



Duty of Care Jurisprudence: Comparing Judicial Intuition and Social Psychology Research

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The jurisprudence of the duty of care of corporate boards is incoherent, arbitrary, and inefficient. This Article presents proposals to resolve these problems. Corporate boards are responsible for overseeing companies and are obligated to make decisions carefully. Directors who fulfill their duty of care (as well as their duties of loyalty and good faith) are protected against liability from shareholder lawsuits by the business judgment rule, which is the principle that a court will not substitute its judgment for that of corporate directors. Courts decide duty of care claims by evaluating the decision-making process used by the defendant directors. Group decision-making processes have been studied by social psychology researchers for nearly a century, but none of this research has been cited in any duty of care case. Instead, judges have relied on their intuition to identify behaviors that are evidence of careful decision-making. I draw on

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social psychology research and a theory of group decision-making to evaluate the factors courts consider when determining if directors have fulfilled their duty of care. I conclude that certain aspects of duty of care jurisprudence are efficient, motivating corporate directors to engage in effective decision-making behaviors (considering multiple alternatives, asking questions, and expressing dissent), whereas others are inefficient or arbitrary, motivating directors to engage in behaviors that are detrimental, ineffective, or have unknown effects (having long meetings, refraining from taking notes during meetings, giving directors advance notice of the matters to be discussed at meetings, and routinely consulting outside financial advisors). I argue that the law would be more efficient and less arbitrary if courts focused on the behaviors psychology researchers have identified as reliable indicators of careful group decision-making. I also argue that the law would be more coherent if courts adopted a theory of group decision-making.

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INTRODUCTION

The jurisprudence of the duty of care of corporate boards is incoherent, arbitrary, and inefficient. The duty of care exists because corporate directors oversee companies that shareholders own.¹ Directors typically have only a nominal interest in the companies they oversee; therefore, they may have insufficient incentive to perform their duties carefully.² The duty of care, which obligates corporate directors to make informed decisions after sufficient deliberation, is a judicial response to this risk.

Shareholders may sue corporate directors for breaching their duty of care. Courts evaluate these shareholder claims by analyzing the directors' decision-making procedure to determine if they acted with

¹ See DEL. CODE ANN. tit. 8, § 141(a) (2003) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."); *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1291 (Del. 1998); *Pogostin v. Rice*, 480 A.2d 619, 624 (Del. 1984); Melvin A. Eisenberg, *Corporate Governance: The Board of Directors and Internal Control*, 19 CARDOZO L. REV. 237, 239 (1997).

² ADOLF BERLE & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976), available at http://papers.ssrn.com/sol3/paper.taf?ABSTRACT_ID=94043, at 10-11.

sufficient care. If the directors were disinterested (i.e., they did not stand to benefit personally from the decision³) and made their decision in good faith⁴ after careful deliberation, the directors may be protected by the business judgment rule. The business judgment rule is the judicially created principle that courts will not substitute their business judgment for that of corporate directors who act in good faith after careful deliberation. Obtaining this protection is an important goal for corporate directors to overcome shareholders' claims that the directors should be held personally liable for harm caused by a careless decision.

This Article addresses how courts should decide whether directors have made a decision carefully. It argues that courts should use social psychology research to identify behaviors that are evidence of careful group decision-making. Psychology researchers have studied group decision-making for more than a century,⁵ but courts deciding duty of care cases have never referred to any of the thousands of published research studies. Instead, judges have relied on their intuition regarding effective decision-making behaviors.

The seminal case of *Smith v. Van Gorkom*⁶ exemplifies courts' failures in deciding duty of care cases without reference to group decision-making research. In *Van Gorkom*, the Delaware Supreme Court held that the directors of Trans Union Corp. used a grossly negligent decision-making procedure to approve the sale of the company.⁷ In ruling in favor of the shareholders, the *Van Gorkom* court focused attention on what happens at board meetings. The court held that the Trans Union board failed to engage in three behaviors that the court characterized as evidence of careful decision-making:⁸ (1) notifying directors in advance of the matter

³ The duty of loyalty is not the subject of this Article and will be described only very briefly here. It requires that directors have no financial interest that would interfere with their ability to act in the best interests of the company. See Dennis J. Block et al., *The Duty of Loyalty and the Evolution of the Scope of Judicial Review*, 59 BROOK. L. REV. 65 (1993); Craig W. Palm & Mark A. Kearney, *A Primer on the Basics of Directors' Duties in Delaware: The Rules of the Game*, 40 VILL. L. REV. 1297 (1995).

⁴ The law regarding the duty of good faith is generally not well-developed and is not the subject of this Article. See Palm & Kearney, *supra* note 3; see also *Detwiler v. Offenbecher*, 728 F. Supp. 103, 150 (S.D.N.Y. 1989) ("According to the *Citron* court, 'the absence of significant financial adverse interest creates a presumption of good faith,' although the good faith requirement further demands 'an ad hoc determination of the board's motives' in making the business decision." (quoting *Citron v. Fairchild Camera and Instrument Corp.*)).

⁵ ALEXANDER PAUL HARE, *HANDBOOK OF SMALL GROUP RESEARCH* 384-88 (2d ed. 1976).

⁶ 488 A.2d 858 (Del. 1985).

⁷ *Id.* at 874.

⁸ The court criticized a number of other aspects of the board's decision-making

to be discussed at the board meeting, (2) holding a sufficiently long meeting, and (3) obtaining advice from outside financial advisors.⁹

The court's analysis failed to address two important issues. First, the court presented no evidence linking these three behaviors to the quality of a group's decision-making process. It simply assumed that advance notice, long meetings, and expert advice are evidence of careful decision-making. Although psychology research on the effects of these behaviors exists,¹⁰ the court did not demonstrate any awareness of it.

This omission causes the court's analysis to seem arbitrary. The only reason corporate directors should follow the procedures set forth in *Smith v. Van Gorkom* is that the Delaware Supreme Court requires them to do so to retain the protection of the business judgment rule. The existence of this holding in the case law is undoubtedly sufficient to induce director compliance, but the lack of justification makes the court's analysis seem arbitrary. The court's failure to provide persuasive evidence that the procedures it demanded are associated with careful group decision-making may be one reason the *Van Gorkom* decision has generated tremendous controversy.¹¹

Moreover, it is inefficient for courts to motivate boards to adopt meeting procedures that do not help them make better decisions. In the absence of references to empirical group decision-making research, there is little reason to believe that the *Van Gorkom* court correctly identified

procedure as well. The *Van Gorkom* case is discussed in more detail in *infra* Part I.

⁹ *Van Gorkom*, 488 A.2d at 874. In this Article, I use the term "outside" financial advisors to refer to financial consultants who are not employees of a company, such as investment banks and accounting firms. The *Van Gorkom* court clearly stated that advice from outside financial advisors is not necessary for a board to fulfill its duty of care; however, it is equally clear that the court would have viewed consultation with an outside financial advisor as evidence of a careful decision-making process. See, e.g., Robert J. Giuffra, Jr., *Investment Bankers' Fairness Opinions in Corporate Control Transactions*, 96 YALE L.J. 119, 119-20 (1986) ("As one of the few cases imposing personal liability on the reputable directors of a major corporation in the absence of fraud or wrongdoing, *Van Gorkom* has placed new importance on obtaining fairness opinions.").

¹⁰ See *infra* Part III.

¹¹ Cf. Mae Kuykendall, *Symmetry and Dissonance in Corporate Law: Perfecting the Exoneration of Directors, Corrupting Indemnification and Straining the Framework of Corporate Law*, 1998 COLUM. BUS. L. REV. 443, 506 (1998) ("Thus, the principle established by [Delaware's legislative reaction to *Van Gorkom*] and widely embraced, although not without dissent, could be best expressed colloquially: 'We don't trust the courts!"). For a discussion of the controversy, see William T. Allen et al., *A Critique of Van Gorkom and its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449 (2002) [hereinafter *Critique of Van Gorkom*]; Daniel R. Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 BUS. LAW. 1437, 1455 (1985) ("one of the worst decisions in the history of corporate law"); Stephen A. Radin, *The Director's Duty of Care Three Years After Smith v. Van Gorkom*, 39 HASTINGS L.J. 707 (1988).

procedures that are evidence of careful decision-making.¹² Yet, corporate directors who wish to avoid liability must be guided by the *Van Gorkom* opinion. Even apart from a fear of liability, duty of care jurisprudence sets norms that influence director behavior.¹³ Norms and fear of liability influence the behavior of virtually all corporate directors — not just directors who are sued. Therefore, the law should reward director behavior that improves board decisions and only punish behavior that leads to poor decisions. Current duty of care jurisprudence does not do so.

The second point missing from the *Van Gorkom* opinion is that the court's intuitions about the features of careful group decision-making were not guided by an explicit theory of group decision-making processes. In other words, the *Van Gorkom* court did not describe what happens when boards make decisions and how advance notice, long meetings, and expert advice affect the decision-making process. This omission makes duty of care jurisprudence incoherent. The absence of explicit underlying principles in duty of care jurisprudence forces lawyers' and corporate directors' interpretations of cases to be narrow and almost literal. The lack of a judicially approved conceptual description of the process by which a board selects a course of action makes it risky for boards to adopt procedures that have not been mentioned in duty of care cases, even if research has demonstrated that certain non-judicially approved procedures improve group decisions.¹⁴ Only judges have the ability to shape and control duty of care jurisprudence; lawyers and corporate directors cannot contribute to the law because courts have never disclosed its underlying principles.¹⁵

Courts should make the law more efficient, less arbitrary, and more coherent by adopting a theory of group decision-making and using empirical psychology — rather than intuitive psychology — to justify their identification of director behaviors they treat as evidence of careful decision-making. Although great care generally must be taken when applying laboratory research to real-world situations, the case for incorporating psychology research into duty of care jurisprudence is

¹² See *infra* Part III and accompanying notes.

¹³ Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1265 (1999); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 350 (1997); Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 961-62 (2003).

¹⁴ See *e.g.*, *infra* note 217 (discussing stepladder technique).

¹⁵ For an attempt to identify principles underlying cases in this area, see Bernard Black & Reinier Kraakman, *Delaware's Takeover Law: The Uncertain Search For Hidden Value*, 96 NW. U. L. REV. 521, 525-38 (2002).

unusually straightforward because the alternative is for the law to be based on judicial intuition. The ultimate purpose of the duty of care is to improve the decision-making processes used by boards. Research on group decision-making is more likely to make the law serve this purpose than are untested judicial intuitions.

This Article is organized as follows. In Part I, I describe the overall framework within which courts review board decisions when shareholders claim that corporate directors violated their duty of care. In Part II, I explain the importance of theory for creating coherence and outline a simple theory of group decision-making that provides a context for my analysis of duty of care jurisprudence.

Part III uses theory and empirical research to evaluate the likely effects of current duty of care jurisprudence on the quality of corporate board decisions. Certain aspects of current duty of care jurisprudence impose burdens on boards without making their decision-making procedures more effective. Specifically, the law's treatment of long board meetings as evidence of careful decision-making and its failure to protect directors from the risks of taking notes in board meetings places burdens on corporate directors without guiding them toward effective decision-making behavior. Other aspects of duty of care jurisprudence are arbitrary because they cannot be justified on the basis of existing empirical research. In particular, empirical research provides no support for the law's treatment of obtaining outside financial advice and notifying directors in advance of the matters to be discussed at meetings as evidence of careful decision-making. On the other hand, other aspects of duty of care jurisprudence accurately identify director behaviors that reflect careful decision-making: considering multiple courses of action, asking questions, and expressing disagreement.

Part IV describes two additional director behaviors that are evidence of careful decision-making: adopting and using methodical decision-making procedures, and producing a written rationale for decisions. Making these factors, which are not part of current duty of care jurisprudence, central components of duty of care jurisprudence would increase the efficiency and reduce the arbitrariness of the law because they would motivate boards to use more effective, empirically justified, decision-making procedures. Moreover, incorporating these factors and adopting the theory of group decision-making set out in Part II would promote coherence in duty of care jurisprudence because the theory explains how these factors affect the decision-making process. Part IV also outlines ways in which judges, lawyers, and legislators can achieve the goals of increasing coherence, reducing arbitrariness, and increasing

efficiency by introducing empirical group decision-making research into duty of care jurisprudence.

Finally, Part V points out benefits and potential costs of incorporating empirical group decision-making research into duty of care jurisprudence. Part V also discusses the effects duty of care jurisprudence has on corporate directors who engage in bad-faith compliance, directors trying to avoid liability without making a careful decision.

The following points summarize the recommendations made in this Article. First, courts should adopt a theory of group decision-making that explains and guides duty of care jurisprudence. Second, courts should provide empirical justification for their treatment of specific behaviors as evidence of careful decision-making. Third, courts should focus duty of care jurisprudence on factors that have been theoretically and empirically associated with careful group decision-making. In particular, courts should treat the following as evidence of careful decision-making: discussing multiple courses of action, asking questions, expressing disagreement, using a methodical decision-making procedure, and producing a detailed written rationale for decisions. Fourth, courts deciding duty of care cases should refrain from treating behaviors that have not been empirically associated with careful decision-making, such as having long meetings, giving directors advance notice of the purpose of meetings, and obtaining advice from outside financial experts, as evidence of careful decision-making. Finally, courts should encourage directors to take notes by prohibiting discovery of notes taken in board meetings.

I. THE DUTY OF CARE

The duty of care requires that directors make informed and careful decisions. *Aronson v. Lewis* provides the leading definition of the duty of care: “[D]irectors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them. Having become so informed, they must then act with requisite care in the discharge of their duties.”¹⁶ The duty of care addresses decision-making procedure, rather than the outcome of decisions,¹⁷ and it

¹⁶ 473 A.2d 805, 812 (Del. 1984).

¹⁷ See *Emerald Partners v. Berlin*, 787 A.2d 85, 96 (Del. 2001) (“When the entire fairness standard of review is applicable, however, judicial analysis must begin with an examination of the process by which the directors discharged their fiduciary responsibilities”); *Brehm v. Eisner*, 746 A.2d 244, 259 (Del. 2000) (“In making business decisions, directors must consider all material information reasonably available, and the

extends somewhat beyond simple information gathering. In *Van Gorkom*, for example, the court said that the directors, in addition to informing themselves, had “an affirmative duty to proceed with a critical eye in assessing information.”¹⁸

A great deal has been written about the duty of care and the business judgment rule.¹⁹ The duty of care has been characterized as “a critical component” of corporate law, serving four broad goals: (1) compensating shareholders who have been injured, (2) deterring directors from making uninformed or careless decisions, (3) providing aspirational goals for boards that educate directors as to the ideal way for them to function, and (4) expressing the fundamental moral principle that people must be careful when performing actions that risk injury to others.²⁰

The second and third goals involve guiding director behavior. The guidance provided by duty of care jurisprudence motivates directors to engage in particular behaviors in order to retain the protection of the

directors’ process is actionable only if grossly negligent.”); Melvin Aron Eisenberg, *The Director’s Duty of Care in Negotiated Dispositions*, 51 U. MIAMI L. REV. 579, 584 (1997); Melvin A. Eisenberg, *The Duty of Care of Corporate Directors and Officers*, 51 U. PITT. L. REV. 945, 965 (1990) [hereinafter *Duty of Care of Corporate Directors and Officers*]; Henry Ridgely Horsey, *The Duty of Care Component of the Delaware Business Judgment Rule*, 19 DEL. J. CORP. L. 971, 974-75 (1994) (discussing historical origins of duty of care). This policy is intended to allow directors to take risks, acknowledging that doing so is an inherent part of business. See *Joy v. North*, 692 F.2d 880, 886 (2d Cir. 1982).

¹⁸ *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).

¹⁹ For critical discussions of the duty of care, see *Critique of Van Gorkom*, *supra* note 11; William T. Allen et al., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 26 DEL. J. CORP. L. 859 (2001); Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735 (2001); Fischel, *supra* note 11; Lawrence A. Hamermesh, *Fiduciary Duty, Limited Liability, and the Law of Delaware: Why I Do Not Teach Van Gorkom*, 34 GA. L. REV. 477 (2000); Mark Kock, *Dead Hands — Poison Catalyst or Strength-Enhancing Megavitamin? An Analysis of the Benefits of Managerial Protection and the Detriments of Judicial Interference*, 2001 COLUM. BUS. L. REV. 67 (2001); Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619 (2001). See also Thomas C. Lee, *Limiting Corporate Directors’ Liability: Delaware’s Section 102(b)(7) and the Erosion of the Directors’ Duty of Care*, 136 U. PA. L. REV. 239 (1987).

²⁰ Lee, *supra* note 19, at 261-70; see also *id.* at 239 (“The corporate directors’ duty of care ideally plays a crucial role in corporate management. From the shareholders’ perspective, that duty theoretically represents an emblem of their ownership of, and ultimate control over, the corporation. It aids shareholders in monitoring those who manage the corporation for the shareholders’ benefit, while also allowing the courts to scrutinize unreasonable managerial behavior.”); Larry D. Soderquist, *The Proper Standard For Directors’ Negligence Liability*, 66 NOTRE DAME L. REV. 37, 44-45 (1990) (listing deterrence of bad conduct, compensation, and punishment for bad conduct as three valid goals of duty of care).

business judgment rule.²¹ For example, boards making decisions about mergers and acquisitions have routinely sought opinions from outside financial experts after the Delaware Supreme Court found the *Van Gorkom* directors liable in part because they failed to obtain an expert opinion.²² As described below,²³ however, expert opinions are not always helpful. If duty of care jurisprudence motivates directors to adopt ineffective decision-making procedures, it is not serving its purpose.

A. Applications of the Duty of Care

Smith v. Van Gorkom and *EAC Industries, Inc. v. Frantz Manufacturing Co.* illustrate the application of the duty of care.²⁴ *Van Gorkom* arose from the acquisition of Trans Union Corp., a diversified holding company deriving most of its earnings from leasing railway cars. The CEO of Trans Union, Jerome Van Gorkom, proposed to Jay Pritzker, an investor who was interested in acquiring companies, that Pritzker acquire Trans Union at more than a forty percent premium over the current market price of the company's stock. After several meetings, Pritzker and Van Gorkom reached a deal. At a two hour meeting, Van Gorkom informed the Trans Union board of his meetings with Pritzker and described the terms of the agreement. The board approved the transaction without consulting an outside financial advisor or inquiring about how the price of the deal had been reached.

Shareholders sued the board claiming that the directors breached their duty of care when they approved the acquisition. The Delaware chancery court found for the Trans Union directors, but the Delaware Supreme Court reversed, holding that the directors had breached their duty of care. Much of the court's criticism of the board can be characterized as a determination that the directors passively accepted the transaction Van Gorkom presented to them. The court ruled against the Trans Union directors in part because (1) the directors were called to the meeting without being notified in advance that they would be asked to consider an acquisition proposal,²⁵ (2) the directors met for only two

²¹ Holdings in duty of care cases are limited to the facts at hand, of course, and are typically not phrased as general rules. *But see* Grobow v. Perot, 539 A.2d 180, 191 (Del. 1988) (listing examples of director behavior that are evidence of lack of care).

²² *See Van Gorkom*, 488 A.2d at 874.

²³ *See infra* Section III.C.1. and accompanying notes.

²⁴ *Van Gorkom*, 488 A.2d at 858; *EAC Industries, Inc. v. Frantz Manufacturing Co.*, 501 A.2d 401 (Del. 1985).

²⁵ *Van Gorkom*, 488 A.2d at 874, 875.

hours,²⁶ and (3) the directors did not receive an opinion regarding the value of the company from an inside or outside financial expert.²⁷ According to the court, these factors indicated that the directors failed to critically assess the transaction they approved.

Another case in which directors were held to have breached their duty of care is *Frantz Manufacturing Co. v. EAC Industries, Inc.*²⁸ The case arose when the Frantz board tried to dilute EAC's newly acquired fifty-one percent ownership of Frantz by transferring treasury shares to a new employee stock ownership plan ("ESOP").²⁹ The chairman of EAC attended the Frantz board meeting at which the transfer was approved, but was not allowed to vote despite his election to the board by majority consent of the outstanding shares. The Delaware chancery court enjoined the actions taken at the meeting, holding that the directors breached their duty of care by engaging in an insufficient amount of deliberation before approving the transfer of shares to the ESOP:

The hastily-called directors meeting . . . , conducted from a script prepared by counsel, had an aura of inevitability which was clearly at variance with the requirement that the board members be adequately informed and act after sufficient deliberation. *Smith v. Van Gorkom*, Del. Supr., 488 A.2d 858 (1985). The improvised fairness opinion of [the outside financial advisor]; the absence of discussion; and the limited knowledge of the ESOP events by directors other than [the CEO and the company's attorney] strongly suggest that the attempted ratification of the ESOP funding and stock purchase was mere window dressing.³⁰

B. *The Business Judgment Rule*

When shareholders claim that directors have breached their duties of loyalty, good faith, or care, the business judgment rule provides a burden-shifting framework for the court's analysis. The Delaware Supreme Court described the business judgment rule in *Aronson v.*

²⁶ *Id.* at 874.

²⁷ *Id.* at 876, 877-78. This list includes only "pure process" factors and excludes the "informational" factors considered by the court. These terms are defined in Part III.

²⁸ *Unreported Case: EAC Industries, Inc. v. Frantz Manufacturing Co.*, No. 8003, 11 DEL. J. CORP. L. 608, 620 (1987) [hereinafter *Unreported Case: EAC v. Frantz Manufacturing*].

²⁹ *Id.* at 620.

³⁰ *Id.*; see also *Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 274 (2d Cir. 1986) ("The law is settled that, particularly where directors make decisions likely to affect shareholder welfare, the duty of due care requires that a director's decision be made on the basis of 'reasonable diligence' in gathering and considering material information.").

Lewis,³¹ as “a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”³² The court also said that “the burden is on the party challenging the decision to establish facts rebutting the presumption.”³³ The presumption is important because courts will “decline to evaluate the merits or wisdom” of a decision until the presumption is rebutted.³⁴

If plaintiffs are able to rebut the business judgment rule’s presumption by showing that the board has been grossly negligent,³⁵ courts will evaluate the entire fairness of the board’s action. This shifts the burden to the defendant directors to show that the action they took involved fair dealing (similar to the duty of care) and a fair price.³⁶ If the court finds

³¹ 473 A.2d 805 (Del. 1984).

³² *Id.* at 812.

³³ *Id.*

³⁴ *AC Acquisitions Corp. v. Anderson, Clayton & Co.*, 519 A.2d 103, 111 (Del. Ch. 1986).

³⁵ The Delaware Supreme Court emphasized the ability of plaintiffs to rebut the presumptions of the business judgment rule in *Van Gorkom*. There, the court affirmed the view of board liability that it stated in *Aronson*:

While the Delaware cases use a variety of terms to describe the applicable standard of care, our analysis satisfies us that under the business judgment rule director liability is predicated upon concepts of gross negligence.

Aronson, 473 A.2d at 812. Additionally, the court stated, “We think the concept of gross negligence is also the proper standard for determining whether a business judgment reached by a board of directors was an informed one.” *Smith v. Van Gorkom* 488 A.2d 858, 873 (Del. 1985); *see also In re Abbott Laboratories Derivative S’holders Litig.*, 325 F.3d 795, 808 (7th Cir. 2003); *Detwiler v. Offenbecher*, 728 F. Supp. 103, 148 (S.D.N.Y. 1989) (“Michigan has codified the duty of care in Section 1541 of the Michigan Business Corporation Law This provision makes officers and directors of a Michigan corporation liable for ‘ordinary neglect.’”); *Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 257, 270 (Del. 1989); *Moran v. Household Int’l, Inc.*, 500 A.2d 1346, 1356 (Del. 1985); *Grover v. Simmons*, 642 A.2d 792, 807 (Del. Ch. 1993) (stating that “[t]he standard for determining whether a board decision was sufficiently informed is gross negligence.”). *But see Critique of Van Gorkom*, *supra* note 11, at 458 (arguing that Delaware courts do not apply gross negligence standard despite claiming to do so). The duty of care is described in statutory law of certain states; some of these statutes impose lower standards than gross negligence.

³⁶ The Delaware Supreme Court described the concept of entire fairness as follows:

The concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a

that the defendant's actions do not meet the entire fairness standard, the court can impose injunctions³⁷ or award monetary damages.³⁸ On the other hand, if the plaintiffs fail to rebut the presumptions of the business judgment rule, the directors' decision will be protected as a valid exercise of their business judgment.³⁹

The business judgment rule developed out of necessity. Full judicial review of all board decisions would be too time-consuming. Moreover, it would place courts in the role of "super directors," a role for which they are not well-suited⁴⁰ and which is contrary to the notion that

company's stock. . . . However, the test for fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness. However, in a non-fraudulent transaction we recognize that price may be the preponderant consideration outweighing other features of the merger.

Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983); see also Kahn v. Lynch Communication Sys., Inc., 638 A.2d 1110, 1115 (Del. 1994); Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993).

³⁷ See, e.g., Edelman v. Fruehauf Corp., 798 F.2d 882, 886-87 (6th Cir. 1986).

³⁸ See Palm & Kearney, *supra* note 3, at 1319 n.76 & 1320. A plaintiff's recoverable loss can exceed the difference between the price offered for stock and the fair market value of the stock. See Cede & Co., 634 A.2d at 371; Weinberger, 457 A.2d at 714.

³⁹ See Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 64 (Del. 1989) ("If the proponent fails to meet her burden of establishing facts rebutting the presumption, the business judgment rule, as a substantive rule of law, will attach to protect the directors and the decisions they make."); see also Palm & Kearney, *supra* note 3, at 1314-16 (noting that directors' decision is subject to "rationality" standard unless presumption is rebutted).

⁴⁰ Brehm v. Eisner, 746 A.2d 244, 266 (Del. 2000) ("To rule otherwise would invite courts to become super-directors, measuring matters of degree in business decisionmaking and executive compensation. Such a rule would run counter to the foundation of our jurisprudence."); see Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250, 256 (7th Cir. 1986), *rev'd on other grounds*, 481 U.S. 69 (1987) ("This rule expresses a sensible policy of judicial noninterference with business decisions made in circumstances free from serious conflicts of interest between management, which makes the decisions, and the corporation's shareholders. Not only do businessmen know more about business than judges do, but competition in the product and labor markets and in the market for corporate control provides sufficient punishment for businessmen who commit more than their share of business mistakes."); Detwiler v. Offenbecher, 728 F. Supp. 103, 148 (S.D.N.Y. 1989) ("Courts are ill-equipped to review a business decision's merits, and they fear that such oversight may interfere with 'the full and free exercise of the . . . power granted to [a corporation's management]'" (quoting Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985)); Keyser v. Commonwealth Nat'l Fin. Corp., 675 F. Supp. 238, 257 & fn.22 (M.D. Pa. 1987) ("One objective of the business judgment rule is to keep courts out of a role they are ill-equipped to perform, namely, injecting the courts into the role of management. A second purpose behind the rule is to encourage others to assume entrepreneurial and risk-taking activities by protecting them against personal liability when they have performed in good faith and with due care, however unfortunate the consequence." (citations omitted)); *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996) ("To employ a different rule — one that permitted an 'objective' evaluation of the decision — would expose directors to substantive second guessing by ill-equipped judges or juries, which

corporations are supervised by directors who are ultimately designated by shareholders.⁴¹ The rule reduces the frequency with which courts will substitute their judgment for that of a board of directors.

C. Protecting Directors

The penalties can be significant for directors who are found liable for breaching their duty of care.⁴² Potential outside directors may be discouraged from serving because of the possibility that they might be held personally liable. Directors who do serve may become risk-averse to minimize this possibility.⁴³

Delaware law uses two methods to protect directors from significant personal liability. First, companies are allowed to obtain insurance for their directors and officers to reimburse them if they have personal liability.⁴⁴ Second, Delaware allows companies to adopt a charter provision limiting or eliminating personal liability for directors who are

would, in the long-run, be injurious to investor interests.”); *In re RJR Nabisco, Inc. S’holders Litig.*, 1989 FED. SEC. L. REP. (CCH) ¶ 94,194, 1989 Del. Ch. LEXIS 9, at *40 n.13 (Del. Ch. Jan. 31, 1989), *reprinted in* 14 DEL. J. CORP. L. 1132, 1157 n.13 (Del. Ch. 1989) (“To recognize in courts a residual power to review the substance of business decisions for ‘fairness’ or ‘reasonableness’ or ‘rationality’ where those decisions are made by truly disinterested directors in good faith and with appropriate care is to make of courts super-directors.”).

⁴¹ See *AC Acquisition Corp. v. Anderson, Clayton & Co.*, 519 A.2d 103, 111 (Del. Ch. 1986) (“This deference — the business judgment rule — is, of course, simply a recognition of the allocation of responsibility made by section 141(a) of the General Corporation Law and of the limited institutional competence of courts to assess business decisions.”). For a relevant excerpt from the text of Del. Code Ann. tit. 8, § 141(a), see *supra*, note 1.

⁴² See Barbara J. Gustafson, Note, *The Lawyer as Impresario: Form vs. Substance in the Target’s Boardroom*, 39 HASTINGS L.J. 759, 788 (1988) (mentioning that *Van Gorkom* case was eventually settled for \$23.5 million).

⁴³ *Joy v. North*, 692 F.2d 880, 886 (2d Cir. 1982); *Critique of Van Gorkom*, *supra* note 11, at 455; *Duty of Care of Corporate Directors and Officers*, *supra* note 17, at 964.

⁴⁴ Delaware law provides that:

A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person’s status as such, whether or not the corporation would have the power to indemnify such person against such liability under this section.

Del. Code Ann. tit. 8, § 145(g) (2003); see also Roberta Romano, *What Went Wrong with Directors’ and Officers’ Liability Insurance?*, 14 DEL. J. CORP. L. 1, 3-4 (1989); E. Norman Veasey et al., *Delaware Supports Directors with a Three-Legged Stool of Limited Liability, Indemnification, and Insurance*, 42 BUS. LAW. 399, 399-404 (1987).

found to have breached their duty of care.⁴⁵ However, insurance and charter provisions do not protect directors who are deemed to have committed willful breaches of the duty of care. Several courts have recently found directors to have done so.⁴⁶ This development suggests that the mechanisms for protecting directors may not provide full relief. Any reforms of duty of care jurisprudence should avoid increasing the personal risks faced by corporate directors.

II. A THEORY OF GROUP DECISION-MAKING

Duty of care jurisprudence lacks a theory of group decision-making. If courts explicitly adopt such a theory, this would have two beneficial consequences. First, it would make the law more coherent by describing the principles underlying the holdings in particular cases. Second, it would promote the incorporation of group decision-making research into duty of care jurisprudence.

This Part proposes a three-stage theory of group decision-making that describes the process by which a group arrives at a decision. This theory, which is a simplified version of several theories in the research literature, guides my discussion of the case law in Part III. Duty of care jurisprudence would derive multiple benefits if courts adopted the theory described here or any other empirically validated theory of group decision-making.

⁴⁵ The code further provides that:

[T]he certificate of incorporation may also contain any or all of the following matters: . . . (7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) for any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective.

Del. Code Ann. tit. 8, § 102(b) (2003).

⁴⁶ *In re Abbott Labs. Derivative S'holders Litig.*, 325 F.3d 795, 809-11 (7th Cir. 2003); *McCall v. Scott*, 239 F.3d 808, 819 (6th Cir. 2001); *In re The Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 278 (Del. Ch. 2003).

A. *Why a Theory of Group Decision-making is Necessary*

When shareholders bring claims that directors breached their duty of care, the law must respond to a fundamentally psychological question: what behaviors characterize a group of people making a decision carefully? Duty of care jurisprudence reflects an accumulation of judges' answers to this question.⁴⁷ Duty of care jurisprudence is incoherent because judges have acted in this psychological arena without guidance or support from an underlying conceptual framework. Case law neglects to explain how the legally relevant factors reflect informed decision-making; the law does not explain how (or if) the factors are related to each other. For example, the case law does not provide guidance for a lawyer who wishes to determine if corporate directors can fulfill their duty of care by holding a particularly long meeting instead of obtaining the opinion of an outside financial advisor. Do financial advisors' opinions and long meetings have similar effects on decision-making groups? The case law provides no principles that can be used to answer this question.

Theories provide answers to such questions. They make the law coherent by explaining how its elements are interrelated. For a body of law to constitute a "coherent system of thought," it must "display some coherent internal structure."⁴⁸ Lawyers and judges need unifying principles to understand what the law means; without them, they encounter difficulty identifying essential factors in cases⁴⁹ and applying

⁴⁷ Leo E. Strine, Jr., *The Inescapably Empirical Foundation of the Common Law of Corporations*, 27 DEL. J. CORP. L. 499, 505-06 (2002) (pointing out that judicial decisions that address application of business judgment rule raise psychological questions and turn on empirical intuitions about human behavior, producing general rules that dispose of individual cases).

⁴⁸ LON L. FULLER, *ANATOMY OF THE LAW* 94 (1968).

⁴⁹ *Id.* ("[T]o discern what is essential and what is not in the decision of a case, one must have resort to principles that transcend their immediate application."); *cf.* *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 67 (Del. 1989) ("Plaintiff's attempt to compare this case to *Van Gorkom* is strained and juxtaposes superficial similarities while ignoring crucial differences."); *Rabkin v. Philip A. Hunt Chem. Corp.*, 547 A.2d 963, 971-72 (Del. Ch. 1986) (referring to *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), and *Joseph v. Shell Oil Co.*, 482 A.2d 335 (Del. Ch. 1984), court said, "there are no parallels between the facts of those three cases and the allegations in plaintiffs' Complaint The facts in *Revlon* bear absolutely no resemblance to the facts in this case."); *Gries Sports Entm't, Inc. v. Cleveland Browns Football Co.*, Nos. 49184, 49197, 1985 Ohio App. LEXIS 6545, at *81 (Ohio Ct. App. Apr. 25, 1985) ("While the circumstances in the case at bar are not identical, the events leading up to the . . . acquisition of CSC certainly bear a distinct resemblance to those discussed in *Smith*.").

the law to novel fact patterns.⁵⁰ Cases can only be interpreted narrowly and followed as literally as possible.

A conceptual framework would also benefit duty of care jurisprudence by enabling courts to use empirical research to identify indicators of careful decision-making. Generalizing research conclusions across settings (e.g., to the world outside the laboratory) requires a theory.⁵¹ Just as cases can be used as precedent even though no two are identical, research always takes place in a context that is different from the context in which it is ultimately applied.⁵² Theories are necessary to determine if differences are important.

B. *The Proposing-Discussing-Selecting Model of Group Decision-making*

Empirical research supports the idea that decision-making involves proposing alternative courses of action and deciding which one seems best in light of the available evidence.⁵³ What I will refer to as the Proposing-Discussing-Selecting (“PDS”) model holds that in any complex decision, such as those made by corporate boards, there are many potential courses of action. Groups make good decisions by exploring as many alternatives as possible and accurately identifying the best alternative among those considered. Groups make decisions by (1) proposing courses of action, (2) discussing facts and arguments that support or discredit them, and (3) selecting the best course of action by determining which one has the most support from the facts and arguments the group has discussed.⁵⁴

⁵⁰ GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 34 (1989) (describing and quoting Blackstone: “[Lawyers who are ignorant of the principles underlying the law] will be ill-equipped for the practice of law except in routine cases. If the student is ‘uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him’”).

⁵¹ See generally John G. Lynch, Jr., *Theory and External Validity*, 27 *ACAD. MARKETING SCI. J.* 367 (1999); Michael A. Shapiro, *Generalizability in Communication Research*, 28 *HUM. COMM. RES.* 491 (2002).

⁵² John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 *U. PA. L. REV.* 477, 490-91 (1986).

⁵³ See *infra* Section III.D.1. and accompanying notes.

⁵⁴ Roughly analogous theories of decision-making appear in a wide range of articles. See, e.g., Ramon J. Aldag & Sally R. Fuller, *Beyond Fiasco: A Reappraisal of the Groupthink Phenomenon and a New Model of Group Decision Processes*, 113 *PSYCHOL. BULLETIN* 533, 541 (1993) (“Problem solving may be viewed as a multistage process that includes problem identification, alternative generation, alternative evaluation and choice”); Eugene Burnstein & Yaacov Schul, *The Informational Basis of Social Judgments: Operations in Forming an Impression of Another Person*, 18 *J. EXPERIMENTAL SOC. PSYCHOL.* 217, 218-21 (1982) (arguing that decision-making involves acquiring information, interpreting it, resolving

For example, a corporate board deciding how to respond to a confidential takeover proposal might consider several alternative responses (the proposing step of the PDS model). One response could be to issue a press release describing the offer in the hope that this public announcement will lead to an auction of the company. The board members would discuss potential problems with this proposed solution, such as whether the original bidder is willing to continue if the offer is made public before the company accepts it, and if there will be other bidders when the offer becomes public.⁵⁵ The board would collect and

inconsistencies, and translating resulting conclusion into response); Chip Heath et al., *Cognitive Repairs: How Organizational Practices Can Compensate For Individual Shortcomings*, 20 RES. ORG. BEHAV. 1, 5 (1998) ("Effective learners must (1) generate hypotheses that explain the causal structure of the world, (2) collect information to distinguish among their hypotheses, (3) draw conclusions that are appropriate and cautious."); Patrick R. Laughlin & Bryan L. Bonner, *Collective Induction: Effects of Multiple Hypotheses and Multiple Evidence in Two Problem Domains*, 77 J. PERSONALITY & SOC. PSYCHOL. 1163, 1163 (1999) ("[A variety of] groups observe phenomena, patterns, and regularities in some domain. They propose hypotheses to explain the observations and test the hypotheses against evidence by further observation and experiment. If the results are consistent with the hypotheses, the hypotheses remain plausible, whereas inconsistent results lead to revision of the hypotheses."); Marc Orlitzky & Randy Y. Hirokawa, *To Err Is Human, to Correct for it Divine: A Meta-Analysis of Research Testing the Functional Theory of Group Decision-Making Effectiveness*, 32 SMALL GROUP RES. 313, 315 (2001) (arguing that effective group decision-making involves generating alternative solutions and using information available to group to evaluate negative and positive consequences of each potential solution); Randall S. Peterson, *A Directive Leadership Style in Group Decision Making Can Be Both Virtue and Vice: Evidence From Elite and Experimental Groups*, 72 J. PERSONALITY & SOC. PSYCHOL. 1107, 1107 (1997) ("Although stated in many different ways, there is a common core to various prescriptive models of decision making To make decisions in the right way, decision makers should carefully survey the range of objectives they want to achieve; carefully review and formulate action alternatives; rigorously search for information bearing on the likely consequences of each alternative; analyze incoming information dispassionately and thoughtfully; reconsider once-rejected action alternatives when new information comes to light; confront trade-offs that arise as a result of the conflicting costs and benefits of preferred options; and make the effort to complete detailed contingency plans to be enacted should key assumptions underlying the preferred plan fail to hold."); see also Nancy Pennington & Reid Hastie, *Reasoning in Explanation-based Decision Making*, 49 COGNITION 123, 129-30 (1993) (describing criteria decision-makers use to evaluate potential courses of action); cf. Arie W. Kruglanski & Donna M. Webster, *Motivated Closing of the Mind: "Seizing" and "Freezing"*, 103 PSYCHOL. REV. 263, 263 (1996) ("From relatively simple activities such as crossing a busy road to highly complex endeavors such as launching a space shuttle, new knowledge is indispensable for secure decisions and reasoned actions. The knowledge-construction process is often involved and intricate. It draws on background notions activated from memory and local information from the immediate context. It entails the extensive testing of hypotheses and the piecing of isolated cognitive bits into coherent wholes.").

⁵⁵ There are a number of additional assumptions involved as well, of course, such as that an auction will in fact lead to the highest price. The example also assumes that the board is loyal and that its objective is to obtain the highest price possible for the company.

discuss information relevant to these questions (the discussing step of the PDS model), such as the number of bidders in recent auctions in its industry and the risk that senior employees will leave if the company is put up for auction. The board would follow a similar fact-gathering process for other potential courses of action. The board would eventually make a decision about which course of action to take based on the costs and benefits as well as the risks associated with each potential course of action (the selecting step of the PDS model). If the board accepts as true facts that are inconsistent with the assumptions of a proposed course of action — such as that the original bidder is unwilling to be the first bidder in an auction⁵⁶ — that proposed course of action would be rejected.

Corporate boards will not always follow the steps in the PDS model in the sequence in which the steps have been described here, and they may engage in each more than once. Groups are likely to cycle through different types of activities in the course of making a decision.⁵⁷ The PDS model is a prescriptive theory to some extent; the theory does not exclude the possibility that groups can make decisions without discussing relevant facts or attempting to select the alternative most consistent with the evidence.

The next Part reviews case law and experimental psychology research relevant to the factors courts have considered as evidence of careful decision-making. The PDS model ties together features of duty of care jurisprudence by explaining how they influence each step in the process of group decision-making.

III. CURRENT DUTY OF CARE JURISPRUDENCE

The effect of the duty of care on corporate board decisions is potentially quite important. To the extent that it guides boards to use effective decision-making procedures, the duty of care can provide benefits to shareholders (and to society in general) by making companies more efficient.⁵⁸ Effective corporate boards might also prevent

⁵⁶ See, e.g., *Citron v. Fairchild Camera & Instrument Corp.*, 1988 FED. SEC. L. REP. (CCH) ¶ 93,915, 1988 Del. Ch. LEXIS 67, at *32-33 (Del. Ch. May 19, 1988) (noting that executives of potential acquirer declared that they would refuse to be drawn into bidding contest).

⁵⁷ Marshall Scott Poole & Michael E. Holmes, *Decision Development in Computer-Assisted Group Decision Making*, 22 HUM. COMM. RES. 90, 120 (1995).

⁵⁸ Duty of care jurisprudence does not explicitly provide general rules for boards to follow. However, lawyers interpret fact-based holdings in particular cases as reflecting general rules which can be communicated to clients, and the ultimate effect of legal advice

catastrophic frauds.⁵⁹ However, duty of care jurisprudence has not been carefully designed to achieve these goals. Courts have not provided persuasive evidence that the law has identified valid indicators of careful decision-making. If it has not identified valid indicators, duty of care jurisprudence inefficiently motivates directors to engage in decision-making behavior that does not make them more effective.

Group decision-making research provides evidence regarding the likely effects of duty of care jurisprudence on the quality of corporate board decision-making procedures. The law should be refined such that inefficient elements are excised and effective features are made more central.⁶⁰ Although group decision-making research does not provide infallible information about the world, it provides more reliable conclusions than judicial intuition.⁶¹

on client behavior is as if courts were announcing general rules. Cf. William T. Allen, *Tribute to Chancellor William T. Allen: Ambiguity in Corporation Law*, 22 DEL. J. CORP. L. 894, (1997) (describing his pragmatic decision making as a Delaware Chancery Court judge: "Ideally this 'pragmatic' technique [of deciding corporate cases] could move over a substantial period from principles to generalizations that were more rule-like, in an organic and accretionary process. The model thus was not deductive, but invited induction by others."); Strine, Jr., *supra* note 47, at 502 (discussing cases regarding director independence, pointing out that, "As the law developed, the outcome of corporate law cases more and more turned on common law rules founded on empirical assumptions about human behavior That is, cases turned not so much on disputed case-specific facts . . . but rather on the law's view about the proper effect to be given to undisputed case-specific facts This judgment is based largely on non-case-specific factual assumptions about board behavior, which in turn becomes the basis for a general rule that disposes of particular cases."). See generally Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDIS. L.J. 375 (1997) (arguing that lawyers interpret cases in self-serving ways, overstating risks of client liability).

⁵⁹ See, e.g., Marianne M. Jennings, *A Primer on Enron: Lessons From A Perfect Storm of Financial Reporting, Corporate Governance and Ethical Culture Failures*, 39 CAL. W. L. REV. 163, 259-60 (2003). See generally Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233 (2003).

⁶⁰ See Stephen M. Bainbridge, *Why A Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 47-48 (2002) ("[T]he findings of group decisionmaking research are sometimes inconsistent with the intuitions of conventional wisdom. Periodic vetting of corporate law by group decisionmaking specialists, therefore, may prove useful in law reform."); Strine, Jr., *supra* note 47, at 515 ("While judges should not become easily enamored with academic fads, it is, on balance, well worth it for judges to seek out knowledge and test their instincts against the relevant social science literature.").

⁶¹ See Strine, Jr., *supra* note 47, at 506, 513 ("[J]udges . . . need to be informed by social science research and other generalized data about real world behavior" to overcome their idiosyncratic views of human nature.). In contrast to judicial "idiosyncrasy," consider SHARON S. BREHM ET AL., *SOCIAL PSYCHOLOGY* 45-47 (4th ed. 1999) (discussing methods researchers use to justify application of research conclusions across settings); George S. Howard, *The Role of Values in the Science of Psychology*, 40 AM. PSYCHOL. 255 (1985) (discussing scientific values that guide and systematize researchers' efforts to understand

Duty of care jurisprudence appears arbitrary because courts have not used empirical or other evidence to persuade lawyers and corporate directors that duty of care jurisprudence has beneficial effects on director behavior.⁶² Judges have not clarified how they identify which behaviors they use as evidence that boards have made decisions carefully. For example, judges have never explained why they have concluded that providing advance notice to directors of the matters to be discussed at their meetings is evidence of careful decision-making. They have done nothing more than state this conclusion.⁶³

Openness about the fact that judges are making assumptions about human behavior promotes the legitimacy of the law: "Because such moments . . . involve judicial judgments about how humans are likely to behave in particular contexts and the likely results of that behavior, candor about that reality is essential."⁶⁴ Empirical group decision-making research can provide persuasive justification for judicial conclusions about human behavior, and thereby provide benefits similar to those of precedent. "As a source of authority that is exterior to the judge, precedent negates suspicion that discretion — that is, the interior, arbitrary, and subjective — is at work in judicial decisionmaking."⁶⁵

world).

⁶² See Jack B. Jacobs, *Comment on Contestability*, 54 U. MIAMI L. REV. 847, 851 (2000) ("A 'counter scientific' finding of fact based on human perceptions should have no more validity because it is made by a court than should an edict of the church about the shape of the solar system during the time of Galileo.").

⁶³ The *Van Gorkom* court noted that advance notice was a factor in *Gimbel v. Signal Cos.*, 316 A.2d 599, *aff'd per curiam*, 316 A.2d 619 (Del. 1974). See *Smith v. Van Gorkom*, 488 A.2d 858, 880 (Del. 1985); Strine, Jr., *supra* note 47, at 517 (arguing that "judicial obscurantism, in which judges rest their decisions on their 'discovery' of rules of decision within prior precedents," should not be used to hide empirical and normative foundations of principles that frequently determine outcome of duty of care cases).

⁶⁴ Strine, Jr., *supra* note 47, at 515.

⁶⁵ Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 73 (1992). To some extent, the use of social science research simply pushes the problem of arbitrariness back one step. The lessons of social psychology research are arbitrary to the extent that they only concern topics that researchers have decided (for unknown reasons) to investigate. See, e.g., David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1025 (1989) ("[T]he short history of scientific social inquiry is marred by examples of extraordinary imprecision and the large role researchers' biases seem to play in their findings."); Howard, *supra* note 61, at 261. Nevertheless, social psychology is constrained by the methods of scientific research; although it is not entirely objective and transparent, it is more objective and transparent than is judicial intuition about empirical questions. Faigman, *supra* note 65 at 1012 ("Nonetheless, the scientific method provides guidelines by which suspected infirmities can be identified so that third parties can evaluate the verity of purportedly objective findings.").

A. Informational and Pure Process Factors

Before examining the empirical and theoretical links between duty of care jurisprudence and the quality of group decisions, it is necessary to distinguish two types of factors used by courts in duty of care cases: informational and pure process factors. This Article focuses on the pure process factors because they can be interpreted as general rules that apply across cases, whereas the informational factors are much more case-specific. The following Subparts use empirical research to examine the effects of pure process factors on the effectiveness of group decision-making procedures.

1. Informational Factors

Informational factors are specific pieces of information that a board considered or should have considered. When courts evaluate claims that directors violated their duty of care, courts focus on whether the board obtained all material information reasonably available and used a reasonable decision-making process. Directors who fail to consider particularly important pieces of information may be deemed to have violated their duty of care.

The information courts deem important varies widely depending on the type of decision being made, the company's industry, and many other factors. For example, in *In re The Walt Disney Company Derivative Litigation*,⁶⁶ shareholders of the Walt Disney Company contended that the company's directors breached their duty of care when they approved a non-fault termination of Michael Ovitz' employment contract one year after he was hired as president of the company. The shareholders alleged that the board approved Ovitz' contract and his non-fault termination without calculating the termination payment the company would owe him if the contract ended prematurely. It turned out that the contract awarded Ovitz over \$140 million in termination payments when he left the company.⁶⁷ The Delaware chancery court found that the board should have considered this piece of information. This holding cannot be interpreted as a broad rule, however, because this type of information is not relevant to other types of board decisions, such as a decision about how to respond to a takeover offer.

⁶⁶ 825 A.2d 275 (Del. Ch. 2003).

⁶⁷ *Id.* at 279.

2. Pure Process Factors

In contrast to informational factors, pure process factors are general and apply regardless of the type of decision being made and the nature of the company's business. They concern aspects of the board's decision-making process rather than the specific information the board considered. An example is whether directors are given advance notice of the matters to be discussed at a board meeting.⁶⁸ Pure process factors do not require judges to have significant knowledge of the specific business context because the same factors can be applied to virtually all decision-making groups.

The pure process factors courts have used to determine if directors have fulfilled their duty of care are analyzed in the next three Subparts. First, I discuss elements of duty of care jurisprudence that are inefficient because they inaccurately characterize particular behaviors as evidence of careful decision-making and, as a result, motivate corporate directors to engage in behaviors that do not lead to careful decision-making. Second, I review elements of duty of care jurisprudence that are arbitrary because there is little empirical evidence about their effects on the group decision-making process. Finally, I review elements of duty of care jurisprudence that are efficient because they accurately characterize particular behaviors as evidence of careful decision-making, and, therefore, motivate directors to engage in behavior that leads to careful decision-making.

B. Inefficient Elements of Duty of Care Jurisprudence

Two pure process elements of duty of care jurisprudence are inefficient. First, courts frequently, but inaccurately, treat meeting length as an indicator of careful group decision-making. Duty of care jurisprudence would be more efficient if courts ignored meeting length. Second, the law discourages directors from taking notes in meetings, but note taking helps groups make better decisions. The law will be more efficient if courts or legislatures declare that notes taken in board meetings are not discoverable in duty of care cases.

1. Meeting Length

Meeting length is not a reliable indicator of the quality of a group's decision-making process for several reasons. First, many factors, other

⁶⁸ See *infra* Section III.C.2. and accompanying notes.

than a group's carefulness, can influence the length of a meeting. Groups whose members communicate through e-mail or instant messaging generally take longer than face-to-face groups working on the same task, but discuss less information and make poorly-informed decisions.⁶⁹ Groups have shorter meetings when members are required to stand during the meeting.⁷⁰ Although a group's diligence can undoubtedly influence meeting length,⁷¹ other factors do so as well.

Second, group members may not function as effectively during longer meetings. A case study of food co-op meetings in Madison, Wisconsin provides a detailed description of the effects of meeting length on decision-making behavior.⁷² After about two hours, fatigue led to breakdowns in the organization of meetings and, because some members tired more quickly than others, unequal participation. Members were more frequently distracted and quicker to anger as meetings wore on, resulting in unproductive conflicts.⁷³ These observations were consistent with a survey of undergraduates' experiences in group meetings: individuals who were members of groups that frequently had long meetings reported less careful listening and poorer comprehension of what members said in those groups.⁷⁴

Third, directors can do work outside of meetings.⁷⁵ If directors have considered a matter for months, the length of the meeting at which they

⁶⁹ See Boris B. Baltes et al., *Computer-Mediated Communication and Group Decision Making: A Meta-Analysis*, 87 *ORG. BEHAV. & HUM. DECISION PROCESSES* 156 (2002). See generally Andrea Hollingshead, *Information Suppression and Status Persistence in Group Decision Making: The Effects of Communication Media*, 23 *HUM. COMM. RES.* 193, 213-14 (1996).

⁷⁰ Allen C. Bluedorn et al., *The Effects of Stand-Up and Sit-Down Meeting Formats on Meeting Outcomes*, 84 *J. APPLIED PSYCHOL.* 277, 277-78, 282 (1999) (reviewing research indicating positive and negative associations between time taken to make group decision and decision quality).

⁷¹ In theory, longer meetings should allow more alternatives to be considered (the proposing step in the PDS model), more information to be discussed (the discussing step in the model), and more questions to be asked. Some evidence indicates that the length of time an individual takes to make a decision can reflect the degree to which the decision maker has thought carefully about the issues. See Adele Diederich, *Decision Making Under Conflict: Decision Time as a Measure of Conflict Strength*, 10 *PSYCHONOMIC BULL. & REV.* 167, 174 (2003) (finding that time individuals took to make decision in laboratory experiment was related to amount of internal conflict they experienced while making decision).

⁷² See generally John Gastil, *Identifying Obstacles to Small Group Democracy*, 24 *SMALL GROUP RES.* 5 (1993).

⁷³ *Id.* at 8-9.

⁷⁴ *Id.* at 23.

⁷⁵ Bayless Manning, *The Business Judgment Rule and the Director's Duty of Attention: Time for Reality*, 39 *BUS. LAW.* 1477, 1487 (1984); see also *In re Digex, Inc. S'holders Litig.*, 789 A.2d 1176, 1210-11 (Del. Ch. 2000) (noting that directors apparently formed their opinions prior to board meeting).

formally vote to select a course of action is largely irrelevant. The length of the meeting would be unrelated to the number of alternative courses of action the group considered (the proposing step of the PDS model) or the range of facts the group discussed (the discussing step of the PDS model).

Psychology research supports the conclusion that meeting length is a poor proxy for the quality of a group's decision-making process,⁷⁶ but duty of care jurisprudence is not consistent with this conclusion. Meeting length is mentioned in the vast majority of duty of care cases,⁷⁷ giving the impression that courts consider it relevant.⁷⁸ The court in

⁷⁶ Cf. Langevoort & Rasmussen, *supra* note 58, at 388. Langevoort and Rasmussen point out that the number of hours a lawyer bills on a particular matter is not a particularly good indicator of effort. They noted that "as those of us who have practiced law know, some hours are more productive than others." *Id.* They also suggest that lawyers might provide less accurate legal advice as a direct result of taking more time to formulate it. Although not directly applicable to corporate board decision making, these ideas further undermine the idea that the amount of time taken to make a decision is a reliable indicator of the quality of the decision making process.

⁷⁷ See, e.g., *Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 271 (2d Cir. 1986) ("The meeting began at nine o'clock in the evening, and lasted approximately three hours."); *Samjens Partners I v. Burlington Indus.*, 663 F. Supp. 614, 619 (S.D.N.Y. 1987) ("The merger agreement was considered and approved by the Board at an all-day meeting on May 19 and another meeting on May 20, 1987."); *Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 257, 267 (Del. 1989) ("The special board meeting began at approximately 8 a.m. and lasted for about six hours."); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 950 (Del. 1985) ("[T]he meeting lasted nine and one-half hours . . ."); *In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 280 (Del. Ch. 2003) ("The compensation committee . . . met on September 26, 1995, for just under an hour."); *Kumar v. Racing Corp. of America, Inc.*, 1991 Fed. Sec. L. Rep. (CCH) ¶ 95,896, 1991 Del. Ch. LEXIS 75, at *10 (Del. Ch. Apr. 29, 1991) ("The April 2 board meeting began at approximately 2 p.m. and, according to Gelbach's notes of the meeting, ended at 2:25 p.m. Although other defendants thought that the meeting lasted longer, Wilson, who conceded that it could not have lasted more than 2 1/2 hours, also acknowledged that approximately half of the time was devoted to matters other than the merger."); *In re NVF Co. Litig.*, No. 9050, 1989 Del. Ch. LEXIS 167, at *10 (Del. Ch. Nov. 21, 1989) ("The meeting took around ten minutes . . ."); *Citron v. Steego Corp.*, No. 10171, 1988 Del. Ch. LEXIS 119, at *29, 31 (Del. Ch. Sept. 9, 1988) (90 minute meeting); *Eisenberg v. Chicago Milwaukee Corp.*, 537 A.2d 1051, 1055 (Del. Ch. 1987) (1 1/2 hour meeting); *Sealy Mattress Co. v. Sealy, Inc.*, 532 A.2d 1324, 1330 (Del. Ch. 1987) ("Sealy's directors held a meeting by telephone to approve the merger. The meeting lasted between fifteen minutes and one-half hour."); *Gimbel v. Signal Cos.*, 316 A.2d 599, 612 (Del. Ch. 1974) ("The meeting lasted a couple of hours and resulted in the approval of a transaction of over \$480,000,000 and possibly one of the largest private cash sales ever to take place."), *aff'd per curiam*, 316 A.2d 619 (Del. 1974).

⁷⁸ It may be that courts focus on a minimum meeting length, using it as a rough filter to screen out boards that take so little time to make a complex decision that they could not possibly have given it through consideration. However, such a use of meeting length is still inefficient. First, if courts adjust their minimum reasonable meeting length in each case depending on the judge's perception of the complexity of the board decision at issue, directors may wish to guard against the possibility that a court will overestimate the

Smith v. Van Gorkom faulted Trans Union's board of directors for deciding to sell the company at a meeting that lasted only two hours.⁷⁹

Meeting length had a powerful effect in *Keyser v. Commonwealth National Financial Corp.*⁸⁰ In that case, shareholders challenged the Commonwealth directors' decision to approve a merger with Mellon Bank Corporation, claiming the directors breached their duty of care. One point the plaintiffs raised was that the Commonwealth board approved the transaction at a meeting that lasted only two hours. Although the court acknowledged that the directors had a significant amount of information about the transaction they approved, the court denied their motion to dismiss the complaint because, interpreted in a light most favorable to the plaintiffs, the length of the board's meeting cast doubt on its diligence.⁸¹

Some courts have avoided a narrow focus on meeting length and instead more directly considered the degree to which a board is informed.⁸² In these cases, courts have treated meeting length as largely irrelevant if the board conducted a thorough analysis. For example, in *Van De Walle v. Unimation, Inc.*,⁸³ the court acknowledged that the

complexity of the board's decision by holding a meeting long enough to meet such a court's minimum requirement. If courts do not adjust the minimum allowed meeting length in each case (e.g., decisions regarding takeover offers should never be made in less than two hours), such a requirement is easily undermined by bad-faith compliance. See *infra* Section V.B.2. and accompanying notes. In any case, a meeting that falls below any reasonable minimum meeting length should be easy to characterize as grossly negligent under the efficient duty of care criteria described below. See *infra* Subpart III.D.

⁷⁹ *Smith v. Van Gorkom*, 488 A.2d 858, 874 (Del. 1985).

⁸⁰ 675 F. Supp. 238 (M.D. Pa. 1987).

⁸¹ *Id.* at 260-61 ("[T]he length of the deliberations, apparently less than two (2) hours, when construed in a light most favorable to plaintiffs, may support plaintiffs' position. That is, aside from the Board's general awareness of Commonwealth's merger potential, the availability and terms of Mellon's offer apparently were discussed only for two (2) hours.").

⁸² See *Northwest Indus., Inc. v. B.F. Goodrich Co.*, 301 F. Supp. 706, 709, 713 (N.D. Ill. 1969) (noting one hour meeting, but board's "haste" was not sufficient to warrant judicial interference); *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 925 (Del. 2003) ("Although that meeting lasted less than an hour, the Court of Chancery determined the minutes reflect that the directors were fully informed of all material facts relating to the proposed transaction"); *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 62 (Del. 1989) (concluding that short meeting was not evidence of lack of care because board could choose to be rushed to obtain bargaining advantage); see also *Tomczak v. Morton Thiokol*, No. 1990 Fed. Sec. L. Rep. (CCH) ¶ 95,327, 1990 Del. Ch. LEXIS 47, at *36-37 (Del. Ch. Apr. 5, 1990) (meeting was 2 hours, but thorough); cf. Manning, *supra* note 75, at 1487 (arguing that frequency of attendance at board meetings is not good indicator of director's contribution because directors do work outside of board meetings). The same arguments support the idea that meeting length is not critical.

⁸³ *Van De Walle v. Unimation, Inc.*, 1991 Fed. Sec. L. Rep. (CCH) ¶ 95,834, 1991 Del.

Unimation board had collected a significant amount of relevant information outside the board meeting, and, therefore, "the fact that the formal Unimation directors' meeting was short is of no moment."⁸⁴

Even when a board is well-informed (as in *Unimation*), courts typically treat a short meeting as evidence of a lack of care that must be overcome.⁸⁵ As the law stands, it is safest (although perhaps somewhat extreme) for lawyers to advise boards that important decisions should be made in meetings that last more than two hours (the length of the board's meeting in *Smith v. Van Gorkom*). This is obviously inefficient; if a board can make an informed decision in less than two hours, it should not fear liability for doing so.

The costs of using meeting length as a factor in duty of care cases include the following. First, treating meeting length as evidence of careful decision-making increases the risk of unfair denial of a motion to dismiss. Second, treating meeting length as evidence of careful decision-making motivates directors to have long meetings that may impair their performance. Third, treating meeting length as evidence of careful decision-making without providing a reason to do so is arbitrary. On the other hand, the potential benefits of using meeting length as a factor in duty of care analyses are summarized as follows. First, meeting length is generally an undisputed fact. Second, longer meetings may encourage some boards to be more thorough, even if longer meetings are not associated with better group decision-making on average. Finally, regulating meeting length involves relatively minimal interference in boards' decision-making processes. Most likely, the costs outweigh the benefits. It makes little sense for courts to evaluate directors' degree of care using a criterion that is not reliable evidence of careful decision-making.

Ch. LEXIS 27 (Del. Ch. Mar. 6, 1991).

⁸⁴ *Id.* at 40. The court noted that:

[a]s for the due care claim, the record conclusively establishes that Unimation's directors were fully informed and knowledgeable of the eight-month market search for potential buyers and of Unimation's business, prospects, and value. . . . [T]he fact that the formal Unimation directors' meeting was short is of no moment, because for months Unimation's directors had been kept fully apprised of all relevant facts on an ongoing basis, and they had already fully considered those facts before their formal meeting was convened.

Id.

⁸⁵ *Cf. Roberts v. General Instrument Corp.*, 1990 Fed. Sec. L. Rep (CCH) ¶ 95,465, 1990 Del. Ch. LEXIS 138, at *27 (Del. Ch. Aug. 13, 1990) ("The board acted quickly, but it would seem to have had adequate information to enter the sort of agreement that it entered. The board had been considering strategic alternatives for some time . . .").

2. Notes Taken in Board Meetings Are Discoverable

Note taking has powerful beneficial effects on decision-making. It helps group members remember facts and ideas that have been discussed (the discussing step of the PDS model). In turn, this helps the group select a solution that is consistent with the available evidence (the selecting step of the PDS model). Directors who have access to the information that has been discussed can use it to critique the courses of action the group considers.

Notes help people remember more information for two reasons. First, people think about information when they write it down, creating more elaborate mental representations of the information that are more easily retained.⁸⁶ Second, notes can act as an external storage device, allowing people to write information down and then forget about it until they want to access it again.⁸⁷ Many studies have provided evidence consistent with the conclusion that note taking has significant benefits.⁸⁸ For example, in one experiment on juror note taking, participants listened to a two-hour audio taped trial reenactment and were asked to recall all the trial events they could remember. Participants who were allowed to take notes recalled more probative trial events than jurors

⁸⁶ Lynne ForsterLee et al., *Effects of Notetaking on Verdicts and Evidence Processing in a Civil Trial*, 18 LAW & HUM. BEHAV. 567, 568-69, 576 (1994); Kenneth A. Kiewra, *A Review of Note-taking: The Encoding Storage Paradigm and Beyond*, 1 EDUC. PSYCHOL. REV. 147, 149-50 (1989) [hereinafter *A Review of Note-taking*]. See generally Kenneth A. Kiewra, *Investigating Notetaking and Review: A Depth of Processing Alternative*, 20 EDUC. PSYCHOL. 23 (1985).

⁸⁷ *A Review of Note-taking*, *supra* note 86, at 148 (1989). See generally Stephen L. Benton et al., *Encoding and External-storage Effects on Writing Processes*, 85 J. EDUC. PSYCHOL. 267 (1993); Kenneth A. Kiewra et al., *Note-taking Functions and Techniques*, 83 J. EDUC. PSYCHOL. 240 (1991).

⁸⁸ ForsterLee et al., *supra* note 86, at 576 (finding that mock jurors were better at identifying distinctions among plaintiffs in civil case when they were allowed to take notes); Lynne ForsterLee & Irwin A. Horowitz, *Enhancing Juror Competence in a Complex Trial*, 11 APPLIED COGNITIVE PSYCHOL. 305, 317-18 (1997); James Hartley, *Notetaking in Non-academic Settings: A Review*, 16 APPLIED COGNITIVE PSYCHOL. 559, 571 (2002) (noting that note taking has benefits in non-academic settings, but more research needs to be done); Irwin A. Horowitz & Kenneth S. Bordens, *The Effects of Jury Size, Evidence Complexity, and Note Taking on Jury Process and Performance in a Civil Trial*, 87 J. APPLIED PSYCHOL. 121, 128-29 (2002); Irwin A. Horowitz & Lynne ForsterLee, *The Effects of Note-taking and Trial Transcript Access on Mock Jury Decisions in a Complex Civil Trial*, 25 LAW & HUM. BEHAVIOR 373, 387 (2001); Kenneth A. Kiewra, *Notetaking and Review: The Research and its Implications*, 16 INSTRUCTIONAL SCI. 233, 234 (1987); David L. Rosenhan et al., *Notetaking Can Aid Juror Recall*, 18 LAW & HUM. BEHAV. 53 (1994). See generally Jeremy C. Biesanz et al., *When Interviewers Desire Accurate Impressions: The Effects of Notetaking on the Influence of Expectations*, 29 J. APPLIED SOC. PSYCHOL. 25, 29 (1999); William A. Henk & Norman A. Stahl, *A Meta-analysis of the Effect of Notetaking on Learning from Lecture*, 34 NAT'L READING CONF. Y.B. 70 (1985).

who were not allowed to take notes.⁸⁹ A number of jurisdictions have recognized the potential benefits of note taking for jurors and adopted policies allowing or encouraging jurors to take notes during trials.⁹⁰

Of course, the participants in laboratory experiments and the tasks they work on differ from corporate directors and their tasks in many ways. Nevertheless, research provides strong evidence that note taking is an important memory aid. However, courts have not considered note taking relevant to careful board decision-making. In fact, corporate directors may be discouraged from taking notes because the notes could be discovered and used against them.⁹¹ The failure of duty of care

⁸⁹ ForsterLee et al., *supra* note 86, at 575-76. Participants who were instructed to take notes recalled 22.59 probative trial events, and participants who were not instructed to take notes recalled only 16.08 probative trial events. Participants who were instructed to take notes also recalled more information overall (including non-probative information). Participants in this study were not undergraduates; they had a mean age of 28 years.

⁹⁰ See *Esaw v. Friedman*, 586 A.2d 1157, 1161 nn.8-9 (Conn. 1991) (listing federal court decisions holding that courts may permit jurors to take notes and listing state court decisions allowing jurors to take notes (and one that does not)); see also Faust F. Rossi, *Survey: Evidence*, 49 SYRACUSE L. REV. 507, 535-536 (1999):

For many years judges did not allow note-taking by jurors because of the fear that jurors taking notes would dominate jury deliberation. Today, in New York, the practice of allowing note-taking has been approved by all four departments of the appellate division, as well as jury reform advocates and many legal scholars. A large majority of other jurisdictions have held that juror note-taking is a matter of trial court discretion. To this growing consensus, we may now add the New York Court of Appeals.

Larry Heuer & Steven D. Penrod, *Some Suggestions for the Critical Appraisal of a More Active Jury*, 85 NW. U. L. REV. 226, 229 (1990) (listing states that allow juror note taking; two of three that did not allow it in 1990 — Louisiana and New Mexico — allow it now (LA. CODE CRIM. PROC. ANN. art. 793 (West 2004) and N.M. U.J.I. CR. 14-101 (2004)); Janessa E. Shtabsky, *A More Active Jury: Has Arizona Set the Standard for Reform with Its New Jury Rules?*, 28 ARIZ. ST. L.J. 1009, 1018 (1996):

Courts will now instruct juries in both civil and criminal trials that they can take notes during the proceedings. Arizona jurors have had the right to take notes during criminal trial proceedings for over twenty years, however, it wasn't until the enactment of these new rules that jurors could enjoy this same privilege in all civil cases.

Re-examining Wyoming's Jury Trial Procedures; Initial Recommendations of the Wyoming Commission on Jury System Improvement, 1 WYO. L. REV. 93, 98-99 (2001) [hereinafter *Re-examining Wyoming's Jury Trial Procedures*] (recommending that Wyoming state courts be required to allow juror note taking).

⁹¹ See, e.g., *Detwiler v. Offenbecher*, 728 F. Supp. 103, 112-15 (S.D.N.Y. 1989) (using handwritten notes used as evidence); *Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 257, 266 (Del. 1989) (using handwritten notes to characterize board action as anti-takeover measure: "[The assistant treasurer's] handwritten notes of the same date confirm the link between the implementation of the ESOP and Shamrock's expression of interest in

jurisprudence to protect director note taking may impair the quality of corporate boards' decision-making process.

Even directors who engage in effective decision-making behavior have good reason to avoid taking notes. Inaccurate conclusions can be drawn from inferences based on notes because notes typically are incomplete, vague, and terse. The incompleteness of notes is illustrated by a study of experienced investigators who intended to take verbatim notes of their interviews with alleged child abuse victims.⁹² The study revealed that the investigators wrote down less than half of their own utterances and omitted twenty-five percent of the incident-related details mentioned by the children. Of course, corporate directors have no intention of taking verbatim notes and might be expected to omit an even larger portion of the information discussed in a board meeting.⁹³ Moreover, directors are most likely to omit events from their notes when the board discusses important issues and the directors are most engaged in their discussion.

The incompleteness of notes has had an impact on duty of care cases. In *Chesapeake Corp. v. Shore*,⁹⁴ defendant directors claimed to have been concerned about threats posed by an offer being made for their company's shares. They testified and gave depositions stating that, at a board meeting, they had discussed their concerns about the fact that the offer price was inadequate and that shareholders would be confused by it. Despite this testimony, the court pointed out that discussion of the shareholder confusion issue was not mentioned in minutes or notes

Polaroid."); *Grover v. Simmons*, 642 A.2d 792, 801 & n.12 (Del. Ch. 1993) (permitting undated meeting notes written on back of envelope to be introduced as evidence); *Kumar v. Racing Corp. of Am., Inc.*, No. 12039, 1991 Del. Ch. LEXIS 75, at *10 (Del. Ch. Apr. 26, 1991) (noting directors' notes used to determine length of board meeting); *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 801 (Tx. Ct. App. 1987). The court interpreted the meaning of notes:

Other Texaco notes admitted into evidence implied that Texaco believed it had "24 hours" to "stop the train" and "take care of Liedtke [Pennzoil's CEO]." Texaco's chairman testified that "the train" probably meant Pennzoil, and that "stop" meant that prompt action was necessary. Texaco recognized that under the Pennzoil plan, if an agreement on restructuring couldn't be reached within one year, Getty's "assets [were] to be divided!"

Texaco, Inc., 729 S.W.2d at 801.

⁹² Michael E. Lamb et al., *Accuracy of Investigators' Verbatim Notes of Their Forensic Interviews with Alleged Child Abuse Victims*, 24 LAW & HUM. BEHAV. 699, 699 (2000).

⁹³ However, it is likely that omission of information from notes is related to the cognitive demands of participating in a dyadic conversation; the interviewers in the Lamb et al. study were engaged in dyadic interviews, but directors typically are not. Lamb et al., *supra* note 92, at 701.

⁹⁴ 771 A.2d 293 (Del. Ch. 2000).

taken at the meeting and concluded that the directors had not, in fact, discussed the shareholder confusion problem at their meeting.⁹⁵ It seems quite likely that directors who take notes during board meetings do not note every issue discussed at every meeting. Even minutes can be incomplete. It is unjust for the court to draw conclusions based even in part on the absence of an event from directors' notes.

In addition to being incomplete, the meaning of notes can be uncertain because they are not intended to communicate information to anyone but the note taker. Several laboratory studies have demonstrated that notes are more accurately understood by the note taker than by others.⁹⁶ Directors take notes for themselves; they have no intention of making them comprehensible to others.

The uncertain meaning of notes has had an impact on duty of care cases. In *Keyser v. Commonwealth National*,⁹⁷ Meridian Bancorp made an offer to acquire Commonwealth National, but Commonwealth's board accepted a takeover offer from Mellon Bank Corp. instead. One issue in the case was whether the Commonwealth board failed to adequately consider Meridian's offer, or if, as the board claimed, Meridian's offer had been withdrawn before the board considered and accepted the Mellon offer. The court made an effort to interpret an attorney's notes taken during the Commonwealth board meeting, which included the line "'assurances' they are still there." The court determined that, seen in a light most favorable to the plaintiff, the notes could be interpreted to support the view that the Commonwealth board still considered the Meridian offer to be open (or "still there"). The person who took the notes disagreed with that interpretation. The court concluded that the meaning of the notes was uncertain and an issue to be resolved by a fact

⁹⁵ *Id.* at 307.

⁹⁶ Susan R. Fussell & Robert M. Krauss, *Understanding Friends and Strangers: The Effects of Audience Design on Message Comprehension*, 19 EUR. J. SOC. PSYCHOL. 509, 514-15 (1989) (finding that participants in laboratory experiment understood descriptions they wrote better than descriptions written by others); Susan R. Fussell & Robert M. Krauss, *The Effects of Intended Audience on Message Production and Comprehension: Reference in a Common Ground Framework*, 25 J. EXPERIMENTAL SOC. PSYCHOL. 203, 211-12, 213 (1989) (showing participants in laboratory experiment wrote longer descriptions of objects when descriptions were intended to be read by others than when they were intended to be read only by themselves; latter descriptions were less comprehensible to others than were former); cf. Robert C. Friese, *Document Creation, Retention and Destruction, and the 'Negative Inference'*, 7 INSIGHTS 22, 22 (1993) ("Directors' notes or other scribbles on the happenings at board of directors meetings can be more dangerous than loosely-drafted minutes. For example, the director who innocently writes the word 'entrenchment' in his notes during a discussion of how to avoid the problem has invited some interesting questions from plaintiffs' counsel.").

⁹⁷ 675 F. Supp. 238 (M.D. Pa. 1987).

finder, requiring the court to deny the defendant's motion to dismiss.⁹⁸ This reasoning is likely to result in unfair denials of motions to dismiss because the meaning of notes is likely to be uncertain. The notes in this example were not complete sentences and were almost certainly intended to be understood only by the note taker. The uncertain meaning of the notes is a reason not to allow them to be discovered.

An additional harm caused by the discoverability of notes is that they can record frank and creative private discussions that can aid decision-making. In *United States v. Nixon*,⁹⁹ the Supreme Court pointed out that "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."¹⁰⁰ The possibility of disclosure of notes taken at brainstorming meetings can alter the character of those meetings.¹⁰¹ Allowing directors

⁹⁸ The court said, "Certain notes of Attorney Hagele, taken at the October 8th Board meeting, state:

- Withdrawn, although aware of board meeting
- 'assurances' that they are still there
- no effort on their part to raise offer."

Id. at 252. The court's analysis was as follows:

Plaintiffs argue that this indicates that the Meridian 'offer' was regarded by Commonwealth as being open. On the other hand, defendants maintain that Hagele was referring to Meridian still being there, not the 'offer.' Although the court has found that the 'offer' was withdrawn, . . . the meaning of these entries and their materiality to the issues in this case are for the fact finder.

Id. at 252.

⁹⁹ 418 U.S. 683 (1974).

¹⁰⁰ *Id.* at 705; *see also* *Esaw v. Friedman*, 586 A.2d 1164, 1170 (Conn. 1991) (requiring that juror notes be preserved after trial would "create the impermissible risk that jurors who wish to take notes would be inhibited from doing so.").

¹⁰¹ In *Keyser*, the court pointed out that a defendant director's notes indicated that:

Goldman Sachs, in "kicking numbers around, felt that \$42 to \$45 now is franchise value". . . . The record reflects that on October 2nd, Merrill and John R. Biechler . . . of the Board of Directors met with [its] legal and financial advisors. Of course, the factual determination concerning the meaning of Goldman Sachs "kicking numbers around" is for the fact finder. Defendants characterize the October 2nd meeting as a "brainstorming session in which all possibilities and avenues open were being explored." The fact remains that the scenario of Meridian paying \$42 or \$43 a share, with \$50 a possibility, was raised by Goldman Sachs.

Keyser, 675 F. Supp. at 259.

to take notes and to destroy them afterwards would allow them to benefit from notes as a learning aid while preventing the notes from being discovered and admitted as evidence, but destroying notes can lead courts to suspect the notes contained damaging information.¹⁰²

The law would be more efficient if courts and legislatures acknowledged the significant benefits of note taking by explicitly declaring that notes taken during board meetings are not discoverable. Although there are reasons favoring the discoverability of notes taken during board meetings (in particular, they provide evidence about what went on during the meeting), the reasons against their discovery are stronger. Most importantly, note taking would benefit shareholders by helping directors make better decisions. It would also prevent courts from making uncertain interpretations of cryptic scribbles. Excluding notes would not deprive plaintiffs of much evidence because most directors currently refrain from taking notes to avoid their discovery.¹⁰³ Courts can use other information to evaluate boards' decision-making process, such as written explanations produced by the board¹⁰⁴ and the testimony of directors.

C. *Arbitrary Elements of Duty of Care Jurisprudence*

Two pure process elements of duty of care jurisprudence, obtaining expert advice and notifying directors in advance of the matters to be discussed at meetings, are not justifiable in light of existing psychology research. Courts have treated these behaviors as evidence of careful decision-making, but there is little or no empirical research that supports this view. The law appears arbitrary when courts rely on these factors in duty of care cases.¹⁰⁵

¹⁰² See Friese, *supra* note 96, at 22 ("Plaintiffs' counsel request, and sometimes obtain, rulings from courts allowing the drawing of a negative inference from the method of document destruction employed. The negative inference concept derives from the logical conclusion that one in the better position to produce a piece of evidence should not gain advantage by making that evidence unavailable.").

¹⁰³ Friese, *supra* note 96, at 22-23 ("So is the answer to instruct board members not to take notes of meetings? No (although some defense lawyers might disagree). The answer is to instruct them to take notes cautiously and in a manner that does not invite an unjustified inference."); James F. Reda, *Compensation Committee Handbook* 14 (2001) ("Most legal experts argue that it is not a good idea to allow board members to take their own notes during a board meeting.").

¹⁰⁴ See *infra* Subpart IV.B. and accompanying notes.

¹⁰⁵ This is a strong claim which rests the idea that the burden of persuasion should be on courts to justify the factors they use in duty of care jurisprudence. The fact that psychology research has identified valid indicators of careful group decision-making shifts this burden onto the courts. It is reasonable to expect courts to justify divergence from

1. Obtaining Expert Advice

The court in *Smith v. Van Gorkom* faulted the Trans Union directors for not obtaining an opinion regarding the value of the company from an inside or outside financial expert.¹⁰⁶ The court treated this omission as evidence of a lack of care in the board's decision-making process. Since *Van Gorkom*, courts have frequently noted whether boards obtained advice from outside financial advisors.¹⁰⁷ Consequently, duty of care

empirical findings; unless empirical psychology research is deemed utterly worthless, it is arbitrary for courts to provide no reason whatsoever for failing to use the indicators of careful group decision-making identified by decades of research. This does not mean that it is always inappropriate for judges to rely on intuition; there may be no alternative when relevant empirical research is lacking. See Strine, Jr., *supra* note 47, at 506. However, the legitimacy of the law is undermined when it fails to acknowledge the existence of relevant empirical research. See David L. Faigman, "Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation, 139 U. PA. L. REV. 541, 602, 604 (1991) ("As the only unelected branch of the federal government, the judiciary must constantly reflect upon its own legitimacy The Court's efficacy depends on the public being persuaded by its judgments The Court retains legitimacy only so long as it remains within accepted bounds when exercising its discretion. Empirical research assists in the definition and enforcement of those boundaries. . . . [R]ulings which rest on suspect factual bases will themselves be suspect. Holdings resting on faulty premises have little or no persuasiveness, for they lack rationality — the source of judicial power.").

¹⁰⁶ See Helen M. Bowers, *Fairness Opinions and the Business Judgment Rule: An Empirical Investigation of Target Firms' Use of Fairness Opinions*, 96 NW. U. L. REV. 567, 572 (2002) (stating that *Van Gorkom* decision "dramatically increases [the] importance" of fairness opinions "by imbuing fairness opinions with power to reduce, even eliminate, liability to shareholders for members of corporate boards arising from disagreements in valuation"); Charles M. Elson, *Fairness Opinions: Are They Fair or Should We Care?*, 53 OHIO ST. L.J. 951, 958 (1992) ("[T]he fact that the court imposed liability on a board which failed to obtain such an opinion and indicated that procurement of such an opinion would have insulated the directors from liability, suggested the imposition of an informal 'requirement.' In short, the use of such an opinion would have supported a finding of the board's informed business judgment which was necessary to preclude liability."). Courts routinely note when boards obtain advice from outside experts. See Lucian Arye Bebchuk & Marcel Kahan, *Fairness Opinions: How Fair Are They and What Can Be Done About It?*, 1989 DUKE L.J. 27, 28 (1989) ("[D]irectors obtain fairness opinions in order to satisfy their fiduciary obligations. Indeed, courts have indicated that they give weight to fairness opinions in their analyses of fiduciary obligation."); see also *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 67 (Del. 1989) ("The board, . . . in contrast with the Trans Union board, received investment advice from four leading investment banking firms, [and] commissioned financial evaluations by three of them."); *Grobow v. Perot*, 593 A.2d 180, 191 (Del. 1988) (noting that allegation that directors failed to consult with financial advisors would support claim of lack of due care).

¹⁰⁷ *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 925 (Del. 2003); *McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1174 (Del. 1995); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 356 (Del. 1994); *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1339 (Del. 1987); *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1349 (Del. 1985); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 950 (Del. 1985).

jurisprudence has led lawyers to recommend that boards consult outside financial advisors when making important decisions, particularly with regard to offers to acquire the company.¹⁰⁸ *Van Gorkom* is seen by some as an inefficient boon to investment banks,¹⁰⁹ whereas others are willing to acknowledge some value in investment bank opinions.¹¹⁰

In theory, outside experts can help groups by suggesting potential courses of action (the proposing step of the PDS model) and by providing information the group can use to evaluate courses of action (the discussing step of the PDS model).¹¹¹ Although there is some research support for the idea that outsiders can help groups make better decisions,¹¹² there is also research that suggests that expert advice is not

¹⁰⁸ See Elson, *supra* note 106, at 958 (“Although the court explicitly stated in that case that fairness opinions were not ‘required as a matter of law,’ still the fact that the court imposed liability on a board which failed to obtain such an opinion and indicated that procurement of such an opinion would have insulated the directors from liability, suggested the imposition of an informal ‘requirement.’ . . . [F]ollowing *Van Gorkom*, prudent corporate counsel mandated the acquisition of a fairness opinion in corporate control transactions as a vital prophylactic measure for the board.”). But see Bowers, *supra* note 106, at 577 (discussing widespread belief that *Van Gorkom* case led boards of acquisition targets to obtain fairness opinions, but presenting empirical evidence that *Van Gorkom* had little effect on frequency with which board of acquisition targets obtain fairness opinions).

¹⁰⁹ See Elson, *supra* note 106, at 951 (discussing increase in investment bank fees as result of *Van Gorkom* decision); Fischel, *supra* note 11, at 1453 (“The most immediate effect of *Trans Union* will be that no firm considering a fundamental corporate change will do so without obtaining a fairness letter or other similar documentation from outside consultants. Indeed, these outside consultants are the biggest winners after *Trans Union*.”); Leo Herzel & Leo Katz, *Smith v. Van Gorkom: The Business of Judging Business Judgment*, 41 BUS. L.J. 1187, 1191 (1986); Jonathan R. Macey & Geoffrey P. Miller, *Trans Union Reconsidered*, 98 YALE L.J. 127, 139 (1988).

¹¹⁰ See, e.g., Giuffra, Jr., *supra* note 9, at 126-27 (“Fairness opinions rendered by investment bankers, if based on valuations following accepted procedures, can reduce the agency problem inherent in corporate control transactions. First, such opinions, like accountants’ audits and lawyers’ opinions, can serve a monitoring function for shareholders Second, fairness opinions can limit the discretion and therefore the opportunistic behavior of managers.”); see also Bebchuk & Kahan, *supra* note 106, at 52-53.

¹¹¹ See, e.g., Eva Jonas & Dieter Frey, *Information Search and Presentation in Advisor-client Interactions*, 91 ORG. BEHAV. & HUM. DECISION PROCESSES 154, 154 (2003) (noting one reason people take advice is to obtain information).

¹¹² James K. Esser, *Alive and Well after 25 Years: A Review of Groupthink Research*, 73 ORG. BEHAV. & HUM. DECISION PROCESSES 116, 131, 134 (1998) (reviewing case studies and laboratory experiments, some of which included group insulation as antecedent condition for poor decision making); Ralph Katz, *The Effects of Group Longevity on Project Communication and Performance*, 27 ADMIN. SCI. Q. 81, 99 (1982) (finding that groups perform worse when they are isolated from external sources of information); Gregory Moorhead et al., *The Tendency Toward Defective Decision Making Within Self-Managing Teams: The Relevance of Groupthink for the 21st Century*, 73 ORG. BEHAV. & HUM. DECISION PROCESSES 327, 342 (1998) (“Communication with the external environment reduces the potential for closed mindedness and group overestimation by team members.”); see also IRVING L. JANIS,

consistently helpful. Even when an expert provides a group with accurate information that is new to the group members, the group may reject it as a challenge to the positive feelings they have for their group.¹¹³ A case study of a California city council vividly illustrates this phenomenon. The Santa Cruz city council rejected the advice of an expert engineer who warned that the city was unprepared for an earthquake.¹¹⁴ The city council tried to discredit the expert and failed to act on his recommendations for four years. In 1989, the expert's warning was validated as the city's downtown was devastated by an earthquake, resulting in approximately one billion dollars of property damage.

A number of laboratory studies are consistent with this real-world case study, finding that groups routinely search for information that supports their majority opinion.¹¹⁵ This problem is compounded by the finding that advisors in laboratory experiments frequently shift their opinions closer to that of the group they are advising.¹¹⁶ Although research suggests that advisors may engage in a more even-handed evaluation of evidence than do the decision makers they advise, there is also evidence that advisors may present those evaluations in a biased way.¹¹⁷

GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES 176, 266-67 (2d ed. 1982). For an application of Janis' groupthink theory to corporate boards, see O'Connor, *supra* note 59.

¹¹³ Marlene E. Turner & Anthony R. Pratkanis, *A Social Identity Maintenance Model of Groupthink*, 73 *ORG. BEHAV. & HUM. DECISION PROCESSES* 210, 223 (1998).

¹¹⁴ Anthony R. Pratkanis & Marlene E. Turner, *Groupthink and Preparedness for the Loma Prieta Earthquake: A Social Identity Maintenance Analysis of Causes and Preventions*, in 2 *RESEARCH ON MANAGING GROUPS AND TEAMS: GROUPS IN CONTEXT* 115, 125 (Ruth Wageman ed. 1999). The authors' explanation for the council's behavior is that it was a cohesive group lacking norms of methodical decision-making. The council avoided acting on the expert's recommendations because it perceived them as threatening the council's positive self-image and the city's economic well-being. *Id.* at 130.

¹¹⁵ See generally Stefan Schulz-Hardt et al., *Biased Information Search in Group Decision Making*, 78 *J. PERSONALITY & SOC. PSYCHOL.* 655 (2000) [hereinafter *Biased Information Search*] (finding that groups of managers preferred evidence supporting majority group view to evidence undermining it); Ilan Yaniv, *Receiving Other People's Advice: Influence and Benefit*, 93 *ORG. BEHAV. & HUM. DECISION PROCESSES* 1, 10-11 (2004) (noting that advice is more likely to be discounted when it differs from decision maker's opinion).

¹¹⁶ Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 *PSYCHOL. BULL.* 255, 257 (1999) ("Several field experiments in organizational settings corroborate the laboratory findings. When audience views were known, insurance agents, telecommunications workers, and professional auditors tailored the message to their respective audiences.") (citations omitted). Advice is most helpful when it is independent of the decision maker's views. See Timothy R. Johnson et al., *Averaging Probability Judgments: Monte Carlo Analyses of Asymptotic Diagnostic Value*, 14 *J. BEHAV. DECISION MAKING* 123, 138 (2001); Yaniv, *supra* note 115, at 11.

¹¹⁷ Jonas & Frey, *supra* note 111, at 162, 164-66.

The application of these ideas and laboratory results to real world situations involving boards and their outside financial advisors is somewhat uncertain. Investment bankers are generally older than the participants in laboratory studies and they have much more experience in giving advice.¹¹⁸ In addition, the financial and reputational consequences of giving incorrect advice can be much greater than in the laboratory. Moreover, there is undoubtedly great variation in the willingness of financial advisors to provide advice that conflicts with the client's preferences.

On the other hand, it is generally accepted that financial advisors sometimes provide any opinion their client desires, and corporate directors sometimes seek out expert opinions that support their pre-existing view.¹¹⁹ The woeful performance of accountants in recent corporate fraud scandals may reflect a similar co-optation of outside experts by groups that did not want to hear independent opinions.¹²⁰ For example, in the fraud committed by executives at Waste Management, Inc., the company's accountant allegedly became part of the conspiracy, making a written agreement with the company to phase out fraudulent accounting practices gradually over a ten-year period, without notifying investors or regulators.¹²¹

¹¹⁸ Age has been found to reduce conformity. See Monisha Pasupathi, *Age Differences in Response to Conformity Pressure for Emotional and Nonemotional Material*, 14 PSYCHOL. & AGING 170, 173 (1999).

¹¹⁹ Giuffra, Jr., *supra* note 9, at 123 ("Investment bankers may have an incentive to craft their opinions in misleading ways or to follow valuation techniques that predispose results. Similarly, self-interested directors may 'shop' for a compliant investment banker."); Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 72-74 (1986) (discussing opinion shopping); Park McGinty, *The Twilight of Fiduciary Duties: On the Need for Shareholder Self-help in an Age of Formalistic Proceduralism*, 46 EMORY L.J. 163, 210-12 (1997) ("Financial advisors to corporations face severe conflicts of interests that encourage them to . . . render opinions that favor management."); Radin, *supra* note 11, at 730 (discussing four duty of care cases in which courts were suspicious of the opinions of outside financial advisors, noting "[e]ach of these four cases also involved highly suspect investment advisor presentations, which either omitted information, such as the range of fair value, or which relied exclusively on highly suspect management-prepared forecasts."); see also *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1268 (Del. 1989) (placing weight on fact that outside advisors of independent committee of directors were hired by company's CEO). See generally *Bebchuk & Kahan, supra* note 106 (providing examples and detailed discussion of reasons that opinions of outside financial advisors are not objective, including social ties to corporate directors, lack of standards for what 'fairness' means, and how to value companies).

¹²⁰ Cf. John C. Coffee, Jr., *What Caused Enron? A Capsule Social and Economic History of the 1990s*, 89 CORNELL L. REV. 269, 287-97 (2004). See generally Robert A. Prentice, *The Case of the Irrational Auditor: A Behavioral Insight into Securities Fraud Litigation*, 95 NW. U. L. REV. 133 (2000).

¹²¹ Complaint at *7, *SEC v. Buntrock*, No. 02-C2180, 2004 U.S. Dist. LEXIS 9495, (N.D.

Overall, research and case law suggest that the costs and benefits of outside expert advice are likely to vary depending on the situation.¹²² Costs of considering expert advice as a factor in duty of care analysis are that (1) outside experts are expensive and (2) expert advice may not improve board decisions if its content is determined by the board. On the other hand, two potential benefits include the following. First, outside expert advice can help directors work with complex issues that they can not handle on their own.¹²³ Second, whether a board has obtained advice is generally an undisputed fact, which allows courts to use a simple bright-line rule.

Some of the costs of expert advice can be avoided if courts focus on the independence of the advisor and the information the advisor provides. An advisor's opinion regarding fairness should carry little weight in an inquiry regarding the directors' degree of care because it is too easily manipulated and does not help the board propose solutions, gather facts, or engage in critical discussion. Independent advisors who provide factual information (such as an estimate of the value of the company) can help boards engage in careful decision-making because such advice can help boards propose and critique potential courses of action. In general, however, empirical research does not provide much support for courts' routine use of expert advice as a factor in duty of care cases.

Ill. May 25, 2001).

¹²² Fischel, *supra* note 11, at 1441 ("It would be foolhardy to either require or prohibit the use of outside experts . . . because some decisions might require such experts but not others.").

¹²³ For example, in *In re RJR Nabisco Inc. S'holder Litig.*, 1989 Fed. Sec. L. Rep. (CCH) 94,194, 1989 Del. Ch. LEXIS 9, at *49-50 (Del. Ch. Jan. 31, 1989) the court pointed out that it was entirely appropriate for the board of RJR to consult outside financial experts to ascertain the value of two competing offers to acquire the company because "the consideration offered in both proposals contained complex securities not susceptible to intuitive evaluation. Sophisticated and effective business generalists of the type likely to be found on the board of such companies as RJR will seldom have the specialized skills useful to most accurately value such securities. Our law, of course, recognizes the appropriateness of directors relying upon the advice of experts when specialized judgment is necessary as part of a business judgment." See also *Detwiler v. Offenbecher*, 728 F. Supp. 103, 151 (S.D.N.Y. 1989) ("In light of their extensive knowledge of [the company, the defendant directors] had no obligation to obtain an independent valuation of the Company."); *McGinty*, *supra* note 119, at 192-93 ("Given the complexity of and resulting division of labor in post-industrial capitalism, such advisors supply highly technical and highly valuable information more efficiently than could the less specialized personnel within the agent's direct organization. Virtually all states' corporation codes appropriately codify the directors' right to rely on opinions and reports of persons of professional or expert competence who have been selected with reasonable care.").

2. Providing Directors with Advance Notice of the Matters to be Discussed at Board Meetings

The court in *Smith v. Van Gorkom* noted with disfavor that directors of Trans Union had been given no advance notice of the purpose of the meeting at which they agreed to sell the company.¹²⁴ The court did not explain why it considered advance notice evidence of careful decision-making, but it did mention this point in the context of condemning the board for relying solely on a presentation made to it by the chief executive officer. The court appeared to implicitly suggest that advance notice and distribution of documents can augment directors' ability to be critical of reports that are presented at a meeting.¹²⁵ The court's explanation of the relevance of this factor is terse and incomplete.

The PDS model of group decision-making suggests that advance notice might be beneficial. Advance notice of a meeting, especially when relevant documents are distributed prior to the meeting, can help group members generate potential solutions (the proposing step in the model) without influence from other members.¹²⁶ This independence should

¹²⁴ See also *Plaza Securities Co. v. Fruehauf Co.*, 643 F. Supp. 1535, 1539 (E.D. Mich. 1986) (finding lack of due care in case where special committee of outside directors did not receive any written materials to study "prior to the very day management's proposal was adopted"); *Gimbel v. Signal Co., Inc.*, 316 A.2d 599, 614 (Del. Ch. 1974). Some courts appear to treat prior notice of the purpose of a meeting as relevant without making reference to whether documents are distributed prior to the meeting. See *Grobow v. Perot*, 539 A.2d 180, 191 (Del. 1988) (noting that plaintiff's allegation that board members were not provided with "adequate and timely" notice of nature of transaction they were going to consider at meeting would support claim of lack of due care); *Kumar v. Racing Corp.*, No. 12,039, 1991 Del. Ch. LEXIS 75, at *16 (Del. Ch. Apr. 29, 1991) (concluding that deliberate failure to notify one director that merger would be considered at board meeting supports claim of lack of due care); *Tomczak v. Morton Thiokol, Inc.*, No. 7861, 1986 Del. Ch. LEXIS 418, at *8 (Del. Ch. May 7, 1986) (noting that plaintiff alleged that no outside directors "had any real notice of the proposed transaction" prior to board meeting at which it was considered). In other cases, notice of the matters to be discussed at the meeting and advance distribution of documents are both mentioned. See, e.g., *Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 257, 270 (Del. Ch. 1989) ("Here, as in *Van Gorkom*, the meeting was called on short notice and the directors were given no written materials with which to prepare for the meeting.").

¹²⁵ *Smith v. Van Gorkom*, 488 A.2d 858, 875 (Del. 1985).

¹²⁶ Janet A. Sniezek & Timothy Buckley, *Cueing and Cognitive Conflict in Judge-advisor Decision Making*, 62 ORG. BEHAV. & HUM. DECISION PROCESSES 159, 160, 162, 170-73 (1995) (finding that decision makers are more likely to agree with others' opinions that are encountered before they have had chance to form their own opinion); see also Johnson et al., *supra* note 116, at 138; Janet A. Sniezek & Rebecca A. Henry, *Revision, Weighting, and Commitment in Consensus Group Judgment*, 45 ORG. BEHAV. & HUM. DECISION PROCESSES 66, 73 (1990) [hereinafter *Consensus Group Judgment*] ("In group discussion without prior individual judgments, members' contributions are less likely to be independent due to normative and informational influences of others.").

lead to a greater variety of solutions being generated and discussed, which should be beneficial.¹²⁷ Moreover, initial commitment to a solution generated prior to the meeting could make group members more likely to express dissent from a majority that favors a different solution.

However, empirical evidence regarding the effect of advance notice on the quality of group decisions is sparse and mixed. It provides little support for the *Van Gorkom* court's intuition. One study, using company managers as subjects, demonstrated that group members who made tentative individual decisions prior to group discussion had relatively closed minds. Their groups tended not to generate new ideas, only considering ideas brought to the group by members.¹²⁸ This suggests that giving directors advance notice of the topic to be discussed at a board meeting could lead them to arrive at the meeting with their minds made up, unwilling to listen to others' opinions.

In contrast, another laboratory study (using undergraduates as subjects) found that groups made better decisions when their members were given an opportunity to make individual decisions prior to the start of the meeting.¹²⁹ Advance notice may have been beneficial because it led group members to consult their personal knowledge as well as the information others mentioned during the group meeting. Group members who arrive at a meeting without having formed their own opinions may only listen to what others say, never consulting their own knowledge or judgment. However, the application of this research to corporate directors is uncertain. Compared to the risks faced by experimental participants, the potential risks corporate directors face may make them more motivated to consult their own knowledge and form their own judgments even after they hear others' opinions.

The case law suggests potential costs of advance notice. A party in one duty of care case accused a board of taking advantage of advance notice to sway independent directors' votes prior to the board meeting. In *Amanda Acquisition v. Universal Foods*,¹³⁰ Amanda Acquisition made an offer to acquire Universal Foods and challenged the board's decision to reject the offer. Amanda claimed that, in the days before the board met to consider Amanda's takeover offer, "[executives of Universal Foods]

¹²⁷ *Consensus Group Judgment*, *supra* note 126, at 73 ("Group performance has been found to be positively related to heterogeneity in individual judgments").

¹²⁸ Norman R.F. Maier, *Prior Commitment as a Deterrent to Group Problem Solving*, 26 PERS. PSYCHOL. 117, 124-25 (1973).

¹²⁹ Sniezek & Buckley, *supra* note 126, at 169.

¹³⁰ 708 F. Supp. 984 (E.D. Wis. 1989).

spent the weekend contacting the independent directors and lining up the directors' uninformed opposition to [Amanda's] offer."¹³¹ Directors may be more easily influenced in one-on-one contacts than when they meet as a group;¹³² one-on-one contacts are more likely when directors are given prior notice of a meeting than when they are present at the meeting.

Overall, there are costs and benefits of providing directors with advance notice of the purpose of board meetings. The costs include the facts that advance notice (1) could lead to leaks of secret transactions, (2) could lead directors to arrive at a meeting with their minds already made up, and (3) could possibly be used by management directors to influence the opinions of outside directors prior to a meeting. Moreover, there is little evidence that advance notice is associated with the quality of group decisions,¹³³ making courts' use of this factor somewhat arbitrary.¹³⁴ On the other hand, two potential benefits of advance notice are summarized as follows. First, there is little financial cost involved in notifying directors of the purpose of meetings (apart from the risk of leaks). Second, theory indicates advance notice has benefits, such as allowing directors to prepare for meetings, thereby helping directors to be more independent. In the absence of empirical research support, it is not clear that the benefits of advance notice outweigh the costs.¹³⁵

¹³¹ *Id.* at 1010. This allegation was rejected by the court as inconsistent with the evidence.

¹³² See Bibb Latane, *The Psychology of Social Impact*, 36 AM. PSYCHOL. 343, 343-44 (1981) (arguing that social influence attempts are more effective when ratio of targets to influencers is smaller).

¹³³ *But cf.* Bainbridge, *supra* note 60, at 46-47 (arguing that notice requirements should improve corporate board decisions; however, experimental evidence cited therein does not directly compare performance of groups whose members are given advance notice to groups whose members are not).

¹³⁴ Although advance notice has been considered in a large number of cases, some courts have not treated advance notice as an overwhelming consideration. Due care was found in several cases in which directors were not given documents or notice prior to their meeting. See, e.g., *Keyser v. Commonwealth Nat'l Fin. Corp.*, 644 F. Supp. 1130, 1147 (M.D. Pa. 1986) ("[T]he directors did not receive advance notice that the . . . meeting would be to discuss the [transaction] and, consequently, the directors did not have an opportunity to review beforehand the lengthy financial and legal documents presented to them at the meeting."); *Eisenberg v. Chicago Milwaukee Corp.*, 537 A.2d 1051, 1055 n.3 (Del. Ch. 1987) (noting that no written materials were made available to directors prior to meeting at which decision was made); *Mesa Petroleum Co. v. Unocal Corp.*, No. 7797, 1985 Del. Ch. LEXIS 411, at *22 (Del. Ch. May 13, 1985), *rev'd on other grounds*, 493 A.2d 946 (Del. 1985) (finding board fulfilled its duty of care despite what chancery court described as a "lack of documentation provided to the . . . board before, during and between its meetings").

¹³⁵ Little improvement in efficiency would result if courts used a combination of factors such as advance notice, meeting length, and consultation with outside experts. Although

Advance notice should not play a role in duty of care jurisprudence until stronger empirical justification is available.

D. *Efficient Elements of Duty of Care Jurisprudence*

A careful and informed decision-making process includes three features: proposing and considering multiple alternatives (the proposing step of the PDS model), collecting and discussing information (the discussing step), and critically analyzing alternatives (the selecting step). These features correspond to three practices treated as evidence of careful decision-making by current pure process duty of care jurisprudence: considering multiple alternatives, asking questions, and expressing dissent. These factors have played a role in several cases, but courts have not relied on them consistently, cited research to justify them, or used a theory of group decision-making to connect them to underlying principles. The law would be more efficient if these three factors formed the core of the pure process component of duty of care jurisprudence.

1. Considering Multiple Alternatives

Considering multiple alternatives is important for careful decision-making.¹³⁶ For all but the easiest decisions, it is unlikely that a group will

there is no empirical research that allows a direct assessment of the combined effects of these factors on the quality of group decisions, several considerations suggest that it would not be beneficial for their combination to become part of duty of care jurisprudence. These three factors can be seen as loose proxies for efficient aspects of duty of care jurisprudence. See *infra* Subpart III.D. Although the three factors are relatively easy for courts to evaluate, they do not directly address features of group decision-making that are associated with good decisions. As a result, this combination would be susceptible to bad-faith compliance. See *infra* Section V.B.2. and accompanying notes. Courts might not be able to distinguish between boards that merely went through the motions to satisfy the three factors and boards that were genuinely thorough.

¹³⁶ JANIS, *supra* note 112, at 175, 250; Gregory M. Herek et al., *Decision Making During International Crises: Is Quality of Process Related to Outcome?*, 31 J. CONFLICT RESOL. 203, 204 (1987) (listing seven symptoms of defective group decision-making; first item is "Gross omissions in surveying alternatives. The group fails to consider a number of viable alternative policies, either concentrating its deliberations entirely on the course of action preferred from the outset or confining its discussions to only one alternative."); Thomas Mussweiler et al., *Overcoming the Inevitable Anchoring Effect: Considering the Opposite Compensates for Selective Accessibility*, 26 PERS. & SOC. PSYCHOL. BULL. 1142, 1148-49 (2000) (finding that decision-makers, when required to consider the opposite of certain relevant beliefs they hold, avoid making common errors); see also Orliczky & Hirokawa, *supra* note 54, at 315. See generally Edward R. Hirt & Keith D. Markman, *Multiple Explanation: A Consider-an-Alternative Strategy for Debiasing Judgments*, 69 J. PERS. & SOC. PSYCHOL. 1069 (1995); Laura J. Kray & Adam D. Galinsky, *The Debiasing Effect of Counterfactual Mind-sets: Increasing the*

immediately hit upon the best alternative; discussion of more alternatives (the proposing step of the PDS model) increases the group's chances of discovering the optimal course of action.¹³⁷ Considering more alternatives can also increase the amount of information the group considers (the discussing step of the model) by making a broader set of information relevant.¹³⁸

Duty of care jurisprudence is consistent with these empirically supported conclusions. Courts have consistently viewed the consideration of multiple alternatives as evidence of careful decision-making.¹³⁹ For example, in *Citron v. Fairchild*,¹⁴⁰ the Delaware Supreme

Search for Disconfirmatory Information in Group Decisions, 91 ORG. BEHAV. & HUM. DECISION PROCESSES 69 (2003).

¹³⁷ Michael Diehl & Wolfgang Stroebe, *Productivity Loss In Brainstorming Groups: Toward the Solution of a Riddle*, 53 J. PERS. & SOC. PSYCHOL. 497, 501 (1987) (finding correlation between number of ideas produced and number of ideas that meet quality threshold); Richard P. McGlynn et al., *Brainstorming and Task Performance in Groups Constrained by Evidence*, 93 ORG. BEHAV. & HUM. DECISION PROCESSES 75, 84-85 (2004) (finding that groups that generated more ideas were more likely to propose correct solution to problem). See generally ALEX F. OSBORN, *APPLIED IMAGINATION* 228 (1957) (suggesting that groups should generate large number of ideas because that will result in generation of some high-quality ideas). Considering additional alternatives may increase decision quality only minimally for certain types of tasks. See Laughlin & Bonner, *supra* note 54, at 1170 (finding that requiring groups to consider more alternatives had no effect on problem-solving performance, most likely because groups already generated enough alternatives); Orlitzky & Hirokawa, *supra* note 54, at 333-34 (finding that generating alternative solutions had reliable but small effect on group decision-making performance). However, generating multiple alternatives may be beneficial even when it does not help groups solve problems. See Robert I. Sutton & Andrew Hargadon, *Brainstorming Groups in Context: Effectiveness in a Product Design Firm*, 41 ADMIN. SCI. Q. 685 (1996) (finding that, in product-design consulting firm, generating multiple response alternatives aided organizational memory, provided variety for employees, supported attitude of critical thinking, led employees to compete on basis of skill, and impressed clients). But see Craig D. Parks & Rebecca Cowlin, *Group Discussion as Affected by Number of Alternatives and by a Time Limit*, 62 ORG. BEHAV. & HUM. DECISION PROCESSES 267, 273-74 (1995) (finding that group performance under time pressure was impaired when groups were required to consider larger number of response alternatives).

¹³⁸ See Andrea B. Hollingshead, *The Rank-Order Effect in Group Decision Making*, 68 ORG. BEHAV. & HUM. DECISION PROCESSES 181, 190 (1996) (finding that groups required to rank quality of all available response choices discussed more alternatives and more information, and made better decisions than groups required only to select best response); McGlynn et al., *supra* note 137, at 86 ("Our findings suggest . . . that an hypothesis generation procedure that prompts groups to explore the full dimensions of the problem early in the task may provide groups with some of the resources to later reason to the correct hypothesis."); John P. Wanous & Margaret A. Youtz, *Solution Diversity and the Quality of Group Decisions*, 29 ACAD. MGMT. J. 149, 150, 155-56 (1986) (finding that degree of divergence of individual member solution preferences was positively associated with quality of group decisions).

¹³⁹ *Gregory v. Corr. Connection, Inc.*, Civil Action No. 88-7990, 1991 U.S. Dist. LEXIS 3659, at *85 (E.D. Pa. Mar. 27, 1991) ("[D]efendants have failed to designate specific facts to show that CCI's board engaged in a good-faith analysis, based on a reasonable investigation, not

Court said, "In our case law since *Van Gorkom*, our due care examination has focused on a board's decision-making process. We look for evidence as to whether a board has acted in a deliberate and knowledgeable way in identifying and exploring alternatives."¹⁴¹

In *In re The Walt Disney Company Derivative Litigation*,¹⁴² the board's failure to explore alternatives was crucial to the court's decision. There, the Delaware chancery court held that the directors of Disney breached their duty of care when they allowed company President Michael Ovitz to terminate his employment contract on a non-fault basis. Ovitz had not performed well at Disney in the year that he had been there, but he allegedly received over 140 million dollars in termination fees as a result of the non-fault termination.¹⁴³ Failure to explore alternatives was a factor in the court's explanation of its decision: "If the board had taken the time or effort to review. . . other options, perhaps with the assistance of expert legal advisors, the business judgment rule might well protect its decision In this case, however, the . . . complaint asserts that the . . . directors refused to explore any alternatives, and refused to even attempt to evaluate the implications of the [alternative the company actually pursued]."¹⁴⁴

only of alternative methods of addressing Gregory's threats to CCI's financial stability but also of the method that was chosen."); *In re Sea-land Corp. S'holder Litig.*, 642 A.2d 792, 795, 807 (Del. Ch. 1993) ("The board . . . instructed [the CEO] 'to explore all available alternatives to maximize value to the shareowners'; "[When they made their decision,] [t]he directors understood Sea-Land's available alternatives and the ramifications of rejecting the CSX Offer. Any comparison of the deliberations and behavior of this board to that of the directors in *Van Gorkom* only underscores the due care with which the Sea-Land directors proceeded."); *In re RJR Nabisco, Inc. S'holder's Litig.*, 1989 Fed. Sec. L. Rep. (CCH) ¶ 94,194, 1989 Del. Ch. LEXIS 9, at *55 (Del. Ch. Jan. 31, 1989) ("[T]here appears to have been no neglect of duty of any sort in this instance. This would appear quite evident given the amount of attention the directors lavished upon this important transaction and the responsible steps they took to be competently advised concerning alternatives open to them."); *Seven Springs Farm, Inc. v. Lynda Dupre Croker*, 748 A.2d 740, 756 (Pa. Super. Ct. 2000) ("The board's alleged failure to explore alternative proposals that may have been more advantageous to the shareholders, if established, would place in question the propriety of the board's approval of the [transaction].").

¹⁴⁰ 569 A.2d 53 (Del. 1989).

¹⁴¹ *Id.* at 66; see also *Citron v. Fairchild Camera & Instrument Corp.*, 1988 Fed. Sec. L. Rep. (CCH) ¶ 93,915, 1988 Del. Ch. LEXIS 67, at *52-56 (Del. Ch. May 19, 1988) ("When the decision is to recommend a merger, surely a prudent judgment requires an assessment of available alternatives.").

¹⁴² 825 A.2d 275 (Del. Ch. 2003).

¹⁴³ *Id.* at 279.

¹⁴⁴ *Id.* at 289.

Directors can explore alternatives by conducting an auction for a company that is being sold or by considering competing bids.¹⁴⁵ In *Roberts v. General Instrument Corp.*,¹⁴⁶ the court held that the board of General Instrument fulfilled its duty of care when it accepted a takeover offer. Considering multiple alternatives was a critical factor in the court's determination. The court phrased the duty of care as an obligation of directors to gather enough information to be able to reasonably conclude that the selected course of action is the best alternative.¹⁴⁷ The court noted that the board's financial advisor had discussed the effects of a variety of alternatives on the value of the company.¹⁴⁸

The benefits of treating directors' consideration of multiple courses of action as evidence of careful decision-making in duty of care cases are summarized as follows. First, it is a valid indicator of careful decision-making, so courts that rely on it are more likely to accurately identify directors who made decisions carefully. Second, groups that consider multiple courses of action make better decisions, and directors will be motivated to do so if it helps them avoid liability. Third, the effects of considering multiple alternatives on group decisions are accounted for by the PDS model, thereby increasing the coherence of duty of care jurisprudence if the model is adopted by courts. Fourth, courts currently use this factor in duty of care jurisprudence.

On the other hand, there are costs of having courts examine the number of alternatives a board considers. First, encouraging boards to consider more alternative courses of action could lengthen board meetings. Second, encouraging boards to consider more alternative courses of action involves judicial intervention in boards' decision-making processes. Third, this factor can involve some uncertainty because directors may not be able to know how many alternatives courts will require them to discuss in a particular situation or if a court will decide that the board failed to discuss a particularly important alternative.¹⁴⁹ Finally, this factor can require courts to sift through a large

¹⁴⁵ The preference for auctions in certain situations in Delaware takeover law rewards boards for considering multiple alternatives. See *Paramount Communications v. QVC Network*, 637 A.2d 34, 44 (Del. 1994) ("[M]ethods [that] are designed to determine the existence and viability of possible alternatives . . . include conducting an auction, canvassing the market, etc.").

¹⁴⁶ 1990 Fed. Sec. L. Rep. (CCH) 95,465, 1990 Del. Ch. LEXIS 138, at *28 (Del. Ch. Aug. 13, 1990).

¹⁴⁷ *Id.* at 24-25.

¹⁴⁸ *Id.* at 27.

¹⁴⁹ This issue is discussed in more detail *infra* Section V.B.1. and the accompanying

amount of evidence about what occurred in a board meeting.

Other than the risk of uncertainty, the costs of having courts consider the number of alternatives a board discusses are probably relatively minimal. First, board meetings lengthened by considering multiple alternatives can nevertheless be efficient when they lead to better decisions. Moreover, if directors have already flown into town for a board meeting, the cost of staying in the meeting for longer is relatively low. Second, intervention in the board's decision-making process has risks, but interventions that are justified by research and theory are likely to be beneficial. Finally, Delaware courts (where most duty of care cases are brought) already work with large factual records, even on summary judgment motions. On balance, increasing the quality of board decisions, the accuracy of court decisions, and the coherence of duty of care jurisprudence are sufficiently weighty reasons for making the number of alternatives a board discusses a central component of duty of care jurisprudence.

2. Asking Questions

Collecting and discussing facts (the discussing step of the PDS model) helps groups make good decisions.¹⁵⁰ Groups make better decisions when they have more information because they use information to evaluate proposed courses of action.¹⁵¹ Groups are less likely to accept

notes.

¹⁵⁰ JANIS, *supra* note 112, at 175 (characterizing "Poor information search" as symptom of defective group decision-making); Garold Stasser & Dennis Stewart, *Discovery of Hidden Profiles by Decision-Making Groups: Solving a Problem Versus Making a Judgment*, 63 J. PERS. & SOC. PSYCHOL. 426, 432 (1992) (noting that groups solved problem better when they engaged in comprehensive information search). *But cf.* James R. Larson, Jr. et al., *Leadership Style and the Discussion of Shared and Unshared Information in Decision-Making Groups*, 24 PERS. & SOC. PSYCHOL. BULL. 482, 493 (1998) (finding that groups whose leaders encouraged members to discuss more information did not make better decisions). *See generally* Jennifer R. Winquist & James R. Larson, Jr., *Information Pooling: When It Impacts Group Decision Making*, 74 J. PERS. & SOC. PSYCHOL. 371, 375 (1998) (introducing new information into discussion can improve group decisions).

¹⁵¹ Gregory M. Herek listed seven symptoms of defective group decision-making; the fourth item is:

Poor information search. The group fails to obtain available information necessary for critically evaluating the pros and cons of the preferred course of action and other alternatives. If the group engages in any information search at all, it does so in such a perfunctory and incomplete manner that it fails to obtain a number of important pieces of information that would have been available if requested from experts or other appropriate persons inside or outside their organization.

poor solutions as the number of available facts increases because there are more constraints that each solution must satisfy; the more evidence there is, the more likely it is that it will reveal which solutions are poor.¹⁵²

One way to obtain information is to ask questions. Question-asking can elicit additional facts and help groups identify inconsistencies between a solution and the available facts (the selecting step of the PDS model).

Research and theory provide decisive support for the conclusion that asking questions is beneficial for — perhaps even central to — learning and decision-making.¹⁵³ Questions are a critical aspect of thinking: “[Q]uestions are one of the fundamental . . . components that guide human reasoning. . . . [T]hreads of coherent reasoning are built around the questions that humans ask and their answers to these questions.”¹⁵⁴

Herek et al., *supra* note 136, at 204.

¹⁵² See James W. Dean, Jr. & Mark P. Sharfman, *Does Decision Process Matter? A Study of Strategic Decision-Making Effectiveness*, 39 ACAD. MGMT. J. 368, 373, 389 (1996) (arguing that collecting facts improves the quality of management decisions); Laughlin & Bonner, *supra* note 54, at 1170-71 (finding that groups solved problems more effectively when given more information to test their solution proposals); Sniezek & Buckley, *supra* note 126, at 160 (“[C]onfidence and accuracy depend on the extent to which the decision maker searches for evidence about each alternative. . . . [S]maller samples of evidence will, in general, reduce one’s chance of selecting accurately.”).

¹⁵³ Arthur C. Graesser et al., *Question-driven Explanatory Reasoning*, 10 APPLIED COG. PSYCHOL. S17, S20 (1996) (“[T]here is substantial support for an ‘elaborative interrogation’ hypothesis, which predicts that learning improves to the extent that the learner asks and answers questions that require explanatory reasoning about the material”); Arthur C. Graesser & Brent A. Olde, *How Does One Know Whether a Person Understands a Device? The Quality of the Questions the Person Asks When the Device Breaks Down*, 95 J. EDUC. PSYCHOL. 524, 524, 526 (2003); Gerardo A. Okhuysen & Kathleen M. Eisenhardt, *Integrating Knowledge in Groups: How Formal Interventions Enable Flexibility*, 13 ORG. SCI. 370, 381-83 (2002) (finding that instructing group members to ask each other questions caused them to engage in more thorough analysis of problem); Barak Rosenshine et al., *Teaching Students to Generate Questions: A Review of the Intervention Studies*, 66 REV. EDUC. RES. 181, 183 (1996) (finding that students who are taught to ask questions have better comprehension than students who are not, and stating that “[c]omposing questions may require students to play an active, initiating role in the learning process Engaging in these active processes may lead to improved comprehension and enhanced recall of information. . . .”). One potential cost of question-asking is that corporate directors might have to evaluate the credibility of executives making presentations to the board, and active participation in a discussion might interfere with their ability to do so. See generally Norah E. Dunbar et al., *The Effects of Participation on the Ability to Judge Deceit*, 16 COMM. REP. 23 (2003) (noting that conversational participants are worse at detecting deception than are passive observers).

¹⁵⁴ Arthur C. Graesser et al., *Question-driven Explanatory Reasoning*, 10 APPLIED COG. PSYCHOL. S17, S20 (1996); see also Ashwin Ram, *A Theory of Questions and Question Asking*, 1 J. LEARN. SCI. 273, 273 (1991) (“Children ask questions constantly in an attempt to understand and learn about the world around them. Even as adults, we express our curiosity in the form of questions, often to ourselves, as we wonder about novel situations, explore new hypotheses, and become interested in various issues. The ability to ask questions . . . is central to the processes of reasoning, understanding, and learning.”).

People tend to ask questions in response to the omission of critical information, the presence of contradictions, or the observation of salient irrelevant information.¹⁵⁵ This is precisely the sort of inquiry that is involved in determining the internal consistency of proposed solutions and how well they fit with the available facts (the selecting step of the PDS model).

Question-asking is frequently a factor in duty of care cases. For example, it played a critical role in *NCR Corp. v. American Telephone and Telegraph Co.*¹⁵⁶ The board of NCR established an employee stock ownership plan as AT&T was trying to acquire the company. The court held that the directors of NCR violated their duty of care, and that asking questions might have elicited relevant facts that they should have considered.¹⁵⁷

On occasion, directors who ask questions are not protected from liability. In *Hanson v. ML SCM Acquisition Corp.*,¹⁵⁸ the directors of an acquisition target were held to have violated the duty of care when they approved a transaction that gave one bidder an option to purchase certain company assets. Before they voted, the directors asked questions in what seems to have been an attempt to collect additional information (the discussing step of the PDS model) and identify problems with the course of action they eventually adopted (the selecting step of the PDS model). For example, they asked "whether asset options such as that proposed had been legally upheld," "whether a higher price might be

¹⁵⁵ Arthur C. Graesser & Cathy L. McMahan, *Anomalous Information Triggers Questions When Adults Solve Quantitative Problems and Comprehend Stories*, 85 J. EDUC. PSYCHOL. 136, 147 (1993); Arthur C. Graesser & Brent A. Olde, *How Does One Know Whether a Person Understands a Device? The Quality of the Questions the Person Asks When the Device Breaks Down*, 95 J. EDUC. PSYCHOL. 524, 524, 526 (2003) ("Questions are asked when individuals are confronted with obstacles to goals, anomalous events, contradictions, discrepancies, salient contrasts, obvious gaps in knowledge, expectation violations, and decisions that require discrimination among equally attractive alternatives."); Ram, *supra* note 154, at 274 ("I argue that knowledge goals, often expressed as questions, arise when the reasoner's model of the domain is inadequate in some reasoning situation. This leads the reasoner to focus on what he or she needs to know, to formulate questions in acquiring this knowledge, and to learn by pursuing these questions.").

¹⁵⁶ 761 F. Supp. 475 (S.D. Oh. 1991).

¹⁵⁷ The court stated:

[T]he transaction is not protected by the business judgment rule because the Board was not acting in an informed capacity. This seems to be the fault both of NCR's management, which failed to make the Board aware of key information, and of the Board itself, which failed to ask questions, consider certain consequences or examine the plan with a critical eye.

Id. at 495.

¹⁵⁸ 781 F.2d 264 (2d Cir. 1986).

obtained for these assets," and "whether [the bidder] would do the deal without the asset option."¹⁵⁹ Nevertheless, the court ruled against the directors, holding that they did not have enough information and did not take enough time to make their decision.¹⁶⁰

The holding in *Hanson* is contrary to the more general trend, however. Question-asking has been treated as strong evidence of careful decision-making in many duty of care cases.¹⁶¹ The benefits of question-asking for decision-making groups have also been accepted by legal scholars who argue that juries would make better decisions if they were encouraged to ask questions of witnesses.¹⁶² A number of jurisdictions have adopted such a policy.¹⁶³

The benefits of treating question-asking as evidence of careful decision-making are summarized as follows. First, question-asking is

¹⁵⁹ *Id.* at 290 (Kearse, J., dissenting).

¹⁶⁰ *Id.* at 275.

¹⁶¹ See *Detwiler v. Offenbecher*, 728 F. Supp. 103, 155 (S.D.N.Y. 1989) (using fact that defendant directors who accepted offer to acquire their company questioned their financial advisor "at great length" on list of factors supporting its ruling that board fulfilled its duty of care); *Buckhorn v. Ropak*, 656 F. Supp. 209, 220 (S.D. Ohio 1987), *aff'd mem.*, 815 F.2d 76 (6th Cir. 1987) (holding that directors' failure to question their outside financial advisor regarding its valuation methods supported claim of lack of due care); *Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 257, 268 (Del. 1989) ("The directors did not question the ESOP size chosen by management and they did not ask about or discuss alternative funding sources."); *Grobow v. Perot*, 539 A.2d 180, 191 (Del. 1988) (noting that plaintiffs might have stated claim of lack of due care if they had alleged that directors failed to ask about reasons for undertaking transaction they approved); *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 939 (Del. 1985) (relying on fact that directors asked questions as evidence that their decision was informed). In *In re NVF Co. Litigation*, the court stated:

Evidently, NVF's May 21 telephonic board meeting involved no deliberations, documents, negotiations or questions. The meeting resulted, however, in the sale of NVF's most valuable (and marketable) asset. . . . Because they represent the financial interest of others, directors must assess transactions of the type presently challenged with a critical eye. The NVF directors appear to have made no such critical assessment. In fact, there is no evidence to indicate that they did anything but vote for the challenged transaction.

In re NVF Co. Litig., No. 9050, 1989 Del. Ch. LEXIS 167, at *17 (Del. Ch. Nov. 21, 1989); see also *Smith v. Van Gorkom*, 488 A.2d 858, 877 (Del. Ch. 1985).

¹⁶² See, e.g., Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 211-213 (1990); Steven D. Penrod & Larry Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, 3 PSYCH. PUB. POL. & L. 259, 280-82 (1997).

¹⁶³ See Penrod & Heuer, *supra* note 162, at 272 ("Although some jurisdictions discourage the procedure, only Texas and Georgia prohibit juror questions."); Shtabsky, *supra* note 90, at 1020-21 (discussing benefits of Arizona rules allowing jurors to question witnesses); *Re-examining Wyoming's Jury Trial Procedures*, *supra* note 90, at 112 (recommending that judges allow jurors to question witnesses).

valid evidence of careful decision-making, and courts that treat it as such are more likely to accurately identify directors who have made decisions carefully. Second, directors will be motivated to ask questions if question-asking is a factor in duty of care cases, and decision makers who ask questions make better decisions. Third, the effects of question-asking on group decisions are accounted for by the PDS model, thereby increasing the coherence of duty of care jurisprudence if the model is adopted by courts. Finally, question-asking is currently a factor in duty of care jurisprudence. On the other hand, the costs of having courts consider question-asking in duty of care analysis include the following. First, encouraging directors to ask questions could lengthen board meetings. Second, motivating directors to ask questions involves court intervention in the directors' decision-making process. Third, making question-asking a factor involves some uncertainty because directors may not be able to determine how many questions courts will require them to ask in a particular situation, or if a court will decide that the directors failed to ask a particularly important question. Finally, making question-asking a factor requires courts to sift through a large amount of evidence to determine what occurred at board meetings.

Apart from the risk of uncertainty, these costs are probably relatively minimal.¹⁶⁴ Question-asking should be a central component of duty of care jurisprudence because increasing the quality of board decisions, the accuracy of court decisions, and the coherence of duty of care jurisprudence outweighs the costs.

3. Expressing Dissent

The potentially beneficial impact of dissent is clearly evident in the PDS model of group decision-making. Group members who disagree with an emerging majority are likely to suggest alternative solutions or provoke others to suggest alternatives¹⁶⁵ (the proposing step of the model). Attempts to poke holes in a majority's preferred solution are a hallmark of dissent: dissenters may point to facts that cast doubt on the course of action preferred by a majority faction (the selecting step of the

¹⁶⁴ The uncertainty issue is discussed *infra* Section V.B.1.

¹⁶⁵ Daniel P. Forbes & Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24 ACAD. MGMT. REV. 489, 494-95 (1999). See generally Fabrizio Butera et al., *Majority and Minority Influence, Task Representation and Inductive Reasoning*, 35 BRIT. J. SOC. PSYCHOL. 123 (1996); Paolo Legrenzi et al., *Majority and Minority Influence in Inductive Reasoning: A Preliminary Study*, 21 EUR. J. SOC. PSYCHOL. 359 (1991).

model), facts that are inaccurate,¹⁶⁶ or facts that are incomplete, necessitating acquisition of additional information (the discussing step of the model). Open dissent makes it difficult for a majority faction to apply social pressure to those who are undecided.¹⁶⁷ Instead, the majority is pushed to provide reasons for its preference, to demonstrate that its solution is consistent with the available facts, or to propose creative alternatives to the majority and dissenting positions.

The idea that dissent reflects (or promotes) careful decision-making might seem paradoxical because dissent could indicate that a group lacks strong and persuasive reasons for its choice. In contrast, unanimity could be taken to indicate that an agreed-upon course of action is clearly the best one.¹⁶⁸ However, studies typically find that unanimity reflects a

¹⁶⁶ Verlin B. Hinsz, *Cognitive and Consensus Processes in Group Recognition Memory Performance*, 59 J. PERS. & SOC. PSYCHOL. 705 (1990) (noting group interaction can allow members to correct each others' memory errors); Orlitzky & Hirokawa, *supra* note 54, at 333 ("[S]mall groups need someone who points out the potential disadvantages of proposed solutions or decisions.").

¹⁶⁷ BREHM ET AL., *supra* note 61, at 219; Vernon L. Allen & John M. Levine, *Social Support and Conformity: The Role of Independent Assessment of Reality*, 7 J. EXP. SOC. PSYCHOL. 48, 50 (1971).

¹⁶⁸ Ruth Bader Ginsburg, discussing Justice Brandeis' policy of refraining from publishing dissenting opinions, stated:

Brandeis was a great institutional man Dissents and concurrences need to be saved for major matters if the Court is not to appear indecisive and quarrelsome, [for] the appearance of indecision and quarrelsomeness are drains on the energy of the institution, leaving it in weakened condition at those moments when the call upon it for public leadership is greatest

Ruth Bader Ginsburg, *Remarks On Writing Separately*, 65 Wash. L. Rev. 133, 143 (1990) (quoting Jerome Frank); William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 434 (1986) (quoting CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 67-68 (1928)) ("When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence."). Discussing the impact of unanimous decisions of the Delaware Supreme Court on corporate directors, David A. Skeel stated:

Far more than a regime characterized by separate opinions, unanimity reinforces the supreme court's effectiveness as moral arbiter — that is, in illuminating how directors ought to act. If the court regularly issued separate opinions, the justices' internal disagreements would dilute the impact of the court's pronouncements, and suggest uncertainty as to the parameters of appropriate directorial behavior. By speaking instead with a single voice, the justices send a very different message, one that suggests that the full authority of the court stands behind the conclusions that they reach as to appropriate and inappropriate directorial behavior.

David A. Skeel, Jr., *The Unanimity Norm in Delaware Corporate Law*, 83 VA. L. REV. 127, 170 (1997); see Meredith Kolsky, *Justice William Johnson and the History of the Supreme Court Dissent*, 83 GEO. L.J. 2069, 2075 (1995) ("Donald Lively, for example, argues that by insisting that the Court speak through a single opinion, [Chief Justice John] Marshall 'promoted

cursory decision-making process, whereas dissent is associated with more thorough consideration of evidence. One straightforward way of understanding these findings is to note that many decisions are, in fact, difficult to make. A lack of disagreement within a group suggests the group is not really grappling with the key issues.¹⁶⁹ A persistent dissenter can cause a majority faction to re-evaluate the evidence on which its position is based, deal with the dissenter's objections, and generally make a more carefully considered decision.¹⁷⁰

analytical common ground and consensuality. The procedural change enabled the Court to speak in a single voice and significantly enhanced its institutional influence and status.'").

¹⁶⁹ Cf. Manning, *supra* note 75, at 1491. Manning described why directors refrain from expressing dissent:

Courts and the public must understand that quite commonly a director will go along with a business proposal that he does not really like Even if a director is strongly opposed to a project, he may still go along because the CEO is determined to proceed and, in the director's best judgment, the disruption that would be caused by firing the CEO at this time would be more injurious to the interests of the company and its shareholders than the negative risks of the project proposed.

Id.

¹⁷⁰ William Brennan, Jr. stated:

But the dissent is often more than just a plea; it safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision At the heart of that function is the critical recognition that vigorous debate improves the final product by forcing the prevailing side to deal with the hardest questions urged by the losing side. In this sense, this function reflects the conviction that the best way to find the truth is to go looking for it in the marketplace of ideas.

Brennan, Jr., *supra* note 168, at 430. Meredith Kolsky stated:

[D]issents improve the substance of judicial decisions in two distinct ways. Initially, dissents may serve as corrective devices by pointing out flaws in the majority's legal analysis that can be seized upon by litigants and courts in subsequent cases to correct these jurisprudential errors. Second, by forcing the majority to confront and consider alternative outcomes or analyses, a dissent improves the actual outcome and reasoning of the decision at hand.

Kolsky, *supra* note 168, at 2082-83.

Many laboratory studies,¹⁷¹ as well as more naturalistic studies,¹⁷² support the causal connection between dissent and good group decisions.¹⁷³ One reason for this connection is that dissent increases the

¹⁷¹ Felix C. Brodbeck et al., *The Dissemination of Critical, Unshared Information in Decision-making Groups: The Effects of Pre-discussion Dissent*, 32 EUR. J. SOC. PSYCHOL. 35, 51 (2002) (finding that greater initial disagreement leads to discussion of more information); Charlan Nemeth et al., *Devil's Advocate Versus Authentic Dissent: Stimulating Quantity and Quality*, 31 EUR. J. SOC. PSYCHOL. 707, 708 (2001) ("A number of studies show that minority dissent stimulates a consideration of more information and more alternatives to a problem, resulting in better and more creative solutions."); Stefan Schulz-Hardt et al., *Productive Conflict in Group Decision Making: Genuine and Contrived Dissent as Strategies to Counteract Biased Information Seeking*, 88 ORG. BEHAV. & HUM. DECISION PROCESSES 563, 573, 579 (2002) [hereinafter *Productive Conflict*] (finding that strength of group preference for information supporting majority view was associated with size of majority); Janet A. Sniezek & Rebecca A. Henry, *Accuracy and Confidence in Group Judgment*, 43 ORG. BEHAV. & HUM. DECISION PROCESSES 1 (1989) (finding that groups made better decisions when members had widely-varying initial judgments about correct decision); see also Charlan Nemeth & Cynthia Chiles, *Modelling Courage: The Role of Dissent in Fostering Independence*, 18 EUR. J. SOC. PSYCHOL. 275, 278 (1988). See generally Gordon B. Moskowitz, *The Mediatonal Effects of Attributions and Information Processing in Minority Social Influence*, 35 BRIT. J. SOC. PSYCHOL. 47 (1996); Craig D. Parks & Nicole L. Nelson, *Discussion and Decision: The Interrelationship Between Initial Preference Distribution and Group Discussion Content*, 80 ORG. BEHAV. & HUM. DECISION PROCESSES 87 (1999) (finding that greater initial disagreement leads to discussion of more information).

¹⁷² See generally Carsten K.W. de Dreu & Michael A. West, *Minority Dissent and Team Innovation: The Importance of Participation in Decision Making*, 86 J. OF APPLIED PSYCHOL. 1191 (2001). De Dreu and West surveyed 28 management and project teams (consisting of 207 individuals, with mean age of 35.8 years) in government, consulting, and other industries. They found that, in teams whose members all participated in decision-making, the expression of dissenting viewpoints was associated with the frequency with which teams created and implemented novel procedures or tools to facilitate their work. They found the identical result in a survey of 21 teams working for a package delivery service. See Jeffrey A. Sonnenfeld, *What Makes Great Boards Great*, 80 HARV. BUS. REV. 106, 110 (Sept. 2002) (effective corporate boards are characterized by tolerance of disagreement). See generally Michael C. Jensen, *The Modern Industrial Revolution, Exit, and the Failure of Internal Control Systems*, in A THEORY OF THE FIRM: GOVERNANCE, RESIDUAL CLAIMS AND ORGANIZATIONAL FORMS 53 (Michael C. Jensen ed., 2000) ("An effective board will often evidence tension among its members as well as with the CEO."); Carsten K.W. de Dreu, *Team Innovation and Team Effectiveness: The Importance of Minority Dissent and Reflexivity*, 11 EUR. J. WORK & ORG. PSYCHOL. 285 (2002) [hereinafter *Team Innovation and Team Effectiveness*] (finding relation between dissent and team innovation in organizational teams (average member age 32.4 years)); Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?*, 77 ST. JOHN'S L. REV. 837 (2003) (arguing that diversity and disagreement can improve board oversight and decision-making); Linn Van Dyne & Richard Saavedra, *A Naturalistic Minority Influence Experiment: Effects on Divergent Thinking, Conflict and Originality in Work-groups*, 35 BRIT. J. SOC. PSYCHOL. 151 (1996) (groups of students working together for 10 weeks produced more creative work products when they contained dissenters than when they did not).

¹⁷³ Personal disagreements can interfere with group functioning if they are not handled properly. See Carsten K.W. de Dreu, *Productive Conflict: The Importance of Conflict Management and Conflict Issue*, in USING CONFLICT IN ORGANIZATIONS 9-10 (Carsten K.W. de

creativity of decision makers' thinking. Studies also show that exposure to dissent leads to more nuanced understanding of issues.¹⁷⁴ For example, a laboratory study involving fifty-eight groups of undergraduates found that exposure to dissent increased the integrative complexity of the subjects' explanations of their decisions.¹⁷⁵ Participants were asked to indicate and explain their views of a fictional Supreme Court opinion regarding the use of mandatory busing to reduce racial segregation in schools. On the basis of these expressed opinions, participants were assigned to groups whose members all had similar opinions ("unanimous groups") or to groups in which a minority of the members had expressed views that differed from those of the other group members ("non-unanimous groups"). After these groups discussed the issue and produced decisions by majority vote, participants again wrote explanations of their views. Analysis of these explanations revealed that members of non-unanimous groups wrote explanations of their views that were more complex than those of participants in unanimous groups. In addition, there was an increase in the complexity of the explanations of members of non-unanimous groups from their pre-discussion explanations of their views to their post-discussion explanations. Participants were more likely to perceive value tradeoffs and other nuances when they were exposed to people who disagreed with their opinions.¹⁷⁶ The results of this laboratory study are complemented by an analysis of the complexity of thirty-two

Dreu & E.V. Van de Vliert eds., 1997); see also *In re Annrhon, Inc. v. Lesinski*, 17 Cal. App. 4th 742, 754 (1993) (noting disagreement on board of directors led to deadlock which threatened company); *Kaplan v. Goldsamt*, 380 A.2d 556, 560 (Del. Ch. 1977) (noting same). See generally Leslie A. DeChurch & Michelle A. Marks, *Maximizing the Benefits of Task Conflict: The Role of Conflict Management*, 12 INT'L J. CONFLICT MGMT. 4 (2001); M. Afzalur Rahim, *Toward a Theory of Managing Organizational Conflict*, 13 INT'L J. CONFLICT MGMT. 206 (2002).

¹⁷⁴ Charlan J. Nemeth & Julianne L. Kwan, *Minority Influence, Divergent Thinking and Detection of Correct Solutions*, 17 J. APPLIED SOC. PSYCHOL. 788 (1987); Charlan J. Nemeth & Joel Wachtler, *Creative Problem Solving as a Result of Majority vs. Minority Influence*, 13 EUR. J. SOC. PSYCHOL. 45 (1983).

¹⁷⁵ Deborah H. Gruenfeld et al., *Cognitive Flexibility, Communication Strategy, and Integrative Complexity in Groups: Public versus Private Reactions to Majority and Minority Status*, 34 J. EXP. SOC. PSYCHOL. 202, 219 (1998) [hereinafter *Cognitive Flexibility*]. Integrative complexity refers to the number of perspectives or dimensions a person considers relevant to an issue, as well as the extent to which the person sees those dimensions as conceptually related. Integratively complex thinking addresses value trade-offs and relations among issues; integratively simple thinking involves bright-line rules. See Deborah H. Gruenfeld, *Status, Ideology, and Integrative Complexity on the U.S. Supreme Court: Rethinking the Politics of Political Decision Making*, 68 J. PERS. & SOC. PSYCHOL. 5, 5-10 (1995) [hereinafter *Rethinking the Politics of Political Decision Making*].

¹⁷⁶ See *Cognitive Flexibility*, *supra* note 175, at 214-17.

Supreme Court opinions, which found that the majority opinions in unanimous cases were less complex than the opinions in non-unanimous cases.¹⁷⁷

Although it is not currently a core element of duty of care jurisprudence, the expression of dissenting opinions in board meetings has been treated as evidence of careful decision-making in three duty of care cases. In *Moran v. Household International, Inc.*,¹⁷⁸ the board of Household International adopted a shareholder rights plan when one of its members (Moran) was hoping to conduct a leveraged buyout of the company. One of the provisions of this plan (now commonly referred to as a poison pill) granted stockholders the right to purchase discounted stock of any company that acquired Household. The plan was intended to discourage hostile acquirers and had the effect of preventing Moran's leveraged buyout. Moran dissented from the board's vote approving the plan, as did a second director who was concerned that the plan would bring unwanted attention to the company.¹⁷⁹

Moran sued the Household directors, claiming, among other things, that the directors breached their duty of care when they adopted the rights plan. The court held that the board had fulfilled its duty of care and noted that Moran participated in the board meeting at which the plan was adopted. His expression of a dissenting view in the board meeting was a factor in the court's decision because "Moran's expression of his views at the meeting served to place before the Board a knowledgeable critique of the Plan."¹⁸⁰

The result was different in *EAC Industries v. Frantz Manufacturing*,¹⁸¹ in which a director disagreed with the board but, unlike Moran in the *Household* case, refrained from expressing his views in the board meeting. In *EAC*, a potential acquirer (who had voted himself onto the board) attended a board meeting at which the directors adopted an employee stock ownership plan for the purpose of thwarting his takeover attempt. The acquirer was not given the right to vote and declined to comment on the employee stock ownership plan when given an opportunity to do so.¹⁸² The court held that the directors breached

¹⁷⁷ See generally *Rethinking the Politics of Political Decision Making*, *supra* note 175. The author noted that she was unable to rule out the possibility that the unanimous cases were simpler and therefore did not offer opportunities for integratively complex reasoning.

¹⁷⁸ 500 A.2d 1346 (Del. 1985).

¹⁷⁹ *Id.* at 1348.

¹⁸⁰ *Id.* at 1356.

¹⁸¹ *Unreported Case: EAC v. Frantz Manufacturing*, *supra* note 28.

¹⁸² *Id.* at 615. At a subsequent meeting, the potential acquirer presented a merger proposal, supported by a fairness opinion, but the board voted not to accept the proposal.

their duty of care. Although the court did not characterize the potential acquirer's presence in the board meeting as relevant to its duty of care analysis, it is conceivable that if he had actively participated in the board meeting, as Moran did in *Household*, the discussion would have been more thorough, and the court might have decided that the directors fulfilled their duty of care. This pair of cases, *Household* and *EAC Industries*, suggests that potential acquirers can influence a court's decision as to whether the target directors have fulfilled their duty of care by expressing dissent (*Household*) or refraining from doing so (*EAC*).¹⁸³

The court in *Gries Sports Enterprises, Inc. vs. Cleveland Browns Football Co.*¹⁸⁴ also treated a director's expression of dissent as evidence of careful decision-making. Gries, a director and substantial shareholder of the company that owned the Cleveland Browns football team, sued the Browns' board. He claimed, among other things, that the board was not sufficiently informed when it approved the purchase of Cleveland Stadium Corp. ("CSC"), the company that operated the stadium in which the team played. Because he thought the price was too high, Gries opposed the purchase of CSC from its sole owner, a member of the Browns' board. The approval process was contentious — and thorough — as a result of Gries' opposition. The court noted that Gries wrote to the other directors prior to the board meeting urging them not to approve the purchase,¹⁸⁵ retained his own financial advisor,¹⁸⁶ and gave a ninety minute presentation at the board meeting explaining his

Id.

¹⁸³ However, it is quite common for directors to recuse themselves from meetings at which the board discusses matters in which they have a personal financial interest. See, e.g., *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1339 (Del. 1987) (noting two directors representing potential acquirer recused themselves from meeting at which board of potential target adopted agreement with potential acquirer); *Ivanhoe Partners v. Newmont Mining Corp.*, 533 A.2d 585, 596, 598 (Del. Ch. 1987) (directors rejoined meeting but did not vote on related transactions); Kenneth B. Davis, Jr., *Approval by Disinterested Directors*, 20 IOWA J. CORP. L. 215, 239 (1995) ("[T]he interested directors' abstention, by itself, seems a rather paltry means of promoting the independent judgment of their disinterested colleagues. The better course would be for the interested directors to recuse themselves from the meeting when their transaction comes up for discussion."); see also Greg M. Zipes & Lisa L. Lambert, *Creditors' Committee Formation Dynamics: Issues in the Real World*, 77 AM. BANKR. L.J. 229, 233 (2003) ("A proposed member [of a creditors' committee] may represent that it will recuse itself from committee deliberations when the committee is discussing that member's claim, or if that member believes that it must take a position contrary to a position the committee as a whole supports.").

¹⁸⁴ Nos. 49184, 49197, 1985 Ohio App. LEXIS 6545 (Ohio Ct. App. Apr. 25, 1985).

¹⁸⁵ *Id.* at 5-6.

¹⁸⁶ *Id.* at 4, 85.

opposition to the purchase (which was followed by a presentation in favor of the purchase by CSC's owner).¹⁸⁷ The court stated that Gries' vigorous opposition was a factor in its holding that the board fulfilled its duty of care.¹⁸⁸

In *Detwiler v. Offenbecher*,¹⁸⁹ a court again treated a dissenter's efforts as evidence of careful group decision-making. In *Detwiler*, the board of a closely held company decided to sell the company despite objections from a minority group of shareholders (the Detwiler family), one of whom was a director. The minority shareholders sued the directors claiming that they breached their duty of care when they accepted an offer to buy the company. The court held that the directors did not breach their duty of care and presented a list of facts underlying its finding.¹⁹⁰ Six of the seventeen items on the court's list referred to the dissenting director's actions. The dissenting director's opposition caused the board to consider more information because he and the shareholders he represented retained their own financial advisors, performed their own valuation of the company, and presented their own views about how the company should be marketed. In board meetings, the dissenting director suggested procedures for selling the company, criticized the company's earnings projections, expressed his views about potential purchasers, and pushed the board to obtain a higher price for the company. The dissenting director's opposition helped the board in *Detwiler v. Offenbecher* become more informed; the court took that fact into account in its ruling.

Although the expression of dissent by corporate directors played a role in the holdings of the three cases described here, dissent is not considered in the vast majority of duty of care cases. Dissent is not a central element in duty of care jurisprudence; courts typically do not mention whether any directors dissented.¹⁹¹ Perhaps as a result, boards'

¹⁸⁷ *Id.* at 6-7.

¹⁸⁸ *Id.* at 32-33 ("The appellees have not proven that the directors were grossly negligent in failing to inform themselves of readily available information regarding the acquisition of CSC. The directors knew of the proposed acquisition months before they voted on it; nothing in the record indicates that they did not read and consider the reports that were provided to them; and they listened to a one-and-a-half hour presentation by Gries during which he delineated his reasons for opposing the acquisition.").

¹⁸⁹ 728 F. Supp. 103 (S.D.N.Y. 1989).

¹⁹⁰ *Id.* at 154-55.

¹⁹¹ There have been cases in which dissenters were present on a board but the court did not consider this fact in its duty of care analysis. See, e.g., *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 801 (Tx. App. 1987) (noting that Getty board accepted Pennzoil's proposal by 15-1 vote). The court determined that the directors fulfilled their duty of care but gave no indication that the dissenting director's vote played a role in the court's determination. *Id.*;

decisions are usually unanimous.

The benefits of treating the expression of dissent as evidence of careful decision-making can be summarized as follows. First, it is a valid indicator of careful decision-making; courts that rely on it will more accurately identify directors who have made decisions carefully. Second, decision-making groups whose members express dissent make decisions more carefully, and directors will be motivated to express dissent if doing so is a factor in duty of care cases. Third, the effects of dissent on group decisions are accounted for by the PDS model, thereby increasing the coherence of duty of care jurisprudence if the model is adopted by courts. Finally, dissent has already been a factor in some duty of care cases.

On the other hand, there are costs of having courts treat the expression of dissent as evidence of careful decision-making. First, encouraging directors to express disagreement could lengthen board meetings. Second, motivating directors to express dissent, by protecting them from liability if they do so, involves court intervention in the directors' decision-making process. Third, making the expression of dissent a factor involves some uncertainty because directors may not be able to know how much credit they will receive, if any, for particular expressions of dissent in particular situations. Fourth, courts that examine expressions of dissent will have to sift through a large amount of evidence about what occurred in board meetings. Finally, encouraging the expression of disagreement in board deliberations involves the risk of creating conflict that interferes with the ability of directors to work together.

Other than the risk of uncertainty, these costs are relatively minimal.¹⁹² The risk that the law may cause directors to engage in conflict that interferes with their ability to function as a group is probably not particularly large. Directors are adults; they are likely to have sufficient social skills to resist a breakdown of civility in board meetings. In addition, outside directors' minimal investment in the firms they oversee means that they run relatively low personal risks in the event of a wrong decision. Thus, lack of engagement seems to be a more likely occurrence than bitter conflict. Overall, increasing the quality of board decisions, the accuracy of court decisions, and the coherence of duty of care

see also Gimbel v. Signal, 316 A.2d 599, 614-15 (Del. Ch. 1974) (noting that minority shareholders wrote to each board member, expressing opposition to sale which board approved without further consultation with minority group). The board's action was enjoined, but the court said it was satisfied with the directors' decision making process. *Id.*

¹⁹² *See infra* Subpart V.B.1. and accompanying notes.

jurisprudence outweighs the potential costs of encouraging directors to express disagreement.¹⁹³ The expression of dissent should be a central component of duty of care jurisprudence.

IV. REFORMING DUTY OF CARE JURISPRUDENCE

Changes should be made to duty of care jurisprudence. First, courts should consider two additional behaviors as evidence of careful decision-making: using a methodical decision-making procedure and producing a detailed written rationale for decisions. Second, judges, lawyers, and legislators should promote the use of group decision-making research in duty of care jurisprudence. These changes would increase the efficiency and coherence of duty of care jurisprudence, and make it seem less arbitrary.

A. Methodical Decision-making Procedures

The law would be more efficient and less arbitrary if courts treated the adoption and use of a methodical decision-making procedure as evidence of careful decision-making. A methodical decision-making procedure is a set of steps that a group decides to follow for every important decision. Use of a methodical decision-making process leads groups to have a consistent process for making decisions.

When there is an initial consensus among group members, they may only briefly discuss the issue, focusing on the unanimously preferred solution.¹⁹⁴ In such situations, groups explore fewer potential courses of action (the proposing step of the PDS model), discuss fewer facts (the discussing step), and may not engage in critical analysis of the course of action they choose to follow (the selecting step). A methodical procedure can lead groups to have a consistently thorough decision-making process. This can prevent a premature consensus from forming around a course of action that more thorough consideration would

¹⁹³ Contrived dissent, such as objections produced by a group member designated as a devil's advocate, is less beneficial than genuine dissent. This appears to be the case because devil's advocates may not be as confident as a genuine dissenter, and a devil's advocate is likely to be less persistent. See generally Nemeth et al., *supra* note 171, at 716-18 (noting that both genuine and contrived dissent improved quality of group work products, but genuine dissent led to greater improvement than did contrived dissent); *Productive Conflict*, *supra* note 171, at 574-77, 580 (noting that genuine dissent reduced bias in group information search, but contrived dissent had no effect).

¹⁹⁴ Hollingshead, *supra* note 138, at 182-83; *Biased Information Search*, *supra* note 115, at 666; *Productive Conflict*, *supra* note 171, at 579-80.

reveal as a poor choice.¹⁹⁵

The following steps outline a methodical procedure that helps groups make decisions carefully. First, the group lists a broad range of alternatives.¹⁹⁶ Second, the group discusses the risks, costs, and potential benefits of every alternative it has identified.¹⁹⁷ Third, the group selects one alternative as the group choice. Fourth, the group discusses potential problems with that alternative, along with ways to handle those problems and to reduce the risks that a particular problem will arise.¹⁹⁸ During the process, directors can also discuss the risks they personally face as a result of their decision (such as personal liability), as well as ways to minimize those risks.¹⁹⁹

Groups that adopt this procedure should routinely have a careful decision-making process in which there is a broad information search. The process outlined here requires multiple solutions to be considered (the proposing step of the PDS model) and elicits information about each alternative (the discussing step of the model). By making the risks, costs, and benefits of each alternative explicit, this procedure encourages the group to evaluate the factual support for each potential course of action (the selecting step of the model). Dissent is encouraged because the group requires itself to discuss drawbacks and risks of all alternatives, even the ones that are preferred by a majority.

¹⁹⁵ JANIS, *supra* note 112, at 249; see also Joseph P. Forgas & Jennifer M. George, *Affective Influences on Judgments and Behavior in Organizations: An Information Processing Perspective*, 86 *ORG. BEHAV. & HUM. DECISION PROCESSES* 3, 9 (2001) (arguing that routines can reduce effects of emotions on decision-making).

¹⁹⁶ See *infra* Subpart III.D.1. and accompanying notes.

¹⁹⁷ Herek et al., *supra* note 136, at 204 (listing seven symptoms of defective group decision-making; third item is: "Failure to examine major costs and risks of the preferred choice. The group fails to consider the negative consequences of the preferred alternative or examines them so incompletely that its members overlook a number of important negative consequences even though information about those consequences is available."); Orlitzky & Hirokawa, *supra* note 54, at 332-33 (finding that "across different study contexts, the most important group process function is group members' assessment of the negative consequences of alternative solutions."). See generally Hollingshead, *supra* note 138, at 191 (finding that groups made better decisions when they were encouraged to evaluate all of available response alternatives, not just pick best one).

This step appears to have occurred in at least one case concerning the duty of care. In *Detwiler v. Offenbecher*, the board's decision to sell the company was challenged. The court noted that the board's investment bank described to the board the costs and potential benefits of its alternatives. *Detwiler v. Offenbecher*, 728 F. Supp. 103, 113 (S.D.N.Y. 1989).

¹⁹⁸ See JANIS, *supra* note 112, at 175 ("Failure to examine risks of preferred choice"); Herek et al., *supra* note 136, at 204-05; Turner & Pratkanis, *supra* note 113, at 225 (explaining the risk technique).

¹⁹⁹ Turner & Pratkanis, *supra* note 113, at 225-26.

Research has demonstrated that adoption and use of a methodical decision-making procedure improves the quality of group decisions.²⁰⁰ A methodical decision-making process can become a routine, or a part of a group's identity,²⁰¹ encouraging members to use it consistently. The benefits of treating a board's adoption and use of a methodical decision-making procedure as evidence of careful decision-making include the following. First, use of a methodical procedure is valid evidence of careful decision-making; courts that rely on it in duty of care cases will more accurately identify directors who have made decisions carefully. Second, decision makers who use a methodical procedure make better decisions, and directors will be motivated to adopt and use a methodical procedure if doing so is a factor in duty of care cases. Third, the effects of a methodical procedure on group decisions are accounted for by the PDS model, thereby increasing the coherence of duty of care jurisprudence if the model is adopted by courts. Finally, courts, lawyers, and directors can easily determine if a board has adopted a decision-making procedure and followed it in a particular case.

On the other hand, there are costs of having courts consider a board's use of a methodical decision-making procedure in duty of care cases. First, motivating directors to use a methodical procedure involves court intervention in the directors' decision-making process. Second, a methodical decision-making procedure can be time consuming. Finally, boards may face some uncertainty about which decisions are important enough to warrant the use of their methodical procedure.

These costs are not sufficient to outweigh the benefits of a methodical decision-making procedure. Intervening in boards' decision-making process seems justifiable and efficient if it promotes more careful decision-making. Moreover, boards could adopt specific criteria for when they would use their methodical decision-making procedure, such as when evaluating any transaction that involves a specified percentage

²⁰⁰ See JANIS, *supra* note 112, at 249 (1983) (noting that failure of group to "adopt methodical procedures of information search and appraisal (such as filling out a balance sheet of pros and cons for each available option)" leads to defective group decision-making); Michael R. Callaway & James K. Esser, *Groupthink: Effects of Cohesiveness and Problem-Solving Procedures on Group Decision Making*, 12 SOC. BEHAV. & PERS. 157, 162-63 (1984); Chris P. Neck & Gregory Moorhead, *Jury Deliberations in the Trial of U.S. v. John DeLorean: A Case Analysis of Groupthink Avoidance and an Enhanced Framework*, 45 HUM. REL. 1077, 1087-88 (1992); Turner & Pratkanis, *supra* note 113, at 227-28. See generally Chris P. Neck & Gregory Moorhead, *Groupthink Remodeled: The Importance of Leadership, Time Pressure, and Methodical Decision-Making Procedures*, 48 HUM. REL. 537 (1995).

²⁰¹ Heath et al., *supra* note 54, at 30 (routines used to correct decision-making errors in organizations can become indicators of members' insider status); Turner & Pratkanis, *supra* note 113, at 227.

of the company's stock or assets. Courts should make the adoption of a methodical decision-making procedure a central component of the duty of care because the benefits outweigh the costs.

B. Written Rationales

Individuals and groups make better decisions when they are accountable for their decision-making process.²⁰² Thus, courts should reward boards that produce detailed written rationales for their decisions. This would make boards more accountable for their decision-making process. Providing rewards for good process and punishment for poor process causes decision makers to think and talk more about how to go about doing their work. As a result, groups make better choices about organizing tasks and information.²⁰³

The benefits of process accountability are illustrated by a field study of decision-making by individual purchasing professionals at large companies. This study found that "[p]rocess-accountable buyers seem[ed] to cope with demands for accountability by thoroughly analyzing information prior to making a decision. Because they might expect their evaluators to look beneath the surface in evaluating their decision processes, these buyers rel[ied] on more extensive information analysis to justify their behavior."²⁰⁴ Although this study involved individual, rather than group, decision-making, its results support efforts to increase the process accountability of corporate directors.

Courts should treat as evidence of careful decision-making a detailed written rationale that includes the output of the methodical decision-making procedure described above: directors should list the costs and benefits of each course of action discussed and examine the risks of the

²⁰² Carsten K.W. de Dreu et al., *Unfixing the Fixed Pie: A Motivated Information-Processing Approach to Integrative Negotiation*, 79 J. PERS. & SOC. PSYCHOL. 975, 984 (2000); Marceline B.R. Kroon et al., *Managing Group Decision Making Processes: Individual Versus Collective Accountability and Groupthink*, 2 INT'L J. CONFLICT. MGMT. 91, 109-10 (1991); Lerner & Tetlock, *supra* note 116, at 258; Winston Sieck & J. Frank Yates, *Exposition Effects on Decision Making: Choice and Confidence in Choice*, 70 ORG. BEHAV. & HUM. DECISION PROCESSES 207, 217 (1997); Philip E. Tetlock et al., *Social and Cognitive Strategies for Coping With Accountability: Conformity, Complexity, and Bolstering*, 57 J. PERSONALITY & SOC. PSYCHOL. 632, 638 (1989). See generally Itamar Simonson & Barry M. Staw, *Deescalation Strategies: A Comparison of Techniques for Reducing Commitment to Losing Courses of Action*, 77 J. APPLIED PSYCHOL. 419 (1992).

²⁰³ Karen Siegel-Jacobs & J. Frank Yates, *Effects of Procedural and Outcome Accountability on Judgment Quality*, 65 ORG. BEH. & HUM. DECISION PROCESSES 1, 2-3 (1996).

²⁰⁴ Patricia M. Doney & Gary M. Armstrong, *Effects of Accountability on Symbolic Information Search and Information Analysis by Organizational Buyers*, 24 J. ACAD. MARKETING SCI. 57, 63 (1996).

course of action chosen by the group. Having boards produce written rationales for their decisions would remind the directors that they are accountable for their decision-making process and it would help courts hold them accountable. A written rationale identifying various courses of action, pros and cons, and risks involved would be more to the point than minutes of the meeting and would, therefore, make courts' jobs easier. It could provide clear evidence that boards considered information supporting a wide range of alternatives and made an informed decision, and it would motivate boards to do so.

An additional benefit is that writing an explanation of a decision would force boards to organize their ideas.²⁰⁵ Scholars and judges generally believe that the discipline of providing written opinions improves judicial decisions.²⁰⁶ Likewise, boards would benefit from the discipline of writing a detailed rationale, primarily as part of the selecting step of the PDS model. The written output would give the board an overview of its options, help it spot inconsistencies, identify excessive risks of the selected course of action, and remind the directors

²⁰⁵ It is common for boards to list the reasons supporting the course of action they selected. See, e.g., *Citron v. Fairchild Camera & Instrument Corp.*, 1988 Fed. Sec. L. Rep. (CCH) P93,915, 1988 Del. Ch. LEXIS 67, at *42 (Del. Ch. May 19, 1988). But it is not as common for them to list the pros and cons of each alternative considered. Boards might be afraid to list reasons favoring unchosen alternatives, but courts or legislatures could provide a safe harbor by explicitly valuing a methodical decision-making process. Regulation M-A, 17 C.F.R. § 229.1012(b) (2004) requires companies recommending an acquisition offer to shareholders to state the reasons for the recommendation, but does not require a discussion of reasons not to recommend the offer.

²⁰⁶ Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 139 (1990). Ginsberg commented:

The process of writing signed opinions is a testing venture. California's once Chief Justice Roger Traynor wrote of the process: "I have not found a better test for the solution of a case than its articulation in writing, which is thinking at its hardest. A judge . . . often discovers that his tentative views will not jell in the writing. He wrestles with the devil more than once to set forth a sound opinion that will be sufficient unto more than the day.

Id.; Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 781 (1995) ("Opinion writing facilitates the decisionmaking process by sharpening analysis, and by imposing a sense of responsibility and discipline on judges."); Patricia M. Wald, *The Problem with the Courts: Black-robed Bureaucracy, or Collegiality under Challenge?*, 42 MD. L. REV. 766, 782 (1983) ("My own guiding principle is that virtually every appellate decision requires some statement of reasons. The discipline of writing even a few sentences or paragraphs explaining the basis for the judgment insures a level of thought and scrutiny by the court that a bare signal of affirmance, dismissal, or reversal does not."). See Sieck & Yates, *supra* note 202, at 217-18 (finding that decision makers made better decisions when required write down their reasons).

of any significant benefits of rejected alternative courses of action.

If producing a written rationale is treated as evidence of careful decision-making, there is a risk that directors would simply have lawyers write up a list of pros and cons after the board makes its decision; the written rationale would play little or no role in the board's decision-making process.²⁰⁷ Such "bad-faith compliance" is discussed below.²⁰⁸

Two benefits of having boards produce detailed written rationales for their decisions are that it would (1) increase directors' feelings of accountability for their decision-making process, causing them to be more thorough, and (2) help courts accurately evaluate the care with which a board made a decision. A potential cost is that directors might be afraid of bringing up arguments against the chosen course of action if those points will be written down. Unlike notes directors might take during meetings, however, written rationales could be carefully prepared, like minutes, reducing the likelihood that courts will interpret them inaccurately. Courts should make it clear that discussing drawbacks is an important aspect of the decision-making process, and that boards that fail to do so are not being careful.

C. *Introducing Group Decision-making Research into Duty of Care Jurisprudence*

The law should be reformed to make duty of care jurisprudence more efficient, less arbitrary, and more coherent. Courts should base their rulings in duty of care cases on whether the directors considered multiple alternatives, asked questions, expressed disagreement, used a methodical decision-making procedure, and produced a written rationale for their decision. In addition, a theory of group decision-making should be incorporated into duty of care jurisprudence because that would help boards justify their use of decision-making procedures that are supported by research, but have not been explicitly mentioned in case law. Finally, notes directors take in board meetings should not be

²⁰⁷ Cf. *Citron*, at *40 n.14 (considering and rejecting plaintiff's allegation that defendant directors engaged in post-hoc fabrication when they claimed to have considered particular factor when they decided to accept takeover offer); Doney & Armstrong, *supra* note 204, at 62, table 1 (finding that organizational purchasers who felt accountable for outcome of their decisions — but not for their decision-making process — were more likely to agree with questionnaire items reflecting efforts to appear careful such as "[a]n important reason I collected information was to show I did a good job in case something went wrong later on.").

²⁰⁸ See *infra* Subpart V.B.2. and accompanying notes.

discoverable. There are several ways in which judges, lawyers, and legislators can make these changes occur.

1. Judges

There are three ways judges can begin to ground their duty of care decisions in psychology research. First, judges should increase the frequency with which they apply factors the courts have relied on that empirical research indicates are strongly associated with careful decision-making. Every duty of care opinion should discuss whether the directors considered multiple alternatives, asked questions, and expressed dissent. This will help judges more accurately identify directors who have made decisions carefully and it will motivate directors to engage in these effective decision-making behaviors.

Second, a judicial opinion should make a general statement that the court will treat procedures supported by empirical research as evidence of careful decision-making. Judges should list empirically-supported decision-making procedures and describe the research supporting them.²⁰⁹ This would put boards on notice that these factors will be treated as evidence of careful decision-making.

Third, a model of group decision-making (such as the PDS model) should be explicitly adopted in a judicial opinion. The theory should be used to describe the effects of the factors courts take into account when deciding duty of care cases. This would require little change in the substance of the law and it would make duty of care jurisprudence significantly more coherent.

2. Lawyers

It is unlikely that lawyers would be willing to advise their clients to depart from the methods of avoiding liability that have been explicitly mentioned in duty of care cases, such as consulting outside financial experts, providing directors with prior notice of the purpose of meetings, and avoiding short meetings.²¹⁰ However, lawyers can benefit from the persuasiveness of empirical group decision-making research. To do so, they should introduce psychology research into their advice given to

²⁰⁹ In dicta, the court in *Grobaw v. Perot* provided plaintiffs and boards with a guide to duty of care jurisprudence by listing factors not alleged in that case. 539 A.2d 180, 191 (Del. 1988) (overruled on other grounds) (listing examples of director behavior that are evidence of lack of care).

²¹⁰ See Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 121-23 (1979).

boards and their arguments presented in duty of care cases in three ways.

First, lawyers should have boards explicitly acknowledge the empirical bases for aspects of their decision-making process. For example, a lawyer could advise directors to adopt a resolution that states that they will routinely ask questions when presented with reports by management or outside advisors and which cites relevant empirical research demonstrating that this practice is beneficial. This would help the directors avoid liability because it demonstrates their commitment to a good decision-making process. Of course, directors would not benefit unless they obey their resolution and actually ask questions.

Second, trial lawyers should focus their arguments on factors that have strong empirical support as evidence of careful decision-making. In particular, lawyers defending directors should highlight the expression of dissenting opinions in board meetings, consideration of multiple alternatives, and question-asking. Lawyers should encourage the expression of dissent at board meetings. This might be accomplished by inviting representatives of disgruntled shareholders or employees to speak.²¹¹ Lawyers should also encourage board members to ask questions,²¹² while keeping careful track of the questions asked. Lawyers should press directors to consider multiple courses of action and make sure courts are made aware of the alternatives they consider. Briefs should cite empirical research supporting the connection between these activities and careful group decision-making.²¹³

Third, because the law changes, its application to particular cases is rarely certain. Lawyers should reduce the risk that directors will be held liable by advising them to go beyond the factors that are currently part of

²¹¹ Cf. *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 939 (Del. 1985) ("The directors also heard from the attorney representing Gruss, the [minority] shareholder who had been threatening suit since May 1976."); Susan-Jacqueline Butler, *Models of Modern Corporations: A Comparative Analysis of German and U.S. Corporate Structures*, 17 ARIZ. J. INT'L & COMP. L. 555, 561-64 (2000) (discussing rules requiring shareholder and labor representatives on corporate boards of German companies); Michael B. Dorff, *Softening Pharaoh's Heart: Harnessing Altruistic Theory and Behavioral Law and Economics to Rein in Executive Salaries*, 51 BUFF. L. REV. 811, 878 (2003) (proposing that boards be advised by committee of randomly-selected shareholders).

²¹² See Larson, Jr. et al., *supra* note 150, at 493 (finding that groups discuss more information when leaders encourage members to participate).

²¹³ See John Monahan and Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 496 (1986) (stating that lawyers should present social science research in briefs rather than through expert testimony). In addition to making the arguments more persuasive, this would help courts become more familiar with the research.

duty of care jurisprudence. For instance, even under current law, directors may be particularly safe if they adopt a methodical decision-making process and produce detailed written rationales for their decisions. Regardless of the effect these interventions have on judicial review of the board's decision-making process, their effect could reduce directors' risk of liability by improving their decisions.

3. Legislators

First, legislators can pass laws reforming the duty of care. Such laws should direct courts to focus on factors such as whether directors considered multiple alternatives, asked questions, expressed dissent, used a methodical decision-making procedure, or produced a detailed written rationale for their decision. New laws should identify and restrict courts' use of factors whose association with careful decision-making is not strongly supported by existing research, such as meeting length. However, such directives should provide for future developments in empirical research by allowing courts to consider other factors they deem relevant.

Second, as discussed above,²¹⁴ legislators should make directors' notes taken in board meetings non-discoverable in duty of care cases. Third, legislators could create a program of research grants for the study of indicators of careful decision-making in corporate boards. Research could provide empirical justification for duty of care criteria that may be beneficial, but have not yet been thoroughly studied, such as notifying directors in advance of the matters to be addressed at meetings. Research findings from such a program could further two important state interests: increasing the quality of corporate board decisions and helping courts justify duty of care jurisprudence.

V. BENEFITS, PROBLEMS, AND CONCLUSIONS

Empirical research on group decision-making should play a role in duty of care cases. Judges currently rely on their intuition to identify behaviors that are evidence of careful group decision-making, but, for the reasons described in this Part, empirical psychology is superior to judicial intuition for this purpose. This Part also discusses five problems that could potentially result from the incorporation of empirical group decision-making research into duty of care jurisprudence.

²¹⁴ See *infra* Subpart III.B.2. and accompanying notes.

A. Empirical Research vs. Intuition

Although the virtues of empirical psychology may be clear to psychology researchers, it is worthwhile to describe several reasons why research is preferable to intuition as a source for duty of care jurisprudence.²¹⁵ First, empirical psychology research is more likely to identify valid indicators of careful decision-making. Empirical research is done by trained experts using standardized methods in controlled environments; conclusions are not accepted until they are subjected to detailed criticism and replicated by peers.²¹⁶ In contrast, judicial intuitions are based on small numbers of ad hoc observations of behavior that takes place in complex environments; the conclusions judges draw about indicators of careful decision-making are not subjected to detailed review.

Second, basing duty of care jurisprudence on judicial intuition makes court decisions and jurisprudence seem arbitrary. Courts have presented little or no explanation for their conclusions that certain behaviors are evidence of careful group decision-making. The source of these conclusions is not clear, and courts have provided no support for their assumption that they are valid indicators of careful decision-making. In contrast, peer-reviewed empirical psychology research provides more accessible justifications for the conclusions it draws. Lawyers and boards can do their own research and bring relevant findings to the attention of courts.

Third, the insights of psychology research are embedded in theories that describe the process of group decision-making. The judicial intuitions that have been accumulated in duty of care jurisprudence are not integrated into any theory or model of the process by which a group arrives at a decision. In the absence of underlying principles, only narrow and literal interpretations of cases are justifiable. A conceptual framework drawn from group decision-making research would allow judges and lawyers to identify the essential aspects of holdings and to make reasonable predictions about the outcome of novel cases.

²¹⁵ See, e.g., David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1020 (1989) ("The testing of theories forms the battlefield of the scientific enterprise, and it is in the trenches that science maintains its principal advantages over common sense."); BREHM ET AL., *supra* note 61, at 10-11 (explaining how social psychology is different from common sense). I am making no claim for the use of psychology research in any area of law other than duty of care jurisprudence. The use of social science research in law in general is a topic that is beyond the scope of this Article.

²¹⁶ See BREHM ET AL., *supra* note 61, at ch. 2.

Moreover, the underlying principles provided by a psychological theory would allow the law to adapt. A theory of group decision-making would allow duty of care jurisprudence to incorporate new indicators of careful group decision-making as they are identified by research. It would also allow directors to explain how the underlying principles in duty of care jurisprudence are served by boards' use of novel discussion techniques that are supported by empirical research.²¹⁷

B. Potential Problems Arising from the Incorporation of Empirical Group Decision-making Research into Duty of Care Jurisprudence

Several problems could arise from the incorporation of empirical group decision-making research into duty of care jurisprudence, but it is unlikely that these problems outweigh any benefits gained. First, judges are not psychologists and they may have difficulty evaluating psychology research. Second, directors might be motivated solely to avoid liability when they engage in the behaviors the law treats as evidence of careful decision-making. Third, the information directors consider might be more important than the decision-making procedures they use. Fourth, empirical psychology cannot provide bright line rules for boards to follow. Finally, empirical psychology research might not be able to provide useful guidance for policy-making outside of the laboratories in which it is typically conducted.

²¹⁷ For example, without a theory it is difficult to predict how duty of care jurisprudence would deal with a board that used the "stepladder" technique. The stepladder technique involves having two group members begin a meeting, then having the other members join them one by one at intervals, initiating their entry into the discussion by presenting their opinions about what course of action the group should take. Several studies have demonstrated that this method leads groups to make better decisions. It is far from clear how current duty of care jurisprudence would treat a board that used this effective decision-making procedure, but it is not difficult to predict the reaction of a court that has adopted the PDS model of group decision-making. A court relying on the PDS model would point out that the stepladder technique is likely to increase the number of alternatives the group considers (the proposing step) because each member is required to describe his or her preferred course of action upon joining the discussion. The method probably promotes criticism of an emerging group consensus as well (the selecting step) because new members may favor a course of action that is different from the majority preference. See generally Christopher Orpen, *Using the Stepladder Technique to Improve Team Performance*, 42 *PSYCHOL. STUD.* 24 (1997); Steven G. Rogelberg & Matthew S. O'Connor, *Extending the Stepladder Technique: An Examination of Self-paced Stepladder Groups*, 2 *GROUP DYN.: THEORY, RES., & PRAC.* 82 (1998); Steven G. Rogelberg et al., *The Stepladder Technique: An Alternative Group Structure Facilitating Effective Group Decision Making*, 77 *J. APPLIED PSYCHOL.* 730 (1992); Steven G. Rogelberg et al., *Using the Stepladder Technique to Facilitate the Performance of Audioconferencing Groups*, 87 *J. APPLIED PSYCHOL.* 994 (2002).

1. Judicial Evaluation of Empirical Research

One potential concern with incorporating empirical group decision-making research into duty of care jurisprudence is that judges are not trained to evaluate psychology research. Although *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²¹⁸ assigned to judges a gatekeeping role in admitting expert scientific testimony into evidence, many commentators remain skeptical about judges' ability to perform this function.²¹⁹ If judges incorporate unreliable findings into duty of care jurisprudence, this would defeat the purpose of introducing empirical research into the law.

However, this issue should not hinder the introduction of psychology research into duty of care jurisprudence. First, although it is certainly the case that judges are not ideal evaluators of psychology research, psychology research is likely to be easier for judges to understand than is research in areas farther removed from human experience, such as physics or chemistry. Second, judges can employ court-appointed experts to help them screen out "junk science."²²⁰ In some cases,

²¹⁸ 509 U.S. 579 (1993).

²¹⁹ See, e.g., *Craig v. Boren*, 429 U.S. 190, 204 (1976) ("It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique."); Margaret Bull Kovera et al., *Assessment of the Commonsense Psychology Underlying Daubert: Legal Decision Makers' Abilities to Evaluate Expert Evidence in Hostile Work Environment Cases*, 8 PSYCHOL. PUB. POL. & L. 180, 196 (2002) (presenting empirical evidence that judges are not sensitive to methodological flaws in social psychology experiments); Michael H. Gottesman, *From Barefoot to Daubert to Joiner: Triple Play or Double Error?*, 40 ARIZ. L. REV. 753, 758-59 (1998); John Hein, *When Reliable is Reliable Enough: The Use of Expert Testimony After Kumho Tire v. Carmichael*, 6 WASH. U. J.L. & POL'Y 223, 229-30 (2001); David G. Owen, *A Decade of Daubert*, 80 DENV. U. L. REV. 345, 372 (2002) ("In *Daubert* and its progeny, the Supreme Court . . . sought to improve the legitimacy of judicial determinations involving science and technology by forcing courts to rigorously scrutinize the foundations of an expert's scientific or technological opinions. This is a messy task that requires both courts and lawyers to do the kind of rigorous science they may have entered law to avoid."). But see Christopher B. Mueller, *Daubert Asks the Right Questions: Now Appellate Courts Should Help Find the Right Answers*, 33 SETON HALL L. REV. 987, 991-95 (2003) (arguing that judges are better than jurors at evaluating scientific evidence).

²²⁰ See Carol Krafka et al., *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 PSYCHOL. PUB. POL. AND L. 309, 326 (2002) (reporting results from survey of over 300 federal district court judges in which judges reported using variety of methods for understanding expert testimony, including to "[e]ngage in your own research in specific areas(s) [sic] of testimony," (41%) "[a]sk the parties to provide special education or instruction to the court in specific areas of testimony," (39%) "[a]ppoint an expert under F.R.E 706," (26%) "[a]ppoint a special master under F. R. Civ. P. 53 to prepare a report for the court," (22%) and "[a]ppoint an advisor to educate the court about scientific or technical areas" (9%).); Strine, Jr., *supra* note 47, at 516 ("Judges reviewing a skewed and incomplete body of difficult-to-understand social science

however, judges would have to evaluate the reliability of psychology research cited by litigants, which might not be easy for them to do. Nevertheless, *Daubert* places this responsibility on judges, and it is their duty to fulfill it.²²¹ This Article is not the place to reinvent *Daubert*.

Moreover, judges currently predominantly use their intuition to analyze director behavior. It goes almost without saying that judges' intuition would not be admissible as expert testimony. Even if judges do a poor job of screening out unreliable psychology research, it makes little sense for them to rely on intuition instead. It may be challenging for judges to evaluate the reliability of psychology research, but the expected value of doing so seems better than the alternative.

2. Bad Faith Compliance with the Duty of Care

The reforms proposed in this Article are not foolproof. It is possible to imagine that a corporate board could avoid good faith deliberation (perhaps with the goal of preserving the jobs of current management), but, nevertheless, fulfill the criteria for duty of care analysis proposed in this Article. For example, boards could have legal advisors create a list of alternative courses of action for each decision the board makes, writing out extensive catalogs of the costs and benefits of each alternative. Directors could falsely claim to have read these documents or listened to other directors present summaries of them. If the board makes enough of an effort, it might be difficult for courts or plaintiffs to find evidence that such claims were false. If these practices became widespread, the beneficial effects of the factors set out in this Article would be diminished.

There are four responses to this challenge. First, this scenario is just as problematic for the current legal regime.²²² Boards can distribute

articles whose composition is shaped largely by time-pressured personal research and citations by self-interested litigating adversaries must proceed with some hesitance. When possible, empirical evidence should be presented through live, expert testimony so that the judge can go beyond the cold page to an active dialogue with the social scientists on both sides of the question, aided by adversarial examinations."); Herbert Hovenkamp, *Book Review: The Rationalization of Antitrust Law by Richard A. Posner* (2d ed.), 116 HARV. L. REV. 917, 942-44 (2003) (noting that Judge Richard Posner suggests that courts hire experts when judges are unable to understand complex economic testimony in antitrust cases).

²²¹ Judges do so for other types of social science research. For example, economists routinely provide expert testimony in antitrust cases. See generally Malcolm B. Coate & Jeffrey H. Fischer, *Can Post-Chicago Economics Survive Daubert?*, 34 AKRON L. REV. 795 (2001) (critically reviewing role of expert testimony of economists in antitrust cases).

²²² See Gustafson, *supra* note 42, at 792 (claiming that lawyers can help boards protect themselves against shareholder suits regardless of whether board's decision was careful); Macey & Miller, *supra* note 109, at 141 ("[W]e believe, along with the majority of

documents prior to meetings, hire outside financial advisors, ask questions, and have long meetings, all with the goal of producing evidence of careful decision-making without engaging in good faith deliberation. Corporate directors can pretend to comply with any relatively clear set of requirements.²²³

Second, in the more likely event that directors augment good faith decision-making with procedures designed primarily to insulate themselves from shareholder suits, the legal regime proposed in this Article would be more beneficial than is current duty of care jurisprudence. For example, under the current system, a board might protect itself by consulting an outside financial advisor who provides the board with little or no new information or analysis. Taking note of the fact that a longer meeting is generally safer than a shorter one, the board might also make an effort to extend its meeting unnecessarily. As described above, it is not clear that these procedures improve group decisions.²²⁴

In contrast, after implementing the reforms proposed in this Article, the court's analysis would focus more directly on evidence that the board engaged in thorough exploration of the decision. As a result, even compliance resulting from a mixture of motivations would be likely to improve the quality of a board's decisions. For example, increasing the number of alternative courses of action the board considers and making sure independent directors question management directors would make a board's decision more thorough — even if these activities are engaged in partly for the purpose of protecting the directors from lawsuits. If the board's lawyer encourages the independent directors to ask management questions, there is a chance that a query could turn up an unexpectedly important nugget of information.

Third, the proposals outlined in this Article could alter norms of proper director behavior in beneficial ways. Avoidance of dissent is currently the norm,²²⁵ and the proposals outlined here would explicitly

commentators, that the benefits of such increased deliberation are likely to be small, because of the ease with which corporate boards, aided by a phalanx of sophisticated lawyers and investment bankers, can cloak result-oriented decisionmaking in the guise of careful deliberation.”).

²²³ See E. Norman Veasey, *Law and Fact in Judicial Review of Corporate Transactions*, 10 U. MIAMI BUS. L. REV. 1, 2 (2002) (“[I]t is impracticable to devise a bright-line regulatory scheme that could: 1) adequately cover the vast corporate landscape, 2) prevent circumvention by unscrupulous actors, and 3) keep pace with changes in corporate governance, takeover strategies and defenses, and financial devices.”).

²²⁴ See *infra* Subparts III.B.1, III.C.1. and accompanying notes.

²²⁵ Stephen Hill, *The Social Organization of Boards of Directors*, 46 BRIT. J. SOC. 245, 253, 256-57 (1995); Martin Lipton & Jay W. Lorsch, *A Modest Proposal for Improved Corporate*

reverse that norm. If dissent were a central component of duty of care jurisprudence, dissenting directors could come to be seen as working to protect the board from shareholder suits, rather than being viewed as disruptive individualists. Duty of care jurisprudence could create norms that would guide directors toward other beneficial practices in a similar way. The influence of law on norms²²⁶ is likely to be greatest when the law connects its requirements to larger goals in a persuasive way. Empirical research can persuade directors and lawyers that the pure process elements of duty of care favor behaviors that help groups make good decisions; intuitive psychological assumptions are much less likely to be persuasive. Directors who want to make good decisions are more likely to use the law as a guide when the law is based on empirical research.

Fourth, even if directors engage in bad-faith compliance with the proposals outlined here, the reforms I recommend in this Article would reduce the arbitrariness of duty of care jurisprudence and increase its coherence. These are important goals regardless of how directors behave. Moreover, it is possible that directors would be less inclined to act in bad faith if the law were more coherent and less arbitrary.²²⁷

3. Do Boards' Decision-making Procedures Matter?

It is important for courts to consider pure process factors in duty of care cases because decision-making procedures influence decisions.

Governance, 48 BUS. LAW. 59, 66 (1992) (“[T]he norms of behavior in most boardrooms are dysfunctional. They discourage directors from speaking out, especially if they are going to be critical of management.”); Jensen, *supra* note 172, at 49-50 (“The great emphasis on politeness and courtesy at the expense of truth and frankness in boardrooms is both a symptom and cause of failure in the control system. . . . [B]y rewarding consent and discouraging conflicts, CEOs have the power to control the board, which in turn ultimately reduces the CEO’s and the company’s performance.”); Bainbridge, *supra* note 60, at 32; Note, *The Propriety of Judicial Deference to Corporate Boards of Directors*, 96 HARV. L. REV. 1894, 1896-1903 (1983); see also Chris Serres, *Wachovia Merger Naysayer Loses Job*, NEWS & OBSERVER Nov. 1, 2001, at D1 (describing how only director of Wachovia Corp. who voted not to reject takeover offer from SunTrust Banks, Inc. was later fired). See generally O’Connor, *supra* note 59.

²²⁶ See Moohr, *supra* note 13, at 961-62 (2003) (“[One] theory that explains how criminal law supports law-abiding behavior suggests that people obey the law without conscious reflection, because of an instinct to do the right thing. The role of the criminal law in this model is to embody and communicate the social norm of the community that defines ‘the right thing.’ . . . In this model, criminal laws and their enforcement communicate societal standards, and violations trigger universal condemnation. Laws thus have an educative function that influences the development of norms.”).

²²⁷ See generally TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002).

However, there are two potential objections to making decision-making procedures an important part of duty of care jurisprudence. One potential objection is that board members might acquire and discuss information outside of meetings.²²⁸ Meeting procedures matter less when the decision-making process occurs elsewhere. There are two reasons this objection is unlikely to be valid. First, outside directors are not likely to participate in discussions that take place outside of meetings;²²⁹ their involvement is likely to take place primarily at board meetings. Second, even if directors have discussions outside of meetings, it can be beneficial for the group to meet to summarize and review the facts they have gathered. In any case, the pure process duty of care factors I recommend can be applied to discussions that take place outside of meetings (e.g., considering multiple alternatives, asking questions, and expressing dissent).

A second potential objection to a focus on meeting procedures in duty of care jurisprudence is that the information the board considers might have more of an impact than the procedures the board uses in its meetings. The information that a board considers is undoubtedly very important. The proposals in this Article are not intended to replace or eliminate informational factors from duty of care jurisprudence. However, even if information is critical, meeting procedures can also play a role because the information a board considers may be determined in part by the group's meeting procedures. For example, the methodical decision-making procedure described above²³⁰ can lead groups to consider alternative courses of action, help them identify the strengths and weaknesses of the alternatives they consider, and lead them to identify additional information they need to obtain. When groups make difficult decisions that require the collection of large amounts of information, meeting procedures may be particularly important because they influence the information-gathering process.

Well-designed meeting procedures might also minimize the effects of biased presentations of evidence, such as might be made by management directors²³¹ or financial advisors who provide any opinion a board

²²⁸ See *In re Digex, Inc. Shareholders Litigation*, 789 A.2d 1176, 1210-11 (Del. Ch. 2000); Manning, *supra* note 75, at 1487.

²²⁹ See *Detwiler v. Offenbecher*, 728 F. Supp. 103, 110-11 (S.D.N.Y. 1989) (noting that company managers discussed sale of company with investment bankers for several weeks before informing the board of directors); *Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 257, 261-62 (Del. Ch. 1989) (noting that management discussed employee stock ownership plan for months before board of directors was informed).

²³⁰ See *infra* Subpart IV.A and accompanying notes.

²³¹ *Jonas & Frey*, *supra* note 111, at 162 (demonstrating that independent advisors tend

desires.²³² For example, if a biased advisor provides only evidence that supports a particular course of action, the methodical procedure described in this Article will lead directors to seek out information casting doubt upon that course of action, counteracting the biased presentation.

4. Problems with the Review Process

If courts rely on indicators of careful decision-making that are supported by empirical psychology research, they will face questions of how to interpret those indicators. For example, if dissent is expressed in a board meeting, how much is required? What if a director expresses disagreement regarding a relatively peripheral issue? What if the board considers multiple alternatives, but fails to consider an obvious one, such as accepting a takeover offer?²³³

These questions concern the duty of care itself, not the proposals made in this Article. The same problems are present in the current state of the law.²³⁴ For example, what meeting length is sufficient? And, if directors

to present evidence in biased ways that support their recommendations). Management board members are not even independent, of course.

²³² See *infra* Subpart III.C.1 and accompanying notes.

²³³ *E.g.*, *Buckhorn, Inc. v. Ropak Corp.*, 656 F. Supp. 209, 218 (S.D. Ohio 1987) (noting that board of directors of Buckhorn, which had just received takeover offer from Ropak, authorized CEO to explore six alternative courses of action but not to negotiate further with Ropak); see also *Hanson Trust PLC v. MLSCM Acquisition Inc.*, 781 F.2d 264, 288-89 (2d Cir. 1986) (Kearse, J., dissenting) (listing dozen of questions directors asked, but majority felt directors had not engaged in sufficiently critical analysis of transaction they approved); *cf.* *Danaher Corp. v. Chicago Pneumatic Tool Co.*, 633 F. Supp. 1066, 1072 (S.D.N.Y. 1986) ("No doubt plaintiffs can point to additional tests and studies they argue should have been conducted. Perhaps it would have been more prudent to do so. But a stockholder certainly cannot enjoin corporate transactions taken in good faith by the corporation merely on the showing that it would have been more prudent to study the matter further before acting."); *In re RJR Nabisco, Inc. S'holders Litig.*, 1989 Fed. Sec. L. Rep. (CCH) ¶ 94,194, 1989 Del. Ch. LEXIS 9, at *57-58 (Del. Ch. Jan. 31, 1989) ("[T]he amount of information that it is prudent to have before a decision is made is itself a business judgment of the very type that courts are institutionally poorly equipped to make. See *Solash v. Telex Corp.*, Del. Ch. [1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 93,608, 1988 Del. Ch. LEXIS 7; *Citron v. Fairchild Camera & Instrument Corp.*, Del. Ch., C.A. No. 6085, 1988 Del. Ch. LEXIS 67, Allen, C. (May 19, 1988) (appeal pending)."); Manning, *supra* note 75, at 1488 ("Assuming that the director specifically undertakes to 'inquire' into a matter, how deeply should he go? Wherever the questioning stops, it would always be possible to question still further, as every lawyer knows.").

²³⁴ Fischel, *supra* note 11, at 1441 ("[T]he need to expend resources for additional information will vary from firm to firm, manager to manager, and decision to decision. Because the performance obligation cannot be specified (other than in the most general terms that managers should not acquire too much or too little information), it is correspondingly difficult to determine when there has been a breach.").

are given advance notice of a board meeting, how should courts determine if the notification adequately described the purposes of the board meeting?

Although empirical group decision-making research cannot resolve these issues, a theory of the decision-making process can place them in a meaningful context. For instance, the PDS model presented in Part II provides a framework for evaluating the adequacy of a director's expression of dissent. Courts could conduct a case-specific inquiry to determine the effects of the dissent on each stage of the model: did the expression of dissent lead directors to propose any additional solutions to the problem they were trying to solve? Did the dissent cause the directors to discuss any additional facts related to the courses of action the board considered? Did the dissent raise criticisms that caused the board to reject or modify any proposed courses of action?²³⁵ Courts can use questions derived from a theory of group decision-making to screen out dissent that concerns only peripheral issues.

Even if the duty of care were an unworkable concept,²³⁶ it could still set beneficial norms for directors to follow.²³⁷ The proposals in this Article are intended to reform duty of care jurisprudence so that it sets efficient norms. Current case law does not do so.

5. Are Laboratory Studies Relevant Outside the Laboratory?

Laboratory research can be used to predict the behavior of people in their natural environment (e.g., directors in a board meeting). The fact that laboratories are different from the real world in many ways should not prevent courts from relying on empirical group decision-making research. The relevance of the research discussed in this Article to real world settings, such as board meetings, cannot be denied out of hand for three reasons. First, a significant portion of the research cited in this Article was conducted in real world settings.²³⁸ Second, much of the laboratory research discussed in this Article has been replicated by

²³⁵ Dissent should probably count as evidence of careful decision making if it could reasonably have led to any of these consequences, even if it did not actually do so.

²³⁶ Fischel, *supra* note 11, at 1441.

²³⁷ See *infra* notes 13 and 227 and accompanying text.

²³⁸ See generally *Team Innovation and Team Effectiveness*, *supra* note 172; de Dreu & West, *supra* note 172; Dean & Sharfman, *supra* note 152; Doney & Armstrong, *supra* note 204; Forbes & Milliken, *supra* note 165; Gastil, *supra* note 72; *Rethinking the Politics of Political Decision Making*, *supra* note 175; Maier, *supra* note 128; Mussweiler et al., *supra* note 136; Pratkanis & Turner, *supra* note 114; *Biased Information Search*, *supra* note 115; Sutton & Hargadon, *supra* note 137; Tetlock et al., *supra* note 202.

multiple independent researchers using a variety of research methods. When research findings can be replicated using different methods and different types of subjects, the replication supports the claim that the results are independent of the research settings and methods used.²³⁹

Third, theories make it possible to apply research findings across settings.²⁴⁰ Although there are differences between laboratory groups and real-world groups, many of these differences are unimportant. Research can be generalized from one setting to another to the extent that the settings have conceptual similarities, as described by theories. It is quite plausible that the processes described by the PDS model — proposing solutions, discussing facts and ideas, and selecting the solution that is best supported by the available facts — exist in boards of directors as well as in laboratory groups. The model explains why dissent, for example, leads groups to make better decisions, and this explanation should be valid in any setting in which the theory is valid.

Conceptual links do not completely resolve the problem of generalizing research findings, but they do shift some of the burden onto those who claim that research findings are not applicable to a particular setting. Such claims must include more than simple identification of differences between settings. They must explain why these differences render the conceptual links invalid. For example, the expression of dissent has been found to be beneficial in laboratory groups because it leads them to consider more alternative courses of action, discuss more facts, and scrutinize proposed courses of action more carefully. Any attempt to deny that the expression of dissent will be beneficial to corporate boards must explain why dissent would not have similar effects in corporate board meetings, or why these effects would not raise the quality of board decisions.

CONCLUSION

Duty of care jurisprudence is inefficient, arbitrary, and incoherent. The inefficiency of the duty of care would be reduced if courts refrained from treating meeting length as evidence of careful decision-making, and if the law did not allow discovery of notes taken by directors in board meetings. The arbitrariness of duty of care jurisprudence would be

²³⁹ See John E. Hunter, *The Desperate Need for Replications*, 28 J. CONSUMER RES. 149, 150 (2001) (“The key to generalization from one population to another has to do with the causal effect being studied. If that effect is the same in the two populations, then the two populations are equivalent even though the populations might be different on other irrelevant dimensions.”).

²⁴⁰ See *supra* note 51.

reduced if courts refrained from motivating corporate directors to engage in behavior that is not empirically associated with effective decision-making: consulting financial experts and giving directors advance notice of the matters to be discussed at meetings.

In general, the duty of care would also be more efficient and less arbitrary if pure process factors that empirical research has demonstrated to be valid evidence of careful decision-making formed the core of duty of care jurisprudence and were considered in every case: considering multiple courses of action, asking questions, expressing dissent, using a methodical decision-making procedure, and producing a detailed written rationale for decisions. Finally, duty of care jurisprudence would be more coherent if a theory of group decision-making were incorporated into the law. Without a theory, lawyers and judges can only interpret cases almost literally, and corporate directors cannot safely adopt decision-making procedures unless they have been explicitly mentioned in a judicial opinion.