limited Liability Policy and Veil Piercing*, 9 WYO. L. REV. 551, 565–68 (2009) (arguing generally that "the perspective [that] courts in piercing the veil should be more hostile to [C]ontract creditors than [T]ort creditors may be fashionable in some quarters . . . but it is actually inappropriate," specifically because, *inter alia*, "courts have been reluctant to pierce entity veils" and "[p]rotecting [C]ontract creditors against egregious behavior by withdrawing the limited liability shield . . . should be the norm and not the exception"). Gelb's arguments rely heavily on observations that are at odds with the findings here and, in any event, prove too much as they ultimately aim to supplant the Contract–Tort distinction with an amorphously broad equitable test that would generate mixed incentives and costly uncertainty.

courts, as evidenced by their divergence from such views with respect to piercing individual versus corporate shareholders.[259]

Although highly frequent, Statute claims are very context dependent. The Statute data was divided into thirty different subtypes, which feature considerably variable veil-piercing rates. The exclusions applied to cases involving Arbitration, Bankruptcy, Discrimination, Environmental, ERISA/Social Security, Labor, Tax, Trust and Estate, and Workers' Compensation statutes concern substantively distinct analogies to veil-piercing,[260] and thus there are still some cases involving the classic corporate doctrine. Only the claims couched in Environmental and ERISA/Social Security statutes feature a rate higher than the overall dataset; this may be due to the Environmental claims involving a disproportionate amount of corporate torts, and a tendency toward construing ERISA/Social Security provisions liberally in favor of the beneficiary.[261] Not surprisingly, the largest share of Statute cases belongs to Bankruptcy, as insolvency is a natural complement to veil-piercing.[262] Notably, Commercial and Unfair or Deceptive Trade statutes account for a sizable share, which may be due to their being an alternative to Contract claims; their veil-piercing rates, though, are among the highest for Statutes and considerably higher than those for Contract claims.

D. Mapping the Wilderness of Judicial Reasons

A plethora of reasons is at the disposal of courts to support their decision whether to pierce. Courts may cite just the conclusory metaphorical aspects of the alter ego or instrumentality test.[263] Alternatively, courts simply may recite the litany of fact-specific factors, even when the factors are

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259. *See supra* notes 169–73 and accompanying text.

260. *See supra* notes 124–28, 130–32 and accompanying text.

261. *See, e.g.*, Leddy v. Standard Drywall, Inc., 875 F.2d 383, 388 (2d Cir. 1989) (holding an officer–shareholder liable for required contributions under ERISA due to ERISA's legislative purpose, despite "the traditional conditions for piercing the corporate veil . . . not [being] met"); Lucia Ann Silecchia, *Pinning the Blame & Piercing the Veil in the Mists of Metaphor: The Supreme Court's New Standards for the CERCLA Liability of Parent Companies and a Proposal for Legislative Reform*, 67 FORDHAM L. REV. 115, 118 (1998) ("[C]ourts repeatedly face plaintiffs seeking to hold parent corporations liable for the CERCLA responsibilities of their subsidiaries. This has been justified primarily as an effort to cast a wide net for responsible parties and achieve CERCLA's oft-touted broad remedial purposes.").

262. *See, e.g.*, Clark, *supra* note 85, at 542 n.98 ("As is often said, a fraudulent conveyance is but the reflex of an insolvent man."). *But see, e.g.*, Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 621 n.164 (1989) ("Courts have not, however, been willing to pierce the corporate veil in [T]ort cases where the *sole* justification for doing so is involuntary insolvency.").

263. *See, e.g.*, Mesler v. Bragg Mgmt. Co., 702 P.2d 601, 607 (Cal. 1985) ("The essence of the alter ego doctrine is that justice be done. 'What the formula comes down to, once shorn of verbiage about control, instrumentality, agency, and corporate entity, is that liability is imposed to reach an equitable result.'" (citation omitted)).

attenuated from the underlying harm.[264] A factor's mere mention, however, is not necessarily reflective of a court's actual deliberations. As a result, a simple tally of factors appearing in decisions may provide an optical illusion, rather than an accurate portrait, of the reasons why veil-piercing succeeds.

This study presents two angles to the *ratio decidendi* of veil-piercing. The frequency data indicate the relative popularity of an instrumental rationale in veil-piercing decisions. And the veil-piercing rate data indicate the relative value of that rationale, as its absence or presence in a case depended on the veil-piercing claim's success.

Table 12. Veil-Piercing by Rationale

Rationale	*n*	V-P Rate (%)
Agency	152	**52.63**
Alter Ego	197	**62.94**
Assumption of Risk	104	3.85
Commingling	584	**61.30**
Advertising	7	**71.43**
Assets	440	**58.64**
Contracts	8	**62.50**
Directors	115	**69.57**
Employees	41	**75.61**
Officers	79	**72.15**
Records	29	48.28
Retirement Plans	0	--
Stationery	7	**71.43**
Taxes	40	**50.00**
Domination	787	**66.58**
Fraud/Misrepresentation	989	38.62
Fraud/Deceit	262	27.48
Assets	97	**62.87**
Identity	129	**65.12**
Informalities	354	**61.30**
Meetings	124	**64.52**
Records	146	**67.12**
Other	156	**55.77**

(continued)

264. *See supra* note 12 and accompanying text.

Table 12 (cont.). Veil-Piercing by Rationale

Rationale	*n*	V-P Rate (%)
Injustice/Unfairness	890	**51.35**
Instrumentality	143	**61.54**
Sham/Shell	286	**60.14**
Siphoning of Funds	278	**73.74**
Statutory Policy	251	**51.39**
Undercapitalization	411	**61.56**
Incorporation	42	**64.29**
Post-Incorporation	376	**61.97**
Other	550	33.45

For instance, assumption of risk accounts for only 1.74% of the total number of observations for instrumental rationales, which reflects its disfavor as a justification; the 3.85% veil-piercing rate reflects that the rationale overwhelmingly functions to justify a decision not to pierce.

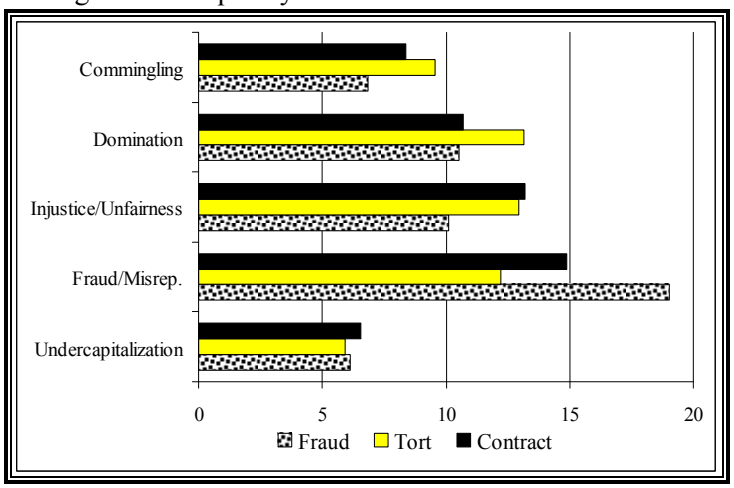
There are no surprises about the five most popular instrumental rationales. The top three—fraud or misrepresentation, injustice or unfairness, and domination—all commonly appear in veil-piercing tests, and are among the most compelling rationales within academic and practical commentary.[265] Similarly, there has been a durable belief about the relevance of commingling and undercapitalization to veil-piercing.[266]

All of these rationales also are the most popular in veil-piercing claims grounded in Contract, Fraud, or Tort.

265. *See* PRESSER, *supra* note 1, § 1:6, at 1-31 ("It was not enough, then, for Powell, for the subsidiary to be utterly dominated by the parent. In addition, there must be some 'injustice' perpetrated . . . ."); Rutheford B. Campbell, *Limited Liability for Corporate Shareholders: Myth or Matter-of-Fact*, 63 KY. L.J. 23, 37–39 (1975) ("[S]ome element of control seems indispensable to the disregard of the corporate entity."); Thompson, *Empirical Piercing*, *supra* note 20, at 1045 n.58, 1063 tbl.11, 1066 (reporting both domination and misrepresentation to be among the most frequently mentioned rationales, while reporting unfairness to be a commonly mentioned rationale that does not, however, rank among the top five); *supra* note 99 and accompanying text.

266. *See, e.g.*, Hamilton, *supra* note 216, at 985 ("The [Texas] courts often stress two factors—inadequate capitalization and the commingling of shareholder and corporate affairs—when determining whether shareholders should be held responsible for claims against their corporation.").

Figure 6. Frequency of Rationales for Certain Claims



This figure depicts how frequently a rationale was instrumental as a percentage of each claim's total number of rationale observations. The proportions for all these rationales are strikingly similar in Tort and Contract.[267] This is most surprising with respect to undercapitalization,[268] which some believe to be far more relevant in Tort than Contract.[269]

267. *See infra* Table 13.

268. *Cf.* Thompson, *Empirical Piercing*, *supra* note 20, at 1066 ("In both contexts [(Contract and Tort)] courts refused to pierce in 25 to 30% of the cases even when undercapitalization was present . . . .").

269. *See, e.g.*, Mark J. Roe, *Corporate Strategic Reaction to Mass Tort*, 72 VA. L. REV. 1, 44 n.123 (1986) ("An undercapitalization requirement may make good sense in some nontort, contractual settings."); *supra* notes 28, 107 and accompanying text.

Table 13. Veil-Piercing by Rationale and Claim

Rationale	Contract	Criminal	Fraud	Statute	Tort
Agency	**49.48**	**100.00**	36.36	**52.94**	40.91
Alter Ego	**61.11**	**50.00**	**71.88**	**62.32**	**67.86**
Assumption of Risk	3.16	**100.00**	0.00	10.00	0.00
Commingling	**56.15**	**100.00**	**65.15**	**65.27**	**65.85**
Domination	**66.81**	**89.47**	**70.30**	**70.17**	**54.87**
Fraud/Misrep.	34.75	**83.33**	**67.76**	38.55	40.95
Informalities	**61.92**	0.00	**69.44**	**56.47**	**56.25**
Injustice/Unfairness	**50.71**	**87.50**	**67.01**	**49.20**	**54.95**
Instrumentality	**60.26**	**100.00**	**73.33**	**61.11**	**61.90**
Sham/Shell	**60.57**	**75.00**	**75.00**	**60.56**	46.51
Siphoning of Funds	**69.84**	**75.00**	**74.29**	**77.97**	**75.86**
Statutory Policy	44.83	47.06	**60.00**	**51.41**	40.00
Undercapitalization	**61.79**	0.00	**61.02**	**59.55**	**60.78**
Other	33.53	18.18	47.62	30.99	29.55

Evidence of fraud or misrepresentation is the most popular rationale overall. The rationale is instrumental with comparable frequency in Contract and Tort, in line with commentary.[270] But the rationale is instrumental in only 45.75% of cases involving Fraud, which may be due to courts focusing on the claim rather than the evidence to justify veil-piercing.[271]

Popularity is not everything, however, and some of the less frequent instrumental rationales merit attention. Despite their conclusory nature, alter ego and instrumentality do not appear with much frequency overall.[272] And agency does not rank highly among the rationales, despite being a doctrinal precursor to veil-piercing and receiving considerable attention as a potential substitute for at least Contract claims;[273] the rationale seems to be comparably relevant to both Contract and Tort. In contrast courts not surprisingly cite assumption of risk far more often in Contract than Tort.

The mean veil-piercing rate for all observations of instrumental rationales is 53.16%.[274] Fraud or misrepresentation features among the

270. *See supra* note 92 and accompanying text.

271. *Cf., e.g.*, Krendl & Krendl, *supra* note 12, at 31 ("Clearly, if the plaintiff . . . had a good fraud claim he would plead it . . . .").

272. *See, e.g.*, HENRY WINTHROP BALLANTINE, BALLANTINE ON CORPORATIONS § 136, at 312 (rev. ed. 1946) ("All corporations are used as business instrumentalities.").

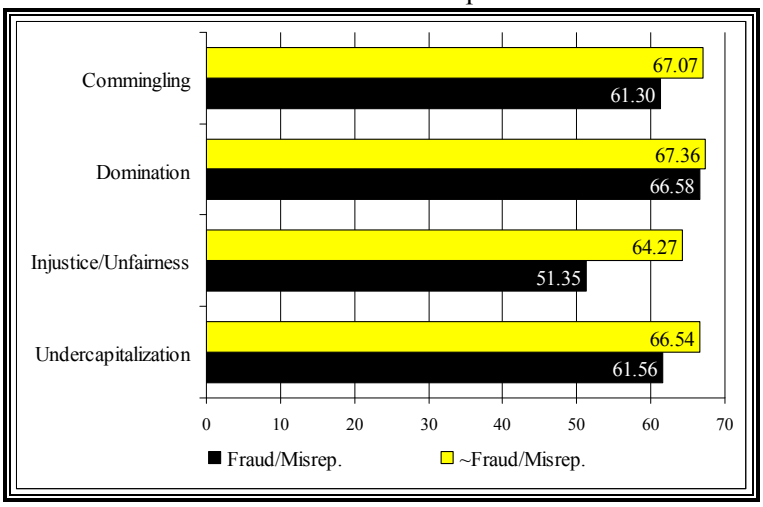
273. *See, e.g.*, Hamilton, *supra* note 216, at 983–94 ("[N]o conceptual problems emerge when liability is imposed upon shareholders under conventional theories of [A]gency or [T]ort law."). *But see, e.g.*, Millon, *supra* note 16, at 1331 ("If the courts . . . are serious about a finding of agency, there is no need to consider veil piercing at all."); *infra* note 290.

274. This varies from the overall veil-piercing rate of 48.51% due to the increased number of observations.

lowest rates, which seems to indicate that the rationale asserts itself most strongly in decisions not to pierce. But the particularized results tell a different story. Ambiguous or general references to the rationale result in piercing only 27.48% of the time; in contrast, specific evidence of fraud or misrepresentation as to assets or identity justifies piercing, respectively, 62.87% or 65.12% of the time.[275] These results indicate that, whether the jurisdiction's test explicitly requires proof, fraud or misrepresentation is a significant consideration for courts; its general absence is highly instrumental in deciding not to pierce, while specific evidence translates into superior odds for successful veil-piercing.

Even more fascinating, though, is what happens when evidence of fraud or misrepresentation is *not* instrumental. In such cases there is essentially a substitution effect: the veil-piercing rates for the other most instrumental rationales all increase.

Figure 7. Veil-Piercing Rates for Rationales in Relation to Fraud/Misrepresentation



The effect is most pronounced for injustice or unfairness, where the veil-piercing rate leaps to 64.27% when the cases also citing fraud or misrepresentation are excluded. And this effect is far stronger for all of the most popular rationales within state courts, particularly in the case of domination (70.81%) and undercapitalization (68.82%). These results circumstantially suggest that when instrumental, evidence of fraud or misrepresentation asserts itself more strongly than other prominent rationales, even though its presence alone tends to justify veil-piercing.

275. This pattern applies to claims in both Contract and Tort.

The results for undercapitalization are also illuminating. On the one hand, the relatively high veil-piercing rate indicates that the rationale tends to assert itself more strongly when courts decide to pierce;[276] this comports with widely held beliefs about undercapitalization's relevance and utility.[277] On the other hand, the rate is virtually uniform across veil-piercing claims in Contract, Tort, and Fraud, which may be surprising to some commentators.[278] Regardless, courts appear to have adjusted their use of the rationale appropriately to reflect the change in capitalization requirements, as attention over time has shifted from the initial point of incorporation to working amounts, which are now cited far more frequently. This shift conceptually complements another prominent rationale, siphoning of funds. And like undercapitalization, evidence of a corporation's accounts being pillaged for a shareholder's benefit is very instrumental in decisions to pierce for all types of substantive claims.

For the most part, however, the instrumental value of rationales does vary based on the type of substantive claim. When fraud or misrepresentation concerning a corporation's assets was instrumental in a Tort case, piercing occurred 90.91% of the time, by far the strongest rationale for any civil claim; yet fraud or misrepresentation about a shareholder's identity resulted in piercing only 60.00% of the time. Further, this sharp disparity in veil-piercing rates did not appear in either Contract or Fraud;[279] although the number of observations in Tort is quite small, the results may reflect a distinction in the kinds of fraud or misrepresentation that are most likely to occur within that context.

The emphasis on assets within Tort is manifest in its other instrumental rationales. In addition to siphoning of funds and undercapitalization,[280] evidence of commingling resulted in a high rate of veil-piercing. These results contrast with Contract, where commingling is fairly neutral; instead, evidence of domination and a failure to observe formalities were highly instrumental to a decision to pierce within the bargaining context.[281] For both Tort and Contract claims, though, veil-piercing claims experience comparably low rates of success when the plaintiff is found to have assumed risk or there is an absence of general evidence of fraud or misrepresentation.

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276. *But cf.* Thompson, *Empirical Piercing*, *supra* note 20, at 1063 tbl.11 (reporting that the presence of undercapitalization is correlated with decisions to pierce 73.33% of the time, which is substantially less than numerous other rationales).

277. *See supra* notes 28, 101–06 and accompanying text.

278. *See supra* notes 101–03 and accompanying text. *Cf.* Thompson, *Empirical Piercing*, *supra* note 20, at 1066 (finding undercapitalization present in only 18.65% of 327 Contract cases where piercing occurred, versus 12.86% of 70 Tort cases).

279. In Contract, the veil-piercing rates were 63.38% for assets and 62.86% for shareholder; in Fraud, the rates were 81.82% for assets and 82.61% for shareholder.

280. *See supra* notes 274–76 and accompanying text.

281. Different types of bargains yielded similar veil-piercing rates for domination, but when there was a failure to observe formalities, the veil-piercing for bargains between individuals and organizations (70.93%) was considerably higher than that between organizations (56.86%).

Fraud claims feature the most distinct group of instrumental rationales. Aside from siphoning of funds as well as specific evidence of fraud or misrepresentation, courts that decide to pierce predominantly resort to conclusory metaphors, such as evidence of a defendant corporation being the sham or shell, mere instrumentality, or alter ego of a controlling shareholder.[282] Such metaphors, along with domination, are common elements of most veil-piercing tests; accordingly, the results indicate that litigants capable of proving their Fraud claim already may have surpassed the evidentiary threshold for seeking relief from a controlling shareholder.[283]

The results collectively suggest that different claims do indeed represent distinct settings for veil-piercing.[284] Litigants that seek relief in Contract experience relatively more success upon proffering a set of evidence: excessive control, as manifest in domination or a failure to observe corporate formalities, that has resulted in a financially depleted corporation whose ultimate risk has been distorted by some kind of fraud or misrepresentation. In contrast, litigants in Tort enjoy superior odds when marshaling evidence about financial misconduct, with courts apparently recognizing that the element of control may be less relevant in such contexts.[285] And when litigants can meet the requirements for Fraud, they already have gone a considerable way toward demonstrating a case for veil-piercing. At their core, though, all substantive claims seem to be more compelling when supported by evidence that the corporation's inability to satisfy a judgment is due to some kind of asset-related abuse or malfeasance. Such evidence seems far more instrumental in decisions to pierce than injustice or unfairness, despite the latter's resilient popularity.

E. Staking Out the Voluntary–Involuntary Debate

The distinction between voluntary and involuntary creditors may strike some as an "argument from convenience."[286] There is a compelling intuition

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282. Arguably, sham or shell may be a substitute for fraud or misrepresentation. *See, e.g.*, WORMSER, *supra* note 4, at 59 ("Where a corporation is organized as a mere sham . . . courts, even without regard to actual fraud, are wont to disregard the entity theory.").

283. *See supra* note 269 and accompanying text.

284. *See supra* note 95 and accompanying text.

285. *See, e.g.*, Krendl & Krendl, *supra* note 12, at 6 ("The plaintiff may be . . . a tort victim who had no knowledge of the defendant prior to the incident giving rise to his claim.").

286. *See* PRESSER, *supra* note 1, § 1:7, at 1-34 to 1-35 ("I have called [economic analysis of limited liability] the 'argument from convenience' in order to invoke Holmes's theory that the law at any given time corresponds closely with what is then regarded as 'convenient.'"); OLIVER WENDELL HOLMES, JR., THE COMMON LAW (Little, Brown & Co. reprint) (Mark D. Howe ed., Harv. Univ. Press 1963) (1st ed. 1881) ("The substance of the law at any given time pretty nearly corresponds . . . with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past."). Although Presser's comment is directed to orthodox economic treatments of limited liability, this may be construed more specifically about the economic recasting of the Contract–Tort distinction into one between voluntary and involuntary creditors. Robert Clark, for instance, dismisses Richard Posner's analysis of veil-piercing as merely complementary:

behind enforcing transactions against creditors that have had an ex ante opportunity to assess, bargain, and insure themselves against risk, versus those that have not.[287] While that intuition is commonly articulated for veil-piercing in economic terms, its roots actually lie in traditional doctrinal analysis.[288] Nevertheless, a few courts apparently refuse to adhere to this distinction,[289] which simply makes clear that part of its utility may be normative.

Less clear, though, are the lines demarcating Contract, Fraud, and Tort.[290] While the asymmetry between Contract and Tort runs throughout the veil-piercing jurisprudence and literature, the distinction may be conceptually misdrawn. Reexamining veil-piercing cases in terms of voluntary or involuntary creditors affords an alternative perspective that ultimately may confirm whether courts indeed perceive differences between civil bargains and wrongs, and adjudicate them appropriately.

This dataset's coding of specific subclaims provides a unique opportunity to analyze the creditor distinction. Accordingly, all of the results were recast. Voluntary creditors comprise all veil-piercing claims in Contract, Material Misrepresentation, Innocent Misrepresentation, and Tortious Interference with Contract; all veil-piercing claims in Intentional Tort (with Person or Property), Negligence, Strict Liability, Common Law Fraud or Deceit, and Negligent Misrepresentation comprise involuntary

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> Richard Posner's recent article on veil-piercing . . . seems to me . . . to constitute an elaboration and justification, in terms of microeconomic theory, of what I call the standard initial response to the problem. . . . In general, though I find Posner's analysis complementary rather than objectionable . . . and [do] not adopt[] his emphasis . . . [because] his elaborate arguments seem to me to be directed towards propositions which, in their essence, have been accepted by judges for decades.

Clark, *supra* note 85, at 542 n.98; *cf.* Presser, *supra* note 59, at 157 ("Posner did not rely to any significant extent on the historical purposes of the doctrine to support his analysis, which appears to have been implicitly based on the conditions of the modern credit market."). These misgivings seem to discount the efficiency of the common law hypothesis. *See generally* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

287. *See, e.g.*, Barbara H. Fried, *Ex Ante/Ex Post*, 13 J. CONTEMP. LEGAL ISSUES 123, 123 (2003) ("No principle of ethics requires that Monte Carlo produce only winners." (quoting J. Mark Ramseyer & Minoru Nakazato, *Tax Transitions and the Protection Racket: A Reply to Professors Graetz and Kaplow*, 75 VA. L. REV. 1155, 1160 (1989))).

288. *See, e.g.*, BALLANTINE, *supra* note 270, § 137, at 315 ("A voluntary [C]ontract creditor stands in a somewhat different position from the involuntary [T]ort creditor."); *id.* § 137, at 315–18 (illustrating how, but for "intermeddling . . . in the affairs" of the subsidiary by the parent, or other "special circumstances," courts will not hold the parent liable on contracts of the subsidiary); LATTY, *supra* note 101, § 49, at 201 ("To make the classification [between Tort and Contract creditors] more significant, the line of distinction should perhaps be drawn between involuntary and voluntary creditors."); *id.* § 49, at 201–05 (exploring the intuition behind more strictly limiting the liability of a parent company for claims against its subsidiaries in Contract than in Tort).

289. *See, e.g.*, Phar-Mor, Inc. v. Coopers & Lybrand, 22 F.3d 1228, 1240 n.20 (3d Cir. 1994) ("In some states, . . . piercing the corporate veil and alter ego actions are allowed to prevent unjust or inequitable results; they are not based solely on a policy of protecting creditors.").

290. *See, e.g.*, KEETON ET AL., *supra* note 136, § 92, at 655 ("The distinction between [T]ort and [C]ontract liability . . . has become an increasingly difficult distinction to make.").

creditors. Fraudulent Misrepresentation and Fraudulent Transfer claims were divided equally between voluntary and involuntary creditors.

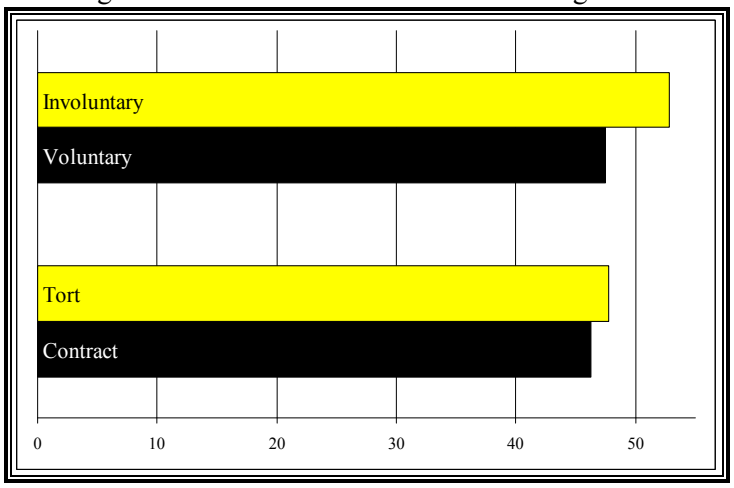
The results evince that veil-piercing claims prevail more often when they concern an involuntary (52.83%) versus a voluntary (47.50%) creditor. Although almost three times as frequent as their involuntary counterparts, voluntary-creditor claims thus virtually mirror the veil-piercing overall rate of 48.51% for the entire dataset.

Table 14. Veil-Piercing by Creditor and Jurisdiction

Corporation	*n*	V-P Rate (%)
Voluntary	1933.5	47.50
Federal	492	44.41
State	1441.5	**48.56**
Involuntary	627.5	**52.83**
Federal	216	**51.16**
State	411.5	**53.71**

And the disparity in veil-piercing rates for voluntary and involuntary creditors is greater than that for Contract and Tort.

Figure 8. Creditors v. Claims Veil-Piercing Rates



As with Tort, involuntary-creditor claims present a considerably greater risk of veil-piercing for individual shareholders than corporate parents.

Table 15. Veil-Piercing by Creditor and Shareholder Type

Claim	*n*	V-P Rate (%)
Voluntary	1933.5	47.50
Entity	511.5	41.35
Person	1420	**49.82**
Involuntary	627.5	**52.83**
Entity	171.5	41.45
Person	456	**57.22**

These results collectively suggest that courts may conceptualize veil-piercing as best suited to prevent a wrong from individual shareholders who externalize unforeseeable risk. Incidentally, this conception is compatible with the judicial view that corporate parents tend not to be shareholders in the classic sense.[291]

The five most popular instrumental rationales for Contract and Tort remain so in voluntary and involuntary creditor cases: fraud or misrepresentation, injustice or unfairness, domination, commingling, and undercapitalization.

Table 16. Veil-Piercing by Rationale and Creditor

Rationale	*n*	V-P Rate (%)
Agency	132	47.73
Voluntary	106	**49.06**
Involuntary	26	42.31
Alter Ego	172	**61.05**
Voluntary	125	**58.00**
Involuntary	47	**69.15**
Assumption of Risk	104	2.88
Voluntary	98.5	3.05
Involuntary	5.5	0.00
Commingling	512	**58.79**
Voluntary	391.5	**56.19**
Involuntary	120.5	**67.23**
Domination	697	**65.57**
Voluntary	518	**66.70**
Involuntary	179	**62.29**

(continued)

291. *See* BLUMBERG, *supra* note 168, at xl (asserting that the advantages of limited liability are mostly "irrelevant" in the context of corporate parents); Strasser, *supra* note 169, at 638 (noting that "different policy issues" are presented by parent companies, and thus "their limited liability should be determined by a different analysis").

Table 16 (cont.). Veil-Piercing by Rationale and Creditor

Rationale	*n*	V-P Rate (%)
Fraud/Misrepresentation	952	42.75
Voluntary	716.5	38.38
Involuntary	235.5	**56.05**
Informalities	333	**61.56**
Voluntary	257.5	**62.52**
Involuntary	75.5	**58.28**
Injustice/Unfairness	780	**53.85**
Voluntary	611.5	**51.76**
Involuntary	168.5	**61.32**
Instrumentality	116	**62.93**
Voluntary	86.5	**60.12**
Involuntary	29.5	**71.19**
Sham/Shell	265	**60.75**
Voluntary	198	**62.12**
Involuntary	67	**56.72**
Siphoning of Funds	260	**70.38**
Voluntary	206	**69.90**
Involuntary	54	**72.22**
Statutory Policy	61	**49.18**
Voluntary	38.5	48.05
Involuntary	22.5	**51.11**
Undercapitalization	406	**63.05**
Voluntary	308.5	**62.88**
Involuntary	97.5	**63.59**
Other	513	35.09
Voluntary	379.5	35.44
Involuntary	133.5	34.08

And as with the overall dataset, the relative proportion of these rationales remains roughly the same for both types of creditors. Although not among the more popular rationales, agency is instrumental in both types of cases with comparable frequency; this is somewhat surprising in light of the consensual nature of such relationships that also tend to exist in the voluntary-creditor context.[292] That dynamic is most apparent in assumption of risk, whose palpable presence in voluntary-creditor cases becomes almost nonexistent in the involuntary context.

292. *But see, e.g.*, Krendl & Krendl, *supra* note 12, at 3 n.9 (embracing Learned Hand's position about the limits of agency principles for veil-piercing purposes: "express agency would not provide a remedy because the consensual element would be lacking and . . . implied agency would be inappropriate because that would mean the veil would be pierced in every situation").

The differences are broader and sharper with respect to the veil-piercing rates. Both injustice or unfairness and commingling assert themselves far more strongly when courts decide in favor of involuntary creditors; this is also true for the conclusory metaphors of alter ego and instrumentality, similar to claims in Fraud.[293] Conversely, domination and a failure to observe formalities mirror their strength in Contract with decisions to pierce.[294] These results tend to reinforce that Tort and Fraud present relatively comparable scenarios with respect to judicial reasoning, as distinguished from Contract.

The greatest disparity, though, concerns evidence of fraud or misrepresentation. On the one hand, with respect to voluntary creditors, the rationale exhibits the same split as the overall dataset; ambiguous or general evidence of fraud is instrumental in decisions not to pierce, in contrast to specific evidence concerning assets or identity. On the other hand, with respect to involuntary creditors, the rationale is fairly neutral in a court's decision to pierce; this is because the most common type of evidence of fraud or misrepresentation is ambiguous or general evidence and is instrumental in 46.20% of cases that result in piercing. These results collectively provide some support for arguments that fraud or misrepresentation presents a compelling exception to ex ante bargaining and insurance, yet a broad-based justification for ex post compensation.[295] And the evidence is particularly noteworthy in light of the fact that very few jurisdictions require proof of fraud or misrepresentation specifically for voluntary-creditor claims.[296]

Conclusion

Some pieces to the veil-piercing puzzle now appear to be in place, as the findings here and from Thompson's study cohere in numerous ways. The presumption in favor of corporate separateness is hardly axiomatic, with veil-piercing claims prevailing over 40% of the time and with virtually equal success in federal and state courts.[297] Further, all courts will disregard the form of only close corporations[298] and reach into the assets of individual shareholders far more often than those of corporate parents;[299] both of these dynamics merit additional investigation into the specifics of corporate groups

293. *See supra* note 280 and accompanying text.

294. *See supra* note 279 and accompanying text.

295. Interestingly, this asymmetry does not obtain for siphoning of funds or undercapitalization. *Cf.* Bainbridge, *supra* note 19, at 517–26 (proposing a regime of direct liability predicated on fraud or misrepresentation, siphoning of funds, or undercapitalization).

296. Notable exceptions to this can be found in Texas and federal common law. *See* Subway Equip. Leasing Corp. v. Sims (*In re* Sims), 994 F.2d 210, 218 (5th Cir. 1993) ("Although a finding of fraud is not essential in [T]ort cases, 'in [C]ontract cases, fraud is an essential element of an alter ego finding.'" (citation omitted)); *supra* note 35.

297. *See supra* notes 157, 174–80 and accompanying text.

298. *See supra* note 165 and accompanying text.

299. *See supra* notes 166–72 and accompanying text.

to determine the composition of those shareholders and the ways in which they influence how veil-piercing claims are litigated and adjudicated. Also worth exploring are the reasons why veil-piercing continues to be grounded overwhelmingly within Contract,[300] which may require a more complete understanding about the litigation patterns and settlement rates for different substantive claims.[301]

But this study's findings do reveal that some empirics of veil-piercing need revision. The results affirm the central role that Fraud, as an instrumental rationale and as a substantive claim, must occupy within any account of veil-piercing; indeed, the extent to which the doctrine is permeated by Fraud is manifest, even in its absence as a rationale, by spurring a substitution effect with other prominent factors or as a claim by expanding the disparity in litigant success in Tort over Contract.[302] And the results realign the theory and practice of veil-piercing with respect to distinct types of creditors; courts find veil-piercing more compelling when faced with creditors in Tort or of the involuntary sort, particularly when the ultimate shareholder is an individual or there is evidence of financial misconduct.[303] In contrast, creditors in Contract or of the voluntary sort seem to face a fairly neutral setting for veil-piercing; courts apparently do not impute any special regard to the relative sophistication of bargaining parties or the type of shareholder, with litigants experiencing fairly stable rates of success over the past three decades.[304] If a story is to be constructed from the data, it may be that, with respect to veil-piercing, the comparison between Contract and Tort is less valuable than Contract serving as a reference point for the relationship between Tort and Fraud.

Nevertheless, we remain hostage to a mangled and muzzy doctrine. The lack of consistency within the collective results reinforces that veil-piercing would benefit from principled simplification, and if such options already exist, from disciplined judicial attention. Some of the doctrine's most vigorous criticisms have come from courts, which have condemned the use of metaphors, denigrated the attenuated multifactor approach, and bemoaned the confusing landscape of past decisions. Yet these problems were highlighted by I. Maurice Wormser's elegant synopsis almost a century ago and detailed by Robert Thompson's empirical study almost two decades ago. The results presented here afford us with an opportunity to engage in a reinvigorated debate that ultimately may produce a doctrine that truly befits the title of Our Lady of the Common Law.

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300. *See supra* note 233 and accompanying text.
301. *See supra* note 147 and accompanying text.
302. *See supra* Figure 7.
303. *See supra* notes 277–78 and accompanying text.
304. *See supra* notes 242–49 and accompanying text.