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Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles

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When the Stranger says: 'What is the meaning of this city?
Do you huddle close together because you love each other?'
What will you answer? 'We all dwell together
To make money from each other'? or 'This is a community'?
And the Stranger will depart and return to the desert.
O my soul, be prepared for the coming of the Stranger,
Be prepared for him who knows how to ask questions.[**]

INTRODUCTION

Great stories should be re-told. Does corporate law tell a story?[1] What is the story? Who is telling the story? To whom? Is it being re-told? Who is re-telling it and what are they saying?

Corporate law initially permits rather than tells a story. Indeed, it permits the telling of many stories sharing a common theme. Its loose statutory constraints allow a master narrative of business persons eagerly pursuing self-interest and seeking the good life as they see it. This everyday plotline unfolds in remarkably diverse ways as to the particulars, but it typically draws scant attention in the legal community.[2] Another voice in corporate law, however, occasionally moves into the foreground to interrupt and tell its own story—a counter-narrative demanding a measure of self-restraint—when those who direct or manage company affairs press self-gain (or sloth) to the point of intolerable excess. The tellers of these stories are judges—especially Delaware's judges—when, sitting in equity,[3] they in-

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** Excerpt from T. S. ELIOT, *Choruses from "The Rock"*, *in* COLLECTED POEMS 1909-1962 145, 156-57 (1991).

1. This is the provocative question posed by Professor Mae Kuykendall. Mae Kuykendall, *No Imagination: The Marginal Role of Narrative in Corporate Law*, 55 BUFF. L. REV. 537, 541 (2007) ("Corporate law is abstract, because its subject is not readily reducible to human stories.").

2. George Eliot's closing line in her novel *Middlemarch* captures the obscurity in which most humans, including businesspersons, toil: "[F]or the growing good of the world is partly dependent on unhistoric acts; and that things are not so ill with you and me as they might have been, is half owing to the number who lived faithfully a hidden life, and rest in unvisited tombs." GEORGE ELIOT, MIDDLEMARCH: A STUDY OF PROVINCIAL LIFE 640 (Gregory Maertz ed., Broadview Press 2004) (1872). In terms of narrativizing, we would say these hidden "stories" have not been told, their "voices" are not heard.

3. The Chancery Court of Delaware is a court of equity. *See* DEL CODE ANN. tit. 10, § 341 (Supp. 2008). As stated by former Delaware Chancellor William Allen:

> The duties [corporate officers and directors] owe to shareholders with respect to the exercise of their legal power over corporate property supervene their legal rights, are imposed by equity and are recognized and enforced exclusively by a court of equity.
>
> Chancery takes jurisdiction over "fiduciary" relationships because equity, not law, is the source of the right asserted.

McMahon v. New Castle Assocs., 532 A.2d 601, 604 (Del. Ch. 1987) (citations omitted).

voke the discourse of fiduciary duty to confront the dominant story line and reshape how corporate managers may use the vast power conferred by law.

Corporate law, then, is bi-vocal. The "law" found in corporate statutes is disarmingly prosaic, and is well known to be permissive, enabling, and expansive in its thrust;[4] it is not regulatory or prohibitory, nor does it seek to inhibit or constrain. It seems, moreover, to be as morally "neutral" as it is radically liberating. At the same time, corporate statutes consolidate power in the hands of a select few—directors and managers.[5] In a perfect world, the few would diligently and devotedly serve the common ("corporate") good.[6] As another grand narrative tells us, however, we live in a "fallen" world,[7] and so the mixture of lax law and flawed human nature frequently leads, not surprisingly, to the unleashing of boundless ambition, vanity, avarice, duplicity, and all manner of sordid mischief. This is the master narrative permitted, but not mandated or proscribed, by the initial amorality of corporate law. The other dialect of corporate law—equity—is, in contrast, a morally laden discourse that serves to counter, temper, and tame the failings of human desire. In short, equity seeks to "redeem" that which is fallen.

This Article will argue that corporate law permits a master narrative that is highlighted and made legally visible only when challenged by equity's counter-narrative, with which it is complicit.[8] In unveiling discrete stories within the master narrative, Delaware's judges tell the tale of other protagonists—the "saints and sinners" described by Edward Rock[9]—and then offer their own assessments of those accounts. These appraisals are

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4. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1417 (1989) ("The corporate code in almost every state is an 'enabling' statute."). Corporate statutes do contain certain mandatory provisions, to be sure, but they are not strong constraints and often can be avoided by careful planning. *See* Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542 (1990); Elvin R. Latty, *Why Are Business Corporation Laws Largely "Enabling"?*, 50 CORNELL L.Q. 599 (1965).

5. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (2001) ("The business and affairs of [a] corporation . . . [are] managed by or under the direction of the board of directors.").

6. As Professors Meyer and Gustafson note, the linkage between individual welfare and the public good forms part of "the oldest moral traditions of the West, which held that persons should pursue not only proper individual self-fulfillment but also the common good and that these two ends were mutually implicated." John R. Meyer & James M. Gustafson, *Epilogue: For Whom Does the Corporation Toil?*, *in* THE U.S. BUSINESS CORPORATION 211, 230 (John R. Meyer & James M. Gustafson eds., 1988).

7. The biblical account of humanity's fall is found in the third chapter of the book of Genesis. *Genesis* 3 (New International Version).

8. On counter-narrative and complicity, see Michael Bamberg, *Considering Counter Narratives*, *in* CONSIDERING COUNTER-NARRATIVES: NARRATING, RESISTING, MAKING SENSE 351 (Michael Bamberg & Molly Andrews eds., 2004).

9. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997).

indeed, as Rock contends, written in normatively saturated and judgmental language that, in tone and words, resembles sermons and parables.[10] The problem in corporate law, however, is not in the genre of telling but in the genre of re-telling, because these sermons and parables lose their cautionary and inhibitory force if they are not properly re-told. If corporate law homilies are read only by lawyers or if, in being recounted to business persons, their moral flavor is drained in favor of discerning the "rule" or "best practice," then equity's co-telling role in the overall business narrative is once again, as at the outset, subdued by law.[11]

To see that this may be happening in corporate law, this Article draws on a biblical narrative. To oversimplify this sweeping account, the world was created by God but, rather quickly, humans, exercising free will, sinned and "fell" until God, through Christ, redeemed and graciously saved humanity.[12] The redemption story culminates for Christians in the Gospels, where Christ's life and moral teachings are told from four vantage points. The teachings, for the most part, are conveyed by didactic parables and sermons emphasizing overarching principles and standards, not detailed rules or codes of conduct. Critically, moreover, His apostles were exhorted not to keep the stories to themselves. Rather, they were commissioned to go forth and re-tell the Good News to the whole world.[13] The New Testament's Epistles—especially the Pauline Epistles[14]—carry the news out into the broader community and explain its meaning for everyday communal life, while retaining its pervasive moral tenor.

In a parallel way, equity's role in corporate law is redemptive, and Delaware's chancellors preach and teach in parables and sermons. In response to law's tale of unbridled freedom, the chancellors speak of restraint. Moral drama arises from this clash. This is seen not only in Rock's discussion of several noteworthy judicial opinions from the late 1980s and early 1990s,[15] but also in Chancellor William Chandler's memorable opinion in the high-

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10. *Id.* at 1015-16, 1106.

11. *See* MARGARET HALLIWELL, EQUITY AND GOOD CONSCIENCE IN A CONTEMPORARY CONTEXT 6 (1997) ("Fundamental misconceptions of equity abound . . . because of a persistent refusal to acknowledge that equity is, by its very nature, subversive of the law.").

12. *See supra* note 7; *Colossians* 1:14.

13. *Matthew* 28:19-20 ("[G]o and make disciples of all nations . . . teaching them to obey everything I have commanded you."); *Luke* 9:1-2 ("When Jesus had called the Twelve together, he . . . sent them out to preach the kingdom of God . . . .").

14. *See infra* notes 82-91 and accompanying text.

15. Rock, *supra* note 9, at 1022-63. Rock cites both Chancery and Supreme Court opinions. *Id.* These two kinds of opinions do differ in that the chancellors listen to and observe firsthand the accounts of others, and then compose a coherent original storyline, unlike judges on appeal who largely accept the original account. *Id.* Given standards of appellate judicial review, moreover, the chancellor's organizing account, factually, generally will prevail.

profile *Disney* case of 2005.[16] Unlike the re-tellers of the biblical gospel, however, the "apostles" of corporate law—the elite corporate bar—frequently screen out the moral tone when writing their "epistles" about *Disney*, as seen in twelve sample letters.[17] By contrast, newspaper accounts do a far better job of preserving and transmitting the moral fervor of the Chancellor's judicial sermon.[18]

Part I of the Article briefly summarizes Professor Rock's thesis. Part II invokes the biblical narrative as a structure for better understanding corporate law and its formulation and transmission. Part III examines the *Disney* decision as a prime example of a sermon laced with moral criticism and disapproval as a spur to better conduct and a deeper "spiritual" understanding of what it means to be a faithful director. Part IV details how twelve apostles re-tell the story of the *Disney* opinion–sermon in their epistles to clients, contrasting them with several newspaper accounts. It is concluded that to maintain narrative balance in the two-fold design of corporate law, the very freedom to pursue the master narrative made possible by slack statutes depends on equity's moral sensibility and counter-narrative being fully re-told to business actors.

I. PROFESSOR ROCK'S THESIS

In an important article published in 1997,[19] Professor Edward Rock posed three questions about the production of corporate law: "First, how is the content of corporate law rules and standards determined? Second, how are they generated? And third, how are they communicated to officers and directors?"[20] Rock's article deliberately ignores the first question and "focus[es] on the second and third questions, which go to the mechanisms of corporate law."[21]

As to the second question, Rock concludes that Delaware courts expound on the fiduciary duties of directors through "fact-intensive, normatively saturated" descriptions of saintly and sinful conduct.[22] These descriptions, according to Rock, serve to elucidate appropriate standards of conduct "through a distinctively narrative process, leading to a set of stories that is typically not reducible to a rule."[23] He goes on to describe these judi-

16. *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006).

17. *See infra* Subsection IV.B.2.

18. *See infra* Subsection IV.B.1.

19. Rock, *supra* note 9.

20. *Id.* at 1014.

21. *Id.*

22. *Id*. at 1015. *See also id.* at 1040 (noting the "normatively charged quality of the opinions").

23. *Id*. at 1016.

cial opinions, variously, as "corporate law sermons,"[24] "stories,"[25] "parables,"[26] "morality tales,"[27] and "a morality play."[28]

As to the all-important third question—that of how judicial pronouncements are actually transmitted—Rock only very briefly "begin[s] to trace" an answer.[29] He looks quickly at newspaper accounts of certain high-profile cases involving management buyouts of public companies and at three law firms' memoranda to clients about these cases.[30] Only one firm's memorandum discusses director duties specifically, however, leading Rock to conclude that it is "consistent with my hypothesis but provide[s] relatively little direct support."[31] Overall, he concludes that "[t]he mechanism by which Delaware opinions influence conduct is ultimately an empirical question, the full description of which awaits further research."[32]

Rock's insightful conception of corporate law focuses on a single source, decisional law, not corporate statutes, which he recognizes as enabling in thrust.[33] The chief quality of each legal source, in fact, vitally depends on the other. This is the inevitable complicity of law and equity in the corporate area, where neither silences its longtime counterpart in co-narration. Importantly, Rock's observations can be broadened and extended by viewing them in relation to a larger, well-known narrative from which Rock could have derived his parable and sermon rubric, that is, the biblical narrative. Doing so confirms the view that equity judges serve as expounders of standards through the preaching of sermons and parables, a fitting practice given that "the first English chancellors were . . . clerics."[34] It also highlights the judiciary's key role (and success) in employing a morally laden, redemptive counter-narrative to corporate law's amoral master narrative, while exposing the corporate bar's apostolic failure to pass along similarly moral epistles to the larger corporate community, instead reverting to the more neutral "rule talk" of law.

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24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 1101.
28. *Id*. at 1047.
29. *Id*. at 1019.
30. *Id*. at 1064-68, 1070-72.
31. *Id*. at 1070.
32. *Id*. at 1106. Although Rock's article indicates that he and a colleague were undertaking such research, *id*. at 1020 n.19, he recently confirmed to the author that they have not done so. E-mail from Edward B. Rock to author (May 4, 2009) (on file with author).
33. *Id*. at 1101-02.
34. DAVID SCIULLI, CORPORATE POWER IN CIVIL SOCIETY 371 n.44 (2001).

II. THE BIBLICAL NARRATIVE IN SHORT

The theologian Cyrus Ingerson Scofield described the Bible as a book that "at once provokes and baffles study."[35] The Bible, of course, is grand narrative, offered from multiple vantage points, where nothing is told at once but its message progressively unfolds, "like a picture wrought out in mosaics."[36] It provides history, prophecy, moral instruction, and horrific stories of human depravity, cruelty, and folly countered by stirring stories of sacrifice, saintliness, and restoration. Throughout human history, the Bible has played an influential role in shaping moral conduct through, for example, the Ten Commandments,[37] the Proverbs,[38] the Sermon on the Mount,[39] and the parable of the Good Samaritan.[40] It also has contributed enormously to Western literature.[41] Its ancient admonition against "serving two masters" underlies the fiduciary duty of loyalty in corporate law.[42] And it has much to say about "faithfulness" in general,[43] the core demand of a fiduciary's loyal behavior.[44]

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35. *Preface* to THE HOLY BIBLE ix (C. I. Scofield ed., 1967) (1917).

36. *Id.*

37. *Exodus* 20:1-17.

38. *See Proverbs* (New International Version). The Hebrew word "mashal" translated as "proverb" is also sometimes translated as "parable." *See Ezekiel* 17:2; FRANCIS BROWN ET AL., A HEBREW AND ENGLISH LEXICON OF THE OLD TESTAMENT 605 (Edward Robinson trans., Houghton, Mifflin & Co. 1906) (1891). Proverbs and parables frequently use figurative language, even though both are designed to give practical advice about the art of living.

39. *Matthew* 5-7.

40. *Luke* 10:25-37.

41. *See* MARIE WACHLIN & BYRON R. JOHNSON, BIBLE LITERACY REPORT 10-14 (2005) (noting allusions and references to the Bible in the works of Shakespeare, John Steinbeck, George Orwell, William Faulkner, and other writers). Dean Saul Levmore has noted that among "the most penetrating and long-lived sagas are those found in the Bible and classical literature. A good number of stories found in the Bible and in Homer . . . [introduce] flawed, multidimensional heros." Saul P. Levmore, *Fables, Sagas, and Laws*, 33 WILLAMETTE L. REV. 485, 493-94 (1997).

42. *Matthew* 6:24 ("No one can serve two masters . . . ."). "Numerous fiduciary [duty] cases in the nineteenth century and first half of the twentieth century . . . cited th[is] biblical prohibition . . . in their discussion[] of loyalty." Lyman Johnson, *After* Enron*: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27, 53 n.150 (2003) [hereinafter Johnson, *After* Enron]. The phrase continues to be used in the fiduciary duty context. *See, e.g.*, John Bogle, The Fiduciary Principle: "No Man Can Serve Two Masters," Lecture at Columbia University School of Business (Apr. 1, 2009) (on file with author).

43. *See* Lyman P.Q. Johnson, *Faith and Faithfulness in Corporate Theory*, 56 CATH. U. L. REV. 1, 29-30 (2006) [hereinafter Johnson, *Faith and Faithfulness*].

44. Chancellor Chandler in the *Disney* case described the traditional fiduciary duties of care and loyalty as "but constituent elements of the overarching concepts of allegiance, devotion and faithfulness that must guide the conduct of every fiduciary." *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 755 (Del. Ch. 2005). *See also* Johnson, *Faith and Faithfulness*, *supra* note 43, at 25-28 (describing Chandler's elaboration of "faithfulness").

With 613 Old Testament commandments and such New Testament commandments in favor of foot washing[45] and against jewelry,[46] the Bible, of course, can be read, wrongly, as the ultimate legalistic rulebook. It also has engendered heated interpretive debates within the believing community, some of which led to historic ruptures in the Christian church.[47] And, of course, throughout human history it has had a large number of critics and scoffers.[48] As observed by Scofield, however, even "the non-believer in its authority rightly feels that it is unintelligent to remain in almost total ignorance of the most famous and ancient of books."[49]

This Article, however, more narrowly draws on the Bible for three ways in which it can shed light on corporate law discourse. First, its overall narrative of God's Creation, mankind's Fall (and the resulting problem of Sin), and the Redemption of humanity by the gracious sacrificial work of Christ illuminates how law reveals the need for redemption but cannot itself achieve it. Second, its articulation of an overarching moral command—i.e., love your neighbor as yourself[50]—is both a standard (not a rule) and is said to represent the fulfillment of all law.[51] Likewise, the grammar of equity is broad standards—i.e., loyalty, fairness, care—not narrow rules to offer moral guidance.[52] Third, the narrative structure of the New Testament reveals a progressive dissemination and re-telling of core moral teachings. That is, the teachings of Christ's parables and sermons appear in the Gospels, followed by the Apostles (as messengers) taking the Good News into the larger world,[53] in part through the Epistles by which believers are taught, exhorted, and comforted. These three threads will be briefly elaborated here.

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45. *John* 13:14.

46. *1 Peter* 3:3.

47. The split into the Western (Latin) and Eastern (Orthodox) branches and the sixteenth century Protestant Reformation are the outstanding examples.

48. Modern noted scoffers include Richard Dawkins, Christopher Hitchens, Sam Harris, and Bill Maher. *See* RICHARD DAWKINS, THE GOD DELUSION (2006); CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING (2007); SAM HARRIS, THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON (2004). William Maher wrote and acted in the 2008 film *Religulous*, which satirizes religious belief.

49. THE HOLY BIBLE, *supra* note 35, at ix.

50. *Mark* 12:31.

51. *Romans* 13:8 ("[H]e who loves his fellowman has fulfilled the law."); *id.* 13:10 ("[T]herefore love is the fulfillment of the law."). *See also James* 2:8 and *Galatians* 5:14.

52. *See generally* Johnson, *After* Enron, *supra* note 42.

53. *Mark* 3:14.

A. Redemption

In the Creation story, Adam and Eve, possessing free will, disobey God.[54] Having sinned, they are banished from Eden,[55] separated from God, and death looms. The problem: how can humans and God reconcile and restore human–divine fellowship? One wrong answer: obey law. God demands justice but humans are flawed and cannot set matters right. Law's purpose, then, was to reveal the problem of sin, not to surmount it.[56] God Himself, through divine grace (not human works), paid humanity's sin debt and reestablished the possibility of communion with God.[57] In short, humanity needs redemption but it does not come by law.[58]

Within the corporate law framework, the statutory law enacted by legislatures likewise lacks power or any pretense to do much that is affirmatively good. The overall statutory architecture creates a regime with an aura of staid if stable orderliness while, ironically, its deeper aim is to unleash and enable, not constrain, proscribe, regulate, or otherwise explicitly demand the pursuit of a specified moral or social outcome. It creates legal space for human enterprise that may be moral or immoral but it is itself decidedly amoral. Far from curbing fallen humanity's impulses, the meagerness of corporate law gives them license and legitimacy. Corporate statutes are so undemanding, in fact, that one wonders whether what it creates—the corporation—is best understood not as a legal entity but as an amorphous "condition."[59] And the separate legal identity of the corporation permits those who stand behind it to create a sort of legal avatar, subject to their control, but for which they bear little responsibility. Moreover, those empowered under corporate statutes—directors and officers—gain behavioral guidance largely from business lore, custom, and social–moral norms,[60] not from law. Law leaves a great deal unstated in permitting, but not itself telling, a story.

Except, that is, for the branch of corporate justice that stems from equity. Equity, in propounding broad standards of loyalty and care, demands

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54. *Genesis* 3:1-6.

55. *Id.* 3:23.

56. The Apostle Paul's epistle to the Romans makes this clear. *Romans* 7:7 ("I would not have known what sin was except through the law.").

57. *Ephesians* 2:8-9.

58. *Galatians* 4:4-5.

59. On the idea of a "condition"—as seen in Theodore Dreiser's character Frank Cowperwood, the "Financier," representing a "condition," not a man—see DAVID A. ZIMMERMAN, PANIC! MARKETS, CRISES, & CROWDS IN AMERICAN FICTION 194 (2006).

60. *See* Lyman Johnson, *A Role for Law and Lawyers in Educating (Christian) Business Managers About Corporate Purpose* 3 (Univ. of Saint Thomas Sch. of Law, Legal Studies Research Paper No. 08-22, 2008), *available at* http://papers.ssrn.com/abstract=1260979.

that directors and officers adhere to those guidelines and either moderate their conduct or give an account for their failings. Equity seeks to infuse a moral dimension into the master narrative and redeem the corporation from the grip of voracious, self-serving managers seeking untoward personal advantage. Equity honors the freedom accorded managers under law, but redirects their focus to the well-being of others, and equity strives to instill an element of self-sacrifice while maintaining an overall sense of financial fair play.[61] As in the biblical narrative, innate human frailty and fallenness permeate human (commercial) life, unchecked, indeed facilitated, by the license of "law," until a redemptive counterforce, here equity, intercedes.

In this respect, equity subverts law,[62] but necessarily so given law's universality and, in the corporate arena, its extreme liberality and moral vapidity. But equity itself must constantly resist subduction by the innate rule-orientation of law, for as Aristotle noted: "[T]he rule of the undefined must be itself undefined also."[63] Standards, not law's rules, are the *lingua franca* of equity. Two different voices, then, co-narrate the stories of corporate law.

B. A Moral Standard

The overarching ethical commandment of the New Testament, the "Golden Rule,"[64] is not a rule at all as we understand rules, but is a quintes-

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61. Chancellor Chandler succinctly captured these twin thrusts of freedom and constraint provided by the joint effort of law and equity: "[U]nder our corporate law, corporate decision-makers are held strictly to their fiduciary duties, but within the boundaries of those duties are free to act as their judgment and abilities dictate . . . ." *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 698 (Del. Ch. 2005).

For a literary figure who embodies the raw, "natural" and relentless energy of an entrepreneur who resists any limits on his drive for wealth and influence, it would be hard to top Frank Cowperwood, the nineteenth century "financier" in Theodore Dreiser's 1912 novel by that name. THEODORE DREISER, THE FINANCIER (World Publ'g Co. 1940) (1912). For an excellent discussion of Dreiser's doubt that finance, law, or public opinion could fully bring to account such forces of financial nature as Cowperwood, see ZIMMERMAN, *supra* note 59, at 191-222. Dreiser himself describes Cowperwood's motto of "I satisfy myself" and his eventual "fall from grace." THEODORE DREISER, THE TITAN 27, 448 (WORLD PUBL'G CO. 1925) (1914).

62. *See* HALLIWELL, *supra* note 11.

63. ARISTOTLE, NICOMACHEAN ETHICS 142 (Martin Ostwald trans., Bobbs-Merrill Co. 1962) (n.d.).

64. *Matthew* 7:12 ("[D]o to others what you would have them do to you, for this sums up the Law and the Prophets."). This is commonly known as the "Golden Rule." SERMON ON THE MOUNT: EXAMINING YOUR LIFE 55 (1998). Interestingly:

> The negative form of this rule was widely known in the ancient world: "Do not do to others what you do not want them to do to you." Such diverse figures as Confucius and the great rabbi Hillel taught this. It is also found in Hinduism, Buddhism, as well as in Greek and Roman teachings. Jesus, however, alters this statement in a slight but highly significant way. He shifts this statement from the negative ("Do

sential standard.[65] It is a standard that also acknowledges the interdependence of proper esteem for one's self and an ethical stance toward others. So all-encompassing was this standard and the related command to love your neighbor as yourself,[66] that the Apostle Paul stated about the latter that "he who loves his fellowman has fulfilled the law. . . . Therefore love is the fulfillment of the law."[67] Of course, the New Testament articulates more specific rules of conduct too, but the motivational root of those rules is love, and one who genuinely loves will strive to engage in right conduct in all facets of life.

So too, equitable commands—i.e., fiduciary duties—are not narrow rules but broad standards, and they are similarly all-encompassing. Directors and officers are pervasively to act loyally, in good faith, and with due care. Corporate statutes, by contrast, specify more particular and technical rules, but here too one who is genuinely loyal and careful will of course adhere to those details while also acting for the good of others (not self) in doing so. Standards enjoy certain advantages over rules for the morally reflective and conscientious actor, and standards are central to the biblical and corporate counter-narratives to the master narrative—in law and life—of humanity's ingrained tendency to pursue self-interest.

> not") to the positive ("Do"). By so doing, he provided the world with one of the great (and rare) advances in moral understanding. Whereas the negative rule was fulfilled by inaction (not bothering others), the positive rule requires active benevolence (working for the good of others). The law of noninterference has become the law of love.

Id.

65. For a discussion of rules and standards, see Rock, *supra* note 9, at 1014 n.10 (citing authority).

66. *See supra* note 50 and accompanying text.

67. *Romans* 13:8-10. *See supra* note 51 and accompanying text. As Josiah Royce has observed, truly seeing one's neighbor depends on a "moment of insight": The moral insight is:

> The realization of one's neighbor, in the full sense of the word realization[;] . . . the resolution to treat him . . . unselfishly. But this resolution expresses and belongs to the moment of insight. Passion may cloud the insight . . . after no very long time. It is as impossible for us to avoid the illusion of selfishness in our daily lives, as to escape seeing through the illusion at the moment of insight. We see the reality of our neighbor, that is, we determine to treat him as we do ourselves. But then we go back to daily action, and we feel the heat of hereditary passions, and we straightway forget what we have seen. Our neighbor becomes obscured. He is once more a foreign power. He is unreal. We are again deluded and selfish. This conflict goes on and will go on as long as we live after the manner of men. Moments of insight, with their accompanying resolutions; long stretches of delusion and selfishness: That is our life.

JOSIAH ROYCE, THE RELIGIOUS ASPECT OF PHILOSOPHY: A CRITIQUE OF THE BASES OF CONDUCT AND OF FAITH 155-56 (Harper & Bros. 1965) (1885).

C. Apostles and Epistles

Christ travelled in a relatively small geographic area during His earthly life. But He issued a Great Commission commanding His followers to go out and teach all nations.[68] He chose twelve Apostles for the specific purpose of sending them out to preach, after spending time with Him.[69] The word "apostle" comes from the Greek "apostolos," meaning "someone sent out" or "messenger."[70] In biblical use, it means the twelve men specifically selected by Christ,[71] but it also includes such early preachers as Paul and Barnabas.[72]

Although Christ spoke and inspired, He did not write any portion of the Bible. His life and teachings were preserved by others in the four Gospels, which, historically, recorded events up to the time of Christ's resurrection and ascension. Except for the Gospel of John, they contain many parables, because that was a favorite technique of Christ for teaching.[73] A parable is a brief allegory with figurative meaning designed for moral instruction.[74] The parable of the Good Samaritan,[75] the parable of the Prodigal Son,[76] and the parable of the Talents,[77] are especially well known.

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68. *See supra* note 13.

69. *See supra* notes 13, 53 and accompanying text.

70. RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 99 (2d ed. 2001) [hereinafter DICTIONARY].

71. *Matthew* 10:2-4. One of the original twelve, Judas, betrayed Christ and died, and he was replaced by Matthias. *Acts* 1:16, 26. The Bible is full of such stories of disloyalty and its opposite, faithfulness.

72. *Acts* 14:14. Paul, undoubtedly the most famous apostle, was known as Saul prior to his dramatic conversion and calling on the road to Damascus. *Id.* 9:1-16. He strongly opposed Christianity before his conversion and he zealously participated in persecuting its followers.

73. D. C. PARKER, AN INTRODUCTION TO THE NEW TESTAMENT MANUSCRIPTS AND THEIR TEXTS 312 (2008) ("The . . . Gospels . . . are the literary medium for the presentation of the teaching of Jesus."). J. D. Crossan has underscored in his work on parables those biblical passages stating Jesus spoke to the crowd *only* in parables. JOHN DOMINIC CROSSAN, IN PARABLES: THE CHALLENGE OF THE HISTORICAL JESUS xiv (1973) (quoting *Matthew* 13:30).

74. *See* DICTIONARY, *supra* note 70, at 1405. Certain influential theologians, notably J. D. Crossan, have argued that those who see Jesus' parables as clear-cut moral messages are mistaken because they are, in Crossan's view, indeterminate and contain nothing stable in meaning but are meant to subvert existing order, not impart timeless truth. *See* G. J. Laughery, *Reading Jesus' Parables According to J. D. Crossan and P. Ricoeur*, 8 EUR. J. THEOLOGY 145 (1999) (reviewing and critiquing Crossan and Ricoeur's views on biblical parables).

75. *Luke* 10:25-37.

76. *Id.* 15:11-32.

77. *Matthew* 25:14-30.

The Gospels caution against legalism, as seen in Christ's defiance of the rule-bound Pharisees by healing on the Sabbath,[78] and in His deep compassion for the woman caught in adultery.[79] He did not excuse legal noncompliance,[80] but insisted that it be practiced along with "the more important matters of the law—justice, mercy and faithfulness."[81] The Gospels, moreover, are only one of five sections of the New Testament. The New Testament also records history and the founding of the Christian Church in the book of Acts, which is followed by thirteen epistles authored by Paul, eight other epistles, and the prophetic book of Revelation.

The word "epistle" derives from the Greek "epistole" or "epistellein," meaning "to send a message."[82] As a genre, epistles in ancient times were widely used in secular literature, as seen, for example, in the epistles of Horace, Cicero, and Seneca,[83] but they were not a typical method of Jewish religious instruction—both Christ and Paul were Jews—in the first century.[84] The epistolary form is "especially suited for the transmission of knowledge or of advice."[85] In the New Testament, the epistles are a kind of pastoral letter to the believing community,[86] written to preserve and record for the purpose of teaching, training, and rebuking.[87] Although they are placed after the Gospels in the canon of the New Testament, most actually were written before the Gospels, though, of course, the Gospels recorded events that took place prior to the writing of the Epistles. The Epistles, then, play a variety of roles. They explain, teach, exhort, comfort, and prescribe. They can be quite specific as, for example, in their prescriptions for

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78. *Mark* 3:1-5.

79. *John* 8:1-11. Again, it was the legalists who sought Christ's condemnation of the oppressed woman. *Id.* This is the only instance in Scripture where Jesus writes. He wrote something on the ground with his finger that was not recorded. *Id.*

80. He told the woman caught in adultery not to sin any more, even though he did not then condemn her. *Id.* 8:11.

81. *Matthew* 23:23.

82. DICTIONARY, *supra* note 70, at 654.

83. *See, e.g.*, THE SATIRES AND EPISTLES OF HORACE (Smith Palmer Bovie, trans., 1959); ANCIENT LETTERS: CLASSICAL AND LATE ANTIQUE EPISTOLOGRAPHY 157 (Ruth Morello & A. D. Morrison eds., 2007) [hereinafter Morello & Morrison].

84. D. A. CARSON & DOUGLAS J. MOO, AN INTRODUCTION TO THE NEW TESTAMENT 331 (2d ed. 2005).

85. Morello and Morrison, *supra* note 83, at viii.

86. The two epistles to Timothy and the one to Titus, however, were addressed to particular individuals. It was expected, nonetheless, that they would be shared more broadly within the community of believers.

87. *2 Timothy* 3:16. Professors Carson and Moo suggest that Paul used letters because it was convenient and necessary, given the rapid growth of Christianity, for communicating from a distance. And also for their sense of "personal immediacy," that is, as "a means of establishing personal presence from a distance." Carson and Moo, *supra* note 84, at 331.

handling disputes[88] and orderly worship,[89] but they also recurrently include calls for adherence to such overarching standards as kindness, patience, faithfulness, and self-control.[90] The Epistles do not so much create as unfold and reveal. They are central to the beliefs and practices of the Christian Church.[91]

If Professor Rock is correct that Delaware courts issue sermons and parables, then those opinions serve as authoritative "gospel" for corporate law. And lawyers, law professors, and law students rightly give them the close and careful study that theologians and conscientious clergy and lay readers give the Bible. But, although the Bible is accessible to all who can read, and in fact is widely read by clergy and lay believers around the world, it is quite unlikely that corporate directors and officers read judicial opinions, at least not frequently. Professor Rock does not fully grapple with this problem. He states, for example: "Consider how Evans, Reilly, or Wasserstein felt when reading these opinions."[92] Softening the transmission-of-law point somewhat, he also states: "Imagine how other managers and directors, when they read *or heard* about these opinions, felt about the prospect of being similarly pilloried."[93] If managers in fact are reading judicial opinions about fiduciary duties, that would be extraordinarily helpful for the project of disseminating legal knowledge, but that seems improbable. Where, then, in the re-telling of corporate law's morally laden counter-narrative, are the apostles, and what are they saying in their epistles to the corporate community? That question will be explored in Part IV, after Part III examines a recent, well-known and highly instructive sermon from Delaware—the *Disney* opinion.

III. THE DISNEY NARRATIVE AND COUNTER-NARRATIVE

Few cases in corporate law over the past decade have been as long-awaited and as closely scrutinized as the trial court opinion in *In re The Walt Disney Co. Derivative Litigation*.[94] After an attention-grabbing pretrial order in 2003 refused to dismiss a complaint alleging breaches of the fiduciary duty of good faith,[95] the case went to trial in late 2004. Chancellor

88. *See 1 Corinthians* 6:1-8.

89. *See 1 Corinthians* 14:26-40.

90. *Galatians* 5:22-23.

91. James W. Aageson, PAUL, THE PASTORAL EPISTLES, AND THE EARLY CHURCH 1 (2008) ("What is virtually indisputable is that Paul and his letters, during his lifetime and after, played a critical role in making Christianity what it was to become.").

92. Rock, *supra* note 9, at 1048. Those gentlemen had been strongly chided in the opinions described earlier by Rock.

93. *Id*. (emphasis added).

94. 907 A.2d 693 (Del. Ch. 2005).

95. *In re* The Walt Disney Co. Derivative Litig., 825 A.2d 275, 291 (Del. Ch. 2003).

William Chandler found for the defendants in handing down his lengthy opinion in August 2005, the culmination to what the Chancellor described as "something of a public spectacle."[96] In June 2006, the Delaware Supreme Court affirmed Chancellor Chandler's decision.[97]

The Disney Company, of course, is a household name famous for its fictional characters like Mickey Mouse, Donald Duck, Dumbo, Bambi, Cinderella, and many others, and for its original effort to provide wholesome entertainment for the entire family. Disney owns theme parks, a movie studio, and television properties including ABC, ESPN, and the Disney Channel. The basic facts of the *Disney* litigation itself are well known to corporate law readers, so only a summary is needed here.

The legal issue centered on whether the directors and certain executive officers of Disney had breached their fiduciary duties in connection with the hiring and termination of Michael Ovitz as president. Ovitz was the founder and head of Hollywood's most powerful talent agency. He was courted for the number-two position by Michael Eisner, Disney's CEO, following a period of considerable turmoil at Disney. The prior president, Frank Wells, had died in a helicopter crash. Eisner himself had a serious heart condition requiring surgery, and the company had just acquired Capital Cities/ABC, a very significant expansion. However, once Ovitz took over as president of the Disney Company, he served for only about fourteen months, yet he received approximately $130 million in severance compensation. Many shareholders were upset and brought a derivative action in which they asserted breaches of the fiduciary duties of due care and good faith in the way the Disney directors and officers had handled Ovitz's hiring and termination.

At the trial, which consumed thirty-seven days, several Disney officers and directors took the witness stand to give their own versions of what had happened in the Ovitz affair. They told their story directly to Chandler. He observed their demeanor and listened to their accounts firsthand, unlike appellate judges who receive witness testimony secondhand from a written record. The defendants' lawyers understandably sought to portray their clients as saintly—or at least as not too sinful—while opposing counsel drew out the villainy or ineptitude in their behavior. Assessing these multiple vantage points, Chancellor Chandler pieced together "the facts" as he found them and wove them into a master narrative told only by him.

Recall that corporate statutes permit a business story but do not themselves tell it.[98] Consequently, prior to the litigation, the Disney/Ovitz story had substantially played out factually, but had not yet come into the legal light. Chandler's narrative not only painstakingly and coherently ordered

96. 907 A.2d at 698.
97. *In re* The Walt Disney Co. Derivative Litig., 906 A.2d 27, 75 (Del. 2006).
98. *See supra* INTRODUCTION.

the key events and characters to make sense of what had happened at Disney, it formed the essential backdrop for framing and interjecting his equitable counter-narrative. Equity's moralizing counter-narrative is thus complicit in, even as it engages and recasts, the often tragic-comic master narrative permitted by lax law and fallen man.[99]

Of course, one of the delicious ironies of the encounter between the master narrative and the counter-narrative in *Disney* is that most of the defendants—except Ovitz himself—thought all along that the problem at Disney was Ovitz. After being wooed by Eisner and signing a lucrative employment agreement that, at Ovitz's insistence, presciently covered a possible abrupt departure, the tale of Ovitz told by Eisner and others was that Ovitz and Disney were a mismatch of cultures, personality, and work styles. Director Gary Wilson testified, for example, that "there was a problem of Mr. Ovitz being accepted into the organization."[100] Shareholders—cast as always in the role of Plaintiffs—alleged other impropriety by Ovitz, such as supposed lying and violations of Disney's gift policies, but these and other charges were given short shrift by the Chancellor.

Overall, Chandler's rendering of the Ovitz affair is not unsympathetic to Ovitz. He noted, for example, that "Ovitz did make some valuable contributions while President of the Company."[101] Chandler also cast Ovitz somewhat as the classic "outsider" who did not fit into the foreign culture to which he had migrated, and who was somewhat shabbily treated by many of those elite habitués already inside the power structure at Disney. Like the new kid at a swank and cliquish Beverly Hills 90210 high school with the wrong clothes, car, and manner, the veteran, hard-edged Hollywood agent moved clumsily about in the more mannered corporate America he had frequently fought but never inhabited. The outcome of Ovitz's short-lived tale at Disney was eventually one of rejection and banishment.[102] Whether he fell by his own sin or that of others, he was thrown out of the Magic Kingdom.

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99. The interaction of statutory law and equity thus responds to Mae Kuykendall's claim that "[c]orporate law will benefit from a guiding framework that proposes a narrative structure for a socially embodied set of stories about the sort of people who inhabit the corporate world, both the concrete setting and the legal constructs." Mae Kuykendall, *Comment on Kostant: Tune in to Hear Stories of Corporate Governance, the Adventures of the Go-Between and More Exciting Tales of Corporate Law*, 28 J. SOCIO-ECON. 259, 263 (1999). The "guiding framework" is co-produced by two different voices, the one enabled by legislatures and the other expressed directly by courts, one offering freedom and another restraint, and each resting on the other.

100. 907 A.2d at 714.

101. *Id.* at 716.

102. Ovitz himself described his termination as having been "cut out like cancer." And, "I guess you could say I got pushed out the sixth-floor window." Kim Christensen & Richard Verrier, *Judge Rules in Favor of Disney in Ovitz Case But Criticizes Eisner*, L.A. TIMES, Aug. 10, 2005, at A1.

As it happens, however, from a corporate law standpoint the issue in the *Disney* case was not, ultimately, Ovitz's behavior, but, instead, that of the directors and certain officers in hiring and firing Ovitz. Having concluded that Ovitz's conduct was lacking (but not "faulty" under the terms of his employment agreement), Eisner and the other insiders found their own conduct under attack at trial. They, not Ovitz, held the reins of power conferred by the corporate law statute,[103] so it was they who would be judged in the Chancellor's counter-narrative.

In a lengthy opinion, Chandler concluded that none of the defendants had breached their fiduciary duties. Nonetheless, the opinion was a paragon of how Rock had earlier described Delaware opinions.[104] It was detailed, normatively saturated, judgmental, and laced with scolding, sometimes acerbic, moral reproof. In the Introduction alone, Chandler used the morally laden word "stewardship" to describe fiduciary standards,[105] and five times in the space of two pages, he used the word "faithful" or "faithfully," once employing the biblical phrase "faithful servant[]."[106]

The opinion is replete with morally freighted phrasings. For example, he described a portion of General Counsel Litvack's testimony as "pathetic."[107] He characterized a joint appearance on the Larry King Show by Eisner and Ovitz as a "shameless public relations move."[108] A press release concerning Ovitz's departure was "either a deliberate untruth or an incredibly irresponsible and sloppy error."[109] Chandler recounted that "the Disney directors had been taken for a wild ride, and most of it was in the dark."[110] He also referred to the "board's collective kowtowing . . . [and] Eisner's desire to surround himself with yes men. . . . who would have sycophantic tendencies."[111]

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103. *See supra* note 5 and accompanying text.
104. *See supra* notes 19-33 and accompanying text.
105. 907 A.2d at 697.
106. *Id.* at 697-98. *See* Matthew 25:21 ("Well done, good and faithful servant!").
107. 907 A.2d at 777.
108. *Id.* at 726.
109. *Id.* at 735.
110. *Id.* at 736.
111. *Id.* at 761 n.488. Novelist Anthony Trollope presciently captured the low level at which many corporate directors often operate in dialogue in his 1875 book, THE WAY WE LIVE NOW:

> Paul [in responding to a question asked by Lord Nidderdale]: "I didn't mean to be savage, but I think that as we call ourselves Directors we ought to know something about it."
>
> Lord Nidderdale: "I suppose we ought. I don't know, you know. I'll tell you what I've been thinking. I can't make out why the mischief they made me a Director."

ANTHONY TROLLOPE, THE WAY WE LIVE NOW 240 (London, Chapman and Hall 1875). Many shareholders continue to wonder "why the mischief" certain people ended up as direc-

Most memorable and biting, however, were three highly critical depictions of Eisner and his relationship to the Disney board.[112] Chandler portrayed the "unwholesome boardroom culture at Disney . . . [where] ornamental, passive directors contribute to sycophantic tendencies among directors and . . . imperial CEOs can exploit this condition."[113] Continuing this "imperial" CEO theme, Chandler's portrayal of Eisner brings to mind Trollope's description of his iniquitous character, Melmotte—a nineteenth century Bernie Madoff—"whose arrogance in the midst of his inflated glory was overcoming him."[114] Chandler thus described Eisner's "Machiavellian (and imperial) nature as CEO . . . [and] failings in process that infected and handicapped the board's decisionmaking abilities. Eisner stacked his (and I intentionally wrote 'his' as opposed to 'the Company's') board of directors . . . ."[115] And in the crowning depiction of Eisner's renowned narcissism,[116] he was described as having "enthroned himself as the omnipotent and infallible monarch of his personal Magic Kingdom."[117]

Chandler made explicit his awareness that the opinion did not simply resolve a single corporate dispute but would be mined for its application to other boards and other CEOs: "[T]he Opinion may serve as guidance for future officers and directors—not only of The Walt Disney Company, but of other Delaware corporations."[118] And: "For the future, many lessons of what not to do can be learned from defendants' conduct here."[119] Like a good preacher, Chandler urged his parishioners to learn from the waywardness of others and strive to live a more decent and upright life. To do this most effectively, Eisner necessarily emerged, in Chandler's account, as an emblem, a personification of the vanity and breakdown to be avoided in a healthy corporate culture. In Chandler's storytelling hands, Eisner became another of the well-known Disney characters, not imaginary or especially wholesome, however, but all too real and deeply flawed.

Regrettably, many a humdinger of a fire and brimstone homily is quickly forgotten over Sunday's pot roast. But Chandler published his sermon, preserving its text for return study. The genre of corporate law opi-

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tors, at Disney and elsewhere, notwithstanding the legal requirement of a shareholder vote. In honesty, perhaps many of those same directors, like Lord Nidderdale, likewise wonder.

112. Rock distills from Delaware's opinions other examples of colorful, condemnatory language aimed at villainous conduct. Rock, *supra* note 9, at 1047.

113. *In re Walt Disney*, 907 A.2d at 741 n.373. *See also id*. at 760 n.487.

114. TROLLOPE, *supra* note 111, at 288.

115. 907 A.2d at 760. The Chancellor's use of the word "infected" invokes a metaphor of disease.

116. *See* Jayne W. Barnard, *Narcissism, Over-Optimism, Fear, Anger, and Depression: The Interior Lives of Corporate Leaders*, 77 U. CIN. L. REV. 405, 412 (2008) (describing Eisner as a "legendary narcissist" and citing several specific instances).

117. 907 A.2d at 763.

118. *Id.* at 698.

119. *Id.* at 760.

nions is not a literary best seller, however, and so neither the public at large nor directors of public companies are likely to read the full-blown original.[120] The probable readers are journalists, corporate lawyers, law professors, and law students. Journalists for their subscribing public, and corporate lawyers for their clients, must mediate and translate what the judge said into understandable and helpful terms. Do the press and corporate clerisy accurately and fully convey to their audiences the strong moral refrain suffusing Chandler's opinion–sermon, or is that quality lost in the re-telling?

IV. APOSTLES AND EPISTLES

A. Methodology

The obvious messengers—apostles—of Delaware's opinions on fiduciary duties, such as that in *Disney*, are journalists at big-city newspapers and lawyers at elite corporate law firms, each of which like to report "breaking news." The media by which these messages—epistles—are sent, therefore, include newspaper stories and law firm memos.

As to newspapers, the author examined reports of Chancellor Chandler's opinion in *The Wall Street Journal*, *The New York Times*, and *The Los Angeles Times* for August 10, 2005, the day following release of the opinion. As to elite law firm accounts, Professor Rock rightly notes that it is hard to get a clear handle on what law firms actually say to clients in corporate boardrooms, for a variety of reasons.[121] He suggests examining the unexplored genre of the "memorandum to our clients."[122] That is one possibility, but another more accessible avenue is to examine law firm postings on their websites. Not only are these more prevalent than when Rock wrote in 1997, websites are efficient ways for firms to promptly communicate with existing clients. Law firm websites convey to actual and potential clients a clear sense that the firm is *au courant* on the latest legal developments and can offer immediate and insightful analysis of their significance. Consequently, the author examined the websites of twelve elite corporate law firms to see what they said about the *Disney* opinion.[123] The website is

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120. *See supra* notes 92-94 and accompanying text. Interestingly, an editorial in London's *Financial Times* newspaper stated: "Directors on both sides of the Atlantic should make it their duty to read all 174 pages [of the *Disney* opinion]." Michael Newman, *Editorials Elsewhere: A Very Popular Opinion*, L.A. TIMES, Aug. 11, 2005, at B12.

121. Rock, *supra* note 9, at 1070 & n.166.

122. *Id.* at 1070.

123. The twelve law firms were: Akin, Gump, Strauss, Hauer & Feld; Cadwalader, Wickershaw & Taft; Davis Polk & Wardwell; Dorsey & Whitney; Fulbright & Jaworski; Gibson, Dunn & Crutcher; Hunton & Williams; Morrison & Foerster; Potter, Anderson & Corroon; Simpson, Thacher & Bartlett; Skadden, Arps, Slate, Meagher & Flom; and Weil, Gotshal & Manges.

itself an interesting genre in the elite law firm setting. A "visitor" to the sites may read, free of charge, legal analyses seemingly intended for firm clients. In this respect, as with the literary form of letters generally, the reader is afforded the eavesdropping "sense of privileged access to a private world."[124]

Before describing the findings, it is worth recalling that Chandler anticipated that his opinion would serve as guidance for "future *officers* and directors."[125] He also noted, citing one of this author's articles, that the plaintiffs had not differentiated between officers and directors in their theory of liability.[126] This lawyering failure reflects a distressing pattern in the law of fiduciary duties of simply lumping officers and directors together.[127] Moreover, recent empirical work suggests lawyers do not do an especially good job of advising corporate officers as to their duties.[128] Inside counsel appear to do a better job than outside counsel,[129] but even general counsel fall down in some respects. For example, fewer than half of all respondents in a recent survey reported that they advise officers below the level of CEO and CFO.[130] Thus, in terms of the current Article, lawyers appear not to be effective missionaries to corporate officers. Those most powerful corporate actors, then, those with the greatest legal, and perhaps personal, potential for sin and villainy, and so those most in need of a periodic call to redemption, are the least likely to hear judicial guidance from corporate lawyers.

B. Bearing Witness to Directors

1. *Newspaper Reports*

All three newspapers used strong words to characterize Chandler's reproach of Eisner and the Disney board. *The Los Angeles Times* stated, variously, that the Chancellor had "rebuked," "scolded," "lambasted," and

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One lawyer has told the author that he thinks firm websites are self-promoting. That is undoubtedly true, but that portion of these firms' web sites devoted to legal analysis is professionally quite impressive, and, moreover, there is no reason for even a self-promoting website to inaccurately describe legal materials.

124. Morrello & Morrison, *supra* note 83, at xi.

125. *In re* The Walt Disney Co. Derivative Litig., 907 A.2d 693, 698 (Del. Ch. 2005) (emphasis added).

126. *Id.* at 777-78 n.588.

127. *See generally* Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597 (2005).

128. *See generally* Lyman P.Q. Johnson & Robert V. Ricca, *(Not) Advising Corporate Officers About Fiduciary Duties*, 42 WAKE FOREST L. REV. 663 (2007).

129. *See generally* Lyman Johnson & Dennis Garvis, *Are Corporate Officers Advised About Fiduciary Duties?*, 64 BUS. LAW. 1105 (2009).

130. *Id.*

"chided" Eisner and the directors, and had made "bristling comments" about them.[131] The *Wall Street Journal*'s account stated that the judge at times had "chastised" the board and Eisner, and "did rebuke" them.[132] *The New York Times* stated that Chandler had "chided" the directors and "offered pointed criticism" of Eisner and the board.[133]

All three newspapers included Chandler's crowning passage that Eisner had "enthroned himself as the omnipotent and infallible monarch of his personal Magic Kingdom."[134] All three newspapers also included the unflattering description of Eisner as "Machiavellian,"[135] with two of the three quoting the entire passage in which that word appeared. The term "Machiavellian," of course, is a strongly negative descriptor, meaning cunning, scheming, and unscrupulous.[136] It is customarily reserved for especially reprehensible and calculating behavior. Two of the three papers conveyed the "imperial CEO" descriptor.[137] The *New York Times* report included Chandler's passage that Eisner had "stacked his . . . board,"[138] and the *L.A. Times* quoted the judge's description of the Larry King interview as a "shameless public relations move" and his description of the whole affair as "a public spectacle."[139]

These three major newspapers, with a combined circulation numbering in the millions and likely a far larger readership, clearly conveyed intact the strongest and most morally judgmental language from the Chancellor's opinion. This was evident not only by inclusion of the descriptors and passages noted above, but also in their overall tone, although that interpretation is more subjective. These twenty-first century newspapers seem to be doing what novelist Theodore Dreiser described in his essay "Ideals, Morals, and the Daily Newspaper."[140] Dreiser loftily observed that newspapers did what preachers once had done, serving as "guardians of all phases of virtue, honesty and the like."[141] He noted that in advocating "moral self-control, pub-

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131. Christensen & Verrier, *supra* note 102, at A1.

132. Bruce Orwall & Merissa Marr, *Judge Backs Disney Directors in Suit on Ovitz's Hiring, Firing*, WALL ST. J., Aug. 10, 2005, at A1.

133. Laura M. Holson, *Ruling Upholds Disney's Payment in Firing of Ovitz*, N.Y. TIMES, Aug. 10, 2005, at A1.

134. Christensen & Verrier, *supra* note 102, at A1; Orwall & Marr, *supra* note 132, at A1; Holson, *supra* note 133, at A1. *See also supra* notes 113-117 and accompanying text.

135. Christensen & Verrier, *supra* note 102, at A1; Orwall & Marr, *supra* note 132, at A1; Holson, *supra* note 133, at A1.

136. *See* THE OXFORD POCKET DICTIONARY OF CURRENT ENGLISH, *available at* http://www.encyclopedia.com/doc/10999-machiavellian.html.

137. Christensen & Verrier, *supra* note 102, at A1; Holson, *supra* note 133, at A1.

138. Holson, *supra* note 133, at A1.

139. Christensen & Verrier, *supra* note 102, at A1.

140. THEODORE DREISER, *Ideals, Morals, and the Daily Newspaper*, *in* HEY RUB-A-DUB-DUB: A BOOK OF THE MYSTERY AND WONDER AND TERROR OF LIFE 152 (1920).

141. *Id.*

lic and private," newspapers expressed the civic ideals of the "average man."[142] Dreiser's language may be a bit overblown but it seems to accurately capture how three major newspapers reported the judge's sermon in *Disney*.

2. *Law Firm Reports*

What do elite law firms say about the *Disney* trial court opinion? Just as many corporate lawyers appear not to spend much time advising officers about their duties,[143] it appears, based on a review of their websites, that many elite law firms said little or nothing about this important ruling. Possibly, of course, the website archives had been purged of the material, but many of the sites still contained information from the same or earlier periods. These same firms also could have conveyed information about the *Disney* decision to their clients by other means. Still, given these firms' regular use of their websites to communicate recent legal developments, the lack of any reference to a case as significant as *Disney* is striking.

Many leading law firms, however, did post summary descriptions of the *Disney* opinion. The websites of twelve elite firms that did so were reviewed to see what they reported about Chandler's ruling,[144] with particular attention being given to how they characterized the Chancellor's criticisms of Eisner and the board, and whether the firms fully conveyed the language of moral denunciation used by Chandler. All of the examined websites, it should be noted, did a thorough job of reporting certain matters. They stated that the directors had prevailed and incurred no liability; that the business judgment rule retained its central role in judicial analysis of director conduct; described the court's explanation of how the obligation of good faith related to the duties of care and loyalty; and offered practical points for corporate directors to draw from the opinion for the future.

Also, the twelve reports uniformly noted that Chandler had leveled criticisms at the behavior of Eisner and the other directors, frequently using the words "criticize" or "criticism." Unlike the three newspaper accounts, however, which all had used somewhat tougher—and more accurate, in this author's view—language such as "chastised," "scolded," "chided," "lambasted," and others, only one firm—Potter, Anderson & Corroon[145]—used such language in describing Chandler's "chastising" of the directors.

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142. *Id.*

143. *See supra* notes 128-133 and accompanying text.

144. *See supra* note 123.

145. Potter, Anderson & Corroon was the only law firm of the twelve that was involved as counsel in the *Disney* litigation. The firm represented Sanford Litvack, Disney's General Counsel.

The reports were less likely than the newspapers to convey or quote Chandler's harshest comments. Only one firm quoted the crowning "Magic Kingdom" comment and only one firm (a different one) quoted the striking description of Eisner as "Machiavellian." Two firms described Chandler's view that Eisner had taken the directors on a "wild ride." One firm used Chandler's "kowtowing" description. However, eight of the twelve firms reported the "imperial CEO" description of Eisner, and six conveyed at least one of the Chancellor's descriptions of the Disney directors as "ornamental" or "sycophantic" or "supine." Three of those same firms plus an additional three—a total of six firms—conveyed the idea of a "stacked" board at Disney, but four of those deleted most of the entire phrase,[146] thereby losing its full critical thrust, especially Chandler's derisive "his board" parenthetical.[147]

Three firms conveyed none of the Chancellor's three most critical passages. Four firms included three or more of the most scolding passages from the opinion, and one firm seems to have used every such passage except the term "Machiavellian."

Several observations can be made. Obviously, twelve firms is not a large sample size. Nonetheless, these firms are, by anyone's standards, elite, high-quality law firms and likely would do a good job of accurately capturing what corporate lawyers think the *Disney* opinion did. Broadening the sample size may or may not show further weakness in capturing the moral flavor of the opinion. Also, these reports are not meant to be scholarly articles and are written fairly hurriedly, one surmises, but the same is true of next-day newspaper articles. Again, moreover, these are elite law firms, accustomed to absorbing and summarizing legal materials quite quickly. And they are fully conversant with the corporate law concepts at play and surely appreciate the significance of Chancery Court rulings, especially one as long awaited and momentous as *Disney*.

All that being said, it is clear that these law firm reports, varied as they are, overall are more likely than newspapers to "tone down" the opinion's harshest language. Of course, the firms may be passing along the Chancellor's moral reproach via some means other than their websites, such as through client-specific correspondence or oral advice. Or, perhaps the firms believe that the news accounts already have done that, so why repeat it? Alternatively, they may not think the moral rebuke is important, regarding it as just a sort of judicial "blowing off steam" with no larger significance for the counseling of their clients. They might think the key role for them is to

146. *See supra* note 115 and accompanying text.
147. *Id.*

distill and transmit the opinion's practical pointers—the "dos" and "don'ts"—for future boardroom conduct.[148]

This last view is open to challenge, however. The moral disapproval expressed in a court of equity's opinion is a key feature of it. Former Chancellor William Allen has written, for example, that corporate directors are "members of moral communities with allegiances to moral codes."[149] He also has noted that "we would be badly wrong to think that knowledge of legal rules is all that we need to understand the legal world."[150] Furthermore, judges are among the very few persons in our society with the moral and legal authority to warn and exhort corporate elites. To be useful for instruction, however, the judicial message somehow must be communicated to members of those moral communities.

A Chancery Court opinion, moreover—like a sermon, song, or story—has a "tone," a "melody," as well as words and a particular ending. Anyone who has been severely scolded and let off the hook remembers the scolding, as does anyone witnessing another person on the wrong end of a good dressing down. Not to report that event in a way that fully captures the speaker's attitudes is to misreport by omission what really happened; translating by deletion is not re-telling. The *Disney* opinion was not crafted at great length merely to explain why the directors were being let off the legal hook. It was written to communicate disapproval with past performance and to convey a clear expectation of better conduct in the future, Chancellor Chandler perhaps being fully mindful that equity's demands were not especially onerous and needed bolstering with rhetorical fervor. The opinion therefore, as do parables generally, employed certain jarring images and colorful terms to compose this counter-narrative of judicial reproof and path to redemption. The upbraiding, moreover, was not intended only for Eisner's and the other Disney directors' burning ears. The deterrence sought by a preacher's or judge's rebuke is, like that of a parent with more than one child, general in its thrust, not "special" and limited to the edification only of the wayward.

This is not to say that "pointers" and "tips" and "rules" do not matter. Of course they do. The danger is that compliance with them is wrongly thought to fully discharge one's duties. A specification of particular behaviors to adopt or avoid in order to be a "careful" or "loyal" director is useful

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148. My colleague David Millon thinks these lawyers are serving more as "translators" than "retellers," as they translate equity's principles into practical pointers.

149. *See* William T. Allen, *The Corporate Director's Fiduciary Duty of Care and the Business Judgment Rule Under U.S. Corporate Law*, *in* COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF THE ART AND EMERGING RESEARCH 307, 330 (Klaus J. Hopt et al. eds., 1998) (emphasis omitted).

150. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 278 (1992). Allen goes on to observe that "if we were to learn the content of legal rules alone we would achieve only a dry and brittle power that would quickly snap under the dynamic cross-pressures of complex and contradictory real life." *Id.*

by way of example and illustration, but specific instances of a category ("loyalty" or "care"), although cognitively helpful, do not (and cannot) exhaust the breadth of those qualities any more than literally complying with every traffic rule makes one a "safe" driver. Loyalty and care not only are open-ended standards, not rules, they are attributes of a particular disposition of the actor.[151] Loyal and careful behavior is more likely to result from a director who, through cogent remembrance, recalls that he or she must habitually "be" loyal and careful as a matter of course, not just episodically. The poet W. H. Auden links teaching to parables by noting: "You cannot tell people what to do, you can only tell them parables."[152]

Chandler fully anticipated that his opinion would be read or at least heard about.[153] His predecessor, Chancellor William Allen, similarly believed that a famous opinion he wrote—*Caremark*[154]—also would be read and

> [W]ould change directors' behavior through its simple statement that directors have a duty to oversee legal compliance. Chancellor Allen believed that *Caremark's* standard of conduct could change behavior, notwithstanding its narrow standard of review, because he believed that directors generally want to satisfy their legal duties. . . . Chancellor Allen believed that *Caremark*[] . . . would alter directors' behavior through its moral suasion and associated impact on directors' norms.[155]

Neither Chandler nor Allen, however, seems explicitly to have considered the critical issue of exactly how their "moral suasion" would be communicated to directors.[156] No doubt they knew their immediate reader-

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151. Johnson, *After* Enron, *supra* note 42, at 47-55. Moreover, as philosopher J. L. Stocks had noted, moral claims are not the same as policy claims as they call an actor to "surrender" what rightly may seem to be his:

> [T]he claims of morality, as they operate in human life, present on the face of it a very different appearance from the claims of policy or purpose. They come as a recognized obligation to do or not to do, which is often seen to involve the temporary surrender or restriction of a desire in itself innocent, of a perfectly legitimate purpose. All serious moralists have had to recognize this very obvious and familiar contrast.

J. L. STOCKS, MORALITY AND PURPOSE 73 (D.Z. Phillips ed., 1969).

152. MONROE K. SPEARS, THE POETRY OF W. H. AUDEN: THE DISENCHANTED ISLAND 13 (1963) (quoting W.H. Auden, *Psychology and Art Today* (1935)). *See* Crossan, *supra* note 73, at xiv (describing how Jesus taught the crowd only by parables).

153. *See supra* notes 125-126 and accompanying text.

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

155. Jennifer Arlen, *The Story* of Allis–Chalmers, Caremark, *and* Stone*: Directors' Evolving Duty to Monitor*, *in* CORPORATE LAW STORIES 323, 341-42 (J. Mark Ramseyer ed., 2009).

156. This problem is not rectified by the fact that, as Delaware Chief Justice Myron Steele has noted, Delaware's judges write articles and give speeches, and participate in policymaking bodies like the ABA. Myron T. Steele & J. W. Verret, *Delaware's Guidance: Ensuring Equity for the Modern Witenagemot*, 2 VA. L. & BUS. REV. 189 (2007). Most of

ship was lawyers, even though the ultimate audience was directors and officers themselves. As effective promulgation is an essential aspect of the Rule of Law,[157] the teachings of equity must be appropriately transmitted to corporate decision-makers whose conduct will be authoritatively assessed by reference to them. This means the evocative *re-telling* of these stories is critical to achieving the didactic aim of the first telling. The language of moral suasion is different—it is sharper and more convicting—than the objective transmittal of a recipe or a formula or a rule. Conveying that key language from the original narrator is crucial for a faithful re-telling and, from there, to altered behavior.

We in law too infrequently think about how (or whether) law is ever communicated beyond lawyers and truly promulgated to the public at large or, at least, to key sectors of society. To the extent common law is rooted in shared social norms[158]—indeed Lon Fuller described law as "the enterprise of subjecting human behavior to the governance of rules"[159]—judicial rulings may reflect beliefs already held by large numbers of people. Thus, Delaware's judges can continue to demand loyalty and care because those qualities are presumably still valued, and perhaps more or less comprehended, in both the corporate and broader social arenas. But even if these underlying norms are already understood in these particular social settings (the boardroom and executive suite), failure to use moral language to periodically underscore these norms can lead to an eventual withering of these essential qualities.[160] Silence on certain points itself communicates; it communicates a lack of significance.

Law as a positivist system of social rules generally may enjoy significant autonomy from the domain of morality as such.[161] And therefore specialists—judges and lawyers—trained in the form, techniques, and lexicon of legal analysis, understandably emphasize the rules aspect of positive law.

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the readers, listeners, and co-participants in these settings are lawyers. Only where judges speak directly to directors and officers—something that occurs but is rarer—is the mediative role of lawyers bypassed. Perhaps Delaware's judges should "go public" more often.

157. *See* LON L. FULLER, THE MORALITY OF LAW 49 (rev. ed. 1969).

158. This subject is very ably treated by Melvin Eisenberg. MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 14-42 (1988) (describing the influence of "social propositions" on doctrine). For an elaboration of how social norms undergird corporate law doctrine, see Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865 (1990).

159. FULLER, *supra* note 157, at 124.

160. Sociologist Alan Wolfe believes corporate America already has squandered its reserve of loyalty. "Of all the virtues presumed to have been lost in America, loyalty generally takes pride of place. . . . No other institution . . . provokes such bittersweet reflections of loyalty lost as the business corporation." ALAN WOLFE, MORAL FREEDOM: THE SEARCH FOR VIRTUE IN A WORLD OF CHOICE 23-26 (2001).

161. Robert P. George, *What Is Law? A Century of Arguments*, FIRST THINGS, Apr. 2001, at 23, 29.

But law also, and fiduciary duty law in particular, although cultural artifacts, nonetheless are grounded in principles "of great moral worth brought into being largely for moral purposes."[162] Consequently, the moral tenor of fiduciary duty law forms an essential aspect of positive law. This means that authoritative voices—those of leading corporate lawyers—must fully re-tell the story.[163] If not, then the redemptive role of equity's counter-narrative in resisting the master narrative impelled by lax law and human frailty is, in the two-fold design of corporate law, inevitably nudged into the background by legal elites.

CONCLUSION

Business stories, large and small, visible and invisible, play out across this nation and throughout the world every day. These stories are shaped by the personal make-up and goals of the managers, and by business lore, social norms, training, fortune and misfortune, and market constraints. Few of these stories will ever show up in court,[164] or be widely told.[165] Corporate law's role initially appears limited to statutorily "under-writing" the story by offering the many attractive features of the corporate form, including broad freedom coupled with a reduced exposure to personal liability. But equity's counter-narrative, which seems in a litigated case like *Disney* to intervene only later in the larger narrative, in fact stands ready to speak its influence from the very start. Its insistence on loyalty and care is meant to guide the master plotline all along in every story.

The dazzling freedom afforded business characters in corporate statutes would be unlikely and highly problematic without the inhibitory "counter" voice of equity. Equity embeds something of a moral infrastruc-

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162. *Id.*

163. What is being urged in the text—accurately and fully retelling what equity says about fiduciary duty—is distinct from advocating that lawyers provide "moral counsel" as such, *see* Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1319 (2006), or that lawyers have a "civic obligation" to impart full counsel, *see* Bruce A. Green & Russell G. Pearce, *"Public Service Must Begin at Home": The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207 (2009). The claim here is more straightforward. To accurately convey *factually* what Delaware's judges have done in an opinion and to accurately convey *factually* what director and officer fiduciary duties entail, the moral dimension of both must be communicated.

164. *See* Arlen, *supra* note 155; THE ICONIC CASES IN CORPORATE LAW (Jonathan R. Macey ed., 2008). The stories in these two collections are all litigated stories, almost all of which, except Chancellor Chandler's opinion in Disney, are told from the vantage point of appellate judges. *See* James D. Cox & Eric Talley, *Hope and Despair in the Magic Kingdom:* In re Walt Disney Company Derivative Litigation (Berkeley Program in Law and Economics, Working Paper Series, May 2008), *available at* http://escholarship.org/uc/item/7j44n7wf.

165. *See supra* note 2.

ture into the otherwise meager contours of corporate law in order to endow business activity with an element of moral endeavor. But equity "counters" the master narrative—explicitly, in those cases that do show up in court—for the purpose of more generally co-producing the larger business narrative, not just periodically opposing it. The judicial speakers in this ostensibly counter-discourse, therefore, expect to be listened to and to have their moral musings woven into the unfolding dominant storyline.

The key to this co-telling role of equity, however, is the re-telling role of lawyers. Drawing on the biblical narrative structure, we see that equity judges generate convicting sermons but that the apostolic role is critical to completing the didactic mission. Perhaps a strong oral tradition in the practice of corporate law is effectively spreading equity's moral word to corporate directors and officers. But the epistolary genre, as in the biblical narrative, nevertheless remains vital, and it is a moral (not a rules-based) discourse that needs habitual bolstering or good sermons will go unheard and, therefore, will not alter the overall business storyline.

Corporate lawyers must reflect on their mediative role. Rule-focused lawyers or, worse, "gamesters,"[166] will not effectively discharge their part in passing along the full flavor of judicial teaching about fiduciary duties. It is less a matter of the Stranger who knows how to ask questions,[167] asking "where were the attorneys?"[168] as a question of "who are the lawyers?" Or, just perhaps, "who do they think they are?"

166. Christine E. Parker, Robert Eli Rosen & Vibeke Lehmann Nielsen, *The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation*, 22 GEO. J. LEGAL ETHICS 201 (2009).

167. *See* T. S. Eliot epigram *supra*, accompanying note **.

168. *See* Parker et al, *supra* note 166, at 202 (describing Judge Stanley Sporkin's famous question to this effect about the savings and loan disasters in 1990 and how others have repeated it at times of corporate scandal thereafter).