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Abstract

There are too few discussions about race and race relations among corporate managers and directors. The rhetoric used in these infrequent discussions revolves around the idea of diversity in the workplace. In recent years, when speaking about employees and race issues, corporate actors have become curiously silent about discrimination and racism. This Article provides several examples of the rhetorical devices used by corporate spokespersons that ignore persisting problems with discrimination and racism by focusing solely on diversity efforts. Diversity rhetoric allows corporate managers to avoid responsibility for enduring discrimination in the workplace. Diversity efforts, without antidiscrimination efforts, increase the likelihood that the company will be engaged in litigating and mediating disputes about discrimination. This Article explores the potential for improving the discourse about race and racism in the corporate setting in a way that has the potential to transform racially-toxic corporate cultures.

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I. Introduction: Diversity Doublespeak

In January 2004, I attended the Seventh Annual Rainbow/PUSH Wall Street Project Conference in New York City. The mission of the Wall Street Project, founded by Reverend Jesse Jackson, Sr., is to assure "equal opportunity for America's underserved consumers, employees and entrepreneurs. Access to capital, industry and technology continues to be the last stage of today's civil rights movement."[1] Of particular importance to me were two panels entitled "Inclusion Advocates—How Have the Roles of Workforce Diversity Directors, Supplier Diversity Directors and Community Affairs Executives Changed Post 9/11 and Recession?," and "Best Practices: The Steps Multinational Corporations Are Taking to Avoid Diversity Crises." Diversity executives with varying and elaborate titles from several public companies presented on these two panels.[2] Each presenter delivered an adulatory portrayal of their companies' diversity efforts. Each presenter used the same words to describe aspirations of racial equity at their firm—"diversity," "access to opportunity," "inclusion."[3] As I listened to their presentations, I was reminded of a book about a phenomenon called "doublespeak."[4] The book's subtitle was, "How Government, *Business*,

1. Letter from Jesse L. Jackson, Sr., President & Founder, Rainbow/PUSH Wall Street Project, to Friends of the Wall Street Project (Jan. 2004) (on file with the Washington and Lee Law Review).

2. The following is a list of some of the presenters, their titles, and the companies they represented: Essie L. Calhoun, Director, Multicultural Marketing, Community Relations and Contributions, Eastman Kodak Company; Shan Carr, Director, Workforce Management, Lockheed Martin; Elizabeth Derby, Director, Global Diversity, Credit Suisse First Boston; Deborah A. Elam, Manager, Global Employer of Choice Initiatives, General Electric; Ana Duarte-McCarthy, Director, Global Workforce Diversity and College Relations Director, Citigroup; Fernando Hernandez, Supplier Diversity, AT&T; Javette Jenkins, Program Director, Global Procurement, IBM; Roderick K. Gillum, Vice President, Corporate Responsibility and Diversity, General Motors Corporation; May Snowden, Vice President, Chief Diversity Officer, Starbucks; and Carlton Yearwood, Vice President, Business Ethics and Diversity, Waste Management, Inc. Program, Seventh Annual Rainbow/PUSH Wall Street Project Conference (2004) (on file with author).

3. In fact, the theme for the 2004 Wall Street Project Conference was "Inclusion—The Key to Economic Empowerment and Growth." Letter from Jesse L. Jackson, Sr., *supra* note 1.

4. WILLIAM LUTZ, DOUBLESPEAK (1989).

Advertisers, and Others Use Language to Deceive You."[5] The author defined "doublespeak" in the following manner:

> [L]anguage that pretends to communicate but really doesn't. It is language that makes the bad seem good, the negative appear positive, the unpleasant appear attractive or at least tolerable. Doublespeak is language that avoids or shifts responsibility . . . . It is language that conceals or prevents thought; rather than extending thought, doublespeak limits it . . . . Basic to doublespeak is incongruity, the incongruity between what is said or left unsaid, and what really is.[6]

In the three hours and fifteen minutes I spent listening to the presenters on both panels, not one presenter uttered the word "discrimination." None of the panelists spoke of antidiscrimination law and their companies' efforts to monitor compliance with such law. Discrimination, "the D-word," I presumed, was an epithet to be avoided at all costs at gatherings such as these. Implicit in their silence about discrimination and racism was the conclusion that these problems had been resolved within their companies, if they had ever existed at all. Their silence implied that the only remaining issues for corporate managers to address were inclusion of people of color in the wealth generated by public companies, access to equal opportunity, and diversity. This was diversity doublespeak.

I left both panels with unanswered questions. Did the panelists represent the exceptional companies? Have the companies at which the panelists work resolved discrimination problems to the extent that they no longer require discussion? How many people of color were senior managers at their companies? Were people of color, particularly African Americans, promoted at the same rate as whites? Did African Americans earn the same pay as their white counterparts?

Because some of the panels ran concurrently, I could not attend everything. I searched the conference program for a panel, any panel, about the problem of continuing racism and discrimination within public companies. I found only discussions about "inclusion," "access," and "diversity." Yet, to me at least, it seemed clear that race discrimination continues to be a problem for corporate employees, communities, consumers, and suppliers of color. How else can one explain the economic gap between whites and African Americans? In 2002 the average black household income was 64.9% of white household income,[7] and black men earned 73.9% of what white men

5. *Id.* (emphasis added).

6. *Id.* at 1–2.

7. Roger O. Crockett, *Progress Without Parity*, BUS. WK., July 14, 2003, at 99.

earned.[8] "Since the stock market bubble burst in March, 2000, black unemployment has soared to nearly 11%, double that of whites. And it's not just less skilled blacks who get hurt. In 2002, the number of employed black managers and professionals fell .... Meanwhile, the number of employed white managers and professionals continued to rise ...."[9] Additionally, black male managers and executives earn 23% less than white ones.[10]

There are two possible explanations for the disparities in pay between African Americans and whites and the higher unemployment rate overall for African Americans, including highly educated and professional African Americans. One way to understand this economic gap between whites and African Americans requires acknowledging that discrimination persists among those who serve as corporate agents who make hiring, firing, promotion, and pay decisions. The other explanation, always unspoken (at least in evolved circles), is that African Americans deserve less pay and should be fired first because they are intellectually, or otherwise, inferior to their white counterparts. There seem to be two logical ways to explain why only a painfully small number of senior corporate managers are African-American. Either discrimination is the cause, or African Americans do not have the intellectual acuity to function as senior executives.

Because I do not believe that African Americans are inferior to whites, I believe that race discrimination among corporate actors is one of the primary causes of the economic divide between African Americans and whites. Few would argue with this proposition as a historical fact. For example, within the last ten years, many public companies paid large amounts to settle race discrimination class actions. Most notable among these companies are Texaco and Coca-Cola. Both companies paid historic amounts to settle race discrimination class actions.[11] There are some, however, who seem to believe that discussions about racism and discrimination are no longer relevant in

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8. *Id.*

9. *Id.*

10. *Id.* at 102. *See also* Louis Uchitelle, *Blacks Lose Better Jobs Faster as Middle-Class Work Drops*, N.Y. TIMES, July 12, 2003, at A1 (concerning the disproportionate loss of manufacturing jobs among African Americans); Roger O. Crockett, *How to Narrow the Great Divide*, BUS. WK., July 14, 2003, at 104 (advocating policy changes including more intensive preschool, more parental attention, smaller class sizes, more access to money for college, affirmative action in college admissions and employment, more blacks on college boards of directors, and stronger enforcement by the EEOC).

11. In 1996, Texaco settled a race discrimination class action for $176 million, and in 2000, Coca-Cola settled race discrimination litigation for $192.5 million. Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389, 389 (2002).

2004, even though there are many very recent cases where employees of color continue to allege race discrimination in corporate workplaces. I find it interesting that almost all of the companies sued by employees of color within the past ten years, including Texaco and Coca-Cola, engaged in the same kind of diversity cheerleading I heard at the Wall Street Project.

There are two reasons why corporate spokespersons should not talk about diversity while remaining silent about discrimination. First, a company that focuses on diversity alone, without considering discrimination issues, will inevitably and predictably face complaints from, and possibly litigation brought by, employees of color. Diversity efforts, without antidiscrimination efforts, increase the likelihood that the company will engage in litigating and mediating disputes about discrimination. Second, diversity discussions make people of color supplicants, and whites become their benefactors. Employees and suppliers of color must ask for inclusion, equal opportunity, and diversity. As supplicants, people of color risk the possibility that whites will choose not to diversify and include them. White managers of public companies may choose to grant the requests for diversity, access, or inclusion, or they may ignore them. Because of the law prohibiting discrimination, this element of choice does not exist if the focus is on antidiscrimination measures. Corporate officers and employers *must* comply with antidiscrimination law, and corporate boards owe a duty to monitor such compliance.

Presenters at the 2004 Wall Street Project Conference discussed their companies' diversity, access, and inclusion efforts. For example, they described their companies' programs providing mentors for minority and women employees. Many companies facilitated the formation of "affinity groups." These are separate groups of women, African-American, Asian, and Latino employees who meet periodically to discuss common issues. Companies also established programs for minority public school students to introduce them to the company's business and employees. These are worthy programs, but diversity efforts that focus all corporate energy on such programs while ignoring the issue of compliance with antidiscrimination law, allow workplace discrimination to persist and thrive.

Diversity doublespeak allows companies to avoid responsibility for enduring discrimination within the firm. When managers and boards talk about their diversity efforts while at the same time failing to adequately monitor compliance with antidiscrimination law, their firms' reputations glisten, even while employees of color suffer. Part II of this Article provides an example of diversity doublespeak taken from recent headlines.[12] I also

12. *See* Matthew C. McCue & Ronald Smothers, *Race and Sex Bias Suit is Filed Against*

provide a more vivid example of diversity doublespeak in the context of a race discrimination class action brought against Texaco Incorporated. I examine the firm's proxy statements that were drafted and disseminated to shareholders while the discrimination class action was pending.[13] In the proxy materials, Texaco enumerates its affirmative action policies and its policies on diversity, and Texaco also includes a statement from its Corporate Conduct Guidelines.[14] Texaco "believes a work environment which reflects diversity and is free of all forms of discrimination, intimidation and harassment is essential for a productive and efficient work force."[15] Texaco paints a picture of a board of directors that closely monitors compliance with laws prohibiting discrimination.

The discussion of Texaco's doublespeak about compliance in its proxy statements takes me to Part III of this article, which examines the corporate law duty of care. My examination includes consideration of a Delaware Chancery Court settlement opinion describing the monitoring component of the duty of care.[16] It is possible that the opinion merely describes behavior to which directors should aspire and not behavior that should result in a director's personal liability. This observation, however, does not dilute the import of the opinion's description of a board's duty to monitor compliance with the law. It offers a blueprint for corporate self-governance. Whether shareholders file derivative suits claiming directorial care breaches becomes irrelevant. Boards understand that the duty of care is a fundamental part of a firm's "best practices," and the settlement opinion offers important guidance in this regard. Part IV explores ways to make a firm's monitoring obligations meaningful and capable of transforming discriminatory corporate cultures. It is possible that a firm's compliance program, assembled to fulfill care obligations, may be as obfuscating as doublespeak.[17] Some compliance programs are assembled for

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a New Jersey Utility, N.Y. TIMES, Apr. 14, 2004, at B5 (describing a racial and sex discrimination lawsuit filed against Public Service Electric and Gas Company).

13. *See* Part II.B (discussing Texaco's proxy statements and explaining the importance of the Texaco case despite the relative age of the settlement).

14. *See id.* (discussing Texaco's proxy statements).

15. TEXACO, INC., PROXY STATEMENT 12 (1996), *available at* http://www.sec.gov/Archives/edgar/data/0000950112-96-000941.txt (on file with the Washington and Lee Law Review). This statement was included as part of a stockholder proposal requesting the board to update its Corporate Conduct Guidelines.

16. *See infra* notes 86–90 and accompanying text (discussing the court's decision in *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985)).

17. *Cf.* R. Franklin Balotti et al., *Equity Ownership and the Duty of Care: Convergence, Revolution or Evolution?*, 55 BUS. LAW. 661, 663–64 (2000) (criticizing the process-emphasizing approach to examining due care because it allows boards to mask lack of due care

cosmetic purposes only, and this part of the Article describes one attorney's strategy to make compliance real.[18]

Part V considers the transformative potential of a board that acknowledges discrimination and accepts responsibility for monitoring and compliance failures when discrimination is pervasive and egregious. Acknowledgment and acceptance of responsibility for failing to adequately monitor compliance with antidiscrimination law is helpfully antithetical to the obfuscation that occurs when corporate boards and spokespersons engage in diversity, compliance, and equal opportunity doublespeak.

II. Examples of Diversity Doublespeak

A. Public Service Electric and Gas Company

In April 2004, eleven "current and former employees" filed a race and sex discrimination suit against New Jersey's largest electric utility, Public Service Electric and Gas Company (PSE&G), a subsidiary of Public Service Enterprise Group (PSEG).[19] The plaintiffs alleged discriminatory pay and promotion practices that precluded minorities and women from advancing to senior positions.[20] The plaintiffs claimed that minority employees were paid less than their white counterparts for the same work.[21] The company "den[ied] the assertions of discrimination."[22]

On its web site, PSEG devotes a considerable amount of space to the discussion of diversity within the company. The web site includes quotes concerning diversity from PSEG's "senior leaders."[23] Judging from the photographs and surnames published on the web site, all nine senior PSEG leaders appear to be non-Hispanic whites, one is female, and each says all the right things about diversity, as the following quotations illustrate: "Diversity is extremely important to our business;"[24] "I see the benefits of diversity every

by using established procedures).

18. *See infra* notes 153–71 and accompanying text (detailing interview with Steve Kardell of the Kardell Law Group).

19. McCue & Smothers, *supra* note 12.

20. *Id.*

21. *Id.*

22. *Id.*

23. PUB. SERV. ENTER. GROUP INC., QUOTES FROM OUR SENIOR LEADERS, *at* http://www.pseg.com/career/diversity/quotes.html (last visited Nov. 13, 2004) (on file with the Washington and Lee Law Review).

24. *Id.*

day;"[25] "[a]n unwavering drive to embrace diversity and embed it deeply in our culture is paramount to our continued success;"[26] "PSEG understands that having a diverse, broad supplier base is not just the right thing to do, but is the right business decision as well;"[27] "[h]ere in PSEG Power and all across Enterprise, because we celebrate and honor the differences among us, we are achieving excellence in the workplace;"[28] "the more diverse the group working on a problem or an opportunity, the better the outcome;"[29] and "[d]iversity must be fully integrated within all of our policies, practices and processes."[30]

Directing senior managers to talk, and perhaps even think, about diversity is useful, but the discussion could have been more effective in promoting racial equity at PSEG. None of the quotes from PSEG's senior managers deals with the difficult problems of discrimination and racism—problems that may be inevitable in a large public company employing hundreds of people. None of the managers discusses the need to monitor compliance with antidiscrimination law. Diversity discussions that ignore compliance issues allow corporate leaders to avoid an examination of their own views about race, racism, and equality within their firm. The discussion becomes diversity doublespeak without the managers' examination of their firm's compliance with antidiscrimination law.

There are several other sections devoted to diversity doublespeak on PSEG's web site.[31] The company describes its Workforce Diversity Management Group as composed of varying participants who are expected to do the following: "Lead the Diversity Vision & Mission; Champion the Diversity Initiative; Drive the Diversity Initiative; Internalize diversity & inclusion into the company culture; Support diversity structures; and Integrate [the] diversity plan into business strategy & goals."[32] The site includes the names of the company's four Workforce Diversity Managers[33] and the

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25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. The other sections are: PSEG Diversity Definition, and Commitment; Networking and Outreach; Diversity Plan Executive Summary. PUB. SERV. ENTER. GROUP, INC., CAREER OPPORTUNTIES [sic], *at* http://www.pseg.com/career/diversity/diversity_overview.html (last visited Nov. 13, 2004) (on file with the Washington and Lee Law Review).

32. PUB. SERV. ENTER. GROUP INC., WORKFORCE DIVERSITY MANAGEMENT GROUP, *at* http://www.pseg.com/career/diversity/managementgroup.html (last visited Apr. 17, 2004) (on file with the Washington and Lee Law Review).

33. *Id.*

company's definition of diversity, which includes an almost overwhelmingly long list of the "differences" that exist among people and encouragement to respect those differences.[34] The web site also provides a description of affinity or network groups for women and minority employees that "are designed . . . to allow employees to gain access to informal networks of both information and support within organizations."[35] Also on the site is an ostentatious list of awards given to PSEG's minority employees, or to PSEG by minority and community groups.[36] This part of the site describes some of the diversity doublespeak delivered by PSEG spokespersons at the various galas where the awards were presented. Each time PSEG received an award, company spokespersons seized the opportunity to talk about diversity without ever addressing unfortunate realities for some minority employees relating to disparate pay and promotion practices for whites and minorities and the company's plan to deal with such disparities.[37]

Interspersed throughout the diversity doublespeak on PSEG's web site are a few worthwhile statements about the company's goals in this context. A Diversity Council and a Steering Committee promise to "set annual diversity objectives & measure deliverables, [p]rovide council updates through Steering Committee to Exec Sponsors & owner, and [a]lign HR policies & practices with diversity plan."[38] Setting objectives, measuring results, providing updates on progress, and ensuring that the policies that guide the firm's human resources professionals embody diversity goals can form part of a concrete course of action that moves the company closer to achieving racial parity. There is, however, no indication as to whether the objectives, measurements, updates, and policies will move beyond diversity doublespeak. There is no discussion about specific objectives or policies that would focus on the way promotion and pay decisions are made. The web site is silent about what PSEG's Diversity Council would measure. Would the Council measure

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34. "Diversity is a value that is demonstrated through mutual respect and appreciation of the similarities and differences (such as *age, culture, education, ethnicity, experience, gender, race, religion, sexual orientation, etc.*) that make people unique." PUB. SERV. ENTER. GROUP INC., PSEG DIVERSITY VISION AND COMMITMENT, *at* http://www.pseg.com/career/diversity/statement.html (last visited Nov. 13, 2004) (on file with the Washington and Lee Law Review) (emphasis added).

35. PUB. SERV. ENTER. GROUP INC., NETWORKING AND OUTREACH, *at* http://www.pseg.com/career/diversity/networking.html (last visited Nov. 13, 2004) (on file with the Washington and Lee Law Review).

36. PUB. SERV. ENTER. GROUP INC., AWARDS, *at* http://www.pseg.com/career/diversity/awards.html (last visited Apr. 17, 2004) (on file with the Washington and Lee Law Review).

37. *Id.*

38. *Id.*

promotion rates for minorities? Would its updates include information about salaries, and whether minority employees are paid the same as their white counterparts? This sort of measuring and updating is potentially worthwhile, but the company makes no promises in this regard.

While the diversity doublespeak on its web site is quite extensive, the company's discussion of its obligations to comply with antidiscrimination law is negligible. The stated mission of its Workforce Diversity Group includes "helping to ensure statewide compliance with new AA/EEO regulations."[39] The executive summary of PSE&G's diversity plan promises "to educate all levels of our workforce on management's regulatory responsibilities" and labels this policy as "Affirmative Action Compliance."[40] In the long term, the company promises to "go beyond government regulations . . . however the short-term focus will be on compliance" with government regulations.[41] PSE&G's diversity plan includes the observation that "[a]s a government contractor, [the company] must comply with the new Office of Federal Contract Compliance Programs (OFCCP) affirmative action regulations, which became effective on December 13, 2000."[42]

PSEG's web site says nothing more about compliance. Moreover, the web site describes compliance obligations as they relate to affirmative action and equal opportunity, rather than compliance with antidiscrimination law.[43] Doublespeak relating to affirmative action is especially misleading because it creates the impression that employees of color receive benefits through affirmative action that are not available to others, even while minority employees are victimized by discriminatory employment practices.

B. Texaco's Proxy Statements

In the 1990s, African-American employees at Texaco and Coca-Cola received the largest amounts ever paid to settle race discrimination litigation. In 1996, Texaco paid over $175 million to settle a race discrimination class

39. PUB. SERV. ENTER. GROUP INC., WORKFORCE DIVERSITY GROUP, *at* http://www.pseg.com/career/diversity/manager.html (last visited Apr. 17, 2004) (on file with the Washington and Lee Law Review).

40. PUB. SERV. ENTER. GROUP INC., PSE&G DIVERSITY PLAN, *at* http://www.pseg.com/career/diversity/plan.html (last visited Nov. 13, 2004) (on file with the Washington and Lee Law Review).

41. *Id.*

42. *Id.*

43. *See id.* (stating that the short-term focus will be on compliance).

action.[44] In 2000, Coca-Cola paid almost $200 million to settle a class action brought against it alleging race discrimination.[45] In addition to the monetary recovery awarded the African-American employees of Texaco and Coca-Cola, both settlements included terms that required the companies to undertake efforts to train employees concerning diversity issues.[46] Both settlements required oversight by a task force composed of members who were not employed by or otherwise affiliated with the companies.[47] This subpart examines statements made by Texaco in its proxy materials during the time between the filing of the discrimination class action and its settlement. These proxy materials provide a graphic illustration of diversity doublespeak.

Even though the Texaco class action litigation was settled years ago, the continued examination of this race discrimination case is important for two reasons. First, Texaco provided an opportunity for other companies to learn how to handle the kind of crisis that Texaco faced. Unfortunately, however, it does not seem that other companies heeded the lessons. Four years after the Texaco settlement, Coca-Cola paid almost $200 million to settle a similar race discrimination class action.[48] Similar allegations of pervasive discrimination have been made at many other companies since the Texaco and Coca-Cola settlements.[49]

Even more disturbing are indications that the changes made pursuant to the terms of the agreement to settle the race discrimination claim against Coca-Cola failed to mitigate the effects of discrimination on the company's African-

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44. Wade, *supra* note 11, at 389.

45. In another article, I concluded that the huge settlement amounts paid by both companies were the result of duty of care breaches, which failed to maximize shareholder wealth by minimizing corporate losses. *See id.* at 397 (stating that if the managers of the companies had investigated and taken steps to counteract allegations of discrimination in an effort to satisfy their duties of care, discrimination litigation might have been avoided).

46. *See* Phillip M. Berkowitz, *The Coca-Cola Pact: A Wake-Up Call for International Employees*, N.Y.L.J., Nov. 30, 2000, at 5 (stating that the Coca-Cola settlement agreement included annual diversity training); Kenneth Labich, *No More Crude at Texaco*, FORTUNE, Sept. 6, 1999, at 205 (indicating Texaco's 1996 racial discrimination settlement now requires all employees to attend diversity training).

47. Wade, *supra* note 11, at 389.

48. *Id.*

49. There are some very recent examples. *See, e.g.*, Browne v. Microsoft, 48 Fed. Appx. 620, 621 (9th Cir. 2002) (mem.) (finding a genuine issue of material fact regarding the plaintiff's allegations of race and age discrimination); Goodwin v. Gen. Motors Corp., 275 F.3d 1005, 1013 (10th Cir. 2002) (finding a genuine issue of material fact regarding the plaintiff's claim of race-based pay discrimination); Gutierrez v. Johnson & Johnson, Inc., No. 01-5302, 2002 U.S. Dist. LEXIS 15418, at *4 (D. N.J. Aug 12, 2002) (claiming that company's compensation and promotion policies violate the civil rights of the minority plaintiffs).

American employees.[50] Even after paying historic amounts to settle the discrimination litigation, and, even after agreeing to settlement terms that included the assembling of a task force to monitor racial diversity within the firm, discrimination endures. Two years after the settlement, a large group of Coca-Cola's African-American employees protested outside the company's 2002 annual shareholders meeting.[51] The protesters said that African Americans "remain underrepresented in top management at the company, are paid less than white employees and fired more often."[52] Seventeen Coca-Cola employees filed discrimination suits against the company after the November 2000 class action race discrimination settlement.[53] Also, there is evidence that Texaco's discriminatory corporate culture persisted even after its agreement to settle the class action race discrimination suit. For example, three years after the 1996 settlement of the race discrimination litigation, Texaco paid $3.1 million to settle sex discrimination litigation.[54]

The second reason why I continue to write about Texaco is because there is a detailed record of the Texaco debacle. The same kind of detail about other

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50. For example, Coca-Cola employees recently filed a complaint about the company's discriminatory practices. Plaintiffs' Amended Complaint, Abdullah v. Coca-Cola Co., 133 F. Supp. 2d 1364 (N.D. Ga. 2001) (No. 1-98-CV-3679), *available at* http://www.essentialaction.org/spotlight/coke/complaint.html.

51. *See* Ben White, *Black Coca-Cola Workers Still Angry*, WASH. POST, Apr. 18, 2002, at E3 (summarizing the grievances of the workers protesting Coca-Cola).

52. *Id.*

53. *Id.*

54. *See Texaco Agrees to Pay $3.1 Million to Settle Sex Discrimination Case*, ATLANTA J.-CONST., Jan. 6, 1999, at D2 (describing the terms of a settlement agreement between Texaco and female employees following a finding by the United States Labor Department that female employees were underpaid). Settlements of discrimination allegations at Mitsubishi also provide examples of the failure of such settlements to transform discriminatory corporate cultures. *See* Steven Wilmsen, *Mitsubishi to Pay $34m in Harassment Suit*, BOSTON GLOBE, June 12, 1998, at A1 (exploring the potential effects of the unprecedented size of the settlement of harassment litigation between Mitsubishi and female workers). In 1996, female workers filed a class action alleging sexual harassment. *Id.* The company settled the suit in 1998. *Id.* Female employees alleged that they were victims of sexual insults and groping. *Id.* In the three years following the settlement, Mitsubishi settled a lawsuit alleging racial harassment and faced another suit alleging age discrimination. *See* Lisa Girion, *Fired U.S. Mitsubishi Managers File Suit*, L.A. TIMES, Aug. 3, 2001, at C1 (describing three separate discrimination suits filed against Mitsubishi's Normal, Illinois plant); *Mitsubishi Settles Racial Discrimination Suit*, ST. LOUIS POST-DISPATCH, Apr. 2, 2001, Business Plus, at 5 (outlining settlement agreement between Mitsubishi and minority workers who had alleged racial discrimination).

If agreements to settle discrimination litigation included acknowledgment of wrongful conduct when appropriate, Mitsubishi's sex discrimination settlement may have helped the company resolve some of its problems with discrimination against employees of color. This acknowledgement may have helped the company avoid the filing of the race discrimination suit along with the negative publicity and monetary losses from the settlement.

companies does not exist. The limited information about potentially discriminatory employment practices at other companies may be attributable to the advice given by one attorney in Texaco's aftermath. A New York-based lawyer advised corporate managers to avoid repercussions that may result from discrimination in hiring, promotion, and pay by prohibiting the taping of executive meetings.[55] He also advised that companies destroy documents as part of their regular routine.[56]

In this Part, I use a detailed account of the events that led to the filing of the Texaco race discrimination suit provided in a book written by Bari-Ellen Roberts, one of the lead plaintiffs.[57] I compare Roberts' narrative about race and Texaco to the narrative the company told in its proxy statements. I describe the company's discussion about race and diversity in its proxy statements for 1994, 1995, and 1996 because the discrimination class action was filed in 1994, and it was settled in 1996.

Roberts provides a detailed account of racist harassment at Texaco. Roberts tells disturbing stories of the blatant, overtly racist behavior suffered by many of Texaco's African-American employees. Some employees of color endured "racist taunts" and "physical threats."[58] Texaco's African-American employees complained of racist epithets and jokes.[59] Roberts also writes of subtle discriminatory practices in the way Texaco managers made decisions about hiring, promotion, and pay. African Americans were "passed over for one promotion after another"[60] and were paid less than whites in the same position.[61]

Roberts describes her conversation with an African-American woman in Texaco's human resources department. The human resources employee explained the pervasive nature of racism at Texaco:

> I've talked to lots of blacks who've been working here for years who aren't even being paid the minimum salary for the grade they're in. If they ask for a promotion, they get turned down. The government comes in once in a

55. Karen Donovan, *Winston & Strawn's How-To: Avoid a Texaco Prob*, NAT'L L. J., Dec. 16, 1996, at A4.

56. *Id.*

57. *See generally* BARI-ELLEN ROBERTS & JACK E. WHITE, ROBERTS VS. TEXACO: A TRUE STORY OF RACE AND CORPORATE AMERICA (1998).

58. *Id.* at 207.

59. *See infra* Part III (further elaborating on the racist behavior endured by Texaco's African-American employees).

60. ROBERTS & WHITE, *supra* note 57, at 207.

61. *See infra* Part III (citing statistical evidence of the disparate treatment of white and African-American employees at Texaco).

> while and finds violations and Texaco promises to fix them, but absolutely nothing gets done. Most of the blacks are too scared to complain.[62]

This human resources worker told Roberts that Texaco no longer provided her with an office and reassigned her to a cubicle "where anybody can hear whatever you're saying."[63] She opined that employees of color did not complain about discrimination because they could not come to her and expect confidentiality under the circumstances in which she worked.[64]

Roberts writes of her meeting with Texaco's vice president of human resources about undertaking measures that would enhance racial diversity.[65] She suggested, among other things, that the company start an association for black employees and recruit more at black colleges.[66] He bellowed his reaction to her suggestions: "You people must have lost your minds! . . . We'll never do any of these things!"[67] Roberts tells of an African-American employee who was suddenly and mysteriously fired right after he made calls to other employees about the possibility of filing a claim against Texaco for race discrimination.[68]

Not surprisingly, the narrative that Texaco provides in its proxy statements is dramatically different than Roberts's account of race matters within the company. A company's proxy materials provide notice to shareholders of the firm's annual meeting and the matters on the agenda for the meeting. In its proxy statements for 1994, 1995, and 1996 (as in statements before and after this period), Texaco described the credentials of the nominees for election or reelection to its board and asked shareholders to send in their proxies, or votes, for the nominees.

In its proxy statements, Texaco's board seems to take seriously its duty of care, which includes a duty to monitor compliance with the law. Texaco paints a picture of a board of directors that closely monitors compliance with antidiscrimination law. The company states that "Human Resources Committees . . . review the development of minorities and women within the company."[69] In the 1996 proxy materials, Texaco made explicit statements

62. ROBERTS & WHITE, *supra* note 57, at 171.

63. *Id.*

64. *See id.* (recounting a conversation with a member of Texaco's human resources department).

65. *Id.* at 146.

66. *Id.*

67. *Id.* at 148.

68. *Id.* at 178.

69. TEXACO, INC., PROXY STATEMENT 18 (1995), *available at* http://www.sec.gov/Archives/edgar/data/97349/0000950112-95-000763.txt (on file with the Washington and Lee

about the board's fiduciary obligations and the fact that they include "gathering all the information [the board] deems necessary, from whatever sources, including the officers and managers of the company, outside experts, and others in order to make decisions that are in the best interest of the company and its stockholders."[70] The company claims to monitor "activities of Texaco [that] pose significant risks and . . . the company's programs to respond to and contain such risks."[71] In the 1996 proxy materials, Texaco promises its shareholders that "[t]he Board, working with management, has established a series of procedures to assure a flow of information about the company's business."[72]

Texaco's 1996 proxy statement was drafted two years after hundreds of Texaco employees of color alleged pervasive race discrimination within the company, and months before a disgruntled white employee turned over tapes that contained evidence of the blatant racism of some of the firm's managers. (These tapes inspired the company to settle the class action.) In its proxy statements, Texaco's board claims that it gathered information.[73] Did any director or board committee speak to any of Texaco's minority employees? Did the board communicate with the Human Resources vice president who reacted to suggestions from minority employees by saying they had lost their minds? And what about Texaco's Human Resources Committees? The company claimed that these committees monitored minority employees' progress within the company.[74] Did the board or the Human Resources Committees ask why some African-American employees were paid less for the same work? With the monitoring systems that the board described in the proxy materials in place, how could the board not know about some of the problems that Roberts so thoroughly describes in her book? Was the discussion about the board's monitoring and information-gathering systems doublespeak?

Texaco's board also engages in the type of diversity doublespeak that occurred at the Wall Street Project Conference. In its 1994 and 1995 statements, Texaco included a shareholder proposal relating to the company's

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Law Review).

70. TEXACO, INC., *supra* note 15, at 17.

71. *Id.*

72. *Id.* at 2.

73. *See* TEXACO, INC., *supra* note 69, at 16–17 (stating that Texaco conducts numerous reviews, analyses, and employee surveys).

74. *See id.* at 17 (stating that Texaco's human resources policy includes reviewing the development of minorities and women within the company).

employment practices.[75] The shareholder proponents specifically stated that their goal was to "encourage [Texaco's] Board . . . and [CEO] to improve [the] corporation's Equal Employment record."[76] In the proxy statements, Texaco's board explained why it recommended that shareholders vote against the proposal.[77] In so doing, the company enumerated its affirmative action policies and its efforts to achieve diversity.[78] The materials described Texaco's "[e]stablishment of . . . [p]rocedure[s], designed to provide employees with the opportunity to raise and fairly resolve workplace disputes without litigation."[79] Texaco's proxy statement painted a picture of a utopian company. "Texaco is an Equal Opportunity Employer . . . ."[80] The company described its "toll-free telephone line [that] is available to employees to ask any questions about, or to report any violations of" its equal employment opportunity and human resources guidelines.[81]

Compare the company's statements about what seemed to be ideal dispute resolution procedures to Roberts' description of the ranting human resources vice president. Compare the firm's description of the adequacy of its toll-free telephone line and other information-gathering systems to the predicament of the human resources employee who was expected to receive employee complaints in a cubicle that afforded no privacy, or to the African-American employee who was fired after making calls about the possibility of filing a discrimination suit.

III. Compliance Doublespeak

Every year, I devote valuable classroom hours discussing the duty of care with my students in Business Organizations and Corporate Governance by analyzing several cases on this point.[82] In the teacher's manual for the

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75. *See id.* at 16 (concerning a stockholder proposal relating to employment opportunity); TEXACO, INC., PROXY STATEMENT 11 (1994) (same), *available at* http://www.sec.gov/Archives/edgar/data/97349/0000950112-94-000873.txt (on file with the Washington and Lee Law Review).

76. *Id.*

77. *Id.* at 12–13; TEXACO, INC., *supra* note 69, at 17–18.

78. TEXACO, INC., *supra* note 69, at 17–18; TEXACO, INC., *supra* note 75, at 12–13.

79. TEXACO, INC., *supra* note 75, at 13.

80. TEXACO, INC., *supra* note 69, at 16.

81. *Id.* at 18.

82. *See generally* Joy v. North 692 F.2d 880 (2d Cir. 1982) (reversing summary judgment dismissing a shareholders derivative suit against directors and officers of Citytrust for losses sustained as a result of substantial loans for the construction of an office building); Smith v. Van

casebook I use, one of the authors explains how he distinguishes the topic of fiduciary duty from securities regulation work for his students:

> I note that, unlike fiduciary duties, securities regulation is something lawyers talk about. Although fiduciary duties *structure* the way lawyers organize transactions and firms, they are not an explicit part of law-firm discussions. Lawyers do not tell summer associates, "I do fiduciary duty work;" they do brag about how many S-1s they have supervised.[83]

Reading this took me back to the time when I practiced law, first as a summer associate, and then as an associate at two large New York City law firms. I incorporated firms, performed due diligence, and eventually worked on securities deals, but at no point did I hear, read, write, or talk explicitly about fiduciary duties. Of course, much of what I did as an associate was done on behalf of clients who relied on us, their lawyers, to satisfy their fiduciary duty of care. That is the purpose of due diligence. Junior associates pour over document after document to make sure that deals can be effectively, legally, and efficiently consummated. At no point, however, did I hear any of the partners with whom I worked explicitly discuss the fiduciary duty of care that our clients owed their shareholders.

I find appealing the idea of explicitly discussing the duty of care, not only in the classroom, but also with legal scholars, with summer and junior associates at firms, and most importantly, with corporate clients. At least theoretically, directors are liable for any decisions they make that lack a rational basis and that result from a process in which directors failed to duly deliberate, exercise independent business judgment, and seek expert advice when necessary.[84] Directors will not be held liable for negligent or unwise

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Gorkom, 488 A.2d 858 (Del. 1985) (finding a board of directors liable to shareholders for failure to act on an informed basis in approving a merger agreement and failing to disclose all material facts to the shareholders); Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125 (Del. 1963) (affirming dismissal of a complaint filed by stockholders against directors for losses suffered by the corporation as a result of the directors' failure to monitor employees' compliance with antitrust law); *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996) (accepting settlement of a shareholders derivative suit against members of a board of directors for breach of their duty to monitor employees' compliance with the law); Francis v. United Jersey Bank, 432 A.2d 814 (N.J. 1981) (affirming a finding of breach of a director's duty to exercise ordinary care where a corporate director negligently failed to discover misappropriation of trust funds); Kamin v. Am. Express Co., 383 N.Y.S.2d 807 (N.Y. Spec. Term 1976) (granting summary judgment in favor of the defendants in a stockholder derivative suit alleging that the directors negligently squandered potentially favorable tax treatment for the company), *aff'd* 387 N.Y.S.2d 993 (N.Y. App. Div. 1976).

83. WILLIAM A. KLEIN ET AL., TEACHER'S MANUAL FOR BUSINESS ASSOCIATIONS, CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, AND CORPORATIONS 233 (2000) (emphasis added).

84. *See generally* Kamin v. Am. Express Co., 383 N.Y.S.2d 807 (N.Y. Spec. Term 1976)

decisions. They breach their duty of care only when their decisionmaking process is grossly negligent.[85] With these duty of care principles in place, in *Smith v. Van Gorkom*,[86] the board of a publicly-traded holding company approved a cash-out merger after the chief executive, who wanted the merger to go through, spent twenty minutes orally presenting the alleged merits of the merger.[87] Even though the board had nothing in writing that described the merger, the directors deliberated for only two hours and recommended the merger to shareholders, who voted to approve it.[88] The Delaware Supreme Court held that the directors' decisionmaking process displayed the type of gross negligence that breached their duty of care.[89]

The legislative response to judicial enforcement of the board's duty of care in *Smith v. Van Gorkom* was to substantially weaken shareholders' ability to hold their directors accountable for such breaches by enacting Section 102(b)(7) of the Delaware General Corporation Code.[90] The Delaware statute allows a company within that state to elect to include in its certificate of incorporation a provision limiting or eliminating the personal liability of directors for duty of care breaches, if shareholders approve.[91] This statute was passed, it was claimed, to ameliorate the substantial negative impact that potential personal liability for directors' duty of care breaches would have on the board's ability to function. In one recent article, the authors write:

> In the wake of *Smith v. Van Gorkom*, a directors and officers . . . liability insurance crisis was triggered. Policies were not renewed, premiums skyrocketed, and firms worried about being able to recruit high quality directors. In response, on June 18, 1986, a year and a half after the [*Smith v. Van Gorkom*] decision, the Delaware legislature enacted section

(stating that a breach of duty will be found if the directors completely neglect their duties), *aff'd* 387 N.Y.S.2d 993 (N.Y. App. Div. 1976).

85. *See id.* at 811 ("It is not enough to allege . . . that the directors made an imprudent decision . . . ."); *see also* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (articulating the standard for ascertaining when pre-suit demand by the shareholders is excused and writing in dicta that "under the business judgment rule director liability is predicated upon concepts of gross negligence"); Francis v. United Jersey Bank, 432 A.2d 814, 826 (N.J. 1981) (holding director of financial institution liable to creditors for gross negligence when she failed to take any steps at all to stop her sons' obvious looting of company).

86. Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

87. *Id.* at 868–69.

88. *Id.*

89. *Id.* at 893.

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

91. *See id.* (allowing the amendment of corporate charters to limit or remove directors' personal liability for duty of care breaches and explicitly including exceptions for intentional misconduct or breaches of the duty of loyalty).

102(b)(7) which permits firms to amend their certificates of incorporation to opt out of monetary liability for nonintentional breaches of the duty of care.[92]

Some commentators suggest that the duty of care is now, and has always been, empty rhetoric inappropriately borrowed from the law of trusts and agency to apply in corporate law contexts.[93] These commentators argue that the application of care principles in the corporate context is inappropriate because of differences between intrafirm governance and the regulation of market transactions to which the law of trusts and agency apply.

> Difficulties arise if one fails to recognize the market–firm boundary as critical. That boundary represents a choice of governance structure, a choice between third-party judicial enforcement of market transactions and nonlegal self-governance within firms.
>
> . . . .
>
> Our argument is that a negligence-based standard works in trust and agency law because those relationships are fundamentally market-based and contractual, where legal enforceability normally and effectively applies. The relationship between corporate directors and shareholders, however, is not market but intrafirm based. Inside the firm, nonlegally enforceable rules and standards apply. Indeed, the firm–market boundary is intended to be a jurisdictional boundary between legal governance and self-governance.[94]

Legal rules and governance, however, do apply to intrafirm activity. The firm is far from being a completely self-governing entity. This fact is especially obvious in the discrimination context where firms are required to comply with the laws that prohibit discrimination. The legal compliance requirement is an essential part of the relationship between corporate directors and shareholders. To the extent directors fail to comply, the more likely

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92. Edward Rock & Michael Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants*, 96 NW. U. L. REV. 651, 659 (2002). Delaware was the first state to enact such a statute. Other states enacted statutes that have substantially the same effect as Section 102(b)(7). *See, e.g.*, FLA. STAT. ANN. § 607.0831 (West 2001) (limiting the personal liability of corporate directors for breaches of a director's duty of care except for the most egregious cases); VA. CODE ANN. § 13.1–692.1 (Michie 1999) (allowing limitation of liability for officers and directors if specified in a company's articles of incorporation). These two statutes are different from Delaware's Section 102(b)(7) in material respects. Florida's statute applies to all companies incorporated in the state. FLA. STAT. ANN. § 607.0831. Virginia's statute applies not just to directors but to officers as well. VA. CODE ANN. § 13.1–692.1.

93. *See* Rock & Wachter, *supra* note 92, at 663–68 (exploring why the duty of care, as applied in the trust and agency setting, is ill-suited for application in the corporate context).

94. *Id.* at 652–72.

shareholder wealth will be minimized rather than maximized when a firm must pay criminal or civil fines, penalties, and settlements as a result of compliance failures. Moreover, under the nexus of contracts theory of the firm, intrafirm relationships are contractual in nature, as are market relationships. These observations blur the boundary between market and firm and lead to the conclusion that a requirement that directors exercise care in monitoring compliance with legal rules is as appropriate as care obligations are in market relationships.

Other commentators have made important observations about the corporate law fiduciary duty of care in recent years, implicitly supporting the notion of the corporate law duty of care as an enduring and meaningful principle.[95] Lyman Johnson has advocated revitalization of the duty of care.[96] Johnson analyzes one court's attempt to revise care principles, lamenting that the court's analysis fails to recognize "the genuine fullness of a due care inquiry."[97] He notes the "absence in Delaware of a fully-articulated duty of due care"[98] and proposes the adoption of a standard of care that would require directors to behave as "ordinarily prudent person[s]" and to "act with reasonable prudence throughout the discharge of all their duties."[99] In arriving at his proposal, Johnson surveys various interpretations of the meaning of care in the corporate law context.[100]

One strategy for shareholders harmed by directorial and managerial duty of care breaches is to file derivative litigation. This strategy, however, rarely leads to success for plaintiffs harmed by care breaches. For the most part,

95. *See, e.g.*, Balotti et al., *supra* note 17, at 662 (describing the fiduciary duty of care as "one of the pillars of Delaware corporate law" and proposing that a director's equity ownership establish a "rebuttable presumption that directors acted with due care"); Melvin Aron Eisenberg, *The Director's Duty of Care in Negotiated Dispositions*, 51 U. MIAMI L. REV. 579, 581 (1997) (exploring the standard of review for duty of care and describing the duty of care as based on the same policies as the law of negligence).

96. *See* Lyman Johnson, *Rethinking Judicial Review of Director Care*, 24 DEL. J. CORP. L. 787, 810–19 (1999) (considering the benefits of a revitalized general duty of care).

97. *Id.* at 801.

98. *Id.* at 789.

99. *Id.* at 828.

100. *See id.* at 808–10 (arguing that the concept of care in the corporate context is a broad concept by explaining the different ways in which "care" can be interpreted). In a more recent article, Johnson analyzes the fiduciary duty of loyalty which he describes as receiving "renewed attention" as a result of the declining importance of the duty of care in corporate law discourse. *See* Lyman Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27, 33–42 (2003) (scrutinizing the meaning of loyalty within the corporate law context in order to reconsider the concept "both as a corporate law duty and as a widely shared social norm").

shareholders are precluded from monetary damages when boards fail to satisfy the duty of care under statutes such as Section 102(b)(7).[101] None of the state statutes, however, that allow for limits on or elimination of a director's personal liability for duty of care breaches preclude the possibility of injunctive relief for aggrieved shareholders.[102] Shareholders may seek equitable or injunctive relief for care breaches.

Through injunctive relief there is potential to transform corporate cultures. Theoretically, injunctive relief has the ability to change a corporate culture of noncompliance that far exceeds the ability of monetary relief to stop corporate practices that violate the law. Before the enactment of statutes such as Section 102(b)(7), if directors were held personally liable for duty of care breaches, they were indemnified by their companies, or the judgments or settlements were paid with the proceeds from director's and officer's insurance.[103] These monetary settlements or judgments offered directors and officers no explicit or specific guidance for changing the corporate practices or cultures that led to fiduciary duty breaches. In fact, some commentators conclude that monetary settlements of derivative litigation provide almost no benefit to the corporation and shareholders: "The principal beneficiaries of [derivative] litigation . . . appear to be attorneys, who win fee awards in 90 percent of settled suits. There is little evidence of specific deterrence."[104]

In contrast, injunctive relief presents the possibility of providing the specifics of what should change within the corporation. Because injunctive relief is the sole remedy for most duty of care breaches in states that have adopted statutes similar to Delaware's Section 102(b)(7), when derivative claims are settled in this context the settlements include no monetary component. The terms of the settlement are limited to steps that would have been ordered if the litigation continued and a judgment entered. While there is

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101. CAL. CORP. CODE § 309(c) (West 2001); N.Y. BUS. CORP. LAW § 719 (4)(e) (McKinney Supp. 2003); PRINCIPLES ON CORP. GOVERNANCE § 7.19 (1994).

102. *See* PRINCIPLES ON CORP. GOVERNANCE § 7.19 Reporter's n.2 (stating that nonfinancial penalties are not addressed by Section 7.19).

103. *See* Charles M. Elson, *Director Compensation and the Management-Captured-Board—The History of a Symptom and a Cure*, 50 SMU L. REV. 127, 152 (1996) (explaining that the complex business decisions of the early 1980s compelled companies to provide D&O insurance coverage and other indemnification arrangements to ensure corporate director retention and recruitment). *See generally* Kurt A. Mayer, Note, *Indemnification of Directors and Officers: The "Double Whammy" of Mandatory Indemnification Under Delaware Law in Waltuch v. Conticommodity Services, Inc.*, 42 VILL. L. REV. 223, 230 (1997).

104. Roberta Romano, *The Shareholder Suit: Litigation Without Foundation*, 7 J.L. ECON. & ORG. 55, 84–85 (1991); *see also* Nell Minow, *Hollow Shareholder Suits Show Rottenness in Delaware Courts*, LEGAL TIMES, Sept. 17, 1990, at 25 (questioning the effectiveness of shareholder suits for challenging directors' actions).

great potential for settlement terms to impose requirements that may help to change a corporate culture of noncompliance and unethical behavior, this potential has not come to realization.

In the aftermath of the Texaco debacle, a shareholder derivative claim brought by Texaco investors was settled on terms that missed the opportunity to provide meaningful change. Texaco's shareholders filed derivative litigation seeking recovery of corporate losses incurred in the settlement of the race discrimination litigation.[105] According to the court, the shareholders alleged that Texaco directors:

> [B]reached their fiduciary duties to the company and its shareholders, and wasted corporate assets, by intentionally, recklessly, grossly negligently and/or negligently failing to exercise appropriate oversight in connection with Texaco's compliance with federal and state civil rights laws, enforcement of anti-discriminatory practices, conduct within Texaco's human resources department, and particularly in the defense of the [race discrimination class action].[106]

Texaco's shareholders received no monetary recovery in the settlement of the derivative suit.[107] The court-approved settlement of the shareholders' suit allowed for the payment of shareholders' attorney's fees and expenses and gave shareholders the right to request a copy of the public portion of the annual report of the Task Force that was appointed to monitor compliance with antidiscrimination law under the terms of the race discrimination settlement.[108] Shareholders were given the right to request the Task Force report for "so long as the Task Force remains in existence."[109] Texaco's 1997 annual report to shareholders included a statement that informed shareholders of their right to request the Task Force report.[110] The settlement also required Texaco to include in all of its new contracts with outside vendors a statement declaring Texaco's commitment to nondiscriminatory workplace practices.[111]

105. *In re* Texaco, Inc. Shareholder Litig., 20 F. Supp. 2d 577, 582 (S.D.N.Y. 1998), *rev'd* 192 F.3d 60 (2d Cir. 1999).

106. *Id.*

107. *See id.* at 584–85 (detailing the terms of the settlement).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 584. The language of the "Statement of Equality and Tolerance Objectives" is as follows:

> Texaco Inc. is affirmatively committed to the fullest extent to an environment of inclusion; to eradicate all forms of prejudice within the company; to promote and foster complete equality of job opportunities within the company to all applicants and employees regardless of race, gender, religion, age, national origin and

Of course, the shareholders were right to pursue their claim that Texaco's board breached the duty of care owed them because of the directors' failure to require adequate information and monitoring systems that would oversee compliance with antidiscrimination law. The court observed that the plaintiffs would have to show reckless indifference by the board to prevail in a claim alleging breach of the board's duty of care[112] and opined that plaintiffs are likely to be unsuccessful in this regard.[113] The court also noted that under Section 102(b)(7), Texaco had severely limited the ability of shareholders to hold directors personally liable for duty of care breaches.[114] There are, however, two problems with the court's discussion.

First, it is a stretch to argue that Texaco's board was not recklessly indifferent to the claims of African-American employees of pervasive race discrimination within the company and the potential effect of those claims on shareholder wealth. Bari-Ellen Roberts, the named plaintiff in the race discrimination class action, described the state of affairs for African Americans at Texaco during the years before the suit was filed in 1994, and settled in 1996.[115] Over fifty people contacted a shareholder activist group in a one-year period in the mid-1990s to "complain about discrimination."[116] At least eleven cases were pending with local Human Rights Commissions. Until the late 1990s, no African American had ever sat on the Texaco board "in the nearly hundred years of the company's existence."[117] The leader of the shareholder activist group described his conversation with top managers at Texaco "about naming some women and blacks" to the Texaco board.[118] Texaco's corporate secretary yelled, "[w]e are simply not seeking skirts or a black face to put on our board!"[119]

Roberts provides statistical evidence of Texaco's racist corporate culture: "At every level Texaco had far fewer black employees than the industry average and the disparity grew by an alarming degree the higher up the scale

disability; and to insure tolerance, respect and dignity for all people.

Id.

112. *Id.*

113. *Id.* at 585.

114. *Id.*

115. *See generally* ROBERTS & WHITE, *supra* note 57, at 107–285 (recounting experiences of African Americans at Texaco).

116. *Id.* at 184.

117. *Id.*

118. *Id.*

119. *Id.*

you went."[120] And as the African-American plaintiffs worked with lawyers to draft their complaint, they endured "a fresh plague of racial insults."[121] As Roberts and her lawyers added new members to the class action, they gathered alarming stories of racism that included "racist taunts, physical threats, and being passed over for one promotion after another."[122] Several African-American employees were paid significantly less than whites who did the same work. For example, an African-American woman with a "stellar sales record . . . was . . . paid $850 a month less than whites who held the same position."[123]

Throughout her book, Roberts describes pervasive, almost ubiquitous discrimination at Texaco. Some of the discriminatory acts were blatant. Others were covert and subtle. And in the years before the class action was filed, African-American employees filed complaints with local Human Rights Commissions,[124] an activist group,[125] and Texaco's vice president of human resources.[126] It is clear that Texaco's vice president of human resources breached the duty of care he owed shareholders to comply with antidiscrimination laws and to monitor the compliance of those supervised to avoid potential litigation costs, settlement fees, and negative publicity that could reduce shareholder wealth. The vice president of human resources and other managers at Texaco were at least "recklessly indifferent" to noncompliance with antidiscrimination law.

But was the board "recklessly indifferent" to its fiduciary obligations? Long before the class action was filed, the board was indifferent to pay disparities between African-American and white employees and to the lack of African-American directors and senior managers. This indifference to employee interests eventually led to the employees' class action and the attendant negative publicity and large settlement costs that were potentially harmful to shareholders. After the filing of the employee class action, the board remained recklessly indifferent to complaints of discrimination made by

120. *Id.* at 189.

121. *Id.* at 192.

122. *Id.* at 207.

123. *Id.* at 211.

124. *See id.* at 184 (quoting Gary Bronse's description of a number of lawsuits pending against Texaco).

125. *See id.* (describing complaints filed with Interfaith Center for Corporate Responsibility).

126. *See id.* at 146–48 (describing meeting with John Ambler, the vice president in charge of human resources for the whole company).

hundreds of its African-American employees and to the potential harm that continued discrimination would have on shareholder interests.

The race discrimination suit languished. Even after the Equal Employment Opportunity Commission investigated Texaco and issued a report stating that "[t]here is reasonable cause to believe that [Texaco] failed to promote Blacks . . . as a class throughout its facilities because of their race," the company "sent out an open letter to all employees that was . . . full of self-serving distortions about the agency report."[127] What would have happened had Texaco's board and senior managers undertaken a different strategy? Instead of sending a letter to employees denying the claims made by its African-American employees, would the company have avoided the impending crisis if directors and officers had met with the lead plaintiffs in the discrimination suit? What could Texaco's managers and directors have learned from such a meeting? One of the lawyers representing Texaco's employees heard appalling stories about the company's racist climate when she deposed class action members.[128] The plaintiffs described the use of racist epithets and symbols by white Texaco employees and low-level managers, some of whom referred to African-American employees as "nigger," "orangutan," and "porch monkey."[129] The letters "KKK" were painted on an African-American employee's car.[130] One Texaco vice president "dressed up as a black Sambo for a company Halloween party."[131] White managers told racist jokes.[132] Disparaging comments were made about the intellectual acuity of African Americans.[133] The indifference of the board and senior executives to the potential impact of race discrimination on the company and its shareholders converted into action only after a disgruntled employee delivered tapes that

127. *Id.* at 249.

128. *See id.* at 241–42 (describing depositions conducted by Diane R. Williams).

129. *Id.* at 243–44.

130. *Id.* at 244.

131. *Id.* at 242.

132. *Id.* One "white manager in [Texaco's] personnel department shared a joke with . . . white coworkers" in the presence of an African-American employee. *Id.* The Texaco manager's joke is as follows: "Do you know why black parents don't let their kids play in the sandbox? Because when they go to the bathroom, they can't tell their kids from their shit." *Id.* On the day before her birthday, an African-American secretary announced that she was pregnant. Her boss gave her a birthday cake. "On top of the cake was a figure of a black woman with dark skin and an Afro, obviously far along in pregnancy. Beneath it, an inscription written in icing read, 'Happy Birthday . . . . It must have been those watermelon seeds.'" *Id.* at 273.

133. *See id.* at 243 (quoting a plant manager as referring to an African-American employee as a "dumb truck driver who can't read").

contained evidence of discriminatory practices at Texaco.[134] This event occurred, however, only after the large settlement became necessary, and after the company endured a public relations nightmare.

There is a second, and perhaps more important, problem with the court's discussion in the settlement opinion for the shareholder suit against Texaco. The court approved the derivative litigation in part because of the claimed "non-pecuniary . . . therapeutic benefits" that the corporation would derive from the settlement's terms.[135] In reaching its decision as to the appropriateness and amount of plaintiff's attorney's fees, the court concluded that there was substantial benefit to the company because the derivative litigation settlement gave shareholders the ability to request the report of the Task Force created pursuant to the settlement of the discrimination litigation.[136] Shareholders, under the terms of the derivative suit settlement, could request the Task Force report in writing, by e-mail, or by telephone.[137] The court wrote that even though the derivative suit settlement allowed shareholders the ability to request only the public portions of the Task Force report—the parts of the report already available to shareholders because they were available to the public—"[t]he increased access or its expedition is . . . a real benefit both to the inquiring mind and to concerned Texaco shareholders."[138] According to the court, the expedited access was beneficial because of the typical difficulty of obtaining court documents.[139] Moreover, the court thought that expedited shareholder access to the Task Force report would provide "further incentive (if any still be required) for achievement of the goals of the Task Force and . . . the proper interests of the company and its shareholders, as well as sound public policy."[140]

Are the benefits to the corporation of allowing shareholders to receive the Task Force report therapeutic, as the court suggests, or is allowing shareholder access to this information mere window dressing? What should shareholders do with the information they receive from the report? How truthful, complete, and accurate is the information? It is true that the Task Force members are independent of the company, but in drafting the report, they must rely to a

134. *Id.* at 250–55 (describing Rich Lundwall's effort to contact plaintiffs' attorneys and deliver the tapes).

135. *In re* Texaco, Inc. Shareholder Litig., 20 F. Supp. 2d 577, 585–86 (S.D.N.Y. 1998), *rev'd* 192 F.3d 60 (2d Cir. 1999).

136. *Id.* at 596.

137. *See id.* (describing settlement terms).

138. *Id.* at 594.

139. *Id.*

140. *Id.*

great extent on corporate insiders for information about the company's progress with respect to discrimination matters. Moreover, how can the shareholder's access to the information contained in the Task Force be meaningful if the problem of discrimination is never acknowledged? The same may be asked with respect to the settlement of the discrimination litigation. Can the Task Forces that were assembled pursuant to the terms of the discrimination suit settlements change a corporate culture where discrimination seems to thrive if the corporation never acknowledges the discrimination?[141]

The terms of the settlement of the Texaco derivative litigation provide a vivid example of the squandered potential for transforming a culture of noncompliance. The settlement terms of the Texaco derivative suit were superfluous and anemic. They duplicated the settlement terms of the race discrimination suit, and they provided for no real transformation of Texaco's racially-toxic climate. Settlements of derivative suits alleging duty of care breaches provide potentially winning outcomes for shareholders. Plaintiffs lose, however, even when their claims are settled because their attorneys fail to negotiate for more substantial settlement terms that may transform corporate cultures. Plaintiffs lose also because courts approve such settlements as fair and reasonable.

IV. Directorial Ignorance Is Directorial Bliss: In re Caremark International Inc. Derivative Litigation *and Cosmetic Monitoring*

Years after the enactment of statutes such as Delaware's Section 102(b)(7), Chancellor Allen discussed the duty of care in *In re Caremark International Inc. Derivative Litigation*[142] as though corporate care obligations retained their force and importance. Allen articulated two components of the duty of care. First, directors are obliged to make decisions on behalf of the company in good faith and employ a rational decisionmaking process.[143] Second, directors breach their duty of care when there is "an unconsidered failure of the board to act in circumstances in which due attention would, arguably, have prevented" corporate or shareholder losses.[144] Allen explains that while boards are not involved in the day-to-day business decisions made

141. *See infra* Part IV (describing ineffectiveness of remedial measures).

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

143. *See id.* at 967 (describing liability resulting from ill-advised or negligent decisionmaking).

144. *Id.*

by corporate officers and employees, directors are potentially liable for corporate and shareholder losses that result from the failure of officers and employees who are deep "in the interior of the organization" to comply with applicable laws.[145] Satisfaction of this duty to monitor component of the duty of care requires the board to "exercise a good faith judgment that the corporation's information and reporting system is in concept and design adequate to assure the board that appropriate information will come to its attention in a timely manner as a matter of ordinary operations, so that [the board] may satisfy its responsibility."[146]

Did Chancellor Allen mean what he wrote in *Caremark*, or is the settlement opinion merely a statement about ideal directorial and managerial aspirations? Allen does not discuss the impact of statutes such as Delaware's Section 102(b)(7) on the viability of cases alleging duty of care breaches. Nor does he mention the fact that while courts have held that directors owe a duty of care and have attempted to articulate its content, there are almost no cases holding directors liable for duty of care breaches. Boards will, of course, respond, at least to some extent, to duty of care cases such as *Caremark*. Directors will *say* that they monitor corporate compliance with law. What is questionable, however, is whether the information and monitoring systems they require officers to install and implement, or the inquiries they make regarding corporate compliance, are intended to bring them real information about noncompliance. Are information and reporting systems mere window dressing intended for cosmetic purposes only? Do compliance programs and reporting systems merely provide managers and boards an opportunity to engage in compliance doublespeak by describing and boasting about their programs? Did Chancellor Allen expect anything more than this?

Consider what would happen if corporate information and reporting systems uncovered and revealed to the board that their managers and employees routinely failed to comply with law. Information-gathering systems that are designed to reveal noncompliance require officers and employees to collect and report much of the information a litigant would need in a case alleging harm resulting from the company's noncompliance. In other words, any corporate board that took seriously Chancellor Allen's monitoring requirement would make easier the case for potential litigants who claim harm from the company's failure to comply with applicable law. Meaningful monitoring of corporate compliance may produce the evidence needed by potential plaintiffs in their lawsuits against the company.

145. *Id.* at 968.

146. *Id.* at 970.

Allen had to understand that a board's serious monitoring of corporate compliance would uncover evidence that could be used by plaintiffs against the corporation and its directors and that this would dramatically reduce the incentives for corporate boards to know the truth about whether their managers and employees comply with law. Directors are likely to consider the gathering of information of noncompliance unnecessarily risky because it may increase the chances that they and the company will be sued. Managers and employees may decide that at times the costs of compliance outweigh its benefits. If the costs of compliance outweigh its benefits, directors may calculate that it is better for them to say they have required the installation of information and reporting systems even though such systems do not bring them the truth about corporate compliance. Once directors know of corporate noncompliance, they open themselves and the company to potential liability. Directorial ignorance is directorial bliss.

Courts and commentators have discussed various aspects of the duty of care, including obligations to employ rational processes in decisionmaking, to inquire about possible corporate misconduct when there is notice of such, and to monitor corporate compliance with the law.[147] The duty to inquire and monitor, however, is virtually meaningless and has no power to transform unethical corporate cultures as long as boards remain fearful of the consequences of authentic information gathering. Directors who serve on the boards of large publicly-held companies must face certain inevitable truths. First, they, along with senior executives, must understand that in large companies that employ hundreds and sometimes thousands of employees, some workers and managers will violate the law. Second, though they may rely on the integrity of their officers and employees, they must not ignore

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147. *See* Melvin A. Eisenberg, *The Duty of Care of Corporate Directors and Officers*, 51 U. PITT. L. REV. 945, 948 (1990) (proposing that a corporate director's duty of care consists of three distinct duties: (1) the duty to monitor the corporation's business, (2) the duty to inquire about information which raises cause for concern, and (3) the duty to exercise care in making decisions both procedurally, by insuring that directors are properly informed of all relevant information, and substantively, by requiring a rational belief that the decision was in the best interests of the company); *see, e.g.*, Francis v. United Jersey Bank, 432 A.2d 814, 826 (N.J. 1981) (holding duty of care requires directors to inform themselves about the affairs of the firm, so that a widow on notice from her deceased husband that her sons were likely to loot the company was under a duty to take action to prevent the loss); *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996) ("[C]ompliance with a director's duty of care . . . [is] determined by . . . the good faith or rationality of the process employed."); H. Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post Caremark Era*, 26 DEL. J. CORP. L. 1, 127 (2001) (stating the corporate fiduciary duty of care requires monitoring).

indications that such reliance is inappropriate.[148] Directors and senior executives should strive to create corporate cultures that render violations of the law unacceptable, even though violations by some are inevitable.

Meaningful inquiry about, and monitoring of, corporate compliance is one essential step toward transforming corporate cultures that tolerate violations of the law. Obviously, meaningful inquiry and monitoring require open and honest communication between boards and chief executives. Directors must go beyond requiring senior executives and managers to install information-gathering and monitoring systems. Boards must expect to receive real information. They must ask penetrating questions regarding compliance with the law. They must pay careful attention to the information gathered. And boards in some instances should be suspicious of claims that all is well, recognizing the inevitability of law violation, especially when a corporation hires thousands of employees.

The paradoxical reality for shareholders whose companies are harmed when directors breach their duty of care is that plaintiffs are almost never able to hold defendant directors accountable for such breaches. The best strategy for shareholders may be to take advantage of demand, a procedural prerequisite to derivative litigation that is more than likely to be dismissed or settled on terms that are less than favorable for shareholders and the company. A board's corrective action taken in response to shareholder demand may eliminate corporate practices that harm the company and may begin to transform the corporate culture in a way that reduces the likelihood that the board will fail to monitor managers' compliance with law. Or the corrective action may be aimed at corporate managers who failed in their obligations to oversee employees' compliance with the law. This approach offers the most potential for transforming corporate cultures of noncompliance.

Though courts have held that directors owe a duty of care and have made various attempts to articulate its content, only a few Delaware cases actually hold directors liable for duty of care breaches.[149] Plaintiffs rarely, if ever, win duty of care cases.[150] Perhaps shareholder victories in duty of care cases

148. *See, e.g.*, Francis v. United Jersey Bank, 432 A.2d 814, 822 (N.J. 1981) (stating that "directors may not shut their eyes to corporate misconduct").

149. *See generally* Johnson, *supra* note 96.

150. *See id.* at 805 (noting the difficulty plaintiffs face in satisfying evidentiary standards under Code II and Code III review standards); *see also* Joseph W. Bishop, Jr., *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1095 (1968) (stating that "cases in which directors of business corporations are held liable, at the suit of stockholders, for mere negligence are few and far between"); Stuart R. Cohn, *Demise of the Director's Duty of Care: Judicial Avoidance of Standards and Sanction Through the Business Judgment Rule*, 62 TEX. L. REV. 591, 591 (1983) (stating that "[c]ases that

should be rare,[151] but shareholders have navigated a legal landscape in which litigation victories are virtually nonexistent, even in the most egregious cases of directorial lack of due care or failure of oversight. In confronting this issue in this Article, I take a broad view of potential shareholder victory in duty of care cases. A winning outcome for shareholders whose companies are harmed by duty of care breaches can be broadly defined. One possible outcome for shareholders would be to have a court decide in their favor when they bring derivative suits alleging duty of care breaches. This, however, never happens because legislative enactments in several states dramatically reduce the import of the duty of care. Another potentially positive outcome for shareholders would be found in derivative suit settlements that provide real benefits to the corporation. This outcome *could* happen, but rarely does.

The best strategy for shareholders claiming harm to their companies resulting from duty of care breaches may be to go to the board and to put directors on notice of compliance problems within the firm. Shareholders who can convince boards to take remedial action to eliminate care, oversight, and monitoring breaches will eliminate the need for derivative litigation in this context. Shareholders who suspect ongoing and pervasive noncompliance with the law within their firms should ask their attorneys to contact boards to inform them about their suspicions. Shareholders—most likely institutional shareholders—or their attorneys should request that boards, in satisfaction of their duty of care, inquire about the suspected noncompliance. Before filing suit, and instead of claiming that demand is excused, shareholders can simply make demand on the board to take corrective action that eliminates duty of

assess damages against negligent management are rare to the point of becoming an endangered species").

151. Plaintiffs' success is rare because of judicial deference to board decisionmaking. Their success *should* be rare, the argument goes, because otherwise, the omnipresent specter of liability for breaches of care would make directors excessively risk adverse, and this consequence would have a detrimental impact on shareholder profits. Directors would be too cautious to take the kinds of risks that make shareholders money. *See, e.g.*, Joy v. North, 692 F.2d 880, 886 (2d Cir. 1982) (explaining that the interests of shareholders are hampered by "overly cautious corporate decisions"). There are other reasons that justify judicial deference for boards' decisions. Shareholders "voluntarily undertake the risk of bad business judgment" when they invest in an enterprise. *Id.* at 885. Also, courts defer because they "recognize that after-the-fact litigation is a most imperfect device to evaluate" board decisionmaking. *Id.* at 886; *see also* Franklin A. Gevurtz, *The Business Judgment Rule: Meaningless Verbiage or Misguided Notion?*, 67 S. CAL. L. REV. 287, 306 (1994) (noting the potential costs of after-the-fact judicial proceedings). Finally, some conclude that plaintiffs' success is justifiably thwarted by the business judgment rule because the increased potential for liability that would result if courts did not defer to board decisions under the rule would dissuade qualified individuals from joining the board. *E.g.*, *In re* Caremark International Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996).

care breaches. Shareholders can request that boards take the kind of remedial action that would satisfy their duties to monitor and oversee compliance with law and inquire about compliance when there is a reason to do so.

Advocating an approach such as this seems naively hopeful. Surprisingly, however, the expectation that boards will respond to shareholder demands that they avoid duty of care breaches is not as incredulous as it sounds. Steve Kardell, a Texas attorney, has successfully represented shareholders making such demands on boards.[152] Kardell's requests that boards monitor and inquire about allegations of noncompliance have been successful.[153] Boards responded favorably, honoring Kardell's requests on behalf of his clients that directors oversee and inquire about claims of employee noncompliance.[154] Shareholders have achieved modest success in eliminating duty of care breaches by simply asking the board to satisfy its care obligations. Shareholders, it seems, take the duty of care seriously. Kardell's success provides evidence that many directors also take duty of care obligations seriously.

Specifically, Kardell has made demand requests on corporate boards on behalf of his shareholder clients requesting that directors fortify corporate codes of conduct and take seriously their compliance obligations.[155] The companies that receive such requests from Kardell may have compliance programs, but the programs "have no muscle."[156] For example, Kardell discovered that even though monitoring and reporting systems are in place, at some companies they may be cosmetic because employees' complaints or reports of corporate noncompliance are implicitly discouraged.[157] In such cases, Kardell's demand contains requests that the board revise its code of conduct or compliance code to include a clause with strong language that clearly prohibits retaliation against employees who blow the whistle.[158]

Kardell was somewhat surprised by the board's response to the demands he made on behalf of his shareholder clients. Kardell expected that his demand requests would be denied.[159] His initial plan was to file suit in

152. Telephone Interview with Steve Kardell, Kardell Law Group (Aug. 11, 2003).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. Kardell explained that companies sometimes rely on the at-will employment doctrine to terminate employees who report or complain about a company's failure to comply with law. *Id.*

159. *Id.*

response to this anticipated denial claiming that the board's refusal of demand was wrongful.[160] He wanted to get the most serious cases of egregious duty of care breaches before Delaware courts.[161] Kardell, however, in most instances, did not have the opportunity to file on behalf of his clients because the board responded favorably to his clients' demand to take corrective action.[162]

Delaware courts have noted the importance of monitoring compliance with law, but it is clear that specific monitoring obligations are not triggered if directors have no notice of failure to comply with the corporation's legal obligations.[163] Kardell's approach puts "directors on notice of a compliance breakdown. Without notice of deficiencies in the architecture of a corporate code of conduct or compliance program," boards cannot take remedial action.[164] Kardell has used the pre-suit demand process as a mechanism that provides directors with notice that compliance and reporting systems are ineffective.[165] One of Kardell's future strategies in representing shareholders is to demand that boards conduct internal independent audits to determine the effectiveness of their compliance and reporting processes.[166] Another possible strategy is to demand that boards address substantive issues in their codes of conduct. He suggests requiring boards to draft language regarding the company's compliance in specific areas.[167] For example, a company's code of conduct may include language that the company complies with all applicable environmental law.[168]

Because plaintiffs rarely win duty of care cases, what incentives do boards have to take corrective action in response to shareholders alleging duty of care breaches? Perhaps shareholder requests that boards satisfy their duty of care contain all the incentive needed by diligent directors who intend to do their best for shareholders. Directors, especially outside directors who are not involved in the day-to-day operations of the firm, are likely to be unaware of noncompliance within their companies. Shareholders who demand that boards take remedial action may be an important source of information for directors

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. Kardell's initial expectation was that boards would refuse his shareholder clients' demand to fix ineffective compliance systems. *Id.* He wanted to know how to proceed if demand is refused in this context. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

who rely heavily on managers for such information. At times, concerned shareholders may be the *only* source of information concerning noncompliance because managers have an incentive to withhold information about the company that may create a negative perception concerning their own performance. Perhaps the avoidance of negative publicity serves as an incentive for boards to take remedial action when shareholders describe failures on the part of corporate employees to comply with law and attendant directorial oversight and monitoring breaches.

Can Kardell's approach make a difference in transforming corporate cultures of noncompliance? The favorable responses to the demand made on boards on behalf of Kardell's clients suggest that positive transformation is possible. According to Kardell, boards respond favorably because in the aftermath of the Enron debacle, boards are having a harder time getting opinion letters from outside counsel attesting to the adequacy of compliance programs.[169] If Kardell's demand presents specific problems with a company's compliance program, that firm's outside counsel will hesitate to give an opinion letter that concludes that the board's decisions regarding compliance and monitoring deserve the protection of the business judgment rule.[170] Attorneys such as Kardell inspire boards to take compliance seriously, and attorneys who take on boards have the incentive to do so because they earn fees for making pre-suit demand on boards.[171]

V. Acknowledgment and/or Apology: The Potential To Transform Corporate Cultures

Boards are far removed from a company's day-to-day operations, but directors should routinely inquire about all aspects of corporate compliance with the law. Directors should make clear that they expect truthful and complete information. Before corporate cultures can change, the boardroom culture must change.[172] Most important in the effort to transform unethical

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169. Telephone Interview with Steve Kardell, Kardell Law Group (Oct. 14, 2003).

170. *Id.*

171. Kardell's approach is an alternative to the shareholder proposal process as it provides another way to influence directorial and managerial conduct.

172. *See generally* Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363 (2002) (stating that corporate responsibility movement can force corporate boards to focus on interests of shareholders); Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?*, 77 ST. JOHN'S L. REV. 837 (2003) (describing connection between current corporate governance and lack of systematic racial reform); Stephen A. Ramirez, *Diversity and*

corporate cultures that routinely tolerate violations of law is to make clear what directors and senior executives should do when they discover noncompliance. When serious or pervasive noncompliance is uncovered, and this can happen only after meaningful inquiry or monitoring that is intended to uncover violations of law, directors and senior executives should acknowledge the wrongdoing. Acknowledging corporate misconduct that is serious and pervasive is a prerequisite to correcting such conduct. Unlawfulness that is never acknowledged will persist and may worsen.

Of course, the decision about the form that the acknowledgment should take should be left to the board and senior managers. At times, apology for failure to comply with the law is the most appropriate form of acknowledgment. Also up to the board is the decision about when noncompliance should be acknowledged. My suggestion is that acknowledgment is appropriate upon discovery of serious and pervasive noncompliance.

Courts describe a duty to employ rational decisionmaking processes, and obligations to inquire about and monitor conduct that may harm the shareholders or the corporation.[173] Courts do not offer guidance to directors and managers about what they should do when noncompliance is discovered. Without such guidance, directors and managers may do all they can to avoid receiving complete and accurate information about noncompliance. They do not know what to do with such information. They are afraid of the potential lawsuits that may follow if noncompliance is discovered.

The *Caremark* litigation illustrates an important point concerning the issues I raise. There was extensive disagreement as to whether Caremark employees violated the law.[174] If companies perform meaningful inquiries and uncover no wrongdoing, that should end matters. But additional direction and elaboration is required in this regard. Courts should make clear that monitoring and inquiry processes should be rational. I refer to an economist's definition of rational decisionmaking that is "based on deliberation, i.e. on the collection and processing of information, and on the drawing of proper conclusions from it."[175] This definition of rational decisionmaking embodies the idea of the fiduciary duty of care as having been satisfied when directors

the Boardroom, 6 STAN. J. L. BUS. & FIN. 85, 133 (2000) (stating that diversity initiatives result in more flexible, creative, innovative workplaces).

173. *See supra* notes 113–17 and accompanying text (discussing Chancellor Allen's analysis of duty of care in *In re Caremark Int'l Inc. Derivative Litigation*).

174. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 960 (Del. Ch. 1996) (describing settlements entered into by Caremark after it was charged with multiple felonies stemming from alleged violations by employees).

175. AMITAI ETZIONI, THE MORAL DIMENSION TOWARD A NEW ECONOMICS 144 (1988).

and managers collect information. Courts, however, when discussing the duty of care, have failed to discuss fully the "processing" of the information collected, nor have they encouraged boards and officers to draw conclusions, proper or otherwise, from the information they have gathered.

This observation may begin to explain how the duty of care has been rendered meaningless and anachronistic, and why the idea of imposing on boards an obligation to inquire about and to monitor corporate compliance has failed to transform corporate cultures. For it to be meaningful, the board's duty of care should include not only an obligation to inquire and monitor, but also an obligation to adequately analyze the information gathered, to process it carefully, *and* to acknowledge those instances when failure to comply with the law is discovered. The fear of potential liability would be magnified if directors and managers are asked to acknowledge the failure of their employees to comply with applicable law as I suggest here. So, corporate attorneys must help boards understand that their discovery of corporate unlawfulness is not the worst that can happen. It may mean that the company will be liable to the persons harmed, but it is also likely to mean that the unlawful conduct will not recur. It is only when misconduct is acknowledged that boards can direct managers to take the appropriate corrective action. Of course, the decision regarding the type of corrective action taken is entirely up to the board. But corrective action is impossible without acknowledging the need for such action.

Inquiries and monitoring systems are meaningless without a board's desire for receiving complete and accurate information, its willingness to process the information received, and the inclination of directors and senior managers to acknowledge serious pervasive misconduct when discovered. Acknowledging wrongdoing, even apologizing for misconduct, however, will not prevent recurring unlawfulness. There are unfortunate examples of corporate spokespersons who have made public statements concerning misconduct or failure to comply with law to save a company's reputation, while at the same time failing to take action to correct the problem.[176] Jacques Nasser, the president of Ford Motor Company, "pledged on television to resolve the mess surrounding faulty tires . . . and [the] chairman of Firestone . . . went before the U.S. Senate to take responsibility for the tire-related accidents causing 88 fatalities."[177] Unfortunately, at least initially,

176. *See* Taryn Fuchs-Burnett, *Mass Public Corporate Apology*, 57 DISP. RESOL. J. 26, 32 (May-July 2002) (describing actions taken by Ford and Firestone to address public relations crises).

177. *Id.* Another example involved Mitsubishi's president who "apologized for a 20-year cover-up by Mitsubishi that put thousands of motorists at risk." *Id.*

> neither Ford nor Firestone [came] forward to apologize and accept responsibility for the faulty tires. Instead, the two corporations have opted for another crisis management strategy, finger-pointing. In the end, the way in which the apology was carried out in conjunction with the timing of the apology has hurt the companies' credibility.[178]

A vital antecedent to taking action that may preclude recurring liability and negative publicity as a result of corporate employees' failure to comply with law is acknowledging the noncompliance. Often, an acknowledgment of noncompliance, accompanied by an apology for harm caused, will go a long way in helping to restore a company's good reputation and minimizing shareholder losses by reducing the likelihood that noncompliance will recur. "Johnson & Johnson is an example of a corporation that used apology successfully and became a role model for handling a crisis during the Tylenol tampering case that killed seven people in 1982."[179] Johnson & Johnson made crucial organizational changes following its apology and reestablished itself as a company deserving public and consumer trust.[180] The company did not avoid liability for injuries resulting from the tampering, but its apology, accompanied by corrective action, may have prevented additional litigation and negative publicity.[181] It is also possible that an appropriate apology may help a company avoid litigation for its misconduct altogether.[182]

Consider the duty of care breaches that occurred at Texaco and Coca-Cola. The nonpecuniary terms of both settlements required steps that would have satisfied fiduciary obligations under the duty of care and should have been taken when pervasive complaints of discrimination were first articulated.[183] Long before the complaints were made, directors, in satisfaction of their duty of care, should have required managers to implement a system

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178. *Id.*

179. *Id.* at 82.

180. *Id.*

181. According to Taryn Fuchs-Burnett:

> Over time, the public was willing to forgive Johnson & Johnson, and while no one will ever really forget the Tylenol scare, the corporation's credibility and reputation was restored by its ability to understand the consequences of its actions, take measures to fix the problem, and install measures to prevent similar incidents from occurring.

Id. at 82–83.

182. An African-American teenager sued an Eddie Bauer store after having been falsely accused of stealing. *Id.* at 28. The store's security guard made the accusation in public and in a degrading way, but the company offered no apology for the guard's conduct or the boy's embarrassment. *Id.* The boy's father explained that "if they had apologized from the start or given some response, the lawsuit wouldn't happen. It feels like they don't care." *Id.*

183. Wade, *supra* note 11, at 389.

that would have alerted the board to potential discrimination. Directors should have been asking questions about compliance routinely. Specifically, directors, or at least a committee of the board, should inquire about employee satisfaction. If directors take seriously this aspect of the monitoring component of the duty of care they owe shareholders, they will ask penetrating questions that will yield truthful answers. When the answers to the board's questions provide notice of employee complaints, the board should require training programs concerning compliance[184] or install a hotline so that noncompliance is easily communicated. In other words, some of the steps required under the terms of the Texaco and Coca-Cola settlements should have been taken in satisfaction of the directorial duty of care at the time the complaints were made, *before* the race discrimination suit was filed.

Whether taken in order to satisfy the board's duty of care or as part of a settlement of discrimination litigation, the installation of outside watchdogs, a hotline for complaints, and diversity training will not be enough to ameliorate the effects of discrimination. These corporate undertakings are likely to be merely cosmetic without some acknowledgment of pervasive trouble within the workplace. For example, neither Coca-Cola nor Texaco acknowledged the failure of the board and senior managers to adequately monitor compliance with antidiscrimination law. Spokespersons and senior managers at both companies failed to acknowledge the pervasive nature of discriminatory conduct within their firms. The failure to do so dilutes any ability of the organizational changes made under the terms of the race discrimination settlements to truly transform the racially-toxic cultures at Texaco and Coca-Cola.

In the Texaco race discrimination case, African-American employees first complained about discrimination to the vice president of human resources.[185] Before these complaints were made, the absence of the Texaco board's consideration as to whether the company violated antidiscrimination law was appropriate. The approach I advocate, however, would have notified the board that something was amiss at their company when the complaints were made. The board should have asked senior executives whether mid-level managers, such as the vice president of human resources, had received complaints. The board's penetrating questions and expectation of real information from

184. Training programs should focus on the persisting problem of discrimination, not just diversity. *See supra* Part I (describing how corporate diversity programs avoid addressing discrimination issues).

185. *See* ROBERTS & WHITE, *supra* note 57, at 146–48 (detailing a meeting between African-American employees and the vice president of human resources, which ended with the vice president asking the employees whether they had lost their minds).

managers would have revealed that some employees were complaining about race discrimination, and this response should have triggered more questions and investigation. All of this may have avoided the negative publicity that led to the settlement. This approach may have been an important step toward transforming a racially-toxic corporate culture, and it may have avoided the large settlement itself.

The Texaco settlement seems to have been inspired by the revelations contained in tapes turned over to the plaintiffs' attorneys by a disgruntled white Texaco manager.[186] The audiotapes contained a conversation of Texaco managers discussing plans to destroy evidence germane to the plaintiff's case.[187] A few days after the tapes became public, Texaco responded to the media's questions about the plaintiffs' allegations. There was no apology in Texaco's initial response after the tapes. There was only diversity doublespeak. The following statement was made in a press release: "The company is committed to providing a work environment which reflects an understanding of diversity, and is free from all forms of discrimination, intimidation, and harassment.... We are dedicated to equal opportunity in all aspects of employment and will not allow any violation of law or company policies."[188]

A letter from the Chairman and Chief Executive Officer of Texaco, Peter Bijur, to employees, contained more doublespeak: "None of us should permit anyone to detract from our commitment to maintain a work environment which is free from discrimination and allows every employee to develop to the utmost of their capabilities."[189]

In a video message to employees, however, Bijur used strong language that came close to an acknowledgment of the obligation of managers to monitor compliance with antidiscrimination law: "We are determined to root out [the employees involved in the] alleged behavior."[190] And in a press release, Bijur apologized:

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186. *See generally id.* at 250–72 (concerning the tapes and their impact).

187. *See id.* at 256 (discussing dialogue between Texaco executives about withholding and destroying key evidence).

188. Texaco, Inc., Texaco's Responses for Media Inquiries Regarding Allegations in New York Times Article, *at* http://www.texaco.com/sitelets/diversity/press/pr11_4.html (last visited Nov. 13, 2004) (on file with the Washington and Lee Law Review).

189. Letter from Peter I. Bijur, CEO of Texaco, to Employees of Texaco, *at* http://www.texaco.com/sitelets/diversity/taskforce/letter.html (last visited Nov. 13, 2004) (on file with the Washington and Lee Law Review).

190. Statement by Peter I. Bijur, CEO of Texaco, Inc., A Message to All Employees Via Satellite Broadcast (Nov. 4, 1996), *at* http://www.texaco.com/sitelets/diversity/task force/videomsg.html (on file with the Washington and Lee Law Review).

> With regard to the four individuals involved in the allegations before us, two are active employees. They are both being suspended today . . . . As to the two retired employees, we believe there is sufficient cause to withdraw benefits . . . . Fundamentally, we don't believe the statements and actions on the tapes are representative of Texaco . . . . I want to offer an apology . . . . I am sorry for this incident; I pledge to you that we will do everything in our power to heal the painful wounds that the reckless behavior of those involved have inflicted on all of us.[191]

Other than his promise that "[w]e are determined to root out" employees involved in the alleged behavior, nowhere in his public comments does Bijur acknowledge that the problem may extend beyond the four employees heard on the tapes. He does not acknowledge that the problem may be structural, systemic, and cultural. In his statements, Bijur apologizes, but he does not accept responsibility for the failure of the board and senior managers to exercise oversight with respect to compliance with antidiscrimination law.[192]

VI. Conclusion

My goal in this Article is to help firms move beyond unthinking repetitions such as "we are an equal opportunity employer" and close the gap between what firms say and what they do when it comes to diversity, discrimination, and compliance issues. In the 1990s, several large publicly-held companies paid huge amounts to settle discrimination litigation.[193] Shareholders have brought derivative suits against corporate boards claiming that directors' fiduciary duty breaches caused the corporate losses incurred

191. Statement by Peter I. Bijur, CEO of Texaco, Inc., Regarding Allegations of Employee Misconduct (Nov. 6, 1996), *at* http://www.texaco.com/sitelets/diversity/press/pr11_6.html (on file with the Washington and Lee Law Review).

192. According to the lead plaintiff's narrative, it is left to wonder whether Bijur's apology was sincere. Even after he issued several seemingly heartfelt apologies, Roberts describes what she calls a "strange encounter with Peter Bijur in the Texaco cafeteria a few days after the settlement." ROBERTS & WHITE, *supra* note 57, at 280. She describes Bijur's missed opportunity to apologize directly to Bari-Ellen Roberts—to acknowledge her attempts to reform Texaco's culture of race discrimination. According to Roberts:

> I was in line at the sandwich counter when I noticed that [Bijur] was standing right in front of me. He turned and our eyes met. We looked at each other for perhaps half a minute. I am sure he recognized me. Neither of us said anything. Then he turned back to the counter, picked up his sandwich, and walked away.

Id.

193. *See* Wade, *supra* note 11, at 389 (concerning settlements paid by Texaco and Coca-Cola).

when companies settled these discrimination suits for millions of dollars.[194] These settlements, however, have not healed or transformed discriminatory corporate workplaces. In approving the settlements of both the discrimination and derivative suits, courts have allowed boards and senior managers to avoid the very difficult work of frank inquiry into, and meaningful monitoring of, allegations of discrimination caused by racism and sexism. The settlements have no curative power because they do not require companies to acknowledge the problem of discrimination when it exists. Left unacknowledged, the discrimination persists in the face of the kinds of cosmetic organizational changes that corporations have made under the terms of the various settlements.

In this Article, I consider settlement opinions of employment discrimination claims and the resulting shareholder derivative suits that allege that the large amounts paid to settle discrimination litigation cause corporate losses that are the result of the directorial breach of the duty of care. These settlements point out the need to revitalize, clarify, and resurrect the fiduciary duty of care. When employees claim pervasive workplace discrimination, courts should encourage meaningful investigation and corporate acknowledgment of discriminatory practices if discovered.

I suggest nothing drastic in this Article. My modest suggestion is that what is said—whether by corporations or courts—should be taken seriously. There should be no gaping disparity between what companies *say*—"we are an equal opportunity employer"—and what they *do* when they fail to acknowledge the tragedy of continuing workplace discrimination. There should be no material gap between what courts *say*—directors owe a duty of care that includes inquiring about and monitoring compliance with law—and what courts *do* when they allow anemic settlements of discrimination suits brought by employees and derivative litigation brought by shareholders.

Professor and historian Manning Marable and law professor Richard Delgado have written about the structural nature of racism.[195] Law professor Susan Sturm searches for structural remedies to more adequately deal with today's employment discrimination, much of which is no longer blatant, but is

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194. *See generally In re* Texaco, Inc. Shareholder Litig., 20 F.Supp.2d 577 (S.D.N.Y. 1998).

195. *See generally* MANNING MARABLE, THE GREAT WELLS OF DEMOCRACY: THE MEANING OF RACE IN AMERICAN LIFE xiii (2002) (outlining a portion of the work that "describes the dimensions of structural racism"); Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993) (recounting a series of dialogues that explored racism as an inherent element of social structure).

now covert, subtle, and often unconscious.[196] The appeal of the suggestion I make in this Article to revitalize the duty of care to avoid shareholder losses and, more importantly, to achieve racial equity within the corporate workplace is that the duty of care is structural in nature. The duty of care as a structural approach is important in its ability to avoid problems before they harm the corporation, its shareholders, and its employees. As Professor Ramseyer, one of the authors of the Business Organizations casebook I use, explains to his students, "fiduciary duties *structure* the way lawyers organize transactions and firms."

It is interesting that the court that approved the Texaco derivative litigation looked for therapeutic benefits. Therapeutic means to have "healing or curative powers."[197] The goal is to heal, cure, and transform racially-toxic corporate cultures. I do not believe that racism can be eradicated because I agree with Professor Derrick Bell's conclusions about the permanent and indestructible nature of racism.[198] I do believe, however, that corporate cultures can be healed, cured, and transformed. Racist and discriminatory decisionmaking and conduct may persist, but these problems will not thrive in a corporate culture that inquires about such problems, monitors them, and acknowledges the problems when they exist. An unacknowledged disease cannot be healed. It is the acknowledgment of discrimination's existence and harm at Texaco, Coca-Cola, and other companies that is lacking in the settling of discrimination litigation brought by employees and derivative suits brought by shareholders.

196. *See generally* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

197. THE AMERICAN HERITAGE DICTIONARY 1260 (1985).

198. *See generally* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992).