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# Corporate Law Doctrine and the Legacy of American Legal Realism

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## ARTICLE

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### CORPORATE LAW DOCTRINE AND THE LEGACY OF AMERICAN LEGAL REALISM

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EDWARD B. ROCK<sup>†</sup>

*In this contribution to a symposium on “Legal Realism and Legal Doctrine,” I examine the role that jurisprudence plays in corporate law doctrine. Through an examination of paired cases from the United States and United Kingdom, I offer a case study of the contrasting influence on corporate law judging of American Legal Realism versus traditional U.K. Doctrinalism.*

*Specialist judges in both systems, aided by specialist lawyers, clearly identify and understand the core policy issues involved in a dispute and arrive at sensible results. Adjusting for differences in background law and institutions, it seems likely that the disputes would ultimately be resolved in more or less the same way in each system. This is unsurprising in a field such as corporate law, where market and institutional pressures demand practical solutions to practical problems.*

*On the other hand, the differences in style are inescapable. While Delaware corporate law judges openly identify gaps and resolve them by reference to policy, U.K. judges employ a traditional historical/doctrinal approach, working through precedent and, in doing so, developing principles to resolve the case at bar. These differences in style, it seems to me, are a legacy of the impact of American Legal Realism on legal education in the United States, in contrast to the more traditional approach dominant in the United Kingdom. Explicit policy analysis is far more acceptable and natural in the Delaware approach than in the United Kingdom, and this difference in legal culture has effects on how lawyers present cases.*

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## INTRODUCTION

American Legal Realism (ALR) has penetrated American legal thinking so deeply that nearly every lawyer, judge, or legal academic educated in an American law school began to absorb its core lessons from the time he or she started studying law. At the same time, as corporate lawyers, judges, and corporate law academics, we spend much of our time discussing, describing, and contesting corporate law doctrine. Should the persistence of doctrine be surprising to a Legal Realist? Does a Legal Realist approach legal doctrine differently from a legal formalist? What role does corporate law doctrine play in a corporate law system populated by actors educated in the Legal Realist tradition?

### I. THE LEGACY OF AMERICAN LEGAL REALISM

In law schools, we spend little time talking with our students or with each other about the fundamental jurisprudential commitments that form the foundation of our views of law. Although law schools offer courses in Jurisprudence or Legal Philosophy, these courses are not mandatory, and most law students graduate without receiving any systematic overview of

these subjects. But there are core jurisprudential commitments that form the foundation of American legal education and that distinguish it from legal education in other countries. I submit that most of us who were educated in American law schools came away with some version of the following understandings of law.

First, American lawyers, to one degree or another, all subscribe to the notion that in many litigated cases—especially those that get to the Courts of Appeals and form the foundation of our casebooks—traditional legal materials (i.e., statutes and case law) rarely suffice to determine the outcome. We identify a gap between those materials and a case’s result that is not filled by logical deduction, regardless of how a court ultimately explains the outcome. In nearly all interesting cases, we teach and believe that there is enough slack that a court can come out either way. In casebooks, cases with similar fact patterns but different outcomes are often paired. We typically teach these cases as illustrations of the manipulability of doctrine, rather than as opportunities for fine-grained distinctions.<sup>1</sup>

Second, when we identify these gaps, we teach that judges make new law—not discover law that was somehow already there—and ask our students to articulate the “policy” considerations that explain the result or could motivate a different result.

For purposes of this Article, assume that, as a descriptive matter, I am more or less right in this characterization of American legal education. Where do these ideas come from and what implications do they have for the role of corporate law doctrine?

## II. THE CORE OF AMERICAN LEGAL REALISM: THE “UNDERDETERMINATION” THESIS AND THE ROLE OF FACTS

In an extremely valuable reconstruction that I rely on heavily here, Brian Leiter distinguishes several strands that broadly characterize the fairly heterogeneous group of scholars who can be labeled American Legal Realists: Karl Llewellyn, Underhill Moore, Walter Wheeler Cook, Herman

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<sup>1</sup> For example, in introducing the goals of damages in U.S. contracts courses, *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962), which held that the proper measure of damages is the cost of remedying the defect, is paired with *Groves v. John Wunder Co.*, 286 N.W. 235 (Minn. 1939), which held that the proper measure of damages is the difference in value of the property before and after the defective performance. See JOHN P. DAWSON, WILLIAM BURNETT HARVEY & STANLEY D. HENDERSON, *CONTRACTS: CASES AND COMMENT* 11-19 (7th ed. 1998) (juxtaposing *Peevyhouse* and *Groves* as examples of damages calculation in contract law).

Oliphant, Leon Green, Jerome Frank, Thurman Arnold, Felix Cohen, Max Radin, and others.<sup>2</sup>

First, all Realists agree that the traditional style of judicial opinions provides an inaccurate description of the actual process of adjudication when it expresses the conclusion as the result of a sort of syllogism in which the major premise is “the law,” the minor premise is “the facts,” and the conclusion follows with logical certainty.<sup>3</sup> This view is sometimes ridiculed as “mechanical jurisprudence.”<sup>4</sup>

Second, all Realists agree that traditional legal materials underdetermine the outcome in two related senses.<sup>5</sup> As Leiter explains, the law is “rationally indeterminate” in that the available legal reasons drawn from statutes and cases do not justify a unique decision in a significant number of cases.<sup>6</sup> In addition, the law is “causally or explanatorily indeterminate” in that legal reasons do not suffice to explain why a judge decided as he or she did.<sup>7</sup>

In justifying the indeterminacy thesis, Realists go beyond the lawyers’ sense of uncertainty and identify a particular source of uncertainty in legal decisionmaking: conflicting but plausibly applicable lines of precedent and tools that allow a judge to legitimately choose either outcome.<sup>8</sup> Karl Llewellyn’s famous article on canons of statutory construction is a paradigmatic example of this approach.<sup>9</sup>

The idea that there are situations in which the law “runs out” and judges make law “interstitially” is not unique to Realism.<sup>10</sup> H.L.A. Hart, who

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<sup>2</sup> See Brian Leiter, *American Legal Realism* (providing an overview of the theoretical approaches to ALR), in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 50, 50-66 (Martin P. Golding & William A. Edmundson eds., 2005). In this Article, I will use “American Legal Realist,” “Legal Realist,” and “Realist” more or less interchangeably.

<sup>3</sup> See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* 103 (1930) (“[Y]ou will study these opinions in vain to discover anything remotely resembling a statement of the actual judging process.”).

<sup>4</sup> See, e.g., Leiter, *supra* note 2, at 50 (explaining that early scholars of ALR reacted to the “mechanical jurisprudence” of their time).

<sup>5</sup> *Id.* at 52-53.

<sup>6</sup> *Id.* at 51.

<sup>7</sup> *Id.* (emphasis omitted).

<sup>8</sup> See *id.* at 51-52 (interpreting precedent in different ways can lead to different outcomes, which reduces its value as a source of law).

<sup>9</sup> See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 *VAND. L. REV.* 395, 401-06 (1950) (identifying strains of law in the canon of statutory interpretation allowing contradictory, but equally legitimate, interpretations of statutes); see also Leiter, *supra* note 2, at 51 (“[I]f a court could properly appeal to either canon when faced with a question of statutory interpretation, then the ‘methods’ of legal reasoning . . . would justify at least two different interpretations of the meaning of the statute.”).

<sup>10</sup> See Leiter, *supra* note 2, at 61-65 (reviewing how the “legal process” school of legal theory began as a response to ALR and adopted many of its assumptions).

argued strongly against Realism's "rule skepticism," acknowledged that judges can and must make law.<sup>11</sup> What separates the Realists from Hart<sup>12</sup>—indeed, what separates the implicit jurisprudence of American legal education from the prevailing view in the United Kingdom and the rest of the world—is (a) a sense of how often the law runs out and (b) how gaps are and should be filled.

Hart argued that the Realists overstated the extent of indeterminacy and misconceived how judges fill gaps. In cases not addressed by the relevant statute, Hart argued that the judicial role is fundamentally different from the legislative role: "[N]ot only are the judge's powers subject to many constraints *narrowing his choice* from which a legislature may be quite free, but since the judge's powers are exercised only to dispose of particular instant cases he cannot use these to introduce large-scale reforms or new codes."<sup>13</sup>

Rather, for Hart, the judge's role as an interstitial lawmaker is best analogized to the "delegated rulemaking power [of] an administrative body."<sup>14</sup> In this model, courts have authority to make rules for unregulated cases and are instructed to do so with reference to the principles and standards established in the authoritative provisions.<sup>15</sup> Hart further argued that "legal decisionmaking does not proceed *in vacuo* but always against a background of a system of relatively well established rules, principles, standards, and values."<sup>16</sup>

The Realists had a very different view. Mainstream Realists, including Llewellyn, Oliphant, Green, and others, thought that the gap was filled by some combination of "fact-scenarios" and industry practice.<sup>17</sup> Thus, in understanding tort law, Leon Green argued that traditional tort law—with its doctrinal categories including negligence, intentional torts, and strict liability—was misleading and should instead be thought of as organized by factual scenarios such as "surgical operations," and "traffic and

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<sup>11</sup> H. L. A. HART, *THE CONCEPT OF LAW* 132-44 (2d ed. 1994). One of the key differences between Hart's and Ronald Dworkin's views is whether judges make law interstitially. Dworkin famously argued against Hart that even in "hard cases," there is one right answer which judges must try to reach, even if we may not know whether they have succeeded in doing so. RONALD DWORKIN, *LAW'S EMPIRE* 109 (1986).

<sup>12</sup> Here, I take Hart to be a very articulate spokesman for British legal culture.

<sup>13</sup> HART, *supra* note 11, at 273.

<sup>14</sup> *Id.* at 132.

<sup>15</sup> *Id.*

<sup>16</sup> H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 979 (1977).

<sup>17</sup> See Leiter, *supra* note 2, at 54-55 (explaining that in Oliphant's example of the conflicting court decisions on the validity of contractual promises not to compete, the courts enforced the prevailing norms as expressed in guild regulations for a particular fact-scenario).

transportation.”<sup>18</sup> Similarly, Oliphant, in his reconstruction of the law of contractual promises not to compete, claimed that the decisions could be understood only by reference to the factual circumstances of the cases: an employee’s promise to an employer (often invalid) versus a business seller’s promise not to compete with the buyer (often valid).<sup>19</sup> For Realists such as Llewellyn, Green, Oliphant, and others in the group Leiter refers to as the “Sociological Wing,” the law cannot be understood without attention to the underlying and determinative factual and industry details.<sup>20</sup> These are the “materials” that were thought necessary to supplement the cases and statutes in our typical “Cases and Materials on the Law of X.”

For these Realists, “what judges decide on the facts in such cases falls into one of two patterns[:] either (1) judges enforce the norms of the prevailing commercial culture; or (2) they try to reach the decision that is socioeconomically best under the circumstances.”<sup>21</sup> This latter category is the domain of “policy.”

This vision differs from Hart’s and points judges in a very different direction. In Hart’s view, the role of the judge, as delegated decisionmaker, is to dig deeply into the cases and statutes to identify the core principles—the ratio decidendi—and then to redescribe them at a level of generality sufficient to resolve the new case.<sup>22</sup> A delegated decisionmaker must strive to discern the principles according to which he or she is expected to decide.

By contrast, the Realists, in focusing on how judges actually decide cases, did not have a single view of how judges *should* decide them. Leiter argued that “[s]ome Realists (Holmes, Felix Cohen, Frank on the bench) think judges should simply adopt, openly, a legislative role, acknowledging that, because the law is indeterminate, courts must necessarily make judgments on matters of social and economic policy.”<sup>23</sup> For the Sociological Realists, the judge should look *outside* legal materials to determine the

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<sup>18</sup> *Id.* at 55.

<sup>19</sup> *See id.* at 54-55 (quoting Oliphant’s analysis of cases involving promises not to compete).

<sup>20</sup> *See id.* at 55 (providing that the thesis of Sociological Wing Realists like Llewellyn, Oliphant, and Moore posits that “judges enforce the norms of commercial culture or try to do what is socioeconomically best on the facts of the case”).

<sup>21</sup> BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 27 (2007).

<sup>22</sup> Hart, *supra* note 16, at 980 (extolling Lord Atkin’s analysis in the early products liability case *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) 564 (appeal taken from Scot.)).

<sup>23</sup> Leiter, *supra* note 2, at 58. Others, according to Leiter, largely ignore the normative question on the grounds that how judges decide cases is just a fact about what they do and it would be “idle to tell judges they *ought* to do otherwise.” *Id.*

prevailing commercial norms or, in the absence of such norms, the socially or economically preferred outcome.<sup>24</sup>

Both approaches, from Hart's perspective, go well beyond the delegated rulemaking authority given to judges and usurp the role of the legislature.<sup>25</sup>

### III. THE CRITICAL LEGAL STUDIES EXTENSION: A BRIEF DIGRESSION

Many American lawyers, judges, and academics were exposed to Critical Legal Studies (CLS) in law school. How does CLS relate to the ALR of the 1930s? At the risk of dramatically oversimplifying a varied group of scholars, the connections are more or less the following. ALR convincingly demonstrated that the gap between traditional legal materials and judicial decisions is a persistent feature of adjudication.<sup>26</sup> As noted above, the mainstream Realists thought the gap could largely be filled by what are now viewed as accepted supplements, such as industry practice, or have already been incorporated into the traditional legal materials through law reform efforts that pay more attention to fact-scenarios, such as the Restatements. More generally, ALR argued that the gaps are filled by considerations of policy.

CLS picked up on this gap, viewed it as pervasive, and argued that (a) judicial opinions *never* convince us that the result was legally compelled and (b) adjudication is irredeemably *ideological*.<sup>27</sup> The above overview of ALR allows one to trace the connections and the divergences. The gap—the observation that, at least for the “interesting” cases, a judge could come out either way—becomes a pervasive “contradiction” in the law.<sup>28</sup> If one can come out either way, then the rhetorical claim of logical inevitability that characterizes much judicial prose is shown to be false.<sup>29</sup> If the gap is filled by reference to considerations of policy, then we can interrogate those

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<sup>24</sup> These Realists were later joined by Judge Posner in arguing that judges should step out from behind legal doctrine and directly engage with political and economic considerations weighed by legislatures. *See, e.g.*, RICHARD POSNER, REFLECTIONS ON JUDGING 121 (2013) (arguing that when the legislative purpose is not discernible, “the judge is the legislator and has to base [the] decision on his conception of sound public policy within the limits the legislators have set . . . [and] must, like other legislators, consider among other things the likely consequences of a decision one way or the other”).

<sup>25</sup> Hart does recognize that in the small set of cases where searching the law for applicable principles yields no answer, it is appropriate to decide as a conscientious legislator would. *See* HART, *supra* note 11, at 273 (“[T]here will be points where the existing law fails to dictate any decision as the correct one, and to decide [these cases] . . . the judge must exercise his lawmaking powers.”).

<sup>26</sup> *See* discussion *supra* Part II.

<sup>27</sup> DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 82-92 (1998).

<sup>28</sup> *Id.* at 83-92, 284-85.

<sup>29</sup> *Id.* at 86-89.



considerations. As soon as we ask “who benefits?”, a case can often be made that entrenched interests benefit. In this way, policy considerations, far from being neutral or technocratic, are seen as a Trojan horse for ideology.<sup>30</sup>

Because CLS has not, to my eyes, had anywhere near the impact on the culture of legal education or legal thinking as ALR, I will focus my attention here exclusively on ALR.

#### IV. AMERICAN LEGAL REALISM AND DOCTRINE

ALR has always had a complex relationship with legal doctrine. In many respects, doctrine was the principal focus of the Realist project. In its worst incarnation, legal doctrine, as wielded by the exaggerated figure of the “formalist,” is the disingenuous, ex post rationalization that obscures the degree of judgment involved in adjudication.<sup>31</sup> For Realists, the frequent rhetorical claim that legal doctrine “compels” an outcome should *never* be taken at face value.<sup>32</sup>

Legal doctrine can also be misleading when other factors are the principal determinants of adjudication. In Oliphant’s analysis of the enforceability of promises not to compete, the principal determinant turns out to be whether the promise was made by an employee to an employer (presumptively invalid) or by a business seller to a buyer (presumptively valid).<sup>33</sup> The then-governing doctrine misled by failing to identify these as critical factors.<sup>34</sup>

This critique led to a view of doctrine as a *solution* to uncertainty, and explains the Realists’ central role in law reform efforts such as the American Law Institute’s (ALI) Restatements and the development of the Uniform Commercial Code (UCC). For example, by modifying legal doctrine regulating contractual promises not to compete to track relevant fact-scenarios, the *Restatement (Second) of Contracts* section 188 incorporated

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<sup>30</sup> *Id.* at 86, 97-130.

<sup>31</sup> *See, e.g.*, FRANK, *supra* note 3, at 22-41 (discussing the language of law that allows rationalization of seemingly incompatible outcomes in legal decisionmaking and the role of judges in making laws).

<sup>32</sup> *Id.* at 32-40 (arguing that the “basic legal myth . . . that the law can be entirely predictable” stems from a “childish desire” to have a world free from “chance and error due to human fallibility”).

<sup>33</sup> *See supra* note 19 and accompanying text.

<sup>34</sup> Leiter, *supra* note 2, at 56 (“[T]he problem for Oliphant . . . wasn’t that rules were pointless, but rather that [they] were pitched at a level of generality that bore no relation to the fact-specific ways in which courts actually decided cases.”).

Oliphant's critique and thereby potentially provided *better* guidance to parties planning their affairs.<sup>35</sup>

When judges respond to underdetermination by acting in a legislative or quasi-legislative capacity, those legislative judgments are expressed and entrenched in doctrine. There is no inconsistency between legislators making judgments and enacting legislation based on social or economic policy or because of interest group pressures. On the contrary, legislation—a key form of legal doctrine—is how legislators implement both considered judgments and interest group bargains.<sup>36</sup>

Doctrine was relevant even for Jerome Frank, the most skeptical Realist. For Frank, doctrine's chief use was to enable judges to rationalize their conclusions.<sup>37</sup> At its worst, doctrine prevents clear thinking by judges by “compelling them to shove their thoughts into traditional forms, thus impeding spontaneity and the quick running of ideas.”<sup>38</sup> It “often tempt[s] the lazy judge away from the proper task of creative thinking to the easier work of finding platitudes that will serve in the place of robust cerebration.”<sup>39</sup>

However cynical he seems, even Frank did not view judging as entirely unconstrained and outcome driven. On the contrary, although adjudication starts with a judge's “hunch” for how the case should come out, legal rules and principles (i.e., doctrine) can have real value:

The conscientious judge, having tentatively arrived at a conclusion, can check up to see whether such a conclusion, without unfair distortion of the facts, can be linked with the generalized points of view theretofore acceptable. If none such are discoverable, he is forced to consider more acutely whether his tentative conclusion is wise, both with respect to the case before him and with respect to possible implications for future cases.<sup>40</sup>

The contrast between Hart and Frank—while overdrawn because of Frank's amusingly idiosyncratic and exaggerated style—is useful for

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<sup>35</sup> LEITER, *supra* note 21, at 91 (“[T]he Restatements have internalized the important lesson of Oliphant and other Realists . . .”).

<sup>36</sup> One can argue with Jonathan Macey that the extent to which legislation implements an interest group bargain should affect how courts interpret that statute. See generally Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986) (arguing that judicial statutory interpretation can allow the broader public to benefit from legislation enacted to benefit specific interest groups).

<sup>37</sup> FRANK, *supra* note 3, at 130 (“We have seen that one of [legal principles'] chief uses is to enable the judges to give formal justifications—rationalizations—of the conclusions at which they otherwise arrive.”).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 131.

sketching out alternative approaches. For Frank, a judge starts with a hunch, derived somehow from a sense of rules and principles of law, “the political, economic and moral prejudices of the judge,” and countless other factors.<sup>41</sup>

By contrast, for Hart, such an approach is or should be marginal:

It is possible that, in a given society, judges might always first reach their decisions intuitively or “by hunches,” and then merely choose from a catalogue of legal rules one which, they pretended, resembled the case in hand; they might then claim that this was the rule which they regarded as requiring their decision, although nothing else in their actions or words suggested that they regarded it as a rule binding on them. Some judicial decisions may be like this, but it is surely evident that for the most part decisions, like the chess-player’s moves, are reached either by genuine effort to conform to rules consciously taken as guiding standards of decision or, if intuitively reached, are justified by rules which the judge was antecedently disposed to observe and whose relevance to the case in hand would generally be acknowledged.<sup>42</sup>

There is tremendous variation among Realists and one may cringe at the extent to which they were influenced by contemporary intellectual fads, whether it be Felix Cohen’s invocation of the Logical Positivism of the Vienna Circle<sup>43</sup> or Jerome Frank’s Freudianism.<sup>44</sup> What stands the test of time is their critique of traditional approaches and their ability to penetrate legal argumentation.<sup>45</sup> Those of us educated in American law schools bear their imprint, even if we do not follow them to the end. Many of us share the Realists’ belief—often from personal experience—that the outcome of interesting cases is underdetermined by traditional legal materials. With the Sociological Realists, we look outside the law library to learn about

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<sup>41</sup> *Id.* at 104-06 (relying on Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274 (1928)). In an indication of the differences among Realists, Felix Cohen rejects the hunch theory of judging as insufficiently empirical. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843 (1935) (“[B]y magnifying the personal and accidental factors in judicial behavior, [the hunch theory] implicitly denies the relevance of significant, predictable, social determinants that govern the course of judicial decision.”).

<sup>42</sup> HART, *supra* note 11, at 140-41.

<sup>43</sup> Cohen, *supra* note 41, at 826 (explaining that the Viennese School, “instead of assuming hidden causes or transcendental principles behind everything we see or do . . . redefine[s] the concepts of abstract thoughts as constructs, or functions, or complexes, or patterns, or arrangements, of the things that we do actually see or do”).

<sup>44</sup> FRANK, *supra* note 3, at 249 n.\* (noting the Freudians understanding of the “ambivalent” attitude towards the father).

<sup>45</sup> Part I of Cohen’s *Transcendental Nonsense and the Functional Approach*, *supra* note 41, at 809-21 should be required reading in the first year of law school.

commercial practice and “what makes sense.” On the other hand, many of us, from personal experience in counseling, litigation, adjudication, teaching, and scholarship, know that doctrine matters even if it does not constrain as sharply as judicial opinion writing might suggest. Even the most skeptical of us uses legal doctrinal categories to structure our analysis and, as my colleagues Shyam Balganesh and Gideon Parchomovsky point out, in doing so rule certain considerations out of bounds.<sup>46</sup> With Hart, many of us believe that a judge, as an interstitial lawmaker, exercises delegated authority and generally should not (and, given institutional constraints, probably cannot) act with the degree of freedom that a legislator has in making legislative judgments. While judges or academics may start with a hunch (for lawyers, clients’ interests make hunches unnecessary), with Frank, they know that they cannot stop there and must convince others to adopt their views.

Our views are complex and reflect personal variations. But, I submit, a “Realist” judge can be identified by two related beliefs: (1) in interesting cases, reasonable people can frequently come out either way and (2) in such situations, policy considerations are relevant even if not dispositive. I suggest below that a “traditionalist” or “formalist” judge approaches matters quite differently, at least on the surface.

With this in mind, I turn to an examination of the role of legal doctrine in corporate law by contrasting Delaware and U.K. approaches in two different contexts: controlling shareholder freezeouts and bondholder exit consents.<sup>47</sup>

## V. CONTROLLING SHAREHOLDER FREEZEOUTS

### A. *Delaware #1: The MFW Litigation*

When a controlling shareholder (CS) enters into a transaction with the corporation—for example, selling property to the corporation or buying property from the corporation—alarm bells go off. Because the CS’s interests as a buyer or seller conflict with the interests of the corporation and other shareholders, such transactions raise concerns of self-dealing. Every corporate law system must deal with this conflict of interest. In Delaware, the basic rule is that such transactions must meet the “entire fairness” standard, where entire fairness is understood to be a unitary

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<sup>46</sup> Shyamkrishna Balganesh and Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. 1241 (2015).

<sup>47</sup> The following pairs of cases are illustrative rather than comprehensive.

analysis of fairness of price and fairness of process, with fairness of price measured against a third-party sale benchmark.

A particularly sharp form of this conflict of interest arises when a CS uses its control of the company to buy the shares that it does not already own. There are two principal transactional structures through which a CS can freeze out the non-controlling shareholders (i.e., buy their shares without their consent): (1) a merger between the CS and the corporation or (2) a tender offer to acquire 90% followed by a short-form merger under Delaware General Corporate Law Section 253.<sup>48</sup> In the merger structure, the CS uses its influence over the CS-elected directors to induce the board to recommend a merger to the shareholders and then votes its control bloc in favor of the merger. Under Delaware law, that merger is valid.<sup>49</sup> Yet the CS faces a clear conflict of interest: as buyer, the CS wants to acquire the non-controlling shares at a low price, while as sellers, the non-controlling shareholders want to sell their shares at a high price. When a CS freezes out non-controlling shareholders through a merger, the leading case of *Weinberger v. UOP, Inc.* established that the merger will be treated as a self-dealing transaction with the CS bearing the burden of establishing entire fairness.<sup>50</sup>

At the same time, the Delaware Supreme Court suggested that things might have been different had the board of directors of the controlled subsidiary, UOP, appointed “an independent negotiating committee of its outside directors to deal with Signal [, its controlling shareholder,] at arm’s length.”<sup>51</sup> The court held that “[p]articularly in a parent-subsidiary context, a showing that the action taken was as though each of the contending parties had in fact exerted its bargaining power against the other at arm’s length is strong evidence that the transaction meets the test of fairness.”<sup>52</sup>

This holding gave birth to a long line of cases on “cleansing devices” and the effect of such measures on the review of the transaction.<sup>53</sup> Two

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<sup>48</sup> DEL. CODE ANN. tit. 8, § 253 (West 2010).

<sup>49</sup> DEL. CODE ANN. tit. 8, § 251(c) (2015) (requiring a majority vote of stockholders of each constituent corporation in favor of the proposed merger); *see also* *Weinberger v. UOP, Inc.*, 457 A.2d 701, 703 (Del. 1983) (“[W]here corporate action has been approved by an informed vote of a majority of the minority shareholders, we conclude that the burden entirely shifts to the plaintiff to show that the transaction was unfair to the minority.”).

<sup>50</sup> 457 A.2d at 710 (“The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.”).

<sup>51</sup> *Id.* at 709 n.7.

<sup>52</sup> *Id.* (citations omitted).

<sup>53</sup> *See* William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1306-09

measures are typically available: (1) an independent special committee and (2) disinterested shareholder approval. *Kahn v. Lynch Communications Systems* held that *either* an effective special committee *or* fully informed disinterested shareholder approval would shift the burden of proof to the non-controlling shareholders challenging the transaction, but would *not* shift the standard from entire fairness to the deferential Business Judgment Rule (BJR).<sup>54</sup>

Given this holding, what is the effect of adopting *both* an effective independent special committee *and* disinterested shareholder approval? Would doing so shift the standard from the entire fairness standard to the BJR? Although in the years since *Kahn v. Lynch* was decided in 1994 there were a variety of transactions in which both measures were used, the Delaware Supreme Court did not reach this question until the *MFW* litigation in 2013. Many had assumed that the standard would remain entire fairness, with only a shift in *burden* to plaintiffs.<sup>55</sup> At the same time, important arguments were made that maintaining the stricter scrutiny of entire fairness was a bad outcome.<sup>56</sup>

The *MFW* litigation presented a classic doctrinal question, namely, what is or should be the rule?<sup>57</sup> Before turning to the courts' analyses, I want to pause for some non-doctrinal background.

What is at stake in the choice between entire fairness and BJR scrutiny? From a procedural perspective, the principal difference is whether a CS who ensures that "proper procedures" are followed—such as an independent special negotiating committee backed up by disinterested shareholder approval—can get a case dismissed on summary judgment or whether plaintiffs can proceed to trial on the theory that the CS acquired the

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(2001) (arguing that self-interested transactions that have been ratified through a cleansing mechanism should be reviewable under only the business judgment standard).

<sup>54</sup> 638 A.2d 1110, 1116 (Del. 1994) ("Entire fairness remains the proper focus of judicial analysis in examining an interested merger, irrespective of whether the burden of proof remains upon or is shifted away from the controlling or dominating shareholder, because the unchanging nature of the underlying "interested" transaction requires careful scrutiny.").

<sup>55</sup> *In re MFW S'holders Litig.*, 67 A.3d 496, 500 (Del. Ch. 2013) ("Although *Lynch* did not involve a merger conditioned by a controlling stockholder on both procedural protections, statements in the decision could be, and were, read as suggesting that a controlling stockholder who consented to both procedural protections for the minority would receive no extra legal credit for doing so, and that regardless of employing both procedural protections, the merger would be subject to review under the entire fairness standard.").

<sup>56</sup> See Allen et al., *supra* note 53, at 1307 ("[W]e question whether there is enough utility to justify continuing the stricter scrutiny of interested mergers that are approved by one or both of these intra-corporate 'cleansing processes.'").

<sup>57</sup> *MFW*, 67 A.3d at 501 ("The court therefore analyzes whether . . . the MFW special committee and the majority-of-the-minority vote qualify as cleansing devices under our law.").

non-controlling shares for less than they were worth. This affects the CS's litigation costs and risks of adverse judgment—and thus the settlement value of the claim.

Institutionally, the issue has different implications. The choice between entire fairness and BJR scrutiny has an impact on the case load of the Delaware Chancery Court—entire fairness trials take a long time—and the record that arrives at the Delaware Supreme Court on any appeal—trials produce a more complete factual record than summary judgment proceedings.

There are also substantive considerations. Reasonable people may differ in their evaluation of the threat posed by CSs. Does the presence of a CS lead to better or worse firm performance? Is it frequent or rare that CSs mistreat non-controlling shareholders? People also disagree on the extent to which entire fairness litigation deters CS misbehavior and compensates shareholders. Finally, people may differ in their appraisal of the effectiveness of cleansing devices in protecting non-controlling shareholders. When implemented, do they actually approximate an arm's length, third-party negotiation—or are they little more than a Potemkin Village?

Finally, as a matter of forward-looking “social engineering,” the choice raises an incentives issue: what incentive is there for a CS to adopt *both* cleansing structures if the second has *no* effect on the standard of review or the burden of proof?

The *MFW* case arose out of a transaction in which MacAndrews & Forbes (M & F), a holding company owned by Ronald Perelman that held 43% of the shares of M & F Worldwide (MFW), offered to acquire MFW's remaining shares in a merger.<sup>58</sup> In structuring the transaction, M & F provided for an independent special committee and a separate vote by the 57% of the shares that M & F did not own.<sup>59</sup> The special committee was duly appointed, hired its own advisors, met frequently and negotiated with M & F, which eventually raised its offer from \$24 to \$25 per share.<sup>60</sup> The merger was subsequently approved by a majority of the non-controlling shares.<sup>61</sup>

Then-Chancellor Leo Strine, who had been thinking and writing about this issue for a decade,<sup>62</sup> opened his opinion with the following statement: “This case presents a novel question of law.”<sup>63</sup> After Strine provided

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<sup>58</sup> *Id.* at 499.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> See generally Allen et al., *supra* note 53.

<sup>63</sup> *MFW*, 67 A.3d at 499. With the backdrop of ALR and competing views of adjudication, this is an interesting opening. Against the most extreme views of Legal Realists, it assumes that

background to the dispute and the debate over the correct rule, he framed the question as one of incentives: what incentive is there to adopt both prophylactic structures if a CS does not receive any “extra legal credit” for doing so?<sup>64</sup>

Strine then embarked on a far-reaching analysis in which he demonstrated first that the question had not been decided by the Supreme Court (and thus, in fact, was open), and second that MFW had in fact adopted an effective special committee and fully informed disinterested shareholder approval (thereby making it necessary to answer the legal question).<sup>65</sup> Strine went on to hold that the better rule is that adoption of *both* cleansing devices leads to BJR scrutiny and permits summary judgment for the defendants.<sup>66</sup>

Most interesting is Strine’s justification for the rule. First, he briefly related it to the structure of Delaware corporate law: “This conclusion is consistent with the central tradition of Delaware law, which defers to the informed decisions of impartial directors, especially when those decisions have been approved by the disinterested stockholders on full information and without coercion.”<sup>67</sup> But then, he argued directly that the proposed rule is a good rule:

Not only that, the adoption of this rule will be of benefit to minority stockholders because it will provide a strong incentive for controlling stockholders to accord minority investors the transactional structure that respected scholars believe will provide them the best protection,<sup>68</sup> a structure where stockholders get the benefits of independent, empowered negotiating agents to bargain for the best price and say no if the agents believe the deal is not advisable for any proper reason, plus the critical ability to determine for themselves whether to accept any deal that their negotiating agents recommend to them. A transactional structure with both

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there are questions of law and that they matter. Against the narrowest view of the role of the judiciary, it assumes that courts are competent to make law. Finally, it raises the question of the best model for what a Delaware judge does when the law runs out: does he or she act as a legislator? A delegated sub-legislative decisionmaker, specifying details not spelled out in the governing legislation? A quasi-administrative agency? A free agent? All of these questions are of course within a context in which the Delaware legislature can and sometimes does amend the Delaware General Corporate Law to reverse or modify holdings.

<sup>64</sup> *Id.* at 500.

<sup>65</sup> *Id.* at 501-02.

<sup>66</sup> *Id.* at 502.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 502 n.5 (citing Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785, 839-40 (2003) and Guhan Subramanian, *Fixing Freezeouts*, 115 Yale L.J. 2, 60-61 (2005)).



these protections is fundamentally different from one with only one protection. A special committee alone ensures only that there is a bargaining agent who can negotiate price and address the collective action problem facing stockholders, but it does not provide stockholders any chance to protect themselves. A majority-of-the-minority vote provides stockholders a chance to vote on a merger proposed by a controller-dominated board, but with no chance to have an independent bargaining agent work on their behalf to negotiate the merger price, and determine whether it is a favorable one that the bargaining agent commends to the minority stockholders for acceptance at a vote. These protections are therefore incomplete and not substitutes, but are complementary and effective in tandem.

Not only that, a controller's promise that it will not proceed unless the special committee assents ensures that the committee will not be bypassed by the controller through the intrinsically more coercive setting of a tender offer. It was this threat of bypass that was of principal concern in *Lynch* and cast doubt on the special committee's ability to operate effectively. Precisely because the controller can only get business judgment rule treatment if it foregoes the chance to go directly to stockholders, any potential for coercion is minimized. Indeed, given the high-profile promise the controller has to make not to proceed without the committee's approval, any retributive action would be difficult to conceal, and the potent tools entrusted to our courts to protect stockholders against violations of the duty of loyalty would be available to police retributive action. As important, market realities provide no rational basis for concluding that stockholders will not vote against a merger they do not favor. Stockholders, especially institutional investors who dominate market holdings, regularly vote against management on many issues, and do not hesitate to sue, or to speak up. Thus, when such stockholders are given a free opportunity to vote no on a merger negotiated by a special committee, and a majority of them choose to support the merger, it promises more cost than benefit to investors generally in terms of the impact on the overall cost of capital to have a standard of review other than the business judgment rule. That is especially the case because stockholders who vote no, and do not wish to accept the merger consideration in a going-private transaction despite the other stockholders' decision to support the merger, will typically have the right to seek appraisal.<sup>69</sup>

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<sup>69</sup> *Id.* at 502-03 (all but one footnote omitted).

This is a very sophisticated and clearly articulated discussion of the various considerations that should inform the adoption of the optimal legal rule. On the cost side, Strine found little evidence. From his perspective, the main effect of unavoidable entire fairness scrutiny—with the resulting difficulty in dismissing meritless cases on summary judgment—was to ensure that shareholder litigation would be filed in every CS freeze-out merger, which would then be settled for attorneys’ fees but minimal or no increase in consideration.

The opinion provides a fascinating look into how a leading corporate law judge at the top of his game understands his judicial role.<sup>70</sup> With Hart—and with the knowledge that the Delaware legislature sometimes overrules decisions of the Delaware courts—Strine clearly understood that he is a delegated decisionmaker, charged with filling out an unprovided-for corner of the law. But, with the Realists, he spent far more time considering the “best” rule on policy grounds than in deep analysis of the principles immanent in the cases and how they might be extended to cover the unprovided-for situation.

Yet, there are clear limits to the kind of delegated legislation that is acceptable. Strine made a strong argument for the value to minority shareholders of both cleansing devices. But, if they are so valuable, why not make them *mandatory* for CS freezeouts? Why offer them merely as an option to the CS with the carrot of BJR review? Because to make them mandatory, most would agree, would require a change in the statute, while shifting burdens of proof and standards of review, all of which were invented by the courts, is well within the proper scope of judicial

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<sup>70</sup> As a 1983 University of Pennsylvania Law School graduate, I can testify personally that Strine, a 1988 graduate, would have received a broadly “American Legal Realist” legal education. Moreover, in his extrajudicial writings, Strine strikes a broadly Realist stance:

Judges are lawmakers. Judges do not simply apply settled principles of constitutional and statutory law to particular disputes. Rather, in important ways, judges themselves determine what the law is. . . . That judges act as policymakers in making common law is obviously true. But that truth is discomfiting to many jurists. A candid acknowledgement of that truth opens the judiciary, the least politically influential branch, to criticism, as acting as lawmakers without the legitimacy to do so. Relatedly, to admit that the making of common law necessarily involves the judge’s application of his own normative beliefs, rather than the divining of discoverable, pre-existing principles of natural law, demystifies the judicial process in a way that makes many judges nervous.

Leo E. Strine, Jr., *If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It Is Equitable to Take That Action: The Implicit Corollary to the Rule of Schnell v. Chris-Craft*, 60 BUS. LAW. 877, 877 (2005).

“lawmaking.” This is consistent with Hart’s suggestion that interstitial lawmaking is akin to administrative agency decisionmaking.<sup>71</sup>

Note further that Strine’s approach, which sought to identify the “best” rule within the limits of his delegated authority (subject to review by the Supreme Court), gives clear marching orders to lawyers litigating cases: they need to address these concerns. It means that law review or finance articles that address the issues are relevant,<sup>72</sup> and it may even encourage lawyers to hire academics to prepare reports supporting advantageous policies.<sup>73</sup> The case was affirmed by the Delaware Supreme Court, which—despite placing greater emphasis on the need to satisfy the BJR preconditions prior to trial, without which entire fairness would apply—largely adopted the reasoning of the Chancery Court.<sup>74</sup>

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<sup>71</sup> For a fuller discussion of the extent to which the Delaware Chancery Court acts like an administrative agency, complete with notice and comment, see William Savitt, *The Genius of the Modern Chancery System*, 2012 COLUM. BUS. L. REV. 570, 586 (2012).

<sup>72</sup> Strine himself cites to them, as in the passage quoted *supra* note 70.

<sup>73</sup> Although Strine’s opinion focused on what the rule should be, it provides a useful illustration of the different roles that doctrine plays in even a largely Realist analysis, including the following (each of these illustrates ways in which doctrine is used and useful as a matter of standard litigation practice, without implicating underlying jurisprudential commitments):

First, Strine cited a variety of cases to provide an overall conceptual structure to the analysis and to make clear who is expected to prove what. For example, in describing the standard for determining director independence and determining whether there are financial ties with an interested party, he asserted, with citation to Delaware Supreme Court cases, that

the question is whether those ties are *material*, in the sense that the alleged ties could have affected the impartiality of the director. Our Supreme Court has rejected the suggestion that the correct standard for materiality is a “reasonable person” standard; rather, it is necessary to look to the financial circumstances of the director in question to determine materiality.

*MFW*, 67 A.3d at 509-10 (footnotes omitted).

Second, he cited to cases and statutes to identify specific propositions of law, for example, when he cited *Bershad* to support the assertion that “[u]nder Delaware law, MacAndrews & Forbes had no duty to sell its block.” *Id.* at 508 n.31 (citing *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840 (Del. 1987)).

Third, he cited to cases as a shorthand description of contrasting factual or legal situations. For example, when he examined whether the special committee had met the standards for being a cleansing device, he wrote that “the special committee was empowered not simply to ‘evaluate’ the offer, like some special committees with weak mandates, but to negotiate with MacAndrews & Forbes over the terms of its offer to buy out the noncontrolling stockholders,” and provided support by citing a variety of cases in which that was not the case. *Id.* at 507-08 (footnotes omitted) (referencing the restrictions on special committees discussed in *Am. Mining Corp. v. Theriault*, 51 A.3d 1213, 1244-46 (Del. 2012) and *Brinckerhoff v. Tex. E. Prods. Pipeline Co.*, 986 A.2d 370, 381 (Del. Ch. 2010)).

<sup>74</sup> *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 645-46, 654 (Del. 2014).

B. *United Kingdom #1: The Definition of “Class” in a Scheme of Arrangement*

To put the Delaware style in context, I want to consider a line of cases that raises similar issues from a jurisdiction uninfluenced by American Legal Realism, namely, the United Kingdom. U.K. Company Law provides two main ways for combining companies and thus, essentially two ways to complete a going-private transaction: through a tender offer or a “scheme of arrangement.”<sup>75</sup>

To acquire 100% ownership of a class of stock through a tender offer, the bidder’s offer must be accepted by 90% of the shares to which it relates. If this threshold is met, the bidder may acquire the remaining shares on the same terms as the tender offer.<sup>76</sup> As in the United States, it is far from trivial to reach the 90% threshold.

As a result, the amalgamation of companies is sometimes accomplished through a “scheme of arrangement,” a structure roughly equivalent to Delaware’s classical merger (but, as we will see, also different in material respects).

The current version, section 425 of the Companies Act of 1985, provides that:

(1) Where a compromise or arrangement is proposed between a company and its creditors, or any class of them, or between the company and its members, or any class of them, the court may on the application of the company or any creditor or member of it or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be), to be summoned in such manner as the court directs.

(2) If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement, if sanctioned by the court, is binding on all creditors or the class of creditors or on the members or class of members (as the case may be), and also on the

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<sup>75</sup> Jennifer Payne, *Schemes of Arrangement, Takeovers and Minority Shareholder Protection*, 2 J. CORP. L. STUD. 67, 67 (2011) (“A scheme of arrangement involves a compromise or arrangement . . . between a company and (a) its creditors, or any class of them, or (b) its members, or any class of them.” (internal quotation marks omitted)).

<sup>76</sup> PAUL L. DAVIES & SARAH WORTHINGTON, *GOWER & DAVIES: PRINCIPLES OF MODERN COMPANY LAW* ¶ 28-68, at 1091-92 (9th ed. 2012) (discussing the “post-bid consequences of a successful offer”).

company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.<sup>77</sup>

There are thus three steps in the approval of a scheme of arrangement in a going-private transaction: a compromise or arrangement, approval by the shareholders, and approval by the court. When all three steps are completed, dissenting shareholders can be forced out. From a shareholder's perspective, the protection of a tender offer's 90% threshold is replaced with a lower threshold (a majority in number and 75% in value of shares present and voting) combined with court review of the transaction.

As a window into different judicial and jurisprudential styles, I want to consider the line of cases discussing the creation of classes in the approval of a scheme of arrangement. In CS going-private transactions, a core issue becomes when non-controlling shareholders should have a veto right: with approval by each class mandatory, creating a class grants the members of that class the ability to block a scheme.

In the 1975 Chancery Division case, *In re Hellenic & General Trust*, the CS, Hambros, sought to acquire 100% ownership of a controlled subsidiary, Hellenic & General Trust (HGT), in which the National Bank of Greece (NBG) held a 13.95% interest.<sup>78</sup> Because of NBG's opposition, Hambros could not use a tender offer, as it could not achieve the 90% threshold for freezing out the minority shares.<sup>79</sup> Hambros instead turned to a scheme of arrangement structure. After creating a wholly-owned subsidiary, Merchandise & Investment Trust (MIT), to hold its 53% share of HGT, Hambros proposed a scheme of arrangement in which all shares of HGT would be canceled in exchange for 48p per share, with Hambros receiving new ordinary shares.<sup>80</sup>

NBG opposed the transaction and HGT's petition seeking sanction of the court. The court called a meeting of all the shareholders, at which the resolution passed with 91% of the shareholders supporting the transaction.<sup>81</sup> If the MIT shares had not been counted, however, the resolution would not have received the required 75% approval.<sup>82</sup>

With Hambros's obvious conflict of interest—as controlling shareholder, it wanted to acquire the shares it did not own at a low price, while non-controlling shareholders wanted to sell their shares at a high price—the

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<sup>77</sup> Companies Act, 1985, c. 6, § 425 (U.K.).

<sup>78</sup> [1975] 1 W.L.R. 123, 124 (Eng.).

<sup>79</sup> *Id.* at 127.

<sup>80</sup> *Id.* at 125.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

question before the court was whether that conflict of interest was relevant and, if so, how?<sup>83</sup> Should Hambros and the non-controlling shareholders vote together in the same class, or should there be two separate classes, allowing the non-controlling shareholders to vote separately?<sup>84</sup> The argument for all ordinary shares voting together was that they had identical legal *rights* as ordinary shareholders. The argument for separate classes is that Hambros, the buyer, and the non-controlling shareholders, had diametrically opposed *interests*.

In his judgement, Templeman J. reviewed a variety of cases. The scheme of arrangement has been part of U.K. Company Law since 1870, and there are important cases dating back to the nineteenth century.<sup>85</sup> Templeman J. began the analysis with a reference to a 1910 case which held that holders of partly paid shares formed a different class from holders of fully paid shares.<sup>86</sup> He then quoted a key portion of the Court of Appeal's 1892 judgment in *Sovereign Life Assurance Co. v. Dodd*, which held that policyholders whose claims had matured were in a different class than those whose policies had not matured:

It seems plain that we must give such a meaning to the term "class" as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.<sup>87</sup>

This led Templeman J. to his key finding that "[v]endors consulting together with a view to their common interest in an offer made by a purchaser would look askance at the presence among them of a wholly owned subsidiary of the purchaser."<sup>88</sup>

The *Hellenic & General Trust* holding stands for the proposition that the divergence of interests among shareholders will sometimes be sufficiently great as to justify separate classes. But, when is that the case, and, is the creation of separate classes the right way to handle this conflict of interest?

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See DAVIES & WORTHINGTON, *supra* note 76, § 29-2 (explaining that the scheme of arrangement provisions were introduced by the Joint Stock Companies Arrangement Act of 1870).

<sup>86</sup> *In re Hellenic & General Trust*, [1975] 1 W.L.R. at 125 (citing *In re United Provident Assurance Co.*, [1910] 2 Ch. 477 (Eng.)).

<sup>87</sup> *Id.* at 126 (quoting *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q.B. 573, 582 (Eng.)).

<sup>88</sup> *Id.*

The 1999 case *Re BTR plc* addressed some of these questions.<sup>89</sup> In *BTR*, a scheme of arrangement was being used for an arm's length purchase of publicly traded BTR by publicly traded Siebe.<sup>90</sup> The objector, who opposed Siebe proceeding by scheme of arrangement rather than by tender offer, argued that the interests of BTR shareholders differed substantially as between those who held only BTR shares and those who held mainly Siebe shares.<sup>91</sup> The objector argued that putting all shareholders with such divergent interests in a single class was inappropriate under Section 425 of the U.K. Companies Act.<sup>92</sup>

As with Templeman J.'s judgment in *Hellenic & General Trust*, Parker J. looked to historic precedent and began with the key language from the 1892 case, *Sovereign Life Assurance*.<sup>93</sup> He then turned to a 1991 decision from the High Court of Hong Kong, *In re Industrial Equity (Pacific) Ltd.*, which rejected a similar argument, holding that shareholders' differing interests were better considered when the court decided whether to sanction the scheme:

Common shareholders' holdings of BIL shares could conceivably range in value from a minute, totally insignificant fraction of their IEP shares, to a totally overwhelming quantity, many times the latter. At which point would a conflicting or different interest to that of an IEP shareholder without BIL shares arise? Is every different interest to constitute a different class? Clearly not, but where then is the line to be drawn? The difficulties in identifying shareholders with such interests, as in the present case, could raise in terms of practicality virtually insuperable difficulties. It is determination by reference to rights of shareholders that meets such difficulties, while leaving any conflict of interest which may result in a minority being overborne or coerced to be dealt with by the courts when their sanction is sought.<sup>94</sup>

Adopting this analysis, Parker J. turned to *Hellenic & General Trust* in an attempt to square his approach through an argument that Templeman J. had really been doing the same thing:

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<sup>89</sup> [1999] 2 B.C.L.C. 675 (Ch.) (U.K.), *leave to appeal denied in* [2000] 1 B.C.L.C. 740 (C.A.) (U.K.).

<sup>90</sup> *Id.* at 675.

<sup>91</sup> *Id.* at 690-81.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 681.

<sup>94</sup> *Id.* at 681-82 (quoting *In re Industrial Equity (Pacific) Ltd.*, [1991] 2 H.K.L.R. 614, 625 (H.C.)).

Templeman J effectively discounted the views of the registered holder of those shares and he did so, as I read the judgment, on the basis that in substance the scheme affected only the remainder of the shares. . . . It does not, as I see it, involve any analysis of interests and rights, nor is it inconsistent with the submission made by Mr [sic] Sykes (which I accept) that the relevant test is that of differing rights rather than differing interests.<sup>95</sup>

The Court of Appeals agreed with Parker J. and refused leave to appeal.<sup>96</sup> The *BTR* analysis now prevails in schemes of arrangement, including when such schemes are used in going-private transactions.<sup>97</sup>

Note the approach in the cases discussed above. Each judge recognized the core conflict of interest among shareholders and the statutory alternatives for dealing with it, either as separate classes or as part of the judge's review in deciding whether to sanction the scheme. And, each judge recognized and analyzed the practical implications of adopting one solution over the other.

But the style is quite different from what we see in Delaware. Each U.K. judgment worked through the cases, starting with the 1892 *Sovereign Life Assurance* judgment. In working through the cases and teasing out the reasoning and holdings, the judges made arguments about which approach made the most practical sense, while incorporating these considerations as part of the understanding of what prior courts had held.

## VI. THE TREATMENT OF EXIT CONSENTS IN BOND EXCHANGE OFFERS

### A. *Delaware #2: Katz v. Oak Industries*

Corporate bonds are issued pursuant to complex contracts that make a variety of promises and provide a variety of protections. When the issuer encounters financial difficulties, predictable conflicts arise, often in the shadow of bankruptcy. It is sometimes the case that the issuer wishes to adjust its obligations downward outside of bankruptcy, while the bondholders, or some of them, think or claim that they will do better in Chapter 11.

Bonds issued under U.S. law are subject to the Trust Indenture Act, which effectively blocks modifications of the bond's acceleration or payment

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<sup>95</sup> *Id.* at 682.

<sup>96</sup> *Re BTR plc*, [2000] 1 B.C.L.C. at 740-41.

<sup>97</sup> *See Payne, supra* note 75, at 91-92 (distinguishing *Hellenic & General Trust* and *BTR*).



terms, including the principal amount and the interest rate.<sup>98</sup> As a result, issuers who wish to restructure their obligations outside of bankruptcy typically offer to exchange the old bonds for new bonds (an “exchange offer”), along with a pledge of votes to support changes to the terms of the old bonds that make non-exchanging bondholders worse off (known as an “exit consent”).<sup>99</sup>

*Katz v. Oak Industries* involved an exchange offer combined with a consent solicitation by an issuer, Oak Industries, in financial distress.<sup>100</sup> Oak had offered to exchange old bonds for new ones on the condition that a certain proportion be tendered, and that tendering bondholders consent to amendments to the underlying indentures which would remove significant negotiated protections to holders.<sup>101</sup> These changes included the deletion of financial covenants, the removal of which adversely affected non-tendered bonds. All the indentures had collective action clauses that allowed provisions to be modified with approval of a majority of the bondholders.<sup>102</sup>

A bondholder sought to enjoin the exchange offer and exit consent on the grounds that it “coerced” bondholders into tendering and consenting to the amendments for fear of being left with unprotected, and therefore less valuable, bonds.<sup>103</sup>

The case was before the legendary Chancellor William T. Allen (1985-1997), whose opinions continue to frame many of the most important issues in Delaware corporate law. To begin, Allen considered the plaintiff’s allegation that the purpose and effect of the exchange offer was to benefit shareholders at the expense of bondholders. Allen rejected the claim outright.<sup>104</sup> Although shareholders may, in fact, benefit at the bondholders’ expense,

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<sup>98</sup> Trust Indenture Act of 1939 § 316(a), 15 U.S.C. § 77ppp(a) (2012) (“The indenture to be qualified shall automatically be deemed . . . to direct the time, method, and place . . . [and] to consent to the waiver of any past default and its consequences . . .”).

<sup>99</sup> See, e.g., Mark J. Roe, *Fixing the Trust Indenture Act to Allow Restructuring Votes*, HARVARD L. SCH. BANKR. ROUNDTABLE (Feb. 3, 2015), <https://blogs.law.harvard.edu/bankruptcyroundtable/2015/02/03/fixing-the-trust-indenture-act-to-allow-restructuring-votes> (“To get a deal done when there are economically-important holdouts, deal proponents often seek exit consents to induce enough holdout bondholders to reluctantly tender into a deal they don’t otherwise like, by stripping the bond indenture of those covenants on which bondholders can vote.”), archived at <http://perma.cc/366D-KTR9>.

<sup>100</sup> 508 A.2d 873 (Del. Ch. 1986).

<sup>101</sup> *Id.* at 875-877.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 878 (“[P]laintiff’s claim is that no free choice is provided to bondholders by the exchange offer and consent solicitation. . . . [The] bondholder is coerced to tender and thus to consent to the proposed indenture amendments.”).

<sup>104</sup> *Id.* at 879 (“[T]he first aspect . . . about which Plaintiff complains . . . does not itself appear to allege a cognizable legal wrong.”).

Allen held that, because bondholders are not owed fiduciary duties, the harm did not constitute a legal wrong in the absence of legislative direction or indenture provisions providing such protection.<sup>105</sup>

He turned next to the plaintiff's main claim that the corporation's actions violated the "implied covenant of good faith,"<sup>106</sup> formulating the appropriate legal test as follows:

[I]s it clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had they thought to negotiate with respect to that matter. If the answer to this question is yes, then, in my opinion, a court is justified in concluding that such act constitutes a breach of the implied covenant of good faith.<sup>107</sup>

Answering this question required turning to the parties' contract, the Trust Indenture, to see if one could infer that had the parties "negotiated with the exchange offer and consent solicitation in mind[, they] would have expressly agreed to prohibit contractually the linking of the giving of consent with the purchase and sale of the security."<sup>108</sup> With no provision in the indenture prohibiting Oak from offering inducements to bondholders to consent to amendments, the closest provision the plaintiff could identify was a prohibition on the voting of treasury securities.<sup>109</sup> Allen did not read this provision as protecting the plaintiff, however:

The evident purpose of the restriction on the voting of treasury securities is to afford protection against the issuer voting as a bondholder in favor of modifications that would benefit it as issuer, even though such changes would be detrimental to bondholders. But the linking of the exchange offer and the consent solicitation does not involve the risk that bondholder interests will be affected by a vote involving anyone with a financial interest in the subject of the vote other than a bondholder's interest. That the consent is to be given concurrently with the transfer of the bond to the issuer does not in any sense create the kind of conflict of interest that the indenture's prohibition on voting treasury securities contemplates. Not only will the proposed consents be granted or withheld only by those with a

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<sup>105</sup> *Id.* at 878-79.

<sup>106</sup> *Id.* at 880 ("Modern contract law has generally recognized an implied covenant to the effect that each party to a contract will act with good faith towards the other . . .").

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 880-81.

<sup>109</sup> *Id.* at 881.

financial interest to maximize the return on their investment in Oak's bonds, but the incentive to consent is equally available to all members of each class of bondholders. Thus the "vote" implied by the consent solicitation is not affected in any sense by those with a financial conflict of interest.<sup>110</sup>

The opinion is brief but analytically sharp. It focused on the core substantive issue with minimal (although sufficient) citations to case law and a few citations to law review articles, including a slightly off-topic citation to articles on the deeper implications of consent in the establishment of legal norms.<sup>111</sup> Twenty-eight years later, *Katz* remains the leading U.S. case on exit consents.<sup>112</sup>

### B. *United Kingdom #2: Assénagon and Azevedo*

In the aftermath of the 2008 worldwide financial crisis, two exchange offers combined with exit consents were challenged under U.K. law.

First, *Assénagon* arose out of financial difficulties at the Anglo Irish Bank.<sup>113</sup> The relevant Trust Deed provided different bondholder quorum requirements for various modifications, with the most stringent requirements—two-thirds of the nominal amount of the notes—for "extraordinary resolution[s,]" including "reduction or cancellation of the principal payable on the Notes or the exchange or conversion thereof or the minimum rate of interest payable thereon . . ."<sup>114</sup> Approval of extraordinary resolutions required a three-fourths majority of persons voting.<sup>115</sup> Note that, under the United States' Trust Indenture Act, these types of changes can only be made with unanimous consent.<sup>116</sup> That is, U.K. law permits modifications by collective action prohibited under U.S. law.

In announcing the exchange offer in which the old bonds would be replaced with new bonds, the bank also convened a meeting to approve

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 879 n.8 (comparing law review articles discussing the "implications of consent in the establishment of legal norms").

<sup>112</sup> See, e.g., Keegan S. Drake, Note, *The Fall and Rise of the Exit Consent*, 63 DUKE L.J. 1589, 1604 (2014) ("*Katz*'s progeny totals more than seventy cases, some related to exit consents, others simply construing the good faith duty.") (footnotes omitted).

<sup>113</sup> *Assénagon Asset Mgmt. S.A. v. Irish Bank Resolution Corp.*, [2012] EWHC (Ch) 2090, [6] (Eng.).

<sup>114</sup> *Id.* at [15].

<sup>115</sup> *Id.* at [18].

<sup>116</sup> Trust Indenture Act of 1939 § 316(b), 15 U.S.C. § 77ppp(b) (2012) ("[T]he right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security . . . shall not be impaired or affected without the consent of such holder . . .").

amendments that would give it the right to redeem existing notes for 0.01 Euro per 1,000 Euros in principal amount.<sup>117</sup> In other words, if passed, the amendment would have rendered the existing bonds worthless.

As Briggs J. (then, of the High Court Chancery Division and now, of the Court of Appeals) noted, this change was designed to create a version of the prisoners' dilemma.<sup>118</sup> Absent the ability to coordinate effectively with other bondholders, each bondholder would have to assume that enough of the other bondholders would tender to approve the amendment, thereby rendering the non-tendered bonds worthless.<sup>119</sup> In such a situation, bondholders would be irrational not to tender.

The consent solicitation was attacked by the bondholders on three grounds: (1) that it was ultra vires, (2) that the notes once tendered were held for the benefit of the bank and therefore the consents could not be voted under the terms of the Trust Deed, and (3) that the tendering of consents represented an "abuse of power" by the majority bondholders.<sup>120</sup> Note that the bondholders raised claims quite different from the "implied covenant of good faith" claim in *Katz*.<sup>121</sup>

Briggs J. rejected the first ground because of an explicit collective action provision in the Trust Deed that permitted a three-fourths majority to approve an extraordinary resolution for the "[r]eduction or cancellation of the principal payable on the Notes . . . or the minimum rate of interest payable thereon."<sup>122</sup>

The second ground was based on a disenfranchisement clause in the Trust Deed that provided that, "[n]either the Issuer nor any Subsidiary shall be entitled to vote at any meeting in respect of Notes beneficially held by it or for its account."<sup>123</sup> The clause would seem to apply if one focused on the time of the noteholders' meeting, at which point the bank held the consents and the contract for acquiring the notes.<sup>124</sup> On the other hand, the clause would not apply if one focused on the time when noteholders made the decision to offer their notes for exchange and thereby committed to voting for the resolution.<sup>125</sup> Briggs J. viewed this as a close question but held that the clause applied to sterilize the consents.<sup>126</sup> In doing so, he examined the

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<sup>117</sup> *Assénagon*, [2012] EWHC (Ch) 2090 at [30].

<sup>118</sup> *Id.* at [4].

<sup>119</sup> *Id.* at [3]-[4].

<sup>120</sup> *Id.* at [39].

<sup>121</sup> See *supra* note 107 and accompanying text.

<sup>122</sup> *Assénagon*, [2012] EWHC (Ch) 2090 at [54].

<sup>123</sup> *Id.* at [16].

<sup>124</sup> *Id.* at [56].

<sup>125</sup> *Id.* at [57]-[58].

<sup>126</sup> *Id.* at [63]-[64].

similar point raised in *Katz* regarding treasury securities, but declined to follow Chancellor Allen's rejection on the grounds that there were substantial differences in the contractual language.<sup>127</sup>

Recognizing the closeness of the second ground, Briggs J. then turned to the most ambitious and interesting argument, the "abuse of majority" principle.<sup>128</sup> Here, one sees how one English judge plows new ground, while making it seem old. The core theory, advanced by the bondholders and accepted by Briggs J., is the general principle that when a majority acts, it cannot benefit itself at the expense of the minority.<sup>129</sup> In developing his argument, Briggs J. adopted an historical/doctrinal approach.

Starting with Justinian's *Institutes*, Briggs J. reviewed the 1853 partnership case of *Blisset v. Daniel*, and continued to the present.<sup>130</sup> With copious quotes and citations, he argued that there is a longstanding principle that restricts majority action, clearly articulated by Viscount Haldane in 1927 in *British America Nickel Corp. v. M J O'Brien Ltd.*:

To give a power to modify the terms on which debentures in a company are secured is not uncommon in practice. The business interests of the company may render such a power expedient, even in the interests of the class of debenture holders as a whole. The provision is usually made in the form of a power, conferred by the instrument constituting the debenture security, upon the majority of the class of holders. It often enables them to modify, by resolution properly passed, the security itself. The provision of such a power to a majority bears some analogy to such a power as that conferred by s.13 of the English Companies Act of 1908, which enables a majority of the shareholders by special resolution to alter the articles of association. There is, however, a restriction on such powers, when conferred on a majority of a special class in order to enable that majority to bind a minority. They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely, that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only. Subject to this, the power may be unrestricted.<sup>131</sup>

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<sup>127</sup> *Id.* at [62].

<sup>128</sup> *Id.* at [69]-[70].

<sup>129</sup> *Id.* at [70].

<sup>130</sup> *Id.* at [41].

<sup>131</sup> *Id.* at [43] (quoting *Brit. Am. Nickel Corp. v. M. J. O'Brien Ltd.*, [1927] A.C. 369 (P.C.) 371-72 (Can.)).

This principle, Haldane showed, applies to shareholders, bondholders, creditors more generally, and whenever majorities have the power to bind minorities.<sup>132</sup>

To rebut this principle, the bank argued that the proposal, considered as a whole, was approved by bondholders because it was economically beneficial.<sup>133</sup> In making this argument, the bank relied on cases that had held that an inducement, properly disclosed, will not be considered an abuse of power.<sup>134</sup>

In response, the claimant focused on the effect of the resolution itself on the date it was passed, and the fact that it would have left dissenting noteholders holding worthless notes (unlike, for example, a structure in which *all* noteholders would receive new notes if the resolution were approved).<sup>135</sup> In essence, the disagreement became whether the bank's action was best understood as an *offer* or a *threat*.<sup>136</sup>

The distinction between an offer and a threat became the basis for distinguishing the contemporaneous *Azevedo* case in which bondholders were asked to approve a postponement of interest payments in exchange for a fully disclosed "consent payment."<sup>137</sup> The court held this exchange valid because a fully disclosed offer cannot be an improper bribe.<sup>138</sup>

Briggs J. distinguished *Assénagon* from *Azevedo* on two grounds. First, he focused on the resolution changing the old bonds, rather than on the offer of new bonds, to argue that there was "a negative inducement" (i.e., a threat) to deter noteholders from refusing the exchange.<sup>139</sup> Second, he focused on the various substantive differences between the two cases, including the role played by the resolution.<sup>140</sup> For example, in *Azevedo*, the goal was to postpone interest payments, while in *Assénagon*, the goal was to exchange the notes for new ones, with the resolution acting as a threat to

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<sup>132</sup> Brit. Am. Nickel Corp. v. M. J. O'Brien Ltd., [1927] A.C. 369 (P.C.) 371-72 (Can.). As far as I can tell, there is no parallel principle in Delaware corporate law. This may well be a result of Delaware's board-centric corporate law in contrast to the United Kingdom's shareholder-centric law. When, as in the United Kingdom, you allow shareholders to act directly, that power must be regulated. In Delaware, by contrast, shareholders, even with a supermajority, cannot do much of anything directly, other than change the bylaws and remove directors. With so little power, there is less need to control the "abuse of majority power" under Delaware corporate law.

<sup>133</sup> *Assénagon*, [2012] EWHC (Ch) 2090 at [71].

<sup>134</sup> *Id.* at [72].

<sup>135</sup> *Id.* at [70].

<sup>136</sup> *Id.* at [77].

<sup>137</sup> *Azevedo v. Imcopa Importacao*, [2012] EWHC (Comm) 1849, [12]-[13] (Eng.).

<sup>138</sup> *Id.* at [54] (finding that the consent payments offered "are inconsistent with any case of bribery, fraud or illegality").

<sup>139</sup> *Assénagon*, [2012] EWHC (Ch) 2090 at [83].

<sup>140</sup> *Id.*

those who did not tender.<sup>141</sup> Additionally, in *Azevedo*, the issuer made the offer, while in *Assénagon*, the other noteholders imposed the harm.<sup>142</sup> In *Azevedo*, the postponement of interest payments could benefit noteholders by allowing time to restructure while in *Assénagon*, the resolution destroyed the value of the notes with “no conceivable benefit” to the noteholders.<sup>143</sup> Finally, in *Azevedo*, there was no claim of oppression or unfairness, only a claim of bribery, while in *Assénagon*, a charge of oppression was central.<sup>144</sup>

In the end, then, Briggs J. combined an historical/doctrinal review of the cases with an analysis of the effect of the exit consent on the noteholders’ decision to conclude that oppression had been established.<sup>145</sup> It is a very elegant example of classic legal reasoning.

My interest here is not in whether *Katz* and *Assénagon* were correctly decided, but in their style of reasoning and expression. In fact, I believe that both cases were decided correctly because of the differences in the background institutional setting. Under the U.S. Trust Indenture Act, changes in principal or interest require unanimous consent, so the kind of modification at issue in *Assénagon* could not occur. The inflexibility of the Trust Indenture Act, in turn, introduces a degree of rigidity—one response to which is exit consents. By contrast, in the United Kingdom, a straightforward resolution changing the terms of the bonds could have been put to a noteholder vote. With such a possibility, the use of the exit consent that threatens holdouts with ruin as a spur to offer notes in the exchange is less defensible.

## VII. THE LEGAL REALIST VERSUS THE TRADITIONAL STYLE

With regard to the substance of these corporate law cases, specialist judges in both systems, aided by specialist lawyers, clearly identify and understand the core issues involved. Adjusting for differences in background law, it seems likely that the disputes would ultimately be resolved in more or less the same way in each system. This is unsurprising in a field such as corporate law, where market and institutional pressures demand practical solutions to practical problems.

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*; *Azevedo*, [2012] EWHC (Comm) at [13]-[14] (explaining that interest postponement was key to restructuring).

<sup>144</sup> *Assénagon*, [2012] EWHC (Ch) 2090 at [83]; *Azevedo*, [2012] EWHC (Comm) at [17] (setting forth the basis of a claim alleging an unlawful consent payment in the nature of a bribe).

<sup>145</sup> *Assénagon*, [2012] EWHC (Ch) 2090 at [85] (“This form of coercion is in my judgment entirely at variance with the purposes for which majorities in a class are given power to bind minorities . . .”).

But the styles of decisionmaking are strikingly different. At the risk of overstatement, in the Delaware cases, the policy issue is presented explicitly, with cases brought forward as illustrations of the issue or to check that a conclusion is consistent with the main lines of precedent. You can almost hear the judge saying, “This is an interesting and important question. Let’s look for the best answer to that question anywhere we might find it—in law review articles, economics articles or even old cases. Having figured out the right answer, let’s go back and check to make sure that it is not inconsistent with what came before.”

In U.K. judgments, by contrast, the discussion of the cases is the way in which the policy issues are articulated and resolved. The judges almost seem to say, “This is an interesting question. Let’s go look at the cases and see what they say so that I can figure out what I think about it.” To the extent that they seek to convey that impression, there is a rather obvious but harmless disingenuousness. In *Assénagon*, Briggs J. identified the issue, took a position on it and then marshalled the legal materials to make the most convincing argument for that position. In *Katz*, Chancellor Allen did the same thing.

These stylistic differences derive from, or reflect, the different implicit jurisprudence in the two systems. In a Realist system, where one is taught that indeterminacy is pervasive and that, in the interesting cases, policy considerations are paramount, it is entirely natural and appropriate to state the policy issue explicitly and then to resolve it as best one can. In a traditional, doctrinalist system that operates on the assumption that nearly all cases can be resolved by a careful analysis of precedent and that the judge, even in resolving gaps, is very much a delegated decisionmaker (an agent not just of the legislature but also of the arc of precedent), it is entirely natural and appropriate to build policy arguments from within the case law.

These stylistic differences have real implications. In a Realist system, policy analyses can be persuasive to the court, as can retaining experts to submit reports or to testify on the optimal policy. Delaware judges regularly participate in academic conferences, publish articles in academic journals, and become informed consumers of academic research. In such a system, citing to finance literature or economically influenced policy analysis in legal academic literature is common and unremarkable.

As an illustration, return to Chancellor Strine’s opinion in *MFW*. In summarizing the arguments of counsel and prior cases, Strine presented the issue as one of policy:



In prior cases, this court has outlined the development of the case law in this area, as have distinguished scholars, and there is no need to repeat that recitation. The core legal question is framed by the parties' contending positions. For their part, the defendants say that it would be beneficial systemically to minority stockholders to review transactions structured with both procedural protections under the business judgment rule. Absent an incentive to do so, the defendants argue that controlling stockholders will not agree upfront to both protections, thus denying minority stockholders access to the transaction structure most protective of their interests—one that gives them the benefit of an active and empowered bargaining agent to negotiate price and to say no, plus the ability to freely decide for themselves on full information whether to accept any deal approved by that agent. This structure is not common now because controlling stockholders have no incentive under the law to agree to it, and such an incentive is needed because it involves the controller ceding potent power to the independent directors and minority stockholders. The defendants argue that the benefits of their preferred approach are considerable, and that the costs are negligible because there is little utility to having an expensive, judicially intensive standard of review when stockholders can protect themselves by voting no if they do not like the recommendation of a fully empowered independent committee that exercised due care. In support of that argument, the defendants can cite to empirical evidence showing that the absence of a legally recognized transaction structure that can invoke the business judgment rule standard of review has resulted not in litigation that generates tangible positive results for minority stockholders in the form of additional money in their pockets, but in litigation that is settled for fees because there is no practical way of getting the case dismissed at the pleading stage and the costs of discovery and entanglement in multiyear litigation exceed the costs of paying attorneys' fees. Finally, the defendants note that Delaware law on controlling stockholder going-private transactions is now inconsistent, with the intrinsically more coercive route of using a tender offer to accomplish a going-private transaction escaping the full force of equitable review, when a similarly structured merger where a less coercive chance to say no exists would not.<sup>146</sup>

This passage contains comprehensive citations to prior cases, to law review literature, and to expert affidavits filed in the case. The point is not that Strine ignored the cases. Rather, the Delaware style is to present the issue as one of policy and then to analyze it. The way in which the issue is

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<sup>146</sup> *In re* MFW S'holders Litig., 67 A.3d 496, 525 (Del. Ch. 2013) (citations omitted).

presented in the opinion shows what perhaps is so obvious to readers and writers of Delaware corporate law that it is hardly visible: that, as a conventional or normative matter, explicit policy discussions are acceptable and even necessary, at least when there is an open question of law. This kind of discussion not only frees lawyers to argue policy but likely forces them to do so. While the “output” is doctrinal—a statement of a rule of law to govern this case and future cases—the “inputs” will be both doctrinal (how the new rule fits with the overall doctrinal structure of Delaware corporate law) and substantive (what is the best rule from a social policy perspective).

Contrast this with Briggs’s resolution of an equally open question in *Assénagon*. It is not that Briggs hid the fact that the validity of exit consents was an open question under U.K. law or that important policy considerations were at stake. But, his approach to addressing those issues speaks volumes about a different set of implicit jurisprudential understandings and norms. Briggs began with Justinian and proceeded largely chronologically because he emerged from a system in which the practice is to make normative arguments through the analysis of past cases with a careful parsing of holdings to identify the underlying principle (the *ratio decidendi*) to be applied to the current controversy.

Indeed, in a traditionalist system such as Briggs’s, the “nonlegal” materials that Delaware judges so freely incorporate seem to be kept at arm’s length. In the affirmance in *Azevedo*, the Court of Appeals recognized that the validity of exit consents was an issue of first impression.<sup>147</sup> Then, having also recognized that the issue is a version of the “prisoner’s dilemma,” the court (per Lloyd L.J.) considered an alternative game theoretic framework:

Another graphic description of the uncertainty faced by an individual voter in this situation is called the Trembling Hand Perfect Nash equilibrium, as discussed in an article, “Do Bondholders Lose from Junk Bond Covenant Changes?” by Marcel Kahan and Bruce Tuckman in *Journal of Business* (University of Chicago Press) October 1993, vol 66, p 499. (Neither this article nor that mentioned at para 30 above was cited to us; neither affects my reasoning or my conclusion, so I did not consider it necessary to invite submissions from counsel about either.)<sup>148</sup>

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<sup>147</sup> *Azevedo v. Imcopa Importação*, [2013] (Civ) 364, [31] (Eng.) (“We have to decide the point without the benefit of any previous English authority of direct relevance, other than the judge’s judgment in this very case . . .”).

<sup>148</sup> *Id.* at [33].

This reference is revealing in several ways. The court was intrigued or amused by the suggestively named yet obscure “Trembling Hand Perfect Nash Equilibrium.” Indeed, the whole paragraph is likely a judicial joke. But, most importantly, the parenthetical following the citation to Kahan and Tuckman implies that it would have been inappropriate to rely on academic literature that had not been cited to the court without inviting submissions from counsel.

Here, again, we see the difference in style. No U.K. judge would think it inappropriate to cite an obscure *case* not cited to the court without inviting submissions from counsel, at least if the case is from a U.K. or Commonwealth court. But, an *article* on bonds published in a finance journal, co-authored by a law professor (Kahan) and a finance professor (Tuckman), was sufficiently foreign to be treated with care, even when referred to as a joke.

#### CONCLUSION

Bayless Manning’s classic article on shareholders’ appraisal remedy is a tribute to his late colleague Frank Coker.<sup>149</sup> In the opening, he recalled that “[a] dean of my acquaintance is fond of saying that every law school course should be a course in jurisprudence.”<sup>150</sup> He went on to note that Coker, in his fields of corporate law and contracts, “found the stuff of the cosmos. Every problem was a problem in depth; every class a class in jurisprudence.”<sup>151</sup> Just as we humans discover that we speak in prose,<sup>152</sup> we lawyers discover that we have a jurisprudence, whether we know it or not.

Obvious to outsiders, but often invisible to natives, American lawyers have a very particular way of looking at the law, a perspective that we absorb with our first exposure to the law and that we enact in our daily practice. That American perspective, I have argued, is shaped by the American Legal Realists’ understanding of the nature of adjudication. With the Realists, we see widespread indeterminacy in the law. Whether it is pervasive overall or just characteristic of many of the most interesting cases is beside the point. We fully believe that the most interesting cases can be decided either way and that policy considerations, rather than the cases and the statutes, will often be determinative.

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<sup>149</sup> Bayless Manning, *The Shareholder’s Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223 (1962).

<sup>150</sup> *Id.* at 223.

<sup>151</sup> *Id.* at 225.

<sup>152</sup> See generally MOLIÈRE, *THE BOURGEOIS GENTLEMAN* (Bernard Sahlins ed., 2000).

This is our legacy from our teachers and our teachers' teachers, and it is on full display even in a field as practical as corporate law. A comparison of Delaware and U.K. approaches suggests that the different jurisprudential traditions fundamentally shape the judicial style, the ways in which arguments are articulated.

What I cannot discern is whether the differing jurisprudential approaches affect the outcomes. My strong sense is that, at least in corporate law, they do not. In both the Delaware and U.K. cases, the judges recognize the issues at stake and sufficiently understand the underlying institutional context and business realities to arrive at sensible conclusions. There is no evidence that the jurisprudence creates the sort of confusion—the slavery of a priori categories and the curse of Platonic realities—that the Realists attributed to their *bête noir*, the “formalist.” In corporate law, both in Delaware and the United Kingdom, one sees good decisions and bad decisions. But, at least based on my reading, there is no reason to believe that judges trained in the realist tradition are more or less likely to reach good decisions than judges trained as doctrinalists.