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ILLEGAL CORPORATE CULTURES

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ABSTRACT

Culture is a powerful force in corporate compliance. Corporate culture shapes how employees behave, dictating whether, when, and how they follow the law. Cases arising out of cultural failures often involve public harm—plane crashes, poisoned rivers, tainted cancer drugs, and collapsed mines. Before these awful outcomes, however, the corporations that caused these harms fostered cultures that permitted the disregard of legal commands and public commitments. Managers disparaged safety regulations. Messages about profits and production drowned out messages about compliance and safety. Yet, there is a gap between all we know about the power of culture and our understanding of corporate law doctrine's power to change it.

This Article makes sense of that gap and offers a theoretical framework to bridge it by arguing that culture plays a more central role in the essential elements of oversight doctrine than scholars have yet recognized. Corporate directors and officers have fiduciary duties that require them to oversee a firm's compliance with law. Through the Caremark *doctrine,*

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shareholders have the power to assert claims against corporate leaders if the corporation fails to adequately oversee its legal compliance.

When cultural risks are viewed as legal risks, the real power of shareholder oversight can be harnessed to prevent corporate acts of public harm. Culture already informs key features of corporate oversight doctrine. This Article explains that legal risk, good faith, and "mission critical" risk—essential components of modern oversight doctrine—each implicitly interrogate the culture of the firm. With this understanding, this Article demonstrates that corporate law—in the form of the Caremark *doctrine—can and should require managerial oversight of corporate culture to ensure that firms take seriously their promises of legal compliance.*

TABLE OF CONTENTS

INTRODUCTION

In 2011, Chris Zimmerman served as the Vice President for Corporate Security and Regulatory Affairs at AmerisourceBergen, a publicly traded company that controls approximately one third of the country's distribution of pharmaceutical products, including prescription opioids.[1] Zimmerman

1. *See* Lebanon Cnty. Emps.' Ret. Fund v. Collis, No. 2021-1118-JTL, 2022 WL 17841215, at *4 (Del. Ch. Dec. 22, 2022) ("In the United States, AmerisourceBergen is one of the 'Big Three' wholesale

was responsible for ensuring that drugs were not diverted to illicit channels that could potentially lead to addiction or death for users. In that role, however, Zimmerman sent several emails to his team that betrayed his attitude toward that responsibility. On April 22, 2011, he sent an email to five senior members of his team with lyrics to a parody of *The Beverly Hillbillies* theme song about "Pillbillies," telling the story of a "poor mountaineer" who "barely kept his habit fed."[2] On May 6, 2011, in response to new legislation in Florida designed to prevent opioid abuse, he emailed the diversion control leadership team suggesting, "there will be a max exodus of Pillbillies heading north."[3] Zimmerman's dehumanizing attitude toward the people of Appalachia suffering from addiction appeared to infect his team. The following year, in response to a proposed legislative change in Kentucky, a member of Zimmerman's team wrote, "[o]ne of the hillbilly's (sic) must have learned how to read."[4] By then, Zimmerman had been promoted to the role of AmerisourceBergen's Chief Compliance Officer, responsible for the company's entire anti-diversion function and personally responsible for bringing issues to the attention of the Audit Committee.[5]

Following allegations that AmerisourceBergen "systematically refused or negligently failed to flag suspicious orders by pharmacy customers when it had reason to know that opioids were being diverted to illegal channels," the company agreed to pay more than $6 billion in 2021 as part of a nationwide settlement for its role in contributing to the opioid epidemic that devastated Appalachia and, more broadly, spread throughout the country.[6]

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distributors of pharmaceutical products, along with Cardinal Health, Inc. and McKesson Corporation. AmerisourceBergen and McKesson each control approximately one-third of the market, and Cardinal Health controls another fifth.").

2. Complaint at *43, Lebanon Cnty. Emps.' Ret. Fund v. Collis, 2022 WL 17841215 (Del. Ch. Dec. 22, 2022).

3. Lebanon Cnty. Emps.' Ret. Fund v. Collis, 311 A.3d 773, 785 (Del. 2023).

4. Plaintiff's Trial Exhibit 1 at 1, City of Huntington v. AmerisourceBergen Corp., No. 3:17-cv-01362 (S.D.W.Va.) (on file with author).

5. *See Collis*, 2022 WL 17841215, at *6 ("In March 2012, Zimmerman was promoted to the positions of Chief Compliance Officer and Senior Vice President in charge of Corporate Securities and Regulatory Affairs . . . .").

6. *See* Nate Raymond et al., *U.S. Sues AmerisourceBergen, Says Distributor Helped Ignite Opioid Epidemic*, REUTERS (Dec. 29, 2022), https://www.reuters.com/legal/us-sues-amerisourcebergen-failing-report-suspicious-opioid-orders-2022-12-29/ [https://perma.cc/LS3U-UHDT] (reporting the government's allegation that the company "even intentionally altered how one of its units monitored orders, dramatically reducing the number that underwent internal scrutiny"); *Collis*, 2022 WL 17841215, at *1 ("In 2021, AmerisourceBergen agreed to pay over $6 billion as part of a nationwide settlement . . . .").

The human toll of this epidemic has been enormous. Between 1999 and 2020, opioids contributed to more than half a million deaths.[7]

One might fairly draw a line between the culture at AmerisourceBergen and the harm that befell the communities the company's compliance function was charged with protecting.[8] Culture is powerful. The attitudes of individual managers send signals about how much the firm values compliance.

Culture itself is an exceedingly difficult concept to define.[9] Fundamentally, culture consists of tangible and intangible elements.[10] The tangible elements of culture include observable expressions, such as structures, writings, and rituals. By contrast, the intangible elements of culture refer to beliefs and values.[11] Corporate culture is no different.[12] Management scholars often use a definition of culture that includes a firm's tangible elements—a firm's cultural "artifacts"—as well as its intangible "espoused values" and "basic underlying assumptions."[13] Identifying these

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7. *See* Raymond et al., *supra* note 6 ("Opioids, including prescription painkillers and illegal narcotics, have contributed to more than 564,000 overdose deaths from 1999 to 2020, including more than 68,000 in 2020 alone, according to U.S. government data."). *See generally Drug Overdose Death Rates*, NAT'L INST. HEALTH (last updated Aug. 2024), https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates#:~:text=Opioid%2Dinvolved%20overdose%20deaths%20rose,with%2080%2C411%20reported%20overdose%20deaths [https://perma.cc/P62V-YUES] (providing an overview of drug overdose deaths in the United States from 1999 through 2022).

8. Vice Chancellor Laster of the Delaware Court of Chancery thought these attitudes suggested Zimmerman was unfit to hold key positions in the company's compliance function and said as much in assessing a *Caremark* claim against AmerisourceBergen. *See Collis*, 2022 WL 17841215, at *6 ("Zimmerman's communications with his team support a pleading-stage inference that he was not a suitable individual to hold these critical positions."). Notably, at the time of this publication, Zimmerman still serves in a senior compliance leadership role at AmerisourceBergen, which has since rebranded to Cencora. *See* Chris Zimmerman, LINKEDIN, https://www.linkedin.com/in/chriszimmerman/ [https://perma.cc/4FKP-386M] (last visited June 13, 2025) (indicating this role).

9. *See* Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMANS. 35, 38–45 (2001) (describing the debates amongst humanities scholars as to the precise definition of culture); CLIFFORD GEERTZ, THICK DESCRIPTION: TOWARD AN INTERPRETIVE THEORY OF CULTURE, THE INTERPRETATION OF CULTURES 311 (1973) ("[M]an is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning.").

10. *See* Benjamin van Rooij & Adam Fine, *Toxic Corporate Culture: Assessing Organizational Processes of Deviancy*, 8 ADMIN. SCIS., no. 23, 5 (2018), https://doi.org/10.3390/admsci8030023 [https://perma.cc/S2FS-XTX3] (surveying anthropology and management literature concerning the definition of "culture").

11. *See id.* at 5 (describing both tangible and intangible components of culture); EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP 17 (5th ed. 2017) (distinguishing the tangible "artifacts" of culture from intangibles, such as beliefs, values, ideologies, and rationalizations).

12. *But see* Hatch, Mary Jo, *The Dynamics of Organizational Culture*, 18 ACAD. MGMT. REV. 657, 658 (1993) (arguing that while some conceptual models of corporate culture "oversimplify complex phenomena" they still serve an important function in "generating theory").

13. *See, e.g.*, EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP 29 (5th ed. 2017).

elements requires looking to a group or firm's "accumulated shared learning" that is "considered valid and, therefore, to be taught to new members as the correct way to perceive, think, feel, and behave."[14] Although a positive organizational culture can bolster the legitimacy of legal commands and prosocial behavior, a toxic culture can render lawbreaking socially acceptable.[15]

Culturally acceptable lawbreaking, however, runs counter to the most basic constraints on corporate existence. Implicit in every corporate charter is a promise that corporations will follow the law.[16] Corporate directors and officers have an obligation to ensure that the firm they serve operates within the bounds of the law.[17] As "artificial creature[s] of the law," corporations only come into existence through their charters with the state.[18] Those charters may permit the corporation "to conduct or promote any lawful business or purposes."[19] Thus, the requirement of legal obedience or compliance is built into the foundations of the corporate form.[20]

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14. *Id.* at 6.

15. *See* van Rooji & Fine, *supra* note 10, at 6–7 (offering examples from anthropology and sociology, ranging from the treatment of patients in a neonatal intensive care unit to the 1986 Challenger disaster to make the point that "processes within an organization that can help to develop norms that run against those of the law and can become embedded in the organization's values").

16. *See* Leo E. Strine, Jr., Lawrence A. Hamermesh, R. Franklin Balotti & Jeffrey M. Gorris, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 651 (2010) ("[T]he corporation's existence is premised on the nondefeasible promise that it will conduct only lawful business through lawful activities."); Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEX. L. REV. 1423, 1449 (2021) ("Stemming from this statutory language regarding chartering corporations for a lawful purpose, courts have held corporate fiduciaries to the dual requirements of legal obedience and oversight as part of their duty of good faith.").

17. *In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343, 350 (Del. Ch. 2023) (holding the duty of oversight extends to both officers and directors).

18. Upjohn Co. v. United States, 449 U.S. 383, 389–90 (1981).

19. DEL. CODE ANN. tit. 8, § 101(b) (2025). Of course, some organizations choose to go further than these minimal prosocial commitments in their formational governance documents. *See* Christopher D. Hampson, *Bankruptcy & the Benefit Corporation*, 96 AM. BANKR. L.J. 93, 107 (2022) (offering an overview of formational tools used to allow businesses to "pursue profit alongside social responsibility" including benefit corporations, tailored charters, and non-profit corporations). *See generally* Christopher D. Hampson, *Bankruptcy Fiduciaries*, 110 IOWA L. REV. (forthcoming 2025) (describing the complexity of various prosocial business arrangements in cases of financial distress).

20. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."); *cf.* Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, 14 N.Y.U. J.L. & BUS. 965, 976–77 (2018) ("[I]t may be profitable for a firm to provide financial services to a drug cartel, but servicing this client is averse to the public interest (e.g., against the public's moral norms, disruptive to public security).").

Reflecting that core principle, Chancellor Allen of the Delaware Court of Chancery held in *In re Caremark International Inc. Derivative Litigation*[21] that directors are required to do more than just trust their employees to follow the law.[22] Instead, they must adopt and oversee a compliance program that allows them to detect and prevent wrongdoing.[23] The requirement that officers and directors take an active role in overseeing legal compliance efforts serves both a practical and an expressive function. As a practical matter, charging directors and officers with oversight responsibilities helps to ensure corporations meet their fundamental obligation of legal obedience. As an expressive matter, emphasizing corporate directors' and officers' responsibility for compliance indicates that a firm values compliance.[24]

Caremark, importantly, is generally understood to concern legal risk, not business risk.[25] Corporate officers and directors are entitled to take massive business risks—to swing for the fences—and are protected by the business judgment rule.[26] They may not, however, permit a corporation to engage in illegal conduct. Where does culture fit into this framework? At first blush, it would seem to fall on the business side of the divide. Culture may not immediately and obviously implicate legal rules and regulatory standards. And yet, culture can be a source of tremendous legal risk for

21. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

22. *See id.* at 970 ("[A] director's obligation includes a duty to attempt in good faith to assure that a[n adequate] corporate information and reporting system . . . exists . . . .").

23. *Id.*; *see also infra* Part I.A.

24. *See* PRINCIPLES OF L.: COMPLIANCE AND ENF'T FOR ORGS. § 4.06(c), (A.L.I. 2021) [hereinafter A.L.I., COMPLIANCE] ("An organization's board of directors and executive management should regularly demonstrate and communicate the importance of its risk culture, including as it relates to compliance risk, setting an appropriate 'tone at the top' and ensuring that it is also a tone *from* the top.").

25. *See In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 126 (Del. Ch. 2009) (rejecting *Caremark* claims based on Citigroup's excessive exposure to the subprime mortgage market because such claims concerned business risk rather than explicit legal risk). *But see* U. PA. CAREY L. SCH., Technicolor, Caremark, Interco, Paramount & Blasius: William Allen Interview, at 1:33, (YouTube, July 19, 2018), https://www.youtube.com/watch?v=HObhcQ63DHU&list=PLR5Q3wC5nyVnedOquIuZNinYhL5av4ybh&index=23 [https://perma.cc/LC9D-X466] (hereinafter "Oral History Interview") (Former Chancellor Allen, author of the *Caremark* opinion, calling the *Citigroup* decision "silly" because the duty of oversight extends beyond the technical boundary of legal compliance).

26. As the Delaware Chancery Court stated:

> [D]irectors of Delaware corporations have certain responsibilities to implement and monitor a system of oversight; however, this obligation does not eviscerate the core protections of the business judgment rule—protections designed to allow corporate managers and directors to pursue risky transactions without the specter of being held personally liable if those decisions turn out poorly.

In re Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 125 (Del. Ch. 2009)

firms.[27] Scholars of behavioral ethics and corporate compliance maintain that corporate culture drives legal obedience.[28] That culture plays such an important role in keeping illegality at bay suggests that culture, itself, might constitute a legal risk requiring oversight under *Caremark*.

For these oversight duties to be meaningful, *Caremark* claims need to have teeth, but for most of the doctrine's history, these claims have been largely toothless.[29] Proving a *Caremark* claim is, infamously, among the most difficult achievements under Delaware law.[30] But the landscape may be shifting. In recent years, several critical developments in Delaware oversight doctrine have softened the previously impenetrable barrier to establishing *Caremark* liability—what some have called a "new *Caremark* era" or "Caremark 2.0."[31]

First, in a string of recent decisions, Delaware courts have allowed *Caremark* claims to proceed beyond a motion to dismiss—previously a rare

27. Examples of culture leading to liability abound. For example, at Fox News, Roger Ailes' pattern of sexual predation created liability for harassment. *See* Manuel Roig-Franzia, Scott Higham, Paul Harhi & Krissah Thompson, *The Fall of Roger Ailes: He Made Fox News His 'Locker Room' — and Now Women Are Telling Their Stories*, WASH. POST. (Apr. 11, 2023), https://www.washingtonpost.com/lifestyle/style/the-fall-of-roger-ailes-he-made-fox-his-locker-room--and-now-women-are-telling-their-stories/2016/07/22/5eff9024-5014-11e6-aa14-e0c1087f7583_story.html [https://perma.cc/2FJ6-7HDV]. Consider also Papa John's, where founder and former chairman John Schnatter had a penchant for racist and misogynistic rants, resulting in multiple confidential settlements. *See* Noah Kirsch, *The Inside Story of Papa John's Toxic Culture*, FORBES (July , 2018 https://www.forbes.com/sites/forbesdigitalcovers/2018/07/19/the-inside-story-of-papa-johns-toxic-culture/ [https://perma.cc/272M-P6PG]. Finally, consider General Motors, where a company culture that discouraged reporting problems or taking responsibility played a role in delaying a recall that, if issued earlier, could have saved lives. *See* Micheline Maynard, *"The GM Nod" and Other Cultural Flaws Exposed By The Ignition Defect Report*, FORBES (June 5, 2014), https://www.forbes.com/sites/michelinemaynard/2014/06/05/ignition-switch-report-spares-ceo-barra-but-exposes-gms-culture/ [https://perma.cc/97C6-MHAD].

28. *See infra* Part I.B.2.

29. *See* John Armour, Jeffrey Gordon & Geeyoung Min, *Taking Compliance Seriously*, 37 YALE J. REG. 1, 64–66 (2020) (cataloguing oversight and *Caremark* opinions written by Delaware courts between 2000 and 2017 and demonstrating that the vast majority were disposed of on a motion to dismiss).

30. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996) ("The theory here advanced is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."); Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2031 (2019) (examining the cases leading up to 2019 and noting that "approximately one hundred Delaware cases ha[d] cited the 1996 landmark *Caremark* opinion[,] [but] [o]versight liability after a trial on the merits [wa]s extremely rare. . . .[.] [Further,] [e]xamining these cases reveals that oversight ha[d] evolved in application to require a showing [of near] utter failure or disobedience .").

31. *See, e.g.*, Roy Shapira, *A New* Caremark *Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1859 (2021) (identifying the expansion of D.G.C.L. § 220 rights as the driver of the new *Caremark* era); Geeyoung Min, *Strategic Compliance*, 57 U.C. DAVIS L. REV. 415, 441–42, 444 n.115 (2023) (describing recent developments in *Caremark* doctrine).

occurrence[32]—when directors have failed to adequately monitor "mission critical" risks.[33] Second, in 2023, the Delaware Court of Chancery confirmed that *Caremark* claims apply to both directors and non-director corporate officers.[34] This second change is especially significant. Although board members are required to conduct oversight, they are, in many ways, distant from the firm's operations. Officers, on the other hand, are far more likely to personally witness red flags indicating a toxic corporate culture, triggering an obligation to do something.[35]

Developments in *Caremark* also come at a critical juncture for the relationships between the corporation and its stakeholders.[36] Beginning in 2017, the #MeToo movement led to serious and public consequences for CEOs and high-level executives who engaged in sexual misconduct.[37] In 2019, the Business Roundtable—a nonprofit lobbying group made up of powerful CEOs—committed to "foster diversity and inclusion, dignity and respect" for employees and to embrace corporate aims beyond pure shareholder value.[38] In 2020, after the murders of George Floyd, Breonna Taylor, and Ahmaud Arbery, a majority of Fortune 500 companies issued statements committing to antiracism as a corporate value.[39] A backlash

32. *See* Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. 2019-0816-SG, 2020 WL 5028065, at *1 (Del. Ch. Aug. 24, 2020) (describing the difficulty of making out a *Caremark* claim).

33. Marchand v. Barnhill, 212 A.3d 805, 824 (Del. 2019); *see also In re* Boeing Co. Derivative Litig., No. 2019-0907-MTZ, 2021 WL 4059934, at *1 (Del. Ch. Sept. 7, 2021) (denying motion to dismiss information-systems and red flag *Caremark* claims); Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. 2019-0816-SG, 2020 WL 5028065, at *24 (Del. Ch. Aug. 24, 2020) (same); *In re* Clovis Oncology, Inc. Derivative Litig., No. 2017-0222-JRS, 2019 WL 4850188, at *15 (Del. Ch. Oct. 1, 2019) (same).

34. *See In re* McDonald's Corp. Derivative Litig., 289 A.3d 343, 362 (Del. Ch. 2023).

35. *See infra* Part I.B (describing instances of officer misconduct allegedly unknown to the board of directors); Asaf Eckstein & Roy Shapira, *Compliance Gatekeepers*, 41 YALE J. REG. 469, 503 (2024) (suggesting that the *McDonald's* decision clarifying the extension of *Caremark* exposure to corporate officers could improve accountability for outside advisors who aid and abet corporate misconduct); Lisa M. Fairfax, *The Uneasy Case for the Inside Director*, 96 IOWA L. REV. 127, 165 (2010) ("Corporate-governance scandals tend to confirm that many directors lack the knowledge and expertise to sufficiently appreciate the complexities associated with their business, and that such lack of knowledge impedes the effectiveness of their oversight.").

36. *See generally* Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1404, 1410–11 (2020) (describing the Environmental, Social, and Governance ("ESG") movement and arguing that ESG disclosures serve an oversight function by generating information regarding "social risk" within an organization).

37. *See* Tom C.W. Lin, *Executive Private Misconduct*, 88 GEO. WASH. L. REV. 327, 332–38 (2020) (offering an account of the impact of the #MeToo movement on corporate America).

38. *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE, https://opportunity.businessroundtable.org/ourcommitment [https://perma.cc/Z5DV-NS6J] (last updated May 15, 2025).

39. *See* Lisa M. Fairfax, *Racial Rhetoric or Reality? Cautious Optimism on the Link Between Corporate #BLM Speech and Behavior*, 2022 COLUM. BUS. L. REV. 118, 120–21 (2022) (conducting an

followed, with conservative voices decrying investment strategies focused on environmental, social, and governance values as "woke" investing.[40]

Now, into the second Trump Administration, shareholders remain attuned to corporate cultural values. Big-box retailer, Target, faced shareholder suits brought on behalf of Florida state investments and pension funds over the company's Diversity, Equity, and Inclusion ("DEI") programs.[41] And other large corporations like Apple, Disney, and Costco faced anti-DEI shareholder proposals, all of which were emphatically rejected by the vast majority of shareholders.[42] The current battle over the permissibility of socially responsible corporate governance is not new to corporate law.[43] But this iteration suggests that shareholders increasingly see their investments as a reflection of their values and are willing to sue over what might be deemed cultural failures.[44]

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empirical survey of corporate statements responding to the murder of George Floyd and other police killings in the summer of 2020).

40. *See* Ann M. Lipton, *Of Chameleons and ESG*, 107 MARQ. L. REV. 597, 624–25 (2024) (describing anti-ESG efforts).

41. *See* Jonathan Stempel, *Target Sued by Florida for Defrauding Shareholders About DEI*, REUTERS (Feb. 20, 2025), https://www.reuters.com/legal/target-sued-by-florida-defrauding-shareholders-about-dei-2025-02-20 [https://perma.cc/MF9U-2Y45] (summarizing the litigation, as well as consumer backlash for both committing to and backing away from LGBTQ+ pride-related campaigns).

42. *See* Lamar Johnson, *Apple Shareholders Emphatically Reject Anti-DEI Proposal*, ESG DIVE (Feb. 26, 2025), https://www.esgdive.com/news/apple-shareholders-reject-anti-dei-proposal-ncppr/741021 [https://perma.cc/HE2J-EMEK] ("Over 97% of shareholders voted against the proposal asking Apple to 'cease DEI efforts . . . .'"); Jessica Guynn, *Disney Shareholders Overwhelmingly Reject Anti-DEI Proposal*, USA TODAY (Mar. 20, 2025), https://www.usatoday.com/story/money/2025/03/20/disney-investors-reject-dei-proposal/82570923007 [https://perma.cc/Z7BE-ZAXY] (reporting that an anti-LGBTQ+ investor proposal received only one percent of Disney shareholder votes).

43. *See* Adolph A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) (arguing that corporate powers delegated to management "are necessarily and at all times exercisable only for the ratable benefit of all the shareholders . . ."); E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932) ("[P]ublic opinion, which ultimately makes law, has made and is today making substantial strides in the direction of a view of the business corporation as an economic institution which has a social service as well as a profit-making function"); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 33 ("[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game . . ."); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1190–92 (2002) (outlining the history of and flaws in the "'shareholder ownership' argument for shareholder primacy").

44. *See* Lisa M. Fairfax, *Social Activism Through Shareholder Activism,* 76 WASH. & LEE L. REV. 1129, 1142 (2019) (describing "the clear rise in shareholder concern around environmental and social issues"); Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1613–27 (2018) (surveying securities class actions filed that allege violations of securities law due to a failure to disclose or act on toxic cultures and sexual harassment).

Delaware corporate law's *Caremark* doctrine can, and should, require managerial oversight of corporate culture to ensure that firms take the promise of legal compliance seriously. A deep literature in organizational behavior and corporate compliance makes clear that corporate culture dictates when, whether, and how a firm complies with its legal obligations.[45] In fact, our greatest compliance tragedies are often stories of a corporate culture that allowed for the disregard of safety, stakeholders, or legal boundaries in favor of other priorities.[46] And yet, there is a gap between all we know about the power of culture and our understanding of corporate shareholders' power to fix it.

This Article bridges that gap. Part I demonstrates how key features of the *Caremark* doctrine already interrogate corporate culture. This section offers a novel theoretical framework for understanding how cultural risk might constitute legal risk, how culture is implicit in the corporate law's concept of good faith, and how culture is ultimately "mission critical" for firms. Part II then uses this understanding of *Caremark*'s cultural inquiry to map a nascent shift in oversight jurisprudence toward greater accountability for corporate cultures that allow for or encourage illegality. And Part III considers the promise and perils of a cultural *Caremark*, ultimately concluding that good corporate governance should embrace culture as an essential component of firm oversight.

I. CULTURAL FEATURES OF THE *CAREMARK* DOCTRINE

The *Caremark* doctrine requires that corporate managers monitor the firm to protect against corporate trauma caused by violations of law.[47] This section explains how many of the key features of the *Caremark* doctrine already concern firm culture. Specifically, this section considers how three

45. *See infra* Part I.B.2.

46. *See, e.g.*, *In re* Boeing Co. Derivative Litig., No. 2019-0907-MTZ, 2021 WL 4059934, at *11 (Del. Ch. Sept. 7, 2021) (describing employee concerns that Boeing's culture emphasized production goals over safety—concerns that accelerated in the months leading up to the two fatal 737 MAX crashes).

47. One of the many ways that corporations are personified in Delaware law is that they are said to experience "trauma." *See, e.g.*, Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. 2019-0816-SG, 2020 WL 5028065, at *14 (Del. Ch. Aug. 24, 2020) ("[O]rdinarily in the aftermath of a corporate *trauma* it falls to the board of directors to determine the corporation's cause of action . . . .") (emphasis added). This trauma is typically, by its nature, secondary. That is, the primary trauma occurs when the corporation's actions cause external harm, whether to individuals, to the environment, or to others. *See id.* The secondary trauma, therefore, is that external harm to another, often far less sympathetic victim—the shareholder on whose behalf the corporation is purportedly managed. *See id.* at 1 ("At issue is . . . whether the corporation, whose directors have allegedly allowed it to commit bad acts, should *itself* recover damages that ultimately inure to the benefit of the corporate owners, its stockholders.").

key features of the modern-era *Caremark* inquiry—legal risk, good faith, and "mission critical" risk—inherently interrogate the culture of a firm.[48]

Before proceeding, it is worth discussing what "corporate culture" or "organizational culture" means. Social scientists, as well as legal and cultural studies scholars have long debated the meaning of the term "culture" and its relationship to law.[49] Professor Naomi Mezey has explained how not "formal" law but, rather, culture, sets the terms of legal compliance. By way of example, she writes:

> [O]n most roads there is a legal speed limit; there are formal laws, usually enacted by state legislatures, that set the posted maximum speed. Despite the existence of formal law, it is culture that actually determines the "legal" speed limit. The speed limit that is enforced, by the police and in traffic court, and hence operates as the de facto "legal" speed limit, is the limit set by the conventions of drivers—conventions which vary depending on the stretch of road, the time of day, the prevailing conditions, or the habits of a particular city or geographic region.[50]

In management and economics literature, scholars have defined corporate culture as "a set of norms and values that are widely shared and strongly held throughout the organization."[51] And the American Legal Institute's Principles of the Law, Compliance and Enforcement for Organizations defines organizational culture as "[t]he norms, assumptions, perspectives, and beliefs that guide and govern behavior within an organization."[52]

The following section considers how those shared norms, assumptions, and values that make up corporate culture might themselves constitute legal risk implicating *Caremark* liability.

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48. For purposes of this Article, I will use "corporate law" and "Delaware law" somewhat interchangeably to discuss the legal standards governing the duties of officers of directors of corporations, given Delaware's dominant role in generating corporate law doctrine and norms. *See generally* Peter Molk, *Delaware's Dominance and the Future of Organizational Law*, 55 GA. L. REV. 1111, 1113 (2021) ("Delaware dominates business law . . . . Delaware has held this dominant business law position for over a century.").

49. *See* Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMANS. 35, 38–45 (2001) (offering a descriptive account of the debate amongst humanities scholars as to the precise meaning of "culture" and law's role within culture).

50. *Id.* at 52.

51. *See* Luigi Guiso, Paola Sapienza & Luigi Zingales, *The Value of Corporate Culture*, 117 J. FIN. ECON. 60, 62 (2015) (quoting Charles A. O'Reilly & Jennifer A. Chatman, *Culture as Social Control: Corporations, Cults, and Commitment*, 18 RSCH. ORG. BEHAV. 157, 166 (1996)).

52. A.L.I., COMPLIANCE, *supra* note 24, § 1.01(ll), at 4.

A. Culture as Legal Risk

The Delaware Chancery Court's 1963 decision in *Graham v. Allis-Chalmers Manufacturing Company*[53] set off the development of the modern compliance era by recognizing that directors' fiduciary duties include oversight obligations.[54] In *Allis-Chalmers*, corporate directors failed to detect and prevent employee violations of antitrust law. The Chancery Court held directors could not be held liable for this lack of oversight because *"*absent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists."[55] This interpretation stood for more than thirty years, until in 1996, in *In re Caremark International Inc. Derivative Litigation*, the Chancery Court again faced a case of company misconduct, and a board of directors that was ignorant of the wrongdoing.[56] Caremark, a provider of alternative site health care services, had systemically engaged in legally questionable referral practices by paying doctors to refer patients insured through government programs to Caremark providers.[57] The company's board had apparently made some attempts to bring the company into compliance with anti-kickback laws concerning Medicare and Medicaid payments. After a series of illegal referral payments across several states came to light, Caremark was charged with multiple felonies.[58] The company pleaded guilty and paid approximately $250 million in total in civil and criminal fines and reimbursements to various private and public parties.[59] Shareholders then brought a derivative suit, alleging that Caremark's directors had breached their fiduciary duties by "failing adequately to supervise the conduct of Caremark employees, or institute corrective

53. Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125 (Del. Ch. 1963).

54. *See, e.g.*, Pollman, *supra* note 30, at 2021 (2019) ("[T]he starting point for tracing the evolution of Delaware's oversight jurisprudence is, by common practice, the 1963 case *Graham v. Allis-Chalmers Manufacturing Co*."); Jennifer Arlen, *The Story of* Allis-Chalmers*,* Caremark*, and* Stone: *Directors' Evolving Duty to Monitor*, *in* CORPORATE LAW STORIES 323, 324 (J. Mark Ramseyer ed., 2009) (beginning the story of Delaware oversight jurisprudence with *Graham v. Allis-Chalmers*).

55. *Allis-Chalmers*, 188 A.2d at 130.

56. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 961 (Del. Ch. 1996) (holding that directors met their obligations to "supervise or monitor corporate performance").

57. *See id.* at 963 ("Although there is evidence that inside and outside counsel had advised Caremark's directors that their contracts were in accord with the law, Caremark recognized that some uncertainty respecting the correct interpretation of the law existed.").

58. *See id.* at 961–64 (noting company and board actions to bring the company into legal compliance, including updates to internal policies, an internal audit plan, and efforts to centralize management structure).

59. *Id.* at 960–61.

measures, thereby exposing Caremark to fines and liability."[60] When approving the settlement of the shareholder suit, Chancellor Allen took the opportunity to reassess the scope of directors' duties, generally, to monitor the firm for wrongdoing.[61] He ruled that directors were required to:

> [A]ssur[e] themselves that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance.[62]

Further, Chancellor Allen held that "a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists."[63] In announcing the rule of *Caremark*, Chancellor Allen created Delaware law's requirement that corporate boards ensure the firm engage in some form of a compliance program to control enterprise risk.[64] That requirement has come to mean that if

> (a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention [then those directors] breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.[65]

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60. *Id.* at 964.

61. *See id.* at 967–70 (considering the circumstances giving rise to *Graham v. Allis-Chalmers* and suggesting that "[a] broader interpretation of *Graham v. Allis–Chalmers*" would not be consistent with evolving Delaware jurisprudence concerning the role of the board of directors). Years later, in conversation with Professor Jennifer Arlen, Chancellor Allen said that the *Caremark* opinion was motivated by a desire to act "because directors had become overly passive, lulled into complacency by both Delaware's strong business judgment rule and a business norm favoring directorial non-interference with the CEO." Arlen, *supra* note 54, at 339.

62. *Caremark*, 698 A.2d at 970.

63. *Id.*

64. *See* Donald C. Langevoort, Caremark *and Compliance: A Twenty-Year Lookback*, 90 TEMP. L. REV. 727, 729 (2018) ("*Caremark* is at the very least a label attached to what all now agree is a necessary and proper subject of attention for every board of directors: corporate compliance as a function within the broader task of enterprise risk management."); Todd Haugh, Caremark*'s Behavioral Legacy*, 90 TEMP. L. REV. 611, 619–21 (2018) [hereinafter Haugh, Caremark*'s Behavioral Legacy*] (demonstrating that *Caremark* fueled increased investment in the compliance function despite its low probability of actual liability for directors).

65. Stone *ex rel.* AmSouth Bancorp. v. Ritter, 911 A.2d 362, 370 (Del. 2006).

Although corporate existence is premised upon a requirement of legal obedience, corporations are entitled to take enormous business risks that do not break the law.[66] That entitlement only sets the floor at legal risk. But the boundary between legal risk and business risk is blurry.[67] Under the *Caremark* doctrine, directors face liability if they fail to monitor the risk of illegal conduct or if they disregard red flags suggesting illegal conduct. At the same time, they can freely authorize ill-advised, but legal conduct. Under this permissive regime, *culture* seems to fall outside the bounds of illegal conduct, meaning that culture is instead discretionary and within the bounds of corporate business judgment. But upon closer inspection, culture creates and transmits significant legal risks within firms.[68]

To understand the way culture shapes compliance and creates legal risk, it is helpful to break down the kinds of cultural risks that can endanger a firm or ultimately subject it to corporate trauma. This section splits cultural risk into two types: immediate harms and expressive harms. The first imposes instant and precise legal risk. The second is more abstract, more insidious, and harder to remedy.

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66. *See* Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality*, 87 VA. L. REV. 1279, 1284 (2001) ("[A] remaining vestige of the ultra vires doctrine sets off illegal activities" as impermissible for corporations). The claim that corporations must obey the law is not uncontested. Some commentators have argued that corporations are not creatures of the state, but rather creatures of contract. This suggestion undermines charter-based arguments for public-regarding corporate duties. *See, e.g.*, Asaf Raz, *Why Corporate Law Is Private Law*, 25 U. PA. J. BUS. L. 981, 1002–03 (2023) ("[T]he mandatory, unwaivable features of corporate law do not make it public law, and do not stem from corporations being creatures of the state . . . . [T]hey are simply the result of private law's mission to protect individuals' and entities' legitimate interests . . . ."); *but see* Dorothy S. Lund, *Public Primacy in Corporate Law*, 47 SEATTLE U. L. REV. 365, 377 (2024) (reconciling a "public-facing nature" of the corporation with the nexus of contracts theory of the firm). However, the views of former Delaware Chief Justice Leo Strine have shaped the *Caremark* doctrine, and Strine takes the view that "[t]he primary source of the obligation to conduct business lawfully stems from the reality that corporations cannot exist without the blessing of society." Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, Caremark *and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *and EESG Strategy*, 106 IOWA L. REV. 1885, 1895–96 (2021); *see also* Andrew S. Gold, *The Internal Limits on Fiduciary Loyalty* 9–10 (Brooklyn L. Sch., Legal Studies Rsch. Paper No. 723, 2022) ("It is a breach of fiduciary good faith to betray a commitment the directors have made to the corporation . . . . By extension, intentionally violating positive law means intentionally violating the corporation's charter.").

67. *See* Adi Libson & Gideon Parchomovsky, *Are All Risks Created Equal? Rethinking the Distinction Between Legal and Business Risk in Corporate Law*, 102 B.U. L. REV. 1601, 1604–14 (2022) (arguing that, in reality, the distinction between legal and business risks is less straightforward than their clear differentiation in corporate law doctrine); *see also* Elise Bernlohr Maizel, *The Case for Downsizing the Corporate Attorney-Client Privilege*, 75 UC L. J. 373, 393–96 (2024) (describing doctrinal challenges in differentiating between "business advice" and "legal advice" for purposes of assessing the applicability of attorney-client privilege).

68. *See generally* Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933 (2017) (using social science to demonstrate culture's impact on compliance with law).

1. *Immediate Harms.* Immediate harms might be called workplace harms and stem from individual violations of federal and state employment law statutes that prohibit unlawful biases at work and hostile work environments.[69] These harms are often the product of culture and are understood to fall within the ambit of corporate compliance. For example, sexual harassment trainings for employees are ubiquitous. Immediate harms giving rise to violations of employment law are easy and obvious cases of cultural risk translating to legal risk.[70] And it seems that firms and their compliance professionals already think of these cultural risks as legal risks.

Scholars have also drawn direct connections between the broader culture of the workplace and anti-discrimination law. For example, Professor Tristin Green has theorized that "work culture" can, itself, operate as a source of discrimination.[71] Green and others have argued that appearance norms, acceptable forms of communication, and other means of creating a dominant and uniform "work culture" can have the effect of otherizing individuals in the workplace, thereby causing those individuals harm.[72] When those harms are directed at individuals based on dimensions of identity that are statutorily protected from discrimination, those harms can give rise to a cause of action.[73] Thus, immediate harms give rise to immediate legal risk.

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69. *See, e.g.*, 42 U.S.C. § 2000(e)(2) (prohibiting employment discrimination under federal law); N.Y. Exec. Law § 296 (McKinney 2025) (prohibiting employment discrimination under New York state law).

70. *See* Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 70, 74 (2003) (describing sexual harassment as a problem of culture). Interestingly, some literature has suggested that partisan cultures can contribute to risk propensity for these types of immediate harms. *See* Irena Hutton, Danling Jiang & Alok Kumar, *Political Values, Culture, and Corporate Litigation*, 61 MGMT. SCI. 2905, 2923–24 (2015) (finding that firms with a partisan Republican culture are more likely to face litigation for civil rights, labor, and environmental violations while firms with a Democratic culture are more likely to face litigation over securities and intellectual property matters).

71. Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 684 (2005) (isolating "work culture as a source of discrimination and put[ting] legal pressure on employers to devise meaningful programs for reform.").

72. *See id.* at 650–55 ("By demanding that women and minorities conform to stereotypically white, male behaviors, a discriminatory work culture imposes costs on even those women and people of color who ultimately succeed in fitting in."); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1268, 1279 (2000) (describing the way that stereotypes in the workplace force members of "outsider groups" to perform their identity in ways that constitute additional burdens).

73. *See* Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 387–405 (2008) (describing successful employment discrimination class actions at Shoney's, Texaco, Home Depot, Mitsubishi, and Coca-Cola); Blair Druhan Bullock, *Uncovering Harassment Retaliation*, 72 ALA. L. REV. 671, 677 (2021) (describing employer liability for employee sexual harassment).

2. *Expressive Harms.* The less obvious, but perhaps more insidious legal risk is created by expressive acts. Legal and organizational behavior scholars have long recognized that expressive behavior can have a powerfully potent effect.[74] Consider the following fact pattern: a manager who is charged with preventing or remediating sexual harassment engages in that very behavior himself.[75] His behavior sends a signal to other employees about how seriously the manager and the company take that compliance responsibility.[76] Presumably very little. At worst, it may be a tacit suggestion that such conduct is permissible. In this way, the manager's personal behavior may be an expressive act that signals his priorities to other employees.[77]

So too, attitudes toward the importance of safety and compliance can create expressive harms.[78] For example, when a manager undermines a

74. *See supra* notes 66–73 and accompanying text.

75. Real life examples that match this fact pattern are plentiful: for example, Jeff Shell, former CEO of NBC Universal who oversaw NBC's handling of the Matt Lauer sexual harassment and assault scandal, was forced to resign after it was discovered he had an extramarital affair with an on-air anchor. *See* Tatiana Siegel, *Shell Shocked: How a Sex Scandal, Big Egos and Putin Led to Jeff Shell's Sudden, No Payout Exit From NBCU*, VARIETY (Apr. 26, 2023), https://variety.com/2023/tv/features/nbcuniversal-ceo-jeff-shell-firing-reasons-affair-putin-1235594094/ [https://perma.cc/VDW2-RSPA]. Jeff Zucker, former CNN president, was fired after a sexual harassment investigation into former anchor, Chris Cuomo, uncovered evidence of Zucker's sexual relationship with a close colleague. *See* Doha Madani, *CNN President Jeff Zucker Resigns After Failing To Disclose Relationship With Colleague*, NBC NEWS (Feb. 2, 2022), https://www.nbcnews.com/media/cnn-president-jeff-zucker-resigns-citing-questions-consensual-relation-rcna14583 [https://perma.cc/Y5T9-FLTD]. This is also the fact pattern of the *McDonald's* shareholder derivative suit, discussed *infra* Part II.A.3.

76. *See* Alfredo Contreras, Aiyesha Dey & Claire Hill, *"Tone at the Top" and the Communication of Corporate Values: Lost in Translation?*, 43 SEATTLE U. L. REV. 497, 509 (2020) ("[A] CEO may recite the values in the corporate code, but may give cues, verbal or non-verbal that send quite a different message to the company's employees."); Donald C. Langevoort, *Cultures of Compliance*, *supra* note 68, at 959–60 (2017) ("And so a culture that pushes back against the law in subtle (or not so subtle) ways offers a convenient—and very greasy—script for denigrating [the law]"); Harvey S. James, Jr., *Reinforcing Ethical Decision Making Through Organizational Structure*, 28 J. BUS. ETHICS 43, 54 (2000) ("[W]orkers generally get their ethical cues by observing what their bosses do."); Linda Klebe Treviño, Gary R. Weaver, David G. Gibson & Barbara Ley Toffler, *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 CAL. MGMT. REV. 131, 142 (1999) (finding "significantly" improved compliance outcomes where "supervisors . . . regularly pay attention to ethics, take ethics seriously, and care about ethics and values as much as the bottom line").

77. *Cf.* Jennifer Arlen & Lewis A. Kornhauser, *Battle for Our Souls: A Psychological Justification for Corporate and Individual Liability for Organizational Misconduct*, 2023 U. ILL. L. REV. 673, 694 ("Empirical evidence reveals that employees' receptiveness to legal injunctive norms depends on whether they are operating within an organizational decision-making environment that promotes or undermines norms.").

78. *See* Donald C. Langevoort, *Behavioral Ethics, Behavioral Compliance*, *in* Research Handbook on Corporate Crime and Financial Misdealing 263, 271 (Jennifer Arlen ed., 2018) ("If either individually or by reference to the prevailing corporate culture, . . . legal demands are denigrated rather than respected, compliance rates [with those demands] drop."). Compliance scholars have also recognized that

corporation's stated safety protocols or external regulations, employees may take this as a signal about both the legitimacy of the safety requirement and how to weigh that requirement against other priorities.[79]

Expressive harms can show themselves in the facts of the most appalling *Caremark* cases. For example, in *In re Massey Energy Company*,[80] mining company CEO Don Blankenship "did not hide his disdain for the company's regulators" before an explosion at the company's mine killed twenty-nine mine workers.[81] Likewise, at AmerisourceBergen, employees made dehumanizing jokes about people addicted to opioids against the backdrop of compliance failures that would ultimately contribute to the opioid epidemic and cost the company billions.[82] And at Boeing, shortly before two plane crashes that caused hundreds of fatalities, an engineer expressed concerns over safety issues he claimed would have shut down a larger operation in the military.[83] In response, a manager claimed Boeing's attitude toward safety must be different from the military's because "[t]he military isn't a profit making organization."[84] At ice cream manufacturer, Blue Bell, the response to an employee who reported dangerous safety

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managerial messaging around compliance can be a nuanced matter and that the "tone at the top" can be undermined by a less than sincere manager. *See* Geoffrey P. Miller, *The Compliance Function*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 981, 993 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018) ("[I]t is all too easy for an unscrupulous CEO to mouth the right words while secretly subverting performance.").

79. *See* Tom Tyler, John Dienhart & Terry Thomas, *The Ethical Commitment to Compliance: Building Values-Based Cultures*, 50 CAL. MGMT. REV. 31, 43 (2008) ("[A] culture where rule following is the expected norm, and cynicism is low, will be a far less comfortable environment for those who would prefer to break the rules."); Jennifer Arlen, *The Compliance Function* 12 (N.Y.U. Sch. of L., L. & Econ. Rsch. Paper Series, Working Paper No. 23-28, 2023) ("[T]o create the internal culture needed to support deterrence through expressive law, companies also need to determine the root causes of the misconduct and remediate them, including by penalizing, and where appropriate, firing supervisors who induce, condone or fail to terminate misconduct."). When management prioritizes concerns like profitability over values like legal compliance and safety, disaster can follow. For example, at Boeing, one former Chief Financial Officer acknowledged, "[f]or years, we prioritized the movement of the airplane through the factory over getting it done right." Niraj Chokshi, Sydney Ember & Santul Nerkar, *'Shortcuts Everywhere': How Boeing Favored Speed Over Quality*, N.Y. TIMES (Mar. 29, 2024), https://www.nytimes.com/2024/03/28/business/boeing-quality-problems-speed.html?searchResultPosition=6 [https://perma.cc/KEA3-8397].

80. *In* re Massey Energy Co., No. 5430-VCS, 2011 WL 2176479 (Del. Ch. May 31, 2011).

81. *Id.* at *19 ("[T]he Disaster at Upper Big Branch was caused not by a freak and unavoidable accident, but instead by a corporate culture premised on the view that the company's management knew better than the law about what was necessary to run safe mines.").

82. Lebanon Cnty. Emps.' Ret. Fund v. Collis, 311 A.3d 773, 780, 785 (Del. 2023) (quoting the company's Chief Compliance Officer as writing, "[w]atch out Georgia and Alabama, there will be a max exodus of Pillbillies heading north.").

83. *In re* Boeing, No. 2019-0907-MTZ, 2021 WL 4059934, at *11 (Del. Ch. Sept. 7, 2021).

84. *Id.*

conditions was allegedly, "is that all you're going to do is come here and bitch every afternoon?"[85] In 2015, the company experienced a listeria outbreak that killed three people.[86]

Each of these stories describing a toxic corporate culture that preceded corporate disaster demonstrates the somewhat non-obvious way that expressive harms translate to latent legal risk. None of these expressive acts was, itself, illegal. Loose talk about compliance does not violate the law. Nor does talk that disparages legal requirements or regulators. But in each of these cases, the expressive acts appeared to serve as cultural signals of the firm's priorities and the relative importance of compliance.[87] And each story ended in a major compliance failure. Legal and organizational behavior scholars frequently assert that corporate culture shapes how employees behave.[88] So, if culture tells us whether, when, or how employees follow the law, culture becomes a form of legal risk. In both immediate and broader expressive ways, culture imperils firms' legal compliance and undermines the "good faith" now required under Delaware corporate law.

B. Culture as Good Faith

1. *Delaware's Good Faith Requirement*. In corporate law, "oversight liability draws heavily on the concept of . . . good faith."[89] In 1993, three years before Caremark was decided, the Delaware Supreme Court announced that corporate directors owed not only a duty of loyalty and a duty

85. Verified S'holder Derivative Action Complaint at 26, Marchand v. Barnhill, 212 A.3d 805 (Del. 2019) (No. 2017-0586-JRS).

86. *Id.* at 28.

87. *Cf.* Arlen & Kornhauser, *supra* note 77 at 701 ("Evidence shows that people are less likely to anticipate shame should they violate a legal norm if those in the social group to which they are most identified turn a blind eye to—and may even approve of—their illegal conduct."); *see also* A.L.I., COMPLIANCE, *supra* note 24, § 6.03(g), at 7 ("[W]rongdoing by managers is more detrimental to corporate culture because their actions, in effect, sends a message from a person in authority to those employees who are aware of the misconduct that misconduct is a viable response to a problem.").

88. *See* Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507, 540 (2018) ("Organizational theorists have long recognized that corporate-level features–corporate culture, processes and procedures, compensation rubrics, etc.–influence how employees behave."); Vincent Di Lorenzo, *Corporate Wrongdoing: Interactions of Legal Mandates and Corporate Culture*, 36 REV. BANKING & FIN. L. 207, 251–52 (2016) ("Behavioral decision theory and complexity theory advise that there are many factors that will influence future corporate assessments and decisions on legal compliance. Corporate culture influences corporate decision making as much as government policies and actions."); FIONA HAINES, CORPORATE REGULATION 25 (Keith Hawkins ed., 1997) (noting that organizational theorists recognize "[o]rganizational culture" as "the 'touchstone' by which individuals behave and act").

89. *See* Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 369 (Del. 2006) (internal citations omitted) (cleaned up).

of care, but also a duty of good faith.[90] This was more than a semantic change. Delaware corporations are allowed to exculpate their directors for gross negligence—a violation of the duty of care.[91] Violations of the duty of loyalty—which cannot be exculpated—typically involved self-dealing.[92] The explicit addition of good faith asked something more of directors.

Not all commentators welcomed this change. Professor Stephen Bainbridge expressed concerns that the additional duty of good faith could imperil a board of directors that "concluded that the costs associated with creating and maintaining an effective compliance program outweighed the benefits such a program offered."[93] But while the Delaware Supreme Court resituated the duty of good faith within the duty of loyalty, good faith remained a constraint on director action.[94] The court explained that "[w]here directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith."[95]

Although there are many judicial fingerprints on Delaware's duty of good faith, our current conception is largely traceable to the jurisprudence of former Chief Justice Leo E. Strine, Jr. Directors must act in good faith when discharging their oversight duties; otherwise, they violate the duty of loyalty.[96] Per Strine, that requirement arises out of the very basis for corporate existence—the corporate charter—which promises legal obedience to positive law.[97] And indeed, this connection between the corporate charter and its relationship to legal obedience creates a throughline in decisions written by Strine as Vice Chancellor, later Chancellor, and

90. *See* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) (describing a "triad" of fiduciary duties consisting of good faith, loyalty, and due care).

91. *See* DEL. GEN. CORP. L. § 102(b)(7).

92. *See* Strine et al., *Loyalty's Core Demand*, *supra* note 16, at 631–32, 691 (describing the development of good faith as "potentially overc[oming] a sizable obstacle to director liability for conduct not involving self-interest" by situating the duty of good faith within the duty of loyalty rather than the duty of care).

93. Stephen M. Bainbridge, Star Lopez & Benjamin Oklan., *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 601 (2008).

94. *Stone*, 911 A.2d at 370.

95. *Id.*

96. *See* Guttman v. Huang, 823 A.2d 492, 506 n. 34 (Del. Ch. 2003) ("It does no service to our law's clarity to continue to separate the duty of loyalty from its own essence; nor does the recognition that good faith is essential to loyalty demean or subordinate that essential requirement.").

97. *See* Strine, *supra* note 92 at 650 ("A publicly chartered corporation becomes a legal citizen imbued with rights and responsibilities. When directors knowingly cause the corporation to do what it may not—engage in unlawful acts or unlawful businesses—they are disloyal to the corporation's essential nature.").

ultimately Chief Judge of the Delaware Supreme Court.[98] As a Vice Chancellor, Strine wrote "one cannot act loyally as a corporate director by causing the corporation to violate the positive laws it is obliged to obey."[99] Later, in *In re Massey Energy*,[100] he wrote, "Delaware law does not charter law breakers. Delaware law allows corporations to pursue diverse means to make a profit, subject to a critical statutory floor, which is the requirement that Delaware corporations only pursue 'lawful business' by 'lawful acts.'"[101]

As Chief Justice, Strine asserted that the relationship between the firm and the state imposes a duty beyond just minimum legal compliance and box-checking. In *City of Birmingham Retirement and Relief System v. Good*,[102] the Delaware Supreme Court considered shareholders' *Caremark* claims against the directors of Duke Energy Corporation. The company suffered a trauma[103] when a stormwater pipe ruptured under one of its ash ponds, sending toxic substances into a North Carolina river.[104] The plaintiffs claimed that Duke Energy's board knew the company had colluded with a captive regulator[105]—North Carolina's Department of Environmental Quality—to obtain lax enforcement of the environmental regulations designed to protect against such a tragedy.[106] A majority of the Delaware Supreme Court viewed these allegations as inadequate to make out a claim under *Caremark* because even if the regulator was "wholly inadequate" to ensure legal compliance, the allegations "fell short of leading to a reasonable inference that Duke Energy illegally colluded with regulators."[107]

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98. *See infra* notes 107–18 and accompanying text.

99. *Guttman*, 823 A.2d at 506 n.34 (Del. Ch. 2003); *see also* Stephen M. Bainbridge, Caremark *and Enterprise Risk Management*, 34 J. CORP. L. 967, 975 (2009) ("In *Guttman*, . . . Vice Chancellor Strine ripped the *Caremark* claim from its original home in the duty of care and reinvented it as a duty of loyalty . . . .").

100. *In re* Massey Energy Co., No. CIV.A. 5430-VCS, 2011 WL 2176479 (Del. Ch. May 31, 2011).

101. *Id.* at *20 (Del. Ch. May 31, 2011). This statement was actually a direct response to arguments made by Professor Melvin Eisenberg, who had earlier argued that a director could act loyally to a corporation while causing it to violate positive law, but such an action would not be in good faith. *Id.* ("Despite the straw man arguments of certain academics . . . .") (citing Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1, 16 (2006)).

102. City of Birmingham Ret. & Relief Sys. v. Good, 177 A.3d 47, 50 (Del. 2017).

103. *See supra* note 47 and accompanying text (defining "corporate trauma").

104. *Good*, 177 A.3d at 50.

105. *See* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST AND HOW TO LIMIT IT 1 (Daniel Carpenter & David A. Moss, eds. 2013) (offering an example of "regulatory capture" as "[a]gencies tasked with protecting the public interest come to identify with the regulated industry and protect its interests against that of the public.").

106. *Good*, 177 A.3d at 59–63.

107. *Id.* at 60.

Strine disagreed. In his dissent, he suggested that that Duke Energy's board might have owed a greater duty to "the environment, wildlife, and public health."[108] Strine read the plaintiffs' complaint to allege actions that were "not sufficient to come into *good faith* compliance, but . . . would be given a blessing by a regulatory agency whose fidelity to the law, the environment, and public health, seemed to be outweighed by its desire to be seen as protecting Duke Energy and the jobs it creates."[109] In Strine's view, a firm's obligations to the state include good faith compliance with the law, over and above what a captive or apathetic regulator might require.[110] It was also Strine who, two years later, authored the Delaware Supreme Court's opinion in *Marchand v. Barnhill*,[111] the first in a series of recent decisions that allowed *Caremark* claims to proceed beyond a motion to dismiss due to the board's failure to monitor a firm's "mission critical" risks.[112] There, Strine reinvigorated the *Caremark* doctrine, precisely because of a failure of good faith.[113]

2. *Holding Rhetoric Up to Reality.* That good faith is the touchstone for the duty of loyalty suggests a firm's officers and directors must "mean it" when they promise to follow the law and when they direct the firm's employees to do the same. When corporate managers fail to meet their obligations under the duty of good faith, we might think of this failure as a cultural one. Under Delaware law, oversight violations that breach the duty of good faith have been sorted into three essential categories.[114] The first,

108. *Id.* at 65 (Strine, C.J., dissenting).

109. *Id.* (Strine, C.J., dissenting) (emphasis added).

110. Strine's writings since leaving the Delaware judiciary largely echo this sentiment. *See See* Strine et al., Caremark *and ESG, Perfect Together*, *supra* note 66, at 1887–88 ("By aiming for higher standards of conduct than the law mandates, corporations should at least do what is legally required."); Chris Brummer & Leo E. Strine Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 70 (2022) ("[T]he most fundamental requirement is that the directors and officers be loyal to the corporation's basic license from society, which allows the corporation to seek profit, but only conducting lawful business by lawful means."); Brett McDonnell, *Doctor Leo and Justice Strine*, 24 U. PA. J. BUS. L. 855, 864 (2022) (summarizing Strine's scholarly writing as suggesting that "[w]ell-run companies should choose to go well beyond the bare minimum required to comply with the law, in order to reduce the chance of legal violations.").

111. Marchand v. Barnhill, 212 A.3d 805, 824 (Del. 2019).

112. Shapira, *A New* Caremark *Era*, *supra* note 31, at 1863 (describing *Marchand* and the case's impact on *Caremark* jurisprudence).

113. *See Marchand*, 212 A.3d at 824 (Del. 2019) ("If *Caremark* means anything, it is that a corporate board must make a good faith effort to exercise its duty of care. A failure to make that effort constitutes a breach of the duty of loyalty.").

114. *See, e.g.*, Ontario Provincial Council of Carpenters' Pension Tr. Fund v. Walton, No. 2021-0827-JTL, 2023 WL 3093500, at *30 (Del. Ch. Apr. 26, 2023) (describing and reviewing each of the three varieties of *Caremark* claims). Alternately, many Delaware opinions also sort these types of claims

sometimes called "Massey" claims, impose liability on directors who caused the corporation to engage in illegal conduct.[115] The second, called "red flag" claims, find a breach of oversight duties when directors have seen and then consciously ignored red flags indicative of illegal conduct.[116] The third category, sometimes called "information-systems" claims, impose liability on a board of directors that fails to make a good faith effort to monitor for known compliance risks.[117] For each of these three species of *Caremark* claims, a breach of the duty of good faith suggests a cultural breach.

Start with a "Massey" claim and envision officers and directors who created a cultural permission structure that allows for—or even encourages—lawbreaking.[118] In fact, this was the case in *Massey*, in which CEO Don Blankenship enthusiastically undermined his company's legal compliance programs.[119] Indeed, Blankenship actively and vocally opposed federal regulatory efforts and made statements suggesting that miner safety regulations were unnecessary.[120] Blankenship once stated publicly, "Washington and state politicians have no idea how to improve miner safety. The very idea that they care more about coal miner safety than we do is as silly as global warming."[121] Through his adversarial posture toward the legal requirements governing the firm, Blankenship created a culture that diminished the legitimacy of mine safety regulation.

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into "Prong One" and "Prong Two" claims. *See, e.g.*, Constr. Indus. Laborers Pension Fund v. Bingle, No. 2021-0940-SG, 2022 WL 4102492, at *9 (Del. Ch. Sep. 6, 2022) ("[D]irectors must make a good faith effort to satisfy prongs one and two of *Caremark*.").

115. These claims are so named because of *In re Massey Energy Company*, where directors and officers engaged in "willful violations of mining safety laws and falsification of evidence." *In re* Massey Energy Co., No. CIV.A. 5430-VCS, 2011 WL 2176479, at *19 (Del. Ch. May 31, 2011).

116. *See, e.g.*, *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 139 (Del. Ch. 2009) (denying a *Caremark* claim against Citigroup, which alleged that directors failed to respond to red flags of the coming subprime mortgage crisis).

117. *See Marchand*, 212 A.3d at 824 (Del. 2019) (holding that the plaintiff had adequately pled a *Caremark* claim in alleging the board of directors of an ice cream company failed to maintain any good faith monitoring procedure for food safety).

118. *See* Alfredo Contreras et al., *supra* note 76, at 509 ("We posit that all else equal, when a CEO makes a disclosure or a statement, other managers and employees will take the CEO's verbal and accompanying non-verbal cues as primary guidance for their conduct and corporate values.").

119. *Massey*, 2011 WL 2176479, at *5 ("Blankenship was not quiet about his views and took a combative approach with the key federal agency charged with enforcing United States mining operations' compliance with federal safety regulations . . . espousing the belief that when it came to a miner's safety, Blankenship knew best.").

120. *See id.* at *6 (quoting Blankenship as writing to employees, "[i]f any of you have been asked . . . to do anything other than run coal (i.e.—build overcasts, do construction jobs, or whatever), you need to ignore them and run coal.").

121. *Id.* at *7.

Next consider a "red flag" claim and envision officers and directors who have seen signs that the firm's compliance culture is deteriorating. By failing to respond to those red flags, corporate managers send an expressive signal to employees that the firm does not value compliance.[122] That was the case in *McDonald's*, in which the company's Chief People Officer and CEO both engaged in sexually inappropriate conduct in the workplace while the company was actively embroiled in a sexual misconduct scandal.[123]

Finally, consider an "information-systems" claim. A board's failure to even monitor a particular compliance matter at the board level offers a window into how concerned the board is with that area of compliance.[124] This was the case at Boeing, which the Chancery Court faulted for failing to have any sort of board-level risk management process concerning "airplane safety."[125]

A breach of the duty of good faith might also mean that a firm's culture fails to match its compliance rhetoric.[126] In *City of Birmingham v. Good*, plaintiffs alleged that Duke Energy had engaged in a deliberate strategy to capture regulators while illegally dumping 39,000 tons of toxic coal ash into North Carolina's Dan River.[127]

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122. *See, e.g.*, Veronica Root, *The Compliance Process*, 94 IND. L.J. 203, 208 (2019) (suggesting that at Fox News, the lack of clear remediation following instances of sexual harassment by Roger Ailes and Bill O'Reilly constituted a failure to send the necessary signal about the importance of fixing cultural problems at the network).

123. *See In re* McDonald's Corp. Derivative Litig., 289 A.3d 343, 356–57, 377–78 (Del. Ch. 2023).

124. Compliance scholars have described the ways that "cheap" messages describing a need for law-abiding and ethical conduct can be "drowned out by the more credible 'expensive' message that so long as risk-taking pays off, it will be rewarded." *See* A.L.I., COMPLIANCE, *supra* note 24, § 4.05(d), at 5. The disparity between what might be described as a cheap message rewarding compliance and a more expensive message rewarding misconduct or, at least, ethical corner cutting, has been described as the problem of "cosmetic compliance." *See* Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L. Q. 487, 491 (2003).

125. *See In re* Boeing Co. Derivative Litig., No. CV 2019-0907-MTZ, 2021 WL 4059934, at *5 (Del. Ch. Sep. 7, 2021) ("Although the Audit Committee was tasked with handling risk generally, it did not take on airplane safety specifically. Its yearly updates regarding the Company's compliance risk management process did not address airplane safety.").

126. One way of thinking of this problem might be through the lens of economist Douglass C. North's theory of "credible commitment." *See* Douglass C. North, *Institutions and Credible Commitment*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 11, 11 (1993) (considering the "problem of creating institutions that can credibly commit the players to solve problems of exchange"). Lisa Fairfax has explicitly linked the economic theory concept of credible commitment with the problem of empty corporate rhetoric. Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 1163, 1204 (2022) (applying North's credible commitment theory to an examination of contemporary stakeholderism and the "gap between rhetoric and reality").

127. *See* City of Birmingham Ret. & Relief Sys. v. Good, 177 A.3d 47, 65 (Del. 2017) (Strine, C.J., dissenting) (collecting pleading stage allegations of regulatory capture); Trip Gabriel, *Ash Spill Shows How Watchdog Was Defanged*, NY TIMES (Feb. 28, 2014), https://www.nytimes.com/2014/03/01/us/coal

In 2014, Duke Energy entered into a consent decree with federal regulators for environmental damage.[128] The following year, the company pleaded guilty to multiple criminal violations of the Clean Water Act.[129] In connection with that guilty plea, Duke Energy[130] acknowledged that it was aware of the risks associated with the pipe that ultimately ruptured.[131] The company also admitted to ignoring recommendations to monitor the pipe's condition more closely and to refusing to allocate funding for the necessary monitoring that could have prevented the resulting environmental damage.[132] Despite these admissions, in a 2015 Duke Energy Sustainability Report, CEO and board chair Lynn Good nevertheless stated:

> We view safety through the lens of employees, communities and the environment. Of all our achievements in 2015, I'm most pleased by what we accomplished in this area . . . I'm equally proud of the industry-leading solutions we developed for safely managing coal ash. We are working to close all our coal ash basins in ways that protect our communities and the environment.[133]

This gap—between leadership's rhetoric about the company's values and its actual safety practices and compliance outcomes—reveals something about the cultural priorities of the firm.[134] When a firm's interest in legal

-ash-spill-reveals-transformation-of-north-carolina-agency.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer [https://perma.cc/WQQ9-GARN].

128. *See* Case Summary, EPA, *Duke Energy Agrees to $3 Million Cleanup for Coal Ash Release in the Dan River* (May 2, 2014), https://www.epa.gov/enforcement/case-summary-duke-energy-agrees-3-million-cleanup-coal-ash-release-dan-river [https://perma.cc/3XPA-V34X].

129. Press Release, U.S. Dep't of Justice, Duke Energy Subsidiaries Plead Guilty and Sentenced to Pay $102 Million for Clean Water Act Crimes (May 14, 2015), https://www.justice.gov/opa/pr/duke-energy-subsidiaries-plead-guilty-and-sentenced-pay-102-million-clean-water-act-crimes#:~:text=20%2C%202015%2C%20the%20three%20U.S.,steam%20electric%20plant%20(Chatham%20County) [https://perma.cc/5Z6D-E2MQ] (announcing that Duke Energy pleaded guilty and was sentenced to pay a $102 million fine in connection with environmental violations).

130. Admissions were made through a number of subsidiaries. *See* Joint Factual Statement, United States v. Duke Energy Business Services LLC, 15-cr-62 (E.D.N.C. May 14, 2015), https://www.justice.gov/opa/file/484491/dl [https://perma.cc/WJ9D-QGQS] (listing defendants as Duke Energy Business Services, LLC, Duke Energy Carolinas, LLC, and Duke Energy Progress, Inc.).

131. *Id.* at 25 ("The Station Manager told the Vice-President that [Dan River] needed the camera inspections, that the station did not know the conditions of the pipes, and that if one of the pipes failed, there would be environmental harm.").

132. *Id.* at 24–26.

133. DUKE ENERGY, 2015 SUSTAINABILITY REPORT 4 (2016), https://p-micro.duke-energy.com/impact/-/media/pdfs/our-company/esg-archive/2015-duke-energy-sustainability-report-complete.pdf?rev=8e8cb4ff7dc04eb69983e438ab42ca11 [https://perma.cc/Y4PN-GG2M].

134. *Cf.* Greg Urban, *Corporate Compliance as a Problem of Cultural Motion Extension of Remarks to the Symposium on New Directions in Corporate Compliance*, 69 RUTGERS U.L. REV. 495, 514 (2017) (describing culture as "transmitting an orientation to laws and regulation").

compliance and regard for the public appear to be pure "lip service,"[135] it seems fair to question whether firm management has actually made a good faith effort to meet their obligations under *Caremark*. The culture of a firm—what it values, what behaviors it rewards, and what behaviors it deems acceptable—can reveal whether that firm is actually discharging its oversight obligations in good faith.[136]

C. Culture as Mission Critical

Since Chancellor Allen's decision in *Caremark*, the lion's share of complaints alleging breaches of the duty of oversight have been dismissed.[137] As Delaware Vice Chancellor Glasscock observed, "it has become among the hoariest of Chancery clichés for an opinion to note that a derivative claim against a company's directors, on the grounds that they have failed to comply with oversight duties under *Caremark*, is among the most difficult of claims in this Court to plead successfully."[138] In recent years, however, things have begun to change. Delaware courts have allowed *Caremark* claims to proceed beyond a motion to dismiss when they have found a "mission critical" oversight failure.[139]

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135. *See* Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 302 (2020) (describing how the profit-driven priorities transmitted by Wells Fargo's senior management "had devastating results and spurred illegal conduct" despite the company instituting a "plan meant to pay lip service to ethics and compliance"); Veronica Root Martinez, *More Meaningful Ethics*, U. CHI. L. REV. ONLINE 1, 7 (2020) (describing as "paper ethics" the creation of superficial compliance programs that have little to do with actual ethical guiding principles).

136. *See* Langevoort, *supra* note 78 at 10 ("Cynical cultures . . . can be particularly dangerous from a compliance standpoint. Even without cynicism, the inclination within organizational cultures to interpret the law in a self-serving fashion increases compliance risk."); Lynne L. Dallas, *A Preliminary Inquiry into the Responsibility of Corporations and Their Officers and Directors for Corporate Climate: The Psychology of Enron's Demise*, 35 RUTGERS L.J. 1, 3 (2003) ("Corporate culture is . . . based on shared values, assumptions, attitudes and norms."); Vicky Arnold & James C. Lampe, *Understanding the Factors Underlying Ethical Organizations: Enabling Continuous Ethical Improvement*, 15 J. APPLIED BUS. RES. 1 (1999) (describing corporate culture as a "complex set of common beliefs and expectations held by members of the organization"); *see also* Atinuke O. Adediran, *Solving the Pro Bono Mismatch*, 91 U. COLO. L. REV. 1035, 1055 (2020) (defining organizational culture as "a negotiated order of how things function and how organization members behave, and it is influenced by people with power within organizations").

137. Pollman, *supra* note 30, at 2035 (2019) ("Corporate boards must have *some* system and *some* response, but in corporate law these are generally treated as matters of business judgment absent a complete dearth of board-level monitoring or egregious facts—seemingly any level of business risk is permissible.").

138. Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. CV 2019-0816-SG, 2020 WL 5028065, at *1 (Del. Ch. Aug. 24, 2020).

139. *See id.* at *17–18 (describing *Caremark* cases that have survived a motion to dismiss due to a failure to monitor for mission critical risks).

A handful of cases have defined what it might mean to be a mission critical risk.[140] In *Marchand v. Barnhill*, the Delaware Supreme Court found it was mission critical that Blue Bell monitor for compliance with food safety regulations.[141] In *In re Clovis Oncology Derivative Litigation*,[142] the Delaware Chancery Court likewise found a mission critical risk in a small pharmaceutical company's failure to monitor the firm's compliance with clinical trial protocols and Food and Drug Administration ("FDA") regulations related to new drugs.[143] In *Teamsters Local 443 Health Insurance Plan v. Chou*, the Chancery Court found a mission critical risk in the company's willful disregard of health and safety regulations governing drug sterility requirements for cancer drugs.[144] And finally, Boeing's failure to regularly monitor airplane safety constituted a mission critical risk.[145] Reading these cases together could suggest that mission critical risks are limited to legal concerns over consumer or patient safety in highly regulated industries.[146] But a careful reading of *Marchand* reveals something broader:

> Here, the Blue Bell directors just argue that because Blue Bell management, in its discretion, discussed general operations with the board, a *Caremark* claim is not stated.
>
> But if that were the case, then *Caremark* would be a chimera. At every board meeting of any company, it is likely that management will touch on some operational issue. Although *Caremark* may not require as much as some commentators wish, *it does require that a board make a good faith effort to put in place a reasonable system of monitoring and reporting about the corporation's central compliance risks*. In Blue Bell's case, food safety was essential and mission critical. The complaint pled facts

140. *See infra* notes 141–50 and accompanying text.

141. Marchand v. Barnhill, 212 A.3d 805, 824 (Del. 2019).

142. *In re* Clovis Oncology, Inc. Derivative Litig., No. CV 2017-0222-JRS, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019).

143. *See id.* at *13 (Del. Ch. Oct. 1, 2019) ("For Clovis, [mission critical regulatory issues] were Roci's TIGER-X trial and the clinical trial protocols and related FDA regulations governing that study.").

144. *See* Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. CV 2019-0816-SG, 2020 WL 5028065, at *18 (Del. Ch. Aug. 24, 2020) (considering as mission critical "law meant to ensure the safety and purity of drugs destined for patients suffering from cancer.").

145. *See In re* Boeing Co. Derivative Litig., No. CV 2019-0907-MTZ, 2021 WL 4059934, at *25 (Del. Ch. Sept. 7, 2021) ("Like food safety in *Marchand*, airplane safety 'was essential and mission critical' to Boeing's business. . . .").

146. For a more nuanced reading that explores whether and what risks might qualify as mission critical, see Roy Shapira, *Mission Critical ESG and the Scope of Director Oversight Duties*, 2022 COLUM. BUS. L. REV. 732, 765–83 (2022) (suggesting an analytical framework for understanding when ESG risk might give rise to *Caremark* liability).

> supporting a fair inference that no board-level system of monitoring or reporting on food safety existed.[147]

Marchand's language did not cabin these "central compliance risks" to specific kinds of regulatory risks in highly regulated industries. And, indeed, just a few year later in *McDonald's*, the risk at issue was a broader cultural risk rather than a failure to manage a specific regulatory risk in a highly regulated industry.[148] "The plaintiffs' oversight claim assert[ed] that a culture of sexual misconduct and sexual harassment was allowed to develop at the Company."[149] The key legal risk—as framed by both the plaintiffs and the court—did not involve a specific act of sexual harassment, but instead concerned the *culture* that allowed that harassment to take place.[150] Failure to monitor and to remedy that culture—so the theory goes—constituted a breach of *Caremark*'s oversight obligations.

More broadly, this theory of cultural legal risk is consistent with the nature of organizations and their attendant agency costs.[151] Corporations are only able to function through the actions of agents, the human beings they employ. The culture that sets the terms of those agents' interactions is mission critical to the success of legal compliance within the firm.[152]

II. OVERSIGHT'S TURN TOWARD CULTURE

In 2018, Chancellor Allen, the author of the *Caremark* opinion, explained that *Caremark*'s scope extended beyond the boundary of technical legal compliance, clarifying that "boards have an ongoing obligation to try and keep the company operating effectively with respect to the legal risk *but also with respect to every element of the business*."[153] But despite Chancellor Allen's original broad intent for *Caremark*'s reach, the litigated cases that

147. Marchand v. Barnhill, 212 A.3d 805, 824 (Del. 2019) (emphasis added).

148. *See In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343, 376 (Del. Ch. 2023).

149. *Id.*

150. *See id.* at 377 ("The plaintiffs' Red-Flags Claim asserts that Fairhurst permitted a toxic culture to develop at the Company that turned a blind eye to sexual harassment and misconduct."); *id*. at 376 ("From a theoretical standpoint, nothing prevents a stockholder from asserting a derivative claim for breach of the duty of oversight based on that theory.").

151. *See generally* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991) (offering a contractarian theory of corporate law concerned with the controlling of agency costs).

152. *See* Gadinis & Miazad, *Corporate Law and Social Risk*, *supra* note 36, at 1466 (2020) (arguing that managing social risks—whether concerning sexual harassment or environmental harm—should be an essential board function because crises in these areas prove extremely harmful to shareholders).

153. Oral History Interview, *supra* note 25 at 1:26.

followed *Caremark* actually contracted the doctrine's power. For example, in *In re Citigroup*, Chancellor Chandler dismissed the plaintiffs' *Caremark* claims alleging the bank had failed to adequately oversee the risk of exposure to the subprime mortgage market.[154] To Chancellor Chandler, this was a "business risk" not cognizable under *Caremark*'s oversight duty.[155] This distinction drew a bright line between legal risks that might implicate *Caremark*-style duties and business risks that are afforded the deference of the business judgment rule.[156]

If these two viewpoints represent two poles in terms of our understanding of *Caremark*'s scope, for much of the *Caremark* doctrine's history, Delaware courts have hewed much closer to Chancellor Chandler's view.[157] But recent decisions have marked a shift toward a more nuanced understanding of the interrelationship between risk, culture, and the boundary of the law.[158]

The following section explores how Delaware courts have historically grappled with the relationship between one particular type of cultural harm—sexual misconduct—and fiduciary oversight responsibilities. In particular, this section maps two key moves, using shareholder claims based on sexual misconduct as a case study—first, shareholder plaintiffs' direct appeal to culture as the source of corporate harm, and second, the court's imposition of oversight liability on corporate officers—as essential to understanding the potential for *Caremark*'s power to reach culture.

A. Cultural Risk and Sexual Misconduct

Sexual misconduct provides a frequent and persistent example of cultural risk. Until recently, however, fostering a culture that permitted such misconduct fell outside of the realm of Delaware fiduciary liability.[159] The following three cases trace the development of Delaware oversight

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154. *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 124 (Del. Ch. 2009)

> To the extent the Court allows shareholder plaintiffs to succeed on a theory that a director is liable for a failure to monitor business risk, the Court risks undermining the well settled policy of Delaware law by inviting Courts to perform a hindsight evaluation of the reasonableness or prudence of directors' business decisions.

155. Chancellor Allen later called Chancellor Chandler's decision in *Citigroup* "silly" and suggested Chandler had misunderstood the breadth of the oversight duty. Oral History Interview, *supra* note 25 at 1:33.

156. *In re* Citigroup, 964 A.2d at 130–31.

157. *See* Pollman, *supra* note 30, at 2031–32 ("[C]ourts have drawn a line between the oversight of business risk and legal risk—the former given wide allowance and the latter deemed improper. In this way, *Caremark* has largely been cabined to the most extreme cases involving legal violations.").

158. *See infra* notes 191–218 and accompanying text.

159. *See infra* Part II.A.1–2.

jurisprudence, which has evolved to now reach the type of cultural harm of sexual harassment and violence within corporate spaces.

1. *White v. Panic.* Throughout the 1990s, Milan Panic, the CEO of ICN Pharmaceuticals, was so prone to sexually harassing his employees that he made the cover of *US News & World Report*.[160] ICN's board of directors certainly seemed to know about the problem.[161] One of several harassment complaints filed against Panic quoted a board member saying, "the problem with Panic is he can't keep it in his pants."[162] Yet the board was committed to keeping Panic as CEO and to minimizing, if not facilitating, his misconduct.[163] The company paid $3.5 million to settle eight harassment lawsuits against Panic.[164] The board also approved a short-term loan of company funds to Panic so that he could pay a $3.5 million to settle a paternity suit.[165] The board never sanctioned Panic for his misconduct.[166]

When these facts became public, a shareholder filed a derivative action in Delaware, claiming that the board "intentionally or with a reckless disregard of their fiduciary duties made decisions that condoned or encouraged Panic's alleged misconduct."[167] That suit was unsuccessful.[168] Somehow, the Delaware Supreme Court reasoned that, although a board member remarked that Panic "could not keep it in his pants" and the board had approved paying millions to settle eight separate harassment suits, the plaintiff still had not adequately pleaded that the board knew about Panic's sexual misconduct.[169]

To dismiss based on lack of board knowledge, despite all the plaintiffs alleged that the board knew, depended on an extraordinarily generous interpretation of the board's good faith. The business judgment rule presumes that "in making a business decision the directors of a corporation

160. *See* White v. Panic, 783 A.2d 543, 547 (Del. 2001).

161. *Id.* at 548 ("The plaintiff posits that, although ICN officials knew about Panic's alleged misconduct as early as 1992 . . . .").

162. *Id.*

163. *See id.* (noting that Plaintiffs had alleged "the board made a concerted effort to protect Panic by using corporate funds to settle the suits against Panic and ICN and by implementing policies designed . . . to minimize exposure of Panic's alleged activities.")

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 552.

168. *Id.* at 557 (affirming dismissal).

169. *See id.* at 552–53 ("In the present case, the plaintiff has not pleaded facts indicating that the challenged settlements were anything other than routine business decisions in the interest of the 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."[170] On a motion to dismiss, the plaintiff receives the benefit of all reasonable inferences.[171] Apparently, the Delaware Supreme Court was not convinced that the directors could have known about Panic's misconduct. Contrary to the pleading standard that requires plaintiff-friendly inferences, the Delaware Supreme Court inferred that the directors could not have known that Panic was engaged in misconduct.[172]

2. *lululemon.* When lululemon announced the departure of CEO and Board member Laurent Potdevin in 2018, the company's executive chairman, Glenn Murphy issued the following statement: "Culture is at the core of lululemon, and it is the responsibility of leaders to set the right tone in our organization. Protecting the organization's culture is one of the Board's most important duties."[173]

Culture had long been a problem at lululemon. In 1998, founder Dennis "Chip" Wilson shared racist and misogynistic views in press interviews and on the company's blog.[174] Shortly after Wilson was criticized for suggesting that a quality problem with lululemon's signature leggings was due to the size of the women's bodies inside them, Potdevin was tapped to take over as chief executive of the company.[175]

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170. *See, e.g.*, Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

171. *See, e.g.*, Gantler v. Stephens, 965 A.2d 695, 703–04 (Del. 2009) ("In reviewing the grant or denial of a motion to dismiss, we view the complaint in the light most favorable to the non-moving party, accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations.").

172. *White*, 783 A.2d at 553.

173. Press Release, Lululemon Athletica, Lululemon Athletica Inc. CEO Laurent Potdevin Resigns (Feb. 5, 2018), https://corporate.lululemon.com/media/press-releases/2018/02-05-2018-085742151 [https://perma.cc/9GHW-6VYT].

174. Wilson has joked about making Japanese people say the letter "L." *See* Hollie Shaw, *Lululemon Founder Chip Wilson's 5 Most Controversial Quotes*, FIN. POST (Dec. 10, 2013), https://financialpost.com/news/retail-marketing/lululemon-athletica-chip-wilson-controversy [https://perma.cc/A93E-WUDY]. He has also suggested that women's participation in the workforce may cause breast cancer and that birth control leads to divorce. *See* Rebecca Greenfield, *A Shocking Retrospective of the Lululemon Founder's (Many) Offensive Comments*, FAST CO. (Nov. 7, 2013), https://www.fastcompany.com/3021367/a-shocking-retrospective-of-the-lululemon-founders-many-offensive-comments [https://perma.cc/MB3F-T2AE].

175. Tiffany Hsu, *Lululemon's Chief Executive Resigns Over Behavior*, N.Y. TIMES (Feb. 5, 2018), https://www.nytimes.com/2018/02/05/business/lululemon-ceo-resigns.html [https://perma.cc/BE9S-BQS4]. (When quality control problems with the company's pants led to a recall, Wilson suggested that it was because "some women's bodies don't work for the pants"; store employees then asked women returning the pants to "put on the pants and then bend over.").

With Potdevin in charge, the company's culture actually suffered. Indeed, shareholders alleged that Potdevin "created a toxic culture at lululemon and engaged in a pattern and practice of harassment and sexual favoritism while CEO."[176] In derivative litigation following Potdevin's ouster, shareholders offered two primary critiques. First, shareholders alleged Potdevin openly expressed patriarchal and misogynistic attitudes, demonstrated by his preferential treatment for men in hiring and promotion decisions.[177] Potdevin's attitudes "basically turned lululemon's executive team into a boy's club overnight."[178] Second, plaintiffs alleged Potdevin engaged in "weird favoritism," which included offering career opportunities and professional perks to a female designer with whom he had a sexual relationship.[179] Other male managers who Potdevin hired allegedly engaged in similar behavior.[180]

In early 2018, when the #MeToo movement forced a reckoning among much of corporate American about the ubiquity of workplace sexual misconduct,[181] lululemon's board of directors sought to cut ties with Potdevin by negotiating a Separation Agreement that allowed Potdevin to voluntarily resign and receive a five million dollar severance payment.[182] Potdevin's departure attracted negative press attention focused on his inappropriate workplace relationships, and the similarly problematic corporate culture that he fostered.[183]

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176. Verified Stockholder Derivative Amended Complaint at 8, Shabbouei v. Potdevin, No. 2018-0847-JRS, 2019 WL 1864732 (Del. Ch. 2019) [hereinafter Stockholder Amended Complaint].

177. *See id.* at 30–31 ("Under defendant Potdevin's leadership, offensive behavior communicating patriarchal beliefs of male superiority and entitlement to preferential treatment over women permeated through all corporate levels, including among the Company's highest-ranking executives.").

178. *Id.* at 31.

179. *Id.* at 53; *see also* Chavie Lieber, *Lululemon Employees Report a Toxic 'Boy's Club' Culture*, RACKED (Feb. 14, 2018), https://www.racked.com/2018/2/14/17007924/lululemon-work-culture-ceo-laurent-potdevin [https://perma.cc/8SQ9-8JXK] (recounting employee accounts of toxic culture at lululemon).

180. Stockholder Amended Complaint, *supra* note 176, at 33–34.

181. *See* Lin, *supra* note 37, at 332–338 (2020) (describing corporate shakeups in the wake of #MeToo due to executive misconduct).

182. *See* Separation Agreement and Release at 1–2, lululemon, (Feb. 2, 2018), https://www.sec.gov/Archives/edgar/data/1397187/000139718718000005/lulu-20180202xex101.htm [https://perma.cc/6V93-S2VJ].

183. *See, e.g.*, Christina Farr, Lauren Hirsch & Lauren Thomas, *Lululemon CEO Left in Part Because of Relationship with Female Designer at the Company*, CNBC (Feb. 7, 2018), https://www.cnbc.com/2018/02/06/lululemon-ceo-laurent-potdevin-had-inappropriate-employee-relationship.html [https://perma.cc/6FDU-DKLM]; Samantha Schmidt, *Lululemon CEO Resigns. Unspecified Conduct 'Fell Short' of Standards*, WASH. POST (Feb. 6, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/02/06/lululemon-ceo-resigns-unspecified-conduct-fell-short-of-standards/ [https:

Shareholders brought suit, claiming that the company's directors had breached their fiduciary duties by first, failing to act when Potdevin engaged in obvious misconduct and second, for allowing Potdevin to resign and receive a severance payment, rather than be fired for cause.[184] Though the plaintiffs' claims sought to "hold the Board liable for not responding to 'red flags' that the CEO was behaving in a manner detrimental to the Company," the plaintiffs notably disclaimed any attempt to plead a *Caremark* claim.[185] This strategic decision is suggestive of *Caremark*'s perceived toothlessness at the time. And yet, the claims shareholders actually pursued—claims for unjust enrichment and waste—were nevertheless dismissed.[186]

Assuming the plaintiffs' allegations were true, however, the board allowed a CEO to foster an environment that routinely demeaned and harassed female employees, preventing the retention of talent.[187] These actions caused serious reputational harm in a cultural moment when shareholders, stakeholders, and the general public were particularly sensitive to the harms caused by sexual harassment.[188] And yet, at the time that *Potdevin* was decided, Delaware corporate law seemed to offer little to shareholders in the way of accountability mechanisms for this particular kind of corporate cultural harm.

3. *McDonald's.* In 2018, at the height of the #MeToo era, the Board of Directors of McDonald's Corporation saw a red flag—they learned that David Fairhurst, McDonald's Global Chief People Officer and the executive officer with day-to-day responsibility for overseeing the company's human resources function, had personally engaged in an act of sexual harassment.[189]

//perma.cc/Y3PJ-GTCQ]; Sissi Cao, *Lululemon CEO Resigns Over Misconduct Claims, But He Will Walk Away with $5M*, OBSERVER (Feb. 6, 2018) (https://observer.com/2018/02/lululemon-ceo-resigns-over-misconduct-claims/) [https://perma.cc/A6WF-GUJM]; Chavie Lieber, *Lululemon Employees Report a Toxic 'Boy's Club' Culture*, RACKED (Feb. 14, 2018), https://www.racked.com/2018/2/14/17007924/lululemon-work-culture-ceo-laurent-potdevin [https://perma.cc/8SQ9-8JXK].

184. *See* Shabbouei v. Potdevin, No. 2018-0847-JRS, 2020 WL 1609177, at *1 (Del. Ch. Apr. 2, 2020) ("In other words, Plaintiff alleges the Board acted *too slowly* in uncovering and responding to the CEO's misdeeds, but then acted *too quickly* in deciding to negotiate a separation with the CEO rather than fire him outright.").

185. *See id.* ("Notwithstanding the several 'failure of oversight' allegations . . . Plaintiff disavows any attempt to plead a *Caremark* claim.").

186. *Id.* at *13.

187. *See id.* at *3 (describing the culture at lululemon under Potdevin's leadership).

188. Lin, *supra* note 37, at 332–38 (outlining the "shift in norms and expectations surrounding the private conduct of corporate executives, as precipitated in part by the recent #MeToo movement").

189. *See In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343, 353, 378 (Del. Ch. 2023) (describing the plaintiffs' allegations that Fairhurst breached his fiduciary duties both by disregarding red flags of "potential problems with sexual harassment and misconduct at the Company" as well as by

The Board learned of this violation in the midst of a dramatic upheaval at the corporation: In the prior two years, McDonald's employees had filed multiple Equal Opportunity Employment Commission ("EEOC") complaints and had engaged in a multi-city strike to protest the company's culture that turned a blind eye to sexual harassment.[190] In the months that would follow the board's revelations about Fairhurst's personal conduct, McDonald's faced Congressional inquiries into the company's culture, and multiple class action lawsuits alleging sexual harassment and a toxic work environment for women.[191] In 2019, the Board also learned that McDonald's CEO, Stephen Easterbrook, had engaged in a purportedly consensual sexual relationship with a female subordinate.[192] Ultimately, the board chose to fire Fairhurst, and allowed Easterbrook to resign.[193]

Two years later, McDonald's shareholders filed a derivative suit in the Delaware Court of Chancery on behalf of the company, alleging that the board of directors and key officers, including Fairhurst and Easterbrook, had breached their fiduciary duties.[194] The plaintiffs alleged Fairhurst "breached his fiduciary duties by allowing a corporate culture to develop that condoned sexual harassment and misconduct" and by failing to "make a good faith effort to establish a system that would generate the information necessary to manage the Company's human resources function"—in violation of his obligations under *Caremark*.[195] And by allowing these *Caremark* claims to survive a motion to dismiss, Vice Chancellor J. Travis Laster broke from the blind-eye approach of earlier oversight cases and definitively stated for the first time in Delaware law that officers, like directors, owe *Caremark*-style oversight duties.[196]

That doctrinal development was not a shock—several scholars had already come to the same conclusion.[197] But that doctrinal shift made the

committing an act of sexual harassment himself—specifically plaintiffs alleged that Fairhurst "pulled a female employee onto his lap" during a company function).

190. *Id.* at 377.

191. *Id.* at 377–78.

192. *Id.* at 356–57.

193. *Id.*; *see also McDonald's CEO Pushed Out After Relationship with Employee*, AP NEWS (Nov. 4, 2019 at 02:18 ET), https://apnews.com/article/nyc-wire-us-news-ap-top-news-relationships-steve-easterbrook-7b8aa56cb9194edc8802093085f4c254 a3[https://perma.cc/5XZP-QN3X].

194. Verified Stockholder Derivative Complaint for Breach of Fiduciary Duty, Teamsters Local 237 Additional Security Fund v. Hernandez, 2021-0324-JRS (Del. Ch. Apr. 20, 2021).

195. *In re McDonald's Corp.*, 289 A.3d at 349.

196. *See id.* at 369–75 ("[D]iverse authorities indicate that officers owe a fiduciary duty of oversight as to matters within their areas of responsibility. . . . This decision confirms that officers owe a duty of oversight.").

197. In coming to this conclusion, Vice Chancellor Laster relied on a number of scholarly sources that had largely come to the same conclusion. *Id.* at 363. *See* William R. Heaston, *Copycat Compliance*

difference in imposing liability in *McDonald's*. In addition to holding that the complaint sufficiently pled that Fairhurst had breached his duty of loyalty, Vice Chancellor Laster also held that plaintiffs had sufficiently pled a claim against Fairhurst for breaching his duty of oversight.[198] Because oversight duties extend to those who witness the firm's day-to-day culture, the purported knowledge gaps that barred liability for any oversight failures in *Panic* and *Potdevin* were no longer an issue.

This was not the end of the story, however, for *McDonald's*. In a separate opinion, Vice Chancellor Laster considered the claim that the nine-member board breached their oversight duties by deciding to: (1) promote an employee to the role of CEO who had engaged in a sexual relationship that violated the company's policy; (2) discipline, rather than fire, a Chief People Officer who sexually harassed an employee; and (3) terminate the CEO without cause, which allowed him to keep his severance.[199] Laster held that although these decisions may well have been ill-advised, none were necessarily grossly negligent or disloyal.[200] And for that reason, each of the board's decisions was insulated by the business judgment rule and therefore could not give rise to liability.[201]

B. Delaware's Shifting Focus on Culture

In the approximately thirty years that separate the *Panic* and *McDonald's* decisions, the norms around sexual misconduct in the workplace have certainly changed.[202] Indeed, the court in *McDonald's* acknowledged as much.[203] But in the change in outcomes from *Panic* to *McDonald's*, there is more than just a change in societal norms around

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and the Ironies of "Best Practice," 24 U. PA. J. BUS. L. 750, 762 n.56; Richard W. Blackburn & Jeffrey J. Binder, 3 *Successful Partnering Between Inside and Outside Counsel* § 47:6 (Apr. 2021 Update); Paul E. McGreal, Caremark *in the Arc of Compliance History*, 90 TEMP. L. REV. 647, 678 (2018); Paul E. McGreal, *Corporate Compliance Survey*, 73 BUS. L. 817, 835 (2018); Michael R. Siebecker & Andrew M. Brandes, *Corporate Compliance and Criminality: Does the Common Law Promote Culpable Blindness?*, 50 CONN. L. REV. 387, 398 n.49 (2018); Nadelle Grossman, *Turning A Short-Term Fling into A Long-Term Commitment: Board Duties in A New Era*, 43 U. MICH. J.L. REFORM 905, 906 n.4 (2010).

198. *In re McDonald's Corp.*, 289 A.3d at 382.

199. *In re* McDonald's Corp. S'holder Derivative Litig., 291 A.3d 652, 661–62, 688–690 (Del. Ch. 2023).

200. *Id.* at 689.

201. *Id.* at 663.

202. *See* Kellye Testy, *Commentary on* White v. Panic, *in* FEMINIST JUDGMENTS: CORPORATE LAW REWRITTEN 249–56 (Choike, Rodrigues, Williams, eds., 2023) (describing the impact of the #MeToo movement on corporate and shareholder suits concerning sexual misconduct).

203. *See* 291 A.3d at 681 n.7 ("Since the *Panic* case, there has been much hard-won learning on the subjects of sexual harassment and misconduct, the harm they cause, and the risks they pose to a corporation.").

workplace sexual misconduct. That is, the doctrine has changed to ask more of directors and, in particular, of officers.

First, critically and obviously, officers now owe duties of oversight.[204] This means that those who observe problematic culture in their day-to-day roles must now address problems that arise. Unlike officers, however, outside directors may not always have that same insight. Board members are far less likely to personally witness compliance failures than the officers running the day-to-day operations of the firm. For one, directors are busy. The practical realities of the many competing demands on a board member's time may well prevent much of a board from being steeped in the culture of a firm, despite the duty to monitor.[205] Members of the board are, more often than not, independent,[206] and thus, have little direct visibility into company culture.[207] Though independent board members have a duty to make a good faith effort to "put in place a reasonable system of monitoring and reporting about the corporation's central compliance risks,"[208] legal risks that go unidentified by a legally sufficient compliance program and fail to make it to the board also fail to create *Caremark* liability for those board members.

Prior *Caremark* decisions illustrate this point. For example, in *In re Boeing*, the complaint against the company's board described a rapidly deteriorating culture regarding compliance in airplane manufacturing.[209] Following a merger with McDonnell Douglas, Boeing shifted its focus away

204. *See In re McDonald's Corp.*, 289 A.3d at 358.

205. *See* Jeremy C. Kress, *Board to Death: How Busy Directors Could Cause the Next Financial Crisis*, 59 B.C. L. REV. 877, 891 (2018) ("By any measure, public company directors lead exceptionally busy lives. More than half of new independent directors of S&P 500 firms, for example, are actively employed as corporate executives or in other professions.").

206. *See* Bryce Tingle, *The Case for More Company Insiders on Boards*, HARV. BUS. REV. (Sept. 30, 2024), https://hbr.org/2024/09/the-case-for-more-company-insiders-on-boards [https://perma.cc/MWZ9-HALF] ("As of 2023, Spencer Stuart research found that 85% of directors are independent—which generally means that for many companies the only inside director left is the CEO."); Gregory H. Shill, *The Independent Board As Shield*, 77 WASH. & LEE L. REV. 1811, 1825–26 (2020) (discussing the historical rise of the independent board model); Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1475 (2007) (noting that the percentage of independent directors on large public company boards increased from 20% in 1950 to 75% in 2005).

207. *See* Lisa M. Fairfax, *The Uneasy Case for the Inside Director*, 96 IOWA L. REV. 127, 164–65 (2010) ("Studies reveal that while many directors have knowledge about general business matters, few have knowledge regarding the particular industry on whose board they sit, and even fewer have knowledge about the specific company on whose board they sit.").

208. Marchand v. Barnhill, 212 A.3d 805, 824 (Del. 2019).

209. *See In re* Boeing Co. Derivative Litig., No. 2019-0907-MTZ, 2021 WL 4059934, at *3–4 (Del. Ch. Sept. 7, 2021).

from engineering and safety and toward profitability and efficiency.[210] The shareholder plaintiffs painted a vivid picture of a toxic culture so focused on rapid production that one longtime general manager lamented, "for the first time in my life, I'm sorry to say that I'm hesitant about putting my family on a Boeing airplane."[211] And yet, the court recognized, "[w]hile some of these complaints made their way to senior management, none made it to the Board. The Board was unaware of whistleblower complaints regarding airplane safety, compliance, workforce exhaustion, and production schedule pressure at the 737 MAX facility."[212]

Abbott Laboratories faced similarly serious safety culture issues. There, factory sanitation issues were linked to multiple infant deaths and set off a nationwide baby formula shortage during a global pandemic.[213] Officers knew of escalating red flags at a Michigan formula plant, including a whistleblower complaint alleging unsanitary conditions and a "workplace culture as focusing on speed and meeting metrics at the expense of safety."[214] But again, those complaints, implicating deep and deadly safety violations, purportedly never made it to the Board.[215]

For the majority of the life of the *Caremark* doctrine, it has been a paper tiger: The doctrine's likelihood of creating liability was so low as to render it irrelevant.[216] For example, a board of directors could be blissfully unaware

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210. *See id.* at *3 ("With former McDonnell Douglas leaders at the helm, Boeing's corporate culture shifted from 'safety to profits-first' and 'focusing on costs-cutting rather than designing airplanes.'").

211. *Id.* at *11; *see also id.* at *4 ("By 2001, Boeing relocated its headquarters from Seattle to Chicago in order 'to escape the influence of the resident flight engineers.'").

212. *Id.* at *12.

213. *See* Christina Jewett, *Justice Department Investigating Troubled Infant Formula Plant*, N.Y. TIMES, (Jan. 21, 2023), https://www.nytimes.com/2023/01/21/business/justice-abbott-infant-formula-investigation.html [https://perma.cc/3S48-L7CU] (noting that Abbott's infant formula plant "came to national attention in 2022 after the Food and Drug Administration, while fielding reports of infants sickened by formula produced there, found strikingly unsanitary conditions, including puddles of water on the floor near production lines.").

214. *In re* Abbott Lab'ys Infant Formula S'holder Derivative Litig., No. 22 CV 05513, 2024 WL 3694533, at *19 (N.D. Ill. Aug. 7, 2024); Consolidated Amended Verified Stockholder Complaint, *In re* Abbot Lab'ys Infant Formula S'holder Derivative Litig., 2023 WL 11762728 (N.D. Ill. Oct. 16, 2023).

215. *In re* Abbott Lab'ys, 2024 WL 3694533, at *18 ("Management saw red, or at least yellow, flags, but that information never reached the Board.").

216. *See, e.g.*, Mercer Bullard, Caremark*'s Irrelevance*, 10 BERKELEY BUS. L.J. 15, 43 (2013) (arguing that the importance of *Caremark* is overstated in corporate law academic discourse while federal law has more practical effect on corporate compliance); Charles M. Elson & Christopher J. Gyves, In re Caremark*: Good Intentions, Unintended Consequences*, 39 WAKE FOREST L. REV. 691, 692 (2004) (suggesting *Caremark* is "an empty triumph of form over substance"); Claire A. Hill, Caremark *As Soft Law*, 90 TEMP. L. REV. 681, 697 (2018) (describing *Caremark* doctrine as "soft law" and suggesting that directors "hardly need fear liability under *Caremark*."); Langevoort, *Cultures of Compliance, supra* note 68 at 941 ("*Caremark's* 'just do something' message invited a check-the-box mentality"); Kimberly D. Krawiec, *supra* note 124 at 491 (arguing the proliferation of internal compliance mechanisms to solve

of grave compliance risks within the firm and so long as the company maintained some form of a compliance program—even if it were ineffective—the *Caremark* doctrine would generally find that the directors had fulfilled their fiduciary duties.[217] It is for this reason that the kind of officer oversight role outlined in the *McDonald's* case has the potential to be far more probing than a set of obligations confined to outside directors and the most senior officers who happen to sit on the board—the decision noted that officers as junior as, for example, "the executive officer in charge of sales and marketing" would have oversight duties confined to their area of authority, and additional obligations to report up should they be exposed to a "red flag" elsewhere suggesting illegality.[218] Holding officers accountable for oversight violations closes the knowledge gap between officers and the board that has historically doomed *Caremark* claims.

More broadly, though, the shift from *Panic* to *McDonald's* suggests that it is appropriate for shareholders to bring suit when a corporation's managers have failed to properly monitor corporate culture, such that the culture gives rise to legal risk, corporate trauma, or public harm. And as a descriptive, doctrinal matter, it appears that shareholders and courts are now more willing to view culture as falling within the ambit of corporate oversight responsibilities. The consequence of Delaware law's increasing focus on corporate culture is that there is now an opportunity to not only address the clear legal violations identified by compliance efforts, but also to extend the responsibility to monitor cultural issues that may have previously escaped oversight liability. This approach benefits shareholders by allowing them to seek accountability when corporate behavior reflects a disregard for legal obligations, particularly when this disregard leads to public harm.

III. THE PERILS AND PROMISE OF A CULTURAL *CAREMARK*

The prior sections have shown that culture has a powerful effect on legal compliance, that cultural harms can constitute legal harms, and that critical features of modern corporate oversight doctrine already contemplate the culture of a firm. This section considers an explicit requirement that officers

problems of corporate misconduct risks "(1) an under-deterrence of corporate misconduct and (2) a proliferation of costly—but arguably ineffective—internal compliance structures").

217. *See, e.g.*, *In re* Gen. Motors Co. Derivative Litig., No. CV 9627–VCG, 2015 WL 3958724, at *15 (Del. Ch. June 26, 2015), *aff'd*, 133 A.3d 971 (Del. 2016) ("Pleadings, even specific pleadings, indicating that directors did a poor job of overseeing risk in a poorly-managed corporation do not imply director bad faith."); *see also* Pollman, *supra* note 30 at 2032–33 (describing the "common path of dismissal" in *Caremark* cases).

218. *In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343, 370 (Del. Ch. 2023).

and directors monitor a firm's culture to assess whether that culture gives rise to *Caremark*-style risk of corporate trauma.

A. The Case for Board-Level Monitoring of Corporate Culture

If corporate culture significantly influences corporate compliance, then perhaps firms should, at the board level and explicitly, monitor and oversee corporate culture. This would mean regularly assessing how lower-level employees understand the priority of legal compliance compared with other values, like productivity or efficiency. It would also mean reporting up from officers to the board—in the style contemplated by Vice Chancellor Laster's decision in *McDonald's*—regarding immediate and expressive cultural harms that can lead to legal risk.

A cultural *Caremark*—that is, a reconception of *Caremark* duties as encompassing cultural risk as a form of legal risk—solves for several governance problems that can allow for misconduct. First, though large corporations are subject to an enormous number of legal and regulatory responsibilities, external enforcement can only do so much to ensure compliance.[219] Second, though behavioral ethics and compliance scholars frequently cite culture as having a powerful impact on whether a firm follows the law,[220] firm culture can be invisible at the board level.[221] And third, culture can be particularly sticky, evading correction even when traditional legal mechanisms hold the firm accountable.[222]

1. *Compliance with Law as Privatized Responsibility.* Ensuring that corporations follow the law is often a matter of self-policing.[223] Governments do not have the resources to detect and punish corporate misconduct

219. *See* Jennifer Arlen, *The Compliance Function*, THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 6 (Jeffrey N. Gordon & Wolf-Georg Ringe, eds., Oxford University Press 2d ed., 2024) ("[S]ociety cannot rely *solely* on criminal sanctions to optimally deter organizational misconduct through either the incentives or expressive messages produced by criminal sanctions because neither is reliably effective unless the state is able to induce corporations to intervene.").

220. *See supra* notes 88–89 and accompanying text.

221. *See supra* notes 209–15 and accompanying text (describing knowledge gaps at Boeing and Abbott Labs).

222. *See* van Rooij & Fine, *supra* note 10, at 3 ("[I]t is widely agreed that changing corporate wrongdoing through external enforcement is challenging."); *see generally* Mihailis E. Diamantis, *The Law's Missing Account of Corporate Character*, 17 GEO. J.L. & PUB. POL'Y 865, 886 (2019) (proposing a theory of corporate character and suggesting that making changes to corporate character to "induce a sincere commitment to compliance" may be possible but must take time).

223. Root, *supra* note 122, at 214 ("[G]overnmental actors have a very limited ability to detect misconduct within private organizations and must rely on organizations to police their own members.").

effectively.[224] Instead, the burden of policing corporate compliance with law is largely borne by corporations themselves.[225] Although governmental actors provide incentives for maintaining an "effective" compliance department, these incentives cannot guarantee "perfect" compliance, nor is such perfect compliance realistically expected.[226] Instead, federal prosecutors can offer corporate defendants a sentencing credit for having an effective compliance program, though in practice, this kind of leniency is often exercised through the use of deferred prosecution agreements.[227]

Against this enforcement backdrop, it seems fair to suggest that firm compliance is often a matter of internal priorities rather than simply a fear of external enforcement.[228] Firms choose to invest in compliance structures to prevent the kind of corporate traumas that harm shareholders. In the event of wrongdoing, this investment in compliance may also help companies avoid significant government sanctions.[229] In the absence of a meaningful and salient threat of enforcement, however, there may be perverse incentives that inform the construction of a compliance program. That is, it may be preferable to create a superficially rigorous program that fails to effectively

224. *See* Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697, 707 (2020) ("In light of structural and political realities that prevent prosecutors and law enforcement agents from having the resources and public support to comprehensively and intrusively surveil activities inside large corporations, business firms thus can be viewed . . . as a resource in crime prevention.").

225. *See* Root, *supra* note 122, at 214–15; Geoffrey Parsons Miller, *The Compliance Function*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 981, 982 (Jeffrey N. Gordon & Wolf-Georg Ringe, eds., Oxford University Press 1st ed., 2018) (describing the costs and benefits of delegating responsibility for norm enforcement to the organization rather than external law enforcement); *see also* Jennifer Arlen, *Countering Capture: A Political Theory of Corporate Criminal Liability*, 47 J. CORP. L. 861 (2022) (explaining the way powerful corporate actors are incentivized to use political influence to reduce criminal enforcement).

226. *See* Root, *supra* note 122, at 214–16 ("[R]egulators and prosecutors have adopted a range of policies and enforcement norms that serve as incentives for organizations to monitor their members in an effort to deter and prevent corporate misconduct.").

227. *See* John Armour, Brandon Garrett, Jeffrey Gordon & Geeyoung Min, *Board Compliance*, 104 MINN. L. REV. 1191, 1208 (2020) ("[I]t seems that the primary channel through which compliance delivers a discount to firms has shifted to prosecutors rewarding effective compliance with leniency through the use of deferred prosecution agreements.").

228. *See generally*, Veronica Root Martinez, *Purpose Driven Compliance*, 13 TEXAS A&M L. REV. (forthcoming) (on file with author) (challenging assumptions that firms engage in compliance solely out of fear of external enforcement and arguing that firms ought to direct their compliance programs to serve the firm's purpose, inherent risks, and ethical values).

229. *See* Root Martinez, *Complex Compliance Investigations*, *supra* note 135, at 265–65 (surveying scholarly understandings of the compliance function); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 692 (1997) ("Where corporate liability is justified, it must accomplish two goals: it must induce firms to select efficient levels of productive activity (the activity level goal) and to implement enforcement measures that can minimize the joint costs of misconduct and enforcement (the enforcement goal).").

gather and report negative information[230] when discovery of legal risk requires that corporate managers intervene.[231]

What does all this mean for corporate culture? Existing enforcement and compliance incentive structures may perversely encourage firms to avoid information about when firm culture actively undermines the law. Requiring firms to pay explicit attention to their own cultural risks could minimize incentives for strategic ignorance. In fact, when culture is a mission critical risk, corporate officers and boards could be required to design information systems to reach and monitor culture and to respond when culture raises a red flag of potential corporate illegality or public harm.

2. *Culture as an Invisible but Key Indicator of Compliance.* Corporate law and behavioral ethics scholars often cite culture as a key feature of organizational compliance.[232] Nevertheless, firm culture at the lower levels of the organization may be invisible to the board or senior management. This can create a gap between those who set priorities and issue directives, and those who are actually charged with executing them. Such a gap can lead to disastrous results. In a particularly telling example, a Boeing engineer working on the 737 MAX—the model that eventually crashed twice, killing hundreds—reportedly complained to the company's Director of Global Operations that:

> *I don't know how to fix these things* . . . it's systemic. It's culture. It's the fact that we have a senior leadership team that understand very little about the business and yet are driving us to certain objectives . . . . *Sometimes you just have to let things fail big so that everyone can identify a problem* . . . maybe that's what needs to happen rather than just continuing to scrape by . . . .[233]

As this Boeing engineer's complaint illustrates, management and the board can be wholly unaware of how organizational priorities are understood at lower levels of the organization, despite the potential for danger or legal

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230. Brandon L. Garrett & Gregory Mitchell, *Testing Compliance*, 83 L. & CONTEMP. PROBS. 47, 47 (2020) ("[W]hat makes the compliance enterprise deeply uncertain and problematic is that the information generated by compliance efforts is simultaneously useful and dangerous.").

231. This is *Caremark*'s "red flag" theory—when a board of directors becomes aware of "red flags" of illegal conduct within the organization, the board is obligated to act to remediate that legal risk. *See In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 106 (Del. Ch. 2009) (denying a *Caremark* claim against Citigroup, which alleged that directors had failed to respond to red flags of the coming subprime mortgage crisis).

232. *See, e.g.*, *supra* notes 83–95 and accompanying text.

233. *In re* Boeing Co. Derivative Litig., No. 2019-0907-MTZ, 2021 WL 4059934 at *11 n. 83 (Del. Ch. Sept. 7, 2021).

risk.[234] But, in the *Caremark* context, this lack of awareness also justifies not finding a board liable for oversight failures.[235] That is, a board might avoid liability by arguing that evidence of a toxic culture never reached the board—there were no red flags. But if a board has an affirmative obligation to oversee culture, it cannot then intentionally avoid information that might create a red flag that would require them to remedy an apparent culture of illegality.

3. *Legal Failures, Public Harm, and Cultural Persistence.* The recent repeated catastrophes at Boeing also offer an example of the way that our regular tools for addressing corporate misconduct can fail to reach corporate culture. In 2019, after two Boeing airplanes crashed and killed hundreds of passengers, the reporting and litigation that followed painted an ugly portrait of Boeing's organizational culture.[236] Following the 1997 merger between Boeing and rival airplane manufacturer McDonnell Douglas, the combined entity's management indicated that it valued production more than airline safety.[237] Within a few years of the merger, Boeing's management moved

234. The account creation scandal at Wells Fargo provides another high-profile example of this dynamic. There, an independent investigation concluded that "[t]he root cause of sales practice failures was the distortion of the Community Bank's sales culture and performance management system"—the culture [represented] an interpretation of the bank's organizational priorities that CEO John Stumpf was too slow to recognize (and perhaps implicitly encouraged) until enormous damage had been done. *See* INDEPENDENT DIRECTORS OF THE BOARD OF WELLS FARGO & CO., SALES PRACTICES INVESTIGATION REPORT overview (2017), https://lowellmilkeninstitute.law.ucla.edu/wp-content/uploads/2018/01/WF-Board-Report.pdf [https://perma.cc/U6RP-R62C]. Similarly, an internal investigation report on the General Motors's ignition switch scandal identified competing pressures between management messaging on safety and cost-cutting that may have ultimately led to a culture within the firm that was "resistan[t] . . . to rais[ing] issues" and "fail[ed] to share . . . [or] gather information" that might have ultimately saved lives. *See* REPORT TO THE BOARD OF DIRECTORS OF GENERAL MOTORS COMPANY REGARDING IGNITION SWITCH RECALLS 252, 252–56 (2014), https://www.aieg.com/wp-content/uploads/2014/08/Valukas-report-on-gm-redacted2.pdf [https://perma.cc/Y6CB-8FTX].

235. *See, e.g.*, White v. Panic, 783 A.2d 543, 552 (Del. 2001) (Although Barker's comment implies some level of knowledge of Panic's sexual activity, the comment cannot by itself support a reasonable inference that Barker or any of the other directors were aware that Panic had, in fact, harassed female ICN employees.); Lebanon Cnty. Emps.' Ret. Fund v. Collis, No. 2021-1118-JTL, 2022 WL 17841215, at *6 (Del. Ch. Dec. 22, 2022) *rev'd*, 311 A.3d 773 (Del. 2023) ("Zimmerman's communications with his team support a pleading-stage inference that he was not a suitable individual to hold these critical positions. But the complaint does not support an inference that the directors knew about Zimmerman's callous and inappropriate communications with his team.").

236. *See, e.g.*, David Gelles, *'I Honestly Don't Trust Many People at Boeing': A Broken Culture Exposed*, N.Y. TIMES (Jan. 10, 2020), https://www.nytimes.com/2020/01/10/business/boeing-737-employees-messages.html [https://perma.cc/TTG5-L678] ("The very culture at Boeing appears to be broken, with some senior employees having little regard for regulators, customers and even co-workers.").

237. Jerry Useem, *The Long-Forgotten Flight That Sent Boeing Off Course*, ATLANTIC (Nov. 20, 2019), https://www.theatlantic.com/ideas/archive/2019/11/how-boeing-lost-its-bearings/602188/ [https://

the corporate headquarters from Seattle to Chicago to "escape the influence of the resident flight engineers."[238] This move to put space between engineers and Boeing leaders suggested a shift in the firm's cultural priorities. And as Boeing's cultural values shifted, the quality of its airplanes suffered.[239]

Boeing sent signals to its employees about organizational focus through its management choices. Until two 737 MAX 8 airplane crashes in 2018 and 2019, the company had no board-level process to oversee airplane safety.[240] The board itself was largely made up of professionals with financial and governmental affairs expertise—Nikki Haley and Caroline Kennedy both sat on the board, for example—but few had any technical knowledge of airplane safety.[241] Meanwhile, on the factory floor, employees faced intense pressure to produce airplanes at a seemingly impossible pace.[242] Company leadership rejected efforts to make the 737 MAX safer due to cited costs.[243] And as

perma.cc/V6HJ-73NN].

238. *In re* Boeing Co. Derivative Litig., No. CV 2019-0907-MTZ, 2021 WL 4059934 at *4 (Del. Ch. Sept. 7, 2021).

239. Boeing's quality control issues were well documented even before two 737 MAX airplane crashes. In 2015, Boeing paid $12 million to the FAA to settle multiple enforcement cases. As part of that settlement, Boeing agreed—at least on paper—to enhance its compliance systems. *Boeing to pay $12 million penalty to U.S. government in safety cases*, WASH. POST (Dec. 22, 2015), https://www.washingtonpost.com/business/economy/boeing-to-pay-12-million-penalty-to-us-government-in-safety-cases/2015/12/22/bbf74044-a8e2-11e5-bff5-905b92f5f94b_story.html [https://perma.cc/DC8X-MLRQ] ("Among the requirements, Boeing must improve management oversight, accountability and internal audits; conduct more training; and 'meet progressively more stringent performance metrics in the quality and timeliness' of its reports to the FAA.").

240. *See In re Boeing*, 2021 WL 4059934 at *4–5 ("Boeing did not implement or prioritize safety oversight at the highest level of the corporate pyramid. None of Boeing's Board committees were specifically tasked with overseeing airplane safety, and every committee charter was silent as to airplane safety.").

241. *See* Douglas MacMillan, *'Safety Was Just a Given': Inside Boeing's boardroom amid the 737 Max crisis*, WASH. POST (May 5, 2019), https://www.washingtonpost.com/business/2019/05/06/safety-was-just-given-inside-boeings-boardroom-amid-max-crisis [https://perma.cc/XAV7-Y7S9] (describing the makeup of the Boeing board); *Boeing's Board of Directors*, SEATTLE TIMES, https://projects.seattletimes.com/2020/business/boeing-executive-profiles [https://perma.cc/HQ9G-JC8T] (listing the biographical information of each of Boeing's board members at the time of the 737 MAX crisis).

242. Lauren Rosenblatt & Paige Cornwall, *On Boeing's Factory Floor, Workers Feel 'Overmanaged and Undersupported'*, SEATTLE TIMES, (Sept. 1, 2024), https://www.seattletimes.com/business/boeing-aerospace/on-boeings-factory-floor-workers-feel-overmanaged-and-undersupported [https://perma.cc/JD3S-T5V2] (describing longstanding production pressures in Boeing factories and quoting a factory floor employee as saying "[there is] pressure just to make miracles happen").

243. *See* Natalie Kitroeff, David Gelles & Jack Nicas, *Boeing 737 Max Safety System Was Vetoed, Engineer Says*, N.Y. TIMES (Oct. 2, 2019), https://www.nytimes.com/2019/10/02/business/boeing-737-max-crashes.html [https://perma.cc/4JHL-KFXR] (describing reports that Boeing executives rejected requests to study a backup system for angle-of-attack sensors and had avoided any changes that would require pilot flight simulator training for the 737 MAX due to cost concerns about these safety measures).

Boeing's Chief Financial Officer has since acknowledged, "[f]or years, we prioritized the movement of the airplane through the factory over getting it done right."[244]

The consequence of Boeing's compliance failures was devastating. In 2018, a Lion Air Flight crashed off the coast of Indonesia, killing everyone onboard.[245] Boeing initially blamed the plane's pilots.[246] In 2019, an Ethiopian Airlines flight crashed after takeoff, for which Boeing ultimately conceded responsibility.[247] Between the two crashes, 346 people died.[248]

After the crashes, government prosecutors charged Boeing (the corporate entity) and an individual pilot for misleading the Federal Aviation Administration ("FAA") about the Maneuvering Characteristics Augmentation System ("MCAS") software that ultimately led to the two crashes.[249] In 2021, Boeing entered into a deferred prosecution agreement with the Criminal Division of the Department of Justice for one count of

244. Chokshi, Ember & Nerkar, *supra* note 79.

245. *Key Events in the Troubled History of the Boeing 737 Max*, AP NEWS (July 8, 2024, at 09:17 ET), https://apnews.com/article/boeing-plea-737-max-crashes-b34daa014406657e720bec4a990dccf6 [https://perma.cc/5WX7-7U7T].

246. *See* Peter Robison, *Boeing Built an Unsafe Plane, and Blamed the Pilots When It Crashed*, BLOOMBERG (Nov. 16, 2021), https://www.bloomberg.com/news/features/2021-11-16/are-boeing-planes-unsafe-pilots-blamed-for-corporate-errors-in-max-737-crash?embedded-checkout=true [https://perma.cc/C5VC-WC85] (describing a television interview in which then-CEO Dennis Muilenburg denied any issue with the 737 MAX and blamed the pilots following the Lion Air crash).

247. *See* Press Release, Boeing, Boeing CEO Dennis Muilenburg Addresses the Ethiopian Airlines Flight 302 Preliminary Report (Apr. 4, 2019), https://boeing.mediaroom.com/2019-04-04-Boeing-CEO-Dennis-Muilenburg-Addresses-the-Ethiopian-Airlines-Flight-302-Preliminary-Report [https://perma.cc/5T36-KDJ4] ("[W]ith the release of the preliminary report of the Ethiopian Airlines Flight 302 accident investigation, it's apparent that in both flights the Maneuvering Characteristics Augmentation System, known as MCAS, activated in response to erroneous angle of attack information.").

248. *See* Ben Kesslen, *737 Max Crashes that Killed 346 were 'Horrific Culmination' of Failures by Boeing and FAA*, *House Report Says*, NBC NEWS (Sept. 16, 2020), https://www.nbcnews.com/news/us-news/737-max-crashes-killed-346-were-horrific-culmination-failures-boeing-n1240192 [https://perma.cc/FH3W-GEYK].

249. *See* Press Release, U.S. Dep't of Justice, Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over $2.5 Billion (Jan. 7, 2021), https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion [https://perma.cc/TE4B-3RN5]; Press Release, U.S. Dep't of Justice, Former Boeing 737 MAX Chief Technical Pilot Indicted for Fraud (Oct. 14, 2021), https://www.justice.gov/archives/opa/pr/former-boeing-737-max-chief-technical-pilot-indicted-fraud [https://perma.cc/Z6W2-2FXQ].

conspiracy to defraud the FAA.[250] The pilot, Mark Forkner, was acquitted following a jury trial.[251]

The company faced civil liability too, as did Boeing's officers and directors. Survivors of the victims brought wrongful death actions against the corporation, claiming that Boeing knew of the danger posed by the MCAS system and sent planes into the air anyway.[252] Boeing settled these claims for hundreds of millions of dollars.[253] In Delaware, Boeing's shareholders brought *Caremark* claims against thirteen directors and eight officers for the compliance failures that led to the deaths of hundreds, and the damage to the corporation that followed.[254] Delaware's Court of Chancery agreed that the shareholders had adequately alleged that both the officers and directors had disregarded red flags related to safety problems and had failed to address them.[255] At the core of the problem, Vice Chancellor Zurn noted in the opinion's lengthy and unflattering statement of facts, was "a corporate culture [that] shifted from 'safety to profits-first,'" and "'focus[ed] on costs-cutting rather than designing airplanes.'"[256] Boeing settled these claims, too, for hundreds of millions of dollars.[257]

If anything should have been a wake-up call to Boeing, it was this—Boeing's compliance failures had led to two separate airplane crashes and hundreds of deaths. Cumulatively, the company paid billions of dollars in criminal and civil settlements and attendant resignations.[258] And yet, by

250. *See* Press Release, U.S. Dep't of Justice., Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over $2.5 Billion (Jan. 7, 2021), https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion [https://perma.cc/TE4B-3RN5].

251. *See* Press Release, U.S. Dep't of Justice., Former Boeing 737 MAX Chief Technical Pilot Indicted for Fraud (Oct. 14, 2021), https://www.justice.gov/opa/pr/former-boeing-737-max-chief-technical-pilot-indicted-fraud [https://perma.cc/2UHY-3C6C].

252. *See* Complaint, Debets v. Boeing Co., No. 1:19-cv-2170 (N.D. Ill. Mar. 28, 2019).

253. David Shepardson, *U.S. Opens $500 Million Fund for Relatives of Boeing 737 MAX Victims*, REUTERS (June 23, 2021), https://www.reuters.com/business/aerospace-defense/exclusive-us-opens-500-million-fund-relatives-boeing-737-max-victims-2021-06-22/ [https://perma.cc/5H3P-FWF3].

254. *In re* Boeing Co. Derivative Litig., No. 2019-0907-MTZ, 2021 WL 4059934 at *2 (Del. Ch. Sept. 7, 2021) (illustrating that two officers—former CEO Dennis Muilenburg and former CEO W. James McNerney, Jr.—were also named as director defendants).

255. *Id.* at *1.

256. *Id.* at *3.

257. Roy Shapira, *Max Oversight Duties: How* Boeing *Signifies a Shift in Corporate Law*, 48 J. CORP. L. 119, 133 (2022) [hereinafter Shapira, *Max Oversight Duties*] ("In November 2021, two months after VC Zurn rejected the motion to dismiss, and before discovery even started, the parties reached a settlement. That settlement included a payment of over $237 million—by far the highest ever in a *Caremark* case.").

258. *See id.* at 124 (noting the billions of dollars in costs to Boeing associated with the 737 MAX crisis); Press Release, Boeing, Boeing Announces Leadership Changes (Dec. 23, 2019), https://boeing.mediaroom.com/2019-12-23-Boeing-Announces-Leadership-Changes [https://perma.cc/C

2024, the exit door of a Boeing-built 737 MAX 9 had blown off mid-flight, necessitating an emergency landing that narrowly avoided another event of mass death.[259] Although the cause of the issue is still being investigated, a preliminary report from the National Transportation Safety Board suggests that the plane was allowed to leave Boeing's factory without critical bolts needed to hold the exit door in place while in the air.[260] Following the door plug incident, the Department of Justice determined that Boeing had breached its compliance obligations under the deferred prosecution agreement, and sought to pursue criminal charges for fraud.[261] Boeing initially agreed to plead guilty, but, in 2025, as the political circumstances changed under the second Trump Administration, the company sought to withdraw its guilty plea.[262] In May 2025, Boeing entered into a second non-prosecution agreement over the strong opposition of crash victims' families.[263]

Boeing's repeated safety failures, even after facing civil and criminal consequences, suggest the company's culture has not changed.

85Z-PM87] (announcing the ouster of Dennis Muilenburg from Boeing leadership).

259. *See* Michaela Bourgeois & John Ross Ferrara, *'Very Fortunate': What Helped Alaska Airlines Flight 1282 from Turning 'More Problematic'* KOIN 6 (Feb. 9, 2024), https://www.koin.com/news/alaska-airlines-flight-1282/very-fortunate-what-helped-alaska-airlines-flight-1282-from-turning-more-problematic [https://perma.cc/GM2R-6TEC].

260. *See* NAT'L TRANSP. SAFETY BD., AVIATION INVESTIGATION PRELIMINARY REPORT 17 (Feb. 6, 2024), https://www.ntsb.gov/investigations/Pages/DCA24MA063.aspx [https://perma.cc/ARG8-8UD5] (tracing the path of the affected door through its production).

261. *United States v. The Boeing Company*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/criminal/criminal-fraud/case/united-states-v-boeing-company [https://perma.cc/89GX-NV6L] (last updated June 3, 2025) ("[T]he Department notified the Court that the Department determined that Boeing breached its obligations under the Deferred Prosecution Agreement . . . by failing to design, implement, and enforce a compliance and ethics program to prevent and detect violations of the U.S. fraud laws throughout its operations.").

262. Dave Michaels & Emily Glazer, *Boeing Is Pushing to Withdraw Guilty Plea Agreement*, WALL ST. J. (Mar. 24, 2025), https://www.wsj.com/business/airlines/boeing-is-pushing-to-withdraw-guilty-plea-agreement-7cc9c06b [https://perma.cc/HCE8-8CFC] ("Boeing stands to benefit from fresh eyes at Trump's Justice Department . . . . Allowing Boeing to rescind its plea agreement, or lightening the company's punishment, would mark one of the most prominent examples of the Trump administration's lighter-touch approach to some white-collar enforcement.").

263. Joel Rose, *DOJ Confirms it Sas a Deal with Boeing to Drop Prosecution over Deadly 737 Max Crashes*, NPR (May 23, 2025), https://www.npr.org/2025/05/23/nx-s1-5409364/boeing-justic-department-737-max-plane-crashes-charges-deal [https://perma.cc/22SQ-P34C].

Congressional reports and testimony,[264] a *New York Times* exposé,[265] and business experts[266] have all attempted to make sense of Boeing's recurring challenges in manufacturing safe airplanes. Each analysis centers *culture* as the problem. The company's cultural priorities have persisted through law's typical accountability mechanisms for corporate misconduct—criminal liability, civil lawsuits from the survivors of those who were killed and from shareholders under *Caremark*, leadership changes, and reputational harm. Twenty-five years after the company's merger with McDonnell Douglas, new company leadership claims to be focused on implementing a "cultural change" within the company.[267]

Nevertheless, in December 2024, shareholders filed a new *Caremark* action against Boeing, alleging "that Boeing's corporate culture incentivized employees to put profits and cost-cutting ahead of safety."[268] For whatever the result of this ongoing litigation, the moral of the Boeing saga may be that it is better to address culture proactively, rather than reactively after a disaster. To explicitly place culture within *Caremark*'s ambit would require a firm's management and its board of directors to be attuned to the cultural

264. *See* FED. AVIATION ADMIN., SECTION 103 ORGANIZATION DESIGNATION AUTHORIZATIONS (ODA) FOR TRANSPORT AIRLINES EXPERT PANEL REVIEW REPORT 4–5 (2024), https://www.faa.gov/newsroom/Sec103_ExpertPanelReview_Report_Final.pdf [https://perma.cc/L49M-Y3YH] ("The Expert Panel observed a disconnect between Boeing's senior management and other members of the organization on safety culture . . . . Interviewees . . . also questioned whether Boeing's safety reporting systems would function in a way that ensures open communication and non-retaliation.").

265. *See* Chokshi, Ember & Nerkar, *supra* note 79 (cataloguing historical safety culture problems at Boeing).

266. *See, e.g.*, Bill George, *Why Boeing's Problems with the 737 MAX Began More Than 25 Years Ago*, HARV. BUS. SCH. WORKING KNOWLEDGE (Jan. 24, 2024), https://hbswk.hbs.edu/item/why-boeings-problems-with-737-max-began-more-than-25-years-ago [https://perma.cc/4R82-VUZB] ("The underlying cause of these issues is a leadership failure that has allowed cultural drift away from Boeing's once-vaunted engineering quality."); Hersh Shefrin, *Boeing's Weak Corporate Culture Underlies Difficulties With 737 MAX 9*, FORBES (Jan. 28, 2024), https://www.forbes.com/sites/hershshefrin/2024/01/28/boeings-weak-corporate-culture-underlies-difficulties-with-737-max-9/?sh=f0f048aa695a. [https://perma.cc/NAM5-VBTE] ("Boeing's current travails about safety issues with the 737 MAX 9 can arguably be traced to the company's weak corporate culture."); James Surowiecki, *What's Gone Wrong at Boeing*, ATLANTIC (Jan. 15, 2024), https://www.theatlantic.com/ideas/archive/2024/01/boeing-737-max-corporate-culture/677120/ [https://perma.cc/ZZ98-ZCYZ] ("Behind the 737 Max's persistent problems is the erosion of a valuable corporate culture.").

267. *See* Jim Osman, *Can Boeing's Cultural Shift Overcome Failures and Reclaim Leadership?*, FORBES (Oct. 23, 2024, at 09:17 ET), https://www.forbes.com/sites/jimosman/2024/10/23/can-boeings-cultural-shift-overcome-failures-and-reclaim-leadership [https://perma.cc/8QMD-6JT4] ("Under Kelly Ortberg, Boeing is undergoing a cultural change stressing a return to basic safety, ethics, and operational excellence.").

268. Verified Derivative Complaint at 2, Construction and General Building Laborers' Local Union No. 79 General Fund v. Amuluru (*In re* The Boeing Co. Derivative Litig.), No. 2024-1210-MTZ (Del. Ch. Dec. 3, 2024).

interpretation of their messaging at all levels of the firm, and to focus their awareness on the firm's culture before a corporate trauma occurs.

B. The Perils

An explicit requirement that corporate officers and directors oversee firm culture as part of their obligations under *Caremark* raises several theoretical and practical challenges. First, there is a question of whether shareholder plaintiffs are best positioned to police corporate culture through civil actions. Second, aggressive enforcement of a particular set of cultural norms could stifle innovation or quell creativity. And third, some may question whether the actions themselves—*Caremark* claims—are an appropriate vehicle to address issues that test the frontiers of legality.

1. *The Plaintiffs.* Though the facts of *Caremark* cases often concern terrible acts of public harm, plaintiffs in these cases are not comparatively sympathetic victims.[269] *Caremark* plaintiffs are harmed not by the direct act of public harm that led to the suit, but by the attendant damage to the company in which they hold shares, often through fines, monetary settlements, or drops in share price.[270] In some ways, this creates a structural problem: When corporate misconduct or illegality is profitable, shareholders benefit.

If a corporate culture emphasizes profitability over other values like safety, this may ultimately mean that a shareholder benefits from any resulting value generated. In anything less than a catastrophic failure like the one suffered at Boeing, it may actually be economically rational for shareholders to stay quiet, and benefit from a culture that treats compliance more casually. In some cases, lawbreaking may be even a rational choice—like an efficient breach of law—because the fines, settlements, and other mechanisms of liability will cost less than the value generated by legal

269. *See In re Massey Energy Co.*, No. CIV.A. 5430-VCS, 2011 WL 2176479, at *29 (Del. Ch. May 31, 2011) ("In the end, the most sympathetic victims here were not stockholders, they were Massey's workers and their families, who suffered injuries and lost lives and loved ones, and the communities who have suffered because of environmental degradation due to of the company's failure to meet its legal responsibilities."); Ann M. Lipton, *Every Billionaire Is A Policy Failure*, 18 VA. L. & BUS. REV. 327, 394 (2024) (noting that "many *Caremark* opinions begin by acknowledging the vulgarity of examining gruesome tragedies solely through the lens of their effects on stock prices, before going on to do just that").

270. *See, e.g.*, Verified Derivative Complaint, *supra* note 268, at 149 (demonstrating damage to Boeing through fines, settlements, auditing fees, additional compliance costs, and loss in share price).

violations.[271] In such a case, *Caremark* is an illogical remedy because the firm's shareholders are not actually harmed.

This situation—an economically rational legal violation—is fundamentally inconsistent with Delaware law's duties of good faith and loyalty.[272] Delaware corporate law does not condition legal obedience on profitability, nor does it prohibit illegality only when it is economically costly.[273] Compliance and profitability are frequently in tension.[274] But shareholders are only harmed when the cost of illegality exceeds its financial benefits. This creates a potential for misaligned incentives.

There are two potential responses to this critique. First, if the goal of attaching *Caremark* liability to cultural risk only serves to effectively incentivize managerial attention to corporate culture, that goal might be accomplished even if the risk of liability exists only in extreme cases. In other words, a cultural *Caremark* is better than nothing, even if the risk of liability is remote. If there is still *some* risk that officers and directors will face suit for fostering or ignoring a corporate culture that condones illegality, the mere threat of *Caremark* litigation could incentivize managerial attention. Second, the incentives of plaintiffs' attorneys and shareholder plaintiffs are quite different, with the former often driving the litigation.[275] Even imperfect cases offer the possibility of settlement.[276] A *Caremark* case concerning corporate culture may uncover unflattering materials in

271. Some academics have even argued that this kind of efficient lawbreaking should not be deemed inconsistent with fiduciary obligations. *See* Bainbridge et al., *supra* note 93, at 592 ("Individuals routinely make cost-benefit analyses before deciding to comply with some malum prohibitum law, such as when deciding to violate the speed limit. Is it self-evident that the directors of a corporation should be barred from engaging in similar cost-benefit analyses?").

272. *See* Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457, 475 (2009) (explaining how violations of positive law violate the duty of loyalty); Asaf Raz, *The Legal Primacy Norm*, 74 FLA. L. REV. 933, 999 (2022) (arguing that corporate law "insists on a strong norm of *legal primacy*: the corporate entity must comply with all of its positive law obligations").

273. *See* Gold *supra* note 272, at 476 ("Corporate charters only allow the corporation to act consistently with positive law, and directors are bound to comply with the terms of their corporate charter.").

274. J. Travis Laster & Elise Bernlohr Maizel, *Discovery as a Compliance Problem*, 50 J. CORP. L. 53, 66 (2024) ("Lawbreaking can be profitable . . . . Compliance is expensive, creating an innate tension between the duty to deliver value for stockholders and the duty to ensure legal compliance.).

275. *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 680 (1986) (comparing the incentives of shareholder plaintiffs and their lawyers).

276. *See* Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY L. REV. 1749, 1805–06 (2010) (describing the significant costs to a plaintiff corporation associated with shareholder derivative suits); Shapira, *Max Oversight Duties*, *supra* note 257, at 131 (explaining that *Caremark* cases that survive a motion to dismiss "tend to settle quickly and for hefty amounts as defendants attempt to avoid a prolonged legal battle and discovery.").

discovery, which could cause a reputational impact, either for the individual bad actors or the firm as a whole.[277] Against the background of these dynamics, a cultural *Caremark* could offer enough of a deterrent effect to incentivize proactive managerial and board attention to cultural risk.

2. *The Defendants.* Despite the potential prosocial benefits of a cultural *Caremark*, excessive managerial attention to culture could risk stifling innovation or breeding resentment. As Professor Elizabeth Pollman has argued, though some corporate lawbreaking can have little to no redeeming social value, other acts of corporate legal disobedience can potentially serve valuable aims like innovation and entrepreneurship.[278] The growth of many businesses that arguably provide some social value—from tech start-ups like Airbnb and Uber to cannabis industry entrepreneurs—has required bending legal constraints.[279] Mark Zuckerberg's infamous motto, "move fast and break things" offers a window into the kind of culture that may accompany creativity and innovation.[280] An excessive cultural emphasis on legal obedience could restrain the pioneering spirit that drives creative endeavors. On the other hand, however, lawbreaking and inattention to the negative externalities of corporate activity causes public harm, which may outweigh any value of supposed innovation spurred by such a culture. For all his moving fast and breaking things, in the last decade, Mark Zuckerberg has found himself testifying before Congress concerning Meta's role in election

277. Indeed, most of the ugly details recounted in this article are taken directly from the complaints and opinions in *Caremark* cases. Compounding this dynamic, shareholders have expanded their power to gather information prior to filing *Caremark* claims by initially conducting prefiling investigations via Section 220 actions, which have been evaluated under a somewhat more liberal standard in recent years. *See* Shapira, *supra* note 31, at 1872–73 .

278. *See* Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 729–47 (2019) ("[A] wide array of examples exists of corporations violating the law as part of an effort at entrepreneurship, innovation, or legal change[,]" including "cases [that] involve not only transgressions of the law or refusals to comply but also the potential that the conduct is in the greater interest of the public.").

279. *See id.* at 731–47.

280. *See generally* Hemant Taneja, *The Era of "Move Fast and Break Things" Is Over*, HARV. BUS. REV. (Jan. 22, 2019), https://hbr.org/2019/01/the-era-of-move-fast-and-break-things-is-over [https://perma.cc/F2H2-JPK4] (arguing that this approach associated with Zuckerberg and other entrepreneurs is becoming "increasingly untenable").

interference,[281] misinformation,[282] privacy violations,[283] teen mental health crises, and child exploitation.[284]

Cultural monitoring itself also poses certain practical problems. As Professor Donald Langevoort has written, the behavioral impacts of firm compliance monitoring are complex.[285] Overzealous compliance monitoring can breed distrust, cynicism, and low morale among employees.[286] As a practical matter, managerial efforts to monitor and control corporate culture require some level of artfulness—balancing cultural needs for creativity and camaraderie with the need for legal obedience. Although any corporation's efforts to control its culture must be managed with care, allowing a culture that embraces lawbreaking risks creating the environment a "Massey" claim was designed to address.[287] The duty of loyalty leaves no room for cultures that are so hostile to legal commands, and, on balance, the risks of stifling innovation might well be outweighed by the risk of illegality.

3. *The Actions.* The idea that *Caremark* can fix problems with corporate culture is also vulnerable to critique based on the nature of *Caremark* actions themselves. In practice, *Caremark* actions have a limited function. *Caremark* actions typically require that firms gather information about corporate

281. *See, e.g.*, *Zuckerberg Testimony: Members of Congress Grill Facebook CEO*, WASH. POST (Apr. 10, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing [https://perma.cc/PA3A-S9UN] (noting that Zuckerberg had to "prepare[] to apologize for a series of missteps that, he acknowledges, have imperiled the privacy of tens of millions of Americans and helped spread both phony news and Russian disinformation.").

282. *See Hearing Before the U.S. H.R. Comm. on Energy & Com. Subcomm. on Consumer Prot. & Com. & Commc'ns & Tech.*, 117th Cong. 1 (2021) (statement of Mark Zuckerberg), https://www.congress.gov/117/meeting/house/111407/witnesses/HHRG-117-IF16-Wstate-ZuckerbergM-20210325-U1.pdf [https://perma.cc/GJ3S-BRY2].

283. *See Facebook CEO Mark Zuckerberg Hearing on Data Privacy and Protection*, C-SPAN (Apr. 10, 2018), https://www.c-span.org/program/senate-committee/facebook-ceo-mark-zuckerberg-hearing-on-data-privacy-and-protection/500690 [https://perma.cc/HS6L-JWFV].

284. *See Mark Zuckerberg Apologizes to Victims' Families at Senate Hearing on Child Sexual Exploitation*, C-SPAN (Jan. 31, 2024), https://www.c-span.org/clip/public-affairs-event/mark-zuckerberg-apologizes-to-victims-families-at-senate-hearing-on-child-sexual-exploitation/5104639 (on file with author).

285. *See generally* Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71 (2002) (using social and cognitive psychology to understand the impact of compliance monitoring on employee attitudes and behaviors).

286. *See id.* at 94–100 ("If the firm can persuade its agents that what it's doing does not threaten the agent's fundamental autonomy, fine. But second-guessing—especially when there are other pressures within the firm to act aggressively—can be costly.").

287. *See supra* notes 115–21 and accompanying text (explaining "*Massey*" claims and their relationship to culture).

wrongdoing.[288] They require corporate officers, directors, and legal departments to endure the inconvenience and cost of litigation. And, if the *Caremark* claims are not dismissed, the typical remedy is a settlement with shareholder plaintiffs, which may involve changes to the company's oversight function.[289] But, critically, these cases do little to nothing to repair the public harms that tend to form the most damning allegations of a *Caremark* complaint.[290] And beyond the annoyance, expense, and potential reputational harm of litigation, officer and director defendants in *Caremark* actions have little to fear in terms of practical consequences of such a suit.[291]

Scholars have also criticized the expansion of *Caremark* to reach cases beyond those that deal with explicit violations of positive law.[292] It is not always clear precisely what the law requires. Corporate officers and directors are faced with often oppositional duties—to generate shareholder value and to keep the firm within the bounds of the law. If, through *Caremark* actions, the Delaware courts expand the reach of the law, they could be accused of both acting as a regulator and injecting uncertainty into longstanding duties.[293]

As a final structural matter, one might fairly question whether Delaware state court actions are the best mechanism to police corporate culture.

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288. *See generally* Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193, 1195 (2016) (describing the role of "reputational sanctions" on incentives in litigation).

289. *See* Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, *supra* note 110, at 75–76 (describing settlement dynamics in *Caremark* actions); Shapira, *Max Oversight Duties*, *supra* note 257, at 131 (walking through the settlement terms of the Boeing *Caremark* action).

290. For example, in the *Boeing* case, while the company's *Caremark* settlement provided for certain compliance improvements, it did nothing to repair the harm caused by the hundreds of deaths attributable to the company's past compliance failures. *See* Shapira, *Max Oversight Duties*, *supra* note 257, at 133–34 (describing the settlement in *Boeing*).

291. The expenses of investigation and litigation are not borne by the directors and officers themselves. Directors and Officers ("D&O") insurance typically covers all defense costs associated with shareholder derivative claims and is a standard part of executive compensation. *See* Angela N. Aneiros & Karen E. Woody, Caremark*'s Butterfly Effect*, 72 AM. U. L. REV. 719, 764–74 (2023) (describing the mechanics of D&O insurance policies as used to protect executives in shareholder litigation and the potential impact of a more permissive pleading standard for *Caremark* claims following the *Marchand* line of cases).

292. *See* Stephen M. Bainbridge, *Don't Compound the* Caremark *Mistake by Extending It to ESG Oversight*, 77 BUS. LAW. 651, 655 (2022) (arguing that *Caremark* was wrong from the start and only gets worse as its power grows); Ann Lipton, *The Legitimation of Shareholder Primacy*, J. CORP. L. (forthcoming) (manuscript at 37) (on file with author) (arguing that the problem of the expansion of *Caremark* is that it turns Delaware Chancery Court into a "secondary regulator for the United States").

293. *See* Lipton, *The Legitimation of Shareholder Primacy*, *supra* note 292 at 37 ("There is no possibility that Delaware can adopt such a regulatory function while avoiding the appearance of taking a political – and partisan – bent, which once again undermines the justification for shareholder primacy in the first instance, as well as Delaware's role in the system.").

Though Delaware has long been the default source of state corporate law, there are many scholarly challenges to the state's corporate law supremacy.[294] In recent years, some business leaders—most loudly, Elon Musk—have decried Delaware as the preferred forum for incorporation and have reincorporated their businesses elsewhere.[295] Further, though certain structural features of Delaware's judiciary are intended to bolster the courts' legitimacy by rendering the state's business courts nonpartisan, the question of corporate citizenship has taken on a distinctly partisan valence.[296] If Delaware-skeptical corporate reincorporations prompt a "race to the bottom," corporate actors can avoid *Caremark*'s oversight duties by reincorporating in a friendlier jurisdiction.

This critique, however, ignores the way that compliance advisors—the law firms and consultants who advise boards of directors—may steer industry best practices to meet Delaware standards, notwithstanding high-profile reincorporations out of state.[297] The growth of the modern compliance function can be traced back to the announcement of the *Caremark* doctrine, even in spite of the doctrine's failure to create liability in most cases.[298] And despite recent noisy departures, the majority of public companies remain in

294. *See, e.g.*, William J. Carney, George B. Shepherd & Joanna Shepherd Bailey, *Lawyers, Ignorance, and the Dominance of Delaware Corporate Law*, 2 HARV. BUS. L. REV. 123, 126, 129 (2012) (describing Delaware's dominance as the product of "the rational ignorance of lawyers and investors" in spite of the "declining quality" of the state's business courts); Robert Anderson IV & Jeffrey Manns, *The Delaware Delusion*, 93 N.C. L. REV. 1049, 1052 (2015) (presenting "empirical finding suggest[ing] that Delaware's appeal is driven by lawyers' default decision making based on Delaware's past preeminence and reflects lawyers' failure to assess the value added by Delaware compared to other states"); Stephen M. Bainbridge, *DExit Drivers: Is Delaware's Dominance Threatened?*, 50 J. CORP. L. (forthcoming 2025) (manuscript at 3–4) (on file with author) (surveying the various schools of Delaware supremacy criticism, both from the political left and right).

295. *See* Elon Musk (@elonmusk), X (Jan. 30, 2024, at 17:14 CT), https://x.com/elonmusk/status/1752455348106166598 [https://perma.cc/CL9V-68Z3] ("Never incorporate your company in the state of Delaware"); Theo Francis & Erin Mulvaney, *Elon Musk Isn't the Only Billionaire Fighting Delaware*, WALL ST. J. (Feb. 11, 2024, at 17:43 PM), https://www.wsj.com/business/elon-musk-isnt-the-only-billionaire-fighting-delawares-grip-on-u-s-business-e9fe299a [https://perma.cc/JS65-XCSP].

296. *See* Ofer Eldar & Gabriel Rauterberg, *Is Corporate Law Nonpartisan?*, 2023 WIS. L. REV. 177, 224 (2023) (describing the Delaware judiciary's legally required partisan balance as "a distinct and important competitive advantage[,] . . . a key element in ensuring that adjudication of corporate disputes is guided by judges' expertise, rather than political ideology."); J. David Goodman, *As Elon Musk Moved to the Right, His Businesses Moved to Texas,* N.Y. TIMES (Nov. 23, 2024), https://www.nytimes.com/2024/11/19/us/texas-elon-musk.html [https://perma.cc/JHM7-8HLX] (describing Musk's reincorporation decisions in the context of the political culture of Texas).

297. *See* Langevoort, Caremark *and Compliance*, *supra* note 64, at 729 ("*Caremark* no doubt did in its time focus the attention of elite corporate lawyers, who used their considerable influence inside the boardroom to grab the attention of directors and insist on more rigorous internal procedures.").

298. *See* Haugh, Caremark*'s Behavioral Legacy*, *supra* note 64, at 620 (describing the causal relationship between *Caremark* and the growth of the compliance function).

Delaware, leaving its role as the default jurisdiction for the development of industry standards undisturbed.[299] Moreover, even in other jurisdictions that might be perceived as more management-friendly, such as Texas, courts assessing director and officer fiduciary duties often cite and rely upon Delaware Chancery opinions to define those duties.[300]

C. The Promise

Despite these valid criticisms, there is some promise in explicitly allowing *Caremark* oversight duties to reach corporate culture. First, despite the limitations of the *Caremark* action itself, corporate law is said to have expressive power that shapes a firm's norms and conduct. And to take culture seriously sends a signal about its importance within the firm. Second, a focus on culture may encourage compliance departments to take on the problems of silos[301] and individual bad actors within broader corporate structures. If culture falls within the scope of *Caremark* oversight responsibilities, directors and officers might feel obligated to pay explicit attention to culture, to direct compliance resources toward cultural problems, and to think carefully about the kinds of legal risks that culture might engender.[302] And finally, allowing shareholders to bring these actions helps them to avoid complicity in corporate acts that cause public harm, and to enforce the public-regarding duties that emanate from the corporate charter.

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299. *See* Jeffrey W. Bullock, DEL. DEP'T OF STATE, DELAWARE DIVISION OF CORPORATIONS: 2023 ANNUAL REPORT (2023), https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2023-Annual-Report.pdf [https://perma.cc/2RV3-8QCG] (noting that 67.6 percent of Fortune 500 companies are incorporated in Delaware).

300. For instance, a federal court applying Texas law explicitly relied on Delaware law, stating:

> The Delaware Supreme Court has held that a conscious disregard for the duty to monitor rises to the level of bad faith and that 'because a showing of bad faith conduct . . . is essential to establish director oversight liability, the fiduciary duty violated by that conduct is the duty of loyalty.' The Texas Supreme Court would hold the same.

In re Life Partners Holdings, Inc., No. DR-11-CV-43-AM, 2015 WL 8523103, at *12 (W.D. Tex. Nov. 9, 2015) (citations omitted). *But see* William J. Moon, *Havens for Corporate Lawbreaking*, 103 WASH. U. L. REV. (forthcoming 2026) (manuscript at 28) (on file with author) (noting that "there is a significant divergence in legal compliance obligations of Delaware-incorporated corporations compared to those corporations incorporated in Nevada and the Cayman Islands[,]" and that "one, [difference is that] Nevada and the Cayman Islands do not recognize shareholder suits against directors and officers for oversight failures predicated on corporate lawbreaking.").

301. *See infra* notes 315–19 and accompanying text.

302. In recent years, following compliance scandals that have exposed problematic cultures, corporations have begun to invest in internal and external resources to address toxic corporate culture. *See* van Rooij & Fine, *supra* note 10, at 3 (describing the use of designated board committees to study corporate culture, a U.S. National Association of Corporate Directors Blue Ribbon Commission on corporate culture, the engagement of third-party consultants to conduct cultural surveys, and other internal cultural assessments).

1. *Corporate Law's Expressive Power.* Nearly thirty years ago, Professor Ed Rock wrote that Delaware corporate law provides "a set of instructive tales of good and bad managers, as opposed to a set of substantive rules."[303] Under this telling, the opinions of Delaware's business courts offer a normative perspective on corporate managers' behavior, rather than a clearly defined set of rules.[304] The expressive power of Delaware opinions shapes norms that, in turn, dictate behavior.[305] And this expressive role is particularly relevant when it comes to *Caremark* doctrine. Though liability under *Caremark* is rare, the various *Caremark* opinions, through their dicta, often guide officers and directors on what they ought to do to meet their oversight obligations. Indeed, Professor Claire Hill has described this phenomenon as the "*Caremark* penumbra," incentivizing a compliance culture that goes beyond the mere minimum legal requirements.[306] *Caremark* jurisprudence can illustrate how to manage a company, define acceptable conduct, and demonstrate which misdeeds—in service of shareholder value or personal benefit—are beyond the limits of permissible behavior. This expressive value is not limited to an academic audience. Indeed, following *Caremark* decisions, law firms neatly package the opinion's parables into "client alerts" that offer advice and best practices to clients who will, in turn, structure their compliance programs.[307] Through this expressive channel,

303. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1072 (1997). *See also* Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1799 (2001) (arguing that "corporate law channels behavior not just by imposing external sanctions, but also through social framing that encourages officers, directors, and shareholders to view their relationships as cooperative ones calling for other-regarding behavior").

304. More recently, Mark Roe and Roy Shapira have written about power of narrative in corporate lawmaking, arguing that narratives about the normative value of certain corporate actions can drive corporate lawmaking, even when good policy might dictate a different outcome. *See* Mark J. Roe & Roy Shapira, *The Power of the Narrative in Corporate Lawmaking*, 11 HARV. BUS. L. REV. 233, 274–76 (2021).

305. *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2051 (1996) ("[T]he expressive function of law has a great deal to do with the effects of law on prevailing social norms."). *See also* David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1866 (2001) ("Shaming [in corporate law] can fill in the gaps of civil and criminal liability, ensuring that individual and corporate offenders are fully punished for their misbehavior.").

306. *See* Hill, *supra* note 216, at 688, 697 ("I have argued that *Caremark*'s considerable, albeit soft, force is on balance a good thing . . . . In pushing companies toward expansive 'compliance' programs that also include concern for reputation, *Caremark* helps companies fulfill what are increasingly seen as the responsibilities of good corporate citizenry.").

307. Examples abound following the *McDonald's* decision. *See, e.g.*, *Officer Oversight Liability: Insights from the* McDonald's *Decision*, O'MELVENY (Feb. 9, 2023), https://www.omm.com/insights/alerts-publications/officer-oversight-liability-insights-from-the-mcdonald-s-decision [https://perma.cc/678D-PDY6] (providing guidance on officer oversight liability following *McDonald's*); *For the First Time, a Delaware Court Holds That Corporate Officers Have a Duty of Oversight*, COVINGTON (Mar. 6, 2023),

Caremark could help to drive norms as to which kinds of cultures are acceptable and which are too risky.

Further, allowing the development of oversight duties to reach corporate culture requires management to take culture seriously. This, itself, sends a signal. What management deems important, by their words, their attention, or their actions, has a critical role in employee perceptions of legal legitimacy and the priority of legal commands.[308] Requiring cultural oversight could serve to make management aware and proactive when there is a gap between how priorities are expressed at the top of an organization and how those priorities are understood by the lower-level employees charged with executing management directives.

2. *Attention to Silos and Individual Bad Actors.* A cultural approach to corporate oversight—one that considers not just whether individuals within the firm are actively breaking the law, but also how employees perceive the legitimacy and importance of legal commands relative to other priorities—could help firms tackle persistent problems in corporate compliance. First, informational silos within complex organizations can obscure compliance problems, making it difficult for more senior leadership to identify and resolve them.[309] Second, a small number of particularly unethical individuals can disproportionately affect the compliance culture of an organization.[310]

The Wells Fargo account creation scandal provides a useful example of both of these common compliance problems. In 2020, Wells Fargo agreed to pay three billion dollars to resolve civil and criminal investigations into the bank's sales practice of creating unauthorized customer accounts.[311] An

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https://www.cov.com/en/news-and-insights/insights/2023/04/for-the-first-time-a-delaware-court-holds-that-corporate-officers-have-a-duty-of-oversight [https://perma.cc/KZ2A-GMG2] (same); *Delaware Chancery Court Extends Oversight Duties to Non-Director Corporate Officers*, LATHAM & WATKINS (Feb. 3, 2023), https://www.lw.com/admin/upload/SiteAttachments/Delaware-Chancery-Court-Extends-Oversight-Duties-to-Non-Director-Corporate-Officers.pdf [https://perma.cc/QR2K-JMAV] (same).

308. *See supra* note 79 and accompanying text.

309. *See* Martinez, *Complex Compliance Investigations*, *supra* note 134, at 273 (2020) ("Silos have the potential to be particularly dangerous. If individuals at a subsidiary in Mexico are bribing foreign officials, it may be well-known within the confines of that subsidiary, but it may not be known at the parent company, which will be held responsible for the conduct.").

310. *See* Todd Haugh, *The Power Few of Corporate Compliance*, 53 GA. L. REV. 129, 136 (2018) [hereinafter Haugh, *The Power Few*] ("[B]usiness leaders and regulators intent on meaningfully reducing compliance risk and corporate crime are mistargeting their efforts, focusing too much on the 'trivial many' while not paying enough attention to the 'power few.'").

311. *See* Press Release, Off. of Pub. Affs., Wells Fargo Agrees to Pay $3 Billion to Resolve Criminal and Civil Investigations into Sales Practices Involving the Opening of Millions of Accounts without Customer Authorization (Feb. 21, 2020), https://www.justice.gov/archives/opa/pr/wells-fargo-agrees-pay-3-billion-resolve-criminal-and-civil-investigations-sales-practices#:~:text=Many%20of%20these%20practices%20were,management%20to%20meet%20these%20goals [https://perma.cc/4LG8-T2PK].

internal investigation report concluded that senior leadership within the Community Bank division created a culture that emphasized aggressive sales goals and "paid insufficient regard to the substantial risk to Wells Fargo's brand and reputation from improper and unethical sales practices even as they failed to recognize the potential for financial or other harm to customers."[312]

Consequently, Wells Fargo employees created an enormous number of fake accounts, which, ultimately caused the bank and its customers significant harm. Professor Todd Haugh has written about how individual personalities at Wells Fargo—the so-called "power few" within the organization—drove misconduct by transmitting egregiously unethical norms through their social and organizational networks within the firm.[313] And Professor Veronica Root Martinez has explained that decentralized reporting structures within Wells Fargo created informational silos that stifled proper communication and remediation of growing problems.[314] In other words, Wells Fargo faced cultural risk driven by individuals and insufficient oversight obscured by information silos. Cultural oversight obligations within the firm could drive more attention to each of these problems.

3. *Shareholder Accountability.* A cultural *Caremark* also does something to answer the present moment in terms of shareholder accountability. A (perhaps growing) segment of shareholders care about what is done in their name.[315] Many investors believe corporate activity serves as a reflection of their own values, and therefore fear complicity when their investment activity supports forces that cause social harms.[316] For those

312. INDEP. DIRS. OF THE BD. OF WELLS FARGO & CO., SALES PRACS. INVESTIGATION REP.7 (2017), https://lowellmilkeninstitute.law.ucla.edu/wp-content/uploads/2018/01/WF-Board-Report.pdf [https://perma.cc/QP3M-DNDF].

313. *See* Haugh, *The Power Few*, *supra* note 310, at 179–80.

314. *See* Martinez, *Complex Compliance Investigations*, *supra* note 134, at 283 ("The root cause of the misconduct at Wells Fargo was an environment with high-pressure sales goals tied to incentive compensation, but the root cause of the failure to detect the misconduct appears tied to the existence of information silos within the firm.").

315. *See* INST. FOR SUSTAINABLE INVESTING, *Individual Investors' Interest in Sustainability Is on the Rise*, MORGAN STANLEY (Jan. 26, 2024), https://www.morganstanley.com/ideas/sustainable-investing-on-the-rise [https://perma.cc/CDN6-CD3K]; Lisa M. Fairfax, *Social Activism Through Shareholder Activism*, 76 WASH. & LEE L. REV. 1129, 1155 (2019) ("[I]t is undeniable that some shareholders do care about [issues of corporate social responsibility] and are willing to engage around these issues.").

316. Indeed, this is the entire logic of movements to divest from certain types of assets. *See, e.g.*, Off. of the Provost, *Yale's New Commitments to Mitigating Climate Change*, YALE U. (June 24, 2021), https://provost.yale.edu/news/yale-s-new-commitments-mitigating-climate-change [https://perma.cc/F4

shareholders, *Caremark* can be a vehicle for a challenge to those corporate actions that indicate a firm's lack of commitment to its inherent promise of legality. By its nature, the *Caremark* action gives shareholders the power to enforce a corporation's promise of obedience to the state and, by extension, to the greater public good.

These arguments are especially potent in the current political moment, when regulators are vulnerable to critique as captured, political, or illegitimate actors.[317] Without effective government regulatory and enforcement action, private actors play an important role in legal structures of accountability.[318]

This was precisely at issue in *City of Birmingham Retirement and Relief System v. Good*.[319] There, a shareholder alleged that a captive regulator permitted Duke Energy to engage in irresponsible practices that ultimately harmed the public.[320] The suit alleged that the company's strategy "involved flouting important laws, while employing a strategy of political influence-seeking and cajolement to reduce the risk that the company would be called to fair account."[321] The allegation—that Duke Energy was more focused on seducing local regulators than following the law and protecting the environment and the communities in which it operated—suggests that the firm's culture and priorities ran counter to the public interest as well as the law. Allowing shareholders to bring *Caremark* claims in these circumstances would provide an additional and potentially important check on corporate power that may otherwise cause public injury.

At the very least, the information-gathering function of these actions could shine light on the ways that rhetoric around firm culture diverges from reality. For example, shareholders bringing *Caremark* actions could expose firms that engage in "greenwashing" their public messaging, while internally

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9T-GV9H] (developing principles to govern Yale University's ethical investment framework in light of the "grave social injury" threatened by climate change).

317. *See, e.g.*, Dorothy S. Lund, *Asset Managers as Regulators*, 171 U. PA. L. REV. 77, 90 (2022) (arguing that asset managers act as privatized regulators due to governmental inaction).

318. *See* Matteo Gatti, *Corporate Governing: Understanding Corporations as Agents of Socioeconomic Change*, 50 J. CORP. L. 149, 159 (2024) (describing the phenomenon of corporate "[g]overnment substitution" in areas of social policy).

319. City of Birmingham Ret. & Relief Sys. V. Good, 177 A.3d 47 (Del. 2017).

320. *See* Amended Verified Consolidated Shareholder Derivative Complaint for Breach of Fiduciary Duty, Waste of Corporate Assets, and Unjust Enrichment at 53, *In re* Duke Energy Corp. Coal Ash Derivative Litig., 2016 WL 2606013 (Del. Ch. Apr. 29, 2016) (C.A. No. 9682-VCG) ("The fact that six Duke facilities, including Dan River, operated without stormwater permits also appears to be a consequence of pressure that Duke brought to bear on its captive regulator, DEQ.").

321. City of Birmingham Ret. & Relief Sys. at 68 (Del. 2017) (Stine, J., dissenting) (characterizing the nature of the shareholder Plaintiffs' allegations).

deemphasizing environmental principle. Accordingly, those firms that fail to live up to their commitments to stakeholders and to the greater public might be named and shamed.[322] Firms concerned about their reputation may then be incentivized to make good on their public promises.

CONCLUSION

The past decade has brought new life to an old duty of oversight. The *Caremark* doctrine, which was once largely theoretical and ineffective, now requires more of directors and officers in their oversight of the corporation. Shareholder plaintiffs, attuned to social and cultural risk dynamics, have begun to bring claims for failures of cultural oversight. The logic of these suits mirrors the internal logic of *Caremark*'s doctrinal principles. Key features of the *Caremark* doctrine—legal risk, good faith, and the concept of "mission critical" risk—each contain an implicit cultural dimension.

The *Caremark* doctrine should extend to cultural harms. Corporate culture has enormous power to shape employee behavior and to dictate whether those employees enable or prevent conduct that would cause shareholder and public harm. Though *Caremark* claims come with significant structural limitations, allowing them to reach culture could exert another critical force of accountability to prevent and punish corporate misconduct.

322. *See* David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1854–55 (2001) (arguing that shaming sanctions might strengthen the power of *Caremark* to influence director behavior by suggesting, "a judge can shame an offending director by explicitly criticizing her in the published opinion"); Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135, 2207 (2019) ("Nowadays, *Caremark* plaintiffs and regulators stand a better chance, we argue, due to the staggering growth of compliance, which can produce the evidentiary record that opens the path toward board liability."); Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1153 (1983) (considering the power of corporate criminal stigma).