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## Producing Corporate Text: Courtrooms, Conference Rooms, and Classrooms

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MAE KUYKENDALL

## Producing Corporate Text: Courtrooms, Conference Rooms, and Classrooms

ABOUT THE AUTHOR: Mae Kuykendall is a Professor of Law at Michigan State University College of Law. My thanks to Peter Kostant for his invitation to the conference and to Adam Candeub and Lyman Johnson for comments on an early draft. Thank you to Barbara Bean for editorial help.

## I. INTRODUCTION

Lyman Johnson has recently written that Delaware corporate law is bi-vocal.<sup>1</sup> By the phrase, Professor Johnson means that there is a wide dividing line between the voice in which the Delaware Corporate Code speaks and the voice in which the Delaware Chancery Court and Supreme Court speak to the corporate managers and the lawyers who advise corporate boards about fiduciary duties. He explains that a “guiding framework” that might provide an account of the people in the actual corporate setting and in the legal construct is “co-produced by two different voices, the one enabled by legislatures and the other expressed directly by courts, one offering freedom and another restraint, and each resting on the other.”<sup>2</sup>

In describing the whole framework of law as bi-vocal, Professor Johnson suggests a textual discontinuity: a body of case law written by judicial authors with a distinctive voice—that of an epistolary teacher—and a body of statutory text written by “fallen man” for the use of fallen man.<sup>3</sup> The code is master narrative, and the voice of the judge, as in *Disney*,<sup>4</sup> is the voice of a counter-narrative.<sup>5</sup> Narrative, in Professor Johnson’s usage, means an account of the prototypical events associated with a phenomenon, offered as an overarching interpretation that provides a reader with insight, potentially with moral insight.<sup>6</sup> Narrative gives events a human level of understanding about corporate transactions that would be abstractions for a reader or listener if there is no account of the motives and actions of agents, especially human

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1. Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 MICH. ST. L. REV. 847, 849.
  2. *Id.* at 862 n.99.
  3. *See id.* Professor Alfred Conard wrote that “[t]he law of corporations would be a sad rag if it were limited to the emanations of the legislatures.” ALFRED F. CONARD, CORPORATIONS IN PERSPECTIVE 30 (1976).
  4. *See In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006) (holding that the Disney directors did not breach their fiduciary duty but subjected their conduct to an intensely negative discussion). *See also* Johnson, *supra* note 1, at 863 (describing the “counter-narrative” by Chancellor Chandler of the directors’ conduct as “detailed, normatively saturated, judgmental, and laced with scolding, sometimes acerbic, moral reproof”).
  5. *See* Johnson, *supra* note 1, at 848. Interestingly, Ernest Folk described a comparable division, but nominated federal law as the source of a “counter-narrative,” presuming that Delaware case law was not the source of limits on the permissions of the code. “[F]ederal corporation law, addressed to remedying evils, will grow in importance each year. After all, one has less interest in a body of law which, in effect, says everything is permitted and nothing forbidden. Instinct directs attention to rules which inhibit such freedom.” Ernest L. Folk III, *Some Reflections of a Corporation Law Draftsman*, 42 CONN. BAR J. 409, 426 (1968). Edward Rock’s article on a moral voice contained in Delaware takeover law provides a prominent account of Delaware cases that offer normative lessons to corporate managers by depicting, in an extended factual recounting and judicial rebuke, bad conduct by corporate managers. *See* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997).
  6. In his article, Professor Johnson, using the terms “narrative” and “counter-narrative,” offers the Biblical account of “the fall of man” as an example of a narrative. *See* Johnson, *supra* note 1, at 853 (describing the Bible as “grand narrative, offered from multiple vantage points, where nothing is told at once but its message progressively unfolds, ‘like a picture wrought out in mosaics’” and referring to its elements of “history, prophecy, moral instruction, and horrific stories of human depravity, cruelty, and folly countered by stirring stories of sacrifice, saintliness, and restoration”).

agents. For corporate law, he treats the code as providing the basis for narratives of “unbridled freedom” interpreting the corporate form and the expected events associated with the behavior of the entity managers.<sup>7</sup> The counter-narrative is the voice of equity, which supplies a different arrangement of events, casting doubt on the moral understandings given by stories presenting the pursuit of self-interest as the core activity of the corporation and its managers.<sup>8</sup> Narrative, as used in this article, refers to broad accounts that arrange a sequence of events to produce an effect in the reader. The reader is invited to accept a depiction of life events, arranged to suggest causal linkages between actions and outcomes.<sup>9</sup>

In this article, I will extend Professor Johnson’s concept of voices in corporate law and suggest a modification. I will explore three Delaware cases that, in combination, cast a light on the voices that shape the body of corporate law. In addition, I will note features of the entire set of texts, including their production and the controversies about their necessity and uses as a window into the operations and governance of the corporation. The production of texts about the corporation is a large project that requires forms of collaboration. Just as the making of a complex physical infrastructure requires extensive collaboration over time, this is a collaboration that is implicit, but never completely mapped, among many contributors.

The article will proceed as follows: Part II introduces the statutory provision cancelling liability for negligence, and then explores two cases and a law review article by four co-authors, all with differing roles in the legal establishment in Delaware. In that Part, I examine these textual materials, and their provenance, for insight about the way that ideas about the duty of good faith illustrate long-term collaboration to produce and refine legal text about the corporation in Delaware. Part III focuses on *In re Caremark International Inc. Derivative Litigation*, and folds in *Zapata Corp. v. Maldonado*, to explore the role that a commitment to text as a socially valuable product plays in Delaware corporate law and the role that text plays in the developing social logic of corporate law. In addition, the intense readership for Delaware corporate law is contrasted with the deficiencies in readership for other

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7. See Johnson, *supra* note 1, at 850.

8. See *id.* at 849.

9. For a definition of narrative and for a treatment of its role in corporate law, see Mae Kuykendall, *No Imagination: The Marginal Role of Narrative in Corporate Law*, 55 BUFF. L. REV. 537, 542 (2007) (“Narrative, in basic terms, is an account of what recognizable characters say and do, with a time sequence that lends support to depictions of cause and effect, motives and consequences.” (citing M.H. ABRAMS, A GLOSSARY OF LITERARY TERMS 173 (7th ed. 1999))). Even among narrative theorists, the precise contours of what is and is not narrative can be confounding. For example, the eminent narrative theorist Robert Scholes recently answered a query on a narrative listserv asking, “What isn’t narrative?” with the following statement:

Getting back to basics here, narrative is a textual representation of events in time, as description is a textual representation of events in space. Causality is not required in either case. Of course, causality can enrich narrative, but a mere chronicle is a form of narrative, though a primitive one. The texts can be visual or verbal.

E-mail from Robert Scholes, Research Professor of Modern Culture and Media at Brown University, to narrative-l@georgetown.edu (Aug. 17, 2010, 10:48 AM) (quoted with permission).

kinds of corporate text, especially that which is produced by corporations about unusual business models or financial products.

Part IV explores in more detail the fact that the *Caremark* case produced an opinion in connection with a settlement and the award of attorney's fees, even though the case could have been dismissed on a summary basis. The underutilization in *Caremark* of the business judgment rule and the litigation-limiting doctrines of director exculpation and court deference to business judgment is contrasted with Pennsylvania doctrine that emphatically precludes litigation on the merits of a board's decision if a board of directors has met the standard for a recommendation of dismissal. This contrast is used to highlight the disjoining in Delaware of the textual-generating commitment of the Delaware courts, exemplified in *Caremark* and made explicit in *Zapata*, from dependence on director exposure to liability. Part V explores critiques of Delaware law based on efficiency-driven criteria and assumptions about tactical choices by Delaware to protect its franchise from competition by other states or displacement by federal corporate law. It suggests that the factors that produce text cannot be captured by such a model; rather, the collaborative production of text is heavily determined by the cultural heritage of a set of readers and collective authors. The form of the text requires a mapping of the institutional and material factors that organize the reader's contribution into the ongoing creation and meaning of legal texts, such as Delaware law. As a result, Delaware is an example of a community of engaged readers with a tradition of readership and collective authorship.<sup>10</sup>

Let me provide a note on terminology. I will use the term "text" to evoke the whole body of writing about the corporation. The term text within literary criticism refers, in the most basic sense, to "writing intended for study,"<sup>11</sup> especially in a book. It can also mean the main argument of a book.<sup>12</sup> Textual criticism, as a distinctive approach to texts, becomes a more complicated exercise in authenticating the words of a text that may have more than one version in existence.<sup>13</sup> Over time, in literary studies, the approaches to talking about text as a distinctive focus of study evolved, and are well beyond the scope of this article.<sup>14</sup>

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10. See William T. Allen, *The Pride and the Hope of Delaware Corporate Law*, 25 DEL. J. CORP. L. 70, 71-72 (2000).

Important . . . is the sense of professional pride and dedication that has accrued as generations of Delaware lawyers took their turn at designing, redesigning and interpreting provisions of this work. This statute and its administration is truly the work of a relatively small community of Delaware lawyers and public citizens who have operated cooperatively for a century. That community includes its processes of training young lawyers in the practices of interpretation of the community, it includes formal associations, such as the Bar Association's corporation law committee and informal ones.

*Id.*

11. NORTHROP FRYE ET AL., *THE HARPER HANDBOOK TO LITERATURE* 458 (2d ed. 1997).

12. *Id.*

13. *Id.*

14. Although this article does not focus on critical theory of the term text as a term of art in literary criticism, this exploratory article has some connection to the types of treatments of text found in the

Readers of Delaware case law, accustomed to a later gloss placed on cases as the judiciary has responded to new contexts, input, and readerships, may well find literary theory on establishing an authoritative text to provide a moment of recognition. In this article, I will explore the demand in corporate law created by text about the corporation as “an interactive mechanism of communicative exchange,”<sup>15</sup> the intense readership for some corporate text among some readers, and the paradoxical failure of readership for other corporate text. Further, I will explore the frequent dispute in corporate law over the need for, and appropriate source of, given kinds of text. I suggest that there is an implicit collaboration, with mixtures of direct and indirect benefits to participants, to produce legal texts, such as Delaware opinions, as well as a continuing demand for corporations to produce text that is, in many instances, unread. Hence, text as both demanded and produced by intensive interaction with readers and contested as excessive, while being in some instances demonstrably ignored by virtually all readers, constitutes a useful perspective on the corporation as a social enterprise and on the production of legal materials relating to the corporation.

## II. A DELAWARE STATUTE AND TWO CASES

### *A. Speaking of Good Faith in the Code and the Courtroom*

The first two of the three Delaware cases with which I will illustrate my thesis about Delaware law as text are *Caremark*<sup>16</sup> and *Disney*.<sup>17</sup> These cases became of great interest because some language in them suggested the possibility that the statutory permission inserted in the Delaware Code in 1986 for charter exculpation provisions for duty of care violations might not protect directors who commit a violation of an independent duty of good faith. The provision permits a Delaware corporation to include in its charter:

A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith

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body of critical writing about text, which explores, within the vocabulary and theoretical concerns of literary studies, abstract questions about how to conceive of text. Here is one example:

Every text has variants of itself screaming to get out, or antithetical texts waiting to make themselves known. These variants and antitheses appear (and multiply) over time, as the hidden features of the textual are developed and made explicit. They appear because even the most “informational” text comprises an interactive mechanism of communicative exchange. Various readers and audiences are hidden in our texts, and the traces of their multiple presence are scripted at the most material levels.

JEROME J. MCGANN, *THE TEXTUAL CONDITION* 10 (1991).

15. *Id.*

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

17. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006).

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or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit.<sup>18</sup>

The carve-out for acts or omissions not in good faith leads to an interest in the provenance and meaning of that bit of text, with the tantalizing possibility that the reference to good faith is drawn from earlier text that treats good faith as an independent duty of corporate directors.

Delaware Code section 102(b)(7), as a matter of its essential mission, is an example of a “master narrative” written for “fallen man,” because it permits corporations to absolve its directors from monetary liability for breach of their duty of care. The exculpation provision was enacted to strengthen the traditional protection provided by the business judgment rule, a protection breached in *Smith v. Van Gorkom*.<sup>19</sup> The reference in section 102(b)(7) to good faith, however, introduces language into a director-protective text that has the potential for expansion and for weakening the protection afforded to directors in the Delaware Code provision’s “master narrative.” Both *Caremark* and *Disney* mirror the mixed textual content of section 102(b)(7), drawing on the term “good faith,” to provide a counter-narrative, though, tellingly, using the original line of defense against director liability to avoid imposing liability in the matter at hand. Unlike the Code’s blending of voices, the opinions give equal or greater voice to the counter-narrative, even as the master narrative determines the outcome for the individual claims regarding director liability.

In these cases, the Delaware Supreme Court (and the Delaware Court of Chancery) call upon future directors to reject the temptation to act as fallen men (adopting here Professor Johnson’s characterization of the temptations presented by the Code’s permissive form) and embrace a role as well motivated guardians of the interests of the corporation. In *Caremark*, Chancellor Allen, perhaps somewhat incidentally, uses the term good faith as a means of saying that directors must not abdicate their responsibility to set up some sort of system to help achieve law compliance.<sup>20</sup> *Disney* provides an even stronger contrast between the Code’s narrative and the judicial counter-narrative, which utilizes the term good faith as a rhetorical lynchpin of a sermon on good practice. In the *Disney* opinion, the court executes a finely balanced message to directors of assurance and to shareholders of moral limits. The court holds that Disney’s compensation committee did not breach its duty of care for failure to follow corporate

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18. DEL. CODE ANN. tit. 8, § 102(b)(7) (2001).

19. 488 A.2d 858 (Del. 1985). In *Smith v. Van Gorkom*, the Delaware Supreme Court shocked the corporate legal world by imposing liability on a group of distinguished independent directors for the speed of, and cursory consideration of details in, their approval of a sale of the company recommended to them by the CEO, who was nearing the end of his executive career. *See id.* Many writers have critiqued the case since it was announced. A very persuasive critique was provided by members of the Delaware judiciary. *See* William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1299–301 (2001) (discussing the critical reception of Delaware cases, including *Van Gorkom*, that first gave “bite” to the duty of care standard for corporate directors and suggesting *Van Gorkom* and other cases undermined the policy to encourage risk-taking that animated previous articulations of Delaware law).

20. *See infra* notes 29–35 and accompanying text.

“best practices” when it approved a non-fault termination (NFT) clause in an employment agreement.<sup>21</sup> The NFT clause required Disney to pay its president, Michael Ovitz, approximately \$130 million when it fired him without cause after approximately one year of employment.<sup>22</sup> Though the *Disney* court does not impose monetary liability upon the board, it makes clear that had its compensation committee followed ideal practices “there would be no dispute (and no basis for litigation) over what information was furnished to the committee members or when it was furnished. Regrettably, the committee’s informational and decisionmaking process used here was not so tidy.”<sup>23</sup> Instead of following best practices, the committee collectively acted as “fallen men” relying upon: (1) a document that only summarized the material terms of the NFT, (2) “benchmark” options previously granted to the prior president, Frank Wells, and CEO Michael Eisner, and (3) its general knowledge that the agreement was structured to compensate Ovitz for leaving a job that would have paid him \$150 to \$200 million in commissions during the life of the employment agreement with Disney.<sup>24</sup> The committee’s failure to follow “best practices” in setting up the compensation package, and the attendant decision to pay the cost of an early termination of Ovitz, followed by a cost of millions of dollars in shareholder litigation, prompted the court to provide a sermon on good practice that would exceed the standard for avoiding liability afforded by the business judgment rule. The master narrative of license rather than constraint, reinforced in the Delaware Code, blends in the opinion with a judicial counter-narrative that urges directors to meet a higher standard, even without imposing a penalty for poor performance. The court sticks with the rules provided by the master narrative while folding in a counter-narrative of moral scrutiny, given authoritative clout by its official location in a court opinion. Without the publication of the opinion, the disposition of the case would do no more than reaffirm the master narrative of director insulation from legal rebuke.<sup>25</sup> Given the public response to the scale of the payment to Ovitz for one year of work deemed unsuccessful, it is doubtful that corporate interests would have been well served by a form of disposition drawing mainly on the master narrative, cossetting directors within a world of presumed rather than actual good conduct<sup>26</sup> and even in one free of authoritative rebuke by a judicial expert on corporate law.

In delivering the sermon, the court lingered on the concept of “good faith” by directors that was given visibility in the Chancery Court’s *Caremark* opinion by

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21. *See Disney*, 906 A.2d at 55–56.

22. *See id.* at 57.

23. *Id.* at 56. If the company followed best practices, it would have directed its compensation expert to simply prepare a spreadsheet, disclosing, inter alia, the cost to Disney of a non-fault termination for each year of the agreement. *Id.*

24. *See id.* at 56–58.

25. For a discussion of state court doctrine that urges, as an efficient, business-oriented doctrine, the use of summary dispositions in matters where the business judgment rule supplies the master narrative, see *infra* notes 155–56 and accompanying text.

26. *See, e.g., infra* notes 155–58 and accompanying text.

Chancellor Allen. Though the *Disney* court rejected good faith as a basis for turning gross negligence into something else<sup>27</sup> (for which exculpation was not available), it set the pulse of plaintiffs' lawyers and some commentators racing by intimating that good faith might be a category of dereliction that lies between classic duty of loyalty sins and extreme forms of negligence.<sup>28</sup>

Specifically, in *Caremark*, Chancellor Allen approves a settlement between Caremark and shareholders as fair and reasonable where the company pleaded guilty to mail fraud. The court ruled that, though its employees broke the law, the board did not breach its duty of care. The board is protected by the standard duty of care doctrine; the board did not suspect any violations of the law when it "appears to have been informed by experts that the company's practices, while contestable, were lawful."<sup>29</sup> Because most ordinary business decisions are made within the "interior of the organization," directors are not legally bound to inform themselves about mundane details of ongoing operations within the corporation.<sup>30</sup> Chancellor Allen recognizes that directors can only focus their attention on those decisions that require the board's direct authorization, such as mergers, fundamental changes, and executive compensation.<sup>31</sup> Critically, the Chancellor finds that the Delaware Supreme Court ruled as much in *Graham v. Allis-Chalmers*.<sup>32</sup> Chancellor Allen follows that binding precedent, holding that directors do not have a duty to be informed about corporate wrongdoing when there is no cause for suspicion.<sup>33</sup> Though the Chancellor could have disposed of this case here, he chooses to go further in the text. He uses his settlement opinion to place companies on notice regarding directorial duty, debunking any claim that the modern-day court would accept *Graham* as standing for the proposition that a board has no responsibility to establish a monitoring system to assure that employees comply with external law.<sup>34</sup> In this way, Allen affirms for all readers the "public consensus"<sup>35</sup> about the civic role of the corporation and nudges corporations toward stronger compliance protocols.

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27. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006).

28. *See id.* at 64–65.

29. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996).

30. *See id.* at 968.

31. *Id.*

32. *Id.* at 969.

The Delaware Supreme Court concluded that, under the facts as they appeared, there was no basis to find that the directors had breached a duty to be informed of the ongoing operations of the firm. In notably colorful terms, the court stated that "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."

*Id.* (quoting *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 131 (Del. 1963)).

33. *See id.*

34. *See id.* at 969–70.

35. *See generally* Marc T. Moore & Antoine Reberieux, *Corporate Power in the Public Eye: Reassessing the Implications of Berle's Public Consensus Theory*, 33 SEATTLE U. L. REV. 1109 (2010) (describing Adolf

As this symposium<sup>36</sup> illustrates, the idea of good faith attracted the interest of many readers of corporate text, who held hopes for its future as “text screaming to get out”<sup>37</sup> of its lesser placement as a counter-narrative dominated by the stronger master narrative erasing board liability for acts of negligence. The question of good faith asserted itself in the text, in which judicial authors, exploring the contours of director standards of conduct, used the locutions available to describe the moral weight of a director’s obligation, the forms that a shortfall might take, and the role that liability might play in enforcing high standards.<sup>38</sup> In a single text, the judges maintained the liability-limiting line, holding directors harmless for exercising business judgment, and mused, as courts of equity, upon the whole dimension of directorial duty.

Managing such text, however, proved a challenge. The judicial authors did not always neatly segregate their description of ideal duty from their reaffirmation of insulation of directors from monetary responsibility for poor results. Nor did they differentiate the distinctive shapes of positive duty, which is provided by equity, and allocation of risk, which is provided by common law and legislation.<sup>39</sup> Readers, some seeking equitable commands and others searching for the deference to director judgment for which Delaware law was known,<sup>40</sup> were a presence in the making of a judicial text (i.e., the opinion), as the judges responded to readers hidden in previous texts. Soon after the opinion was released, its readers, including both proponents of strong fiduciary standards backed by liability and expositors of the need for judicial deference to board judgments, sought to rescue their vision of the text from displacement by competing text. Such reader and author struggles invited new forms of legal text (statutory enactments, such as section 102(b)(7), law review commentary by leading lawyers and even Delaware judges, and judicial opinions in other states) in forums permitting a renewed tracing of “multiple presences”<sup>41</sup> in the authoritative text of Delaware corporate law.

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Berle’s concept of an implicit public consensus constraining corporations and effectuating political control over the managers’ use of power).

36. This article was written for New York Law School’s Good Faith After *Disney* Symposium held on November 13, 2010. See Peter C. Kostant, *Meaningful Good Faith: Managerial Motives and the Duty to Obey the Law*, 55 N.Y.L. SCH. L. REV. 421 (2010–11).

37. See MCGANN, *supra* note 14, at 10.

38. See generally Leo E. Strine, Jr. et al., *Loyalty’s Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629 (2010) (exploring the “etymological” basis of Delaware’s case law on fiduciary duty and its fit with the policy interests served by a simultaneous adherence to the business judgment rule).

39. See *id.*

By its plain terms, all that section 102(b)(7) says is what acts cannot be exculpated. There is no independent creation of liability as there should be if there were a duty being recognized. The work of recognizing and defining fiduciary duties was left where it had always been, with the courts of equity.

*Id.* at 663.

40. See generally Allen et al., *supra* note 19, at 867.

41. See MCGANN, *supra* note 14, at 10.

*B. Co-Authors Speak of Good Faith*

The work of Adolf A. Berle and Gardiner C. Means about corporations focused on theorizing the basis for the legitimacy of large amounts of property being held within the control of a small number of executives who did not own them.<sup>42</sup> Berle believed solutions could be found to legitimate the separation of ownership from control. A recent analysis of Adolf Berle's theory directs attention to texts and other statements that situate the corporation within a public consensus about the corporation. Though in some respects "unwritten and unsystematic," the consensus "can be elicited by reference to (inter alia) 'the conclusions of careful university professors, the reasoned opinions of specialists, the statements of responsible journalists, and at times the solid pronouncements of respected politicians'" and "includes the capacity to criticize that law."<sup>43</sup> Such a concept presumes outlets for the articulation and refinement of this inchoate consensus, and implies variable readership and authorial relationships: intense, neglectful, sporadic, insistent, forgotten, recurring.<sup>44</sup>

It may be no surprise that some part of the texts produced by corporations about the risk profiles of their operations goes begging for readers.<sup>45</sup> But Berle believed there were forums for the reinforcement and advancement of a public consensus fed by the implicit understandings about the civic role of the corporation; he nominated the annual shareholder meeting as such a forum, "seeing it as a formal ceremonial fulcrum around which the [wider and much more effective] process of public and political consensus formation [vis-à-vis corporate affairs] could develop."<sup>46</sup> Shareholders who did not really read the materials about the investment characteristics of corporations nonetheless constituted an audience for the creation of one type of "text" guiding the corporation as a civic enterprise. One might re-label Berle's notion as a body of text, in the terms deployed here, with variant readerships and audiences and levels of recognition by its most engaged readers at any given moment. The examination of the text, and redeployment and rescue, is ongoing, in multiple outlets for the interaction of readers and text. In Berle's view, such engagement with the

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42. See ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION & PRIVATE PROPERTY* (Transaction Publishers 1991) (1932).

43. Moore & Reberioux, *supra* note 35, at 1126 (quoting ADOLF A. BERLE, JR., *POWER WITHOUT PROPERTY: A NEW DEVELOPMENT IN AMERICAN POLITICAL ECONOMY* 113 (1959)).

44. See *id.* (enumerating a mixture of sources, such as professors, journalists, and politicians, that might be expected to vary over time in the attention given to their views, and in the diligence brought to forming them). Berle emphasizes, according to this recent interpretation of his body of writings, the severing of the real connection of shareholders to the industrial enterprise through the fluidity of the capital markets. In Berle's view, shareholders do not value companies based on their operations. The market is an independent operation generating wealth, relying on a logic severed from the fundamental needs for capital of industrial corporations. As such, one might extrapolate from Moore and Reberioux's interpretation of Berle that readers of disclosure to the stock market do not engage with the features of the corporate form or details about an individual enterprise, as do the intense readers for Delaware law cases. See Moore & Reberioux, *supra* note 35, at 1112–13.

45. See *infra* notes 111–25 and accompanying text.

46. Moore & Reberioux, *supra* note 35, at 1132.

corporate enterprise as a subject of discussion and evaluation is socially valuable and promising.<sup>47</sup> The corporate enterprise gains its standing, and its claim to legitimacy, despite its fictional persona, in the collaborations that imbed it in texts that arise from a social process and engage many readers.

One particularly visible forum for the examination of a consensus about the corporation is commentary by Delaware judges, in collaboration with other “narrators” who are experts in corporate law and in response to readers seeking the official text in Delaware court opinions. Given the extent of interest generated by the *Disney* and *Caremark* opinions in “good faith” as an independent source of director duty and liability, a group of such “Co-Authors” collaborated to produce an extended consideration and discussion of the good faith text in Delaware court opinions, with close attention to the provenance of the good faith idea in the texts of corporate law. In an article published in the *Georgetown Law Review*, a judge/professor (Chancellor Leo E. Strine, Jr.), a law professor (Professor Lawrence A. Hamermesh), a lawyer/professor (Professor R. Franklin Balotti), and a lawyer (Jeffrey M. Gorris) blend their voices to explain the meaning of a Code section.<sup>48</sup> In a striking bow to the hold of text as a focus of interest and a concern with the details of its production, these Co-Authors invoked a long-ago drafting conference:

Section 102(b)(7) was the General Assembly’s answer to that problem [fears relating to liability exposure of directors]. As is generally true of our corporation law, section 102(b)(7) was first proposed by the council of the Corporation Law Section of the Delaware State Bar Association. One of us, Mr. Balotti, was among the four members of the council charged with drafting the section. The others were Joseph A. Rosenthal, a prominent member of the plaintiff’s bar; A. Gilchrist Sparks III, a corporate partner at Morris, Nichols, Arsht & Tunnell; and E. Norman Veasey, then a corporate partner at Richards, Layton & Finger and later Chief Justice of the Delaware Supreme Court. . . .

As Mr. Balotti recalls it, the addition of “acts not in good faith” arose in exactly that context. It was put in one afternoon in a Morris Nichols conference room in the old I.M. Pei building in Wilmington, Delaware, when Morris Nichols was in that building many years ago. The collective memory of the four drafters is that Mr. Rosenthal wanted very broad exceptions to the ability of stockholders to exculpate for breaches of fiduciary duty. He wanted “acts not in good faith” included.

The participants recall the conversation going something like this: Mr. Balotti and Mr. Sparks asked Mr. Rosenthal, “Well, how does that differ from violations of the duty of loyalty?” Mr. Rosenthal said, “I don’t know, but I need it in there to get my people on board.” The rest of the drafters agreed to inserting “good faith violations” to avoid opposition from the plaintiffs’ bar to the adoption of section 102(b)(7). Then the drafters added, by the way, the

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47. *See id.* at 1128–29.

48. *See* Strine et al., *supra* note 38.

word “omissions” to cover situations when directors, as a result of bad faith, failed to disclose a material fact.<sup>49</sup>

Invoked by the Co-Authors of the extended commentary, the drafting conference, which was brought back to life by collective memory, involved one lawyer/professor who was the author of the explication (Balotti) and three other lawyers, one of whom later was the Chief Justice of the Delaware Supreme Court.<sup>50</sup> The Co-Authors thus invoke the physical moment of the production of a critical text, explaining the precise moment of its insertion into the definitive text as enacted and published, and situate their thoughts about the collaboration of the drafters in a conference room meeting within the bindings of a law review. The explication of this component of Delaware law combines the work of lawyers and judges and draws upon work done in multiple work sites and outlets for creating, conveying, and refining the text as a common possession of the corporate law enterprise. This type of commentary on law is what Professor Berman characterizes as the science of law, or meta-law.<sup>51</sup> Meta-law stands above the doctrinal body of law, or legal holdings, and sets forth the framework in which legal doctrine is made; I will argue below that a judicial opinion can also be the vehicle for establishing a meta-law for a body of doctrine.<sup>52</sup>

Professor Johnson may be right to say that the body of corporate text is bi-vocal. But the clear division of roles and, implicitly, the locations by which he sorts out the voices of Delaware corporate text—cases and Code—merit a revision. The enterprise known as Delaware corporate law, which takes a form of intensive engagement with complex bodies of text, contains “multitude[s]” and depends upon a set of readers who maintain and refine the voices in the text.<sup>53</sup> Rather than being bi-vocal, corporate

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49. *Id.* at 661–62.

50. For a brief explanation of the movement through judicial roles of the Delaware Supreme Court and the involvement in extra-judicial commentary of the Delaware judiciary, see Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1603–04 (2005). For a general description of characteristics of the Western legal tradition, see HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 8 (1983):

The body of legal learning in which the legal specialists are trained stands in a complex, dialectical relationship to the legal institutions, since on the one hand the learning describes those institutions but on the other hand the legal institutions, which would otherwise be disparate and unorganized, become conceptualized and systematized, and thus transformed, by what is said about them in learned treatises and articles and in the classroom. In other words, the law includes not only legal institutions, legal commands, legal decisions, and the like, but also what legal scholars (including, on occasion, lawmakers, judges, and other officials talking or writing like legal scholars) say about those legal institutions, commands, and decisions. The law contains within itself a legal science, a meta-law, by which it can be both analyzed and evaluated.

*Id.*

51. See BERMAN, *supra* note 50, at 8.

52. See *infra* notes 72–80 and accompanying text.

53. See BERMAN, *supra* note 50, at 8 (describing the transformation of law by its engagement of a range of institutions and legal specialists).

law blends sounds from cultural resources that shape any legal text.<sup>54</sup> Chancellor Allen has made explicit reference to the broad sources required for a deeper understanding of corporate law text in judicial opinions<sup>55</sup> and has also spoken about the art of creating a voice for a judicial opinion.<sup>56</sup> As with any legal text, the influence of “multitudes” is present but muted.<sup>57</sup>

In the piece by the “Co-Authors,” the voices blend and advance one continuous textual song. We sing the exculpation code! We sing good faith! We sing good faith and exculpation! One voice of law, imprinted with equity, imposes duty and obligation in a set of texts that cancel liability for bad results. Law speaks at once of duty, imprinted with the voice of equitable trusts, and of exculpation. The text of corporate law is continuous, with admixtures from the corporate bar serving in many roles over time: corporate lawyer, bar committee drafter, judge, and scholar.

This continuous body of text contains voices of law and equity, but these voices are not bound in separate legal covers. Instead, the enterprise of corporate law revolves around close readings and re-readings of integrated textual resources. This text is a rich mixture of cultural resources. The relative incorporation of types of textual sources into the mixture is influenced and constrained by the common understanding and expert authorship of those who make a profession of reading and writing corporate text. As with most aspiring authors, the Delaware judges and lawyers rummage about among treatises, statutes, guidebooks for directors, dictionaries, understandings of linguistic patterns, biblical quotation, dominant contemporary

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54. See *supra* notes 11–14 and accompanying text. I use the term “text” here as the focus of interest, but without an attempt at rigor in applying the comparable meanings that attach to it in literary studies, in which the term carries coded and complicated references to bodies of critical interpretation and debate.

55. See Allen, *supra* note 10, at 77–78.

If courts understand corporation law as an autonomous discipline in which all they need to achieve full understanding is a knowledge of prior cases and the words of the statute or document, they will almost certainly fail. They will not allow the law to contribute all that it might. Lawyers and judges require a deep understanding of the function of doctrines of corporation law.

*Id.*

56. *Id.* at 74.

Rather I want to talk about style in the sense of the “voice” of judicial opinions. By voice I mean the tone, tenor and candor of the constructive personality that speaks to us in judicial opinions. I believe that the voice of the judicial opinion is extraordinarily important for a lot of reasons. Most importantly, the voice of the judicial opinion is a vital component of the maintenance of the legitimacy of the judicial branch—and thus our vision of the rule of law.

*Id.*

57. See Joseph Vining, *The Mystery of the Individual in Modern Law*, 52 VILL. L. REV. 1, 3 (2007) (suggesting that the legal mind and the legal form of thought are given a connection to a religious sensibility by the presence in them of “the individual and spirit”).

discourse about the corporation and shareholders,<sup>58</sup> and their own writings<sup>59</sup> and discussions in courtrooms, conference rooms, and classrooms. The results cannot be neatly segregated, nor should they be seen as merely tactical responses to competing regulatory bodies.

Economic analysis of corporate law emphasizes measures of outcome based on monetization, treats doctrine as binary in nature, imagines the motives of Delaware law makers and judges as venal, and overlooks professional concern with the production of legal text. For this article, the focus is on text as a collaboration, one in which Delaware law constitutes a signal contribution to a larger editorial project.<sup>60</sup>

### III. VALUING CORPORATE TEXT: SING IT!

#### A. *A Song of Delaware: Producing Caremark*

*Caremark*, one focal point in this symposium, provides a useful opportunity for thinking broadly about the value placed by lawyers, corporations, and courts on legally authoritative corporate text. Since its issuance by the Delaware Chancery Court in 1996, *Caremark* has provided endless material for academic reflection on its core message about the duty and liability of the corporate board. Yet, putting aside all the focus on its possible source for an independent duty of good faith in corporate law, the striking fact about *Caremark* is that it was an opinion in a matter for which

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58. See KAREN HO, *LIQUIDATED: AN ETHNOGRAPHY OF WALL STREET* (2009) (offering a culturally based account arguing that participants in finance workplaces shaped an ideology of shareholder value that tended to supplant the conception of corporations as social entities rooted in communities).

59. See Strine et al., *supra* note 38. For a strong claim that statutes, even technical ones governing an entity's form, have literary roots, see Jill Horwitz, *Nonprofits and Narrative: Piers Plowman, Anthony Trollope, and Charities Law*, 2009 MICH. ST. L. REV. 989 (2009).

[T]he barriers between nonprofit law and literature are porous, and each is enriched and made fully explicable by reference to the other. The law has, at least, grown in parallel with literature and it is possible that an important legal text may have been copied directly from a literary source. Even the internal revenue code sections regarding the income tax exemption for charities—law that would seem to be about as divorced from literature as possible—ha[s] a history in poetry.

*Id.* at 993.

60. For a tribute to the professional engagement of the intense readers of corporate law in the Delaware bar, see Allen, *supra* note 10, at 71–72 describing

[t]he sense of professional pride and dedication that has accrued as generations of Delaware lawyers took their turn at designing, redesigning and interpreting provisions of this work. This statute and its administration is truly the work of a relatively small community of Delaware lawyers and public citizens who have operated cooperatively for a century. That community includes its processes of training young lawyers in the practices of interpretation of the community, it includes formal associations, such as the Bar Association's corporation law committee and informal ones. It has its heroes and in the choice of those heroes it projects the values that animates its members deeper search for satisfaction.

*Id.*

there was no possible basis for director liability.<sup>61</sup> Without the hammer of a monetary threat to directors, the Chancery Court nonetheless found a path to produce an opinion that has become an “iconic” corporate text,<sup>62</sup> at least for academics, and presumably also for advisors to corporations.<sup>63</sup>

*Caremark* raises several points. One view is that the concern for preserving the formal possibility of monetary exposure of directors is less about exacting a penalty than about retaining a forum for expert commentary and authoritative guidance about director duties. *Caremark* reveals much about the ways the Delaware courts and Delaware corporations approach the production of corporate text. As much as it stands for a doctrinal concern, *Caremark* more broadly represents a solution in Delaware for courts to retain an authoritative voice without the threat of director liability. The willingness of *Caremark* to settle a case that lacked a plausible legal basis, in combination with Delaware’s continued dominance as a jurisdiction for incorporations, suggests that corporations, and their lawyers, value and are willing to pay a fee for the production of text through litigation that another jurisdiction, wedded to “efficiency,” would dismiss.

In what way might a judicial opinion have value to a corporation, in a case that could be dismissed on a summary basis, thus permitting the type of resolution of litigation that any target of litigation should seemingly prefer? Among the goals might be the production of text that allows for greater predictability of results in future litigation. Yet Delaware law is often criticized as being, to the contrary, insufficiently determinate. While Delaware has defenders of its reputation on the indeterminacy

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61. *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 961 (Del. Ch. 1996).

Legally, evaluation of the central claim made entails consideration of the legal standard governing a board of directors’ obligation to supervise or monitor corporate performance. For the reasons set forth below I conclude, in light of the discovery record, that there is a very low probability that it would be determined that the directors of *Caremark* breached any duty to appropriately monitor and supervise the enterprise. Indeed the record tends to show an active consideration by *Caremark* management and its Board of the *Caremark* structures and programs that ultimately led to the company’s indictment and to the large financial losses incurred in the settlement of those claims. It does not tend to show knowing or intentional violation of law. Neither the fact that the Board, although advised by lawyers and accountants, did not accurately predict the severe consequences to the company that would ultimately follow from the deployment by the company of the strategies and practices that ultimately led to this liability, nor the scale of the liability, gives rise to an inference of breach of any duty imposed by corporation law upon the directors of *Caremark*.

*Id.*

62. See Hillary A. Sale, *Good Faith’s Procedure and Substance: In Re Caremark International Inc., Derivative Litigation*, in *THE ICONIC CASES IN CORPORATE LAW* 278 (Jonathan R. Macey ed., 2008).

63. For a recent online legal memorandum advising “health lawyers” of developments affecting the duty of boards of directors to monitor risk areas in connection with Medicaid provider programs, see Michael W. Peregrine, *New Compliance Plan Oversight Developments*, AM. HEALTH LAW. ASS’N 1, 3 (Sept. 2009), available at [http://www.mwe.com/info/pubs/AHLA\\_0909.pdf](http://www.mwe.com/info/pubs/AHLA_0909.pdf) (discussing likely national trends building on recent New York “compliance plan initiatives” and “consistent with expectations of fiduciary conduct set forth in the seminal *Caremark* decision”).

score,<sup>64</sup> even one of the most enthusiastic exponents of Delaware law and commentary has suggested that some Delaware opinions may fail to provide sufficient direction to diligent lawyers seeking to advise clients of their legal obligations.<sup>65</sup> Yet it is the function of these opinions to situate a common activity or predominant enterprise in a body of law that carries with it a stamp of legitimacy.<sup>66</sup>

Opinion writing is of course especially important in corporation law. The statutes prescribe so little; all of the interesting problems are fiduciary in character. It is, of course, the nature of fiduciary analysis to be richly textured and to frame questions of duty in moralistic terms of fairness and loyalty. It is the antipathy of a rule-bound approach to legal control. And there are good economic reasons why such an approach can contribute value in the context of the relational circumstances of investors in public corporations.<sup>67</sup>

The legal professionals and even corporate managers and directors have a common interest in the existence of a legitimating context for the corporation. They need, and value, credibility more than correctly priced case-specific outcomes, either in terms of the court disposition affecting their obligations or in terms of the cost of the process. Any matter involving the proper conduct of directors presents a broader and richer array of questions than merely: Is there liability? Rather, such matters present questions affecting the understanding, among the attentive public for business enterprise, of the social and economic logic of the corporate form in an evolving business and public culture, with a steady stream of innovation in business and finance. The court opinion is an outlet for a developing cultural resolution of issues presented by the corporate form and the activities within it. Production of such text is not contrary to the interests of corporations collectively or individually.

The record of the Delaware courts as successful participants in the overall project of producing authoritative text that is both ruminative and doctrinally authoritative attests to the social value of the resulting material. As one scholar explained,

“Delaware courts are widely renowned and respected for their expertise in the area of business law.” Courts throughout the country look to Delaware’s “rich abundance of corporate law” for guidance due to “the special expertise and body of case law developed in the Delaware Chancery Court and the Delaware Supreme Court.” The Delaware court system, indeed, has been called “the Mother Court of corporate law.”<sup>68</sup>

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64. See Jens Dammann, *Regulatory Competition and Legal Determinacy in Corporate Law* 55 (Univ. of Texas, Sch. of Law, Law & Economics Research Paper No. 166, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1491864](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1491864) (presenting evidence that the corporate law of “[b]oth Germany and the U.K. rely even more strongly upon indeterminate standards than Delaware does”).

65. See Allen, *supra* note 10, at 75.

66. See *id.* at 74 (“Legitimacy in judicial judgments is valuable precisely because with it the legal system can purchase the acceptance of those who disagree with the wisdom of an outcome.”).

67. *Id.* at 75.

68. Stephen A. Radin, *The New Stage of Corporate Governance Litigation: Section 220 Demands—Reprise*, 28 CARDOZO L. REV. 1287, 1287–88 (2006) (citations omitted).

By contrast, one iconic case involving a corporation—Ford Motor Company—led to Ford’s immediate migration from Michigan incorporation to the corporate law of Delaware, after a corporate leader’s wish to implant a highly particular voice within legal text resulted in the production of a counter-text and a court-ordered monetary payment.<sup>69</sup> Whatever psychic cost *Caremark* managers might pay from serving as the poster child for law-breaking in a case that could have been dismissed, the official voice enabled by their collaboration became a contribution to an evolving corporate legal text with an intense readership. In the long run, the cost was minor.

An earlier case helps deepen the broad meaning of *Caremark* as a representative Delaware model for producing corporate text. *Zapata Corp. v. Maldonado*<sup>70</sup> contributed to the generation of corporate text by signaling that the Delaware courts were to apply their own business judgment, meaning that a litigation committee “can establish its independence and sound bases for its good faith decisions and still have the corporation’s motion denied.”<sup>71</sup> “The “business judgment” rule is a judicial creation that presumes propriety, under certain circumstances, in a board’s decision. Viewed defensively, it does not create authority.”<sup>72</sup> In effect, authority lies with the court.

*Zapata* is puzzling insofar as it suggests that the court has some independent business judgment about the internal affairs of entities of which the court is not a managerial component. The idea of a court business judgment is oft criticized as lacking a logic or purpose, and has been written off as a failed Delaware gambit. Professor Skeel summarizes:

In the two years since it was decided, *Zapata* had proven quite unpopular (“a spectacular failure,” in the words of one subsequent commentator). There was general agreement with the court’s skepticism of special litigation committees, but the conclusion that the chancery court should exercise its own business judgment seemed to fly in the face of generations of teaching about the respective roles of courts and corporate boards: that directors, not courts, were the ones who made business decisions.<sup>73</sup>

The void in a conception of a court as a source of “business judgment” about the specific course a corporation should take, with respect to its litigation strategy, directs attention to “meta-law.” The *Zapata* court claims to be a final authority to veto a corporation’s proper conclusion that it is in that corporation’s best interest to drop a derivative lawsuit. If one presumes that the existing body of text on corporations

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69. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 683 (Mich. 1919) (quoting Henry Ford as saying in public, “My ambition, . . . is to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profits back into the business”).

70. 430 A.2d 779 (Del. 1981).

71. *Id.* at 789.

72. *Id.* at 782.

73. David A. Skeel, Jr., *Shareholder Litigation: The Accidental Elegance of Aronson v. Lewis*, in *THE ICONIC CASES IN CORPORATE LAW* 165, 183 (Jonathan R. Macey ed., 2008) (citing Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 *Geo. L.J.* 445, 503 (1991)).

serves static corporate interests, the notion of a court business judgment assessing the value of court proceedings in a given dispute, possibly producing a judicial opinion, lacks a rationale. But the world of the corporation has an ever evolving backdrop of types of business complexity that reveals new kinds of operating challenges driven by the overall cultural atmosphere within the investing world. The recent mortgage bubble that began to be apparent late in 2006 and early in 2007<sup>74</sup> is an example.

As will be discussed below, the production of readable and complete corporate texts describing business models and assumptions is often both deficient and poor at attracting readers.<sup>75</sup> To the extent the production of corporate text is pegged to the specific facts of one entity, which may be able to conclude that the interests of its business model, and hence the interests of its shareholders, are enhanced by less process, the overall project of producing text that, by producing independent commentary, legitimates and situates the corporation within the evolving climate of economic practices and social response is truncated. *Zapata's* court business judgment rule thus recognizes a larger science or “meta law” of Delaware jurisprudence that goes beyond the doctrine governing the creation and function of special litigation committees. The Delaware Supreme Court, by claiming in *Zapata Corp. v. Maldonado* a court business judgment rule that permits the court to retain a case over the credible motion of a special litigation committee for its dismissal,<sup>76</sup> conveyed to corporations a “meta” meaning signaling Delaware’s commitment to the generation of corporate text valued by the cultural milieu of twentieth-century business. *Zapata* is a court hypothesis about text. Without offering a specific knowledge of, or examples to offer of, when the court’s independent judgment might become relevant, *Zapata* confirms the broad editorial function of Delaware law.

For that reason, *Zapata* has a conceptual significance for Delaware’s franchise on the production of authoritative corporate law text which counts that reveal few *Zapata* motion dispositions, or later case developments that are said to have cancelled some of the *Zapata* franchise,<sup>77</sup> might obscure. *Zapata* and *Caremark* as a pair confirm the Delaware franchise on the production of text valued by those associated with the cultural

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74. See HENRY M. PAULSON, JR., ON THE BRINK: INSIDE THE RACE TO STOP THE COLLAPSE OF THE GLOBAL FINANCIAL SYSTEM 65 (2010).

75. One writer on the recent events suggests that the texts produced to describe the need by money markets to contribute capital to money market funds in order to avoid “breaking the buck” failed to convey information that readers would or could absorb. See ROGER LOWENSTEIN, THE END OF WALL STREET 105 (2010). In this account:

Although the money funds were for the moment safe, the failure to inform investors, save for in some hard-to-decipher print, was a huge failing, of which the SEC was strangely tolerant. With fuller disclosure, Wall Street would have realized a sobering truth: the financial system had dodged a bullet. Had investors realized how narrowly they had averted danger, the market would have forced the Street to rein in risk and start raising capital.

*Id.*

76. See *Zapata Corp.*, 430 A.2d at 788–89.

77. See Skeel, *supra* note 73, at 183.

practices of the corporation. In claiming a business judgment rule for the continuation of specific cases, the Delaware court claimed a reserve business judgment relating to the overall mission of litigation, with a function, in addition to resolving specific disputes, of developing basic premises in the operation of the corporation, adding to the text on director conduct over time, and advancing overall corporate health.

The court business judgment rule has to do with the common benefits of litigation. *Zapata*, with *Caremark*, affirmed the role of Delaware judges as collaborators with corporations and their counsel in the production of authoritative corporate text. Hence, the two cases together are the least abashed statement by Delaware justices and chancery judges of Delaware's central role in the legitimization of the corporation. By claiming a status as authors of the corporation's broad text, Delaware courts meet the perennial objections to the lack of a broad national authorial control over its primary textual expressions.<sup>78</sup>

*Zapata's* seemingly unused doctrine of the court business judgment rule positions *Caremark* as a vivid illustration of the appetite in the world of corporate law—among academics, judges, and corporate lawyers—for the generation of text that attracts reader engagement with disparate but blended voices. Readers—even corporate lawyers and judges—search for meaning and insight without demanding in every instance a tight nexus to practical outcomes. Hence, corporate law is necessarily about a search for meaning about the whole range of subjects implicated by the business of producing wealth and the specifics of the corporate form, and not only about the bottom line of profit or liability. The Delaware courts, collectively, strive to find the means of blending the multiple meanings and sources in corporate text without unduly burdening the corporate enterprise with threats of liability for directors.

But in the commitment to producing an ongoing and frequently refreshed body of text, the Delaware courts do not strive to minimize litigation costs, at least not to the bare bone that other states are willing to offer to corporations, which are allegedly averse to making the trek to court.<sup>79</sup> Efficiency-oriented analysis of Delaware law that suggests Delaware extracts monopolistic prices from corporations, given a Delaware shortfall in the various measures of litigation efficiency imposed,<sup>80</sup> overlooks the value produced by a seasoned judicial exegesis that blends law (statutes), equity, and other texts with expertise and nuance. The Delaware judiciary brings a

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78. See *infra* notes 82–94 and accompanying text for a discussion of concern for the absence of a rich guiding discourse concerning the corporation. For a defense of Delaware law by Chandler, see William B. Chandler III & Anthony A. Rickey, *Manufacturing Mystery: A Response to Professors Carney and Shepherd's "The Mystery of Delaware Law's Continuing Success,"* 2009 U. ILL. L. REV. 95, 124–25 (2009).

79. For a highly critical view of Delaware corporate law and the associated litigation costs, see William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1 (2009).

80. See Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205 (2001) (arguing that litigation intensiveness in Delaware corporate law creates price discrimination among firms based on their amount of disputes and is inefficient).

restrained but blended voice situated expertly within and near the “meta-law” by which it is enriched, corrected, and communicated.<sup>81</sup>

A shift to a focus on the value of text and its multiple and rich sources suggests that corporations are willing purchasers of a text, enriched by multiple sources arranged in relative place by expert authors who move over a career through many roles within the Delaware legal culture. The text is valued by the most intense “readers” of the corporation. Delaware’s doctrines, across the dimensions of substance and procedure, encourage discourse that continually situates the body of case law in the emerging patterns of corporate contest while limiting liability for directors and minimizing court interventions. That it achieves discursive richness with minimal disruption is neither a strategy by Delaware to favor managers or to extract monopolist rents with inefficient litigation. It is rather a means of incorporating “bi-vocalism” into a body of statutory and case-embedded textual material. It is part of a large project of corporate “meta-law” in which Delaware has a leading part.

*B. A Song of the Corporation: A Brief Claim About the Core Debate in Corporate Law History*

Corporate law is, at bottom, about money. But the question of how to frame the ground rules about the processes of generating and apportioning profits has perennially raised issues about the amount of debate and textual resources the corporate enterprise should be required to foster, either internally or in official proceedings, as the price of amassing economic and social power. Recurring questions in corporate law have addressed the amount, source, and function of text in helping to give legitimacy to corporate power and to constrain managers.

The debate over corporate federalism has heavily drawn on a concept that the form of corporate founding texts in America had a purity that was lost by what Justice Brandeis referred to as a race of “laxity” rather than “diligence.”<sup>82</sup> Though corporate law lacks the concern for the meaning of a founding text, the debate over charter competition<sup>83</sup> has been grounded in an idealization of the original statute-enabled corporate charters as having the limited political mandate of providing equal opportunity to individuals and avoiding corruption by legislatures in awarding charters.<sup>84</sup> Changes in the text of codes were almost always lamented by many academics and other critics, who prized the statutory language of the prior era, and

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81. See BERMAN, *supra* note 50, at 8.

82. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 559 (1933) (Brandeis, J., dissenting).

83. The charter competition debate in corporate law is a classic argument among scholars as to whether the ability of states to attract out-of-state incorporations leads states to compete to offer better terms that benefit shareholders, or to offer management-favoring terms that allow managers to impress shareholder wealth for their private enrichment. See Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 227–32 (1985) (explaining the connection of the state competition literature to “policy positions by some of the leading corporate law scholars” and describing that opposing views “constitute, in themselves, a debate on the fundamentals of corporation law”).

84. See *Louis K. Liggett Co.*, 288 U.S. 517.

by progressive voices such as that of Justice Brandeis.<sup>85</sup> Thus, the most long-lasting debate in corporate law, the debate over charter competition, has been largely about differing understandings of the functions and sources of corporate text. Law professors, in particular, because they knew the details of statutes that disappeared as corporate law evolved, conceived of the change as textual degradation. But those draftsmen, replacing the older forms of text, were working, in an Emersonian phrase, to “do [their] own quarrying.”<sup>86</sup> They had the confidence to sweep away statutory language that had lost its connection to the culture of business, even as the guardians of an older form treated its effacement as a textual felony. Indeed, the literary study of text—in the narrow sense of seeking to establish a definitive text that is uncorrupted by errors that may occur in the process of producing it—bears a resemblance to the work of the traditionalist law professors, who had some concern for establishing and preserving a pristine text.

Advocacy in the 1960s and 1970s of a federal corporation’s law was a quest for a better text, one with limitations as well as permissions. It also was about a quest to gain control of the enterprise text seen as creating the form of national life and, in effect, to re-establish foundational authority over the text guiding a key aspect of national life.<sup>87</sup> It is as though the narrative control over national business and industrial life was lost when state legislatures first allowed chartering and later competed to make the statutes more convenient for business needs.<sup>88</sup> A strong demand for a textually rich environment, and for a point at which to establish legitimating authorial control over the production of a narrative about the place of the corporation in our national life is apparent in the long-defunct proposal for a nationally mandated corporate annual report under a regime of federal charters, with aspirations that such a regime would require corporations to report clearly on financial health and on issues relating to the place of the corporation in society.<sup>89</sup> The insistent

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85. Professor Conard, whose work involved an exhaustive study of the hundreds of corporate statutes governing a whole range of associational forms, was skeptical about the alarmist view by Brandeis of the various changes cited in his “race of laxity” dissent in *Louis K. Liggett Co.*, 288 U.S. at 559. Professor Conard, who studied texts closely to evaluate their linguistic source and the merits of different aspirations for perfecting them, commented that “[n]one of these departed restrictions seems to be mourned by contemporary commentators.” CONARD, *supra* note 3, at 17.

86. ROBERT D. RICHARDSON, *FIRST WE READ, THEN WE WRITE* 15 (2009) (quoting Emerson’s words, kept in notes by a student named Woodbury).

87. For an article that preserves, in a compact form, the intellectual basis of a policy preference for a federal chartering of corporations derived from a combination of concerns blending nineteenth-century thinking about the corporation as an artificial entity and twentieth-century regulatory logic, see Note, *Federal Chartering of Corporations: A Proposal*, 61 GEO. L.J. 89 (1972) [hereinafter *Federal Chartering*] (published as a student note and written by the late Linda C. Quinn, later the director of the corporate finance division of the Securities and Exchange Commission). Among the concerns were that corporations are large, perpetual, unconstrained in purpose, and given by incorporation laws “mere licenses to operate with the privilege of limited liability and a due process shield,” but with no obligation to consider their relation to the public interest.” *Id.* at 95–96.

88. See generally WILLIAM Z. RIPLEY, *MAIN STREET AND WALL STREET* (1927); see also Henry W. Ballantine, *Ripley’s Indictment of Corporate Skullduggery*, 17 CALIF. L. REV. 35, 35–40 (1928).

89. See *Federal Chartering*, *supra* note 87, at 102.

desire for federal charters is heavily explained by the desire for textual control over the corporate persona, with a persisting sense that something cultural, relating to our common life in written and spoken words, disappeared into the ether of dispersed authorial control over the corporation brought about by the combination of federalism and incorporation by the self-ordering use of statutes.<sup>90</sup> The call by Brandeis to overcome the power of “the money trust” with “publicity” has been described as a call “to imbue the inherently intangible nature of modern business with the virtues of visibility”<sup>91</sup> and to provide counter interpretations of “real value”<sup>92</sup> in a world where the idea of property appeared to lose “visibility, substance, reality.”<sup>93</sup> Progressive rhetoric sought expertise to “uncover corporate secrets” and “serve as a kind of editor, redistributing the intangible value now hidden within corporate fictions.”<sup>94</sup>

In contrast to reformers’ goals to increase and spread information, critics which disapprove of the use of courts to generate text about the corporation treat the *Zapata* case as authorizing an undue burden on corporations, who must bear the cost of gathering information necessary to support a motion to dismiss shareholder derivative litigation.<sup>95</sup> But *Zapata* offers a judicial outlet for a textual richness that substitutes, episodically, inconsistently, and with a relatively narrow reader base for the enriched text that was sought by the national charter proponents to be produced regularly and read widely. *Zapata* claims an editorial voice that is more constrained than that sought by outside reformers. The *Zapata* editorial voice is, like the blended voice of the Co-Authors, a bi-vocalism brought into one unified set of materials by an enterprise-anchored editorial collaboration.

Other examples of the focus on text in corporate law debates and policy-making include literature on whether Delaware law is indeterminate,<sup>96</sup> the related debate

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90. Professor Henry Ballantine summed up the highly negative view of charter competition by Professor Ripley, a business professor at Harvard Business School:

The accusation is hurled by Ripley, the single-handed champion of “Main Street,” against the Machiavellian wealth and power grabbers of “Wall Street,” that by iniquitous newfangled clauses and inventions, inserted with devilish ingenuity in corporate charters, the doors have been thrown wide open to all sorts of financial shenanigan and jugglery. He describes this process by such terms as “prestidigitation, double shuffling, honeyfugling, hornswoggling and skullduggery!”

Ballantine, *supra* note 88, at 35.

91. WILLIAM E. MODDELMOG, *RECONSTITUTING AUTHORITY: AMERICAN FICTION IN THE PROVINCE OF THE LAW 1880–1920* 214 (2000).

92. *See id.*

93. *Id.* at 215.

94. *Id.* at 214.

95. *See* Daniel R. Fischel, *The “Race to the Bottom” Revisited: Reflections on Recent Developments in Delaware’s Corporation Law*, 76 Nw. U. L. REV. 913, 940 (1982).

96. *See generally* Carney & Shepherd, *supra* note 79; *see also* Dammann, *supra* note 64, at 33–55 (presenting evidence that the corporate law of Germany and the United Kingdom rely more on indeterminate standards than Delaware).

over the stylistic merits of Delaware statutory and case law,<sup>97</sup> the previously cited celebration of the drafting history of a critical Code section, opposition to the use of the proxy rules to insert social issues into the proxy solicitation process,<sup>98</sup> criticism of derivative litigation on the ground that plaintiffs' lawyers are not adequate managers of a discourse about the corporation,<sup>99</sup> statutes that require internal processes that assure objective "reading" of managerial conduct before indemnification can be provided,<sup>100</sup> and the critiques of *Smith v. Van Gorkom*<sup>101</sup> as having required that the business judgment of executives be rendered through the (impossible) production of texts about embedded and noncommunicable judgment.<sup>102</sup> Critiques of *Van Gorkom* emphasize that text and readership are costly and manipulable,<sup>103</sup> thus illustrating, in a case best known for imposing liability on directors, that strategies on text and readership are at stake in corporate law. A leading critic of the reform proposals of

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97. See Carney & Shepherd, *supra* note 79, at 11–17 (arguing that Delaware law is prolix, the number of fiduciary duties directors face unclear, and the aesthetics of the Delaware code poor). Chancellor William B. Chandler and Anthony A. Rickey respond that such vagueness as exists is a feature of the agency problem in corporate law litigation and is not demonstrated by Professors Carney and Shepherd to be any greater in Delaware than in states that apply versions of the Model Code. See generally Chandler & Rickey, *supra* note 78. Moreover, they argue that Carney and Shepherd err by comparing the blended voices of Delaware case and statutory law with a "textual statute alone." *Id.* at 97. Finally, Chandler and Rickey actually respond to the aesthetic critique of the statutory text in one Delaware code section:

As for the text of the Delaware General Corporation Law, it may not be entirely "reader-friendly," but it is unlikely that the text is impossible to comprehend, particularly for large corporations with extensive in-house legal departments and access to highly trained outside counsel. The use of bullet points over paragraphs is a stylistic preference, not a matter of positive law.

*Id.* at 102.

98. See, e.g., Henry G. Manne, *Shareholder Social Proposals Viewed by an Opponent*, 24 STAN. L. REV. 481 (1971–1972).

99. See, e.g., Securities Exchange Act of 1934, 15 U.S.C. § 78–4 (2009).

100. See, e.g., Mae Kuykendall, *Assessment and Evaluation: Retheorizing the Evolving Rules of Director Liability*, 8 J.L. & POL'Y 1 (1999).

101. 488 A.2d 858 (Del. 1985).

102. See Bayless Manning, *The Business Judgment Rule and the Director's Duty of Attention: Time for Reality*, 39 BUS. LAW. 1477, 1492–95 (1984).

103. See, e.g., Lucian Arye Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973, 1006 (2002) ("With due respect to investment bankers' opinions, their estimates are hardly money in the bank"). See generally *id.* (suggesting that in takeover defenses, investment bankers have an incentive to reach the highest estimated price that can be supported using a legitimate methodology). See also Bernard Black & Reinier Kraakman, *Delaware's Takeover Law: The Uncertain Search for Hidden Value*, 96 NW. U. L. REV. 521, 531 (2002) (referring to a view of "investment bankers' opinions as little more than camouflage that is bought and paid for"). For a reasonably standard discussion of the expense and procedures imposed by the *Van Gorkom* case, see Charles M. Elson & Christopher J. Gyves, In re Caremark: *Good Intentions, Unintended Consequences*, 39 WAKE FOREST L. REV. 691, 696–97 (2004), and authorities cited therein.

the 1970s, which called for increased disclosure, commented on likely readership: “only a fraction of the mountain of paper produced will ever be read.”<sup>104</sup>

Each of the listed examples of the role that text and readership play in corporate law and in the corporate enterprise is worthy of extended discussion. The law of insider trading is of special interest, in part because it occupies a notably salient point in the expectations of text. Insider trading law attempts to shape readership, either by making text widely available for a hypothesized mass readership, or by suppressing access to text by outsiders to a given corporation while forbidding its use by insiders for purposes of trading the corporation’s securities. One way to think about insider trading law is as an evolving effort to fine tune writing and readership of corporate text. In the conception of insider trading, readers are hungry for text. Nonetheless, the access by all readers to public text, such as the Securities and Exchange Commission (SEC the “Commission”) mandated disclosure, devalues it for readers, while text that is unruly and uncontrolled holds great fascination and high value. By contrast, Delaware law commands the interest of readers who need not be drafted; the judicial authors write with a known, engaged set of readers and audiences who shape the tone and content of the material they produce. It arises from the ongoing collaboration discussed throughout this article. Its production as an ongoing collaboration with authors and readers sets it apart from much other corporate text—perhaps a truism about all courts’ writings, but, in the context of the readership issues relating to corporate text, a basis for understanding the value invested in Delaware law over a near century.

As Professor Stephen Bainbridge explains, the efficient-market hypothesis suggests that reading by the average investor to seek an advantage over the market is pointless.<sup>105</sup> Analysts are the putative readers who absorb information and move

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104. RALPH K. WINTER, *GOVERNMENT AND THE CORPORATION* 54–55 (1978). A contemporary critic of various regulations intended to animate a general readership, in particular Regulation FD, which seeks to place the general investor on par with security analysts in terms of access to company disclosure, has similarly argued that the rule, intended to create a dispersed group of readers with equal “library” privileges, in fact causes an overall decline in the content of the available text and the effective readership of the text: “The search for parity of information in securities markets is quixotic,” since corporate information cannot simply fall like manna on the masses. Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 51 (2002). Interestingly, the combined import of Regulation FD, insider trading cases, and Sarbanes-Oxley is that executives are ordered to read and the mass investing public is invited to read, but the analyst is aided in his expected pursuit of active readership by being protected from punishment by his employer for reporting accurately his understanding of what he has read and by fiduciary law from prosecution for ferreting out hidden text, but not by being given preferred access to the text as it emerges. See Sarbanes-Oxley Act, 15 U.S.C. § 78o–6(a)(1)(C) (2002) (among other things, protecting analysts from retaliation for “adverse, negative or otherwise unfavorable research report[s]”); see also *Dirks v. SEC*, 463 U.S. 646, 658–59 (1983) (creating an insider trading fiduciary-based doctrine of liability protective of analysts).

105. Stephen Bainbridge, *The SEC’s Futile and Misguided Efforts to Clamp Down on Inside Information*, PROFESSORBRAINBRIDGE.COM (Aug. 27, 2004, 7:15 PM), <http://www.professorbainbridge.com/professorbainbridge.com/2004/08/the-secs-futile-and-misguided-efforts-to-clamp-down-on-inside-information.html> (“This form predicts that investors can not [sic] expect to profit from studying publicly available information about particular firms because the market almost instantaneously incorporates information into the price of the firm’s stock.”).

securities to the “right” price. The handful of analysts whose reading drives the market’s instant adjustment to new information are imagined to read all forms of text about corporations as well as to assimilate every scrap of information. In *Dirks v. SEC*, the Supreme Court created a doctrine that was protective of their readership, holding that an analyst who receives information from a corporate insider, absent a quid pro quo, does not inherit a duty to the corporation and hence may trade free of insider trading sanctions.<sup>106</sup> The analyst as a reader is seen by the Court as a market mechanism. The SEC, also concerned with the figure of the analyst as a reader and hopeful to democratize the reading of corporate text, passed a regulation, Regulation FD, intended to scale back the protective shield provided by *Dirks*.<sup>107</sup> Regulation FD bans selective disclosure of information to “securities market professionals”<sup>108</sup> and shareholders. It has been noted that the rule is at odds with the SEC’s goals of transparency and communication within firms.<sup>109</sup> At the same time, the regulation of corporate “writing” and creation of text for intense readers in the SEC’s stringent crackdown on “selective disclosure” has intensified the readership for text that escapes the confines of a regulated disclosure regime, possibly enhancing the diligence of potential readers. Meanwhile, shredded data that is permanently lost is hypothesized to be worth intense readership. Text outside the format imposed by regulation is demonstrably the object of intense readership, and non-existent text is seen as the most valuable of all. The signals that motivate readers who are investors are complex and poorly understood and, as a regulatory object, the creation and availability of text to readers is driven by an idealization of democratic, communal readership that lacks a counterpart in reading behavior,<sup>110</sup> except, perhaps, for the professional audience attentive to the texts created by the Delaware courts. When corporate-produced text is widely available, reader failure is often the result; each potential reader, except for the lone misfit, imagines that productive readership by someone else assures collective comprehension. When text is off limits, or non-existent, it becomes a matter of intense interest.

The settling up of the financial crisis of 2008 has focused on a claim about deficient text, coupled with accounts of widespread reader failure. The SEC filed a

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106. 463 U.S. at 662–64.

107. See 17 C.F.R. § 243.100 (2010).

108. See SEC Selective Disclosure and Insider Trading, 17 C.F.R. pt. 240, 243, 249 (2010).

109. Joseph W. Yockey, *On the Role and Regulation of Private Negotiations in Governance*, 61 S.C. L. REV. 171, 173–74 (2009).

110. In 1970, Professor Homer Kripke urged attention to the average investor’s capacity to absorb material in prospectuses:

My assertion is that a typical prospectus *cannot* enable a lay investor to achieve an informed investment decision. My hypothesis, upon which I urge a behavioral investigation, is that lay investors who are not just impulse buyers of securities in the latest romantic industries *do not try* to reach *informed* investment decisions from a prospectus.

Homer Kripke, *The SEC, the Accountants, Some Myths and Some Realities*, 45 N.Y.U. L. REV. 1151, 1153 (1970).

charge against Goldman Sachs (ultimately settled in a controversial deal that enabled the SEC to claim success and Goldman to put the matter to rest<sup>111</sup>) in connection with the preparation and marketing to other major players of Collateralized Debt Obligations (CDOs).<sup>112</sup> The Commission's story is one of a critical failure of a specific text. Materials given to buyers did not adequately explain the complex instruments, including the identity of other players who had input in the selection of mortgages making up the CDO. The Commission recites a causal concept in the first paragraph of its complaint: "Synthetic CDOs like ABACUS 2007-AC1 contributed to the recent financial crisis by magnifying losses associated with the downturn in the United States housing market."<sup>113</sup> Thus, in response to a bubble of mammoth proportions, in which investment banks, banks, and consumers were reckless and resistant to any and all text that might cause a collective course correction, the SEC hints that a critical failure in the writing of one particular text is a key component in losses<sup>114</sup> in which a systematic failure of attention to disclosures loomed large.

In addition to concerns about deficient text, there has also been concern about the lonely readers, those who read so intensely that they recognize the overly robust pricing of companies or securities. These readers are seen by many as sinister, undermining companies by acting on their voracious appetite for text. Such people are the objects of fascination and, in the instance of the company targets of their readership, fury.<sup>115</sup> In his major book on the meltdown, Michael Lewis describes the personalities associated with those who shorted the subprime mortgage market.<sup>116</sup> He concludes that they were the loners and oddballs, even misfits, who accumulated information with forms of focus and readership denied to more social people.<sup>117</sup> He provides a description of a doctor who became a hedge fund manager, starting out simply buying common stocks.

He was doing nothing more promising than buying common stocks and nothing more complicated than sitting in a room reading financial statements. For roughly \$100 he became a subscriber to 10-K Wizard. Scion Capital's decision-making apparatus consisted of one guy in a room, with the door closed and the shades drawn, poring over publicly available information and data on 10-K

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111. See Jesse Westbrook, *SEC Watchdog Expands Probe to Include Goldman Sachs Settlement*, BLOOMBERG BUSINESSWEEK, July 22, 2010, <http://www.businessweek.com/news/2010-07-22/sec-watchdog-expands-probe-to-include-goldman-sachs-settlement.html> (describing expansion of probe into filing of the suit to include the timing of the settlement for possible influence on financial reform legislation moving through Congress).

112. Securities & Exchange Commission, *The SEC Charges Goldman Sachs with Fraud in Connection with the Structuring and Marketing of a Synthetic CDO*, Litigation Release No. 21489 (Apr. 16, 2010), <http://www.sec.gov/litigation/litreleases/2010/lr21489.htm>.

113. *Id.*

114. *Id.*

115. See generally Ekkehart Boehmer & Juan (Julie) Wu, *Short Selling and the Informational Efficiency of Prices*, (Jan. 8, 2009), <http://www.atl-res.com/finance/WU.pdf>.

116. MICHAEL LEWIS, *THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE* 107 (2010).

117. See *id.*

Wizard. He went looking for court rulings, deal completions, or government regulatory changes—anything that might change the value of a company.<sup>118</sup>

In 2010, the figure of someone intensely reading corporate text and finance documents, without preconceptions, becomes the stuff of a best seller.<sup>119</sup>

Indeed, one theme of the popular books written on the recent bubbles (e.g., the tech bubble and the subprime mortgage securitization fiasco) is the lack of readership of corporate reports. Those who write about the missing reader for corporate disclosure describe, with amazement, how a lack of readership helped to propel a breezy confidence by an equivocating corporation that its murky statements about its business would not draw the ire of skeptical readers, including the rating agencies. They also describe how the hardy few who did read the reports about shaky structures such as CDOs (functioning as lonely readers akin to the legendary I.F. Stone<sup>120</sup>) became aware, upon actually perusing the startling disclosure, of a gaping void of readers actually concerned with the comprehensibility or apparent meaning of the text. In a previous example of lax readership of public documents, the disclosure about the partnerships that hid risk for Enron was opaque and the accounting conventions used defective, but Enron was almost never challenged by analysts to account for, or remedy, disclosure that reeked of danger and deception; the Enron executives “correctly reckoned that most investors wouldn’t read its reports.”<sup>121</sup>

Those few investors who recognized that the market for mortgage-backed securities was destined to fail came to understand the solitary nature of their reading habits, and the uniqueness of their insistence as readers on understanding the content of financial documents. The editor of a newsletter on interest rates tumbled to the realization that it was not possible for the most astute, trained analyst to read a document explaining CDOs and understand the composition of a CDO.<sup>122</sup> The

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118. *Id.* at 44–45.

119. *See id.* In the history of the readership of corporate documents, another figure whose oddity and success has been attributed to abnormally intense readership was made capital of by a writer for popular consumption about business. In *The Predators’ Ball*, Connie Bruck provides a striking portrait of Michael Milken as a young man, in a chapter called “The Miner’s Headlamp.” Milken’s reading is portrayed as unique and even weird. On a daily two-hour commute to Manhattan from Cherry Hill, New Jersey, on a bus in the dark, Milken strapped on a miner’s headlamp and pored over the contents of a bag bulging with “a mountain of prospectuses and 10Ks” that he unloaded “onto the seat next to him.” CONNIE BRUCK, *THE PREDATORS’ BALL: THE INSIDE STORY OF DREXEL BURNHAM AND THE RISE OF THE JUNK BOND RAIDERS* 23 (1989).

120. I.F. Stone was a journalist renowned for his newsletter, which reported for subscribers the results of his immersion in the documents produced by the government. Stone became singular among journalists for reading them. “What he brought to American journalism were the skills of the Talmudist. The ability—no, the impelling need—to pore over obscure and difficult texts. To examine and reexamine. To extract new and unexpected meanings from passages others found dense and impenetrable . . . .” Marvin Caplan, *Testimonials From Obits and Memorials on Stone’s Death*, THE OFFICIAL WEBSITE OF I.F. STONE, [http://www.ifstone.org/on\\_his\\_death.php](http://www.ifstone.org/on_his_death.php) (last visited Dec. 1, 2010).

121. ROGER LOWENSTEIN, *ORIGINS OF THE CRASH: THE GREAT BUBBLE AND ITS UNDOING* 167 (2004).

122. LEWIS, *supra* note 116, at 177 (describing the diligent but futile effort at *Grant’s Interest Rate Observer* to comprehend CDO documents).

conclusion was clear: “no investor” could understand the CDO ingredients. Investors—“far too many people”—were throwing in the towel as readers of CDO disclosure, “taking far too many financial statements on faith.”<sup>123</sup> One of the investors who bet against the mortgage market chose his bets by learning about specific mortgage bonds. “He’d read dozens of prospectuses and scoured hundreds more, looking for the dodgiest pools of mortgages, and was still pretty certain even then (and dead certain later) that he was the only human being on earth who read them, apart from the lawyers who drafted them.”<sup>124</sup>

Aside from the absenteeism of readers among the investing public and finance professionals, the resistance to these types of “text” by readers was not entirely the work of the readers. Rather, the art of writing these documents applied an editorial skill that inverted the functioning of texts, described by theorists of texts, as sites for multiple readers and audiences hidden in the text and over time asserting their presence.<sup>125</sup> Stated differently, texts usually mediate within themselves among avid readers attempting to claim the text. Authors write them with some understanding of the readerships who will claim them, although the process of creating a text occurs over time. The texts that repelled or defeated so many readers were not written to attract a readership contending for control over them, but to satisfy the requirement that text be released for putative readers. For whatever reason, such texts defy the entry into them of the reader as co-creator of text and meaning. Some might say that the authors bury the important financial and factual information within the text. Yet to say the information was buried may be to exaggerate the authorial guile.<sup>126</sup> Such a suggestion may also imply that excavation might be a simpler readership task than was suggested by the conclusion of a sophisticated analyst that no investor could understand the CDO disclosure.<sup>127</sup> Most readers saw few seams that might invite excavation.

Thus, in the corporate enterprise, there is a crisis of readers always lurking: Some are too intense, reading forbidden underground literature with the fascination of adolescents in an adult bookstore; others are too voracious, reading what is there for anyone to read and betting against companies; others are playing hooky, failing to

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123. *Id.* at 177.

124. *Id.* at 50.

125. Typically, texts and readership work together to produce meaning. See *supra* notes 11–14 and accompanying text.

126. Roger Lowenstein describes a period of mass delusion about complexity, based on an idea that a text existed that allowed for “a presumption of safety.” LOWENSTEIN, *supra* note 75, at 295. The supposedly lurking text, in Lowenstein’s words, was “market data,” which “composed a sort of sacred text, on which forecasters could reliably predict household default ratios and the like.” *Id.* at 296. The assurances in the theory of the Efficient Market Hypothesis mesh with Lowenstein’s insight. By hypothesis, there were an excess of readers of market data. Daily, a collective set of intense readers reached judgments that assured less diligent readers that the “sacred text” of market data was indeed sacred, infused with the contributions of active readers who gave regular input to the text, thus adjusting it daily to imbed in it the sum of collective knowledge.

127. See LEWIS, *supra* note 116, at 177.

read, or to participate as authors of, authoritative official corporate text; and some are dreaming of texts they would have read if the texts ever existed or if they had not been destroyed. There is a world of copious but unread text, text read episodically by loners,<sup>128</sup> and an imagined world of juicy and readable, though non-existent text. Unread text exists in a persistent condition of neglect, appearing in the outward form of text but lacking the elements that recommend it to readers and thus remaining inert in the absence of active readership. The significance of such text, the sense of it as bogus, is discovered by strangely focused readers during a gap in time, before the fact of its odd form becomes notorious. With the notoriety appears a vision of suppressed text, consigned to a lost archive of unrecoverable reader riches. The possibility that the material defied reduction to comprehensible text is not considered so much as the sense that the text was corrupted by intention.

The regulation of readers and the drafting of writers for the creation, release, and preservation of “good” texts is a central concern, failure, and point of dispute in corporate law, culture, and practice. Text is wished for, its loss or failure lamented, its overly voracious consumption denounced as disruptive, and the requirement of its production denounced.

Delaware is one of the happier stories of corporate text produced for a readership with a shared culture of reading: those who make a profession, in courtrooms, conference rooms, and classrooms, of understanding the body of law affecting the corporation. Despite attracting critiques, as any set of writings will, Delaware corporate law is a successful collaboration of many voices to produce text about the corporation. It enjoys a readership engaged with the production, re-reading, and re-writing of its content.

#### IV. DELAWARE, *CAREMARK*, AND TEXT: FINANCIAL EXONERATION OF DIRECTORS AND PRODUCTION OF TEXT

The *Caremark* case is a great success in commandeering readers and commentators. *Caremark* is a generative text in that it is read, summarized, and repeated. It produces reader demands for more text with forms that can be read and applied in imagined ideal worlds of corporate accountability enforced by bringing directorial judgment to the surface for rebuke and correction. Gatherings of corporate scholars and commentators<sup>129</sup> look to a hopeful world of textual riches propelled by bringing out

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128. See generally *id.* (pegging the narrative to “outsider” characters, e.g., a doctor with Asperger’s Syndrome (Michael Burry), who looked past conventional wisdom to examine underlying data).

129. See, e.g., Hon. Carolyn Berger, *Good Faith After Disney: Justice Burger’s Closing Discussion*, 55 N.Y.L. SCH. L. REV. 659 (2010–11); William W. Bratton, Lyondell: *A Note of Approbation*, 55 N.Y.L. SCH. L. REV. 561 (2010–11); Christopher M. Bruner, *Good Faith in Revlon-Land*, 55 N.Y.L. SCH. L. REV. 581 (2010–11); Simon Deakin, *What Directors Do (and Fail to Do): Some Comparative Notes on Board Structure and Corporate Governance*, 55 N.Y.L. SCH. L. REV. 525 (2010–11); Kent Greenfield, *Law, Politics, and the Erosion of Legitimacy in the Delaware Courts*, 55 N.Y.L. SCH. L. REV. 481 (2010–11); John A. Humbach, *Director Liability for Corporate Crimes: Lawyers as Safe Haven?*, 55 N.Y.L. SCH. L. REV. 437 (2010–11); Renee M. Jones, *The Role of Good Faith in Delaware: How Open-Ended Standards Help Delaware Preserve Its Edge*, 55 N.Y.L. SCH. L. REV. 499 (2010–11); Lawrence Lederman, *Deconstructing Lyondell: Reconstructing Revlon*, 55 N.Y.L. SCH. L. REV. 639 (2010–11); Alan R. Palmiter, *Duty of*

the blended voices of the existing texts into one stronger voice—a voice of good faith with a strengthened scope for judicial intervention.

Commentators who treat *Caremark* as a fascinating approach by the Delaware courts to director accountability, with tracings in *Disney* and possibilities for a richer menu of director duties, including an independent duty of good faith, enforceable in litigation, overlook the value of the case as an emblematic Delaware legal moment, one concerning Delaware's approach to the corporate litigation process.<sup>130</sup> *Caremark* involved the type of structural settlement without monetary damages<sup>131</sup> that is often critiqued as collusive; it is debatable whether fees were justified.<sup>132</sup>

If no one knew of the lionizing treatment of the *Caremark* court's essay on a monitoring obligation by boards of directors,<sup>133</sup> a critique of the case for missing any rationale for the parties to have litigated it, and the courts to have heard it, would be inarguable and highly persuasive.<sup>134</sup> Nonetheless, *Caremark* is a marker for larger themes of corporate law and theory, as shown by this symposium.<sup>135</sup> *Caremark* has not become a prime exhibit in the perennial critique of derivative litigation but, to the contrary, a much read and even seminal text on corporate directors' duties.<sup>136</sup> As such, it stands as an exemplar of the commitment of Delaware to produce text that

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*Obedience: The Forgotten Duty*, 55 N.Y.L. SCH. L. REV. 457 (2010–11); Robert B. Thompson, *The Short, But Interesting Life of Good Faith as an Independent Liability Rule*, 55 N.Y.L. SCH. L. REV. 543 (2010–11).

130. One salient exception is the careful exegesis of the basis for awarding attorneys' fees in *Caremark* and similar cases by Mark J. Loewenstein. Writing in the late 1990s, when the effects of the *Caremark* decision were first being observed, Loewenstein emphasized both the lack of merits of the case and the lack of benefit to *Caremark*. See Mark J. Loewenstein, *Shareholder Derivative Litigation and Corporate Governance*, 24 DEL. J. CORP. L. 1, 4–7 (1999) [hereinafter Loewenstein, *Derivative Litigation*]. Loewenstein proposed a new rule to prevent the use of litigation to achieve settlements that bring no benefit to the subject corporation. *Id.*

131. See *id.* at 5–6 (explaining the advantages to the parties, including the plaintiffs' lawyers as a party, of a structured settlement).

132. See *id.*

133. In another context, Professor Loewenstein adopts *Caremark* as an element of proof that Delaware law as it has evolved belies the thesis of Professor Cary that Delaware law results from a pro-management race-to-the-bottom. Thus, outside the context of the award of attorneys' fees, Professor Loewenstein joins the chorus of praise for *Caremark*. See Mark J. Loewenstein, *Delaware as Demon: Twenty-Five Years After Professor Cary's Polemic*, 71 U. COLO. L. REV. 497, 514 (2000) (asserting that if *Caremark* is an accurate statement of Delaware law, then Delaware articulates a high standard of fiduciary duty). But of course, as we learn, bulletins from the front about the practical import of a Delaware case can be touch and go. The larger view suggested here may be the better approach for durable comment on the meaning of Delaware opinions.

134. See Loewenstein, *Derivative Litigation*, *supra* note 130, at 5–6.

135. See *supra* note 129 and accompanying text. *Caremark* did not become emblematic of needed pressure to reform the Delaware approach to the award of attorneys' fees in cases that do not yield a common fund for the benefit of the corporation, despite the early treatment by Loewenstein of that feature of the case. See Loewenstein, *Derivative Litigation*, *supra* note 130, at 4–7 (discussing the traditional requirement for the award of attorneys' fees of a common fund achieved as a result of the litigation).

136. See, e.g., Sale, *supra* note 62.

captures the discursive climate in which corporations exist.<sup>137</sup> Such a mission is a natural fit for the core form taken by law. Condemnation for stretching the company-specific standard for awarding attorneys' fees, or interpretation of the case as merely a balancing act to keep corporations in Delaware and federal regulatory displacement at bay, is a mismatch for the form that law assumes in a community bound together by a common but capacious discourse.<sup>138</sup> Of course, critical commentary is a part of the body of learning that constitutes law, with some import for the further development and transformation of the body of corporate law.<sup>139</sup>

The possibilities for ending the *Caremark* litigation without a court opinion or legal fees were many. In the attorney's fee proceedings, defendant Caremark argued that, had it not settled the case, its motion to dismiss would have been granted.<sup>140</sup> First, according to Caremark, the failure on the part of shareholders to make a demand of the board would have been fatal.<sup>141</sup> Second, the case lacked underlying merit in that the directors had the protection of monetary exculpation for negligence.<sup>142</sup> Caremark argued that, therefore, its motion to dismiss would have been granted for failure to state a claim.<sup>143</sup> Caremark was on sound policy and legal ground in its argument, which it only deigned to make when arguing that the benefits to Caremark of the settlement were modest rather than in litigating the motion to dismiss. A third basis for ending the case is that it lacked underlying merits pursuant to the business judgment rule and could have been decided on a motion for summary judgment, even without an exculpation provision. In theory, summary judgment is a device that achieves efficient resolutions of bad litigation and serves judicial economy. Finally, prosecuting the case as a derivative action could not be in the best interests of Caremark on any measure, including an objective measure of the welfare of Caremark as one corporate enterprise. Caremark presumably could have had the case

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137. See BERMAN, *supra* note 50, at 8 (referring to “[t]he body of legal learning in which the legal specialists are trained”). Interestingly, *Caremark*'s judicial author, Chancellor Allen, both criticized the *Van Gorkom* opinion as badly written and hailed it as “an important political and social success,” summarizing, to wit:

*Van Gorkom*, which, from a professional view, I think, is one of the worst cases in corporation law history, can be seen as one of the greatest opinions of modern corporation law. Thus, we're reminded that life is not always so simple and that in the end, we're condemned to be philosophers.

Allen, *supra* note 10, at 76.

138. See generally Allen, *supra* note 10. (describing a small community of Delaware lawyers, working together as “public citizens” to master a set of “practices of interpretation”).

139. See, e.g., BERMAN, *supra* note 50.

140. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 964–65 (Del. Ch. 1996).

141. *Id.* at 965.

142. *Id.* Section 8.31 of the Model Business Corporation Act “recognizes preclusive defenses, entitling the defendant directors to summary judgment or its equivalent, based upon an exculpatory charter provision covering the challenged conduct.” Michael P. Dooley & Michael D. Goldman, *Some Comparisons Between the Model Business Corporation Act and the Delaware General Corporation Law*, 56 BUS. LAW. 737, 743 (2000); see also MODEL BUS. CORP. ACT § 8.31 (2002).

143. See *Caremark*, 698 A.2d at 959, 965.

dismissed by a special litigation committee's motion.<sup>144</sup> While *Caremark* receives credit for good corporate citizenship in the course of academic accounts of the case study that it made possible, the usual corporate rationales for seeking to avoid litigation—distraction, bad publicity—surely applied to Caremark. Despite lip service by chroniclers of the *Caremark* lesson to the virtue of Caremark's overall compliance program, its name is for all times attached to a lesson about corporate law-breaking.<sup>145</sup> Arguably, the reputational harm most deserved by Caremark directors is that created by an overly cautious approach to non-meritorious litigation rather than the shortcomings of the board as revealed in the matter that prompted their memorialization in the annals of Delaware law.

The Delaware exculpation provision, as is well-known and front-and-center in this symposium, was enacted following the imposition of director liability in *Smith v. Van Gorkom*.<sup>146</sup> The cancellation of liability offered by the provision is not total, however. Violations of the duty of loyalty remain subject to financial penalty. More significantly to the subject of this symposium, "acts or omissions not in good faith" are excluded from the statutory permission for corporations to exculpate directors.<sup>147</sup> Hence, it is suggested, good faith could allow for liability for duty of care violations to be revived under the rubric of "good faith." But the possibility that the good faith exception creates an opening for litigation over *Van Gorkom*-types of alleged director process negligence was noticed and closed long ago in the Model Act provision for exculpation. The Model Act provision avoids duty of loyalty language or a good faith exception and focuses on more tightly defined exceptions.<sup>148</sup>

In the evolving body of corporate text, and its continuities or discontinuities, the care taken in the American Bar Association (ABA) text after the adoption of section 102(b)(7) demonstrates the common culture of those who write corporate text and who strive to capture a balanced set of permissions and limitations on corporate managers.<sup>149</sup>

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144. *See Zapata Corp. v. Maldonado*, 430 A.2d 779, 785–87 (Del. 1981).

145. In the course of his argument that corporate law-breaking should be viewed as *ultra vires*, Kent Greenfield delivers a stern reminder of Caremark's misbehavior:

Even in *Caremark*, often cited for the proposition that corporate directors have the duty to erect internal monitoring systems to ensure compliance with the law, the defendant directors were held not to have violated their duty of care through the firm's criminal activities. The directors thus escaped liability under corporate law even though the unlawful activity had cost the firm \$250 million in fines.

Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1299 n.60 (2001) (citation omitted).

146. 488 A.2d 858 (Del. 1985).

147. DEL. CODE ANN. tit. 8, § 102(b)(7) (2001).

148. MODEL BUS. CORP. ACT § 2.02(b)(4) (2002) (carving out the exceptions to cancellation of a director's liability for "(A) the amount of a financial benefit received by a director to which he is not entitled, (B) an intentional infliction of harm on the corporation or its shareholders, (C) a violation of section 8.33, or (D) an intentional violation of criminal law").

149. *See Folk*, *supra* note 5, at 411–12 (critiquing the belief by corporate law drafting committees that they balance competing interests within the corporation).

It is significant that the message we heard from Justice Berger in the gathering for this set of papers is that the exculpation clause really is written to cancel a lot of liability<sup>150</sup>—the same message in the textual exegesis of Delaware history by the Co-Authors and the same “restatement and clarification” provided in 1998 by the corporate textual masters who wrote the ABA Model Act “*Van Gorkom*” exculpation provision.

The evolution of understandings about section 102(b)(7) shed light on the legal environment in which Caremark chose settlement as the mode of disposition, and on the inputs by attentive readers and writers into the body of corporate text. The concern of some corporate-defense-oriented practitioners that the good faith exception permits too much litigation was illustrated by an early Practising Law Institute (PLI) analysis of *Caremark* that suggested that because of the good faith exception to exculpation, and because “*Caremark* suggests that directors may not be acting in good faith if there is a sustained or systematic failure by them to ensure that the company has compliance programs in place and to oversee those programs,” a failure of directors to fulfill their *Caremark* duties “could make the limitation of liability under Delaware law unavailable.”<sup>151</sup> Even with such textual fluidity, before the *Caremark* opinion was announced, Caremark itself had sound reason to assert that its directors were fully exculpated, both because of existing precedent,<sup>152</sup> and because the directors had made efforts to oversee law compliance, as conceded by the plaintiffs and generally acknowledged in commentary.<sup>153</sup> To give Caremark further assurance, as mentioned, the culture involved in creating corporate text—the understandings of those who write the corporate codes and those who apply them<sup>154</sup>—was already coalescing around an understanding that the exception to exculpation for “acts not in good faith” was largely what the Co-Authors suggest, a verbal tic of

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150. See Berger, *supra* note 129, at 659.

151. Venrice R. Palmer, *Initiating a Corporate Compliance Program*, in CORPORATE COMPLIANCE: CAREMARK AND THE GLOBALIZATION OF GOOD CORPORATE CONDUCT, at 225, 227–28 (PLI Corp. L. & Practice, Course Handbook Ser. No. B0-001E, 1998).

152. See *Graham v. Allis Chalmers Mfg.*, 188 A.2d 125, 130 (Del. 1963).

153. See *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 961 (Del. Ch. 1996).

154. For a report on the convergence of the opinion of the attentive “readers and writers” of corporate text, see S. Samuel Arshat, *Reply to Professor Cary*, 31 BUS. LAW. 1113, 1120–21 (1976):

Professor Cary damns the Model Act indemnification provision because it is an exact duplicate of Delaware’s indemnification section. He would have you infer from this that Delaware, as the Pied Piper, enticed the Model Act draftsmen into a bad indemnification law. The actual fact is the exact reverse. The committee that was drafting the Model Act indemnification provision learned from some source that a *Delaware committee, of which I was the chairman*, [emphasis added] had drafted an indemnification provision that did not go as far in allowing indemnification as that which the Model Act draftsmen had tentatively approved. The Model Act draftsmen came to Delaware to persuade us to follow their lead. Rather than embracing the Model Act draftsmen’s view, the Delawareans persuaded the Model Act committee to retreat to the Delaware line. That bit of history would seem to blunt Professor Cary’s charge that Delaware is leading the race for the bottom.

*Id.*

redundancy often found in statutes and contracts.<sup>155</sup> Common sense and textual sophistication, formidable in combination, said that section 102(b)(7) was written to cancel liability for duty of care allegations and such liability was not to be revived.

So Caremark's settlement is at least of mild interest in thinking about what corporations gain from being in a court system that *over*-produces textual exegesis. The very purpose of monetary exculpation, aside from ultimate forgiveness of director liability that can also be achieved with insurance or indemnification,<sup>156</sup> is to minimize the expenses and other costs attendant on litigation. Negating the possibility of an adverse judgment produces the primary benefit of reducing the collateral costs created by legal uncertainty about large damages. Corporations with the benefit of exculpation permission thus presumably should utilize it to achieve its purpose of avoiding needless expense. An exculpation provision that is not used to dismiss a claim only serves prospectively to reassure directors—which is only half its purpose. Its adoption may serve its claimed purpose of enticing potential directors to serve, but foregoing its use as a litigation tool fails to deploy its critical functions of corporate cost-saving and the minimizing of judicial intervention. The result in *Caremark* of not scotching the litigation at a preliminary stage was to provide the occasion for a judicial sermon on good faith as a component of director care, along with an explanation of the many reasons cited by the defendant for the court to have dismissed the case at an early stage.

In an opinion on the ground rules in Pennsylvania for dismissing litigation, the Pennsylvania Supreme Court provides a different sort of judicial sermon. The Pennsylvania court embraces the view that the business judgment rule, discussed by that court as the equivalent to a liability-limitation rule for directors, should serve to end litigation at a procedural stage. “Without considering the merits of the action, a court should determine the validity of the board’s decision to terminate the litigation; if that decision was made in accordance with the appropriate standards, then the court should dismiss the derivative action prior to litigation on the merits.”<sup>157</sup> The rigorous enforcement of such a rule by the court promulgates a norm of litigation efficiency, encourages corporations to forthrightly seek dismissals of weak claims, and discourages collusive settlements. It also reduces the richness of opportunities for the development of textual resources on corporate law. The drive to dismiss litigation demonstrates an understanding of litigation as being about dollars and not about text.<sup>158</sup>

The contrast of judicial tone in *Cuker v. Mikalauskas*, with judicial commentary in Delaware on terminating derivative litigation, is striking. The fit of *Cuker* with

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155. See Strine et al., *supra* note 38, at 660 (“Once one recognizes the reality that redundancy is actually a pervasive presence in statutes and contracts, operates as a belt-and-suspenders protection against unintended consequences, the idea that section 102(b)(7)’s terms provide support for the creation of separate new categories of fiduciary duty becomes far less reasonable.”). As noted, the Model Act had propounded a tighter exculpation provision, one which did not carve out “acts not in good faith” from the permission for exculpation. See MODEL BUS. CORP. ACT, *supra* note 148.

156. See E. Norman Veasey, Jesse A. Finkelstein, & C. Stephen Bigler, *Delaware Supports Directors with a Three-Legged Stool of Limited Liability, Indemnification, and Insurance*, 42 BUS. LAW. 399 (1987).

157. *Cuker v. Mikalauskas*, 692 A.2d 1042, 1048 (Pa. 1997).

158. See Carney & Shepherd, *supra* note 79.

norms to govern party-specific litigation is snug, as is its lack of nuance, despite its adoption of the American Law Institute (ALI) principles for dismissal of derivative actions, in comparison with the governing authority in Delaware, *Zapata Corp. v. Maldonado*.<sup>159</sup> *Zapata* is a text that shimmers with subtlety, formal argumentation, insightful modeling of the corporate form, and prudential considerations. Yet despite the greater serviceability of *Cuker* as an unadorned judicial work product applying the business judgment rule to short circuit derivative litigation and its seeming advantages to corporations facing derivative claims, it languishes as a judicial text in relative obscurity—massively so as compared with *Caremark*, or even the inscrutable *Zapata*.<sup>160</sup> Nuance, as well as the opportunities for exegesis, textual re-readings, and judicial gloss, appear to have a following in comparison to journeyman applications of norms of judicial and litigation efficiency.<sup>161</sup>

*Caremark* completes a circular textual journey in the common enterprise of writing corporate text,<sup>162</sup> begun by the ALI Governance Project, punctuated by the Delaware court's *Van Gorkom* sermon on process care, refined by the Delaware drafting experts in section 102(b)(7), refreshed in the *Caremark* opinion on process care, clarified in the Model Act exculpation provision, and massaged in *Stone v. Ritter*,<sup>163</sup> *In re Walt Disney Co. Derivative Litigation*,<sup>164</sup> and *Lyondell Chemical Company v. Ryan*.<sup>165</sup> The ALI Governance Project drew upon texts written as statements of good practice to import the exhortation into the law of director responsibility for law compliance, despite the recognition that the statements were intended as “practice recommendations rather than rules of law.”<sup>166</sup> In his commentary-rich case book, published in 1995, Professor Dooley focused on the lack of a basis for imposing liability on directors for the illicit acts of others. He noted that no other body of law makes such a sweeping assignment of liability without significant discrimination in the analysis of the disfavored conduct and, in particular, argued that there is no rationale for a “wealth transfer” from directors to shareholders in connection with the general societal interest, proportionally but no more a concern of shareholders, in

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159. 430 A.2d 779 (Del. 1981).

160. Judge Chandler expressed some defensiveness about the case, which opens the Delaware courts to criticism as too willing to retain litigation that other states would reject. The truth, it is suggested here, lies elsewhere, in its signal by Delaware of the value of the full set of voices entering into the production of a set of texts that advance corporate law over time and contribute to the social understanding and legitimacy of the corporate form. See, e.g., Chandler & Rickey, *supra* note 78, at 124–25.

161. The response by Chandler and Rickey, to Carney and Shepherd, and those scholars' efficiency-oriented critique of Delaware law encapsulate the differing views. Compare Carney & Shepherd, *supra* note 79, with Chandler & Rickey, *supra* note 78.

162. See Chandler & Rickey, *supra* note 78.

163. 911 A.2d 362 (Del. 2006).

164. 906 A.2d 27 (Del. 2006).

165. 970 A.2d 235 (Del. 2009).

166. See MICHAEL P. DOOLEY, FUNDAMENTALS OF CORPORATION LAW 283 (1995) (citation omitted).

law compliance.<sup>167</sup> Yet, by the time of *Caremark* one year later, liability had lost its billing as the main driver of an insistence on the director's obligation to monitor for law compliance, because the textual project of affirming a director obligation of monitoring—a text-generating obligation—had become one of text only. Professor Dooley's concerns about liability had receded.

Ignoring the norms of litigation efficiency, the *Caremark* court generated text that was mainly about generating text,<sup>168</sup> inviting corporations to continue to attain the correct amount of text that justifies a monitoring model of corporate law. *Caremark* is the perfect model of corporate litigation that is about text and not about the transfer of wealth (other than the transaction costs of tweaking the body of text already available). Without liability, shareholders nonetheless have played a part in advancing society's general interest in law compliance and in visible public authoritative speech about its importance in the activities of corporations.<sup>169</sup>

## V. THE CORPORATE TUNE

Thus, the worldly interpretation of why *Caremark* is a case—fees!—does not capture the larger notion of a social enterprise persuaded of the premise that text—authoritative text by experts—about the enterprise has value.<sup>170</sup> Again, the assignment by participants or observers of motives<sup>171</sup> is an incomplete account of a process that situates all concerned in an editorial enterprise that draws on existing text and seeks to advance it with new insights. *Cuker*, as an attempt at simplicity, withdraws the Pennsylvania court from the complexity and unstated collaborations<sup>172</sup> that have

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167. *See id.*

168. This insight about the appetite for text provides some answer to Professor Dooley's puzzlement about the "general movement [toward] enlist[ing] private employers as auxiliary police officers . . . . The driving force for this movement is by no means clear." *Id.* at 284.

169. *See id.* at 283.

170. Nonetheless, the extent of its value has always been and remains a point of contention. *See, e.g.,* Arshnt, *supra* note 154. Even without liability as a reason to critique a demand for processes that produce corporate text, the expense of producing it and the friction it introduces into a fluid process of decision-making makes it subject to criticism. *See* Manning, *supra* note 102, at 1492–95.

171. *See* Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987) (presenting a classic statement of the idea that Delaware law is basically about keeping fees in Delaware for Delaware lawyers). Macey also provides a very strong statement of the view of Delaware law as remunerative for lawyers while being protective of directors in critiquing the *Disney* case: "The Delaware judiciary has created an environment in which lawsuits are plentiful, legal fees are high, and attorneys' fees generously awarded, but where directors, in the end, are protected from liability by the slow and steady hand of the Delaware judiciary." Jonathan Macey, *Delaware: Home of the World's Most Expensive Raincoat*, 33 HOFSTRA L. REV. 1131, 1132 (2005). Macey argues further that the *Disney* case is predictable in result despite the prolonged litigation and that the opinion deliberately "provides almost no guidance for future litigants," recites facts at length to no real purpose, and tells us more about charter competition than about corporate law. *Id.* at 1132.

172. *See* *Cuker v. Mikalauskas*, 692 A.2d 1042 (Pa. 1997); *see also* Chandler & Rickey, *supra* note 78, at 113 ("Although academics speak of a 'race' or 'competition' between states for corporate charters, from a judicial perspective the relationship between state laws is often more collaborative than competitive.").

constituted a textual project for the larger social enterprise that consumes corporate law. The *Cuker* opinion in effect calls for reducing the textual resources of corporate law.<sup>173</sup> While fans of parsimony may agree with the Pennsylvania court,<sup>174</sup> textual richness receives significant hosannas from respectable quarters.<sup>175</sup>

#### A. Delaware

Critiques of individual Delaware cases often have a quality of tunnel vision: the focus is on the one doctrine generated by the case, with a suggestion that another doctrine is plainly one that corporate lawyers, shareholders, or corporations should prefer.<sup>176</sup> Here I suggest that a perspective informed by the meshing of multiple doctrines, outcomes, and practices tends to reduce the significance of analysis that enumerates flaws in Delaware law through one-on-one comparisons. Indeed, a series of “efficient” doctrines, rigorously weeding out litigation if it is unlikely to result in monetary liability, may not yield a legal product of general use to the corporate enterprise or to social confidence in a key institution. Efficiency that aggressively weeds out corporate litigation except for instances that rise to the level of old-fashioned theft and hence demand monetary recovery may yield low transaction costs and high reputational costs for corporate enterprise. The view of Delaware law as an “expensive raincoat,”<sup>177</sup> meaning that it is a body of law that requires high transaction costs to reach a predictable outcome—no liability—perhaps overlooks the meta-law

173. In their critique of Delaware law, Professors Carney and Shepherd offer textual parsimony as a good, explicitly by way of an absence of case law: “Here we offer only a few examples of how some other jurisdictions have maintained a less complex and stable body of corporate law. Many states have limited bodies of decisional law.” Carney & Shepherd, *supra* note 79, at 34. Note the assessment by Professor Conard of a world of corporate law consisting mainly of state statutes: “[t]he law of corporations would be a sad rag if it were limited to the emanations of the legislatures.” CONARD, *supra* note 3, at 30.

174. See Carney & Shepherd, *supra* note 79, at 34–37.

175. In contrast to the apparent preference by some commentators for limited decisional law, the late Chief Justice Rehnquist offered the body of Delaware case law as praise: “Corporate lawyers across the United States have praised the expertise of the Court of Chancery, noting that since the turn of the century, it has handed down thousands of opinions interpreting virtually every provision of Delaware’s corporate law statute. No other state can make such a claim.” LEWIS S. BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE 6 (2007), available at [http://corp.delaware.gov/whycorporations\\_web.pdf](http://corp.delaware.gov/whycorporations_web.pdf). Moreover, in the booklet printed and distributed by the Delaware Department of State, Division of Corporations, the point is made that the large body of decisional law affords advantages to corporations without subjecting the average corporation to the risk of litigation. See *id.* at 7–8. The same booklet continues with a quote from the former chief reporter for the American Law Institute’s Principles of Corporate Governance Project, who praises the courts and judges for the large amount of law and number of decisions, by comparison with Illinois, “which has very few cases in the corporate area.” *Id.* at 8.

176. See, e.g., Byron F. Egan & Curtis W. Huff, *Choice of State of Incorporation—Texas versus Delaware: Is it Now Time to Rethink Traditional Notions?*, 54 SMU L. REV. 249, 259–68 (2001) (suggesting that the plain business judgment rule is superior to *Caremark*). See also *Cuker*, 692 A.2d at 1048–50 (suggesting the ALI Principles, in deferring to the business judgment of a special litigation committee, if it recommends dismissal of a derivative action after a reasonable investigation are superior to *Zapata*’s assertion of an independent court business judgment). See *Zapata Corp. v. Maldonado*, 430 A.2d 779, 788–89 (Del. 1981).

177. See Macey, *supra* note 171 (using in his title the nickname for protection of directors from personal liability).

that the points in Delaware law probed as inefficient may in fact add value to the corporate enterprise. And, the objection that Delaware law is too lenient to corporate management may also give too little credence to the value of the textual achievements of doctrines that permit litigation and provide the occasion for sophisticated accounts of corporate gray areas, but shield directors from “wealth transfers” for the conduct of other actors.

More to the point, the text produced by the Delaware Corporate Code draftsmen and judiciary captures the full array of voices embedded in the collective memory of readers and writers of text about the business enterprise. The Code, drafted by practicing lawyers with academic aid, is a form of constrained expression, most harshly viewed as a manner of expression resembling a Dickens lawyer.<sup>178</sup> When they become judges, lawyers begin to speak more boldly,<sup>179</sup> drawing on a full array of cultural resources to re-animate the Code’s expression of corporate law. But they retain the element of constraint learned by the draftsman, bringing forth the blended voice given fullest expression by the judicial craft.<sup>180</sup>

*B. Collaborations: Producing Corporate Text*

The environment of corporate law is more text-rich than economic analysis of the factors that account for state business law codes and state court cases would suggest. States, in fact, have produced a multitude of codes to govern entities with either a common-fund business format or a “corporate” form for the pursuit of organizational goals unrelated to profit.<sup>181</sup> The picture of competition among states motivated to compete, and the rest as passive observers, needs to be enriched with a detailed portrait of the extensive drafting sites involved in the production and tending of a multitude of texts for business organizations.

The portrait can deepen with added detail about the large range of roles and acculturation of the text writers, from heavily public and formal, to private and spontaneous, the widely varied scope and intensity of readership, and the cross cutting memberships of the editorial participants in national policy bodies, state drafting groups, judicial bodies, and corporate enterprises, broadly. Attention to the process as editorial does not exclude the usefulness of empirical studies identifying correlations between law, results, and input, but it does suggest that the text has independent significance in channeling the cultural process of reading and writing the text of corporate enterprise. Suggestions that corporations may migrate from

178. Dickens described a lawyer with an “inward manner of speech and . . . bloodless quietude.” See CHARLES DICKENS, *BLEAK HOUSE* 500 (Andrew Sanders ed., Everyman 1994) (1853) (referring to Vholes).

179. *But see* Macey, *supra* note 171 (ridiculing the *Disney* opinion produced by the Delaware Chancery Court).

180. *See* Allen, *supra* note 10, at 77 (describing the importance of the judicial voice by stating “it is ultimately not precedent, but the quality of judicial reasoning, the integrity of the judicial process, and the candor and modesty of the judicial voice that justifies the public respect for judicial decisions”).

181. Professor Conard provided a taxonomy of the corporation as it evolved, with differing terms introduced for organizing certain types of activity across a number of dimensions relating to the need for a common fund, but with varying orientations to profit. *See* CONARD, *supra* note 3, at 124–51.

Delaware out of concern about judicial results, because courts do not pare down the textual commitments of corporate law to the minimum, hardly pan out.<sup>182</sup>

Scholars who report empirical results acknowledge that favorable findings on the effect of Delaware law on the value of corporations incorporated there do not prove that Delaware law is ideal law, only that on the measure of firm value it appears to outperform other state's laws.<sup>183</sup> Presumably, in the absence of a market for law with perfectly efficient pricing, text retains significance and assumes forms that are driven by cultural forces that arise from a reader's connection to the texts of corporate law, which are fed by the bi-vocalism described by Professor Johnson. In addition, the editorial project admits of the production of efficient results that outstrip the ability of markets to demand them; the text immersion of the participants causes them to write law that is based on a theory about efficiency and not merely on market sensitivity to its degree of efficiency. Perhaps there is no better example than Judge Easterbrook's exegesis<sup>184</sup> on the horizontal demand curve for a particular stock, a finance theory which caused him to hold that non-public fraud by a broker touting a stock would not affect the market for the stock and hence defraud buyers who did not know about the fraud. If the demand of defrauded buyers increased the stock price, other investors would simply substitute a different stock with the same investment characteristics, rather than pay a price made higher by an amount not justified by the public information about the stock. The case embraced "efficiency" not because of a market that demanded it, or a risk to federal courts' hold on business of producing litigation-proliferating doctrine, but because the judge believed in a theory about efficient markets. Is a judge who writes an academic theory about efficiency responding to a market pressure to produce a desired result? Or is he immersed in the text of the contemporary corporate legal institutions, including the academy and other sources of expert commentary?

Thus, while text can be suboptimal, as some have argued it is, it can also be superior to the market's capacity to demand perfect efficiency. Indeed, one British sociologist of finance has explained the significance for understanding economic

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182. Cf. Egan & Huff, *supra* note 176, at 250. Mark Roe asserts that a consensus has emerged that states do not compete with Delaware to attract Delaware corporations to migrate. Mark J. Roe, *Delaware's Shrinking Half-Life*, 62 STAN. L. REV. 125, 125 (2009) ("A revisionist consensus among corporate law academics has begun to coalesce that, after a century of academic thinking to the contrary, states do not compete head-to-head on an ongoing basis for chartering revenues, leaving Delaware alone in the ongoing interstate charter market."). Roe does suggest, however, that competitive pressure may be a factor as a result of an accelerating life cycle of corporations in an era of mergers, restructurings, and financial destruction. *See id.* Delaware must attract new incorporations as the number of Delaware corporations experiences attrition. Of late, and more ominously for the thesis of the article, there is some indication that adjudications about the internal affairs of Delaware corporations are migrating away as well. *See* John Armour, Bernard S. Black, & Brian R. Cheffins, *Delaware's Balancing Act* (Northwestern University School of Law, Law and Economics Research Paper No. 10-04), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1677400](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677400) (asserting that three data sets consistently show that "Delaware is losing its own cases").

183. *See* Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525 (2001).

184. *See* West v. Prudential Sec., Inc., 282 F.3d 935 (7th Cir. 2002).

actors<sup>185</sup> of a “concern with the materiality of markets: their physicality, corporeality, [and] technicality”<sup>186</sup> and the related insight that “actors should not be seen as having fixed natures or fixed characteristics.”<sup>187</sup> Further, in financial markets, certain actors create a type of public fact that can only be created with what is called “distributed cognition” and which takes on different properties when done by “combinations of multiple human beings” rather than an “unaided individual.”<sup>188</sup> The materiality of the production of corporate text, in particular judicial text, is a subject for a sociologist expert in constructing accounts of specific areas of distributed cognition. But at a basic level, it seems apparent to say that corporate legal text is produced by collaborations of actors embedded in a set of material factors and constraints.<sup>189</sup> The economic model that imagines a constant series of tactical and strategic choices made by judges to protect the Delaware franchise from other states or the federal government posits a free actor exercising the kind of solitary authorial majesty that gets debunked by English professors.<sup>190</sup> Each judge is doing active reading in texts from ancient to the most current blog, and all of this surely feeds the individual writing of opinions by drafters striving to restore vitality to former textual treatments,

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185. “Economic actors,” as the term is used by Donald MacKenzie, are not merely “abstract information processors,” as imagined by economists, but “embodied human beings,” and, as bodies, “material entities.” See DONALD MACKENZIE, *MATERIAL MARKETS: HOW ECONOMIC AGENTS ARE CONSTRUCTED* 3 (2009). Even though MacKenzie’s work focuses on players in the construction and operation of financial markets, the insights he brings to the material composition of the mode of work and the effect on how “embodied human beings” use available conceptual framing of economic models and resources created by technology and social organization of their work to simplify a complex task is relevant to understanding the production of legal opinions about corporations. See *id.* at 2–3. While some argue, see Macey *supra* note 171, that the predictability of Delaware opinions, such as *Disney*, shows that the Delaware legal system is designed for starkly instrumental motives to enrich Delaware lawyers, the way that judges are embedded in a material and conceptual world for producing legal text about corporations may be a more realistic way of understanding the resultant writings. Some recent writings have suggested that the U.S. Supreme Court could be “rigged” to ensure an enduring ideology by altering the environment in which the justices are embedded, as by taking away the ability of the justices to choose their clerks, making the clerks a collective body independent of the justices. See, e.g., David S. Law, *How to Rig the Federal Courts*, 99 GEO. L.J. (forthcoming 2011).

186. MACKENZIE, *supra* note 185, at 2.

187. *Id.* at 22.

188. *Id.* at 16.

189. *Id.* at 2–3. Indeed, recent proposals have been aimed at altering the material circumstances by which the Supreme Court is able to produce the sort of “public facts” that long and elaborate opinions become. See Law, *supra* note 185. The theory of Supreme Court decision-making has taken a turn toward the sociological, perhaps without overt recognition of the tie to work by sociologists of finance.

190. See, e.g., Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author,”* 17 EIGHTEENTH-CENTURY STUDIES 425, 426 (1984) (arguing that the author is but one of many craftsmen who produce written works and is not a solitary genius but part of a large, ongoing collaboration to produce texts). Roe imagines the instrumentalist factor in somewhat softer language than one often sees in law and economics analysis: “The revisionist view pushes us to consider how free Delaware is to act. Where and when would it come up against boundaries, punishments, and adverse consequences? When do other states (and Washington) constrain Delaware?” Roe, *supra* note 182, at 125.

responding to a stream of new writings, and doing it in an institutional setting with editorial constraints and rich resources consisting of the input from evolving corporate problems. These constraints and resources produce official writing that does not become what Emerson disdained as “the limestone condition,” or marble, which, he explained, is “crystallized limestone.”<sup>191</sup> The claims that Delaware doctrine is indeterminate, because the application by the Delaware courts to new facts is so subtle and variable, might be seen as judicial guile meant to make the litigation process remunerative for Delaware, but it also can be understood as the way any intense reader would shape the malleable material that is the emerging text. The writing of an emerging Delaware text is not the sole ownership of Delaware judges but the common cultural enterprise of any intense reader who might undertake to write the text as he reads it. The premises of adjudication nominate the Delaware judiciary as the editorial source of the particular text emerging from the collisions of major public corporations; the usual unanimity that the Delaware Supreme Court achieves suggests that the editorial task is not one of free authorial control, but of cultural production that mixes writers’ impulses to read and “convert”<sup>192</sup> existing text to a form reshaped by reading, together with institutional editorial constraint. The work in the Delaware Court of Chancery, by sole judicial authors sometimes said to write too much, settles into the writer’s calling more fully, issuing works that try out ideas and phrasings for public consumption when they are not yet a “finished product.”<sup>193</sup>

### C. *Texting Good Faith*

One writer has suggested an “oscillation” in an “underlying rhetorical structure of corporate law”<sup>194</sup> that is affected by “the world outside the courtroom—specifically, the context of crisis or calm and the relative threat of migration [to another state] or preemption [by federal law].”<sup>195</sup> He specifically suggests that the idea of good faith comes to the fore during crisis and fades away in periods of calm. Professor Griffith thus directs attention to the rhetorical content of corporate law, or “the text” in my preferred phrase, and suggests that an outside, broad context helps to shape the text of corporate law in Delaware judicial opinions. Despite his focus on rhetoric, which is fed by a large body of text, this commentator explains rhetorical flux with tactical considerations relating to the welfare of Delaware as a corporate law forum. In thus offering an instrumental view of the creation of the text as a product, he directs attention away from its own internal form, fed by the voices of law and equity, the

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191. 10 RALPH WALDO EMERSON, *THE COMPLETE WORKS OF RALPH WALDO EMERSON* 564 (Centenary Edition, Houghton Mifflin Co. 1903) (1883).

192. *See generally* RICHARDSON, *supra* note 86 (describing the writing process as an outgrowth of reading, extending, and reshaping existing texts).

193. *See id.* at 39. “Form for Emerson is always secondary, always provisional, always only in the service of the emerging thought.” *Id.* at 38.

194. *See* Sean Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 *DUKE L.J.* 1, 6, 9 (2005).

195. *Id.* at 8.

stray materials lying about in the work product of the court,<sup>196</sup> the expansive cultural legacy of writing and reading, and the effects of ongoing active readership on text.

Without indulging in naïveté about the task facing a Delaware judge, one might nonetheless suggest that the readership that feeds their writing is much richer in content than the political prognostications brought to their reading room by financial crisis or corporate scandal. Assuredly, Delaware cares about threats to its franchise.<sup>197</sup> But setting forth in the sea of text in which any erudite writer swims means responding to the facts and arguments in a given case and then writing an opinion that uses a vocabulary that is a heritage of a wide readership tradition, with influences emanating from contemporary cultural forces and concerns.

Thus, to turn, simply for illustration, to the judicial texts created by the collaborations of the Delaware Court of Chancery, we find Chancellor Chandler suggesting that “greed, hatred, lust, envy, revenge, . . . shame or pride” can be sources of acting in bad faith, and even “sloth” could be a source of bad faith<sup>198</sup> and seeming to cite Chancellor Strine, although the quoted material is not present in the cited source.<sup>199</sup> The characteristics listed hit five of the seven deadly sins: greed, lust, envy, pride, and sloth. Hatred seemingly is a version of wrath, making for an enumeration of six deadly sins, omitting only gluttony from the textual treatment of possible

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196. See *supra* notes 192–94 and accompanying text.

197. See Lawrence A. Hamermesh, *The Challenge to Delaware’s Preeminence in Corporate Law: Federal Interference May Not Pose the Greatest Danger to the State’s Future Success*, 27 DEL. LAW. 8, 11 (2009) (concluding, after expressing concern about threats to Delaware’s preeminence in corporate law that “the economic benefits to Delaware of its corporate law system require ongoing maintenance of its public company base, particularly companies that pay the maximum franchise tax”). Hamermesh is a leading academic expert on Delaware corporate law and one of the Co-Authors. See Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1751 (2006) [hereinafter, *Policy Foundations*] (describing himself as “someone actively involved both as an advocate in corporate litigation and, in the last eleven years, in the formulation and ongoing amendment (and nonamendment) of the Delaware General Corporation Law”).

198. See *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 754 n.454 (Del. Ch. 2005) (quoting *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003). The citation is defective. The *Disney* opinion purports to quote *Guttman* from note 34, but when the reader arrives at *Guttman*, the quote isn’t there. One wonders if Strine is in the literary subconscious of the Chancery Court and its clerks as someone who might well write about the seven deadly sins. Collaborations involve imitation, even imitation based on mistaken attributions.

199. See *Guttman*, 823 A.2d at 506 n.34. The material, except for the reference to sloth, is in fact drawn from *RJR Nabisco*:

Greed is not the only human emotion that can pull one from the path of propriety; so might hatred, lust, envy, revenge, or, as is here alleged, shame or pride. Indeed any human emotion may cause a director to place his own interests, preferences or appetites before the welfare of the corporation. But if he were to be shown to have done so, how can the protection of the business judgment rule be available to him? In such a case, is it not apparent that such a director would be required to demonstrate that the corporation had not been injured and to remedy any injury that appears to have been occasioned by such transaction?

*In re RJR Nabisco, Inc. S’holders Litig.*, No. 10389, 1989 WL 7036, at \* 15 (Del. Ch. Jan. 31, 1989)

corporate sin. Somehow these sins invaded the Chandler text without a clearly cited source in a case, though the citation purported to draw upon a previous opinion.<sup>200</sup>

In a recent Chancery Court opinion involving a limited partnership, the court begins the opinion with a brief exegesis on a variant of business sin:

This case underscores the reality that it is not only greed that can inspire disloyal behavior by a business fiduciary. In fact, when a business fiduciary lives a plush and comfortable life, derived from substantial distributions from family trusts, he can afford to place other considerations—such as the achievement of a personal dream, a desire to prove himself as an entrepreneur and to call himself a CEO, or a stubborn refusal to admit failure—ahead of the prudent pursuit of maximum profit, having a silk-sheeted safety net to fall back upon.<sup>201</sup>

Much analysis of Delaware corporate law has focused on assessing the efficiency of the process that produces the resulting judicial writings and the efficiency of the writings themselves as a generator of further textual development through exposure of corporations to their authority. Such analysis offers either empirical defenses of Delaware law based on findings of a favorable pricing equilibrium or criticism of the law as containing inefficiencies motivated by the extraction of rents from corporations incorporated in Delaware.<sup>202</sup> This form of analysis has intellectual appeal and a degree of explanatory power, but only at a level of abstraction that avoids details about the activities engaged in by those who produce the actual product classified for economic assessment as a set of outcomes and costs.<sup>203</sup>

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200. MacKenzie describes a process of production in which an “actor” is a “hybrid collective” consisting of human beings and their tools. See MACKENZIE, *supra* note 185, at 20 (citing writers on a *semiotics of materiality*). While MacKenzie does not focus on glitches, or errors, it is logical to associate the work of a hybrid collective, which for courts is the judges, the clerks, the bound volumes, the electronic compilation of cases, with the possibility of mis-attribution of specific sources, occurring in a process in which there is not a single human actor but an “assemblage” consisting of humans and machines. In a court system rich in textual materials, the product predictably contains signs of these texts contained within the workings of the hybrid collective.

201. Venhill Ltd. P’ship v. Hillman, 2008 WL 2270488, C.A. No. 1866-VCS, at \*1 (Del. Ch. June 3, 2008).

This is a clear case of fiduciary disloyalty. Although Howard’s motives were not financial enrichment, they were personal. He preferred the continuation of his hobby and let a stubborn sense of pride and an unwillingness to admit error come ahead of his duties to Venhill. Howard knew he was injuring Venhill to benefit his personal interest in continuing Auto-Trol as a hobby. That is, Howard did not act in the good faith pursuit of Venhill’s best interests, as he was bound to do. Instead, he acted in bad faith by impoverishing Venhill in order to keep Auto-Trol afloat for personal reasons unrelated to Venhill’s own best interests.

*Id.* at \*30.

202. See generally Daines, *supra* note 183 (finding, using controls for other factors, that Delaware firms enjoy higher value than firms incorporated elsewhere). See also Macey & Miller, *supra* note 171 (concluding that, as a result of “first mover” advantages, Delaware is able to charge “quasi-rents” that are apportioned among in-state interests).

203. See Hamermesh, *Policy Foundations*, *supra* note 197, at 1750 (“To someone from Delaware who has had firsthand involvement with that lawmaking process, these accounts—largely from observers whose

It is to be expected that the study of corporate law would point many analysts toward the bottom line, yet it seems possible that even in corporate law, operationalizing the bottom line in terms of stated measurable outcomes is eventually unrewarding for readers of legal doctrine, or anyway, a pursuit that exhausts its explanatory power without conferring all the nourishment one might seek. It is worth noting that studies do not converge. Moreover, I am not suggesting that legal insiders make choices for their own preferences over the economic interests of clients, another form of pursuing an answer in a monetizable bottom line; I am suggesting that the dispersion of editorial sites, where many kinds of lawyers contribute time and effort to projects such as nonprofit corporate codes, indicates a professional immersion and pervasive interest in the texts that create or explain corporate law. Notions of text as something “woven”<sup>204</sup> are relevant.

Returning to “good faith” and its elaboration in *Caremark*, a textual affirmation that writes into the infrastructure of the corporation the respect for other authoritative texts is a natural use of text about the corporation and a useful place to revive and celebrate the idea of corporate citizenship. Corporate citizenship demands recognition in critical legal texts, because of the stress placed on its reader reception through the granting of perpetual duration, the ending of constraints on corporate purpose,<sup>205</sup> and the movement to enabling law rather than regulatory regimes.<sup>206</sup> Thus, ALI section 2.01(b)(1) states that a corporation “[i]s obliged, to the same extent as a natural person, to act within boundaries set by law,” even if “corporate profit and shareholder gain are not thereby enhanced.”<sup>207</sup> It is a natural extension of the body of corporate text in a system that licenses corporations to operate on premises of corporate self-interest that, if unlinked to textual refinements placing a gloss on the corporation as mediated by our common texts, would (and does) threaten the understanding that the corporation is imbedded in these common texts and thus in our common culture.

## VI. CONCLUSION

While corporate law produces wins and losses and thus is not the same as literature, it nonetheless functions as text and invites a dynamic relationship with its most engaged readers. The Delaware courts act in the sense of issuing orders that allocate rights to economic actors in individual cases, but they also engage in an editorial enterprise that carries a large significance without specific reference to case outcomes, either singly or in overall effect. Thus, the whole set of questions about a

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involvement is to some degree more remote—resemble the pronouncements of space explorers on missions to describe life forms on an alien planet.”).

204. E-mail from Robert Scholes, Research Professor of Modern Culture and Media at Brown University, to narrative-l@georgetown.edu (Aug. 17, 2010, 11:46 AM) (quoted with permission) (“The word ‘text’ comes from *texere*, to weave. Texts are made of signs. Letters are just one kind of sign. Images are another.”).

205. See *supra* notes 82–86 and accompanying text.

206. See CONARD, *supra* note 3, at 13.

207. AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(b)(1) (1994); see DOOLEY, *supra* note 166, at 282.

text—the means of its production and its functioning as text—is rightly a focus of interest and analysis. The figure of the reader helping to sustain a common editorial enterprise draws attention to a conception of law-making in which text has a power over the writing of legal materials by the means of the form of existing text and the culture of readers and writers that it both draws upon and fosters.

Delaware law is an editorial site of particular value for the creation of corporate law as text commanding a wide readership. Competitive federalism is not sufficient to account for the form and content of Delaware law. Rather, the engagement of a community of readers is a large factor in the creation and influence of Delaware law. If it were supplanted by federal corporate law, it is not clear that the audiences embedded in corporate legal text produced in Delaware, and contending over time for its interpretation and recovery, would recreate a comparably rich collaboration of readers and collective authors.