

SOFT LAW, RISK CULTURES, AND LAW ABIDINGNESS: THE *CAREMARK* CONNECTION

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As Vice Chancellor, Chancellor, Chief Justice, and recidivist law review author, Leo Strine has had much to say about the often-frustrating effort at corporate behavior modification. One point he makes very insistently is that pursuant to their state-granted charters, corporations are authorized to take part only in *lawful* business, not any profitable business. Respect for life-giving law is thus a necessary corollary of good corporate citizenship. But good citizenship is so hard to instill, which irks him. An angry display of this is Strine’s Delaware Supreme Court dissenting opinion in *City of Birmingham Retirement System v. Good*,¹ involving Duke Energy’s shameless toxic chemical dumping, which led to large penalties. In contrast to the usual *Caremark* claim that the board unwittingly facilitated legal wrongdoing by not putting into place a monitoring system to stop it,²

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1. *Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47 (Del. 2017).

2. The seminal case is *In re Caremark Int’l S’holder Litig.*, 698 A.2d 959 (Del. Ch. 1996). In that context, the potential liability for breach of fiduciary duty depends on a showing that the directors of the corporation acted in bad faith by deliberately doing little or nothing

here plaintiff charged knowing complicity by the board with efforts to conceal and continue the wrong, in cahoots with allegedly corrupt state regulators. Defendants sought dismissal for failure of the plaintiff to make demand on the board, which as the case law had developed, required particularized facts giving rise to a doubt that most of the board members had reason to fear unexculpated liability. The majority read the factual allegations as falling short of bad faith or willing acquiescence and dismissed the case under the demand-required rubric. Believing instead that there was enough evidence for this stage of the proceeding, Chief Justice Strine made his feelings amply known:

It may be that after the daylight of discovery shines for some time, the rancid whiff that arises from the pled facts dissipates and turns into the bracing freshness of a new Carolina day. But, without that, the off-putting odor will linger and so too will rational suspicions that the defendants caused the smell.³

My contribution to this festschrift focuses on the cultural dimension to both the commission and prevention of corporate crime and the judicial response in *Caremark*-type cases, inspired by some of Strine's recent post-judicial writings. Corporate case law in Delaware exhibits something of an acoustic separation between holding and dicta, so that judicial opinions frequently chastise the officers and directors charged with wrongdoing even as they make amply clear that no punishment will be handed out. Mel Eisenberg offered up this observation long ago,⁴ and Ed Rock famously elaborated on how the shaming function of this judicial rhetoric works,⁵ via morality tales in the cases before it that call out the greedy and the disloyal. The assumption is that lawyers gather, interpret, and then impart these narratives to their clients, which generates normative improvement in

to put in place a system of compliance monitoring. Variations on *Caremark* involve claims that the board failed to act appropriately in the response to evidence of a compliance failure (red flag cases), or—worse—knowingly acquiesced in and thus contributed to unlawful behavior. *Birmingham Retirement & Relief Systems v. Good* was the latter kind of case. For an excellent recent survey, see Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 WASH. U.L. REV. 1857 (2021); see also Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013 (2019).

3. *Birmingham*, 177 A.3d at 69 (Del. 2017).

4. See Melvin A. Eisenberg, *Are All Risks Created Equal? Rethinking the Distinction Between Legal and Business Risk in Corporate Law*, 62 FORDHAM L. REV. 437 (1993).

5. Edward Rock, *Saints and Sinners: How Delaware Corporate Law Works*, 44 UCLA L. REV. 1009 (1997); cf. David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001).

corporate governance. This is a form of “soft law.”⁶

I have never been quite convinced that soft law works as neatly or as frequently as just described. But I do believe that judges who take advantage of this separation want to be in a cultural conversation with the lawyers reading the cases as to their own spheres of influence, taking advantage of the distinctive norms of the legal profession and (crucially) lawyers’ realization that the indeterminate nature of Delaware corporate law found in both holdings and dicta is an immense and profitable privilege. They listen, carefully, even to dissents. Judges with the right reputational capital can stay settled in this role even after retirement. This is one source from which soft corporate law emerges—aspirational demands not legally enforceable (or above and beyond the legally enforced).

My essay takes as a start Strine’s insistent attitude toward law-abidingness in corporate law and corporate governance as expressed in two recent law review articles. The first (written with two junior co-authors) is *Caremark and ESG, Perfect Together*,⁷ which sends a very clear-sounding message on the connections among law, ethics, and social responsibility. In the second, Strine has collaborated with my colleague Chris Brummer on *Duty and Diversity*, to address the fraught subjects of diversity, equity and inclusion in corporations. Both articles draw from a mutually reinforcing mix of hard and soft law.⁸ Both also invoke “culture” as playing a key explanatory role but stop well short of explaining how or when. So, my contribution here is to move the study of corporate culture a few steps forward by showing its ability to frustrate messages of law-abidingness in many corporate settings.

The expressive power of soft law is open to question for many possible reasons. Judges, scholars, and others interested in corporate crime have offered many explanations, most tending toward conventional agency costs, which implies some kind of *in personam* greed or corruption that sneers at voluntary compliance. An alternative of increasing academic and practical interest is a cultural explanation: the presence of a deeply-rooted belief system that somehow deflects or distorts compliance messages to weaken internal legal controls and restraints. While that seems to be a difference of

6. Specifically on *Caremark*, see Claire Hill, *Caremark as Soft Law*, 90 TEMPLE L. REV. 681, 682 (2018). The author of the *Caremark* opinion, the legendary Chancellor William Allen, explored the idea in an article of his own, *Realigning the Standard of Review of Director Due Care with Delaware Public Policy*, 96 NW. U. L. REV. 449 (2002).

7. Leo E. Strine, Jr. et al., *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient Caremark and EESG Strategy*, 106 IOWA L. REV. 1885 (2021).

8. Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1 (2022).

opinion between economists and sociologists, that methodological distinction has all but collapsed. As put in a recent paper on corporate cultures by economists Gary Gorton, Jillian Grennan, and Alexander Zentefis, the agency cost paradigm “ignore[s] the possibility that managers are essentially well-intentioned people operating in a complex and uncertain environment.”⁹ While cultural accounts are notoriously hard to test rigorously, economists like Gorton et al. have made fascinating progress in that direction. To focus in, this essay addresses what we are learning about the nature and source of so-called “risk cultures,” i.e., those with norms celebrating aggressive risk-taking and denigrating the appearance of excessive caution. Shifting from greed to risk perception as a way of understanding some kinds of corporate cultures require different ways of structuring and communicating legal messages, which will bring us right back to Strine and his soft law messaging.

I. RISK CULTURES

In the social science literature, there is no end to squabbling about the nature or essence of culture, corporate or otherwise. Eric van den Steen defines corporate culture as “the degree to which members have similar beliefs about the best way of doing things,”¹⁰ which is as good a starting point as any. In sociology and anthropology, there is no necessary function played by cultural artifacts and institutions; often, they generate false normative belief-systems (e.g., shareholder primacy) to perpetuate power imbalances. In contrast, as economists like Van den Steen have warmed up to corporate culture as a useful construct, they have naturally sought causal relationships back and forth between culture and success (or failure), or in the longer run, perhaps, between culture and survival (or demise). As Gorton et al. stress, one move among economists is informational and explanatory:

9. Gary B. Gorton, Jillian Grennan & Alexander K. Zentefis, *Corporate Culture 2* (Nat'l Bureau of Econ. Rsch., Working Paper No. 29322, Oct. 20, 2021), https://www.nber.org/system/files/working_papers/w29322/w29322.pdf [<https://perma.cc/WV6V-RP8P>]; see also Quentin Dupont & Jonathan Karpoff, *The Trust Triangle: Laws, Reputation, and Culture in Empirical Finance Research*, 163 J. BUS. ETHICS 217 (2020); Edward Rock & Michael Wachter, *Islands of Conscious Power: Law, Norms and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619 (2001). I have emphasized this in much of my work. E.g., DONALD C. LANGEVOORT, SELLING HOPE, SELLING RISK: CORPORATIONS, WALL STREET AND THE DILEMMAS OF INVESTOR PROTECTION 40–42 (2016); Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933 (2017); Donald C. Langevoort, *Opening the Black Box of Corporate Culture in Law and Economics*, 162 J. INSTITUTIONAL & THEORETICAL ECON. 80 (2005).

10. Eric Van den Steen, *Culture Clash: The Costs and Benefits of Homogeneity*, 56 MGMT. SCI. 1718, 1718 (2010).

corporate cultures generate the kind of coherence in interpreting competitive conditions that make coordinated strategic behavior more likely. Another is motivational: those same beliefs become shared, they can encourage the trust, optimism, and entrepreneurial spirit that make competitive success more likely, or the bickering, pessimism, and risk aversion that make it less likely.¹¹ On average, the former is more likely to be rewarded in competitive markets, the latter punished. But reality doesn't always yield the expected.

As to compliance with law, the causal connections are especially complicated. To be sure, cultures heading toward failure can incite law-breaking born of fear, anxiety, and anger—the infamous “last-period problem” in conventional principal-agent accounts of economic behavior. However, of just as much interest are adaptive cultures that promote success in hyper-competitive settings, both internally and externally. It turns out that many of the cognitive behaviors that executive recruiters covet (confidence especially, and quick competitive arousal) are risk factors vis-à-vis compliance. Not surprisingly, some of the worst compliance shocks arise in firms that were on a steadily accelerating success trajectory, only to hit a sudden reversal—finding themselves facing adversity (whether the world yet knows about it) within a firm culture primed to deny failure. That includes Enron, WorldCom, Wells Fargo, and so many others.

In their very helpful survey of the contemporary economic approach to corporate culture, Gorton et al. highlight risk cultures, i.e., how taste for risk emerges and grows stronger or weaker over time. (Many of the studies they feature arise from the great financial crisis of a decade ago, with immense variation in the risky behaviors of different financial institutions). Their main claim is that risk-taking is observed in the field in ways that cannot be explained empirically by normal economic incentives, which they thus attribute to culture.¹² Such cultures necessarily generate attitudes about how to construe risk and value or devalue aggressive risk-taking.

How do such risk cultures take root and grow? Consider briefly four possibilities:

11. See Luigi Guiso et al., *The Value of Corporate Culture*, 117 J. FIN. ECON. 60 (2015); Donald C. Langevoort, *The Effects of Shareholder Primacy, Publicness, and “Privateness” on Corporate Cultures*, 43 SEATTLE U. L. REV. 377 (2020).

12. The paradigmatic kind of correlation is between executives' taste for thrill-seeking and the incidence of wrongdoing at the corporate level. See Robert Davidson et al., *Executives' “Off-the-Job” Behavior, Corporate Culture, and Financial Reporting Risk*, 117 J. FIN. ECON. 5 (2015). Other traits that match up with risky or conservative corporate level choices include religious orientation, political affiliation, geography, marital infidelity, and age, among others.

A. Founding Narratives about Risk

Like institutions in so many settings, corporations have foundation stories, often mythical, about how they came to succeed (the failures having fallen out of sight and mind). The lessons of the founders are handed down through group rituals and ceremonies and become path dependent as new leaders and followers are recruited in the image of those who came before.¹³ Courage, persistence, aggressiveness, and the like tend to constitute the content of these narratives. These understandings become performative, and when successful become celebrated as proof-text for the validity of the internal norms, while failures are rationalized away.

B. Risk Selection

This is key: risk is, on average, rewarded. To be sure, the aggressive risk-taker has a higher chance of failing as well, but spread over many iterations, there will be lucky (or skilled) people who take credit for a run of successes, and gain power and influence as a result. They survive and prosper to tell their stories, while the losers disappear. A great deal of work in psychology points to the adaptive nature of this bias, on an individual and group level. Winners gain self-confidence (often, overconfidence), which enhances their motivation; gain followers by being evangelists for risk-taking; and display traits that become self-fulfilling, making them more persistent, persuasive, and influential as they climb the corporate ladder.

C. The Neuroscience of Collective Risk-taking

Competitive arousal is a well-studied phenomenon in the willingness to take risks, giving positive hormonal feedback and prompting further aggressiveness that makes success more likely.¹⁴ The winners generate their own myths, ones that often tie back to older foundation mythology. New hires to the firm—and those promoted—will tend to resemble and then reinforce the risk attitudes embedded in the prevailing interpretations. The tribal initiation rites and bonding experiences common in so many businesses help spread the beliefs.

13. See Edgar Schein, *The Role of the Founder in Creating Organizational Culture*, 12 *ORG. DYNAMICS* 13 (1983).

14. Deepak Malhotra, *The Desire to Win: The Effects of Competitive Arousal on Motivation and Behavior*, 111 *ORG. BEHAV. & HUM. DECISION PROCESSES* 139 (2010).

D. Risk Networks

All the foregoing combines to gradually shift power to the winners in the corporate promotion tournament, which powerful cultural consequences. As like-minded persons gain power, they reinforce the beliefs about risk and serve as gatekeepers to preserve and propagate those attitudes. Todd Haugh offers an interesting account of the Wells Fargo scandal and the emergence and movement of a network of key players who ultimately created the opportunities for the illicit practices to grow out of control.¹⁵

None of the foregoing predicts endless success for any business enterprise. But for a time, and with luck for quite a while, aggressive risk cultures can be very powerful and success-inducing, especially in good times when negative feedback happens less frequently. Of course, there will also be times when conservatism is rewarded (again, as a result of skill or luck) and becomes part of the firm's belief system. But the competitive rewards in terms of the trappings of success—which have their own cultural valence—will be more salient in boom times.

E. Cultural Filtration

The point so far is that *some*—by no means all—cultures validate risk-taking in a powerful way, enabling and giving legitimacy to aggressiveness, shunning caution. This is both perceptual and normative. Displays of confidence build on traits that diminish risk perception, instilling a genuine sense of control that makes a risky action seem justifiable. “Groupishness” primes the organizational audience to applaud the successes and demand more.¹⁶ Threats to the culture are resisted.

These shared beliefs about risk can be functional whether accurate or not. Imagine a culture of caution, fed by anxiety, doubt, and paralysis. Getting consensus on forward-looking action is more difficult; motivation thus diminishes. The opposite is, though not all the time, competitively fit if for no other reason its ability to push aside the negativity. Gorton et al. cite survey evidence that executives recognize these alternative directions and worry more about too *little* risk-taking embedded in the culture than too much.

15. See Todd Haugh, *The Power Few of Corporate Compliance*, 53 GA. L. REV. 129 (2018) (discussing the Wells Fargo scandal and the key players who created the opportunity for the illegal practices to grow).

16. See Jesse Kluver et al., *Behavioral Ethics for Homo Economicus, Homo Heuristicus, and Homo Duplex*, 123 ORG. BEHAVIOR & HUM. DECISION PROCESSES 150, 154 (2015) (discussing ethical behavior in organizations).

II. LEGAL RISK TAKING

This last section was intentionally written to be generic about the kind of risk being taken—risk cultures are hardly the only form of corporate culture—though hopefully I’ve shown why they might be especially strong. Now it is time to bring Leo Strine back on stage and return to *legal* risk. In risk cultures, is legal risk just another form of risk deserving of the same attitudes (aggressiveness, etc.), or distinctive in terms of nature and appropriate policy?

The standard legal response is exceptionalism, as Chief Justice Strine forcefully insisted in his dissent in *City of Birmingham*. Intentional law-breaking of any sort is *ultra vires*, with no business judgment excuses. *Caremark* extends this to an obligation for boards to take legal risk seriously even without current awareness of actual illegality, and its sibling application focuses the duty (though still leaving it as a bad faith inquiry) when there are red flags waiving in directors’ faces. Business risks—even large ones that put an entire company at risk—do not get the same treatment. Other corporate law scholars have grappled with the nature and consequences of this exceptionalism. Elizabeth Pollman set the contemporary argument in motion by assessing the rule of law in firms that deliberately shun forms of law-abidingness in the name of creative destruction;¹⁷ a work-in-progress by Gideon Parchomovsky and Adi Libson develops an elaborate version of how the distinction between legal risk and business risk (and the law’s demands thereto) could be made even more imperative;¹⁸ and Jennifer Arlen and Lewis Kornhauser critique the idea that expressive law can substitute in any meaningful way for forced law-abidance. And this is just a sampling. There are significant scholarly literatures dealing with this dualism in law and society,¹⁹ white collar crime, and professional responsibility research, in turn drawing from psychology, organizational behavior, neuroscience, and finance, among other disciplines.

Few corporate officers or directors would say they disagree that clear legal commands are an imperative, business risk a choice. But the cultural filter may deflect or distort both the perceived definition and legitimacy of

17. See Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709 (2019) (discussing a culture of exceptionalism in work environments).

18. See Gideon Parchomovsky & Adi Libson, *Are All Risks Created Equal? Rethinking The Distinction Between Legal and Business Risk in Corporate Law*, 102 B.U. L. REV. (forthcoming, 2022) (discussing the difference between legal and business risk).

19. Work by sociologists on the diffusion of legal rules inside the corporation are foundational to our understanding of organizational cultures. E.g., Lauren Edelman, *Legal Ambiguity and Symbolic Structures*, 9 ACAD. MGT. REV. 1531 (1992).

law abidingness that brings about individual and group behaviors that treat legal risk more the same than different. It is that to which Strine is reacting so vehemently. There are three main social forces behind the deflection and distortion. The first is legal indeterminacy.²⁰ Law is creative, as is its interpretation. Risk cultures are adept, I suspect, at construing legal demands through the lens of motivated inference, thereby lightening the gray areas.

This, in turn, is abetted by the legal actors who buy in to the risk-taking culture. Both in-house and in law firms, lawyers gain power by stressing the constructive rather than nay-saying part of their advice practice. Consider a “winner take all” promotion tournament among three types of lawyers: aggressive risk-takers, mildly cautious ones, and the risk averse. Over many iterations, the winners (for reasons noted earlier) will likely be the lucky risk-takers, who will appear as more skilled and thus gain power as the game goes on. Because they fit in with the risk-taking ethos already embedded in the culture, they will be the favorites of the non-lawyers who watch with interest, including the corporate leadership.²¹ This bias increases considerably if this competition for status, power, and pay is happening when law—for whatever reason—is underenforced. The payoff to aggressive risk taking is that much larger. Fortune favors the brave, as they say.

A third trope is denigration: the ability of the culture to construe even the more determinate of legal requirements as illegitimate—the work product of self-serving partisan political actors or pointy-headed bureaucrats, for example. This feeds the belief that regulation has little or no moral force, especially if it stands in the way of creative destruction that brings on a better world. Anyone who spends time among influential actors in highly regulated industries soon picks up the subtle cues of a shared belief that law and its enforcement are obstacles, like so many business risks that need a creative work-around. One recent firm memo on compliance caught this point:

Managers and employees may be cynical about the extreme shifts in enforcement policy that seem to change in administration. It’s the ‘I’ve seen this movie before’ attitude that can disincentivize management or employee buy-in. The board should anticipate this cynicism and move vigorously to ensure that the organization’s culture remains committed to ethical conduct and to legal

20. See Yuval Feldman & Doron Teichman, *Are All Legal Probabilities Created Equal?*, 84 N.Y.U. L. REV. 980 (2009) (discussing legal indeterminacy).

21. See Donald C. Langevoort, *Getting (Too) Comfortable: In-house Lawyers, Enterprise Risk, and the Financial Crisis*, 2012 WISC. L. REV. 495 (discussing risk taking behavior and its effect on business clients).

compliance. That may not be an easy task.²²

We have gone this far just to make the same point, and explain why, legal actors—whether legislators, regulators, judges, or practicing lawyers who advise clients—will be frustrated that the messages they wish to impart about law-abidingness do not survive the cultural filter that prizes risk-taking. This is not the first article to make this point, or to delve deeply into cultural or alternative explanations for the distorted (but probably genuinely believed) rejection of legal exceptionalism to the larger category of business risk-taking. But it does get us back to *Caremark* and Strine’s frustration, which we can now take on directly.

III. THE *CAREMARK* CONNECTION

In the *Caremark*/ESG article cited earlier, Strine connects the dots among three main ideas: (1) the imperative of obedience to the law, in letter and spirit; (2) *Caremark*’s basic oversight requirement; and (3) the ESG (or stakeholder protection) movement in corporate governance. The first is what we have been addressing, for which a system should be in place that seeks ethical commitment as a precautionary device:

Think about it this way. If directors are seeking to go beyond the legal minimum and to treat all the corporation’s stakeholders and communities of impact in an ethical and considerate manner, the corporation is by definition minimizing the risk of breaking the law. . . . [T]he corporation will have a margin of error that keeps it largely out of the legal grey and create a reputation that will serve the company well with its stakeholders and regulators when there is a situational lapse.²³

An exemplary *Caremark* system is the means to a system that faces up to this combination of legal and ethical demands, which is fostered by having a board of directors and board committee structure with the expertise to integrate ESG data collection and compliance oversight with genuine law abidingness.

This is an ambitious charge; our task here is to identify the justification for it and to think through its likely efficacy in a high risk-taking corporate culture. Here, we come back to the acoustic separation—this is *far* more

22. Michael Peregrine, *Directors Challenged to Respond to New DOJ Corporate Fraud Initiative*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 13, 2021), <https://corpgov.law.harvard.edu/2021/12/13/directors-challenged-to-respond-to-new-doj-corporate-fraud-initiative/> [<https://perma.cc/G9BK-FD43>] (discussing the new DOJ corporate fraud initiative).

23. Strine et al., *supra* note 7, at 1909.

than the *Caremark* line of cases demands in terms of actual liability threat to officers or directors. Doctrinally, the legal standard here is good faith in seeking what is best for the corporation and its shareholders, which connotes a subjective attitude of loyalty and due concern on the part of the board. Here, is the same idea expressed by Strine and Brummer:

From this standpoint, corporate law’s fiduciary duty of compliance is not only important as a matter of ‘hard’ law enforced by the threat of corporate and personal liability. It also defines as normative “soft” law what fiduciaries are expected by corporate law to do, legal expectations that go beyond what fiduciaries can be held liable for in damages and that require them to protect the corporation from the financial, management, and reputational consequences that come when a corporation fails to comply with critical legal duties. . . .²⁴

Because of the minimal hard law risk, most of the force here is aspirational and thus presumptively weaker. Nothing in the more recent *Barnhill*²⁵ revision to the *Caremark* doctrine raises the personal liability risk all that much, even as it adds the insistence that boards demand to be notified promptly of all legal red flags associated with corporate functions that are “mission critical.” Indeed, there is a largely concealed message that cuts the other way. The recent *Boeing* case is probably the Delaware courts’ most assertive application of the duty of good faith regarding mission critical activities,²⁶ settled in November 2021 for an eye-popping \$227.5 million. When announced, the accompanying media coverage indicated this sum was to be paid by the directors and the D&O insurer.²⁷ Soon, however, perhaps because some lawyer melted down upon sensing the half-truth, the reference to the directors having to pay disappeared. I have little doubt that the director culture understands that this is a no-threat doctrine, which may be a more salient message to them than anything else in the *Caremark* doctrine.

So, we turn to the soft or expressive power of a message like the one Strine et al. want to promote. What it is, essentially, is the precautionary principle in *Caremark* (or oversight) garb—in the face of uncertainty about legal demands, be cautious. This puts ethics to work as the basis for the “margin of error” they want to build into the system of internal legal controls.

24. Brummer & Strine, *supra* note 8, at 7.

25. *Marchand v. Berryhill Inc.*, 212 A.2d 805 (Del. 2019).

26. *In re Boeing Co. Deriv. Litig.*, 2021 WL 4059934 (Del. Ch., Sept. 7, 2021).

27. Linda Chiem, *Boeing Board Inks \$238M Deal to End 737 Max Derivative Suit*, LAW360, (November 5, 2021, 10:12 PM), <https://www.law360.com/articles/1438180/boeing-board-inks-238m-deal-to-end-737-max-derivative-suit> [<https://perma.cc/H7ZJ-PE2W>].

But a deeply felt risk culture wants no part of such reticence, and is ready to denigrate, filter, or distort the message to protect the chosen way of seeing things.

This relates to a commonplace idea in the world of compliance controls, well beyond *Caremark* and the duty of good faith. It is often said that good compliance begins with the right “tone at the top,” even if tone is necessarily a soft strategy. And it is correct in one sense: that a cynical or garbled tone at the top will be destructive to both compliance and ethics. But the converse does not follow. A good tone rings hollow if at odds with the prevailing risk culture.

IV. DIVERSITY IN CORPORATE GOVERNANCE

In separate work cited earlier, Strine has extended his thinking about governance to the essential issue of diversity along multiple dimensions. This is a hot topic, with social, political, and economic (empirical) controversy about both hard and soft strategies to alter discriminatory corporate power structures. A short essay like this cannot be comprehensive in engaging the subject. Suffice it to say that Strine and Brummer make an extensive argument that there is a duty of loyalty basis for saying that attention to diversity and inclusion is required, much of it in the soft law sense:

As a matter of fiduciary duty, therefore, corporate leaders not only have broad authority to promote an inclusive and diverse corporate culture, their affirmative obligation to act in the best interests of the corporation can be understood to *require it*, given the important legal requirements for corporations to avoid invidious discrimination and growing societal and investor expectations that business will contribute to reducing racial and gender inequality.²⁸

They are using the word “require” not in the sense that the law will punish the leaders for failing to take such affirmative action but rather as a claim that the dangers facing a corporation that fails to do so is so great that a fiduciary complicit in that failure should be ashamed even if he or she finds the solution to any litigation personally painless. It invites criticism that should be voiced loudly and openly, without mincing words, as in the *City of Birmingham* dissent.

The risk culture idea developed earlier has some purchase in understanding the current controversies as well. One of the tricks that cultural filters play is to reframe issues in ways that cohere with preferred

28. Brummer & Strine, *supra* note 8, at 5.

beliefs; if openness to risk is embedded in the culture, then—perhaps unconsciously—the corporate belief system will interpret board and executive diversity initiatives as a proxy for risk preference reform. There is a large literature about different risk-taking preferences along racial, ethnic, gender, and other lines, the lessons from which are quite complicated.

To be sure, there is more to the story than a taste for risk. Any culture driven by competitive arousal is bound to have second-order effects on gender discrimination and patriarchal power structures. A recent finance paper adds texture by seeking to correlate the incidence of employment discrimination lawsuits with a variety of potential explanations, including corporate governance, changes in firms' competitive environment, governance strategies, and financial resources.²⁹ The rate of litigation implies much more stickiness in what is driving the apparent steady incidence of discrimination, which the authors ascribe to corporate culture and its reinforced beliefs about privilege.

V. CONCLUSION: CULTURALLY ASTUTE LAWYERING

Leo Strine's insistence on a strong norm of law abidingness—letter and spirit—may seem natural and normal to many, especially those deeply acculturated into the legal profession's belief system, but it is not. In corporate cultures, the prized norm is more likely to embrace bold, strategic thinking, with a taste for risk. Soft law messages from judges and the like readily become garbled or distorted in too many business settings, if they are heard at all, diminishing any sense of guilt or shame when the law is demoted as a priority. These cultures develop a hard protective coating, hard to break through.

I said at the outset that I doubted that soft law works as well as its enthusiasts think. It is unrealistic to think that busy, driven, businesspeople pay much attention to messages that lack a strong and relatively certain bite, or that the intermediaries who translate hard and soft threats—i.e., practicing lawyers—are particularly good at penetrating the cultures' rationalizations. Yet corporate law finds so many ways to soften the hard threats, creating more a sense of autonomy than the pull of obedience. I find Strine's soft law claims compelling, but those who matter probably never hear them because of the background noise high velocity cultures generate.

29. Casey Dougal et al., *Corporate Discrimination, Competition and Shareholder Wealth* (Nov. 19, 2021) (unpublished manuscript), <https://dx.doi.org/10.2139/ssrn.3967456>; see Vicki L. Bogan et al., *What Drives Racial Diversity on U.S. Corporate Boards?* (Oct. 29, 2021) (unpublished manuscript), <https://dx.doi.org/10.2139/ssrn.3952897> (evaluating an empirical assessment of progress or lack thereof in racial diversity).

Of particular concern is law's legitimacy, which is easy for lawyers to assume but is challenged regularly in corporations as biased, ill-conceived, and undeserving of respect, leaving only fear if there is really something to worry about. And often enough, corporate lawyers and lobbyists can make the worries go away, leaving little left to gain their attention or tug on their consciences. Lawyers acting as counsellors give in, and give up, unless they have a hard threat to dangle in front of directors and senior executives.

This is a familiar lament, I realize. Inevitably, there is some matching going on, so that lawyers chosen by corporations with a risk-taking or diversity-averse orientation come willing and able to concentrate their advice on the ideas that are already privileged. But I accept the admonitions of Strine and colleagues that the sands are shifting, and that persistent shortfalls in living up to society's expectations can accumulate into something much more serious than a deferred prosecution agreement or *Caremark*-based derivative suit. To be sure, the evidence is usually mixed, and not every demand for some form of social commitments is well thought through, or unbiased politically or financially. The lawyer as cultural translator should be able to sort things through, with some familiarity with evidence and sources. For too many reasons that can be counted here, perceived performance on social responsibility has financial payoffs both good and bad,³⁰ and a corporation's ability to dissemble about its record lessens in a connected world.

So, there are lessons to be learned for those who are willing to be acolytes for the kind of soft law that fills in the gaps and holes that incompletely formulated or enforced hard law creates. The lessons are about blind spots in corporate cultures, as well as blind spots of our own. Is it naïve to think that there are lawyers out there anxious to try? In fact, there is an ever-growing body of empirical work correlating structural lawyer attributes with client law-abidingness or other public-regarding outcomes, offering interesting evidence of lawyers doing their jobs well, with good outcomes.³¹

30. See Karl Lins, Henri Servaes & Ane Tamayo, *Social Capital, Trust, and Firm Performance: The Value of Corporate Social Responsibility during the Financial Crisis*, 72 J. FIN. 1785, (2017) (discussing the financial payoffs for perceived social responsibility).

31. See Stavros Gadinis & Amelia Miazod, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135, (2019). Two good recent surveys of this empirical evidence are Vikramaditya Khanna, *An Analysis of Internal Governance and the Role of the General Counsel in Reducing Corporate Crime*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 282, 282 (Jennifer Arlen ed., 2018), and Sung Hui Kim, *Do Lawyers Make Good Gatekeepers?*, in THE CAMBRIDGE HANDBOOK OF INVESTOR PROTECTION (Arthur Laby ed., forthcoming 2021).

The cynicism that it isn't worth trying may be what is truly naïve.³²

Moreover, I think that a fleshed-out vision of soft corporate law has intellectual heft and value as well as aspirational.³³ Over the long arc of Delaware law on fiduciary responsibility and the availability of remedies, we seem to be trending downward in insistence on fiduciary virtue.³⁴ The courts' pragmatic explanations are many: concerns about the judiciary's institutional competence, fear of risk aversion, distaste for excessive litigation, the just desserts to shareholders who voted the alleged wrongdoers into office, etc. And as we have seen, these anxieties now extend to potential litigation in a world more open to stakeholder rights and remedies, including law abidingness. If only for the lawyers who transmit the messages into the cultural channel, there is virtue in thinking deeply about what fiduciary obligation and good citizenship should mean shorn of all those protections. The answers may not always be clear, but Leo Strine's writings are good texts for starting that journey.

32. See Donald C. Langevoort, *Gatekeepers, Cultural Captives or Knaves? Corporate Lawyers through Different Lenses*, 88 FORDHAM L. REV. 1683 (2020) (describing how the cynicism towards attorneys trying to do their jobs well is detrimental).

33. See Julian Velasco, *The Role of Aspiration in Corporate Fiduciary Duties*, 54 WM. & MARY L. REV. 519 (2012) (explaining the value a fleshed-out version of soft corporate law can bring).

34. See James Cox & Randall Thomas, *Delaware's Retreat*, 42 DEL. J. CORP. L. 323 (2018) (describing in detail the downward trend in fiduciary duty insistence).