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## RESPONSE

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### TWO TIMING THE LAW

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In response to Edward B. Rock, *Corporate Law Doctrine and the Legacy of American Legal Realism*, 163 U. Pa. L. Rev. 2019 (2015).

#### INTRODUCTION

Imagine a benighted student of the law, devoted to attaining a secure professional qualification by learning the rules and passing the exams, who has never read or heard anything about Legal Realism, that is, who has missed out entirely on twentieth century American jurisprudence. Such a Rip Van Winkle of the law, perhaps not so very rare in British law schools, would quickly learn what was at stake in the Legal Realist revolution by reading Professor Edward Rock's fine essay on corporate law doctrine.<sup>1</sup> In this comment I will summarize my outsider's understanding of what Professor Rock has taught us regarding the Realists' conceptions of legal doctrine and judgment, and then offer an English counterpoint. I will show how English lawyers evade the realist embrace of policy by projecting law inter-temporally—that is, allowing the law to inhabit two successive times and allowing one time state to affect the other—in order to yield legal results, and ultimately effect change in the legal system itself. I will then assess Rock's juxtaposition of the Delaware courts' realist approach and the “traditionalist” or formalist techniques of leading English commercial judges when dealing with some of the more difficult areas of corporate

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<sup>1</sup> Edward B. Rock, *Corporate Law Doctrine and the Legacy of American Legal Realism*, 163 U. PA. L. REV. 2019 (2015).

doctrine. This proves to be an interesting laboratory for the hypothesis that inter-temporality can be an effective approach to the determination of complex corporate or civil cases, and is a viable alternative to policy analysis.

### I. REALISM, DOCTRINALISM, AND THE HEURISTICS OF LAW AND FACT

Rock identifies three linked elements in his analysis of Realism.<sup>2</sup> Realists reject the idea that legal rules, when applied to the facts before the court, can yield decisions through a process of logical or analogical reasoning. Over a century ago, proto-Realist Roscoe Pound derided this model of judgment as “mechanical jurisprudence.”<sup>3</sup> Secondly, Realists hold that legal rules are permeated with indeterminacy, both internally and in relation to each other. Judges must actively make the law in every decision, or at least select freely from available legal rules to reach a desired result. Judges must exercise their creativity in conditions of freedom all the time; they are not just interstitially adding norms when the extant constraining rules run out. Realists dispute the concept of a core of determinate rules with a penumbra of uncertain application at the limit bestowing a limited discretion, since rules are simply incompetent to dictate legal norms in any situation. The third feature of Realism is the claim that the judge does not enforce legal rules generated within legal discourse. Rather, judges must constantly apply external communal norms or else make policy judgments driven by canons of social or economic value, or indeed partisan considerations of power or entitlement or ideology.

The core realist belief, then, is that despite the surface appearance of loyalty to doctrinal discourse, judges are really legislating all the time. They resolve factual problems through a balancing process driven by policy, and so overcome the contradictions thrown up by a plethora of rules. Judges and lawyers may not always wish to admit to such policy-driven freedom, but that simply must be the case if one takes a true view of how the law works. Doctrinal reasoning is just a convenient façade.

Professor Rock nods to traditions of linguistic philosophy that grapple with a perennial question at the heart of British analytical jurisprudence as well as American Realism, namely, what it means to follow a rule. H.L.A. Hart developed his answers using the famous example of a rule forbidding vehicles from a public park.<sup>4</sup> One could say this rule advertises a core of

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<sup>2</sup> Rock, *supra* note 1, at 2021-25.

<sup>3</sup> Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 607 (1908).

<sup>4</sup> H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607-08 (1958).

prohibitions that all involved in the language game of talking about use of parks would understand: no cars, obviously, but also like vehicles such as motorcycles. But what of cases outside the common sense of the word “vehicle”? Hart provides the example of an airplane, which is probably a vehicle for most people, and then identifies liminal cases such as bicycles, roller skates, and toy cars. One might add emergency ambulances to the list as a test case. Some of these cases might require judgment to work out the point of the rule in its social context, but in the Hartian view everyone grasps the main thrust of the rule. The core idea inhabiting the rule is not to get in the way of normal play and recreation by introducing transportation machines into the park. Does a realist attitude require us to say that there is no guiding core, only policy choices or hunches dressed up with post hoc reasons? Is it really threatening to our sense of rule determinacy to concede that it may not be clear whether harmless toy vehicles designed for play are in or out of the rule? One could save juristic energy by simply banning the play vehicles in order to create a fence around the core prohibition. Or, instead, decide on a case-by-case basis or postulate a counter rule, if the more patterned outcome is worth the extra decisional work. Professor Rock neatly points out the competition between, on the one hand, efficiency in external outcomes (in the Hartian case of controlled park use, fewer territorial conflicts, and happier and safer users of the space); and, on the other hand, efficiency in running the legal system (fewer arguments between rivalrous park users, less need for policing, and less work for the courts).<sup>5</sup> The realist riposte is that in a world with a multiplicity of rules, one has to deal with legal noise, with rule and counter rule, and that is where the indeterminacy of the law truly lies. The right of access of the ambulance to the park is not an instance at the edge of the rule penumbra, but rather lies in a liberty created by a counter rule; one must therefore develop policy ideas to decide when the medical need counter rule trumps the untrammelled park rule. In a developed legal world we need rules and principles to discriminate between the rules, and the most sophisticated systems have heuristics for those meta-rules, yielding a complexity that destroys all hope of rule certainty. One may note that other sophisticated systems—Roman law, and Jewish *halakhah* for example—have developed precisely such heuristics for the meta-interpretation of primary rules. This is not a discovery of the twentieth century Realists, or indeed of legal process theorists such as Fuller and Dworkin. Both these ancient legal systems had formalist and pragmatist schools; yet neither of these legal cultures turned to Realism, but

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<sup>5</sup> See Rock, *supra* note 1, at 2023-34.

rather moved in their full maturity to codification. Emperor Justinian, in the year 533 C.E., stated that he had ordered codification of the Corpus Juris in order to permit lawyers to navigate the tossing unruly sea of legal rules left by the classical jurists.<sup>6</sup> Fourteen centuries later, American Legal Realism also turned to codification as a key practical response to legal rule indeterminacy, with Karl Llewellyn as the central actor.<sup>7</sup> Nothing new under the sun.

The claims of Legal Realism may in part be positive—telling the truth about the law—but also normative—stating that we ought to think about the law in policy terms in such pragmatic and disenchanting modern societies as twentieth century America.<sup>8</sup> Then why is this form of legal modernism largely an American movement? There is the obvious factor of politicization of law through adjudication of civil rights and governmental powers and prohibitions under the United States Constitution, factors largely absent in English common law adjudication until the past generation. But the divergence of American and English legal mentalities since the 1920s may have resulted from a more hidden procedural parting of the ways. Both societies passed through a broadly similar process of industrialization, urbanization, and highly technical elaboration of law, and both legal systems were transmogrified in legal style. But the English tightened up their legal system by abolishing the civil jury trial and displacing jury discretion with new technocratic rules, a significant change from the law before 1870.<sup>9</sup> Whether due to cultural or constitutional commitments, or both, the United States long preserved the civil jury. It is possibly part of the story that realist suspicion of law was linked to the continued prominence of the trial judge as merely the legal regulator of the jury rather than factual decider in

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<sup>6</sup> J. INST. Prooemium (J. B. Moyle ed. & trans., 5th ed. 1913) (“Having removed every inconsistency from the sacred constitutions, hitherto inharmonious and confused, we extended our care to the immense volumes of the older jurisprudence; and, like sailors crossing the mid-ocean, by the favour of Heaven have now completed a work of which we once despaired.”).

<sup>7</sup> WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 270-340 (2d ed. 2012).

<sup>8</sup> HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 1-68 (2013).

<sup>9</sup> See generally Joshua Getzler, *The Fate of the Civil Jury in Late Victorian England: Malicious Prosecution as a Test Case*, in “THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND”: THE JURY IN THE HISTORY OF THE COMMON LAW 217, 217-35 (John W. Cairns & Grant McLeod eds., 2002); Michael Lobban, *The Strange Life of the English Civil Jury, 1837-1914*, in “THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND” *supra*, at 173, 173-215.

his or her own right. This institutional separation of law from fact made judicial rulemaking seem a suspect mystificatory power.<sup>10</sup>

Interestingly, the Romanistic and continental legal systems, and especially German law, control the freedom and power of juristic reasoning by taking it out of the judicial process completely. Recall that the words for judge and juryman in ancient Rome were the same, “*iudex*,” and that neither type of decisionmaker was typically a lawyer. The real lawyers, the jurists, decided hypotheticals and designed the formulae that governed cases prospectively, but did not directly decide disputes that were litigated all the way to the courtroom. This may explain why civilian lawyers maintain the deepest respect for doctrine as objective juristic science, since judges exerting power over litigants and making choices wield decisional discretion only in the realm of fact-finding; run-of-the-mill and even appellate decisions do not provide precedents, but are only evidence of how juristic norms constantly operate.<sup>11</sup> We should also note that Rock’s proving ground, Delaware corporate law, uses the single judge at first instance using non-jury chancery procedure; this mixed law–fact forum aligns the Delaware judicial procedure with English corporate adjudication, also springing from a chancery single-judge-no-jury template. Does realist analysis work differently in the presence of jury trial, or is it best seen as a theory of appellate law?

## II. COMMON LAW CREATIVITY AND RETROSPECTIVITY

Having set out the terms of the Realist/Doctrinalist split, Rock’s main mission in his paper is to contrast the reasoning processes of Delaware and English corporate judges in the areas of shareholder freezeouts and bond exit consents. He uses these parts of corporate law doctrine as testing grounds to determine whether Realism or Formalism yields different results when addressing similar problems. The answer he gives, perhaps counterintuitively, is no.<sup>12</sup> The style of reasoning may be very different but the determinations are broadly similar. This is the puzzle that Rock poses, and does not presume to solve; indeed, he seems a little surprised at his own discovery of jurisdictional convergence in the results of the cases.

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<sup>10</sup> A theme pursued in JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 415-556 (2009).

<sup>11</sup> See generally JOHN P. DAWSON, *A HISTORY OF LAY JUDGES* 14-112 (1960); PETER STEIN, *THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS* 100-47 (1988).

<sup>12</sup> Rock, *supra* note 1, at 2048-49.

Before turning to the doctrines, we might explore Rock's characterization of English law as "Traditionalist," being "a jurisdiction uninfluenced by American legal realism."<sup>13</sup> It is worth emphasising that English lawyers seldom regard contemporary American law as a counterpart or counterpoint to their own practice, but look instead to the laws of Europe and the Commonwealth.<sup>14</sup> Indeed the direct influence of American Realism on the English legal mind is less now than it was in the early to mid-twentieth century when elite jurists were in close contact across the Atlantic.<sup>15</sup> At the same time, the basic realist message is hardly surprising or revelatory in England. It is well understood that common law and statutory rules are often vague or contradictory. Judges constantly engage with moral and policy choices when they adjudicate. Yet, in England, there is an abiding commitment to the idea that law is found, declared, applied, constructed—not simply legislated as an act of will. The theory was embodied in its pure form in a convention that the House of Lords as the top English court be loyal to its own past decisions. This meta-rule was abandoned with some constitutional controversy by the House of Lords itself through the novel issuance of a "Practice Statement" in 1966 changing its own precedential rules.<sup>16</sup> Perhaps the most revealing recent enunciation of the declaratory theory was in *Kleinwort Benson Ltd. v. Lincoln City Council*,<sup>17</sup> where the House of Lords accepted that the communal sense of justice required a change in legal policy to allow recovery of payments made though mistakes of law. But how can a common law court shift an established rule—relied upon by countless parties including at least one of the litigants before the court in an instant case—without courting the risk of retrospectivity? Prospective overruling in England is no longer seen as impossible, but its boundaries are tightly patrolled as an assumption by the judge of legislative power, a power to change the law detached from the judicial duty to apply and thereby adapt law in order to resolve live cases.<sup>18</sup> So, the courts are

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<sup>13</sup> *Id.* at 2023.

<sup>14</sup> Certain areas are the exception, such as corporate law and antitrust, where English scholars are increasing the attention paid to the post-Realist techniques of economic analysis.

<sup>15</sup> Cf. DAVID M. RABBAN, *LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY* 325-80 & *passim* (2013).

<sup>16</sup> Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234, 3 All E.R. 77 (H.L.).

<sup>17</sup> [1998] UKHL 38, [1999] 2 A.C. 349 (H.L.) (appeal taken from Eng.).

<sup>18</sup> See generally RUPERT CROSS & J. W. HARRIS, *PRECEDENT IN ENGLISH LAW* 228-32 (4th ed. 1991); BEN JURATOWITCH, *RETROACTIVITY AND THE COMMON LAW* (2008); Mary Arden, *Prospective Overruling*, 120 L.Q.R. 7 (2004); Andrew Burrows, *Common Law Retrospectivity*, in *JUDGE AND JURIST: ESSAYS IN MEMORY OF LORD RODGER OF EARLSFERRY* 533-57 (Andrew Burrows, David Johnston & Reinhard Zimmermann eds., 2013); Alan Rodger, *A Time for Everything Under the Law: Some Reflections on Retrospectivity*, 121 L.Q.R. 57 (2005). A full judicial

caught between two walls: the certainty requirements of the rule of law that restrict retrospectivity and the curb on overtly prospective judicial legislation. This poses the question, how can the common law change? How does a contemporary court inaugurate not only an unprecedented rule, but indeed a contra-precedential rule—to be applied to a new case before the court as a better contemporary solution than the old authoritative rule? The answer given in the *Kleinwort Benson* case was paradoxical: change is achieved by declaring the old rule (no recovery for mistake of law) to have been wrong—always wrong—even though every lawyer prior to 1998 would have seen the bar to recovery as an obvious hornbook principle. From the time of the Lords' decision in 1998, the rule was declared to be *per incuriam*, not a correct principle of the common law. This meant that those generations of past lawyers who accepted the old rule were declared to be wrong, even though the Lords freely acknowledged that the now-discovered-to-be-wrongheaded were right in their day. Only the times and policy ideas had changed so as to undermine today's sense that yesterday's lawyers held true opinions about the trans-temporal common law. Retrospectivity with its attendant ills of legal insecurity is avoided because the past lawyers are seen to have failed to predict where the rule would end up; effective lawyers would have advised their clients where the law was heading, so that their affairs in the prior time period could have been arranged to take account of the likely rule change.<sup>19</sup> *Kleinwort Benson* thus suggests that the English common lawyer can live in two times and hold two opposing legal opinions at once, so permitting the lawyer to be quite the Realist in legal *policy* and yet exceptionally doctrinal at the same time. One can stipulate that today's rulemakers are always right, and one can respect and rely upon the rules of the past as right until they are declared wrong, so discovering that one should not really have relied upon them.

There is a contrary tendency in English anti-realist legalism derived from the separation of powers, whereby the legislative authority of the sovereign parliament supplies the "Get Out of Jail" pass for lawyers locked

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exploration of the possibility of prospective overruling is offered in *National Westminster Bank plc v. Spectrum Plus Ltd.* [2005] UKHL 41, [2005] 2 A.C. 680 (H.L.) [1]-[43] (Lord Nicholls) (appeal taken from Eng.).

<sup>19</sup> John Finnis, *The Fairy Tale's Moral*, 115 L.Q.R. 170 (1999); Aruna Nair, "Mistakes of Law" and Legal Reasoning: Interpreting *Kleinwort Benson v. Lincoln City Council*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT* 373-93 (Robert Chambers, Charles Mitchell & James Penner eds., 2009); Lionel D. Smith, *Restitution for Mistake of Law: Kleinwort Benson Ltd. v. Lincoln City Council*, 1999 *RESTITUTION L. REV.* 148.

into a stream of precedent. Many times the judge will say in a hard case<sup>20</sup>: “the rule dictates *X*; one might regret such a rule and such a result, but the court is powerless to depart from the rule and must decide *X*, even though we would prefer *Y* if we were free to choose. For future cases we call on Parliament to change the law to get to *Y* not *X*.”

Such deference to the position of the unitary national parliament as the supreme omniscient rulemaker is the essential companion theory explaining why modern English lawyers, unlike Americans, are so un-Realistic. Judges remain unwilling to concede that adjudication comprises endless policy choices, even as the courts apply the endlessly pliable rules of common law, statute, and lawmaking agencies.

### III. DIVIDING THE CORPORATION AND CONFLICTS OF INTEREST

The main part of Rock's article assays two tough areas of corporate case law administered by expert judges in Delaware and London. One might reframe both the problem areas chosen—freezeouts and forced exits—as examples of an age-old problem: how do co-owners redivide the *res* when circumstances and present and expected value have changed since the original deals setting up the enterprise? How does the law in such reorganizations of ownership prevent (a) manager-agents or (b) majority or entrenched stockholders from oppressing (c) minority or weak stockholders? Conflict of interest seems built in to freezeouts and forced exits as species of ownership reorganizations. Rock shows how Delaware and London courts wield legal rules to contain or licence deals made in the shadow of such intrinsic conflict. Rock is fascinated by how Realist American judges and Traditionalist English judges “manage” the conflicted interests with completely different techniques and vocabularies, yet reach similar results.

We might ask an initial question: what is the mischief involved in conflict of interest? A legendary venture capitalist supposedly quipped “no conflict—no interest,” that is, he wasn't interested in investing without some commercial privilege denied to others.<sup>21</sup> Less cynically, we can see in conflict rules both welfare and deontological objections. A powerful actor who can divert profits from shared or entrusted resources or who generates rents by hoarding assets or information is moving value toward herself in

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<sup>20</sup> Using here the common lawyers' meaning of a “hard case” as one where the clear rule makes for a harsh instant result. Cf. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1060 (1975) (denoting a seemingly indeterminate case governed by conflicting or clouded rules that do not dictate a clear decision using conventional positive materials).

<sup>21</sup> Attributed to L. John Doerr of investment firm Kleiner Perkins. WILLIAM FORBES, BEHAVIORAL FINANCE 378 (2009).



such a way as to destroy trust and chase people out of the market. Even in the absence of profit-taking the conflicted actor is unable to exercise clear judgment and will sub-optimize possibly for himself as well as the group. Thus, I cannot judge how to optimize my principal's interests and welfare if I am permitted to trade in opportunities that come my way through my agency appointment. Even if I try to be objective, I cannot trust my own judgment when surrounded by conflicting incentives.<sup>22</sup>

But how is the law to police conflicts which so readily occur? The answer is to apply presumptions of disability or liability, subject to defences that set demanding standards to make the fiduciary prohibitions defeasible. The Delaware and English cases Rock analyses are, in effect, using different methods to determine what counts as a valid defeasance of an ascriptive fiduciary duty to avoid conflicts. When there is good reason to relax the conflict of duty prohibitions, for example, through consent of all affected parties who can be on alert to monitor the group activity, the law will shrink or adapt the duty. One may propose this oscillating process of rule application, subject to defeasibility and defences, as the Legalists' solution to the Realists' problem of rule contradiction. Defeasibility rules offer a meta-principle for holding rule contradictions in a dynamic balance that is changeable across time.<sup>23</sup>

Thus, to resolve conflicts in the freezeout context of the *MFW Shareholders Litigation*, Chancellor Strine determines that the double protection of arms-length independent negotiating committees, plus some kind of majoritarian disinterested shareholder approval, can displace the presumption of unfairness and allow summary dismissal under the business judgment rule of basic rationality.<sup>24</sup> In these circumstances it is not necessary to go into messy and expensive evidence of "entire fairness," which may often involve rent-seeking by lawyers or blackmailing hold out tactics and will not always yield justice. Justice Holland, on appeal,<sup>25</sup> backpedals slightly and allows a counter-ascription of presumptive liability requiring entire fairness review if the minority can raise credible or prima facie evidence of unfairness, adding another layer of ascriptive liability. But this complication does not disturb the main picture of policy science applied to work out how

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<sup>22</sup> Lionel Smith, *Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another*, 130 L.Q.R. 608, 609-19, 623-26 (2014).

<sup>23</sup> For the full model see Joshua Getzler, *Ascribing and Limiting Fiduciary Obligations: Understanding the Operation of Consent*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 39-62 (Andrew S. Gold & Paul B. Miller eds., 2014).

<sup>24</sup> *In re MFW S'holders Litig.*, 67 A.3d 496, 500-05, 520-36 (Del. Ch. 2013).

<sup>25</sup> *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 642-47 (Del. 2014).

to adapt curial standards in articulating legislative collective schemes of division of corporate value.<sup>26</sup>

The English statutory scheme for freezeouts uses a different strategy of defeasibility—either consent from 90% of the shareholders by value, or consent by a lesser 75% majority in each class of creditor or shareholder. Class membership may thus be determined either by an interest analysis or by formal analysis of the type of legal rights held. Rock identifies a liberalizing or permissive shift in regulation, which seems to be driven largely by formal analysis of statutory texts and precedential reasoning. But he also notes counter-evidence, for in the 1999 *BTR* decision, Justice Jonathan Parker dilutes minority protection on the explicit policy grounds that it would be too hard for courts to sift out economic interests in determining class membership and that multiplication of classes would yield rent-seeking by lawyers and hold out groups.<sup>27</sup> This smells like a policy argument akin to an application of the business judgment rule, not far from the reasoning of the Delaware judges in *MFW* when determining which standard of review to apply to schemes of price purification.

Rock closes his study with an analysis of court control of bond modification consents. In *Katz v. Oak Industries*,<sup>28</sup> bondholders are asked to vote to renegotiate the terms of bonds downwards, with the negative incentive that those who voted against would be stripped of security if the renegotiation won majority approval and went ahead. The coerced exit consent passed as a valid procedure as no voting interest was singled out for different treatment—one voted whether to join the majority, or else took the risk of being stripped of rights in an unsuccessful minority. No conflict of interest between the classes being offered different levels of haircut existed *ex ante*, as those classes only came into existence *ex post*.<sup>29</sup>

In the classic English decision of *Assénagon*, Justice Briggs remarks that the strategic incentives used to push bondholders to join a 75% majority, being the size of effective majority required by statute, could not begin to work in the United States, where unanimous consent to payment modification was mandated by the U.S. Trust Indenture Act of 1939 s.316(b).<sup>30</sup> Moreover, the relevant Delaware authority involves modification of the priority in security of the minority bonds, not evisceration of the payment terms as in *Assénagon*. In the English case of *Azevedo*, decided earlier that year, it was

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<sup>26</sup> Rock, *supra* note 1, at 2036-37.

<sup>27</sup> *BTR Plc, Re* [1999] 2 B.C.L.C. 675 (Eng.), 1999 WL 1457319 (Feb. 2, 1999).

<sup>28</sup> 508 A.2d 873 (Del Ch. 1986).

<sup>29</sup> *Id.* at 878-82.

<sup>30</sup> *Assénagon Asset Mgmt. S.A. v. Irish Bank Resolution Corp. Ltd.* [2012] EWHC (Ch) 2090 [49] (Eng.).

held that a positive incentive openly offered by the issuers to any who joined a successful majority was not oppressive to the minority who chose not to accept the renegotiation and so lost the chance to receive the majority benefit.<sup>31</sup> But in *Asséganon* there was a negative incentive offered by the majority seeking to bring about a haircut to bond terms in order to anticipate state expropriation. The incentive involved what was, in effect, a threat to compel compliance, reducing the minority's entitlement to a derisory payment of just one millionth of the original consideration. But potential minority voters would not know if they would be in an unsuccessful and expropriated minority without predicting the strategic decisions of like voters. Hold together successfully and the dissentients can win out and derive value; but if some in the putative minority rat on the deal in order to win a sure thing with the majority than the loyally dissentient voters will get near nothing. Rock suggests that Justice Briggs's references to prisoners' dilemmas and trembling hand Nash equilibria in his exposition of the problems with the scheme were ironic.<sup>32</sup> Justice Briggs meant what he said when he stated that he ignored the American economic analysis literatures and decided according to impeccable traditional precedents using the English remedies of minority oppression. The key doctrinal move in the *Asséganon* case involves a specific performance point, and arguably this is the main ratio. Here, Justice Briggs uses another time shifting device of the English law: the equitable time machine of back-dated re-characterization of legal interests, in this case to hold that once voters had joined a majority bloc and accepted terms to return their old bonds in exchange for new, the company was in effect the equitable owner of the bonds with associated voting rights. Under the old equitable doctrine that an executory contract for goods not purchasable elsewhere can give rise to a specific performance remedy supporting a constructive trust, the majority voters in the eyes of the law had shifted the beneficial interest in the vote-bearing stock to the purchaser. This is often explained on the moral maxim that "equity sees as done that which ought to be done"; we treat the committed deal as if it were performed.<sup>33</sup> Hence, the majority vote in favor of the bond haircut and ensuing minority expropriation was caught by statutory prohibitions on self-dealing by a company renegotiating its liabilities, due to the doctrinal shift of beneficial claim at the very instant of the majority commitment.

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<sup>31</sup> *Azevedo v. Imcopa Importacao Exportacao E Industria De Oleos Ltda* [2012] EWHC (Comm) 1849 [53]-[69] (Eng.).

<sup>32</sup> Rock, *supra* note 1, at 2052.

<sup>33</sup> For the doctrinal details, see Joshua Getzler, *Assignment of Future Property and Preferences*, in *FAULT LINES IN EQUITY* 73-105 (Jamie Glister & Pauline Ridge eds., 2012).

Again, the law lives simultaneously in two time zones, and allows actions in the present to recharacterize the legal qualities of actions in the past. Thus, the doctrinalist has superbly elegant means to deal with *ex ante* and *ex post* conflicts of interest and so can solve an acute problem of interactive rationality, one that might defeat any amount of complex economic modelling or pragmatic sociological observation. This approach was evoked by Lord Hoffmann with Hegelian flourish in a 2009 House of Lords case concerning an assurance of testamentary disposition established by estoppel:

There was a close and ongoing daily relationship between the parties. Past events provide context and background for the interpretation of subsequent events and subsequent events throw retrospective light upon the meaning of past events. The owl of Minerva spreads its wings only with the falling of the dusk. The finding was that [the plaintiff] reasonably relied upon the assurance from 1990, even if it required later events to confirm that it was reasonable for him to have done so.<sup>34</sup>

### CONCLUSION

In this comment I have argued that Rock proved even more than he may have known, in his very wise and insightful analysis of Realism, doctrinalism, and corporate law reasoning. His work reveals that doctrinalism can develop superb tools for dealing with ascription and defeasibility of claims and thus operate contending or rival rules simultaneously and successfully—without invoking extra-legal policies of balancing interests using realist policy science. Doctrinalism done well in the customary community of the common law is comparable to the best home cooking. Despite the obvious stirrings of policy argument in English courts, we are not yet quite ready to move over to the Realists' *grande cuisine*, prepared and served outside the common law kitchen.

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Preferred Citation: Joshua Getzler, *Two Timing the Law*, 163 U. PA. L. REV. ONLINE 355 (2015), <http://www.pennlawreview.com/online/163-U-Pa-L-Rev-Online-355.pdf>.

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<sup>34</sup> *Thorner v. Major* [2009] UKHL 18 [8] (H.L.) (appeal taken from Eng.). See also Lord Neuberger of Abbotsbury, *The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity*, 68 CAMBRIDGE L.J. 537 (2009).