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Transatlantic Misunderstandings: Corporate Law and Societies

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I. INTRODUCTION

This article argues that the comparative corporate lawyer cannot accurately translate foreign legal rules without a rich understanding of their institutional and social context.[1] Corporate lawyers now need to be comparative lawyers,[2] but they can only adequately understand foreign

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1. *Cf.* Inga Markovits, *Hedgehogs or Foxes?: A Review of Westen's and Schleider's Zivilrecht im Systemvergleich*. 34 AM. J. COMP. L. 113, 134 (1986) ("Above all, we must learn from other disciplines. Comparative law should offer unique possibilities to learn about other societies (and thus, incidentally, about our own) by looking at law as a mirror of social realities.")

2. "The need to ensure that English company law adapts to modern needs stretches beyond England's own shores. Likewise, by looking beyond those own shores, we can benefit from the cross-fertilisation of ideas." The Hon. Mrs Justice Arden, *The Changing Face of Company Law*, BUTTERWORTHS J. OF INT'L BANKING & FIN. L., May 1995, at 211. Robert H. Mundheim, Noyes E Leech, Stephen R. Miller, *Introduction From the Editors*, 1 J. COMP. CORP. L. & SEC. REG. 1 (1978): "As stock exchanges move toward linking their marketplaces, financial institutions create world-wide affiliates and investors purchase securities issued in foreign nations, there is a growing need to plan intelligently for the legal institutions that will facilitate efficient allocation of capital resources in congenial international contexts. The Editors are pleased to present this first issue of a new journal designed to help meet that need." This concentration on other legal systems is not

corporate laws by developing an understanding of the legal cultures in which those laws are embedded.[3] Academics, governments and legislators who consider transplanting foreign rules to solve domestic problems or to make their own legal environment more like those of other countries must appreciate that rules which look similar may work differently in different contexts.[4] Those who need to advise clients on the interpretation and application of domestic rules with a foreign source need to understand how the rules work in their original setting in order to interpret them in their new setting. This comparative enterprise must be approached with caution: problems of translation and interpretation exist even when comparisons are made between English company law and American corporate law.[5]

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new. *See*, *e.g.*, Edward Manson, *The Reform of Company Law*, 11 L. QUARTERLY REV. 346, 346 (1895)(noting that the Board of Trade Departmental Committee set up to look at amendments to prevent fraud in the promotion and management of trading companies examined the law in Germany, France, and the United States).

3. In practice, academic commentators recognise that it is extremely difficult to understand foreign legal rules. *See*, *e.g.*, Ronald J. Gilson and Reinier Kraakman, *Investment Companies as Guardian Shareholders: The Place of the MSIC in the Corporate Governance Debate*, 45 STAN. L. REV. 985, 985-6 (1993)(footnote omitted) ("A mature comparative scholarship must ultimately explore the political and historical complexity of every major corporate governance structure. Even before this enterprise is complete, however, comparative analysis can still carry important policy implications for those of us who have the more limited agenda of making incremental improvements in our own governance structures. Foreign techniques can be evaluated in terms of their potential contributions to one's own system, even without a complete understanding of their origins and function in their domestic contexts.") *Cf.* W.S. Holdsworth, *Case Law*, 50 L. Q. REV. 180, 195 (1934) ("To make a perfectly fair comparison it is necessary to have a thorough and first hand knowledge of the practical working of both the systems which are compared. But it is as rare to possess a thorough first hand knowledge of the practical working of two legal systems as it is to be perfectly bilingual"). *See generally* K. ZWEIGERT AND H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (TONY WEIR TRANS.) (1992); BERNHARD GROSSFELD, THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW (1990); MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE (1989); O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974).

It is much less common for such commentators to recognise the importance of developing an understanding of the culture within which the rules operate. *Cf.* James A. Fanto, *The Absence of Cross-Cultural Communication: SEC Mandatory Disclosure and Foreign Corporate Governance*, 17 NW. J. INT'L L. & BUS. 119, 123 (1996) ("U.S. investment and financial communities, and legal academics, must therefore understand foreign corporate governance as a complex cultural product").

4. *Cf.* W.S. Holdsworth, *Case Law*, 50 L. Q. REV. 180, 195 (1934) ("the imitation of foreign examples. . .may result in changing the inconveniences which they know of for the greater inconveniences from which the virtues of our own laws and institutions have saved us"). *See also* K. N. Llewellyn, *On the Problem of Teaching "Private" Law*, 54 HARV. L. REV. 775, 785 (1941) (arguing that students of law need to understand processes, rather than rules of law, and that a legal concept "changes not only its meaning, but its shape, and changes the direction of its "drive," as it is put to differing uses, among differing social and economic contexts." *Id.* at 788).

5. A.J. Boyle, *The Minority Shareholder in the Nineteenth Century: A Study in Anglo-American Legal History*, 28 MOD. L. REV. 317, 317 (1965) ("The law of business corporations is one area where English and American law differ to a very marked degree").

Many people might argue that it matters very little whether or not we translate foreign legal rules properly or not because even relatively uninformed consideration of different legal rules challenges our understanding of our own rules. Arguably, it does not matter whether we get it right, so long as our misreading of the foreign legal rule provokes insight into our own rules. Sometimes, for policy-oriented work, the original meaning of the words in which the foreign rule is framed is less important than what those words would mean if they were implanted into our own system.[6]

There are problems with this view. First, our interest in other legal systems is often prompted by a feeling that they got the answer to a particular problem right, and deciding whether or not they did so requires more than a surface knowledge of their systems.[7] Moreover, comparative approaches to law are often invoked because the ideas they produce have more credibility than ideas produced out of thin air by academics. Second, we do not use comparative analysis only to challenge our perceptions of our own system. A lawyer who must advise her client on the appropriate jurisdiction or jurisdictions in which to establish or conduct business needs to develop a sensitivity to problems in translating foreign rules, even when local lawyers are consulted or employed. Judges who are called upon to apply foreign law should also be alive to such problems of translation.[8] Similarly, those who are engaged in projects for the harmonisation of rules in different jurisdictions,[9] or who approach law reform with a desire to make their systems

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6. The contributions of western legal scholars and scholarship to restructuring of the countries of central and eastern Europe over the last decade raise some of these issues. *See generally*, Dariusz M. Budzen & Ania M. Frankowska, *Prohibitions Against Insider Trading in the United States and the European Community: Providing Guidance for Legislatures of Eastern Europe*, 12 B.U. INT'L L.J. 91, 115-22 (1994) Emil Bukhman, *The Cart Before the Horse: Anticipatory Securities Regulation in Kazakhstan*, 22 BROOK. J. INT'L L. 537 (1997).

7. The German corporate governance system has been praised by foreign commentators, but is not without its faults. *See, e.g.*, Klaus J. Hopt, *Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe*, 14 INT'L REV. L. ECON. 203, 209 (1994).

8. *Cf.* "Sometimes the foreign law, apart from being in a foreign language, may involve principles and concepts which are unfamiliar to an English lawyer. The English judge's training and experience in English law, therefore, can only make a limited contribution to his decision on the issue of foreign law. But the foreign law may be written in the English language; and its concepts may not be so different from English law. Then the English judge's knowledge of the common law and of the rules of statutory construction cannot be left out of account. He is entitled and indeed bound to bring that part of his qualifications to bear on the issue which he has to decide, notwithstanding that it is an issue of foreign law." MacMillan Inc. v Bishopsgate Investment Trust plc, (CA) 4 November 1998, not yet reported, *available on* Lexis: enggen, cases. *See also* Macmillan Inc. v Bishopsgate Investment Trust plc (No 3), [1996] 1 All ER 585.

9. *See, e.g.*, OECD Principles of Corporate Governance, May 1999, available online at http://www.oecd.org/subject/mcm/1999/pdf/corpgov.pdf.

converge with those of other states, need to develop an understanding of what those rules really mean in the different jurisdictions concerned.

In this article I focus on comparisons between British[10] and American law and society for a number of reasons. First, I have a comparative advantage in carrying out such a comparison: I was trained as a lawyer in England, studying at the University of Cambridge and qualifying as a solicitor[11] at Freshfields, one of the large law firms in the United Kingdom.[12] I then spent six years as a lecturer in the Law Department at the London School of Economics and Political Science.[13] For the last six years I have been at the University of Miami teaching courses in European Community law, International Finance, Business Associations and Securities Regulation. My husband is an American lawyer. Second, although other countries would seem to provide a more exotic comparison with the United States, academics and policy-makers from the United States and United Kingdom do study each other's legal system. Judges in Britain refer to the decisions of American courts and American judges cite the decisions of the English courts. Varieties of English are spoken and written in both countries. Moreover, the identification of

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10. In this article I refer at different times to the United Kingdom ("U.K."), to Britain (or British), and to England (or English). The United Kingdom and Great Britain are political units subject to government by the King or Queen (currently Queen Elizabeth II) in Parliament. The United Kingdom (of Great Britain and Northern Ireland) comprises England and Wales, Scotland and Northern Ireland. Within the United Kingdom there are a number of different legal jurisdictions which include England and Wales, Scotland, Northern Ireland, Guernsey, Jersey, and the Isle of Man. Different legal rules may apply in the different jurisdictions. The Financial Services Act 1986 ch. 60 regulates investment business in the United Kingdom. The Companies Act 1985 ch. 6, as amended, applies to companies in England and Wales or Scotland. Although statutes adopted by the U.K. Parliament often apply to Scotland and to England and Wales the jurisdictions have different histories and the statutes are grafted onto different types of legal system. Scottish law is based on Roman law; the law of England and Wales is common law with a statutory overlay.

11. The legal profession in the United Kingdom is a divided profession. Lawyers qualify as either solicitors or barristers. Barristers may not deal directly with clients. Solicitors have restricted rights of audience in the courts, although sections 30-37 of the Access to Justice Bill currently before the United Kingdom Parliament would expand these rights. The Bill is available online at http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldbills/004/1999004.htm.

A client with a legal problem approaches a solicitor either for litigation or transactional work. If the client wishes to litigate, a barrister will usually be involved in drafting the pleadings and in presenting the case before the court. Barristers may also have a role in advising on the legal implications of transactions, either because they have special expertise which the solicitors involved in the transaction do not have, or because the solicitors wish to use the barrister's legal opinion as insurance against liability for professional negligence.

12. Large law firms in the United Kingdom tend to concentrate in London. For advice on Scottish or Northern Irish law clients should consult lawyers in those jurisdictions. An English lawyer is qualified to give advice on English law, and not on the law in Scotland or Northern Ireland. Separate Law Societies and Bars exist in each jurisdiction.

13. By the time I left the London School of Economics two thirds of my teaching was in the LLM programme, and my students in Regulation of Financial Markets and Legal Aspects of International Finance came from all over the world, including North America.

problems of translation of legal rules between even these countries serves to highlight problems of translation more generally.

The article discusses the ways in which lawyers and other policy-makers use and mis-use comparative law, focusing in particular on corporate and financial law. It identifies some of the substantive differences between British and American corporate law and suggests three problems British and American lawyers encounter in trying to understand the other legal system. These are problems of translation, problems of understanding the institutional context in which the rules of corporate law operate, and problems of understanding the cultural context within which rules of corporate law apply.

The uses (and mis-uses) of comparative corporate law are manifold. Courts often resort to foreign legal systems for help in developing rules for their own system.[14] Foreign legal rules are often considered as an argument for,[15] or as a prelude to, law reform.[16] Academics and policy-makers who would like to improve the corporate governance system in their own jurisdiction, or who seek to criticize domestic rules,[17] often look to other jurisdictions for sources of improvement or criticism.[18]

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14. *See, e.g.*, White v. Jones [1995] 1 All ER 691 (HL); Huntley v. Attorney General for Jamaica [1995] 1 All ER 308 (PC); R v. Securities And Futures Authority Ex Parte Bernard Panton, (CA) 20.6.94 per Sir Thomas Bingham, MR (comparing the regulatory structure set up by the Financial Services Act 1986 ch. 60 with the system administered by the US SEC); South Tyneside Metropolitan Borough Council v. Svenska International plc [1995] 1 All ER 545 (QBD); Hospes v. Northwestern Manuf'g. & Car Co., 50 N.W. 1117, 1120 (1892) (referring to English statutory provision); Baker v. Commercial Body Builders, Inc., 507 P.2d. 387 (Or. 1973)(defining "oppressive conduct" by reference to *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer* [1958] 3 All E.R. 66, 71, 86 (H.L.)).

15. *See, e.g.*, THE LAW SOCIETY, COMPANY LAW COMMITTEE, THE REFORM OF COMPANY LAW, Memorandum No. 255, July 1991, Appendix at 21-27; *Legal Risk Review Committee, Reducing Uncertainty*, THE WAY FORWARD, Feb. 1992, at ¶ 6.5.

16. In the United Kingdom, the Law Commission is a public body which was set up under the Law Commissions Act, 1965, ch. 22, to promote law reform. The statute requires the Law Commission to take account of foreign legal systems where appropriate. *See* section 3(1)(f). *See also Statement of the Objects of the Society*, 1 J. SOCIETY COMP. LEGIS. vi, vii-viii (1896-7) ("It is not uncommon, on the introduction of measures into Parliament, to refer to the laws of other countries. At present the results of foreign experiments are only imperfectly and casually brought to the notice of those who might profit by them; and enactments may be proposed and [viii] adopted in one English-speaking community in ignorance of the fact that similar measures have after trial been abandoned or modified in another").

17. Or foreign attempts at regulation. *See, e.g.*, Ronald J. Gilson, *The Political Ecology of Takeovers: Thoughts on Harmonizing the European Corporate Governance Environment*, 61 FORDHAM L. REV. 161 (1992).

18. American law journals have published many articles about the governance systems in Germany and Japan. Ronald J. Gilson & Reinier Kraakman, *Investment Companies as Guardian Shareholders: The Place of the MSIC in the Corporate Governance Debate*, 45 STAN. L. REV. 985 (1993); Ronald J. Gilson and Mark J. Roe, *Understanding the Japanese Keiretsu: Overlaps between Corporate Governance and Industrial Organization*, 102 YALE L. J. 871 (1993). *See, e.g.*, Mark J. Roe, *Some Differences in Corporate Structure in Germany, Japan, and the United States*, 102 YALE L. J. 1927 (1993); Thomas Christian Paefgen, *Institutional Investors Ante*

Commentators sometimes suggest that an examination of how foreign legal rules work is useful to show the effect the same rules might have in the domestic context.[19]

Practising lawyers may need to study different legal systems in order to advise a client in what jurisdiction she should set up a business or issue securities. Lawyers in jurisdictions which have amended their laws in response to an obligation or encouragement to converge with other legal systems may need to study the foreign source of the rules in order to understand how they will be or are likely to be interpreted in their new home. Convergence may also create opportunities for foreign lawyers to enter a national legal market to attract business.[20] Lawyers may use foreign laws as a basis for lobbying activity on behalf of their corporate clients. Increasingly members of the legal academic community, and the bodies which attempt to affect their actions, are incorporating comparative and international law into the law curriculum.[21]

Corporate lawyers in private practice, in government service, and in the academic world now need to be conscious of the corporate laws of other jurisdictions for a number of reasons.[22] Academics and policymakers concerned with problems of corporate governance or securities regulation look to other jurisdictions for solutions to problems at home. In a world where the business, legal, and accounting professions are increasingly transnationalised,[23] corporate clients desire, and law and accountancy firms seek to provide, advice about the implications of operations in many different jurisdictions. Multinational conglomerates

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Portas: A Comparative Analysis of an Emergent Force in Corporate America and Germany, 26 INT'L. LAWYER. 327 (1992); Cf. Roberta Romano, *A Cautionary Note on Drawing Lessons from Comparative Corporate Law*, 102 YALE L.J. 2021 (1993).

19. *See, e.g.*, Bernard S. Black & John C. Coffee, Jr., *Hail Britannia?: Institutional Investor Behavior Under Limited Regulation*, 92 MICH. L. REV. 1997, 2001 (1994) ("Comparative study of corporate governance in other industrialized countries offers insight into how American corporate governance might have developed under a different legal regime and how governance practices might change if legal rules were changed today").

20. *See* David M. Trubek, Yves Dézalay, Ruth Buchanan & John R. Davis, *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, in *Symposium: The Future of the Legal Profession*, 44 CASE W. RES. 407, 431-34 (1994) ("Internationalization of Legal Fields")(describing the way in which American law firms began to move into Europe after the Second World War).

21. *See, e.g.*, John Hodgson, *The Comparative Dimension (or What do They Know of England, that only England Know?)*, [1995] WEB JCLI, available from http://www.ncl.ac.uk/~nlawww/articles5/hodgson5.html. NYU has announced that it is a Global Law School. *See The Global Law School Program*, NYU THE LAW SCHOOL MAGAZINE, Special Issue 1995. The AALS has in the last few years focused on globalization of law and its implications at the Association's annual meeting.

22. One could argue that this is not new. *Cf.* Frederick Pollock, *The Lawyer as a Citizen of the World*, 48 L. Q. REV. 37, 38 (1932): "no man who aims at being an accomplished lawyer can do without making himself a citizen in the commonwealth of cosmopolitan jurisprudence."

23. *See* Internationalization of Legal Fields, *supra* note 20.

seek to reduce the legal costs of their operations in many different jurisdictions; the transnationalisation of business thus creates pressures for the convergence of legal rules.[24]

Convergence occurs through different mechanisms: through organised fora such as the institutions of the European Union ("EU"), and in a less organised way as a result of lobbying by businesses or pressure from other governments. For example, the United States has campaigned to have insider trading recognised in the rest of the world, and this campaign has had some success.[25] The United States also seeks to have other nations recognise other rules or principles which apply in the United States.[26] Decision-makers who elect to participate in formal or informal convergence of their laws with those of other countries need to understand the different options available to them. When a country's laws are amended to reflect those of other jurisdictions, practising lawyers may need to look to other jurisdictions in order to understand the rules which apply at home.

Transnational legal practice, the harmonisation of laws and policy, and academic work involve different uses of the comparative method, and each of these uses requires different levels of accuracy in the translation and interpretation of foreign legal rules. The comparative corporate lawyer needs to be self-conscious about her reasons for engaging in comparative study, because the reasons affect the degree of accuracy with which the study should be approached. She also needs to be conscious of three sets of problems: problems of translation of legal rules;

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24. *See, e.g.*, John Dunn, *The Economic Limits to Modern Politics, in* THE ECONOMIC LIMITS TO MODERN POLITICS 27 (John Dunn ed., 1990) ("it is not. . .our elaborately structured saturation with information which distinguishes the modern political condition from its miscellaneous predecessors. Rather, it is our common dependence for our daily welfare upon a global system of production and exchange"). On the relationship between international and comparative law see, for example David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545 (1997).

25. *See, e.g.*, Roberta Karmel, *The Relationship Between Mandatory Disclosure and Prohibitions Against Insider Trading: Why a Property Rights Theory of Inside Information is Untenable*, 59 BROOK. L. REV. 149 (1993) (book review) (referring to "the aggressive leadership exercised by the United States Securities and Exchange Commission"). *Id*. at 150; Enrico Colombatto and Jonathan R. Macey, *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 CARDOZO L. REV. 925 , 952 (1996) (referring to SEC's disapproval of German approach to insider trading in the past).

26. *See, e.g.*, Bureau of National Affairs., Inc., *US to seek Foreign Acceptance of Anti-Corruption Practices*, BNA MANAGEMENT BRIEFING, 24 April 1994 Bureau of National Affairs., Inc., *Administration Releases Details on Voluntary Business Principles*, BNA MANAGEMENT BRIEFING, 31 May 1995, (Clinton administration outlining steps it would take to encourage firms operating abroad to honour a code of voluntary business principles). Lawrence Friedman uses the term "convergence" to refer to "the tendency of legal systems, or parts of legal systems, to evolve in parallel directions" rather than to refer to organised harmonisation programmes. *See, e.g.*, Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L. L. 65, 72 (1996).

problems of understanding the institutional context in which those rules operate; and problems of understanding the cultural context in which the rules operate.

II. Problems Of Finding And Understanding Foreign Law

British and American lawyers have developed a habit of thinking that they can understand both legal systems.[27] American casebooks refer to English cases,[28] and thereby encourage law students to believe that English cases, as cases from a common law system, are very much like American cases. Similarly, students of company law in Britain often read American analyses of corporate law and policy because of the relative wealth of such material in the United States compared with Britain.[29] Cases from a foreign legal system are interesting, but may be

27. English judges sometimes refer to decisions of American judges with approval. *See, e.g.*, Commissioners of Customs and Excise v. Hebson [1953] 2 Lloyd's List L. Rep. 382, ("it was a decision of the Supreme Court, and the learned judge in that case was Mr. Justice Storey, and I rather think that he was a very well-known Judge, but at any rate he gave an excellent judgment in every way, and I have no doubt that it would be regarded as authoritative in this country so far as it goes.") (per Pearson, J. Compare other references to Justice Story as a "great American judge" in *Central Asbestos Co Ltd.* v. *Dodd* [1973] AC 518 (HL) and *The Tojo Maru* [1969] 3 All ER 1179 (CA)). In other cases, English judges have referred to American judges as being "distinguished", *see e.g.* Rookes v. Barnard [1963] 1 QB 623 (CA) (Pound C.J.); Chaplin v. Boys, [1971] AC 356 (HL) (Learned Hand); "eminent," *see e.g.*, Government of India v. Taylor [1955] AC 491 (HL) (Learned Hand). Note that English judges often recognise that the British and American legal systems are very different. *See, e.g.*, Mutual Life Insurance Co. of New York v. The Rank Organisation Ltd. [1985] BCLC 1. (North American shareholders sued because they were excluded from an offer of rights to subscribe for new shares in Rank). (Goulding J.) upheld the exclusion because it applied due to the personal situation of the shareholders. It was not the fault of Rank that the shareholders were nationals or residents of countries whose laws imposed onerous obligations.

28. *See, e.g.*, William L. Cary & Melvin Aron Eisenberg, Cases and Materials on Corporations 206 (7th ed. unabridged, 1995), (Ashbury Ry Carriage and Iron Co v. Riche (7 L.R.- Eng. and Ir. App. 653, 33 L.T.R 450 (1875)) and at 1383 (Trevor v. Whitworth 12 App. Cas. 409 (H.L.1887)); Robert Hamilton, Cases and Materials on Corporations 228, 230, (Ashbury Ry Carriage and Iron Co v. Riche), 456 (Automatic Self-Cleansing Filter Syndicate Co., Ltd. v. Cunninghame ([1906] 2 Ch. 34))(5th ed. 1994); Lewis D. Solomon, Donald E. Schwartz, Jeffrey D. Bauman & Elliott J. Weiss, Corporations Law and Policy 89 (3rd. ed., 1994) (Ashbury Ry Carriage and Iron Co v. Riche); Jesse H. Choper, John C. Coffee, Jr., & C. Robert Morris, Jr., Cases and Materials on Corporations 319, 321, 322, (3rd. ed., 1989) (excerpting from the House of Lords' decision in Regal (Hastings) v. Gulliver [1942] 1 All E.R. 378).

29. *See, e.g.*, J.E. Parkinson, Corporate Power and Responsibility (1993). I have been guilty of using U.S. material in my own work. *See, e.g.*, Caroline Bradley, *Corporate Control - Markets and Rules*, 53 Mod. L. Rev. 170 (1990). Although compare Ian Loveland, *Positive discrimination and fair electoral representation in the United States*, (1994) Pub. L. 332, 343: "British public lawyers perhaps regard excursions into United States jurisprudence as an academic day trip to exotic climes. The legal flora is very interesting, but there is no point digging it up and trying to grow it at home because the constitutional environments are so dissimilar."

difficult to understand. A case such as *Shlensky* v. *Wrigley*[30] would surely not resonate with English law students as it does with American students. The development of a feeling of familiarity with a foreign legal system at a formative stage in one's legal education probably interferes with the development of an appreciation of the real differences in that system.[31] Many legal rules do seem to be shared in the Anglo-American legal world, but there are very significant distinctions between the two legal systems which we need to work to appreciate.[32] In their powerful study, Atiyah and Summers argue that there is a "deep difference in legal style, legal culture, and, more generally, the *visions* of law which prevail in the two countries."[33] This difference has been intensified by

30. 237 N.E. 2d. 776 (1968) (challenge to failure to instal lights for night games at Wrigley Field as a breach of the duty of care).

31. W.S. Holdsworth, *Case Law*, 50 L. Q. REV. 180, 194 (1934): "The study of comparative law is a very valuable study which is necessary both to students of legal history and of modern law. But it has its pitfalls. One of these pitfalls is the risk that it may lead us to depreciate unduly our own law and our own legal institutions. If the student of foreign law and foreign legal institutions has a close and practical acquaintance with the working of his own law and legal institutions, which make him painfully aware of their defects, and merely an academic knowledge of foreign law and foreign legal institutions, he will be apt to stress the weak points of his own, and magnify the strong points of the foreign, law and legal institutions of which his knowledge is more distant and theoretical. If his knowledge of his own law and institutions is equally distant and theoretical he will necessarily judge both by reference only to their appearance on paper, and will praise or condemn on merely theoretical grounds, which will often leave out of sight the real strength and weakness of both."

32. *Cf.* A.L.L., *Review of A Treatise on the Law of Stock and Stockholders by William W. Cook*, 4 L. Q. REV. 88, 88 (1888): "In reading it one cannot fail to be struck by the readiness with which the Common Law conception of a corporation has adapted itself to the wants of the business community and to the demands of the stock exchange. The desire for investments, easily transferable and free from personal liability, has been more easily satisfied by means of the form of a corporation than through the more cumbrous machinery of a joint-stock company; and it is for this reason, perhaps, that certain branches of the law of the stock exchange have been far more fully developed in America where the corporation has flourished, than in England where the modern limited company has been evolved from the partnership." K.N. Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699, 703 (1936):

> England's law and ours go ways whose divergence is more marked yearly, and with a higher, wider ridge between. Torts men, equity men can still follow the English decisions. But Companies are not Corporations, a floating charge is not a mortgage, the N.I.L. pushes the Bills of Exchange Act, 1881, into the corner; the Sale of Goods Act, 1893, piously reprinted in the casebooks, lies unthumbed and undiscussed save in a detail; the Marine Insurance Act knows no American counterpart; property lawyers, after a first flurry of interest in the reform of 1925, tend again to drop the English cases; Constitutional law emerges here (not there), with whiskers dripping drops which splash the whole economy. We even build our own, and wholly different, theory of case-law and precedent.

(footnotes omitted).

In this article I am arguing that, whatever surface similarities there may seem to be between English and American corporate and securities laws, there are still significant differences between the two systems.

33. P.S. ATIYAH AND ROBERT H. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 1 (1987).

Britain's membership in the EU.

American lawyers who are used to dealing with more than 51 domestic jurisdictions appreciate that the study of foreign civil law jurisdictions is difficult, but they do not seem to appreciate that the same problems may exist in understanding foreign common law jurisdictions. Academics and other analysts of legal rules on both sides of the Atlantic often do not realize that problems of translation and interpretation exist even when comparisons are made between English company and financial services law and American corporate and securities law. The fact that Britons categorise these aspects of economic life differently from Americans may illustrate some of the problems. Britons cannot map American securities law directly onto British financial services law: we have to engage in translation.[34] Americans must translate British law too, and this may be the harder task. It is much easier for foreigners to research United States law than for United States lawyers to research foreign law because Lexis and Westlaw are available abroad and are useful research tools for federal and state statutes, cases and regulations and for United States law reviews.[35] Although Lexis and Westlaw have allowed access to large amounts of foreign legal material, these databases do not give United States lawyers access to foreign material which is comparable to their access to United States material. For example, very few English legal journals are available on Lexis or Westlaw. In contrast to Lexis' treatment of American cases, reports of English cases in the cases file in the Enggen library on Lexis do not contain references to individual page cites, which means that the reports are of limited usefulness.

The growth of the internet vastly improves our access to foreign legal resources. The English House of Lords publishes its judicial decisions since November 1996 on the internet; similarly, the English Parliament now publishes its proceedings electronically, and internet users may study parliamentary debates on the world wide web the day after

34. On problems of translation see generally, GEORGE STEINER, AFTER BABEL, (2nd. ed. 1992). *See also* Larry Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); Frederick Pollock, *The Lawyer as a Citizen of the World*, 48 L. Q. REV. 37, 39 (1932) ("even official translations are by no means always to be trusted."); Edgardo Rotman, *The Inherent Problems of Legal Translation: Theoretical Aspects*, 6 IND. INT'L & COMP. L. REV. 187 (1995); *Cf.* J.G.A. Pocock, *The Political Limits to Premodern Economics*, *in* THE ECONOMIC LIMITS TO MODERN POLITICS 121 (John Dunn ed., 1990).

35. On the availability of materials which facilitate comparative legal scholarship see, e.g., P. John Kozyris, *Comparative Law for the Twenty-First Century: New Horizons and New Technologies*, 69 TULANE L. REV. 165, 172-73 (1994). Of course, research aids which depend on word searches only work if the researcher uses the right search words.

they take place.[36] Legislation and statutory instruments are also available online.[37] Government Departments publish their press releases on the internet, and may even make proposed legislation available online.[38] But this increased access to foreign legal resources may be misleading unless access is accompanied by tools to help us to improve our understanding of the foreign material. Government websites are primarily designed not for foreign, but for domestic readers. Online journals[39] and the development of increasingly sophisticated online discussions[40] may eventually provide the tools we need to understand foreign legal rules in their context. The internet makes it easier for us to gain access to a wide range of information about foreign law. However, we still encounter problems in evaluating the quality of that information.

III. SUBSTANTIVE DIFFERENCES BETWEEN AMERICAN AND BRITISH CORPORATE LAW

British and American corporate lawyers study each other's systems of corporate law not only because of ideas of shared history and language, but also because of a perception that there may be interesting divergences between the systems.[41] I argue below that this idea of a shared language is not as accurate as we would like it to be. The idea of a shared history may also be misleading.

Differences in terminology result from separate developments of corporate law in the United States and United Kingdom: in the United Kingdom lawyers talk about company law, not corporate law, and the United Kingdom has a Financial Services Act[42] which covers a wider range of activities than do the United States Securities Act and Securities Exchange Act. In both countries much of corporate law is an adaptation of the rules of tort, contract, and agency to fit a special legal form,

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36. See the UK Parliament's website at http://www.parliament.uk/. Hansard is available online at http://www.parliament.the-stationery-office.co.uk.

37. *See* http://www.hmso.gov.uk/acts.htm and http://www.hmso.gov.uk/stat.htm.

38. *See, e.g.*, HM Treasury, FINANCIAL SERVICES AND MARKETS BILL, A CONSULTATION DOCUMENT, July 1998, available online at http://www.hm-treasury.gov.uk/pub/html/reg/fsmb.html. Part Two of the Document contains a Draft Financial Services and Markets Bill, and Part Three contains Draft Explanatory Notes on the Draft Bill.

39. For an argument that authors should "self-publish" on the world wide web, see Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615 (1996).

40. For a discussion of usenet see Michael Froomkin, *Habermas discourse.net* (unpublished manuscript, copy on file with author). There are a number of specialised online discussion groups for those interested in foreign and comparative law, such as INT-LAW, FORINTLAW, and EUROLEX. See Lyonette Louis-Jacques list of useful internet resources for international law available online at http://www.lib.uchicago.edu/~llou/forintlaw.html.

41. *See, e.g.*, Black & Coffee, *supra* note 19.

42. Financial Services Act 1986, ch. 60.

but the forms to which these rules are adapted are different. During the seventeenth and eighteenth centuries in England and the Americas corporations were formed by charter and by statute. But the incorporated business forms which are currently used in the two countries have different origins. The English company was essentially developed from the partnership form,[43] whereas the American corporation grew from the legal form used for municipalities.[44] It is not easy to judge how significant this distinction is (it assumes a distinction, for example, between the American approach to municipalities and the English approach to partnerships which should be tested empirically). However, it seems that the public origin of the corporation in America means that social responsibility arguments have had more resonance here than they do in England where the company grew out of a form used for private business ventures. On the other hand, in the United Kingdom, just as in the United States, the size and wealth of many large incorporated enterprises sometimes leads to calls for increased social responsibility of those enterprises.[45]

During the twentieth century the history of the two countries has continued to diverge. The United Kingdom counterpart of the New Deal's regulatory state was the establishment of a welfare state and the nationalisation of significant portions of industry.[46] Between 1979 and 1997, conservative governments in the United Kingdom dedicated themselves to a rhetoric of rolling back the frontiers of the state. They privatised nationalised industries and contracted out many functions previously carried out by the state to private bodies. However, some commentators have pointed out the contrast between the rhetoric and the reality: The same period saw a remarkable centralisation of power in Britain.[47]

The United Kingdom is still a more homogenous society than the United States, and this homogeneity has implications for the relationships between business and the state. If civil servants come from the

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43. *See, e.g.*, *Notes*, 5 L. Q. REV. 221 (1889) (referring to joint stock companies as "these great statutory partnerships"); Barry A. K. Rider, *Partnership Law and its Impact on "Domestic Companies"*, 38 CAMBRIDGE L. J. 148, 155 (1979).

44. *See, e.g.*, A.J. Boyle, *The Minority Shareholder in the Nineteenth Century: A Study in Anglo-American Legal History*, 28 MOD. L. REV. 317 (1965).

The British equivalent of a U.S. corporation's Articles of incorporation is called the Memorandum of Association, and the equivalent of the U.S. corporation's by-laws is called the Articles of Association.

45. *See, e.g.*, PARKINSON, CORPORATE POWER AND RESPONSIBILITY, *supra* note 29, at 4, 24 (arguing that public companies with publicly listed shares, should be reclassified as '*social* enterprises' in order to allow the state to intervene 'to safeguard the public interest and to ensure compliance with publicly acceptable ethical standards'. *Id.* at 24.

46. *See, e.g.*, PETER HENNESSY, NEVER AGAIN (1993).

47. *See, e.g.*, WILL HUTTON, THE STATE WE'RE IN, 28-41 (Revised ed. 1996).

same schools as the managers of large businesses, they will tend to share assumptions about proper behaviour. This shared attitude has meant that the United Kingdom has tended to rely on self-regulation to achieve objectives which would be pursued in the United States through legislation. This idea has been challenged in recent years by people who believe that increasing foreign involvement in financial activity in the United Kingdom means that self-regulation is no longer appropriate. However, the conduct of take-overs is still subject to control by a self-regulatory body in the United Kingdom, rather than a body established under legislation and with statutory powers.[48] In response to proposals to require legal regulation of take-overs throughout Europe, one U.K. Government expressed its commitment to protecting the non-statutory nature of the regulatory régime for take-overs in the United Kingdom.[49] The non-statutory Take-Over Code contrasts with statutory regulation of take-overs under the Williams Act in the United States.[50]

As well as differences in the techniques used to control businesses, there are differences between the United States and Britain in the substantive rules which apply. The relaxation in the control of legal capital in the United States[51] has not been followed in Britain. Whereas shares issued in the United States often need not have a par value,[52] in Britain shares are required to be issued with a par or "nominal" value, which often bears no relation to the market price or value of the shares.[53] In

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48. *See* PANEL ON TAKE-OVERS AND MERGERS, CITY CODE ON TAKE-OVERS AND MERGERS (1998) ("Take-Over Code"). On the different legal and non-legal rules which may affect take-over activity in the UK see, for example, Caroline Bradley, *Corporate Control - Markets and Rules*, 53 MOD. L. REV. 170 (1990). Note that the competition (anti-trust) aspects of take-overs and mergers are subject to control by the Monopolies and Mergers Commission under the Fair Trading Act 1973 ch. 41, and by the Commission of the European Union under Articles 85 and 86 of the Treaty of Rome, Treaty Establishing the European Economic Community, signed 25 March 1957, 298 UNTS 11, and the Council Regulation 4064/89 on the control of concentrations between undertakings, O.J. L 395/1 (Dec. 12 1989), as amended by O.J. L 257/15 (Sept 21,1990). *See also* Green Paper on the Review of the Merger Regulation, available online at http://europa.eu.int/en/record/green/gp9601/ind_merg.htm.

49. *See* DEPARTMENT OF TRADE AND INDUSTRY, PROPOSAL FOR A THIRTEENTH DIRECTIVE ON COMPANY LAW CONCERNING TAKEOVER BIDS: A CONSULTATIVE DOCUMENT, ¶ 10 (April 1996):

> From the first discussions on the Directive, the Government has indicated that whilst it would support effective regulation of takeovers throughout the Community, including common rules which would improve the protection of shareholders during a bid, any legislation must enable the UK to safeguard the benefits of its non-statutory takeover regime. In particular it must allow for speed of decision-making, flexibility to react to new situations, and freedom from litigation.

50. *See* §§ 13(d), 13(e), 14(d), 14(e) and 14(f) Securities Exchange Act of 1934, 15 U.S.C. §§ 78 (1994).

51. *See, e.g.*, Revised Model Business Corporation Act ("RMBCA") Subchapter B, in particular Official Comment to § 6.21 of the RMBCA.

52. *See, e.g.*, Delaware General Corporation Law ("DGCL") §151; RMBCA § 6.21.

53. The Companies Act 1985 ch. 6, provides in § 2(5)(a) that the memorandum of association

Britain, companies may only pay dividends to shareholders when they have profits available for the purpose[54] and the statute requires dividends to be justified by reference to the company's accounts which must comply with detailed statutory requirements.[55] Corporations established in the United States under statutes modelled on the *Revised Model Business Corporation Act ("RMBCA")* may not make a distribution which would have the effect that the company would be unable to pay its debts as they became due in the usual course of business,[56] or which would reduce the value of the company's total assets to less than its total liabilities plus the amount necessary to satisfy the rights of shareholders having preferential rights superior to those of the shareholders receiving the distribution.[57] The RMBCA allows the directors more freedom to decide on the accounting and valuation methods which may be used to determine whether or not a distribution is appropriate than does the British Companies Act.[58]

Companies in Britain are generally prohibited from purchasing

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of a company with a share capital must "state the amount of the share capital. . .and the division of the share capital into shares of a fixed amount." The statute prohibits the issue of shares at a discount. *See id*. at § 100. Public companies in Britain may not accept undertakings to perform services in payment for shares. *See id*. at § 99. Contrast RMBCA § 6.21(b). The RMBCA does not distinguish between private and public companies. In Britain the default category of company is the private company, and private companies may not issue shares to the public. *See* Companies Act 1985, § 81. A public limited company, or plc, which may issue shares to the public, must have a minimum registered capital of £50,000. *See id*. at §§ 11, 118. The current rules on plcs in Britain derive from the Second Council Directive on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (77/91/EEC) OJ No L 26/1, 30.1.77.

54. *See* Companies Act 1985, *supra* note 53, § 263(1): "A company shall not make a distribution except out of profits available for the purpose." § 263(2) defines the term "distribution". "Profits available for the purpose" means accumulated realised profits less accumulated realised losses. *See* § 263(3). Sections 263-281 of the Act contain detailed provisions regulating distributions by companies. A member of a company who has reasonable grounds for believing a distribution by the company is unlawful is liable to repay it to the company.

55. *See* Companies Act 1985, *supra* note 53, §§ 270-276, and Part VII. The British legislation which sets out requirements for a company's accounts implements European Community law. Article 54(3)(g) of the Treaty of Rome, *supra* note 48, sets out the treaty basis for a programme of harmonisation of company law in the EC. The Fourth Council Directive based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (78/660/EEC) OJ No L 222/11, 14.8.78 harmonises accounting rules within the EC and contains a requirement that a company's accounts give a "true and fair view" of its financial position. See also the Seventh Council Directive based on Article 54(3)(g) of the Treaty on consolidated accounts (83/349/EEC) OJ No L 193/1, 18.7.83; and the Eighth Council Directive based on Article 54(3)(g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents (84/253/EEC) OJ No L 126/20, 12.5.84.

56. *See* RMBCA § 6.40(c)(1).

57. *See* RMBCA § 6.40(c)(1). *Cf.* DGCL §170.

58. *See* RMBCA § 6.40(d).

their own shares,[59] and from giving financial assistance to others so that they may acquire shares in the company.[60] The RMBCA allows a corporation to acquire its own shares.[61] In Britain directors of a company have authority to issue shares when the shareholders vote to give them this authority, and the authority is generally for a limited period of time.[62] In Britain shareholders generally have preemption rights when their company issues new shares.[63] In contrast, there is no provision in the RMBCA for periodic authorisation of the directors to issue shares, and the default in the RMBCA is that shareholders do not have preemptive rights.[64]

The effects of the ultra vires doctrine were reduced in Britain by legislation in 1989,[65] some time after this doctrine effectively lapsed in the United States.[66] However, in Britain, some transactions which would previously have been void as ultra vires the company, such as sales of company property at an undervalue, may be challenged as a breach of the rules restricting when distributions to shareholders may be made.[67] Capital maintenance rules share some of the objectives of the

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59. *See* Companies Act 1985, *supra* note 53, § 143. A transaction in breach of this rule is void, the company is liable to a fine, and officers of the company are liable to a fine or imprisonment or both. *See* § 143(2). However, there are exceptions to this rule. *See* § 143(3).

60. *See* Companies Act 1985, *supra* note 53, §§ 151-158. Section 16 of the Companies Act 1928 18 & 19 Geo 5. Ch 45 (consolidated in the Companies Act 1929 (s 45)) prohibited for the first time financial assistance for the acquisition of a company's own shares. *See* A.F. Topham, *Company Law*, 51 L. Q. REV. 211, 217 (1935): "The prohibition of loans for financing the purchase of the company's own shares has stopped a practice which, though always of doubtful validity, was far too prevalent and led to the ruin of many a company." The Companies Act 1929 was a consolidation of the Companies Acts 1908-28 with other enactments.

61. *See* RMBCA § 6.31.

62. *See* Companies Act 1985, *supra* note 53, §§ 80, 80A. Shareholders in a private company may elect to give the directors authority to issue shares for an unlimited period. See § 80A of the Act. This provision is part of the elective regime introduced under the Companies Act 1989, ch. 40, to reduce the statutory restrictions on private companies. *See* § 379A of the Act.

63. *See* Companies Act 1985, *supra* note 53, §§ 89-96.

64. *See* RMBCA § 6.30.

65. Section 108 of the Companies Act 1989 inserted a new section 35(2) in the Companies Act 1985, *supra* note 53:" A member of a company may bring proceedings to restrain the doing of an act which but for subsection (1) would be beyond the company's capacity; but no such proceedings shall lie in respect of an act to be done in fulfillment of a legal obligation arising from a previous act of the company".

The First directive on company law (Directive 68/151/EEC), OJ Special Edition 1968 (1), at 41 limits the application of ultra vires and limits on directors' authority within the EC. This directive was originally implemented in Britain by the European Communities Act 1972, § 9.

66. The RMBCA § 3.01(a) provides: "Every corporation incorporated under this Act has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation."

67. *See, e.g.*, Aveling Barford v. Perion [1989] BCLC 626 (holding that the sale of property at an undervalue was an unauthorised return of capital). Hoffmann J. (as he then was) described the unauthorised return of capital as being "ultra vires" and said that it could not be validated by shareholder ratification or approval: "Whether or not the transaction is a distribution to

ultra vires doctrine and may be invoked in similar circumstances.[68] In Britain the legislature has reduced the impact of the ultra vires doctrine, but not the capital maintenance doctrine. In the United States legal capital rules and ultra vires have both been relaxed.

There are differences in the duties imposed on corporate fiduciaries in the United States and Britain. In both countries, corporate fiduciaries are subject to duties at common law and under statute. As in the United States, the English courts have begun to recognise that directors of a company may owe duties to creditors when the company is insolvent or doubtfully solvent,[69] and directors have a statutory, but practically unenforceable, duty to consider the interests of the company's employees,[70] but there is no equivalent in Britain of general corporate constituency statutes in the United States. The corporate opportunities doctrine is much less well-developed and much less far-reaching in Britain than in the United States,[71] and the duty of care which has developed such power in the context of take-overs in the United States, particularly in Delaware,[72] is feeble in comparison in Britain.[73] On the other hand, when a British company becomes insolvent, those who controlled the company may be liable for losses negligently incurred in the period leading up to the insolvency. The courts in the United Kingdom are also more reluctant than courts in the United States to recognise contractual modifications of company law.[74]

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shareholders does not depend exclusively on what the parties choose to call it. The court looks at the substance rather than the outward appearance." *Id.* at 631.

68. *See, e.g.*, Edward Manson, *One Man Companies*, 11 L. Q. REV. 185, 187 (1895): "When the privilege of limited liability was conceded, it was conceded on the terms that the subscribed capital should be inviolable. It was to be paid up in cash. It was to be irreducible. That was the price of the privilege - the creditors' security."

69. *See, e.g.*, West Mercia Safetywear v. Dodd [1988] BCLC 250; *cf.* Yukong Line Ltd of Korea v. Rendsburg Investments Corporation of Liberia, [1998] 1 WLR 294 (suggesting there is no direct fiduciary duty owed by a director to an individual creditor). *Cf.* Schwarz, *Rethinking a Corporation's Obligations to Creditors*, 17 CARDOZO L. REV. 647 (1996).

70. *See* Companies Act 1985, *supra* note 53, § 309.

71. IDC v. Cooley [1972] 2 All E.R. 162 is an example of the British approach to the doctrine, which stresses the capacity in which the fiduciary learned of the opportunity. Contrast AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE, § 5.05(b) (1994) (setting out in § 5.05(b)(2) a line of business test for a corporate opportunity).

72. *See, e.g.*, Smith v. Van Gorkom, 488 A.2d. 858 (Del. 1985).

73. *But see* Bishopsgate Investment Management Ltd (in liq) v. Maxwell (No 2) (CA) [1994] 1 All ER 261, 264, (per Hoffmann L.J. "In the older cases the duty of a director to participate in the management of a company is stated in very undemanding terms. The law may be evolving in response to changes in public attitudes to corporate governance, as shown by the enactment of the provisions consolidated in the Company Directors Disqualification Act 1986. Even so, the existence of a duty to participate must depend upon how the particular company's business is organised and the part which the director could reasonably have been expected to play").

74. *See, e.g.*, Guinness v. Saunders [1990] 2 AC 663; [1990] 2 WLR 324 (HL). A committee of the board of Guinness plc was responsible for the conduct of the take-over bid for Distillers plc.

Derivative actions by shareholders against corporate fiduciaries in publicly held companies are much less common in Britain than in the United States as the courts in the United Kingdom are unfriendly to such suits.[75] Judges in Britain are also reluctant to interfere in market operations.[76] The result is that there is virtually no contemporaneous litigation in Britain about take-overs.

In contrast, the state takes an active role in Britain in the disciplining of directors of insolvent companies. The Company Directors (Disqualification) Act 1986 ("CDDA")[77] provides that a court may disqualify a person from acting as a company director for varying periods of time for different misdeeds.[78] The purpose of disqualification of directors is not to punish the director but to protect the public from the activities of directors.[79] One of the main objectives of the CDDA was to

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This committee agreed to pay a success fee of £5.2 million to a company controlled by one of its members. The articles of association of Guinness provided that directors' remuneration was to be decided on by the board of directors, and that the board of directors could delegate any powers to a committee. The House of Lords held that the board could not delegate powers to determine directors' remuneration to a committee of the board. Lord Goff suggested that a company's articles of association "are treated as equivalent to a trust deed constituting a trust." *Id. at* 341. *See* Caroline Bradley, *Contracts, Trusts and Companies in* CORPORATE CONTROL AND ACCOUNTABILITY 217-230 (McCahery, Picciotto and Scott eds., 1993). *See* section 310, Companies Act 1985, *supra* note 54, but compare *Movitex v. Bulfield* [1988] BCLC 104.

75. *See, e.g.*, Prudential Assurance v. Newman Industries [1982] Ch 204; Re Blue Arrow plc [1987] BCLC 585.

76. *See, e.g.*, R v. Panel on Takeovers and Mergers, ex parte Datafin [1987] QB 815, C.A. ("Datafin"); R. v. Panel on Takeovers and Mergers, ex parte Guinness [1989] 2 WLR 863.

77. 1986 ch. 46.

78. The Companies Act 1929, s 217, first introduced a power to disqualify directors. In applying the Company Directors (Disqualification) Act 1986, the Court of Appeal has identified three levels of unfitness to be a director with different lengths of disqualification period. *See* Re Sevenoaks Stationers (Retail) Ltd [1991] Ch 164, [1991] 3 All ER 578; Re Westmid Packing Services Ltd, [1998] 2 All ER 124.

79. See, for example, "The parliamentary intention to improve managerial safeguards and standards for the long term good of employees, creditors and investors is clear." In Re Grayan Building Services Ltd. [1995] 3 WLR 1, 15 (CA per Henry LJ):

> the legislature did not regard indefinite disqualification of those who, in the past, have shown themselves to be incompetent or not to be trusted, as being in the public interest. The legislature must have envisaged that it was in the public interest that a businessman whose past conduct had justified disqualification should, after an appropriate period in which the public was to be protected and during which it must be presumed he became aware of the consequences of his past failings, have restored to him the right to manage businesses with the protection of limited liability. The legislature must have realised that the institution of such proceedings would usually have a serious inhibiting effect on a businessman, but also that the process of education and reform would also start with the commencement of the proceedings.

Re Manlon Trading Ltd; Official Receiver v. Haroon Abdul Aziz, [1995] 1 All ER 988, 1003 (per Evans-Lombe J.); "The primary purpose of the section is not to punish the individual but to protect the public against the future conduct of companies by persons whose past records as directors of insolvent companies have shown them to be a danger to creditors and others. Therefore, the

deal with the "Phoenix" problem of people who carried on business through a number of companies, setting up a new company whenever the old company failed.[80] Very many of the people who are disqualified from acting as directors in Britain are directors of small private companies.[81] The SEC has a similar power in the United States in relation to directors and officers of publicly traded corporations.[82]

If the English court finds that a director is unfit to be concerned in the management of a company it must disqualify the director for an appropriate period.[83] Generally factors which suggest that a director is unfit include not keeping proper accounting records,[84] filing accounts out of time,[85] not complying with the provisions of the Companies Acts,[86] paying creditors who press for payment and not others,[87] not

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power is not fundamentally penal." Lo-Line Electric Motors Ltd [1988] 1 Ch 477, 486A (per Sir Nicholas Browne-Wilkinson V-C).

80. See, for example:

> The Official Receiver suggests that Travel Mondial (UK) Ltd was in effect a successor to the similar business of Travel Mondial Ltd and Pierminster which had previously failed. I think that is a well-founded allegation. This was an attempt to carry on the same business on the same premises, leaving behind the creditors of the old business. This is exactly the kind of behaviour by directors that is most to be deplored in that it is the use of the fabric of a limited company to deprive creditors of their money and simply to change the cloak in which that is done from one company to the next. It is in my judgment a serious case of unfitness to be a director.

Re Travel Mondial (UK) Ltd [1991] BCLC 120, 123 (per Browne-Wilkinson V-C) ; Re Linvale Ltd [1993] BCLC 654.

81. *See, e.g.*, Department of Trade and Industry Press Notice, Crackdown on Unfit Directors Nets 13% Rise and 1,275 Bans, P/98/578, 23 July 1998. Of course, most of the companies in Britain are small private companies. Cf. "Our system of company law has developed around the requirements of large public companies. Yet of the 1.32m companies on the Company House Register at the end of 1997/98 only 12,000 (1%) were public limited companies and of these only 2,450 listed on the Stock Exchange." Department of Trade and Industry Press Release, P/99/166, Modern Company Law For a Competitive Economy, 25 February 1999 (quoting Stephen Byers, Secretary of State for Trade and Industry).

82. *See, e.g.*, SEC v. First Pacific Bancorp, 142 F.3d 1186 (9th Cir. 1998), cert. denied sub nom. Sands v. SEC, 142 L. Ed. 2d 901, 119 S. Ct. 902 (1999) (recognizing that the courts had and exercised equitable authority to impose officer and director bars) 142 F.3d at 1193. See also Securities Exchange Act of 1934, §21(d)(2), 15 U.S.C. §78u(d)(2)."

83. *See, e.g.*, In Re Grayan Building Services Ltd. [1995] 3 WLR 1 (CA).

84. *See, e.g.*, Re Firedart Ltd; Official Receiver v. Fairall [1994] 2 BCLC 340; Re Carecraft Construction Co Ltd [1993] 4 All ER 499, 511; Re A & C Group Services Ltd [1993] BCLC 1297; *Re New Generation Engineers* 435 [1993] BCLC 435.

85. *See, e.g.*, Secretary of State for Trade v. Imo Synthetic Technology Ltd [1993] BCC 549.

86. *See, e.g.*, Re A & C Group Services Ltd [1993] BCLC 1297.

87. *See, e.g.*, Secretary of State for Trade v. Imo Synthetic Technology Ltd [1993] BCC 549; Re Carecraft Construction Co Ltd [1993] 4 All ER 499, 511; Re New Generation Engineers 435 [1993] BCLC 435.

making returns in respect of PAYE[88] and national insurance,[89] getting the company to pay the director's debts,[90] taking excessive remuneration,[91] and allowing the company to trade when it is insolvent[92] (even if this does not amount to wrongful trading).[93] Frequently the cases refer to breaches of accepted commercial morality.[94]

Another significant difference between corporate law in the United States and Britain is that Britain has a centralised companies registry where copies of the memorandum and articles of association of all registered companies must be filed.[95] Legislation requires registered companies to file various other documents with the Companies Registry, including annual reports and accounts, certain shareholders' resolutions, and company charges.[96]

In Britain, the statutory remedy for oppression introduced in 1948[97] was interpreted extremely restrictively in the courts. In contrast, a number of American close corporation statutes offer a remedy for oppression based on the British statute.[98] American courts apply this

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88. The acronym PAYE stands for "Pay as you earn," and is used here to refer to the obligation of an employer to account to the Inland Revenue for income tax on wages and salaries paid to employees.

89. *See, e.g.*, Re Carecraft Construction Co Ltd [1993] 4 All ER 499, 511. Non-payment of a Crown debt is not in itself evidence of unfitness. *See* Re Sevenoaks Stationers (Retail) Ltd [1991] BCLC 325, 336, [1991] Ch 164, 183. But compare: "That form of trading, where one has a succession of companies which no doubt pay a salary to their principal directors and are then allowed to sink, having lived on involuntary credit provided by the Crown, is the very thing which the provisions for disqualification of directors is intended to prevent." Re Swift 736 Ltd [1993] BCLC 1, 3 (per Hoffmann J).

90. *See, e.g.*, Secretary of State for Trade v. Imo Synthetic Technology Ltd [1993] BCC 549 (the director sought to make the company pay for electrical work on his house).

91. *See, e.g.*, Re Firedart Ltd; Official Receiver v. Fairall [1994] 2 BCLC 340; Re A & C Group Services Ltd [1993] BCLC 1297.

92. *See, e.g.*, Re Firedart Ltd; Official Receiver v. Fairall [1994] 2 BCLC 340; Re GSAR Realisations Ltd [1993] BCLC 409.

93. *See, e.g.*, Secretary of State for Trade v. Imo Synthetic Technology Ltd [1993] BCC 549.

94. *See, e.g.*, Re Swift 736 Ltd [1993] BCLC 1.

95. Companies have been formed in Britain by registration since 1844. *See* An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies. 5th Sept. 1844. 7 & 8 Vict. c. 110, *reprinted in* 28 Legal Observer 388 (1844) (The Joint Stock Companies Act 1844). The Select Committee whose report led to the legislation resolved that registration of companies was necessary "in order to prevent the establishment of fraudulent companies, and to protect the interests of the shareholders and of the public." *See First Report from Select Committee on Joint Stock Companies*, 28 LEGAL OBSERVER 22 (1844), Resolution no. 1.

96. *See generally* DEPARTMENT OF TRADE AND INDUSTRY, THE FUNCTIONS OF THE REGISTRAR OF COMPANIES. A CONSULTATIVE DOCUMENT (August 1996). John Major's Government planned to privatise the Companies Registry.

97. *See* the Companies Act 1948, § 210. This provision was based on THE COMMITTEE ON COMPANY LAW AMENDMENT (the "Cohen Committee"), REPORT OF THE COMMITTEE ON COMPANY LAW AMENDMENT, HMSO, Cmd. 6659, ¶ 60 (June 1945).

98. *See, e.g.*, Model Statutory Close Corporation Supplement § 40. The Official Comment to this provision states: "Sections 40 through 43 are derived from similar provisions in the

remedy in a much more expansive manner,[99] even when American judges use the definition of oppressive conduct developed in Britain.[100] Whereas the English courts were reluctant to find that oppressive conduct had occurred,[101] the American courts have not been so constrained. In 1980, the British Parliament replaced the remedy for oppression with a remedy for unfairly prejudicial conduct which was intended to be more protective of shareholders than the old remedy had been.[102] Although the new statutory provision allows the court a wide discretion to choose an appropriate remedy and should be able to provide a range of solutions to suit different problems,[103] English judges have resolutely interpreted this new statutory provision restrictively.[104] In 1989, when Parliament limited the impact of the ultra vires doctrine, the remedy for unfair prej-

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California, Michigan, Minnesota, New Jersey, and South Carolina statutes, which in turn are derived from former section 210 of the 1948 English Companies Act (reenacted as section 75 of the 1980 English Companies Act)."

99.

> Defining oppressive conduct. . .has been considered in other forums. The question has been resolved by considering oppressive actions to refer to conduct that substantially defeats the "reasonable expectations" held by minority shareholders in committing their capital to the particular enterprise. . .oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture.

Gardstein v. Kemp & Beatley, 64 N.Y.2d 63, 72, 473 N.E.2d 1173, 1179 (1984). Only two cases ever found oppression to have taken place under section 210 of the English Companies Act, 1948. *See* S.C.W.S. v Meyer [1959] A.C. 324 (H.L.); Re H.R. Harmer [1958] 3 All E.R. 689, [1959] 1 W.L.R. 62. *Cf.* "Despite the paucity of reported cases, it has been extensively and effectively invoked as a threat to induce those in control to behave reasonably towards all interests, and, as a weapon in the investor's armoury, it will probably always prove more efficacious when brandished *in terrorem* than when actually used to strike." L.C.B. GOWER, THE PRINCIPLES OF MODERN COMPANY LAW 513 (1954).

100. *See, e.g.*, Myron F. Topper v. Park Sheraton Pharmacy, Inc. 107 Misc. 2d 25, 34, 433 N.Y.S.2d 359, 365 (1980), Baker v. Commercial Body Builders, Inc., 264 Ore. 614, 629, 507 P.2d 387, 393, 56 A.L.R.3d 341 (1973).

101. *See, e.g.*, Harry Rajak, *The Oppression of Minority Shareholders*, 35 MOD. L. REV. 156, 167 (1972).

102. Companies Act, 1980, § 75, which later became Companies Act 1985, § 459.

103. *See, e.g.*, Re Macro (Ipswich) Limited [1994] 2 BCLC 354. Cf. "In s 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history (which I discussed in In re Saul D. Harrison & Sons Plc. [1995] 1 BCLC 14, 17-20) that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles." (per Lord Hoffmann), O'Neil v Phillips, (HL) 20 May 1999, not yet reported, *available on* Lexis: enggen, cases.

104. For example, the judges read a "qua member" requirement into the statute, requiring that only prejudice to a shareholder's interests as a member of the company could be remedied under the provision. *See, e.g.*, Re J. E. Cade & Sons Ltd. [1991] BCC 360, 374. The provision was held not to apply where the prejudice affected all shareholders in the company.

udice was amended so that it could apply where a shareholder wished to complain that the company had acted outside the scope of its powers.[105]

This exposition of some of the differences between corporate law in the United Kingdom and the United States illustrates that the patterns of involvement of the state in the control of business are different in the two systems. The United Kingdom leaves some matters to private ordering which are controlled by legislation in the United States and has decided to control through state agencies matters which the United States has generally left to private action.

IV. THE PROBLEMS OF COMPARATIVE CORPORATE LAW

A. *Translation of Legal Rules*

It is notorious that Britons and Americans are two peoples "separated by a common language." Fay Weldon produced two versions of a recent book, one for the U.K. market, and one for the U.S. market.[106] Nevertheless, in Europe it is often easy to ignore the differences between the two languages and cultures. American television programmes are shown every night in Britain. American films fill movie theatres throughout Europe. McDonalds has taken over the world. However, American English and British English use different words.[107] Moreover, Americans and Britons use language differently. For example, the British are renowned among Americans for their use of understatement. This does not mean that Americans understand British understatement, or even that they know how to recognise it.[108]

Even before considering the problem of translation of foreign legal rules, we should recognise that it may be difficult to find the relevant foreign rules. Difficulties in finding a foreign rule may exist if there are many different levels of rules in a particular country: state rules, local

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105. This amendment was necessary because the courts had interpreted the remedy not to apply to actions which adversely affected the interests of all of the members of a company. *See, e.g.*, Re A Company (No. 00370 of 1987), ex p. Glossop [1988] 1 W.L.R. 1068.

106. "After two years. .she completed it and sent it off first to her European publishers and then to her American publishers. The former were very pleased, the latter less so. "I got the feeling that they the Americans were being polite about it," she [Weldon] says. After a little prodding, it emerged that they found it rather obscure. "It was a puzzle to them. They would ask, 'What has this bit got to do with that bit?' The answers would have been quite apparent here, but not over there." Brian Cathcart, *Two Weldons for one in 'Splitting' image*, THE INDEPENDENT, March 26, 1995, at p. 3.

107. For example, the British equivalents of director bars and statutes of limitations are director disqualification and limitation periods. An English lawyer would never refer to one section of an Act of Parliament as a "statute", but would instead refer to it as a statutory provision.

108. *See, e.g.*, PETER HENNESSY, NEVER AGAIN, *supra* note 46, at 405 (Brigadier Tom Brodie telling Americans in Korea that his position was "a bit sticky," meaning it was critical. The Americans did not get it.)

rules, and supranational rules. Similarly a state may use different types of rule, such as legal rules and self-regulatory rules, and it may be more difficult to find self-regulatory rules. It may be difficult to recognise a rule when you see one. In looking for the rule, it may not be clear how to characterise it. The researcher who relies on secondary materials for sources runs the risk that those materials are not up to date.

A British lawyer probably knows that American corporation law is state, rather than federal law,[109] and that there is federal and state regulation of securities, but how much does she know about limited liability companies, limited liability partnerships,[110] and professional corporations? An American lawyer might not appreciate the need to examine whether statutory provisions implementing EU directives in Britain had in fact implemented those directives properly.[111] American lawyers find it difficult to understand that even though a British statute may have been enacted, this says nothing about when or whether it will ever come into force.[112] Many British statutes specify that they will only take effect when secondary legislation is passed,[113] whether or not a governmental or quasi-governmental organisation has rule-making powers under the statute. Part V of the Financial Services Act 1986,[114] which was intended to regulate prospectuses for issues of shares which were not to be listed on a Stock Exchange was not brought into force until

109. *See, e.g.*, THE LAW SOCIETY, COMPANY LAW COMMITTEE, THE REFORM OF COMPANY LAW, Memorandum No. 255, app. at 22 (July 1991). The Appendix refers to the American Bar Association's Model Business Corporation Act, which it says is revised periodically, but it does not explain the significance of this document. It says: "While influential, the Model Business Corporation Act is a publication of the American Bar Association's Committee on Corporate Laws, which, although highly skilled and experienced, is not necessarily as representative of different groupings as a law reform body should be." On the Revised Model Business Corporation Act see Robert W. Hamilton, *The Revised Model Business Corporation Act: Comment and Observation*, 63 TEX. L. REV. 1455 (1985).

110. The UK Government recently suggested that it may introduce limited liability partnerships in Britain, because of the availability of limited liability for members of partnerships in other jurisdictions. *See, e.g.* DEPARTMENT OF TRADE AND INDUSTRY, LIMITED LIABILITY PARTNERSHIPS DRAFT BILL, A CONSULTATION DOCUMENT, URN 98/874, September 1998, available online at: http://www.dti.gov.uk/; *see also* DEPARTMENT OF TRADE AND INDUSTRY, LIMITED LIABILITY PARTNERSHIPS. A NEW FORM OF BUSINESS ASSOCIATION FOR PROFESSIONS. A CONSULTATION PAPER, URN 97/597, ¶ 1.5 (February 1997): "The basic purpose of the intended legislation is to enhance our commercial competitiveness by enabling businesses in regulated professions to take the form of an LLP under UK law."

111. In *Marleasing SA* v. *La Comercial Internacional de Alimentacion SA*, Case C-106/89, [1992] 1 CMLR 305 the European Court of Justice held that a national court must so far as possible interpret national law in the light of the wording and purpose of a relevant directive. *See also* Faccini Dori v. Recreb Srl, Case 91/92, [1995] All ER (EC) 1, Gabriele Habermann-Beltermann v. Arbeiterwohlfahrt, Bezirksuerband Ndb/opf eV, Case 421/92, [1994] 2 CMLR 729, Von Colson and Kamann v. Land Nordrhein-Westfalen [1984] ECR 1891.

112. *See* BRINGING ACTS OF PARLIAMENT INTO FORCE, Cm. 3595.

113. Such secondary legislation is called a "commencement order."

114. *Supra* note 42.

1995.[115] For much of the intervening period the relevant statutory provisions were rumoured to be about to be brought into force. Knowing about the existence of Part V of the Financial Services Act 1986 during that period was not useful for advising clients; practitioners needed to know that sections of the Companies Act 1985[116] were the effective provisions. There is no equivalent to the U.S.C.A. in Britain; legal practitioners rely instead on texts such as Halsbury's Laws of England (which is updated annually) or on a range of general publications such as Current Law, or subject-specific publications.[117] Again, developments in the internet should improve the situation for the future: the British government plans to make a statute law database available to the public in 1999.[118]

Clearly, American lawyers sometimes even find it difficult to find particular provisions of English law. When Professors Black and Coffee wrote about corporate governance in Britain in an article in the *Michigan Law Review* in 1994, they referred to "control-person liability," which does not exist as such in English law.[119] The only source referred to by the authors on the issue of control-person liability is an article in *The Times*.[120] It is difficult to imagine respected U.S. academic lawyers citing to newspapers for rules of U.S. law. Indeed, academic lawyers in the United Kingdom would generally refer to U.S. statutes and cases rather than to articles in the *New York Times*.[121] If it is difficult for an American lawyer to find the statutory source of a rule imposing liability on "control persons," how easy would it be for an American lawyer to

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115. *See* Public Offers of Securities Regulations 1995, SI 1537 (1995).

116. *See supra* note 53. The relevant provisions were those in §§ 56-71 of the 1985 Act.

117. CCH publishes a range of loose-leaf services in Britain as it does in the US.

118. See Lord McIntosh of Haringey, Hansard, House of Lords, 2.7.97, at col. 294.

119. *See* Black & Coffee, *supra* note 19, at 2065:

> A second potential legal concern is control-person liability. Although there is little caselaw, the perceived risk depends both on what you do and on how much you own. Some commentators suggest that institutions do not want to nominate board members or get too involved in a company's business decisions because of this potential liability. (footnote omitted).

Presumably Black and Coffee's invocation of "control-person liability" relates to the concept in English company law of a "shadow director." *See* Insolvency Act, 1986 ch.45, §251; Companies Act, 1985, ch. 6, §741; Coal Industry Act 1994 ch. 21, sched. 9 (excluding the Treasury and Ministers of the Crown from being considered as shadow directors in the context of reorganization of the coal industry); Railways Act, 1993 ch. 43, §114. *See also* Re Hydrodan (Corby) Ltd. [1994] BCC 161, [1994] 2 BCLC 180.

120. *See generally* William Kay, *Money Men Who Rule the Business World*, TIMES (London), Apr. 20, 1992, at 25. To be fair, the authors use the article not as a source for the rule of law, but as a source for institutions' perceptions of the risk of liability. However, this is not just a matter of perception, as these institutions may incur liability for wrongful trading in certain circumstances.

121. It is difficult to authenticate this proposition because of the absence of electronic search tools for UK law journals, but the proposition is based on a number of years of reading such journals. Of course, UK lawyers do make mistakes when they write about U.S. law.

discover the existence of the Financial Law Panel?[122]

Finding the foreign legal rule is one problem, understanding the rule is another. One commentator has suggested that "British law. . .closely regulates all mergers and acquisitions, requiring at least the formal winding up of the company and the appointment of a liquidator."[123] In fact, English law is as familiar as American law with takeovers through the acquisition of shares, which do not involve the liquidation of the acquired company.[124] Another wrote in 1984 that "the British have an entirely separate law to govern close corporations."[125] The statutory provision referred to by this commentator had been replaced in 1980 by a provision introduced to implement European Community law in Britain.[126] The British companies legislation currently in force, the Companies Act 1985, as amended, contains provisions which regulate private companies and public companies. In contrast to the situation in the United States, the default is the private company. Some of the provisions of the statute apply only to public companies,[127] others apply only to private companies.[128]

The translation of foreign legal rules involves two processes: an internal process of trying to understand the foreign legal rule, and an external process of communication of the sense of that rule to others. Each of these processes involves two risks: that the translator/reader assumes the foreign rule is the same as the rule with which she is familiar (when it is not); and that the translator/reader assumes that the foreign rule is different from the rule with which she is familiar (even if it

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122. The Financial Law Panel is sponsored jointly by the Corporation of London and the Bank of England; the English Government established the Panel in response to discontent about legal uncertainty affecting the financial markets. *See, e.g., Legal Risk Review Committee, Reducing Uncertainty, supra* note 15 (the Panel publishes discussion papers and practice recommendations, and has given written evidence to Parliament); Martin Hughes, *A Commentary on the Recent Report by the Financial Law Panel on the Secondary Debt Market*, 2 J. INT'L BANKING & FINANCIAL L. 75 (1997); Bank of England Press Release, Financial Law Panel: Takeovers Directive (visited Apr. 22, 1996) <http://www.coi.gov.uk/coi/depts/GBE/coi7767b.ok. The Panel's premises are 125 Wood Street, London EC2V 7AQ.

123. John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1620 n.6 (1989).

124. *See, e.g.*, Paul L. Davies, GOWER'S PRINCIPLES OF MODERN COMPANY LAW, 772-816 (6th ed. 1997) (regarding takeovers in the U.K.).

125. *See, e.g.*, Kelvin H. Dickinson, *Partners in a Corporate Cloak: The Emergence and Legitimacy of the Incorporated Partnership*, 33 AM. U. L. REV. 559, 562 n.12 (1984) (referring to the Companies Act, 1948, ch. 38, § 28).

126. *See* Companies Act 1980, ch. 22, § 1. After the British companies' legislation was consolidated in 1985, this provision became section 1 of The Companies Act 1985.

127. *See, e.g.*, Companies Act, 1985, ch.6 § 11 (minimum authorized capital for public companies).

128. *See id.* at §§ 171-181 (discussing redemption or purchase by private company of own shares out of capital).

is not).[129] To return to the idea of control-person liability in English law, it is not clear whether Black and Coffee understood the English rule they were referring to, but felt that in describing it for the benefit of others they should use terms with which their readers were familiar, or whether they assumed that a rule they heard about was the same as a rule with which they were familiar.

This raises another question: why should it matter? After all, although English law does not as such deal with "control-person liability," the idea of "control" of a company is significant in many contexts. For example, companies may be responsible for the acts of their employees under various legislative schemes.[130] Tax law and financial regulation have also invoked concepts of control.[131] English company law uses concepts of control in different contexts. English law generally adopts a restrictive approach to derivative shareholder litigation, but one exception to this is when there has been a "fraud on the minority" and the wrongdoers are in control of the company's affairs.[132] Control is an important concept for the purposes of financial disclosures in company accounts.[133] As in the United States, courts in England may take account of control in deciding whether or not to pierce the corporate veil.[134]

Moreover, what the authors were probably referring to is the con-

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129. In the U.S., a corporation's constitution is set out in the relevant state statute and in its articles of incorporation. In Britain, the constitution of a company is found in the Companies Acts and in its Articles of Association. How significant is this distinction between "incorporation" and "association"? The distinction is historically explicable, but does it have continuing resonance today in terms of the way in which the law in the different jurisdictions deals with corporations or companies?

130. *See, e.g.*, Re Supply of Ready Mixed Concrete (No. 2) (Director General of Fair Trading v. Pioneer Concrete (UK) Ltd. and Another) [1995] 1 All E.R. 135, H.L.; Tesco Supermarkets Ltd. v. Nattrass [1972] AC 153, H.L.

131. Steele (Inspector of Taxes) v. European Vinyls Corp. (Holdings) BV [1995] S.T.C. 31; Income and Corporation Taxes Act, 1988, ch. 1 §§840, 416 ("ICTA") (definition of control) *compare* ICTA, § 839(5),(6) and (7) *with* ch.12, §286(5),(6), (7) Taxation of Chargeable Gains Act, 1992, (use of concept of control for the purposes of defining connected persons).

132. *See, e.g.*, Prudential Assurance Ltd. v. Newman Industries Ltd. [1982] All E.R. 354, C.A. Smith v. Croft [1987] BCLC 255. It should be noted that British lawyers think that English law does not impose fiduciary obligations on controlling shareholders in the same way as does United States corporate law. English law provides for a statutory remedy for unfairly prejudicial conduct, which arose as an amendment of rules providing a remedy for oppression. *See* Companies Act, 1985, ch. 6, § 459.

133. *See, e.g.*, Companies Act, 1985, ch.6, §258 *introduced by* Companies Act, 1989, ch.40, §21.

134. *See, e.g.*, DHN Food Distributors v. Tower Hamlets [1976] 1 W.L.R. 852; Multinational Gas [1983] 2 W.L.R. 495; Scottish Co-operative Wholesale Society v. Meyer [1959] AC 324; Lonrho v. Shell Petroleum [1980] 1 W.L.R. 627; Gramophone & Typewriter v. Stanley [1908] 2 K.B. 89. *See also* Robert B. Thompson, Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise, 47 VAND. L. REV. 1 (1994).

cept in English company law of a "shadow director." Shadow directors are persons in accordance with whose instructions the company's directors are accustomed to act;[135] thus a shadow director might be a significant shareholder or creditor of the company. A shadow director has been described as one who "lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself."[136] Many statutory provisions impose liability on shadow directors as well as on people who are appointed to the Board of Directors.[137] Institutional investors who are involved in controlling the management of a company's business risk being characterized as shadow directors, and also risk liability as a result.[138]

In particular, section 214 of the Insolvency Act, 1986, provides that directors of companies may be liable to make contributions to a company's assets when the company becomes insolvent and the directors knew or ought to have known of the risk of insolvency but carried on trading regardless.[139] In Britain this would usually be referred to as "wrongful trading liability," and it is a source of concern to financial

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135. *See* Insolvency Act, 1986, ch. 45, §251; *See also* Companies Act, 1985, ch. 6, §741; Coal Industry Act, 1994, ch. 21, sched. 9, para. 32 (excluding the Treasury and Ministers of the Crown from being considered as shadow directors in the context of reorganization of the coal industry); Railways Act, 1993 ch. 43, §114; Re Hydrodan) (Corby) Ltd. [1994] BCC 161, [1994] 2 BCLC 180 (directors of a corporate body are not automatically shadow directors of its subsidiary by virtue of their position).

136. *Id. at* 163. *See also* N.R. Campbell, *Liability as a Shadow Director*, 1994 J. BUS. L. 609.

137. For example, shadow directors are required, pursuant to Companies Act, 1985, ch.6, §317, to disclose their interests in contracts with the company at a meeting of the directors of the company or be subject to a fine. Shadow directors, like directors, are precluded from dealing in certain options in shares and debentures under Companies Act, 1985, ch.6, §323.

138. *See, e.g.*, Re Tasbian Ltd. (No 3) [1991] BCC 435, 443, (per Vinelott J: "In summary, I think that Mr. Heslop was right when he submitted that the dividing line between the position of a watch-dog or adviser imposed by an outside investor and a de facto or shadow director is difficult to draw. . .").

However, the courts may draw inferences from the circumstances of a particular case. In *Re TR Technology Investment Trust plc* [1988] BCLC 256, Hoffmann J. stated:

> "the composition and conduct of the Firmandale board give rise to a plausible inference that it is accustomed to act in accordance with the directions and instructions of some other person within the meaning of §203(2)(a). The idea that Jersey lawyers as directors of a small investment company with $10,000 capital decided without instructions or directions to borrow £60m and invest the entire proceeds in the shares of a single company and then, after the stock market collapse which made the company insolvent, to borrow another £30m to invest in shares in the same company, lacks reality."

139. *See, e.g.*, Re Produce Marketing Consortium Ltd. (No. 2) [1989] B.C.L.C. 520; L.S. Sealy, Insolvent Company - Wrongful Trading, 1989 CAMBRIDGE L.J. 375; Stephen Gillespie, Wrongful Trading: Policy and Practice, 1989 J. INT'L. BANKING L. 269; D.D. Prentice, *Creditors' Interests and Director's Duties*, 10 OXFORD J. LEG. STUDS. 265 (1990); Vanessa Finch, *Directors' Duties: Insolvency and the Unsecured Creditor*, 1991 CURRENT ISSUES IN INSOLVENCY L., 99; Vanessa Finch, *Company Directors: Who Cares about Skill and Care?*, 55 MOD. L. REV. 179, 193, 201 (1992); Janet Dine, *Punishing Directors*, 1994 J. BUS. L. 325, 334-37.

institutions because it catches "shadow directors" as well as regular directors. There is some concern that liability for wrongful trading could be imposed on a bank which lent money to a company (particularly as part of a rescheduling of the company's debts) on the basis of a loan agreement which contained unduly restrictive covenants.[140] But liability for wrongful trading only arises in the context of insolvency. The American concept of "control-person liability" is much broader.

Controlling shareholders of corporations in the United States may be subject to a duty of fair dealing similar to the duties imposed on directors and officers of the corporation, and breach of this duty will give rise to liability in the same way.[141] Unlike the liability imposed on shadow directors in Britain, this liability will not arise only on insolvency of the corporation. Moreover, the liability is for breach of a duty of loyalty rather than for breach of a duty of care.[142]

English company and insolvency law clearly uses the concept of control in order to impose liability on persons who share responsibility for certain actions, or should be able to prevent them. But this concept is not used in the same way as it is in the United States, and to refer to English rules on "control-person liability" may be misleading. The English statutory provisions which impose liability for false or misleading statements in listing particulars used to sell listed securities do not refer to shadow directors,[143] nor does the statutory provision regulating market manipulation.[144] A shadow director in Britain is not necessarily the same as a control-person in the United States, and is not regulated in quite the same way.[145]

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140. *Cf.* Stephen Gillespie, *Wrongful Trading: Policy and Practice*, 1989 J. INT'L. BANKING L. 269, 272; J. Dennis Hynes, *Lender Liability: The Dilemma of the Controlling Creditor*, 58 TENN. L. REV. 635 (1991); Jeffrey John Hass, Comment, *Insights into Lender Liability: An Argument for Treating Controlling Creditors as Controlling Shareholders*, 135 U. PA. L. REV. 1321 (1987).

141. *See, e.g.*, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, A.L.I. Part V, ch. 3 (1994).

142. *See* Insolvency Act, 1986, ch.45, § 214 (wrongful trading liability is liability for failure to exercise care).

143. *See* Financial Services Act ch.60, §142-157; *See also Re Supply of Ready Mixed Concrete (No. 2) (Director General of Fair Trading v. Pioneer Concrete (UK) Ltd.)* [1995] 1 All E.R. 135 (H.L.) (acts of employee may be the acts of the company).

144. *See* Financial Services Act, 1986, ch.60, § 47. Statutory provisions regulating insider dealing in Britain refer specifically to shareholders as people who may be prohibited from trading in securities as insiders, but the rules do not apply solely to controlling shareholders. *See* Criminal Justice Act, 1993, ch.36, §57.

145. *See, e.g.*, J. Christopher York, *Vicarious Liability of Controlling Persons: Respondeat Superior and the Securities Acts - A Reversible Consensus in the Circuits*, 42 EMORY L. J. 313 (1993); James L. Burns, *Pruning the Judicial Oak: Developing a Coherent Application of Common Law Agency and Controlling Person Liability in Securities Cases*, 93 COLUM. L. REV. 1185 (1993); Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691; Marleen A. O'Connor, *Toward a More*

The term "control-person liability" in the United States is frequently used to refer to provisions in the federal securities laws which impose liability for violations of those laws on control-persons as well as on the persons directly responsible for the violations. When a person is civilly liable under the Securities Act of 1933, the same liability applies to "[e]very person who, by or through stock ownership, agency or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls" the other person.[146] This liability can be used to reach deep pockets when the concept of control can be invoked, even in circumstances where the primary violator is not insolvent.[147] Control-person liability is similar to wrongful trading liability in that the possibility of liability provides incentives to control persons to take care.[148] However, a wider range of people are at risk of being held to be control persons under the federal securities laws in the United States than are at risk of being held to be shadow directors in Britain. In some circumstances, in the United States, a newspaper publisher might be a control person in relation to acts of a financial columnist.[149] The concept of a "shadow director" could not apply to these circumstances.

Another example of the difficulty of translating foreign rules is the business judgment rule, which is a significant element of corporate law doctrine in the United States. This rule precludes substantive review of a director's actions involving the exercise of business judgment unless some vitiating factor exists.[150] English courts are similarly reluctant to

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Efficient Deterrence of Insider Trading: The Repeal of Section 16(b), 58 FORDHAM L. REV. 309 (1989); Ted S. Lodge & Daniel J. McCauley, Jr., *Walking the Tightrope: The Comprehensive Liabilities of Securities Professionals in the United States*, 5 J. COMP. BUS. & CAPITAL MKT. L. 267, 282-86 (1983).

146. The Securities Act of 1933 §15, 15 U.S.C. §770 (1998). *Cf.* The Securities Exchange Act of 1934 §20A, 15 U.S.C. §78a (1998). On the concept of control under the federal securities laws, and the different purposes for which it is used, see generally, 4 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION, 1691-1727. (3rd ed. 1989). On controlling person liability under the federal securities laws, see 9 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION, 4466-75 (3rd ed. 1989).

147. Section 15 provides for a defense when the person has no knowledge of or reasonable grounds to believe the existence of facts; § 20A provides for a defense where there is good faith and the person did not directly/indirectly induce the act or acts constituting the violation. *See also* 9 LOUIS LOSS & JOEL SELIGMAN, *supra* note 146, at 4469 ("The apparent concern of Congress was to ensure the liability of controlling persons rather than to permit them to escape liability by interposing "dummy directors" or other intermediaries".

148. *See, e.g.*, Carpenter v. Harris, Upham & Co., Inc., 594 F. 2d. 388, 394 (4th Cir. 1979), *cert. denied sub nom.* Carpenter v. Edwards & Warren, 444 U.S. 868 (1979); Marbury Management, Inc. v. Kohn, 629 F. 2d. 705, 716 (2d Cir. 1980), *cert. denied sub nom.* Wood Walker & Co. v. Marbury Management, Inc., 449 U.S. 1011, 1980.

149. Zweig v. Hearst 521 F. 2d. 1129 (9th Cir. 1975), *cert. denied*, 423 U.S. 1025 (1975). In *Zweig*, the publisher was not liable.

150. Separate rules restrict the circumstances in which individual shareholders in a corporation

review directors' business judgements. But in England, lawyers do not talk about a business judgment rule, and the rule which usually prevents the review of business decisions in the courts is more closely related to a demand requirement than to a business judgment rule.[151]

This discussion of problems of translation of foreign legal rules assumes that we really care about being able to translate these rules properly. As discussed above, some contexts require more careful translation than others. But even when academics are using examples of rules from other jurisdictions as ideas about how rules might be changed in their own jurisdiction I would argue that it makes a difference whether their characterisation of the foreign rule is accurate or not. An inaccurate characterisation of the foreign rule misleads those who may be influenced by it. "The rule which has worked so well in Urbania for the last 50 years" is likely to be much more persuasive than "the rule Professor Bradley thought up last week."

B. *Understanding the Institutional Context of the Rules*

It is as important to understand the institutions which develop and apply rules as it is to understand the words used to apply the rules, and here too the comparative corporate lawyer encounters problems. Otto Kahn-Freund argued that a person seeking to use foreign rules for domestic law reform would need to consider how power was distributed in the foreign country, and how this distribution of power affected the legal rules in question.[152] Douglass North argues, more narrowly, that an understanding of institutional constraints is crucial for the development of public policy.[153] Again, there is a danger that one will think the

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may litigate about breaches of directors' duties. *See* PRINCIPLES OF CORPORATE GOVERNANCE: Analysis And Recommendations, A.L.I., Part VII (1994).

151. *See, e.g.*, K.W. Wedderburn, *Shareholders' Rights and the Rule in Foss v. Harbottle*, 1957 CAMBRIDGE L.J. 194. The rule in question is a procedural rule limiting standing to bring an action on behalf of the company, known as the Rule in *Foss v. Harbottle* (1843) 2 Hare 461. The "fraud on the minority" exception to this rule which allows shareholders to maintain a derivative action in certain circumstances is related to the recognition in cases such as *Aronson v. Lewis*, 473 A.2d. 805 (1984) that a demand requirement should not be insisted upon where it would be futile. In Britain, a shareholder who surmounts such procedural barriers will not be met with a business judgment rule barrier, although it is probably harder to surmount the procedural barrier in the first place in Britain than in the U.S.

152. O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 12 (1974): ("[A]nyone contemplating the use of foreign legislation for law making in his country must ask himself: how far does this rule or institution owe its existence or its continued existence to a distribution of power in the foreign country which we do not share?").

153. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE, 10 (1990) ("INSTITUTIONS"):

> Economic (and political) models are specific to particular constellations of institutional constraints that vary radically both through time and cross sectionally in different economies. The models are institution-specific and in many cases highly

foreign institutions are more similar than they are to those one knows, or are more different than they are.[154] In Britain and the United States different actors are involved in the development and implementation of rules of corporate/securities/financial law. When the rules are rules developed by courts, it is helpful to understand how those courts work, and how the judges think about their role in the development of the law. It is not difficult to identify some differences between judges in Britain and the United States. For example, British judges generally seem to be more reluctant than American judges to welcome economic theories into the courtroom.[155] When the rules are rules developed by legislatures it is helpful to understand the differences in the political process which may produce different results.[156] When the rules are developed by administrative agencies or regulatory bodies, it is helpful to understand the nature of those bodies and their role in the legal system. When the rules are rules developed by private bodies, it is necessary to understand whether or not the private nature of the body is significant.[157]

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sensitive to altered institutional constraints. A self-conscious awareness of these constraints is essential both for improved theory construction and for issues of public policy.

154. For example, Americans often assume that "the secretary of state" in Britain is one person, because the title Secretary of State refers to a particular function in the federal government in the United States. In fact the term "secretary of state" is used in Britain to refer to the minister who heads a particular government department.

155. *See, e.g.*, Bank of Tokyo Ltd. v. Karoon [1987] AC 45, 64, ("Mr. Hoffmann suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged"). *But see* Nestle v. National Westminster Bank plc [1994] 1 All E.R. 118 (decision of Mr. Hoffmann as Hoffmann J.). The elevation of Hoffmann to the House of Lords suggests that the influence of economic reasoning in the English courts is likely to increase. *But cf.* The Rt. Hon. Lord Steyn, *The Weakest and Least Dangerous Department of Government*, 1997 PUBLIC L. 84, 91 ("The Lord Chancellor as a cabinet member represents the voice of reform guided by the Treasury perspective. The view of the judges is rather different. They do not wholeheartedly share the modern adoration of the deity of the economy. On the whole they put justice first").

156. *See, e.g.*, Albert Gray, *Notes on the State Legislation of America in 1896*, 2 J. SOC. COMP. LEGISLATION 325, 332 (1897) ("Owing to the peculiar methods of working the legislative machinery in America, it is comparatively easy for a dissatisfied class to get a remedial measure passed").

157. THE LAW SOCIETY, *supra* note 15, app. at 22-23 (discussing how corporate law rules are developed in the U.S.). The Appendix of The Committee Report refers to the role of the A.L.I. as "a private, not-for-profit enterprise whose membership consists of prominent members of the bar, judiciary and government." *Id.* at 22. The Appendix also mentions the A.L.I.'s Corporate Governance Project but does not criticize it. *Cf.* J.E. Parkinson, *supra* note 29 at p. 104, n. 30. (Mr. Parkinson's reference to this project is not particularly helpful, as he does not explain the status of the ALI's principles, why the A.L.I. might be relevant to the U.K. reader, nor even what it means in the context of the American courts' review of directors' business decisions to distinguish between a legal standard of rationality and one of reasonableness). *Cf.* Franklin A. Gevurtz, *The Business Judgment Rule: Meaningless Verbiage or Misguided Notion?*, 67 S. CAL. L. REV. 287, 301 (1994).

Sometimes it can be very difficult to understand foreign legal institutions, because the words which commentators use to describe them mean different things in different contexts. For example, American commentators have referred to the British City Panel on Take-overs and Mergers (the "Take-Over Panel") as a "nongovernmental body."[158] Indeed, the Take-over Panel is not a government department, nor the equivalent of a U.S. administrative agency such as the SEC. It does not owe its powers to statute, and the Take-Over Code states that the Take-Over Panel is a body composed of representatives of associations affected by and involved in take-overs.[159] It looks like a self-regulatory body. However, the Take-Over Panel is subject to judicial review[160] as if it were a public body[161] because it operates "wholly in the public domain."[162] Lord Donaldson, then Master of the Rolls, emphasised that although the Take-Over Panel developed in the context of a financial

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158. Black & Coffee, *supra* note 19, at 2027. *Cf.* INTERNATIONALIZATION OF THE SECURITIES MARKETS, REPORT OF THE STAFF OF THE U.S. SECURITIES AND EXCHANGE COMMISSION TO THE SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS AND HOUSE COMMITTEE ON ENERGY AND COMMERCE, III-256 (1987)

> Neither the Code nor the SAR have legal force, but in practice they are the universally recognized market controls in this area. The Code has been referred to in court proceedings, where it has been used as a guide to good commercial practice. Non-compliance with the Code's provisions will likely lead to consequences such as loss of licences to trade on the Stock Exchange.

See also Deborah A. Demott, *Comparative Dimensions of Takeover Regulation*, 65 WASH. U. L. Q. 69, 71 (1987) (referring to the Take-over Panel as a "self-regulatory body"). Note that before the decision of *Rv. Panel on Takeovers and Mergers, ex parte Datafin*, [1987] Q.B. 815, C.A., British lawyers thought of the Take-over Panel as a non-governmental body. After this decision, Roberta Karmel's description of the Panel as a "semi-public body" is more accurate. *See* Roberta Karmel, *Is It Time for a Federal Corporation Law?*, 57 BROOK. L. REV. 55, 89 (1991). British commentators continue to refer to the Panel as a "self-regulatory" body.

159. *See generally*, Robert R. Pennington, *Takeover Bids in the United Kingdom*, 17 AM. J. COMP. L. 159 (1969); D. Prentice, *Take-Over Bids - The City Code on Take-Over and Mergers*, 18 MCGILL L. J. 385 (1972); B.J. Davies, *An Affair of the City: A Case Study in the Regulation of Take-Overs and Mergers*, 36 MOD. L. REV. 457 (1973).

160. The term "judicial review" in English law refers to the review by the courts of quasi-judicial decisions of public authorities. An Application for Judicial Review is made under Order 53 of the Rules of the Supreme Court. On judicial review, see generally, Lord Alexander of Weedon, *Judicial Review and City Regulators*, 52 MOD. L. REV. 640 (1989); LAW COMMISSION, ADMINISTRATIVE LAW: JUDICIAL REVIEW AND STATUTORY APPEALS, Consultative Paper No. 126, (1993); A. P. Le Sueur & Maurice Sunkin, *Applications for Judicial Review: The Requirement of Leave*, 1992 PUB. L. 102; Rt. Hon. Sir Harry Woolf, *Judicial Review: A Possible Programme for Reform*, 1992 PUB. L. 221.

161. *See Datafin*; *Cf.* R. v. Panel on Takeovers and Mergers, ex parte Guinness [1989] 2 W.L.R. 863; *see also* Sir Harry Woolf, *Judicial Review in the Commercial Arena*, 8 COM. L. 167 (1987); Lord Alexander of Weedon, *Takeovers: The Regulatory Scene*, 1990 J. BUS. L. 203, 212-15; Jeffrey Jowell, *The Takeover Panel: Autonomy, Flexibility and Legality*, 1991 PUB. L. 149; Roberta Karmel, *supra* note 158, at 89 (describing the Panel as a "semi-public body," and citing *Datafin*).

162. *See* R. v. Securities And Futures Authority Ex Parte Bernard Panton, C.A. 20.6.94, (dealing with "self-regulatory organizations" under the Financial Services Act, 1986) ("these

community which was a small homogenous community which could regulate itself, the Government decided to build on existing institutions and customs when it became more involved in the control of the financial community.[163] The Master of the Rolls also pointed out that the Take-Over Code and the Take-Over Panel's rulings applied to everyone involved in take-overs and mergers in the United Kingdom, whether or not they were members of the associations represented on the Panel.[164] The Take-Over Panel is a non-governmental body in the sense that it does not derive its powers from statute, but it is a significant element of the regulatory structure for the control of financial activity in Britain. Courts have described the Take-Over Code as being similar to legislation.[165]

The Take-Over Panel is not, of course, the only corporate/financial regulatory body in the United Kingdom which combines public and private aspects in a way which looks strange to American lawyers.[166] The Stock Exchange's rules were originally like the rules of a club, but the Stock Exchange is now the competent authority designated under the Financial Services Act[167] as required by EC directives as the body which regulates the listing of securities in the United Kingdom.[168] The Bank

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bodies are amenable to judicial review but are, in anything other than very clear circumstances, to be left to get on with it").

163. The Governor of the Bank of England was involved in the negotiations and plans that led to the establishment and reinforcement of the Take-Over Panel as a regulatory body in the United Kingdom *See, e.g.*, Barry Alexander K. Rider, *Self-Regulation: The British Approach to Policing Conduct in the Securities Business, With Particular Reference to the Role of the City Panel on Take-Overs and Mergers in the Regulation of Insider Trading*, 1 J. COMP. CORP. L. & SEC. REG. 319, 320-21 (1978).

164. *Datafin*, at 836:

> Its jurisdiction extends throughout the United Kingdom. Its code and rulings apply equally to all who wish to make take-over bids or promote mergers, whether or not they are members of bodies represented on the panel. Its lack of a direct statutory base is a complete anomaly, judged by the experience of other comparable markets world-wide. The explanation is that it is an historical 'happenstance,' to borrow a happy term from across the Atlantic. Prior to the years leading up to 'Big Bang,' the City of London prided itself upon being a village community, albeit of an unique kind, which could regulate itself by pressure of professional opinion. As government increasingly accepted the necessity for intervention to prevent fraud, it built on City institutions and mores, supplementing and reinforcing them as appeared necessary.

165. *Cf.* R. v. Spens [1991] 4 A11 E.R. 421, 428 "[T]he code sufficiently resembles legislation as to be. . .regarded as demanding construction of its provisions by a judge."

166. *See, e.g.*, Black & Coffee, *supra* note 19, at 2028 ("A further source of nongovernmental regulation is the London Stock Exchange's listing rules and guidelines for listed companies. The rules are binding on all listed companies"); *cf. id.* at 2054 (referring to "laws and stock exchange rules").

167. *See* Financial Services Act, 1986, ch.60.

168. The directives were implemented in the United Kingdom by THE STOCK EXCHANGE (LISTING) REGULATIONS S.I. 716 (1984) later replaced by Financial Services Act, 1986, ch.60 Part

of England is another entity which has a strange status. It is neither an arm of the Treasury nor an independent central bank and has regularly been used as an instrument of government policy in the context of financial matters.[169] The Bank of England was until last year responsible for the regulation of banks in the United Kingdom, but the way in which it exercised its control of banking activity changed over time, so that by the beginning of the 1990s it would take legal advice about its regulatory activity.[170] This is part of a larger picture. For a long time, the regulation of financial and securities activity in Britain was informal, but this has not been true now for some years. One commentator writes that "one set of trends is now so firmly established as to be virtually irreversible: it consists in the growth of institutional complexity, legal controls, political intervention and public scrutiny."[171] Last year, the Bank of England's authority to regulate banks in the United Kingdom, was transferred to the Financial Services Authority ("FSA")[172], which will regulate all financial institutions in the United Kingdom, under a statutory scheme which is currently in transition.[173]

IV. *See* Council Directive co-ordinating the conditions for the admission of securities to official stock exchange listing 1979 O.J. (L 66) 21; the Council Directive co-ordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing 1980 O.J. (L100)1, as amended by Directive 1987 O.J. (L. 185)81 and directive 1994 O.J. (L 135)1 and the Council Directive on information to be published on a regular basis by companies the shares of which have been admitted to official stock exchange listing 1982 O.J. (L 48)26. *See, e.g.*, L.C.B. Gower, *Big Bang and City Regulation*, 51 MOD. L. REV. 1, 9 (1988) ("The Stock Exchange was about to be recognised as the 'competent authority' for the purposes of those directives, thus completing its transformation from a private club to a public body. . .").

Contrast the description of Professors Black and Coffee who write, "[a] further source of nongovernmental regulation is the London Stock Exchange's listing rules and guidelines for listed companies. The rules are binding on all listed companies." *See* Black & Coffee, *supra* note 19, at 2028.

169. *See* ADRIAN HAM, TREASURY RULES 33, 35 (1981) (describing the "close" and "cosy" relationship between the Bank of England and the Treasury). On the status of the Bank of England, see, e.g., Alan C. Page, *Self-Regulation: The Constitutional Dimension*, 49 MOD. L. REV. 141, 160-63 (1986); Cosmo Graham, *The Bank of England, The City and the Reform of the Stock Exchange: Continuing the Self-Regulatory Community?*, 36 N. IRELAND LEGAL Q. 122, 127-31 (1985). The Bank of England was given statutory powers to regulate banking business in 1979, and the Banking Act of 1979 was replaced by the Banking Act, 1987, ch. 22.

170. *See, e.g.*, Brian Quinn, *The Influence of the Banking Acts (1979 and 1987) on the Bank of England's Traditional Style of Banking Supervision*, *in* BANK REGULATION AND SUPERVISION IN THE 1990s 2-4 (Joseph J. Norton ed., 1991); *cf.* Norman Lewis and Paul Wiles, *The Post-Corporatist State?* 11 J. L. & SOC'Y 65, 77 (1984).

171. Michael Moran, *Thatcherism and Financial Regulation*, 59 POL. Q. 20, 27 (1988).

172. *See* Bank of England Act, 1998, ch.11. The FSA is an organisation that was originally named the Securities and Investments Board ("SIB") until October 28, 1997. *See also* Howard Davies, speech at the Financial Services Authority Launch Conference, (Oct. 28, 1997), *available online from, The Financial Services Authority Website* (visited Mar. 10, 1995) <http://www.sib.co.uk/speech/speech.htm>. http://www.sib.co.uk/dcs/join.htm

173. *See* Chancellor Gordon Brown, Statement to the House of Commons on the Bank of

An English lawyer looking at the federal securities laws is tempted to describe the stock exchanges as regulatory bodies, because they look very like the SROs empowered in Britain under the Financial Services Act, 1986.[174] American administrative lawyers might cringe at such a description.[175] British and American lawyers have different views of the distinction between what is public and what is private, a distinction which reflects the different constitutional structures in the two countries.[176]

England (May 20, 1997) HM TREASURY NEWS RELEASE 49/97, *available online at HM-Treasury* (visited Dec.20, 1998) <http://www.hm-treasury.gov.uk/pub/html/press97/p49_97.html>.

174. *See* Financial Services Act, 1986, ch. 60.

175. *Cf.* Michael Moran, *Theories of Regulation and Changes in Regulation: The Case of Financial Markets*, 34 POL. STUD. 185, 200 (1986) ("It is widely recognized that there is a much larger element of 'self-regulation' in the American system than the bare formality of the law would suggest"). To suggest that self-regulatory organisations are truly regulators implies to an American administrative lawyer a potential problem with the non-delegation doctrine. *Cf.* Carter v. Carter Coal, 298 U.S. 238 (1936).

See Schemmer v. Property Resources Ltd. [1975] Ch. 273, 288 (Eng.) (Goulding J.'s holding of the Securities Exchange Act of 1934 (to be a foreign penal law which English courts would not enforce). Goulding J. stated that the Securities Exchange Act of 1934:

> [w]as passed for public ends and that its purpose is to prevent and punish specified acts and omissions which it declares to be unlawful. It was, of course, enacted not merely in the interest of the nation as an abstract or political entity, but to protect a class of the public. In that it resembles the greater part of the criminal law of any country. Like many other penal laws, the Act of 1934 also provides in some cases a private remedy available to the victims of the offences which it forbids, and it may possibly be that a private plaintiff who recovers a judgment in a federal court under the Act of 1934 can enforce it by action here.

Those involved in securities exchanges in the United States might see their role differently, as operators and regulators of their markets, subject to the supervision of the SEC. *See also* R. Warren Langley, *SEC's Concept Release on the Regulation of Exchanges*, Oct. 20, 1997 ("The operation of markets and the regulation of markets and their participants are not the same thing and need not be done by the same persons. Traditional exchanges combine these functions because of history and a statutory scheme that was designed to control a historical phenomenon") <http://www.sec.gov/rules/concept/s71697/langley1.htm>.

176. *See, e.g.*, J. Dennis Hynes, *The Revised Uniform Partnership Act: Some Comments on the Latest Draft of RUPA*, 19 FLA. ST. U. L. REV. 727, 746 (1992). In discussing the decision in *Holman v. Coie*, 522 P.2d 515, 517 (Wash. Ct. App.), *rev. denied*, 84 Wash. 2d 1011 (1974), *cert. denied*, 420 U.S. 984 (1975), the author says:

> The argument apparently was based largely on an article in an English journal where the author argued that: '[T]he rules of natural justice are an essential legal prerequisite in the determination of [an expulsion]. This is so because partners in this circumstance are acting as a 'tribunal . . . invested with authority to adjudicate upon matters involving civil consequences to individuals.' The article concludes that a partner is entitled to notice, a hearing, and reasons before expulsion. This argument was rejected by the court on the reasoning that the actions of the partners were within the contemplation of their agreement. Haynes comments that: "[T]he author of the quoted article seems to be confusing state action against individuals and private action pursuant to private agreements.

Hynes, *supra* at 746, n.85.

The article referred to is B. Davies, *Good Faith Principle and the Expulsion Clause in Partnership Law*, 33 CONVEYANCER & PROP. L. 32 (1969).

It is even more difficult to understand the dynamics of a foreign legal system than its statics. Again, to Americans, the British approach to crises in corporate governance or regulation of financial institutions appears to be different from that in the United States. Professors Black and Coffee contrasted the approaches by saying that in the United States, the response to crisis is to pass a new law or regulation, whereas: "The British respond with a blue-ribbon committee that recommends changes in current practice. These recommendations are usually mild, by the nature of the committee process."[177] The authors go on to suggest that the recommendations of such a committee would often be ignored in the United States, whereas in Britain they are often followed, whether the recommendations are for changes in practice or for changes in the rules.[178] This analysis fails to reflect significant differences between Britain and the United States in the legislative process, in the political calculus, and in the mechanisms used to carry out this calculus.[179] Sometimes the solution to a problem in Britain looks very much like Black and Coffee's description of the usual U.S. solution.[180] The authors themselves refer to the British rules for disclosure of interests in shares, and they tell us that these rules were "modestly strengthened in response to the takeover wave of the 1980s."[181] But the authors do not explain that this strengthening of the rules was a lowering of the percent-

177. Black & Coffee, *supra* note 19, at 2023. On Cadbury, see generally, Vanessa Finch, *Board Performance and Cadbury on Corporate Governance*, 1992 J. BUS. L. 581. *Cf.* Michael Power, *Auditing and the Politics of Regulatory Control in the UK Financial Services Sector*, *in* CORPORATE CONTROL AND ACCOUNTABILITY, 191 (McCahery, et al eds. 1993) ("large-scale fraud supplies an exogenous jolt to regulatory regimes which invariably react by generating new institutional structures").

178. Black & Coffee, *supra* note 19, at 2023. "[I]f a high-level British committee recommends legal change, some legal change is likely; if it recommends change in private practice, some change will predictably occur." Note that the authors do not say that the legal change recommended by the committee will occur, but that *some* change is likely. Additionally, they do not say that a change in practice recommended by the committee will occur, but that *some* change will *predictably* occur. One wonders how meaningful this statement is as an appraisal of the effectiveness of what the authors portray as the British approach to corporate governance and the regulation of financial institutions. It is worth noting that the threat of legislative intervention is often used in Britain to encourage people to behave properly.

179. See, e.g., Albert Gray, *Notes on the State Legislation of America in 1896*, 2 J. SOC. COMP. LEGIS. 325, 332 (1897)(role of lobbysts in America). *See generally* ATIYAH AND SUMMERS, *supra* note 33, at 298-335 (discussing statutes and statute-making in the United States and Brittian).

180. *Cf.* David T. Llewellyn, *Reflections on Recent UK Experience of Financial Regulation*, 8 BUTTERWORTHS J. INT'L. BANKING & FIN. L. 375, 377 (1993) ("[T]he 1979 Banking Act was a response to the secondary banking crisis in the early 1970s; the 1979 Banking Act followed the Johnson Matthey failure, the Financial Services Act, *supra* note 43, was a response to a series of scandals, and we can expect a new Banking Act after the BCCI failure"). The Auditors (Financial Services Act, 1986) Rules 1994 (S.I. 1994 No. 526) are also a legislative response to scandal. The rules require auditors to give information to regulators in certain circumstances.

181. Black & Coffee, *supra* note 19, at 2024. These rules were amended by the Companies Act, 1989, ch. 40 as a result of the scandals arising out of Guinness' take-over of Distillers in

age level of interest in a company required to be disclosed. The problem to which this change purported to be addressed was not a problem of the level at which disclosure was required (adverse consequences suffered because the level was set too high) but was a problem of non-compliance with existing rules. The purported "solution" was not responsive to the problem.

In recent years, "American-style" lobbying has become a more significant element in the development of legislation in Britain (and also in the EC/EU) than it used to be, and more and more legislative and rule-making proposals are opened up for general consultation. But the setting up of committees and commissions of the great and the good has for some time been an important element of the evaluation of perceived problems and proposed policies in Britain. This approach has been used a number of times in relation to corporate governance[182] and financial regulation[183] in the last century, as well as in relation to crises in other areas, such as the criminal justice system.[184] In 1994, in a change of approach to issues of company law reform, the then Government invited the Law Commission to look at problems in the enforcement of shareholders' rights as part of its review of directors' duties and directors' remuneration, and to suggest legislative reforms to deal with this problem.[185] The current Government announced a major review of company law in 1998.[186]

1986. This take-over involved breaches of the Take-Over Code and led to civil and criminal actions. *See generally* Guinness v. Saunders, [1990] 2AG 663; R. v. Seelig [1991] 4 All E.R. 429.

182. *See generally* THE COHEN COMMITTEE REPORT, *supra* note 96; THE COMPANY LAW COMMITTEE (THE "JENKINS COMMITTEE:) REPORT OF THE COMPANY LAW COMMITTEE, HMSO, 1962, Cmnd. 1749.

183. *See generally* JAMES GOWER, REVIEW OF INVESTOR PROTECTION: A DISCUSSION DOCUMENT, HMSO (1982); JAMES GOWER, REVIEW OF INVESTOR PROTECTION. REPORT: PART 1., Cmnd. 9125 (1984); FIN. SERVICES IN THE U.K.: A NEW FRAMEWORK FOR INVESTOR PROTECTION, Cmnd. 9432 (1985). (In the 1980s, James Gower was appointed to review Investor Protection in the United Kingdom, and his Review led to the enactment of the Financial Services Act, 1986, and a complex regulatory scheme under that Act.) *See also* L.C.B. Gower, *Big Bang and City Regulation*, 51 MOD. L. REV. 1 (1988).

184. *See, e.g.*, REPORT OF THE ROYAL COMMISSION ON CRIM. JUST., HMSO, Cmnd. 2263 (1993).

185. *See* UK GOVERNMENT PRESS RELEASE, ENFORCEMENT OF SHAREHOLDERS' RIGHTS TO BE REVIEWED, 22.12.94. *See also* Law Commission, SHAREHOLDER REMEDIES, Consultation Paper No. 42, (Oct. 1996) *available online* <http://www.open.gov.uk/lawcomm/library/lccp142> Law Commission, SHAREHOLDER REMEDIES Report No. 246, (Oct. 24, 1997), *available online* <http://www.open.gov.uk/lawcomm/library/lc246> Dept. of Trade and Industry, SHAREHOLDER REMEDIES: A CONSULTATIVE DOCUMENT (Nov. 1998).

186. *See* Department of Trade and Industry, MODERN COMPANY LAW FOR A COMPETITIVE ECONOMY, (June 1998), *available online* <http://www.dti.gov.uk>.

C. *Understanding the Cultural Context of the Rules*

Legal rules and the institutions of a society grow out of that society's culture:[187] a society's legal culture is part of its general culture.[188] Understanding the culture within which legal rules operate is probably the hardest part of understanding a foreign legal system.[189] Indeed, this is probably the hardest part of understanding one's own legal system. Legal rules are not the only determinants of human action, or even, often, very important in determining how people act.[190] It is tempting to think that the result of the internationalisation of business is that business people in Britain and the United States will react to legal rules in similar ways,[191] or that the increasingly transnational nature of much legal and accountancy practice will increase homogenisation of approaches to corporate law, or that the regulatory cultures in the different countries will become increasingly similar. To some extent this is true.[192] But there is limited empirical evidence for this convergence.[193] Indeed it is likely that different cultures retain their own and different understandings and operationalisations of harmonised legal processes and practices.[194]

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187. *See e.g.*, Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L. L. 65, 72-74 (1996) (relationship between law and culture).

188. *See, e.g.*, James L. Gibson & Gregory A. Caldeira, *The Legal Cultures of Europe*, 30 L. & SOC'Y REV 55 (1996)(examining legal cultures in different european countries). The authors distinguish between legal consciousness (specific attitudes to legal matters), legal cultural values (more general attitudes relating to law), and general cultural values. *Id. at* 59.

189. *See, e.g.*, David L. Althiede & John M. Johnson, *Tacit Knowledge: The Boundaries of Experience*, 13 STUD. SYMBOLIC INTERACTION 51, 52 (1992) ("Social scientists share with societal members. .tacit knowledge, those aspects of *commonsense* that provide the deep rules and deep substantive or cultural background critical for understanding any specific utterance or act").

190. *See, e.g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991); BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE, 124-248 (1995); (for a recognition that social objectives are not always achieved by legislation) Angela Glasner, *Gender and Europe: Cultural and Structural Impediments to Change, in* SOCIAL EUROPE 97 (Joe Bailey ed., 1992).

191. *See e.g.*, ROBERT JACKALL, MORAL MAZES 11 (1988). ("By the time American corporations began to bureaucratize, they instituted as a matter of course many of the features of personal loyalty, favoritism, informality and nonlegality that marked crucial aspects of the American historical experience").

192. *See generally* Yves Dézalay, *Professional Competition and the Social Construction of Transnational Regulatory Expertise, in* CORPORATE CONTROL AND ACCOUNTABILITY 203 (Joseph McCahery et al. eds., 1993). On convergence of the U.S. and U.K. regulatory systems see generally, Michael Moran, *Theories of Regulation and Changes in Regulation: The Case of Financial Markets*, 34 POL. STUD. 185 (1986).

193. *See, e.g.*, Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L. L. 65, 77-78 (1996) (advocating more research on the transnational legal community. "It would be good to know more about the huge American law firms that have branches in foreign countries. How do they structure and shape the way business is done, the way contracts are drafted, the way disputes are settled in international markets?"). *Id*. at 78.

194. *See, e.g.*, Rosemary J. Coombe, *The Cultural Life of Things: Anthropological Approaches to Law and Society in Conditions of Globalization*, 10 AM. U. J. INT'L L. & POL'Y 791, 797

There are still significant differences between Britain and the United States, and these differences affect the development of corporate law and policy and the way in which businesses are run.[195] The rhetoric of entrepreneurship is probably more powerful in the United States than in Britain, and the American attitude to disclosure is more extreme than that in Britain.[196] The societies have different attitudes about the appropriateness of litigation as a mechanism for resolving disputes.[197] These attitudes are reflected in comments of judges,[198] the Government,[199] academic writers, and journalists.

Britain is still a much more homogenous culture than that of the United States,[200] and there are greater remnants of "a common culture of the governing class."[201] This common culture may be absorbed even by

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(1995) (argument based on the premise that "the 'global' can only be understood locally and culturally").

195. *See, e.g.*, HUTTON, *supra* note 47, at 111:

> " firms do not emerge perfectly formed from the body of capitalism. Their legal structures and their aims necessarily reflect and reinforce a business culture and institutional structure and these in turn relate to the wider culture of the political and economic élite. The firm is not only at the heart of the economy; it is at the heart of society. It is where people work and define their lives; it delivers wages, occupation and status. It is corporate citizen, economic actor and social institution".

196. *See* HUTTON, *supra* note 47, at 261, (contrasting the demanding standards of transparency and provision of information to shareholders and the public in the United States with the situation in Britain).

197. *See, e.g.*, Oscar G. Chase, *Legal Processes and National Culture*, 5 CARDOZO J. INT'L & COMP. L. 1 (1997)(discussing culture and dispute resolution processes).

198. *See Re A Company* No. 007623 of 1984 [1986] 2 BCC 99,191 at 99,196; "[t]he very width of the jurisdiction means that unless carefully controlled it can become a means of oppression." "It is important that the legitimate and proper workings of business and the investment of capital should not be inhibited by for example unfounded threats of action under section 459." *Re BSB Holdings Ltd* [1996] 1 B.C.L.C. 155.

199. *See, e.g.*, DEPARTMENT OF TRADE AND INDUSTRY, *supra* note 49, at ¶ 11 ("The Government's main concern regarding the current proposal is the effect which the existence of a Directive would have on this non-statutory regime, in particular the consequent possibility of increased tactical or nuisance litigation").

200. ELLICKSON, *supra* note 190, at 251. (Ellickson has argued that homogenous societies need to resort to law less than do more diverse societies:

> "Groups with large or transitory memberships are usually not close-knit and cannot rely so much on informal social control. As a result, resort to the legal system tends to be tolerated more in industrialized than in preindustrial cultures, and more in large cities than in small towns. Law also plays a lesser role in Japan's relatively homogenous society than it does in the United States.
> (footnotes omitted)).

201. Martin Loughlin, *The Limits of Legal Instrumentalism - Part II*, 1991 PUB. L. 568, 598:

> The British constitution, founded on the methods of club government, is disintegrating. That the informal authority structure, rooted in a common culture of the governing class, survived for as long as it did into the twentieth century is due in part to the fact that it has been able to harness professional structures and networks to its purposes.

Cf. HUTTON, *supra* note 47, at 27-28 (discussing the impact of Lady Thatcher on the estab-

those who are not born into it, if they attend the right schools and universities, or even through working in certain environments.[202]

The governing class which determines company and financial law and policy in Britain includes politicians, members of the judiciary, civil servants, and regulators outside the civil service. It also includes those who can influence these groups, such as partners in large law and accountancy firms, successful businessmen, and some academics. These groups comprise people with very similar educational backgrounds.[203] One commentator has argued that these groups espouse the value system of "gentlemanly capitalism," and that this espousal has harmed the British economy.[204] There is some evidence that directors of large companies in the United Kingdom tend to be alumni of elite private rather than state schools.[205]

In 1977 John Griffith challenged the conventional wisdom that

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lishment in Britain): "Although her admirers like to believe that she launched an assault on the old establishment, this radical exponent of the New Right left the old Tory network of the military, public schools, the law, the City and the landed interest immeasurably stronger").

202. *See generally* RALPH NADER & WESLEY J. SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA (1996) (professional socialisation); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988).

203. *See, e.g.*, W.K. Purdue, *Old School Ties*, THE ECONOMIST, Nov. 6, 1982, at 6 (Eng.) The author refers to:

> a lecture at the Institute of Personnel Management annual conference in 1980 by Professor Eric Newbigging of the Central London Polytechnic. Professor Newbigging said that only 4% of our population attends public schools but that 73% of directors of industrial corporations, 80% of directors of financial firms and 60% of permanent secretaries in the civil service come from public schools, some with an Oxbridge leavening. An examination of the backgrounds of the 150 directors of the 10 main insurance companies shows that more than one third went to one school, Eton; more than half were Oxbridge; they shared, between them, some 1,543 other directorships. Since some 30 insurance companies control between them four fifths of Britain's £40 billion of insurance funds, it is fair to say that there is quite an Oxbridge 'old school tie' influence in the generators of our investment policies.

204. *See* HUTTON, *supra* note 47, at 21-22 ("What binds together the British financial and corporate system is a particular value system - 'gentlemanly capitalism' - that places particularly high social status on the less risky, invisible sources of income generated in trading and financial activity rather than production").

205. *See, e.g.*, Stephen Hill, *Britain: The Dominant Ideology Thesis after a Decade*, *in* DOMINANT IDEOLOGIES 1, 16 (Nicholas Abercrombie et al. eds., 1990):

> Meritocracy is undoubtedly a major component of these directors' beliefs. I asked them if they had any views about the proportionately large numbers of top businessmen who had been educated outside the state system in 'public' schools. Most expressed surprise that I should have this impression, since they themselves were not aware that this was the case (in fact, half the people I interviewed had been to public schools). While they believed that I might know things that they did not as the result of my travels around British board rooms, they also thought they saw a hidden agenda in my question, namely that I was referring to the role of the old-boy network and to the power of members of the establishment to advance the careers of their offspring. These assumptions were universally contested as explanations of what happened inside industry - although some people said acerbically that they did

British judges were neutral interpreters and appliers of the law, arguing that they were in fact influenced by political pressures.[206] Professor Griffith suggested that the relatively small number of judicial policy-makers in Britain had very homogenous views.[207] He stated that "judges are a product of a class and have the characteristics of that class. Typically coming from middle-class professional families, independent schools, Oxford or Cambridge, they spend 20 to 25 years in successful practice at the bar, mostly in London, earning very considerable incomes by the time they reach their forties. This is not the stuff of which reformers are made, still less radicals."[208] He went on to argue that even if judges with different family and educational backgrounds were appointed this would not tend to affect their views: "The years in practice and the middle-aged affluence would remove any aberration in political outlook, if this were necessary. Also, if these changes did not take place, there would be no possibility of their being appointed by the Lord Chancellor, on the advice of the most senior judiciary, to the bench. Ability by itself is not enough. Unorthodoxy in political opinion is a certain disqualification for appointment."[209] John Griffith was arguing that even though the British system for the appointment of judges was not overtly political (in contrast to the system in the United States), the system only allowed for people who had managed to adapt to a very particular environment for a number of years, and that the people who fit in that environment tended not to share progressive views. There have been some notable exceptions in the past, such as Lord Denning, perhaps the English judge best known to American law students. In the years since 1979, the judiciary has begun to seem more progressive, partly in contrast to the governments in power during that period.[210] The judiciary also seems more progressive as a result of the actions of an unorthodox Lord Chancellor, Lord Mackay of Clashfern, who, although a Conservative appointee, made some unconventional judicial appointments, including appointing a former Marxist to be a high court

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fit the merchant banks and other parts of the City - and the primacy of individual merit was continually emphasized.

206. J.A.G. GRIFFITH, THE POLITICS OF THE JUDICIARY (1977).

207. *See id.* at 193. The number of truly effective policy makers in the Divisional Court, the Court of Appeal and the House of Lords was fewer than thirty. Professor Griffith stated that these judges have by their education and training and the pursuit of their profession as barristers, acquired a strikingly homogenous collection of attitudes, beliefs and principles, which to them represents the public interest." *Id.*

208. *Id.* at 208.

209. *Id.* at 209.

210. *See, e.g.*, R. v Gloucestershire C.C. ex. p. Barry [1997] A.C. 584, [1997] 2 W.L.R. 459 (H.L.) (Lord Lloyd of Berwick criticizing the government for failing to ensure that a local authority had enough resources to carry out its statutory duty).

judge.[211] In general, however, Griffiths' comments about the backgrounds and socialisation of most high court judges remain accurate.

The City of London was for a long time controlled through this common culture of the governing class, regulated through unwritten and informal rules rather than formally through legislation. People still talk about the Governor of the Bank of England controlling participants in the financial markets by raising his eyebrows. This control mechanism meant that people who were regarded as part of the City were protected, and outsiders were not. The Bank of England is part of the City of London, the largest British financial centre, in a way that other central banks and bank regulators are not. As one commentator has written: "the Bank of England is located symbolically in the heart of London's financial district. It is within a short walk of all the key financial institutions - something vitally important to the way it views itself and conducts its business."[212] When the Bank of England rescued Barings in 1890, part of the explanation for the rescue seems to be that Barings was an insider in the City of London.[213] The common culture may have broken down to some extent, and the collapse of Barings in 1995 may provide an apt illustration. The Bank of England was unable to put together a rescue package for Barings when trading in derivatives exposed the bank to catastrophic losses.[214] The position of the Bank of England is, however,

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211. *See The Subversive Scot*, THE ECONOMIST, Aug. 10, 1996, at 41. (Lord Mackay was Lord Chancellor from 1987 to 1997. After the victory of New Labour in the British parliamentary elections in May 1997 Lord Irvine of Lairg became the Lord Chancellor).

212. HUTTON, *supra* note 47, at 144. Hutton contrasts the situation of the bank of England with that of the Federal Reserve Bank in the United States. The Federal Reserve Bank is in Washington, whereas the main center of financial activity in the United States is in New York. Hutton goes on to examine the composition of the Bank of England's governing body (the Court) and shows that, at the time he was writing, of eighteen directors six were bank officials, six were from City institutions, and six were industrialists. *See id.* at 144-45.

213. *See, e.g.*, 1 DAVID KYNASTON, THE CITY OF LONDON 422-37 (1994). Kynaston writes that, "[a]s never before, the leading houses of the City had come together in conscious, collective action to rescue one of their own. . .Barings, supremely, was the establishment's - political, social, financial - inside house. . ." *Id.* at 436. For a reference to a report of one of the Guinness cases, see Guiness v. Saunders [1990] 2 A.C. 663; [1990] 2 W.L.R. 324 (H.L).

214. *See, e.g.*, John Gapper and James Blitz, *Last-ditch Rescue Plan Sought for Barings*, FIN. TIMES, Feb. 27, 1995, at 1; John Gapper and David Wighton, *Barings Chief Hints at Conspiracy*, FIN. TIMES, Feb. 28, 1995, at 1.

The Bank of England has rescued troubled banks on a number of occasions in the past. During the secondary banking crisis in 1973-76, the Bank of England organized a lifeboat operation. *See, e.g.*, Joseph J. Norton, *The Bank of England's Lament: The Struggle to Maintain the Traditional Supervisory Practices of "Moral Suasion"*, *in* BANK REGULATION AND SUPERVISION IN THE 1990S 11-14 (Joseph J. Norton ed., 1991). The Bank of England also mounted a rescue operation for Johnson Matthey. *See id.* at 25; *see also* Alan C. Page, *Self-Regulation: The Constitutional Dimension*, 49 MOD. L. REV. 141, 161 (1986); A.C. PAGE AND R.B. FERGUSON, INVESTOR PROTECTION, 124-25 (1992). The Bank has sometimes intervened to support banking institutions without disclosing this intervention, in order to preserve confidence in the banking system. *See id.* at 70. (The Bank of England and the U.K. Government have been

in the process of changing. It now has the authority to fix interest rates[215] and, as noted above, the "New Labour" government of Tony Blair has decided to transfer responsibility for all financial regulation in Britain to the FSA.[216]

Of course, in the United States there is also a governing class, and private schools are significant in the development of this governing class.[217] However, the American governing class may be different from governing classes in other countries:

> The American upper class of today is not like that of yesterday. Nor is the American upper class like that of any other country, for it alone grew up within a middle-class framework of representative government and egalitarian ideology, unhampered by feudal lords, kings, priests, or mercenary armies. Only the American upper class is made up exclusively of the descendants of successful businessmen and corporation lawyers - whatever their pretensions, few families are "old" enough or rich enough to forget this overriding fact.[218]

The acquisition of a law degree, particularly from an élite institution, is often regarded as a passport to power in the United States in a way that it is not in Britain.[219] In Britain, many senior managers have accounting backgrounds.[220] Significant numbers of members of Congress, state governors, and mayors of major cities in the United States are lawyers.[221]

Attitudes shared by members of a society may be significant for the way in which corporate and financial activity is carried on and protected

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concerned to maintain the stability of the U.K. financial system, and have seen bank rescues as part of this maintenance).

215. *See* Statement from the Chancellor (May 6, 1997) *available online HM-Treasury* (visited Dec. 20, 1998) at <http://www.hm-treasury.gov.uk/pub/html/chxstatmt/st70506.html>. (This authority was previously exercised by the Chancellor of the Exchequer). *See also*, The Bank of England Act, 1998, ch.11.

216. *See supra* note 171 and accompanying text.

217. *See, e.g.*, G. WILLIAM DOMHOFF, WHO RULES AMERICA 16 (1967).

218. *Id.* at 12.

219. *See* Trubek, et al., *supra* note 20, at 424:

> The corporate lawyers, who form the elite of the American legal field, are recruited from the most prestigious law schools. American law schools serve as the gateway to the profession, and help construct its hierarchies. While social class and symbolic capital play a role in recruitment to the upper reaches of the legal profession in the U.S. as in Europe, meritocratic criteria and academic performance in law school are much more important in the Cravathist mode of production of law than in the old European system.

220. *See, e.g.*, ROBIN ROSLENDER, SOC. PERSP. ON MODERN ACCT. 39 (1992).

221. Linda R. Hirshman, *Nobody in Here But Us Chickens: Legal Education and the Virtues of the Ruler*, 45 STAN. L. REV. 1905, 1907-8 (1993).

or controlled.[222] A society which thinks that it is important to encourage entrepreneurship is likely to adopt legal rules and institutional structures to help entrepreneurs.[223] But that society's attitudes will not only be reflected in legal rules and institutional structures which an outsider can discover and examine with relative ease. Members of a society which values entrepreneurship are likely to act to promote it: banks in such a society may implement policies to encourage new ventures; judges and administrators who apply and interpret legal rules may try to do so in a way which helps (or does not hinder) entrepreneurs. A society's attitudes to the morality of wealth accumulation or speculation may not be reflected in the written legal rules which have been adopted by that society, but may well be reflected in the way in which those rules are applied and interpreted by actors in that society's legal, economic and political systems.[224] Members of other societies with different histories may have quite different attitudes to the same issues.

The downside of British respect for tradition is that Britons tend to accept things as they are. The downside of the American openness to change is a lack of stability. These differences are reflected in various ways. Attitudes of consumers in the different countries are different: British consumers are mostly price takers, and Syms' educated customer would be almost lost in Britain. Supermarkets in Britain mark up prices much more dramatically than comparable stores in the United States.

In recent years newspapers in the United States and the United

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222. James Bryce, *The Influence of National Character and Historical Environment on the Development of the Common Law*, 24 L. Q. REV. 9, 14 (1908):

> One may perhaps say that the mind and character of a nation are more exactly and more adequately expressed in and through its law and its institutions than they are even through its literature and its art. Books and paintings are the work of individual men, many of whom have been greatly influenced by foreign ideas or foreign models, and some of these may have been powerful enough to influence their successors, but may not have been typical representatives of the national genius. But laws and customs are the work of a nation as a whole. They are indeed held binding and put in force by the ruling class, and they are shaped in their details by the professional class, but they are created by other classes also, because the rules which govern the ordinary citizens must be such as are fit to express the wishes of the ordinary citizen, being in harmony with his feelings, and adapted to the needs of his daily life.

223. *See* LESLIE HANNAH, THE RISE OF THE CORPORATE ECONOMY 35 (2d ed. 1983) ("Economic systems are organized by different societies not only in response to an objective assessment of the relative costs of alternative methods of satisfying given wants, but also on ideal grounds - that is, according to whether a particular economic system will produce as well as satisfy wants which are considered socially desirable in themselves.").

224. Robert Rice, *Business and the Law: Towards a Rescue Culture - The Debate Over Insolvency Law in the U.K.*, FINANCIAL TIMES, Oct. 5, 1993, at 16. ("In the U.K., bankruptcy is still very much a moral issue, according to Mr. Michael Crystal QC, a leading commercial silk. The Victorian concept that a director responsible for getting a company into difficulty is not a fit and proper person to continue to manage it is reflected in the 1986 legislation").

Kingdom have focused on very high levels of executive remuneration, often in companies which have engaged in downsizing or have reduced the remuneration of employees in general. Often the source of these very high levels of executive remuneration has been stock options granted to the executives with exercise prices set at a low level in comparison to market price. In both countries this phenomenon has attracted criticism, so it is tempting to see some hostility to very high levels of executive remuneration as a shared Anglo-American cultural attitude. In both countries the problem has been "fixed" by reference to disclosure,[225] and to the introduction of remuneration committees of the Board comprising independent directors. But there are some differences: in the United States these fixes have been implemented through law; in Britain exhortation.[226] Moreover, the contexts are different: the most heartfelt complaints about executive remuneration in Britain have focused on the remuneration of executives of privatised utilities.[227] Many commentators have challenged the purported justification for high levels of remuneration (they are receiving only the market level of remuneration for executives of companies of this size) by arguing that executives of the privatised utilities who worked for the companies in question before privatisation have never been subject to the competition of the marketplace. Others seem to be influenced by the idea that high salaries are really just immoral.

The status and significance of professionals in a society, and the extent of their adherence to professional ethics may also be relevant to our understanding of the cultural context within which rules operate. For example, accountants benefit from a higher status in British society than they do in the United States, and they are involved in a wider range of activities than are accountants in the United States. This raises another set of issues. If lawyers raised in different legal systems have different

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225. *See, e.g.*, Streamlining and Consolidation of Executive and Director Compensation Disclosure, Exchange Act Release No. 33, 7184, [1995-1996 Transfer Binder] Fed.L.Rep. (CCH) (1995).

226. *See, e.g.*, REPORT OF THE COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE, Cadbury committee, (Dec. 1, 1992) London, Gee & Co., at 31-32.

227. *See, e.g.*, Lord Hansard, *The United Kingdom Parliment Homepage* (visited Feb. 24, 1998) <http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldhansrd/pdvn/lds97/index/70228-x.htm>Lord Haskel:

> The Minister will remember that the Greenbury Committee was set up largely because of public disquiet over the huge salary increases and wholly unreasonable share option schemes granted to directors of newly privatized utilities and public transport companies. They were unquoted companies and the public perception was and still remains that those companies are run for the benefit of the shareholders and the directors and not for the customers who depend on them — certainly not for the success of the staff who were quickly disposed of and, in the case of South West Trains, rather too quickly.

approaches to the law with which they deal, how much more different should we expect the approaches of English accountants to be from those of American lawyers?

V. CONCLUSION

This article has identified three distinct sets of reasons for carrying out comparative analysis of corporate law. The first of these is that the person engaging in comparative analysis is looking for some justification for legal change. The idea underlying this reason is "they got it right" abroad, and we can do the same here. This justification for law reform is, however, suspect. A proposal for law reform may sound more credible when based on how they do things elsewhere. However, if the description of foreign law is inaccurate or if it is accurate but there are special reasons for doing it that way in the place in question, there may be no reason based on comparative analysis to adopt the same sort of rule at home. The second set of reasons for comparative corporate law involves practising lawyers. A lawyer who must advise her client on the appropriate jurisdiction or jurisdictions in which to establish or conduct business needs to develop a sensitivity to problems in translating foreign rules, even when local lawyers are consulted or employed. Here, accuracy is crucial to the client's interests, and to protect the lawyer from liability for professional negligence. The third set of reasons relates to legal harmonisation and convergence of laws. We need to be concerned about accuracy particularly in cases where a group of people works out harmonised rules which are to be applied to others not involved in the process as opposed to cases where each jurisdiction affected has a representative involved in the process. In the second case we can rely on the representatives to ensure the accuracy of representations made about their legal systems. Even in this case, however, the perceptions of the reasons underlying particular choices of a foreign system's rules may be important in the negotiation process, and those involved in the negotiation should, in fairness to other participants in the process, seek to understand the basis for different foreign rules.[228] Clearly, lawyers who carry out comparative analysis for these different reasons have different views needs for accuracy in carrying out their analysis.

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228. *See* (Council Directive on Investment Services in the Securities Field, 1993 O.J. (L141) 27. While the Member States of the European Union were negotiating the Investment Services Directive, a deep difference of opinion emerged between two groups of states. Two groups disagreed on whether to restrict trading in securities to "regulated markets," the other did not agree. The group which wanted to restrict trading characterized the reasons for the restriction as being to protect investors. The other group characterized the reasons for the restriction as being to protect national securities markets). *See also* Andrew Hugh Smith, *Chairman's Statement*, LONDON STOCK EXCHANGE. ANNUAL REPORT 1991, at 6-7.

The article argues that each of these three sets of reasons for engaging in comparative corporate law demand a consciousness of problems of legal translation, of institutional translation, and of cultural translation. An acceptance that we need to be very careful when carrying out comparative legal analysis if we might get sued for getting it wrong does not, however, tell us how to carry out such analysis carefully and well. It is very difficult to carry out meaningful comparative corporate law scholarship. We are tempted to think that we understand what the rules are in another legal culture because we think they are like our own, or we think we understand how they are different. But the reality is usually more complex than we could ever imagine, because we need to think not only in terms of different legal rules and structures, but of different social, economic, and political structures, all of which are interlinked with the legal rules and structures. I do not mean to suggest by this that we should all give up and go home, but that we have to learn to think more carefully about what we can achieve through the use of comparative material, and that we have to be conscious of the problems of translation we encounter in trying to understand another legal system. We should understand that we are unlikely to be able to conduct our comparative work from the armchair or during the summer vacation. Instead, we need to participate in and encourage comparative work based on long periods of residence abroad, especially when combined with professional experience that requires daily interaction with a foreign legal system. Best of all, perhaps, is collaborative work in which each author is embedded in a different legal system. It is not enough to read the foreign rules, because even when the rules appear to be written in our own language they are not.