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A Rule-Based Method for Comparing Corporate Laws

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A RULE-BASED METHOD FOR COMPARING CORPORATE LAWS

*Lynn M. LoPucki**

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Introduction

Scholars, lawyers, judges, and policymakers frequently need to compare corporate laws,[1] both internationally and domestically. In part, this need results from the internal affairs doctrine, a conflict-of-laws rule that is unique to corporate law. The doctrine requires that courts apply the corporate law of the state or country of incorporation to the corporation's internal affairs. Because corporations can easily and inexpensively incorporate anywhere—regardless of the locations of their headquarters or operations—the internal affairs doctrine enables them to pick their governing laws from an almost worldwide menu.[2] The result is that even many corporations operating solely in the United States are governed by foreign corporate laws.[3] Lawyers must make comparisons to assist their clients in choosing legal regimes, judges must make comparisons to apply foreign entity laws in their cases, policymakers must make comparisons to decide what corporate and entity laws to offer, and corporate legal scholars must make comparisons to make sense of the differences.

Comparative law scholars are reconciled to the fact that no single comparative method is best.[4] Methods may serve different purposes or be effective only in particular situations.[5] There are, however, some widely accepted

1 "Corporate law," as used in this Article, includes all types of business entities. In the United States, the principal types are corporations, partnerships, limited liability companies, and limited partnerships.

2 *See, e.g.*, Lynn M. LoPucki, *Corporate Charter Competition*, 102 Minn. L. Rev. 2101, 2168 (2018) ("[C]orporations can incorporate anywhere. Once incorporated, corporations can do business anywhere. The law of the incorporation state governs their internal affairs.").

3 Based on my query of the Compustat North America database, more than thirteen percent of U.S. public companies were incorporated outside the United States in 2015.

4 *E.g.*, Maurice Adams & Jacco Bomhoff, *Comparing Law: Practice and Theory*, *in* Practice and Theory in Comparative Law 1, 8 (Maurice Adams & Jacco Bomhoff eds., 2012) ("[T]here can be no single method for comparative law, because there is no uniform conception of 'law' and no single comparative question."); Simone Glanert, *Method?*, *in* Methods of Comparative Law 61, 68 (Pier Giuseppe Monateri ed., 2012) (objecting to Zweigert and Kötz's putative claim for the universality of their method); Esin Örücü, *Developing Comparative Law*, *in* Comparative Law: A Handbook 43, 52 (Esin Örücü & David Nelken eds., 2007) ("It would be odd to allow comparative law research but one methodology, 'functional inquiry', which has only a technical perspective."); Catherine Valcke, *Reflections on Comparative Law Methodology—Getting Inside Contract Law*, *in* Practice and Theory in Comparative Law 22, 23 (Maurice Adams & Jacco Bomhoff eds., 2012) ("Given such diversity, it would be vain to search for a unique, one-size-fits-all comparative law methodology.").

5 *See* Glanert, *supra* note 4, at 65 ("There is no method that would be valid for every domain . . . .").

standards or principles by which methods are judged.[6] Although comparisons may be rule based,[7] they are expected to take context,[8] including legal traditions,[9] into account. They must be capable of discovering and including institutions that perform the same functions,[10] even when those institutions are contained in disparate doctrines[11] and described by different terminology.[12] They must recognize that when concepts do exist in different jurisdictions, they may be understood differently.[13] Comparisons must take into

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6 *See id.* at 63, 68 ("The overwhelming majority of comparatists, then, continue to emphasize the significance of method."); Örücü, *supra* note 4, at 49 ("Following the inquiry, a comparative lawyer is expected to describe, juxtapose, identify similarities and differences and then venture into the field of explanation.").

7 *See* Mary Ann Glendon et al., Comparative Legal Traditions 9 (4th ed. 2014) ("Blackletter rule comparison is still popular but has partially been overcome by studies of historical developments, cultural characteristics, and by narratives."); Geoffrey Samuel, An Introduction to Comparative Law Theory and Method 121–24 (2014) (discussing the "rule model" of law as a basis for comparison); *id.* at 123 ("[T]he assumption of the functional method is that there are in any system clear and observable legal rules."); Mathias M. Siems, *The Methods of Comparative Corporate Law*, *in* Routledge Handbook of Corporate Law 11, 12–14 (Roman Tomasic ed., 2017) (describing "rule-based comparison" as one of seven approaches to comparative corporate law); Örücü, *supra* note 4, at 60 ("At the micro-comparative level therefore, comparative law presupposes the existence of rules and legal institutions, and their plurality, but statutory rules alone cannot be the object of comparative inquiry. The first step is to regard judicial decisions as law.").

8 *See* David Nelken, *Comparative Law and Comparative Legal Studies*, *in* Comparative Law: A Handbook, *supra* note 4, at 3, 19 ("The most common move to get 'beyond legal rules' is to argue for placing 'law in its context.'").

9 *See* Glendon et al., *supra* note 7, at 33 ("Insofar as our approaches to comparison work with history, function and context, cultural narrative and interpretation, or many of the other tools and methods, they presuppose that the law which is the object of our study and comparison is not merely a set of formal doctrines.").

10 *See* Konrad Zweigert & Hein Kötz, Introduction to Comparative Law 34 (3d rev. ed. 1998) ("The basic methodological principle of all comparative law is that of *functionality*. . . . [I]n law the only things which are comparable are those which fulfil the same function.").

11 *See, e.g.*, Michal Zurek & Kamil Szmid, *Capital Maintenance*, *in* Comparative Company Law 191, 218 (Mathias Siems & David Cabrelli eds., 2013) (noting that in Delaware, fraudulent transfer law rather than corporate law might be used to resolve one of the issues in the Scenario).

12 *See* Alan Watson, Legal Transplants: An Approach to Comparative Law 11 (2d ed. 1993) ("Homonyms present traps. The French *contrat*, *domicile*, *tribunal administratif*, *notaire*, *prescription* and *juge de paix*, are not the English 'contract', 'domicile', 'administrative tribunal', 'notary public', 'prescription' and 'justice of the peace'." (footnote omitted)).

13 *See* Peter de Cruz, Comparative Law in a Changing World 354 (3d ed. 2007) ("The 'conceptual' caveat refers to the fact that although legal concepts may exist in every country, these may be understood differently; an example is the concept of share capital.").

account the means by which and the extent to which the legal systems actually enforce their rules.[14]

This exacting list of requirements has thus far prevented the field of comparative law from meeting corporate law's need for a simple and intuitive comparative method. This Article addresses the need by specifying a rule-based method for comparing corporation[15] laws that, when executed well, can meet all of those expectations. Following Rudolf Schlesinger,[16] the method does so by using country experts.[17] What is new is the manner in which researchers using the proposed method frame and execute the comparisons. The researchers break comparisons down into subcomparisons, each consisting of a single rule for each jurisdiction, state the rules in parallel, and then state the ways in which the rules are the same or different. Conclusions of "similarity" are treated as incomplete comparisons. The method's principal advantage is that it increases the closeness, that is, the specificity, of the resulting comparisons. Close comparisons by the proposed method frequently reach different results than comparisons that simply rely on the researchers to exercise good judgment.

The proposed method incorporates and builds on Rudolf Schlesinger's "case-oriented factual method"[18] as adapted to company law by Mathias

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14 *See* Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 155 (1999) ("What counts are all elements of a corporate legal system that bear on corporate decisions and the distribution of value: not just general principles, but also all the particular rules implementing them; not just substantive rules, but also procedural rules, judicial practices, institutional and procedural infrastructure, and enforcement capabilities."); David C. Donald, *Approaching Comparative Company Law*, 14 FORDHAM J. CORP. & FIN. L. 83, 104 (2008) ("Such comparative research, however, should include not only the legal provisions themselves, but also the means of enforcing them.").

15 When referring to U.S. law or comparisons to U.S. law I have used the word "corporation." Most countries use the word "company" to refer to the same concept.

16 *See* Ulrich Drobnig, *Memorial Address for Rudolf Schlesinger: Delivered at the University of Trento Law School*, 21 HASTINGS INT'L & COMP. L. REV. 765, 768 (1998) ("[Schlesinger] did not look to American experts in French, German or Italian law. Rather, he recruited experts from those countries or regions of the world that he intended to study.").

17 Hiram E. Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 IOWA L. REV. 1025, 1057 (1999) ("Knowledge of what is foreign implies a comparison with what is familiar; yet, it is also true that comparisons assume knowledge of what is being compared. Therefore, it is necessary to know foreign law before comparing it."); *see also* Adams & Bomhoff, *supra* note 4, at 21 (referring to "expecting comparative researchers to do what they will never be able to do (i.e., become foreigners)"); Mathias Reimann & Reinhard Zimmermann, *Preface* to THE OXFORD HANDBOOK OF COMPARATIVE LAW, at vi (Mathias Reimann & Reinhard Zimmermann eds., 2006) ("Moreover, hardly anybody possesses the linguistic skills and the background knowledge required to subject even an individual area of the law to a truly comprehensive comparative study . . . .").

18 Drobnig, *supra* note 16, at 769 ("[R]ather than choosing a sizable, functional segment of life, [Rudolf Schlesinger] broke down life situations into 'units which normally constitute the facts of a case.' This 'case-oriented factual method' is the essence of the common core method.").

Siems and David Cabrelli.[19] Under their methods or mine, the researchers begin by posing a hypothetical factual scenario (the "Scenario"). The researchers modify the Scenario reiteratively, and solve it under the laws of each of the jurisdictions under investigation. The purpose of the Scenario is to identify the corresponding laws and practices of the two jurisdictions. Those laws and practices are the ones—regardless of their nature—that would be applied in the jurisdiction to resolve the Scenario. The proposed method differs from Siems and Cabrelli by comparing only two jurisdictions and including in the Scenario all facts necessary for an attorney to render an opinion in each of the two jurisdictions.[20] It rejects the method of posing questions to country experts untethered by a specific factual scenario.[21]

The proposed method assumes that the researchers' goal is to compare a single aspect of a jurisdiction's corporate law with the corresponding aspect of the corporate law of another jurisdiction. The method consists of six steps. The first step is to create the hypothetical fact Scenario. The second step is to choose comparable entity types for comparison—one from each jurisdiction. The third step is to conduct the research necessary to resolve the Scenario in each jurisdiction. The fourth step is to extract from that research the rules that directly determined the resolution, express those rules in parallel to the extent practical, and juxtapose them. The fifth step is to express the most important respects in which the laws are the same or different. The sixth step is to apply the researchers' evaluative criteria to reach useful conclusions.

The method proposed in this Article is designed for the comparison of corporate laws in developed countries. That is a relatively easy context in which to make rule-based comparisons, because corporate law is largely statutory and similar in both form and substance across countries. For example, leading corporate law scholars Henry Hansmann and Reinier Kraakman state:

> The basic law of corporate governance—indeed, most of corporate law—has achieved a high degree of uniformity across developed market jurisdictions,

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19 *See generally* COMPARATIVE COMPANY LAW, *supra* note 11; David Cabrelli & Mathias Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, 63 AM. J. COMP. L. 109, 111–12 (2015) ("The process adopted is akin to the influential case-based comparative methodology used by the so-called Common Core project. However, the Common Core only examines private law in a narrow sense (contract, tort, etc.). Therefore, our project aimed to fill a gap in the comparative law literature by adopting a similar approach in the field of corporate law." (footnote omitted)).

20 That is, the attorney would not have to opine that different results might be reached depending on facts not stated in the Scenario.

21 *See, e.g.*, Holger Spamann, *The "Antidirector Rights Index" Revisited*, 23 REV. FIN. STUD. 467 (2010) (replicating portions of La Porta, Lopez-de-Silanes, Shleifer, and Vishny ("LLSV")'s landmark study using questions instead of scenarios). In this regard, the proposed method is closely analogous to the Delaware Supreme Court's insistence that certified questions of law be accompanied by "a stipulated set of facts." Espinoza *ex rel.* JPMorgan Chase & Co. v. Dimon, 124 A.3d 33, 36 (Del. 2015).

> and continuing convergence toward a single, standard model is likely. The core legal features of the corporate form were already well established in advanced jurisdictions one hundred years ago, at the turn of the twentieth century.[22]

In addition, countries copy popular features of other countries' corporate laws as a means of attracting business activity.[23] David Skeel states that "[f]ew countries develop their own corporate law from scratch. Major enactments are usually borrowed from the laws of another country, and it turns out that nearly every corporate law in the world can be traced, directly or indirectly, to one or more of . . . five jurisdictions."[24] As a result, corporate law is rule based and increasingly contained in statutes that are organized by entity type.

As previously noted, the proposed method assumes that the researchers' goal is to compare a single aspect of a jurisdiction's corporate law with the corresponding aspect of another jurisdiction's corporate law.[25] Comparisons of multiple aspects or among multiple jurisdictions would require that the method be applied separately to each aspect and pair of jurisdictions. Before applying the method, the researchers should specify the purpose of the comparison[26] and conduct a search of the relevant literature to determine whether the same or similar comparisons have already been made.[27]

Part I explains the processes for specifying a Scenario. It introduces the Scenario that will serve as the illustration in the remainder of this Article—a comparison of the liability of directors for the exercise of poor judgment in a Delaware corporation with the corresponding liability in a United Kingdom public limited company.[28] Part II explains and illustrates the necessity of selecting specific entity types for comparison. Part III describes and illustrates the method for resolving the Scenario in both jurisdictions. Part IV explains and illustrates the novel process for close comparison—the extraction, juxtaposition, and comparison of decisional rules from the country

22 Henry Hansmann & Reinier Kraakman, Essay, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001).

23 *See* Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis,* Doing Business *Reports, and the Silence of Traditional Comparative Law*, 57 AM. J. COMP. L. 765, 766 (2009) ("[E]ven critics admit that [the World Bank *Doing Business* reports] have been successful at inciting legal reform in many countries in the world.").

24 David A. Skeel, Jr., *Corporate Anatomy Lessons*, 113 YALE L.J. 1519, 1569–70 (2004) (reviewing REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (2004)).

25 *See* ZWEIGERT & KÖTZ, *supra* note 10, at 34 ("As in all intellectual activity, every investigation in comparative law begins with the posing of a question or the setting of a working hypothesis—in brief, an idea.").

26 *See* Chodosh, *supra* note 17, at 1050 ("Without clarity of purpose, it is difficult to determine the content of what to report.").

27 *See* SAMUEL, *supra* note 7, at 26–27 (explaining literature review at the doctoral dissertation level); EUGENE VOLOKH, ACADEMIC LEGAL WRITING 66 (2003) (explaining literature review for students writing for law reviews or seminars).

28 The choice of Delaware is explained *infra* note 41 and accompanying text.

reports. Part V presents and illustrates the method for evaluation of the differences exposed through close comparison. Part VI distinguishes the reporting of comparisons from the making of comparisons. The Article concludes that the proposed method serves a broad range of needs and, as a result, has the potential to increase the use of comparison as a way of gaining insight into legal systems. Throughout this Article, illustrative text is indented and in a sans serif font in order to distinguish it from supportive materials and my commentary.

I. Step 1: Scenario Specification

The first step is to specify a Scenario. The Scenario is a statement of facts that could occur in either jurisdiction, expressed concretely. Its purpose is to achieve comparability.

Laws are comparable only if they address the same situation.[29] The Scenario is a method for assuring that the compared laws do. To understand the Scenario's function, imagine that cases identical to the Scenario arose in both jurisdictions and a party in each obtained an attorney's opinion as to how the case would be resolved in the jurisdiction. Each attorney would discover and report the laws, customs, practices, and other factors that would resolve the Scenario in the attorney's jurisdiction. The rules identified in each jurisdiction would be comparable to the rules identified in the other jurisdiction because both sets of rules would have addressed the same facts. Rules comparable in one application are probably comparable in some others, thus creating the basis for rule-based comparison.

Use of the Scenario is designed to overcome the problem that jurisdictions may use different bodies of law or procedures to resolve the same issue. For example, one jurisdiction may use corporate law to resolve an issue, while the other jurisdiction uses fraudulent transfer law.[30] If so, the researchers must compare the corporate law resolution with the fraudulent transfer law resolution. If the Scenario step is omitted, the researchers might compare corporate law to corporate law or fraudulent transfer law to fraudulent transfer law, producing nonsensical results.[31]

The use of the legal language of either jurisdiction in the Scenario may create the same problem. Jurisdictions commonly use the same or similar legal language to refer to different situations or practices. Researchers who specified a comparison in such language might conclude that the two jurisdictions had similar laws, even when they actually had different laws. Instead,

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29 *E.g.*, Zweigert & Kötz, *supra* note 10, at 34 ("[I]n law the only things which are comparable are those which fulfil the same function."); Donald, *supra* note 14, at 89 ("It is important that . . . only comparable items be compared to avoid creating useless or misleading comparisons."). *But see* Örücü, *supra* note 4, at 47–48 (expressing skepticism regarding the belief that "things to be compared must be comparable").

30 *See, e.g.*, Comparative Company Law, *supra* note 11, at 217–18.

31 *See* Donald, *supra* note 14, at 89 ("It is important that . . . only comparable items be compared to avoid creating useless or misleading comparisons.").

the Scenario should consist of objective facts—not conclusory facts, laws, legal issues, or legal questions.[32]

A. Method

Functional comparison starts with a "problem."[33] The Scenario is such a problem, although the Scenarios I propose are more specific than those generally used in functional comparison. Like those generally used, each Scenario ends in a question.[34] The question is typically some variant of "who wins?" To answer the question, the researchers must discover and apply the applicable rules. Discovery of the comparable rules is the Scenario's function. Application of the rules is merely a check on discovery. The rules, not the outcomes, are the subject of comparison in the remaining steps.[35]

The Scenario's facts must be sufficiently specific to enable the researchers to predict a single resolution and to identify a single rule or set of rules in each jurisdiction. If the Scenario is insufficiently specific, the researchers may have to consider alternative versions of the Scenario at the comparison stage, rendering that stage unwieldy. For example, assume that in one of the jurisdictions, the Scenario's resolution depended on whether a director notified the corporation of the director's conflict of interest. If the Scenario failed to state whether the director notified the corporation, the researchers

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32 Comparative studies are often conducted through questionnaires instead of scenarios. *See, e.g.*, INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS, at v (Dinah Shelton ed., 2011) ("All of the authors worked from a questionnaire, which is included as the appendix to this volume."); Spamann, *supra* note 21, at 468 n.3 (showing that LLSV used rule-based questionnaires), *id.* at 469 ("Recent studies use an alternative method to develop comparative measures of law: they ask lawyers in each country to describe how their country's legal system would deal with one particular hypothetical case."). "Questionnaires" often turn out to be fact hypotheticals. *See, e.g.*, 4 UNIFICATION OF TORT LAW: CAUSATION 3–7 (J. Spier ed., 2000) (providing "[q]uestionnaire and cases" that are almost entirely fact hypotheticals).

33 *See, e.g.*, ZWEIGERT & KÖTZ, *supra* note 10, at 34 ("The question to which any comparative study is devoted must be posed in purely functional terms; the problem must be stated without any reference to the concepts of one's own legal system."); Adams & Bomhoff, *supra* note 4, at 12–13 ("Critical scholarship has long taken issue with . . . views of comparative law as the comparison of 'solutions' to 'problems' that are supposedly clearly identifiable and more or less identical across systems.").

34 *See, e.g.*, WORLD BANK GRP., DOING BUSINESS 2017: EQUAL OPPORTUNITY FOR ALL 138–40 (14th ed. 2017), http://www.doingbusiness.org/reports/global-reports/doing-business-2017 (stating the shareholder protection hypothetical and posing the seven questions that provided the basis for the Group's comparisons); Theis Klauberg, *General Case on Directors' Duties, in* COMPARATIVE COMPANY LAW, *supra* note 11, at 27 (detailed fact scenario followed by question); Pascal Pichonnaz, *Questionnaire on Set-Off*, COMMON CORE PROJECT (June 2005), http://www.common-core.org/sites/default/files/uploaded/docs/Questionnaire%20Set-off.pdf (providing detailed fact scenarios followed by questions).

35 A comparison of the outcomes would be relevant only in the specific circumstances of the Scenario and so could be used only in conjunction with the Scenario. A comparison of rules is of broader applicability and ordinarily does not require reference to the Scenario that identified the rules.

could complete the comparison only by reporting and analyzing the rules that governed the version in which the director notified the corporation and the version in which the director did not—thus doubling the number of comparisons necessary.

To create a Scenario, the researchers might begin by specifying the minimum facts necessary to predict a resolution in one jurisdiction, and then, through the country experts, determine whether those facts are sufficient to predict a resolution in the other jurisdiction. If they are not, the researchers should add facts until they are.

Scenarios that lead to different resolutions in the two jurisdictions tend to be more useful because they focus the researchers on the difference. If the initial resolutions are not different, the researchers should consider modifying the Scenario so that they are. Such modification is limited by the necessity that the Scenario still must raise the issue that is of interest to the researchers.

B. Illustration

Assume that the purpose of the comparison is to assess scholars' claims that Delaware corporate law provides directors with greater protection against liability than does UK law.[36] The Scenario should, insofar as possible, reflect the context in which this claim is generally made. I have assumed that this context reflects a multimember board in a corporation whose shares are publicly held and whose operations are not subject to special regulations. These assumptions shaped the Scenario's first paragraph:

> The company produces nontoxic chemicals used in manufacturing. The company has about 2000 equity investors and its equity investments are listed on a stock exchange. The company has three directors who make decisions by voting.
>
> The directors made the decision to sell a division of the business. As a result of the decision, the company lost thirty percent of its $100 million market capitalization ($30 million).
>
> The directors reasonably informed themselves prior to making the decision and followed appropriate procedures but exercised terrible judgment in making it. The company continues to operate, and the three directors remain in office. *S* is an investor who invested $500,000 prior to the decision. *S* wishes to sue the three directors for his $150,000 loss on that investment. Will *S* be able to recover on his claim?

The second paragraph hypothesizes a concrete situation of the type that is of concern: the directors make a misjudgment resulting in a large loss.

36 *See, e.g.*, KRAAKMAN ET AL., *supra* note 24, at 70 & n.154 (claiming that "the U.S. business judgment rule significantly reduces the likelihood of a director ever having to make a payment in relation to a duty of care suit" while "[t]he UK reformed its law relating to derivative actions in 2008, making it easier for shareholders to challenge duty of care violations").

The misjudgment is described as generally as could be accomplished without implicating more than one liability rule in either jurisdiction.

The reason for hypothesizing in the third paragraph that the directors reasonably informed themselves and followed appropriate procedures is to eliminate that type of liability from the comparison. Its inclusion would have raised a second issue and necessitated the comparison of an additional rule pair. The same is true for the assumption that the directors remain in office.

The Scenario makes no mention of efforts to eliminate liability through contract—such as an exculpation clause under U.S. law. A Scenario in which the parties did make such a contract would, of course, result in a different comparison.

The amount of the total loss ($30 million) is fixed at an amount high enough to attract a plaintiff's attorney despite the small likelihood of winning. The amount of the plaintiff's loss is fixed at an amount low enough to make a direct action impractical, yet high enough to avoid issues regarding the plaintiff's motives for bringing a derivative action. In general, the goal in drafting is to raise a single Scenario that is as representative as possible of all Scenarios that fall within the scope of the scholars' dispute.

The Scenario would have been essentially the same if the researchers' purpose had been to identify the laws governing director liability for poor decisionmaking in connection with a law harmonization project. The business of the corporation would still be specified in order to avoid laws applicable only to narrow categories of companies, such as medical providers or banks. The number of shareholders would probably be the same because the issue of director liability—like most issues in corporate law—is considered more important in the listed-corporation context.[37]

With the exception of the word "directors,"[38] the Scenario avoids the use of legal terminology from either jurisdiction. Instead, it describes the parties and concepts by their functions. The purpose is to avoid the confusion that arises from the use of a legal term that has different meanings in the two jurisdictions.

Formulation and resolution of the Scenario may be a reiterative process. That is, the researchers can write the Scenario, solve it, and then revise it until it raises precisely the issue of interest to them. The Scenario's functions are to identify the laws to be compared, assure that the laws chosen for comparison actually address the same situation, and assure that all laws addressing that situation will be taken into account.

---

37 *See, e.g.*, Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 AM. J. COMP. L. 1, 9 (2011) (detailing the report of a thirty-three country comparison in which "[t]he focus . . . is on corporate governance in general, primarily of listed corporations").

38 "Directors" is used because (1) the word has the same meaning in both systems and (2) the functional term, "managers," might have been confused with "officers" in American usage.

II. Step 2: Entity Type Selection

The second step is to choose a pair of entity types for comparison. In a large majority of countries, only the national government charters and regulates entities. But in the United States, the state governments have those powers, and in a few other countries, regional authorities have them.[39] For that reason, I use "jurisdiction" rather than "country" to indicate the source of the laws to be compared. With minor modification, the selection method I describe can also be used to compare entity types within a single jurisdiction, for example, to compare Delaware corporate law with Delaware limited liability company law.

Comparison can be close only if the entity types compared actually exist. Thus, the method cannot be used to compare the amalgam of U.S. corporate law with the corporate law of another country. Each business corporation is formed under the law of a state and governed by that law. The federal government has no general incorporation law and incorporates no general business entities. When scholars purport to compare U.S. corporate law with the law of another country, they are necessarily making loose comparisons.[40] To achieve close comparison, the best practice is usually to use Delaware law as a proxy.[41]

Most jurisdictions that have the power to charter entities, charter several types.[42] Some types exist to serve particular kinds of business, such as professional firms, banks, or other firms subject to special regulatory regimes. Some entity types are limited to,[43] or are more suitable to,[44] firms with large or small numbers of investors, while others are intended for use by businesses

39 *See, e.g.*, Lynn M. LoPucki, *Algorithmic Entities*, 95 Wash. U. L. Rev. 887, 919–20 (2018) (reporting on entities chartered by the Ras Al Khaimah Free Trade Zone Authority in the United Arab Emirates).

40 *E.g.*, Kraakman et al., *supra* note 24, at vii (claiming that "[c]oncrete references to the law of particular jurisdictions is key to making our analysis credible," but nevertheless purporting to compare "the U.S." as one of their jurisdictions).

41 *E.g.*, David Cabrelli & Mathias Siems, *A Case-Based Approach to Comparative Company Law*, *in* Comparative Company Law, *supra* note 11, at 19 ("[T]he law of the US state of Delaware was used as a proxy for the US."). Most comparison is of public corporate law. Fifty-five percent of public companies incorporated in the United States are incorporated in Delaware. *See* LoPucki, *supra* note 2, at 2136.

42 For example, California charters corporations, limited liability companies, limited partnerships, consumer cooperative corporations, professional corporations, water companies, fish marketing corporations, benefit corporations, and social purpose corporations, among others. France charters the *Société anonyme* (SA), the *Société par actions simplifiée* ("SAS"), and the *Société à responsabilité limitée* (SARL). *See* Klauberg, *supra* note 34, at 33.

43 *See* Companies Act 2006, c. 46, § 755(1)(a) (UK) ("A private company limited by shares or limited by guarantee and having a share capital must not . . . offer to the public any securities of the company . . . .").

44 Nearly all public companies in the United States are corporations. Harold Marsh, Jr. et al., Marsh's California Corporation Law § 2.03(H) (4th ed. Supp. 2018) ("[M]ost publicly traded businesses are corporations.") But limited liability companies and limited partnerships can be public companies. *See id.* ("[A]n LLC generally will lose its tax advantage if it becomes a publicly traded LLC."); Suren Gomtsian, *The Governance of Publicly*

irrespective of their numbers of investors. Some types exist largely for historical reasons. Some types are more popular than others for a variety of reasons.

Because the laws governing entity types within a jurisdiction differ, any attempt to closely compare the entity laws of one jurisdiction with those of another quickly becomes impossibly complex. For example, in a given comparison, assume that each of the two jurisdictions charters three types of entities. Those six entity types may be governed by six entity laws, each of which takes a different view on the point of law that is the subject of the comparison. Comparing each of the three views in one jurisdiction with each of the three in another would require nine comparisons.

The simplest solution is to choose one entity type from each jurisdiction for comparison (an "entity-type pair"). Only one comparison is then needed. The choice may be made on essentially three bases. First, the research question might directly require or suggest the types to be compared. Second, the research question might indirectly require or limit the types to be compared by raising an issue that arises only with respect to particular entity types. For example, if the issue is how investors elect directors, the entity types must be ones in which investors elect directors. Third, if the issue to be examined can arise with respect to multiple entity-type pairs, in choosing the pair for study, the researchers should consider each entity type's importance,[45] the comparability of the pair,[46] and the availability of information on which to base the comparison.[47]

Although choice of an entity-type pair is, like the choice of jurisdictions, outside the Scenario, researchers should favor the entity-type pair most likely to be involved in an actual case like the Scenario. For example, if shares of the entity in the Scenario are publicly listed, the researchers should not use an entity type whose shares cannot be publicly listed and should avoid a type whose shares can be listed, but rarely are.

On the facts of the Scenario, the researchers choose one entity type from Delaware and one from the United Kingdom would for comparison. In this instance, the two choices are obvious because each jurisdiction has an entity type that is used overwhelmingly by entities with as many as 2000 inves-

Traded Limited Liability Companies, 40 DEL. J. CORP. L. 207, 242–43 (2015) (providing in-depth analysis of twenty U.S.-listed limited liability companies).

45 A type's importance might be measured by the number of entities of the type chartered or by the aggregate sizes of those entities.

46 Comparability is essentially similarity with respect to the characteristics to be examined. The greater the similarity, the easier the comparison will be.

47 For example, in choosing a U.S. entity type for comparison with a foreign entity type with respect to veil piercing, researchers should prefer corporations over LLCs because the bulk of the caselaw and commentary on veil piercing is with regard to corporations.

tors. In Delaware it is the corporation and in the United Kingdom it is the public limited company.[48]

III. Step 3: Scenario Resolution

The third step is to identify the relevant laws and practices in each jurisdiction and apply them to resolve the Scenario.

A. Method

Working in their capacities as country experts, the researchers identify the laws by solving the Scenario in the same manner that they would if they represented one of the parties. They take into account not only statutes, cases, and commentary, but anything that a lawyer, tasked to write an opinion on the Scenario, might consider.[49]

The governing laws may or may not be the laws on the books. The corporate law of most jurisdictions is statutory, often making the task an easy one. But in civil- or common-law jurisdictions, the language of statutes can be misleading. The same terms may be understood differently in different jurisdictions,[50] and statutes may not be interpreted literally or be enforceable. Thus, in most instances, the statute should be only the starting point in determining how the system actually works.[51] The researchers should use caselaw or commentary to gain additional perspectives. If the issues chosen for study are of practical importance, the websites of law firms in the jurisdiction under study will often provide evidence that addresses not only the law on the books, but also the actual practices.[52]

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48 Companies Act 2006, c. 46, § 755(1)(a) (UK) ("A private company limited by shares or limited by guarantee and having a share capital must not . . . offer to the public any securities of the company . . . .").

49 *But see* Siems, *supra* note 7, at 16 ("[I]t would be necessary not only to ask lawyers from each country about the law but also to ask entrepreneurs how such problems may be resolved by extra-legal means.").

50 Watson, *supra* note 12, at 11 ("Homonyms present traps. The French *contrat, domicile, tribunal administratif, notaire, prescription* and *juge de paix*, are not the English 'contract', 'domicile', 'administrative tribunal', 'notary public', 'prescription' and 'justice of the peace'." (footnote omitted)).

51 For example, a country expert may conclude that the judge will probably ignore that applicable statute and base the decision on a social practice. If so, the social practice is the applicable rule. Whether social practices are rules of law is a matter of definition. *See, e.g.*, Walter Otto Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 Yale L.J. 323, 326–33 (1993) (arguing that the social practices of the Roma are law).

52 For further discussion about addressing the actual practices of law, see Zweigert & Kötz, *supra* note 10, at 35 ("Often a solution is provided by custom or social practice, and has never become specifically legal in form."); Donald, *supra* note 14, at 103 ("But it is quite common to find that the comparatist does not cast her analytical net wide enough, and thus fails to appreciate all the functional elements that interact with a law or right in a foreign legal system.").

The depth of this analysis may vary with the purpose of the comparison and the availability of information. For example, countries sometimes enact corporate laws to attract investment, even when the countries lack the institutional infrastructure necessary to make the laws effective. In those countries, information regarding enforcement is unlikely to be available. Despite the Potemkin nature of such a country's statutes, comparison of those statutes to the statutes of other jurisdictions might still be of use in understanding them as propaganda or aspiration.[53] Comparative inquiry, like other forms of inquiry, is made for a wide variety of reasons and should not stop merely because limited information is available.

The researchers' task is to resolve the Scenario. To resolve it is to determine what would happen in the jurisdiction on the facts of the Scenario (the "outcome"). Reasoning all the way to the outcome is important because it prompts the researchers to identify the law that underlies each step of the reasoning.

In this step, the analysis proceeds separately in each jurisdiction. Zweigert and Kötz state that "[s]eparate reports should be offered for each legal system . . . and they should be objective, that is, free from any critical evaluation, though containing all significant qualifications or modifications."[54] They stress: "[T]he process of comparison proper starts only when the reports on the different legal systems have been completed. To present such reports before the comparison proper begins is an established method of research and a proven way of constructing works on comparative law."[55]

All of the country-specific information that will be used in the comparison or that will provide the basis for the comparison should be included in the country reports. No country-specific information should be introduced at later stages of the comparison. Because the method is reiterative, information discovered during later stages can be added to the country reports at that time and then taken into account in reworking the later stages.

B. Illustration

This Section illustrates the process of stating the applicable law of each jurisdiction in a separate report and resolving the Scenario separately for each. Because the comparison must ultimately take into account both the substantive law and the procedural law by which it is enforced, I report separately on the substantive law and enforcement procedures of each jurisdiction, which requires a total of four resolutions.

53 *See* Frances H. Foster, *Parental Law, Harmful Speech, and the Development of Legal Culture: Russian Judicial Chamber Discourse and Narrative*, 54 WASH. & LEE L. REV. 923, 926 (1997) ("My primary interest is not in the results of these opinions but rather in the texts themselves. What do they convey to the reader about the court's definition of itself, the parties before it, its audience, and the relationship between Russian citizens and institutions?").

54 ZWEIGERT & KÖTZ, *supra* note 10, at 43.

55 *Id.*

1. The Substantive Law Resolutions

This subsection addresses the liability of directors for poor decisionmaking, without regard to whether mechanisms exist for the enforcement of that liability. Enforcement is the subject of the next subsection. In this third step of the proposed method, I present the law governing the Scenario and the Scenario's resolution in separate reports for each jurisdiction.

a. The Delaware Report

Directors have a fiduciary duty of care in Delaware,[56] but that duty is merely "a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them."[57] Definitions of that duty add that "[h]aving become so informed, they must then act with requisite care in the discharge of their duties."[58] The requirement to become informed and then to act with due care is sometimes referred to as "process due care" in order to distinguish it from "substantive due care."[59] The directors' exercise of judgment in decisionmaking is in the realm of substantive due care. In that realm, no duty of care exists under Delaware law; decisionmaking is governed by the business judgment rule.

Under the business judgment rule, "[c]ourts do not measure, weigh or quantify directors' judgments. We do not even decide if they are reasonable in this context."[60] To receive business judgment rule protection, however, the judgment must have been rational.[61] The Delaware courts have equated irrational decisions with "waste."[62]

> To recover on a claim of corporate waste, the plaintiffs must shoulder the burden of proving that the exchange was "so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration." A claim of waste will arise only in the rare, "unconscionable cases where directors irrationally squander or give away corporate assets." This onerous standard for waste is a corollary of the proposition that where business judgment presumptions are applicable, the

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56 *See, e.g.*, Benihana of Tokyo, Inc. v. Benihana, Inc., 891 A.2d 150, 192 (Del. Ch. 2005) (holding that "the directors did not breach their fiduciary duty of care"), *aff'd*, 906 A.2d 114 (Del. 2006).

57 Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000); *see also* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 367 (Del. 1993) (quoting *Aronson* with approval), *decision modified on reargument*, 636 A.2d 956 (Del. 1994).

58 *Aronson*, 473 A.2d at 812; *see also Cede & Co.*, 634 A.2d at 367.

59 *Brehm*, 746 A.2d at 264 ("Due care in the decisionmaking context is *process* due care only.").

60 *Id.*

61 *Id.* ("Irrationality is the outer limit of the business judgment rule.").

62 *Id.*

board's decision will be upheld unless it cannot be "attributed to any rational business purpose."[63]

"Plaintiffs rarely satisfy the waste standards."[64] One court stated that "some [directors'] decisions may be so 'egregious' that liability for losses they cause may follow even in the absence of proof of conflict of interest or improper motivation. The exception, however, has resulted in no awards of money judgments against corporate officers or directors in this jurisdiction . . . ."[65]

I conclude that on the facts of the Scenario, it is theoretically possible, but highly unlikely that the directors could be held liable for their "terrible" decision. To warrant such a holding, the decision would have to meet the standard for waste.

b. The United Kingdom Report

In 2006, the United Kingdom codified the duty of care in section 174(1) of the Companies Act.[66] That section provides that "[a] director of a company must exercise reasonable care, skill and diligence."[67] The Act places no relevant limitations on that duty.

The Law Commission Report that preceded the codification recommended against the adoption of a "statutory business judgment rule."[68] But the Commission's concern was apparently only about codification of the rule, but not the rule itself. The Commission said:

> In relation to commercial decisions in general, the courts take the view that it would be wrong "to substitute [their] opinion for that of the management, or indeed to question the correctness of the management's decision . . . if bona fide arrived at."[69]
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> . . .

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63 *In re* the Walt Disney Co. Derivative Litig., 906 A.2d 27, 74 (Del. 2006) (first quoting *In re* the Walt Disney Co. Derivative Litig., 731 A.2d 342, 362 (Del. Ch. 1998); then quoting Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971)). "Irrationality may be the functional equivalent of the waste test or it may tend to show that the decision is not made in good faith, which is a key ingredient of the business judgment rule." *Brehm*, 746 A.2d at 264.

64 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 4.11[A] (3d ed. Supp. 2018).

65 Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1052 (Del. Ch. 1996).

66 Companies Act 2006, c. 46, § 174(1) (UK).

67 *Id.*

68 THE LAW COMM'N & THE SCOTTISH LAW COMM'N, COMPANY DIRECTORS: REGULATING CONFLICTS OF INTERESTS AND FORMULATING A STATEMENT OF DUTIES para. 5.29 (1999), https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc261_Company_Directors.pdf ("[W]e do not recommend a statutory business judgment rule").

69 *Id.* para. 5.21 (alterations in original) (quoting Howard Smith Ltd. v Ampol Petroleum Ltd. [1974] AC 821, 832 (PC)).

> The courts currently do not judge directors with the wisdom of hindsight and do not 'second-guess' directors on commercial matters. There is nothing to suggest that this long-established judicial approach would not apply. It would in any event be difficult to formulate a business judgment principle without either narrowing it or making it too rigid. The examples reviewed in the Paper suggest that there is no simple way of embodying the principle in the statutory form.[70]
>
> The court should continue to have regard to the decision of the directors on commercial matters if the decision was made in good faith, on proper information and in the light of the relevant considerations, and appears to be a reasonable decision for the directors to have taken. In those circumstances, the court should not substitute its own judgment for that of the directors.[71]

Thus, the language of section 174(1) of the Companies Act is in direct conflict with the Commission's apparent intent and expectation with respect to director liability for poor decisionmaking.

Despite the conflict in language, the only court to comment thus far describes that section as codifying the common law and continuing prior law and practice in effect.[72] Similarly, Cahn and Donald stated that "by undeclared practice (as in the UK), courts presume that disinterested directors making business decisions in good faith have met their duty of care absent egregious mismanagement."[73] Another commentator said, somewhat obscurely, that "[a]lthough the distinction between misjudgment and negligence remains apt, the words in these older cases must now, of course, be read in the light of the statutory imposition of an objective assessment of reasonable care," adding that "[i]t remains moot whether the common law protection is as great as that provided by statutory enactments of the business judgement rule."[74]

I searched UK caselaw after 2006 for additional evidence of how section 174(1) of the Companies Act had been interpreted. I found nine reported opinions in which the court mentioned section 174(1) in considering allegations that directors violated their duties under the Act. In none of those cases did the court hold directors liable for poor decisionmaking or clarify the conflict between the language of the statute and that of the Commission Report.[75] I conclude that on the facts of the Scenario, the directors could be

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70 *Id.* para. 5.28.

71 *See* THE LAW COMM'N & THE SCOTTISH LAW COMM'N, SHAREHOLDER REMEDIES: CONSULTATION PAPER para. 1.9(iii) (1997), http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc246_Shareholder_Remedies.pdf.

72 *E.g.*, Gregson v. H.A.E. Trustees Ltd. [2008] EWHC (Ch) 1006 ("[S]ection 174 of the Companies Act 2006 . . . codifies the existing law.").

73 ANDREAS CAHN & DAVID C. DONALD, COMPARATIVE COMPANY LAW 370 (2010) (footnote omitted).

74 *Liability Is for Negligence, Not Mere Errors of Judgement*, 2 PALMER'S COMPANY LAW para. 8.2811 (2018).

75 Hook v. Sumner [2015] EWHC (Ch) 3820 (Eng.); *Re* Micra Contracts Ltd. (In Liquidation) [2016] B.C.C. 153(Eng.); Hedger v. Adams [2015] EWHC (Ch) 2540, [2016] B.C.C. 390 (Eng.); Richmond Pharmacology Ltd. v. Chester Overseas Ltd. [2014] EWHC

held liable for terrible decisions. But to warrant such a holding, the particular decision would have to have been "egregious mismanagement."[76]

2. The Enforcement Procedures Resolutions

The preceding Section reported the standards by which directors could be held liable for poor decisionmaking in Delaware and the corresponding standards in the United Kingdom. To determine whether the hypothetical directors' liability would be greater in one of those jurisdictions, it is also necessary to consider the effect of the two jurisdictions' enforcement systems.

Because the enforcement systems in both countries are complex, that comparison would require consideration of a substantial number of issues. The issues would include: (1) the appropriate type of action (direct, derivative, or class action); (2) the plaintiff's standing to bring the action;[77] (3) doctrines that give the courts and directors some control over whether derivative actions could be brought; (4) indemnification, insurance, and their effects on the feasibility of actions; (5) the rules regulating the collection of judgments obtained against individuals; and (6) the rules governing attorneys' fees in derivative actions. Consideration of these issues would require a lengthier analysis than can be presented here.[78] For illustrative purposes, I consider only the rules governing attorneys' fees in derivative actions of the type suggested by the Scenario.

Recall that in the Scenario, the shareholders suffered losses of $30 million. *S*, the shareholder who seeks to sue, suffered a loss of $150,000. To raise the enforcement issues, I assume in this Section that the directors' exercise of judgment was so egregious that, if *S*'s case were decided on the merits, *S* would have a ten percent chance of prevailing in either jurisdiction. The following reports describe the law and procedure governing the retention and payment of attorneys in such derivative actions on the facts of the Scenario.

(Ch) 2692 (Eng.); Brumder v. Motornet Serv. & Repairs Ltd. [2013] EWCA (Civ) 195, (Eng.); McKillen v. Misland (Cyprus) Invs. Ltd. [2012] EWHC (Ch) 2343 (Eng.); Odyssey Entm't Ltd. (In Liquidation) v. Kamp [2012] EWHC (Ch) 2316 (Eng.); Whessoe Oil and Gas Ltd. v. Dale [2012] EWHC (TCC) 1788 (Eng.); Madoff Secs. Int'l Ltd. (In Liquidation) v. Raven [2013] EWHC (Comm) 3147 (Eng.).

76 CAHN & DONALD, *supra* note 73, at 370; *see also In re* Brazilian Rubber Plantations and Estates, Ltd., [1911] 1 Ch. 425 at 439 (Eng.) (distinguishing "want of sound judgement" from "negligence").

77 On the facts of the Scenario, *S*'s right to bring the derivative action would be doubtful. *See* Saratoga Advantage Tr. Tech. & Commc'ns Portfolio v. Marvell Tech. Grp., Ltd., No. 15-cv-04881, 2016 WL 4364593, at *3 (N.D. Cal. Aug. 16, 2016) (discussing the UK restrictions on derivative actions contained in *Foss v. Harbottle*, [1843] 67 Eng. Rep. 189 (Ch.)).

78 The analysis would also probably cost more than a director would be willing to pay. But even so expensive an analysis might be cost justified if the costs can be spread over a number of similar inquiries.

a. The Delaware Report

Delaware follows the American rule in shareholder derivative actions.[79] Under that rule, "a prevailing party is responsible for the payment of his own counsel fees in the absence of statutory authority or contractual undertaking to the contrary."[80] An exception exists by which a court might award attorneys' fees against a party who proceeded in bad faith.[81] That *S* has a ten percent chance of winning on the facts of the Scenario suggests that *S* is not proceeding in bad faith. Thus, even if *S* loses, the court is unlikely to require that *S* pay the defendants' attorneys' fees.

Under Delaware law, *S* can contract with an attorney for a contingent fee that is a percentage of the amount recovered.[82] On the facts of the Scenario, there is a ten percent chance that *S* will recover $30 million on behalf of the corporation, and a ninety percent chance that *S* will recover nothing. The expectancy value is $3 million, a sufficiently large amount that *S* will probably be able to find an attorney willing to work on a contingent fee.

Under Delaware law, "in class and derivative actions, plaintiffs' counsel are entitled to an award of attorneys' fees and expenses where their efforts achieve a benefit for the corporation or its shareholders."[83] Under this "common fund doctrine . . . 'a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.'"[84] The fees must be awarded or approved by the court, and come out of the plaintiffs' recovery.[85] The fee award limits the amount the attorney can receive.[86]

Until the Delaware Supreme Court's recent decision in *Americas Mining Corp. v. Theriault*, the amount of the fee awarded would have been limited by consideration of the time expended by the attorneys. But in *Americas Mining*,

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79 *See* Tandycrafts, Inc. v. Initio Partners, 562 A.2d 1162, 1164 (Del. 1989) (citing Walsh v. Hotel Corp. of Am., 231 A.2d 458, 462 (Del. 1967)).

80 *Id.*

81 *Id.* ("'[F]ee-shifting' may be required in certain restricted cases. Thus, under the 'equity' exception a litigant may secure an award of counsel fees upon a showing of bad faith by an opposing party."); Nagy v. Bistricer, 770 A.2d 43, 64 (Del. Ch. 2000) (explaining that the Court of Chancery will not lightly award attorneys' fees under the bad-faith exception to the American rule that each party bears his own costs).

82 *See* Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1252 n.69 (Del. 2012) ("Rule 1.5(c) of the Rules of Professional Conduct expressly contemplates fees that are based on a percentage.").

83 Seinfeld v. Coker, 847 A.2d 330, 333 (Del. Ch. 2000).

84 *Id.* at 334–35 (quoting Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980)).

85 *Boeing Co.*, 444 U.S. at 479 ("The court also found its holding consistent with the American rule. It noted that lawyers for the class would receive their fees 'from the amount for which Boeing has *already* been held liable. There is no "surcharge" on the defeated litigant.'" (quoting Van Gemert v. Boeing Co., 590 F.2d 433, 441–42 (2d Cir. 1978))).

86 *See* 1 ALBA CONTE, ATTORNEY FEE AWARDS § 2:11 n.1 (3d ed. 2018) ("In class action fee proceedings, courts may determine reasonable fees and have power to modify contingent-fee contracts when necessary to avoid excessive fees.").

the Delaware Chancery Court awarded the full amount of the fifteen percent contingent fee agreed to by the plaintiff.[87] The resulting fee was $304 million, which implied an hourly rate of $35,000 per hour.[88] The Delaware Supreme Court affirmed the award even though the Chancery Court "fail[ed] to consider the hourly rate implied by the Fee Award as a 'backstop check' on the reasonableness of the fee."[89] Under *Americas Mining*, courts can, but need not, consider the number of hours worked before determining the reasonableness of a contingent fee.[90] As a result, the Delaware courts can, and sometimes do, award windfall fees to plaintiffs' attorneys in shareholder derivative actions. I conclude that *S* could bring its case with little or no risk of liability for the defendants' attorneys' fees and would have no difficulty in obtaining representation under Delaware law.

b. The United Kingdom Report

The United Kingdom follows the English rule in shareholder derivative actions. Under that rule, the successful party in litigation may recover the fees of its attorney from the unsuccessful party. That recovery is within the discretion of the court, but it is usually allowed.[91] By suing, under the English rule, *S* would risk being ordered to pay the defendants' attorneys' fees in the event that the action were unsuccessful.[92]

In a shareholder derivative action under UK law, the court also has discretion to order that the company indemnify *S* against *S*'s liability for the defendants' attorneys' fees.[93] If indemnification is ordered, *S* would be entitled to recover from the company any amounts that *S* is required to pay to

87 *In re* S. Peru Copper Corp., No. 961, 2011 WL 6382006 (Del. Ch. Dec. 20, 2011), *vacated*, No. 961, 2011 WL 6476919 (Del. Ch. Dec. 22, 2011), *aff'd*, *Ams. Mining Corp.*, 51 A.3d 1213 (Del. 2012).

88 *See id.*

89 *Ams. Mining Corp.*, 51 A.3d at 1257.

90 Contingent fees must meet the reasonableness standard set forth in Rule 1.5(a) of The Delaware Lawyers' Rules of Professional Conduct. THE DELAWARE LAWYERS' RULES OF PROFESSIONAL CONDUCT 638 (2013), http://courts.delaware.gov/rules/pdf/DLRPC-LN.pdf ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.").

91 *See* David A. Root, Note, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule,"* 15 IND. INT'L & COMP. L. REV. 583, 601 (2005) ("In England, the 'loser pays' rule is not an absolute, automatic rule, but one in the court's discretion."); Tim Cornwell, *'Double or Quits': Quayle Likes the 'English Rule' but Brits Have Their Doubts*, LEGAL TIMES, Feb. 10, 1992, at 1 (providing example involving $144,000 in attorneys' fees awarded against a widow who brought and lost a medical malpractice case regarding her husband's death).

92 *See* 10 NEIL ANDREWS, THE THREE PATHS OF JUSTICE: COURT PROCEEDINGS, ARBITRATION, AND MEDIATION IN ENGLAND 122 (Mortimer Sellers & James Maxeiner eds., 2012) ("The main rule in England is that a victorious party ('the receiving party') should recover his 'standard basis' costs from the opponent . . . .").

93 *See* Wallersteiner v. Moir (No. 2) [1975] QB 373 at 391, 403–04 (Eng.); *Consequences of Granting Permission: Costs and Settlement Terms*, 2 PALMER'S COMPANY LAW para. 8.3711 (2018) ("[T]he court may order at this stage that the company indemnify the claimant

the defendants.[94] The reasoning is that the company reaps the benefits of the derivative action, so the company should pay its costs.[95] The court may require the company to pay the costs of the derivative action even if the derivative action is unsuccessful.[96] Indemnification is far from automatic. In one case, the court imposed a financial need test as a prerequisite to indemnification.[97] It is also possible that the company might fail before actually reimbursing the plaintiff.[98] Thus, while indemnification reduces the plaintiffs' risk of being required to pay the defendants' attorneys' fees, indemnification does not eliminate that risk.[99] Some UK law firms are apparently using insurance to protect themselves and their clients against the risks in bringing derivative litigation.[100]

UK law prohibits contingent fee agreements but permits conditional fee agreements. A conditional fee agreement is a "no win, no fee" arrangement. That is, the attorney agrees not to charge a fee if the case is lost.[101] If the case is won, "the lawyer can receive a 'success fee', as well as his ordinary fee. The success element is a 'percentage increase'. This bonus cannot exceed 100 per cent of the normal fee."[102] I conclude that to bring its case, *S* would have to bear a significant risk of liability for the defendants' attorneys' fees. Because the attorney who takes the case on a conditional fee would have a ninety percent chance of not being paid and a ten percent chance of being paid at a reasonable hourly rate, *S* probably could not find an attorney willing to take the case on a conditional fee.

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against liability for costs, both in the permission action and in the derivative claim, and whether the litigation is ultimately successful or not.").

94 To "indemnify" is to "compensate (someone) for harm or loss." *Indemnify*, ENG. OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/indemnify (last visited Sept. 22, 2018).

95 *See* ARAD REISBERG, DERIVATIVE ACTIONS AND CORPORATE GOVERNANCE § 6.3 (2007).

96 *Id.* at 231 (stating that "the application for an indemnity has been integrated into the application for leave to proceed" and referring to Companies Act 2006, c. 46, § 261(2) (UK)). Section 261 provides that "[i]f it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a prima facie case for giving permission (or leave), the court—(a) must dismiss the application, and (b) may make any consequential order it considers appropriate." Companies Act 2006, c. 46, § 261(2) (UK).

97 *See* Smith v. Croft [1986] 1 WLR 580 (Eng.).

98 *See* Qayoumi v. Oakhouse Prop. Holdings Plc [2002] EWHC (Ch) 2547(Eng.).

99 REISBERG, *supra* note 95, § 6.4 (characterizing indemnity as "a less than adequate response to the formidable funding problem inherent in derivative actions.").

100 *Id.* § 7.3.1.1 ("[Conditional Fee Agreements] are usually linked with an insurance policy taken out after the event (ATE) which, if the case is lost, pays the other side's costs and the claimant's own out-of-pocket expenses (but, importantly, *not* his own lawyer's fees)."); *see also* Sam Reisman, *UK Litigation Insurance Broker Expands into US Market*, LAW 360 (June 14, 2017), https://www.law360.com/articles/934495/uk-litigation-insurance-broker-expands-into-us-market (promoting insurance that allows "corporate clients and their law firms to mitigate their risks and contain costs while working on contingent").

101 REISBERG, *supra* note 95, § 7.3.1.1 (referring to a conditional fee agreement as a "no-win-no-fee" agreement).

102 ANDREWS, *supra* note 92, at 131 (footnotes omitted).

IV. Steps 4 and 5: Comparison

Although the act of comparing is the heart of any comparative method, comparative law scholars have little to say about it. They seem to assume that once each system is explained, the similarities and differences are obvious. They are not.

A. Method

Comparison occupies two steps. The fourth step is to extract the governing rules from the country reports and juxtapose them. The fifth step is to identify the respects in which the rules are the same or different. I explain both steps before illustrating either so that the juxtaposed rules and comparisons will appear together in the illustrations.

1. Extract, State, and Juxtapose the Governing Rules

In the fourth step, the researchers must extract the "controlling" or "governing" rule from the report for each country. The governing rule is the rule of law or statement of practice that, when applied logically to the facts of the Scenario, correctly predicts or produces the result.[103] The rule for each country is ideally expressed in a single sentence that contains all of the necessary qualifications. Each expression should be as short as possible while still correctly expressing the governing rule or practice. The expression might be the language of a governing statute, the rule stated in a case, or the conclusion of a commentator regarding the resolution of cases of this type. It might be the researchers' conclusion after considering all relevant sources. The authority for each statement should be in an accompanying footnote.

Rules should not be stated in a conditional form, such as "if this fact is present, the outcome will be that." Instead, the Scenario should be modified to indicate whether the fact is present. Stating the rule to be compared in conditional form may not only prevent the researchers from achieving parallelism in the rules to be compared; it may cause the researchers to compare the rules at an ineffective level of generalization.

Even if the researchers did everything possible at earlier steps to isolate a single aspect of the two jurisdictions' laws for comparison, in virtually any application of the proposed method, the researchers will have to apply more than one rule to resolve the Scenario in each country. One reason for this apparent multiplication is that one rule resolves the substantive issue raised by the Scenario while a second rule determines the availability of a remedy.

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103 *See* David Crump, *The Twilight Zone of the* Erie *Doctrine: Is There Really a Different Choice of Equitable Remedies in the "Court a Block Away"?*, 1991 Wis. L. Rev. 1233, 1244 (referring to "controlling rules . . . meaning rules that specifically control the questions at issue"); Evan Tsen Lee, *Section 2254(d) of the Federal Habeas Statute: Is It Beyond Reason?*, 56 Hastings L.J. 283, 292 (2004) ("First, there is the ascertainment of the controlling rule or rules of law. Second, there is a determination of the facts. Third, there is an application of the controlling rule to the facts. Fourth, this application produces a result (disposition).").

Another is that legal reasoning is often a multistep process. Rules are applied in a series to reason from the facts to the resolution of an issue.

At this step, the researchers should state the rules from the two jurisdictions in parallel. "In parallel" means that the sentences used to express the laws have the same grammatical structure, or as similar a grammatical structure as can be achieved without a change in meaning. Expressing the rules in parallel makes comparison easier by making it easier for the researchers and their readers to identify the corresponding elements of the rules. The expressions chosen are important, because both the researchers and their readers look at the expressions when they actually make the comparisons.

The no-change-in-meaning limitation will prevent the modification of some rules. But if no single authoritative expression of the governing law exists for one of the jurisdictions, the researchers should consider paraphrasing that jurisdiction's rule to make it grammatically parallel with the authoritative expression of the other jurisdiction's rule. If one of the authoritative expressions of the governing law consists of more than a single sentence or clause, the researchers should consider reordering the sentences or clauses to match their order in the governing law of the other jurisdiction. If the governing law was translated into English, and the researchers are fluent in both languages, the researchers should consider retranslating that law into sentences that are in parallel with those with which they will be compared. Perhaps needless to say, it is necessary when making these kinds of changes to carefully avoid changes in meaning, to report the exact words of the original sources relied upon, and to justify the changes if the basis for them is not obvious.

Researchers should juxtapose the corresponding rules to compare them. Close comparison is more than just writing with an awareness of a rule pair. Close comparison is the act of determining and expressing the respects in which the two rules are different or the same.

Comparatists often write paired essays separately describing the rules or practices of two jurisdictions on a particular subject. Each essay may be two or three sentences or several pages.[104] Some regard such paired essays as comparison, but in actuality the comparatist has simply left the job of comparison to the reader. Other comparatists follow essays on the law of each jurisdiction with a third essay comparing the multiple rules or practices set forth in them.[105] Such a comparison is not close because the rules to be compared are physically remote, not labeled for easy reference, and hence difficult to identify in a reference. The resulting comparison is necessarily loose and general.

104 Zweigert and Kötz refer to the expressions of governing law as the "country report[s]," suggesting that in a two-country comparison, there would be only two. ZWEIGERT & KÖTZ, *supra* note 10, at 43; *e.g.*, DE CRUZ, *supra* note 13, at 357–85 (providing "comparative overview" consisting of eight pages on the English approach to company law, nine pages on company law in France, and ten pages on company law in Germany).

105 DE CRUZ, *supra* note 13, at 394–95 (providing conclusions based on the earlier reports).

Juxtaposition is achieved by stating the governing rule from one jurisdiction with respect to a single point, followed immediately by the governing rule from the other jurisdiction with respect to that same point. To juxtapose the corresponding rules, the researchers must first decide which of the governing rules correspond. In the context of corporate law, the pairings are usually obvious. Each country has a rule addressing the aspect of interest and another rule addressing the existence of a remedy. But in some instances, the legal reasoning processes in the two jurisdictions employ different numbers of steps to reach their conclusions, and in a worst-case scenario, the two jurisdictions might use entirely different bodies of law to resolve the Scenario. In these circumstances, the researchers should pair rules or groups of rules that perform the same functions in their respective jurisdictions' reasoning processes. Glendon states the principle in slightly different terminology: "Sometimes, several seemingly unrelated legal institutions have to be studied together because it is only their joint operation that meets a particular social need."[106]

In a particular instance, that might mean comparing one rule from the first jurisdiction with two rules that are applied in sequence in the second jurisdiction. In the worst-case scenario, it may mean pairing groups of elements that bear no facial similarity at all.

The available information with respect to some functions for a jurisdiction may be inadequate to predict with reasonable certainty what the jurisdiction would do. In that circumstance, no comparison is possible. The researchers should not clutter their report by stating what the other jurisdiction would do on the issue, unless they have some specific point to make that assists in comparisons actually made.

2. State the Respects in Which the Rules Are the Same or Different

The fifth step is to state the respects in which the rules are the same or different. Almost all comparatists advise instead that researchers describe the "similarities and differences" in the laws compared.[107] Use of the word "similar" should, however, be discouraged. To say that a pair of rules are similar is to say that they are the same in some respects and different in other respects, without identifying those respects. Thus, a statement noting similarity shows that the comparison is not complete. The researchers should either complete the comparison by stating the respects in which the rules are the same or different, or acknowledge the incompleteness.

If the rules compared are complex, the researchers may be unable to state all of the ways in which they are the same or different without the state-

106 GLENDON ET AL., *supra* note 7, at 28.

107 *E.g.*, Nelken, *supra* note 8, at 25 ("[W]ith comparative law the study of similarities and difference is the heart of the endeavor."); Örücü, *supra* note 4, at 44 ("Comparative law . . . is the juxtaposing, contrasting and comparing of legal systems or parts thereof with the aim of finding similarities and differences."); *see also* JEROME HALL, COMPARATIVE LAW AND SOCIAL THEORY 20 (1963) (stating the purpose is to discover "sameness and difference").

ment being unwieldy. In that event, the researchers should report only the ways that are of the greatest substantive importance and acknowledge that other ways remain unreported.

Zweigert and Kötz call the "actual comparison," which begins after the juxtaposing, "the most difficult part of any work in comparative law."[108] Somewhat paradoxically, they add that "simply listing the similarities and differences" is "really just to repeat in a clearer form what is already contained in the reports on each jurisdiction."[109]

The process of generating that list is, however, sufficiently complex to require its own method. That method is to extract governing rules, to state them in parallel, and to juxtapose them to support more precise comparison. The corresponding rules should both be in a researcher's field of vision as the researcher compares them. That is rarely possible without rule extraction and juxtaposition.

Although the researchers may see only the language of the rules while making the comparison, the researchers should be seeking to discover the ultimate differences in actual practices, not just the differences in language. To put it another way, the researchers should not merely consider what appears on the page, but should bring all of the researchers' knowledge regarding the two systems to bear. If that knowledge changes the outcome, the researchers should change the language of the relevant rule, so that the report of samenesses and differences remains consistent with the reports of the rules compared.

In keeping with their multijurisdictional model of comparison, Zweigert and Kötz assert that "[t]he process of comparison at this stage involves adopting a new point of view from which to consider all the different solutions."[110] Others join them in employing a point of view "outside" those being compared.[111] Because the proposed method compares only two jurisdictions, an outside point of view is unnecessary.[112] That reduces the complexity of the comparison process.

108 ZWEIGERT & KÖTZ, *supra* note 10, at 43.

109 *Id.*

110 *Id.*

111 *See, e.g.*, Örücü, *supra* note 4, at 48 ("Comparative law scholars use the term *tertium comparationis*, a common comparative denominator which could be the third unit besides the two legal *comparanda*, that is, the elements to be compared . . . . Here, comparability is seen to depend on the presence of common elements that render juridical phenomena 'meaningfully comparable.'").

112 *But see* Nicholas H.D. Foster, *Company Law Theory in Comparative Perspective: England and France*, 48 AM. J. COMP. L. 573, 578 (2000) ("In the mono-jurisdictional term solution, one arbitrarily fixes upon the technical term of one jurisdiction, with a caveat that that term is to be understood as encompassing a broad range of mechanisms in the jurisdictions under study. In the comparative invention solution, one invents a more accurate expression than the mono-jurisdictional term, an expression which is jurisdiction-neutral.").

B. *Illustration*

The purpose of the instant comparison is to determine whether directors have greater liability for poor decisionmaking under Delaware or UK law. The comparison has two components. The substantive component compares the rules regarding liability for poor decisionmaking. The procedural component compares the rules regarding the enforcement of that liability.

1. The Substantive Law Comparison

With respect to the substantive law, extracting the governing rules and stating them in parallel yields these rules with respect to whether directors can be held liable for poor decisionmaking:

> Under Delaware law, a common-law business judgment rule protects directors from liability for poor decisionmaking unless the decision is "irrational" or "waste."[113] One court described that level as "egregious."[114]
>
> Despite the language of section 174(1) of the Companies Act, under UK law, a common-law business judgment principle protects directors from liability for poor decisionmaking unless the decision constitutes "egregious mismanagement."[115]

The step five comparison should immediately follow. This is that comparison:

> Delaware and UK law are the same in that both apply common-law business judgment rules to protect directors from liability for poor decisions.
>
> Although expressed in different terms, the Delaware standard ("irrationality" or "waste") for denying protection is the same as the UK standard ("egregious mismanagement"). Plaintiffs could rarely meet either.
>
> The word "egregious" has been used to describe both standards.

The Delaware and UK standards differ in the degree to which they are supported by authority. Authority for the UK standard is from prior to codification and sparse. Authority for the Delaware standard is current and relatively clear. Although this difference is important to an understanding of the conclusions from comparison, it is not a difference in the governing rules.

2. The Enforcement Comparison

The comparisons in this Section are with respect to three issues: (1) whether the plaintiff's attorney must charge the plaintiff a fee in an unsuc-

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113 Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000) ("'[S]ubstantive due care' . . . is foreign to the business judgment rule. Courts do not measure, weigh or quantify directors' judgments. We do not even decide if they are reasonable in this context. Due care in the decisionmaking context is *process* due care only." (footnote omitted)); *id.* ("Irrationality is the outer limit of the business judgment rule." (footnote omitted)).

114 Gagliardi v. Trifoods Int'l, Inc., 683 A.2d 1049, 1052 (Del. Ch. 1996).

115 CAHN & DONALD, *supra* note 73, at 370 n.6 and accompanying text.

cessful action; (2) whether the plaintiff is liable for the defendants' fees in an unsuccessful action; and (3) the amount the plaintiff's attorney can recover in a successful action. These issues are relevant because they may affect the willingness of plaintiffs and their attorneys to bring derivative actions for poor decisionmaking.

(1) These are the parallel statements with respect to whether a plaintiff's attorney must charge the plaintiff a fee in an unsuccessful action:

> In Delaware, a contingent fee agreement stating that the plaintiff is not required to pay the plaintiff's attorney any fees except from the recovery is valid and effective.[116]
>
> In the United Kingdom, a conditional fee agreement stating that the plaintiff is not required to pay the plaintiff's attorney any fees except from the recovery is valid and effective.[117]

This is the comparison.

> The two rules are the same.

(2) These are the parallel statements with respect to whether the plaintiff is liable for the defendants' fees in an unsuccessful action:

> In Delaware, the plaintiff is liable for the defendant's attorneys' fees only if the plaintiff acted in bad faith.[118]
>
> In the United Kingdom, the plaintiff may, in the court's discretion, be held liable for the defendant's attorneys' fees.[119] The court can, in its discretion, order that the company indemnify the plaintiff against liability for the defendant's fees, whether or not the case is successful.[120]

This is the comparison.

> The plaintiff may be required to pay the defendant's attorneys' fees in an unsuccessful action in either jurisdiction.
>
> In Delaware, the plaintiff must pay only if the plaintiff acted in bad faith. The plaintiff's risk is much greater in the United Kingdom, because the plaintiff must pay if the court does not exercise its discretion to relieve the plaintiff of liability and does not order the company to indemnify the plaintiff. The plaintiff must also pay if the court does not exercise its discretion to relieve the plaintiff of liability and orders indemnification, but the company does not pay it.

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116 Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1262 (Del. 2012) (approving a fee payable only from the recovery).

117 REISBERG, *supra* note 95, § 7.3.1.1 ("A conditional fee agreement (CFA), also known as 'no-win-no-fee' agreement, allows a lawyer to agree to take a case on the understanding that if the case is lost he will not charge his client for the work he has done.").

118 *See* Tandycrafts, Inc., v. Initio Partners, 562 A.2d 1162, 1164 (Del. 1989) ("Thus, under the 'equity' exception a litigant may secure an award of counsel fees upon a showing of bad faith by an opposing party.").

119 *See* Root, *supra* note 91, at 601 ("In England, the 'loser pays' rule is not an absolute, automatic rule, but one in the court's discretion.").

120 *See* Wallersteiner v. Moir (No. 2) [1975] 1 QB 373 at 391, 403–04 (Eng.).

(3) These are the parallel statements with respect to the amount the plaintiff's attorney can recover in a successful action:

> In Delaware, an attorney can charge, and the court can award, a fee that is a percentage of the recovery, not to exceed a reasonable percentage. The court can, but need not, award that percentage without regard to the amount of time the attorney spends on the case.[121]
>
> In the United Kingdom, an attorney can charge, and the court can award, a reasonable fee based on the amount of time the attorney expends, plus a success fee that cannot exceed the base fee.[122]

This is the comparison.

> The rules are the same in that an attorney can charge no more than a reasonable fee under the law of either jurisdiction.
>
> In determining a reasonable fee, a court applying Delaware law can, but need not, consider time spent. A court applying UK law must consider time spent.
>
> Delaware fees are not capped on the basis of time spent. UK fees are capped at twice a reasonable amount based on the time spent.

V. Step 6: Evaluation of Differences

A. Method

The final step is to evaluate the differences.[123] The researchers do that not by determining that one rule is better than the other in some abstract sense,[124] but by relating the identified differences to the relevant persons' values. Values are "[p]rinciples or standards of behaviour; one's judgement of what is important in life."[125] The relevant person can usually be determined from the purpose of the comparison.

While the purpose of a comparison might be merely to know, most comparisons are conducted for more specific purposes. If the purpose is to discover options for reform, the relevant values are those of the policymakers. If it is to provide insight relevant to a normative debate regarding domestic law, the relevant values are the shared values of the debaters. If the purpose is to enable corporate directors to choose the corporate law most favorable to

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121 *See Ams. Mining Corp.*, 51 A.3d at 1257.

122 *See* Andrews, *supra* note 92, at 131.

123 *See* Chodosh, *supra* note 17, at 1052 ("[C]omparison ought to produce an evaluation . . . .").

124 *See* Masha Antokolskaia, *The "Better Law" Approach and the Harmonisation of Family Law*, *in* 4 Perspectives for the Unification and Harmonisation of Family Law in Europe 159, 181 (Katharina Boele-Woelki ed., 2003) ("[N]o objective criteria can be found in order to justify the choice as to why the drafters consider the rule that they have selected to be the 'better' one.").

125 *Value*, Eng. Oxford Living Dictionaries, https://en.oxforddictionaries.com/definition/value (last visited Feb. 10, 2018).

themselves,[126] the values are those of the directors.[127] Chodosh notes other purposes asserted in the literature,[128] each of which implies some relevant person.

Researchers should attempt to link their comparisons to the relevant values. In doing so, they should avoid the use of simplistic proxies for those values. A recent article by Delaware Supreme Court Chief Justice Leo Strine demonstrates the sensitivity of comparative findings to the proxies employed in their evaluation.[129] Researchers have repeatedly found that European company law accords more rights to shareholders in their interactions with directors than does U.S. corporate law.[130] They have used those findings to reach a consensus conviction that European corporate law is more share-

126 Participants can choose the applicable corporate law by choosing their incorporation jurisdiction. *E.g.*, CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 90 (1987) ("This beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation.").

127 Participants frequently choose jurisdictions other than the one in which the corporation is physically located. *E.g.*, *In re* BP P.L.C. Derivative Litig., 507 F. Supp. 2d 302, 311 (S.D.N.Y. 2007) (holding that English law applied to a derivative action brought by the shareholder of a UK corporation in New York); City of Sterling Heights Police & Fire Ret. Sys. v. Abbey Nat'l, PLC, 423 F. Supp. 2d 348, 363 (S.D.N.Y. 2006) ("Because Abbey is incorporated under the laws of England, plaintiff's fiduciary duty claim is governed by English law."); Davis v. Scottish Re Grp., Ltd., 28 N.Y.S.3d 18, 22 (N.Y. App. Div. 2016) (applying the Cayman Islands rule that "a director does not owe any fiduciary duties to minority shareholders solely based on his or her relationship to the company" because the company was incorporated in the Cayman Islands), *rev'd*, 88 N.E.3d 892 (N.Y. 2017). *But see* RSL Commc'ns PLC *ex rel.* Jervis v. Bildirici, No. 04-cv-5217, 2006 WL 2689869, at *4 (S.D.N.Y. Sept. 14, 2006) ("[W]here the Defendants have not stated why they believe English law governs this case, nor how English law differs from the law of New York, this Court is not obligated to take judicial notice of English law and thus applies the law of New York to this dispute.").

128 Chodosh cites to assertions of these "comparative purposes":

> "[T]o deprovincialize students, broaden their perspectives, and show them that other people can do things differently"; "to confront foreign problems"; "to examine a source of ideas, of examples of different ways of defining and dealing with common social problems"; to unify private law "through description and evaluation of different private law systems"; or for "comparative studies" in "the relations between law and society."

Chodosh, *supra* note 17, at 1049–50 (footnotes omitted) (quoting JOHN HENRY MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 1 (1994)).

129 Leo E. Strine, Jr., *The Soviet Constitution Problem in Comparative Corporate Law: Testing the Proposition That European Corporate Law Is More Stockholder Focused than U.S. Corporate Law*, 89 S. CAL. L. REV. 1239, 1261–80 (2016).

130 *E.g.*, Mathias Siems & David Cabrelli, *Form, Style and Substance in Comparative Company Law, in* COMPARATIVE COMPANY LAW, *supra* note 11, at 363, 375 (concluding, based on numerical scoring of "[p]references for interests of directors, shareholders, and creditors" that "the US tends to favour directors more often than the other countries"); *see also* Arthur R. Pinto, *The European Union's Shareholder Voting Rights Directive From an American Perspective: Some Comparisons and Observations*, 32 FORDHAM INT'L L.J. 587, 612 (2009) ("In Europe, shareholders are generally considered to have more power to act within the share-

holder friendly.[131] As Professor Lynn Stout put it, "[i]n contrast [to the United States], the United Kingdom seems a shareholder paradise."[132]

Strine accepts shareholder friendliness as the value to be served,[133] but changes the proxy for that friendliness from "rights" to the ability to exercise control[134] and the receipt of investment returns.[135] He makes a credible case that American corporate law is actually friendlier to shareholders than European corporate law.

Linking comparisons to values is difficult and often speculative. But as Zweigert and Kötz noted:

> [T]he comparatist is in the best position to follow his comparative researches with a critical evaluation. If he does not, no one else will do it, and if no one does it, comparative law will deserve BINDER's sour description of 'piling up blocks of stone that no one will build with'. The comparatist uses just the same criteria as any other lawyer who has to decide which of the possible solutions is most suitable and just.[136]

Explanation is an alternative way to give meaning to findings of sameness and difference. Glendon regards explanation of the differences and

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holder meeting compared to U.S. shareholders and this power relates to the shareholder ability to add to the agenda.").

131 *See* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 848 (2005) ("[T]he corporate law system of the United States is the one that stands out among the corporate law systems of developed countries in how far it goes to restrict shareholder initiative and intervention."); Sofie Cools, *The Real Difference in Corporate Law Between the United States and Continental Europe: Distribution of Powers*, 30 DEL. J. CORP. L. 697, 703 (2005) ("[Comparing the United States to continental Europe] underscores just how few legal powers shareholders have in the United States and how fundamental the distribution of legal powers is in shaping the character of corporate life."); George W. Dent, Jr., *Corporate Governance: The Swedish Solution*, 64 FLA. L. REV. 1633, 1642 (2012) (one of several articles quoting Christopher M. Bruner's statement that "[s]hareholders in the United Kingdom are, in fact, far more powerful, and far more central to the aims of the corporation than are shareholders in the United States" (quoting Christopher M. Bruner, *Power and Purpose in the "Anglo-American" Corporation*, 50 VA. J. INT'L L. 579, 581–82 (2010)); *see also* LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 56 (2012) ("In contrast [to the United States], the United Kingdom seems a shareholder paradise.").

132 STOUT, *supra* note 131, at 56.

133 Strine, *supra* note 129, at 1306 ("[T]he claim that the U.S. system is less stockholder friendly misunderstands means and ends.").

134 *Id.* at 1273–80 (arguing that American shareholders exercise their lesser rights to remove directors far more frequently than European shareholders exercise their greater rights); *id.* at 1277 (reporting thirty-five stockholder proposals to remove directors in continental Europe and the United Kingdom between 2005 and 2008, as compared with "112 proxy contests opposing management *each year*" in the United States for the same time period).

135 *See id.* at 1303 (arguing that "the United States has a greater incidence of deal activity" and "dramatically higher premiums [are] paid for companies in the United States").

136 ZWEIGERT & KÖTZ, *supra* note 10, at 47.

similarities observed as the "essence" of comparative law research.[137] Although explanation is unquestionably valuable, it is not an easy fit with the proposed method. But knowledge of the existence of sameness and difference can be useful for both academic and practical purposes, even if the researchers do not "explain" the sameness and differences.

B. Illustration

The purpose of the comparison used in the illustration was to assess scholars' claims that Delaware corporate law provides directors with greater protection against liability than does UK law. Those claims value protection of directors from liability, making such protection the criterion for evaluation. Other criteria could be employed, but they might require changes in the Scenario.

Comparison of the substantive law showed that the standards for holding directors liable for poor decisionmaking are, for all practical purposes, the same in the two jurisdictions. Directors could rarely be held liable for poor decisionmaking in either jurisdiction, making the substantive UK law equally as "good" as the Delaware law.

Comparison of the attorneys' fee incentives and disincentives for bringing derivative actions showed that the Delaware rules are more conducive to the filing of those actions.[138] First, UK plaintiffs risk being required to pay the defendants' attorneys' fees in any unsuccessful case, while Delaware plaintiffs risk being required to pay such fees only if they are held to have acted in bad faith. Even small disincentives can deter derivative actions, because neither jurisdiction offers any incentive to become a plaintiff other than to assure that the action is brought.

Second, Delaware law creates greater incentives than UK law for attorneys to bring derivative actions. Delaware lawyers can, in some cases, receive contingent fees that are several times the amounts warranted by the work done, while UK lawyers are limited to fees that are double the amounts warranted by the work done.

On the basis of this partial comparison, I conclude that directors are highly unlikely to be held liable in either jurisdiction, but are more likely to be held liable in Delaware than in the United Kingdom. Liability is equally unlikely to exist in the two jurisdictions, but the action is more likely to be

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137 Örücü, *supra* note 4, at 49 ("An explanation of findings, of exceptional and typical cases, an accounting for differences and similarities, is thus not just a necessary step in comparative research but is its essence."); *see also* Máximo Langer, *Strength, Weakness or Both? On the Endurance of the Adversarial-Inquisitorial Systems in Comparative Criminal Procedure*, *in* COMPARATIVE CRIMINAL PROCEDURE 519, 528 (Jacqueline E. Ross & Stephen C. Thaman eds., 2016) (stating that "[t]he field [of comparative criminal procedure] has been mostly interested in explaining [a list of differences]").

138 Ison v. E.I. DuPont de Nemours & Co., 729 A.2d 832, 839 (Del. 1999) ("It has been suggested that foreign plaintiffs may be motivated by important relative benefits of litigating in the United States, including more favorable law, liberal discovery, contingent fees, high verdicts and procedural advantages.").

brought in Delaware. On the issue of director liability for decisionmaking as a whole, UK law is more protective of directors than Delaware law.

My analysis is consistent with the findings of an empirical study comparing "breach of duty" litigation against directors in the United States and the United Kingdom.[139] A group of U.S. and UK corporate scholars found that the per-year likelihood of directors of a publicly traded firm being sued in the United Kingdom was 0.017% as compared with a per-year likelihood of directors of a publicly traded firm being sued *and generating a judicial opinion* in the United States was 1.1% for New York Stock Exchange or NASDAQ firms and 0.12% for public firms not traded on an exchange. The researchers considered the U.S. law "stronger" in placing liability on directors than UK law.[140] They attributed the higher U.S. rates to the "intensity of formal private enforcement" in the United States[141]—essentially what I have referred to as enforcement procedures. Although the analogy is far from perfect, that study is evidence for the plausibility of the comparative analysis in this Part.

VI. Reporting Comparisons

This Article described a method for making comparisons. The product of comparison is a document that includes a Scenario, reports, rules, statements of sameness and difference, and an evaluation of differences. Presentation of a comparison to third parties in a report, journal article, or informally also requires a narrative that explains the comparison process, the results, and their significance for the reader. The narrative will differ depending on the audience, but some general observations are possible.

First, the Scenario used to identify the rules compared should be available to readers, but need not be part of the narrative. Instead, the reporter should describe the rules compared. Second, the reporter should explain the practical importance of the rules compared—why these rules matter. The reason will likely be the same in both jurisdictions because the researcher chose rules that resolved the same Scenario.

Third, comparisons are easier to understand if the reporter begins by stating the aspects of the rules that are the same and then turning to the differences. If the analysis concluded that the jurisdictions described the same practices in different words, the reporter should explain the reasons for that conclusion. Lastly, after presenting differences, the reporter should explain their effects and significance.

Fourth, reporting, like comparison, should proceed one issue at a time. When no single aspect of one jurisdiction's law corresponds to a single aspect of the other jurisdiction's law, the reporter may have to describe multiple aspects of one before turning to the other. But describing an additional

139 John Armour et al., *Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States*, 6 J. Empirical Legal Stud. 687, 710–11 (2009).

140 *Id.* at 714.

141 *Id.* at 722; *see also id.* at 721 (listing respects in which the procedures differ).

aspect of a jurisdiction's law without first comparing the initial aspect should be avoided to the extent possible. Lastly, comparisons, like most complex subjects, are easier to understand if the report starts with the conclusion and only then presents the support for it.

Conclusions

This Article presented and illustrated a rule-based method for comparing a single aspect of two corporate laws. The laws can be of different countries, different jurisdictions within the same country, or even different entity laws of the same jurisdiction. The method consists of six steps. The first step is to create a hypothetical fact Scenario that addresses the aspect. The second step is to choose two entity types for comparison. The third step is to conduct whatever research is necessary to solve the hypothetical Scenario under each of the laws. The fourth step is to extract from that research the rule or rules that resolved the hypothetical under each law and the authority for them, state the rules in parallel to the extent practical, and juxtapose them. The fifth step—the comparison—is to express the most important respects in which the rules are the same or different. The sixth step is to apply the researchers' evaluative criteria to reach useful conclusions.

The method assumes that the governing law with respect to a set of facts can be expressed in one or more rules. Those rules can be the rules of law enacted by legislatures or promulgated by courts or they can be rules drafted by the researchers to express what the legal system under investigation actually does. To the extent that a legal tradition or attitude that affects outcomes cannot be incorporated into rules, the method will not be fully effective. Corporate law is, however, largely rule based, so the method is widely applicable.

The proposed method has several advantageous features. The most important is that it supports close comparison. Instead of merely identifying similarities, it prompts the researchers to break those similarities into identities and differences, and provides a framework for doing that. The method is easy to understand and execute, making it usable by researchers who do not have extensive backgrounds in foreign systems and comparative methods.[142] They include scholars whose primary field is corporate law, practicing lawyers, judges, participants in corporate law reform efforts, policymakers, and students in comparative law seminars.[143]

The method can be particularly useful in framing issues for empirical work. Close comparison can identify subtleties that must be taken into account in designing empirical inquiries. The lists of differences generated also provide frameworks for the presentation of empirical results.

142 *See* Samuel, *supra* note 7, at 16 (expressing concern that with comparative law's "preoccup[ation] with itself . . . [s]tudents may never actually ever get to compare any laws").

143 I developed and tested the method in the Comparative Corporate Law Seminar at the UCLA School of Law in 2017 and 2018.

Lastly, the method is scalable in two directions from the illustration presented in this Article. First, by repeating the method with respect to additional issues under the same two entity laws, the method can be used to generate general rather than single-aspect comparisons of the entity types. Second, by increasing or relaxing the standards for proof of the rules, researchers can increase the accuracy and authority of the method, or reduce the time and effort necessary to generate results. Because the method is efficient, flexible, and easy to use, it provides a practical means for scholars, lawyers, judges, and policymakers to improve the quality of their corporate law comparisons.