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WANDERING MIND AS FIDUCIARY BREACH: COGNITIVE DUTIES OF CORPORATE DIRECTORS

DAVID YOSIFON*

ABSTRACT

Drawing on contemporary science and ancient wisdom, this Article assesses the ubiquitous human problem of mind wandering as it relates to the fiduciary obligations of corporate directors. Directors must endeavor to advance shareholder interests carefully and loyally. Boards have extremely wide latitude to determine the substance of corporate policies, but the law imposes certain process obligations on corporate decision-making with particularity. Directors must approach their decision-making in an informed and deliberate way. They must listen to reports, and they must deliberate with their fellow directors before voting on corporate action at board meetings. This Article identifies the duty to concentrate as a heretofore unrecognized element of the fiduciary obligations of corporate directors. In the corporate boardroom, a wandering mind can be a fiduciary breach. Having made this innovative doctrinal contribution, the Article then situates its lessons in the context of a broader inquiry into the ways in which fiduciary concepts can inform an approach to personal renewal, excellence, and transcendence, in ordinary life, altogether separate from corporate affairs.

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I know not of any other single thing so conducive to great loss as the untamed mind . . . I know not of any other single thing so conducive to great profit as the tamed mind.

—The Buddha¹

It is the state of the servant's mind which is material. Its external manifestations are important only as evidence.

—Restatement (Second) of Agency²

INTRODUCTION

The human mind is powerful but unaccountable. A person can commit their mind to a particular purpose and deploy it for a particular task. Such efficacy is central to our ideas about the will, personal identity, and what is special about us as a species. Yet the mind also seems to have a mind of its own. Our minds often think about things, and sometimes dwell on things, in ways contrary to our intention. The mind's tendency to wander is often annoying and can be distressing. It detracts from our ability to accomplish in life what we set out to do. And this is not an occasional lapse. The wandering mind is a routine, recurring feature of our mental lives.³

A mysterious aspect of mind wandering is that we do not always realize it is happening. Or, sometimes it takes us a long time to notice it. We set out with the intention to think about a specific thing, and, at some point, our mind instead wanders off, maybe lamenting something we said that morning or long ago, and *time goes by* before we realize we are no longer thinking about what we intended. Once we have noticed that the mind is wandering, it is not difficult to bring it back. It may soon wander

¹ GRADUAL SAYINGS (AṄGUTTARA NIKĀYA), THE BOOK OF THE ONES ch. IV (F.L. Woodward trans.), *reproduced in* 4 COLLECTED WHEEL PUBLICATIONS 109 (2008).

² RESTATEMENT (SECOND) OF AGENCY § 235 (1958).

³ See *infra* Part II (reviewing scientific findings relating to mind wandering).

off again, but bringing the mind back to a purposeful subject, repeatedly, if necessary, is easily done. Yet, we do not always do so. Especially if the mind has gone to a pleasant fantasy, or a dark worry, we sometimes let it remain abroad even after noticing the deviation, before finally returning it to our purposeful subject.⁴

But the mind is not incorrigible and these mental habits are not inevitable. If we commit to paying attention and watching the mind closely, we can more readily notice when our mind has wandered, and more quickly bring it back to intentional thinking. If we are on guard, actively alert, to the propensity of the mind to wander, we can keep it from wandering away as frequently and as far as it otherwise would. This is known in some kinds of literature as the practice of “mindfulness.”⁵ It might just as well be called “monitoring” the mind.

These cognitive dynamics bear on corporate fiduciary duties in ways that have not been explicitly addressed in scholarship or case law. I give that attention here and argue that corporate directors, and other kinds of agents too, have in certain circumstances a duty of cognitive attention and a duty to correct their minds when they notice them wandering in the course of their agency. Failing to do so can be a fiduciary breach. This begins as black letter exegesis. Then, having established my doctrinal contribution, I use insights developed in the course of the analysis to pursue more intimate concerns of existential engagement, individual excellence, and personal transformation.⁶ This is further to a broader project committed to reaping from fiduciary discourses, for private, personal use, a sentiment of being available within them that might fill the void left by the collapse of other, once reliable, now suspect, fonts of wisdom and meaning in our society.⁷

⁴ *Id.*

⁵ See *infra* Section II.C (discussing mindfulness practices).

⁶ See *infra* Part IV (developing this theme).

⁷ Other installments of this project (no familiarity with them is needed here) include David Yosifon, *Corporate Law as an Existential Project*, 88 FORDHAM L. REV. 1801 (2020); David Yosifon, *Moby-Dick as Corporate Catastrophe: Law, Ethics, and Redemption*, 90 U. CIN. L. REV. 372 (2021); and David Yosifon, *Agent Correction: Chastisement, Wellness, and Personal Ethics*, 50 FLA. ST. U. L. REV. 427 (2023).

I. FOCUS ON THE CORPORATE BOARD

A wandering mind could be a problem for many kinds of fiduciaries, including lawyers, trustees, or warehouse workers. I focus here on the minds of corporate directors for several reasons. First, the narrow, relatively minimalist doctrinal requirements of corporate governance law make it a suitable handle for grabbing ahold of what would otherwise be too large and cumbersome a subject. Having managed to make sense of this issue within the boardroom, the lessons grasped here can subsequently be developed and deployed in other areas.⁸ Second, the corporation is an especially important institution in our society at this time. Specifying the mental responsibilities of those at its helm is, therefore, especially socially important. Finally, the simplicity of the study, so construed, combines catalytically with its importance to effectively stoke the more personal purposes to which the inquiry is ultimately directed.

A. Mind Wandering in the Boardroom: Vignettes

Here is a corporate director, call him Marchese, in for the quarterly Board of Directors meeting of an ice cream corporation. The Board is hearing a presentation from a consultant hired by the firm's Health Standards Compliance Committee regarding plans for the implementation of Listeria-prevention protocols that the Board previously determined should be undertaken in the company's manufacturing facilities.⁹

Vignette One

As the presentation is underway, the director turns his body, eyes, and mind to the consultant. He listens and thinks about what is said. Soon, however, his mind begins to wander to his other business interests. He thinks this consultant, the one now briefing the Board, might make a good Chief Health Officer for the cheesecake firm of which he is the principal shareholder.

⁸ Cf. David Yosifon, *Billing for Dreams* (legal-ethics work in progress, drawing on ideas developed here) (on file with author).

⁹ These vignettes are very loosely inspired by *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019).

He begins to think about the problems the cake firm is having. He speculates about what it would cost to hire this consultant. He wonders if it would present a conflict with the ice cream company if he were to draw the consultant away full-time to the cheesecake business. This brings his mind back to the presentation. He has not really heard what was said. His fellow directors appear to be nodding their heads. He nods along too. The Board votes on whether to accept the new Listeria-prevention plan, he votes in the affirmative.

Vignette Two

The same director, but he had an argument with his spouse that morning. He regrets some of the things he said but nevertheless believes his spouse was fundamentally in the wrong. As the presentation is ongoing, he finds his mind composing the email, no, the text, he will send after the meeting, fiddling with the words, anticipating the reply. He sees the consultant making eye contact and realizes he has not been listening to the presentation. Still, his mind dwells on the morning conflict with his spouse. He begins thinking maybe it was his fault after all. The presentation appears to be coming to a close. He votes to approve the new protocols.

Vignette Three

The same director, but as the presentation is underway, his mind wanders to the cleaning products company that his brother-in-law owns, and on whose board of directors he sits as a favor to his sister. In a flash, the director, who was a research biologist before stumbling into industrial work, realizes that a small alteration in that firm's product formula could facilitate water purification in urban water-supply systems for a fraction of the cost municipalities are now spending on clean water. Just then he sees the consultant is sitting down and the Chair is calling for a vote on the Listeria-prevention protocols. He votes in the affirmative.

Vignette Four

The same director, but he is bored by the presentation and undertakes a deliberate sexual fantasy involving the consultant.

Vignette Five

The same director, but he is bored by the presentation and his mind wanders into a sexual fantasy involving the consultant.

Vignette Six

The same director, but he is attending the meeting from his home office by telephone, as is authorized by state incorporation law.¹⁰ During the course of the meeting he falls asleep, dreams briefly of Jamaica, and the boy he saw there on the beach. He wakes just as the Chair is calling for a vote on the Listeria-prevention program. He votes in the affirmative.

Vignette Seven

The same director attending by telephone, but while listening to the presentation his mind wanders to that time he was in Jamaica, to the boy he saw there on the beach. When the Chair calls for a vote on the health compliance program, he realizes his mind has been wandering. He votes in the affirmative.

Vignette Eight

The same director, but he has been experimenting, further to a Silicon Valley fad, with hallucinogenic “micro-dosing.”¹¹ Having taken too much that morning, he is tripping *in extremis* as the consultant’s report is given. When the Chair calls for a vote on the health protocols he votes in the affirmative, thinking he is authorizing a costly but necessary dragon-hunting expedition to save the company.

¹⁰ See DEL. CODE ANN. tit. 8, § 141(i) (permitting attendance at board meetings by conference telephone). See also *infra* text accompanying note 95 (discussing this statutory provision).

¹¹ See Jack Kelly, *Silicon Valley Is Micro-Dosing ‘Magic Mushrooms’ to Boost Their Careers*, FORBES (Jan. 17, 2020, 11:11 AM), <https://www.forbes.com/sites/jackkelly/2020/01/17/silicon-valley-is-micro-dosing-magic-mushrooms-to-boost-their-careers/?sh=eb2ed1f5822a> [https://perma.cc/7PQ6-VSBA]; see also Sarah McBride, *Startup CEO Says He Was Fired for Microdosing LSD at Work*, FORTUNE (Apr. 27, 2021), <https://fortune.com/2021/04/28/justin-zhu-iterable-lsd-microdosing-andrew-boni/> [https://perma.cc/7SJ5-D3VP] (“Zhu told Bloomberg he was . . . microdosing, in an effort to boost his focus.”).

Vignette Nine

The same director, he listens intently throughout the presentation, but does not understand most of it, the concepts and arguments being mostly too complicated for him. He votes in the affirmative on the proposed health protocols.

. . . .

Six months later, a *Listeria* outbreak in one of the corporation's manufacturing facilities goes undiscovered before contaminated products were shipped. Seven people die, including two children. The company is sued for hundreds of millions of dollars, and fined hundreds of millions more, when it comes out that the firm's *Listeria*-prevention program had not been properly implemented in its factories. The value of the company's stock melts away. The shareholders are looking for someone to sue.

B. The Stakes

We want ice cream. It satisfies instinctual desires (for fat, for sugar) in an aesthetically pleasing form, in a reasonably cheap way. The widespread availability of ice cream, uncontaminated by deadly bacteria, is a measure of humanity's ascent from the muck.¹²

Of course, ice cream is just the cherry on top. We also need, and ought to be able to get, securitized subprime mortgages, vaccine innovations, usable artificial intelligence, the manufacture of munitions, exploration and mineral exploitation of the cosmos, and prudent management of relations with aliens encountered there. Assessing the law of corporate purpose is beyond the scope of this Article.¹³ But the social importance of attentive corporate decision-making is clearly evident even within our prevailing shareholder-primacy regime. We all have an interest

¹² But see David Yosifon, *Legal Theoretic Inadequacy and Obesity Epidemic Analysis*, 15 GEO. MASON L. REV. 681 (2008) (analyzing consumer manipulation in the junk-food industry).

¹³ For an extended examination and critique of the shareholder primacy norm in corporate governance, see generally DAVID YOSIFON, *CORPORATE FRICTION: HOW CORPORATE LAW IMPEDES AMERICAN PROGRESS AND WHAT TO DO ABOUT IT* (2018) [hereinafter YOSIFON, *CORPORATE FRICTION*].

in directors paying attention in the boardroom. At stake at the margins of fiduciary cognition, no doubt, is the allocation of huge amounts of capital, which may get the benefit of focused human attention, or not.

II. UNDERSTANDING THE WANDERING MIND

A. *Scientific Depiction*

The study and treatment of the wandering mind have ancient origins and hallowed provenance. As with other fundamental mysteries, humanity's exploration of the wandering mind has long been pursued through religious and philosophical inquiry and is today scrutinized with scientific methods. The formal psychological study of the wandering mind has advanced considerably in the last several decades, owing in part to "a change in the scientific zeitgeist regarding the appropriateness of the study of consciousness."¹⁴

Empirical research psychologists have developed a dogged triangulation strategy to study the wandering mind.¹⁵ This involves, first, asking experimental subjects at random times for self-reports about their own mental experience; second, neurocognitive measurement of brain activity while the mind is wandering; and third, behavioral observations of subjects whose minds are wandering (in particular, measuring eye movement and pupil dilation).¹⁶ Unlike other psychological research that has been introduced into legal scholarship in recent decades, the scientific study of the wandering mind has, by and large, not surfaced dramatically counter-intuitive findings.¹⁷ Instead, the research

¹⁴ Jonathan Smallwood & Jonathan W. Schooler, *The Science of Mind Wandering: Empirically Navigating the Stream of Consciousness*, 66 ANN. REV. PSYCHOL. 487, 487 (2015). Mainstream psychology was previously dominated by schools of thought committed to understanding human psychology only through observation and assessment of behavior ("behaviorism") because of the purported opacity and unreliability in directly examining mental life.

¹⁵ *Id.* at 489.

¹⁶ *Id.* at 489, 492–93, 502–04.

¹⁷ See generally Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004) (surveying counter-intuitive findings from social-psychology that contradict core assumptions in law and legal theory, concerning especially the relative

on mind wandering principally advances the crucial intellectual task of making the obvious explicit, so that we can better understand what we already, but too vaguely, know, and assess more deliberately what ought to be done about it.

For example, experiments confirm the intuition that our minds wander frequently.¹⁸ One study, using randomly timed probes (penny for your thoughts) sent to subjects' cell phones, found that the recipients' minds were "wandering" in 47 percent of all samples.¹⁹ Subjects reported frequent mind wandering irrespective of the type of behavior in which they were engaged, with mind wandering being reported in at least 30 percent of probes in every category of activity except for one (ahem).²⁰ This study, made possible by modern cell phone technology, found significantly higher rates of mind wandering than had been measured in research done in far more artificial laboratory-based experiments in previous decades.²¹ Our minds wander both to the past and to the future, but formal study shows that mind wandering to the future is more common, except among the depressed, whose minds tend to wander to the past.²²

Some research findings on the wandering mind are as strange as they are familiar. When probed about their mental state, people frequently report that their mind was wandering but that they were not consciously aware that it was wandering

influence of individual character, as compared to situational and contextual factors, in accounting for human behavior).

¹⁸ See, e.g., Matthew A. Killingsworth & Daniel T. Gilbert, *A Wandering Mind is an Unhappy Mind*, 330 SCI. 932 (2010) (empirical study documenting, inter alia, frequency of mind wandering).

¹⁹ *Id.* Psychological literature sometimes uses the phrases "stimulus independent thought" and "task independent thought" to describe what constitutes mind wandering. See also Eric Dane, *Where is My Mind? Theorizing Mind Wandering and Its Performance Related Consequences in Organizations*, 43 ACAD. OF MGMT. REV. 179, 180 (2018) ("[M]ind wandering is a psychological state in which one's thoughts have departed from the task at hand as well as the stimulus environment more generally.").

²⁰ Killingsworth & Gilbert, *supra* note 18, at 932 ("Surprisingly, the nature of people's activities had only a modest impact on whether their minds wandered and had almost no impact on the pleasantness of the topics to which their minds wandered.").

²¹ *Id.*

²² Smallwood & Schooler, *supra* note 14, at 496.

until they were probed about it.²³ This data is familiar to our experience. But how can it be? When your mind is wandering, you are thinking about something other than what you are meant to be thinking about. But how can you be thinking about something without knowing you are thinking about it? How can you later say that you were thinking about something specific that you can identify with particularity, but that you had not realized you were thinking about it until you were asked what you were thinking about? Here our language and understanding begin to come up short. The difficulty we have in making sense of this routine cognitive phenomenon poses real challenges for tracking legal requirements bearing on mental alertness and awareness.²⁴

Scientists have also captured in their data an important truth about mind wandering that our common sense has feared all along: mind wandering interferes with task effectiveness.²⁵

²³ *Id.* at 495 (“[I]ndividuals routinely fail to notice that their minds have wandered, and a lack of meta-awareness is often associated with more pronounced indicators of the state.”); *see also* Dane, *supra* note 19, at 181 (“[A]llocating cognitive resources toward generating off-task thoughts does not necessarily imply one is aware that one’s thoughts are disconnected from the present moment and the task at hand.”). External probes also reveal more mind wandering than is self-reported by individuals charged with keeping track of mind wandering on their own. *See* Tracy Brandmeyer & Arnaud Delmore, *Meditation and the Wandering Mind: A Theoretical Framework of Underlying Neurocognitive Mechanisms*, 16 *PERSP. ON PSYCH. SCI.* 1, 22 (2020).

²⁴ *See infra* Part III (discussing cognitive responsibilities of corporate directors).

²⁵ Smallwood & Schooler, *supra* note 14, at 505 (“[M]ore than a decade of research has revealed the broad range of situations under which the tendency to mind wander has a negative influence on task performance.”); *see also* Dane, *supra* note 19, at 179 (“In the fields of management and organization studies, research points to the importance of focusing on the present moment and the tasks and events associated with it.”). Excitement about the conclusions drawn from empirical psychological research can be dampened when one confronts the flatness of the studies themselves. For example: “One study measured mind wandering while participants read a detective novel. . . . [P]articipants who mind wandered without awareness . . . at critical periods in the task were less likely to solve the crime than were those who mind wandered but were aware of this fact.” Smallwood & Schooler, *supra* note 14, at 498. This flatness (and its more dangerous cousin, the replication problem) should not diminish our excitement about the issue and insights under review. Instead, it should diminish our reliance on *science* as the absolute arbiter of these concerns. Put differently, the thinness of the psychological studies (this

This is especially true for endeavors that are complicated and involve problem-solving.²⁶ Among the reasons for the adverse effect of mind wandering on getting things done is our cognitive departure from stimuli associated with the task at hand.²⁷ It seems even stranger when stated formally than it does in the experience of it, which is plenty strange enough: “during periods of self-generated thought, attention is disengaged from perception.”²⁸ That is to say, when a person’s mind is wandering, they are in a very real way no longer hearing what they are listening to and no longer seeing what they are looking at. This decoupling undermines task efficacy.²⁹

Why do our minds wander? The scientific conjecture is that mind wandering is adaptive.³⁰ (Just so). The content to which our minds wander is usually not random or absurd.³¹ Often, it is concerned with our fundamental life projects, subjects of great concern to us.³² The philosopher Zachary Irving emphasizes that mind wandering is “unguided” but not “purposeless.”³³ The ability to think about things distant from the present environment allows humanity to escape the tyranny of immediacy and instead imagine and strategize about future intentions, often drawing

is no knock, they are doing great, hard work) invites, even requires, us to elevate the importance of literary, philosophical, and theoretical perspectives on these matters, given that we *must* have some means of addressing them, and, while science has something to add, it cannot carry the full conversation. We must, as lawyers and legal theorists, take what we can from the scientists, the religious seers, the poets, and the case law, and finally figure it out as best we can for ourselves, in our own way.

²⁶ *Id.* at 505.

²⁷ *Id.* at 500.

²⁸ *Id.*

²⁹ *Id.* at 506. Mind wandering can also harm our ability to engage in relatively easy or automatic (mindless) tasks such as driving. One study of automobile accidents found that being deeply absorbed in mind wandering was the single best predictor of accident responsibility. Cedric Galera et al., *Mind Wandering and Driving: Responsibility Case-Control Study*, 2012 BRIT. MED. J. 345 (2012).

³⁰ Mind wandering appears to be a universal human phenomenon. It seems to happen in all cultures (even if its content is culturally dependent). Smallwood & Schooler, *supra* note 14, at 505.

³¹ See generally Zachary C. Irving, *Mind-Wandering is Unguided Attention: Accounting for the “Purposeful” Wanderer*, 173 PHIL. STUD. 547 (2016).

³² *Id.*

³³ *Id.* at 549–52.

on past experiences to do so.³⁴ Given the perceptual salience and cognitive draw of the present, we might not, if we were always in active, deliberate control, devote sufficient mental resources to stimulus-independent thought or task-independent thought. The fact that our minds escape from the present *on their own*, without waiting on our settled intention to do so, is a stroke of evolutionary genius. Like many geniuses, however, this one is not perfectly balanced. It would be optimal if the mind went to work integrating past experiences with future concerns only when the present situation was not especially cognitively important. But evolution rewards survival, not perfection, leaving recipients of the evolutionary process (us) more neurotic, scattered, and mentally troubled than we would like.

Perhaps the dynamics of human mind wandering were better adapted to earlier epochs of human experience. The mind wanders especially when it is bored; indeed, mind wandering can be a palliative to the psychic pain of boredom.³⁵ In the deep past of human evolution, relatively important moments over the course of the day might have presented themselves with a cognitively attractive salience and vigor, for example, threats from predators, opportunities for prey, and developments in the weather. Such times called for cognitive attention, and that focus was easy to give. More boring times were less cognitively important, and the mind could then wander freely, integrating the past for use in the present, and mentally practicing how to deal with things in the future.³⁶ Under contemporary conditions, tasks are often dull, cognitively demanding, *and* important.³⁷ An example might be listening critically to a consultant's report about health safety protocols in an ice cream manufacturing facility.

There is some scientific support for the folk wisdom that associates mind wandering with creativity.³⁸ As with nightmares,

³⁴ Smallwood & Schooler, *supra* note 14, at 507 (noting the utility of “prospec-tion”).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 508 (describing important tasks in day-to-day life that nevertheless increase the tendency of mind wandering).

³⁸ Brandmeyer & Delmore, *supra* note 23, at 11 (“[I]ndividuals who mind wander more frequently in their daily lives may also be more creative in general.”); Robert F. Blomquist, *Law and Curiosity*, 81 UMKC L. REV. 837,

the wandering mind can draw together themes and forms of representation more loosely, experimentally, provisionally, and perhaps deeply than we tend to achieve in our more deliberative, intentional thought-schemes.³⁹ Creative insights that come through mind wandering typically do not emerge when one intends to be working on a given issue, but instead come when the mind is wandering away from *other* intended work.⁴⁰ Again, it would be best if creative mind wandering would happen when we are otherwise involved in something mentally simple, like exercising or doing housework. It would also be better if coal were found above ground, rather than below it. As things are, creative mind wandering often comes when we mean for the mind to be more intentionally working on something else that is important to us, just as coal usually insists on being found in hard places.

B. Executive Function

Another research area shedding light on the problem of the wandering mind is the study of what psychologists call “executive function.”⁴¹ This construct is composed of mental processes that engage in deliberate, intentional, calculating thought.⁴²

865 n.59 (2013) (giving examples that include the breakthrough-daydreaming of Archimedes, Newton, Descartes, Tesla, and Einstein).

³⁹ Smallwood & Schooler, *supra* note 14, at 507–08. The similarity between daydreaming and night-dreaming also leads psychologists to suppose that mind wandering may serve some of the mental-health and brain-health functions that have been associated with night-dreaming. *Id.* Studies confirm the intuition that bizarre content is more frequent in night-dreams than in daydreams. See M.E. Gross et al., *Comparing the Phenomenological Qualities of Stimulus-Independent Thought, Stimulus-Dependent Thought and Dreams Using Experience Sampling*, PHIL. TRANS. R. SOC. B 1, 8 (2021).

⁴⁰ See generally Benjamin Mooneyham & William Schooler, *The Costs and Benefits of Mind-Wandering: A Review*, 67 CANADIAN J. EXPERIMENTAL PSYCH. 11, 15 (2013).

⁴¹ The coinage “executive function” for these mental processes is attributed to Muriel D. Lezak, *The Problem of Executive Functions*, 17 INT’L J. PSYCH. 281, 281 (1982) (“The executive functions comprise those mental capacities necessary for formulating goals, planning how to achieve them, and carrying out the plans effectively.”). The connection between the psychological name for this construct and the corporate function that we are reviewing here is not exactly ironic, but it may be illuminating.

⁴² Of course, not all decisions are made through executive function. Some are controlled, for example, by automatic, habitual, or instinctual cognitive patterns.

In a sense, “executive function” is the mind “staying put,” working on a particular subject—the inverse of the wandering mind.⁴³ Indeed, neuropsychologists have mapped distinct areas of the brain as being implicated in one or the other mental modes.⁴⁴

Psychologists group three different cognitive processes into “executive function.”⁴⁵ The most crucial of these to our inquiry is called “inhibitory control.”⁴⁶ This is the mental process of stopping other influences—external *or* internal—from interfering with an intentional train of thought.⁴⁷ The other two executive function processes are “working memory,” which concerns holding presently unstimulated thoughts in mind and actively engaging with them, and “cognitive flexibility,” which involves purposefully pursuing frameworks and inferences beyond the routine in addressing a problem.⁴⁸ Psychologists note that it is neither possible nor desirable for executive function to always be in control of our mental lives.⁴⁹ Once we are confidently engaged in appropriate thought and behavioral patterns, it is more efficient and relaxing to turn things over to more automatic processing.⁵⁰ Individuals with strong executive function still engage in mind wandering, but they are better than other people at directing it to time periods that do not call for sustained, focused attention.⁵¹

⁴³ See Lezak, *supra* note 41, at 281.

⁴⁴ See Kalina Christoff, *Mind-Wandering as Spontaneous Thought: A Dynamic Framework*, 17 NAT'L REV. NEUROSCI. 718, 722 (2016). Nevertheless, it is also true that executive-function areas of the brain can be activated while the mind is wandering. *Id.* at 722. The conjecture is that the wandering mind sometimes recruits resources from executive function in order to pursue its own problem-solving agenda. Another possibility is that the executive function part of the brain “fires” during mind wandering because that part of the brain is trying, but failing, to stop the mind from wandering. *Id.*

⁴⁵ Adele Diamond, *Executive Functions*, 64 ANN. REV. PSYCH. 135, 136 (2013).

⁴⁶ *Id.* at 137.

⁴⁷ *Id.* at 136.

⁴⁸ See *id.* at 142, 149 (surveying literature).

⁴⁹ *Id.* at 153.

⁵⁰ In related areas of “self-control” studies, scientists have found evidence of an exhaustion or depletion effect, in which exercising inhibition-control in one task over an extended period can diminish one’s ability to deploy executive function in subsequent tasks. *Id.* at 141. Put differently, when paying attention to one subject for an extended period of time, executive function will tend to tire, and the wandering mind will then operate more freely.

⁵¹ See *id.* at 144.

The construct of “executive function” bears some resemblance to the idea of “intelligence.”⁵² A consensus within academic psychology defines intelligence as “a confluence of the abilities to understand complex ideas and use experience and reasoning to solve problems and adapt to the environment.”⁵³ There is some debate among cognitive scientists as to whether it is useful to think of executive function and intelligence as distinct concepts. In a thoughtful review, one set of researchers submitted that it is worthwhile to maintain both ideas for the time being *because* both are still so little understood and ambiguously defined.⁵⁴ Pursuing research on both executive function and intelligence will help flesh out what is true or not about either construct, and whether they are best understood as the same or distinct cognitive phenomena.⁵⁵ Being alert to this internal debate within academic psychology can perhaps keep non-experts from reifying any of these psychological constructs, and can keep us alert to the reality that the scientific perspectives available now on the subject of the wandering mind allow us to glimpse only a bit more systematically at a crucial aspect of our mental lives that remains, despite its familiarity, deeply mysterious.

⁵² Emily C. Duggan & Mauricio A. Garcia-Barrera, *Executive Functioning and Intelligence*, in HANDBOOK OF INTELLIGENCE, 435, 441 (Sam Goldstein et al. eds., 2015) (“When defined as the ability to problem solve, plan, and structure goal-directed behavior, to produce convergent logical reasoning in the face of novelty, and to make not only efficient but efficacious decisions, little is left for one to distinguish intelligence from executive functioning.”). One area in which there is evidence of a distinction between executive function and intelligence concerns mental illness. Individuals who suffer from ADHD or schizophrenia sometimes register strong intelligence evaluations but exhibit weak executive control. *Id.* at 449.

⁵³ *Id.* at 437 (summarizing numerous studies). In general, if looking to distinguish the two constructs, it may be said that the idea of intelligence is broader than that of executive function, with the latter concerned primarily with task or goal pursuit, and the former representing more general capacities.

⁵⁴ *Id.* at 446.

⁵⁵ *Id.* at 441 (“Historically, the construct of intelligence preceded that of executive function by a large time difference.”). One cannot read long in this literature without suspecting that the idea of executive function has been emphasized lately to avoid the social controversies that have swarmed around the idea of intelligence, especially as it relates to heritability or population differences.

C. Subject to Control: Managing the Wandering Mind

Mind wandering may be adaptive for the species, and it may be useful in some ways for the individual.⁵⁶ Nevertheless, it is clear that for nearly every individual person, and for the species as a whole, some margin of mind wandering is sloppy, superfluous, and destructive.⁵⁷ Our minds will wander, and perhaps they must wander, but they do not have to wander as much as they do, and they do not have to wander during a board meeting, or while we are otherwise specifically inclined to deploy our cognitive abilities to some important purpose.⁵⁸ For millennia, yogis, Buddhists, and other seekers have cultivated, used, and taught techniques for dealing with the problem of the wandering mind. More recently, psychological researchers have pursued and examined similar methods in the laboratory.⁵⁹

A basic mindfulness practice, the essence of which is reflected in numerous traditions and research agendas, works like this: the aspirant sits quietly, with their eyes closed, and is instructed to focus their mental awareness on their breath.⁶⁰ The breath is used not because it is abstract but because it is palpable. Its physical, constant presence requires no mental effort to conjure or sustain. The aspirant need only pay attention to what

⁵⁶ See *supra* text accompanying notes 35–40.

⁵⁷ Cf. SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS (1930). Freud argues that some measure of the superego's suppression of the id is *gratuitous*. While we must suffer to have civilization, Freud argues, it is possible that we need not suffer as much as we do.

⁵⁸ Classical yoga takes the view that the adaptive work of the mind in thinking through the past or the future for practical problem-serving purposes happens irrespective of our conscious awareness of it. None of the adaptive work is lost if we just let the mind do its non-immediate thinking without our “involvement.” Indeed, our involvement may inhibit the more efficient and effective work of the wandering mind *sub silentio*. See SWAMI SATYANANDA SARASWATI, A SYSTEMATIC COURSE IN THE ANCIENT TANTRIC TECHNIQUES OF YOGA AND KRIYA 9, 360 (1981).

⁵⁹ See generally Shian-Ling Keng et al., *Effects of Mindfulness on Psychological Health: A Review of Empirical Studies*, 31 CLIN. PSYCH. REV. 1041 (2011) (providing a history and review of the formal study of mindfulness).

⁶⁰ While this overview is based on the wonderful instruction provided in SARASWATI, *supra* note 58, it is, as stated in the text, a very common, simple mindfulness practice that can easily be found in any basic text or internet search.

is already there. Despite their intention, because they are human, and because the breath is boring, the subject's mind will soon wander to some other matter, another subject, a concern about the past or the future. The student is told to be alert for this development and to try to *notice* the mind wandering when it wanders. When the mind is seen to be wandering, the subject is instructed to *bring the mind back* to the chosen point of concentration, the breath, boring as it is. In this exercise, the subject is "practicing" noticing that their mind has wandered, and "practicing" bringing their mind back to a deliberate point of attention. Such practice will, it is hoped, enable the subject to notice their mind wandering more readily in daily life, and more quickly recover their wandering mind when they are trying to concentrate on things more important than the breath. Through the practice of mindfulness, the mind also comes to wander less frequently. It is not so much that the mind is taught to tolerate boredom as it is shown that whether something is boring or not can be a function of the quality of deliberate attention that we give to it. Even the breath, and certainly a Listeria-prevention protocol, reveals its engrossing dimensions the more deeply we concentrate on it.

The utility of mindfulness meditation for taming the wandering mind has been "documented in scholarly Buddhist texts dating back more than two thousand years."⁶¹ Contemporary academic psychology has also repeatedly demonstrated the efficacy of mindfulness practice in improving control over the wandering mind, and thus aiding in problem-solving, by improving concentration and focus.⁶² Even relatively modest mindfulness practice, just ten minutes per day, shows positive results.⁶³ There is also evidence that mindfulness training done immediately in advance of a hard task can aid the discovery of innovative approaches to

⁶¹ Brandmeyer & Delmore, *supra* note 23, at 41.

⁶² Smallwood & Schooler, *supra* note 14, at 505 ("[I]mproving awareness of mind wandering via meditation reduced the occurrence of the experience."); *see also* Brandmeyer & Delmore, *supra* note 23, at 43 ("[L]ong-term meditation practice is associated with a reduced frequency of mind-wandering episodes.").

⁶³ *See* Brandmeyer & Delmore, *supra* note 23, at 52 ("Accumulating findings from contemplative-neuroscience research suggest that meditation practice strengthens the top-down feedback mechanisms involved in the regulation of attention.") (citing numerous studies).

the problem as “emphasis placed on the ‘present moment’ experience reduces the tendency toward habitual responses when searching for the solution to a creative problem.”⁶⁴

It is important to recognize that the formal scientific study of mindfulness as a means of improving on the problem of the wandering mind is still in its infancy (everything is).⁶⁵ The submission here is simply that for many people, mindfulness can yield at least marginal improvement in concentration and problem-solving. Of course, marginal improvement in mental functioning sustained over long periods of time can be life-altering. And if it can be life-altering, then it can certainly be quarter-improving.

III. COGNITIVE DUTIES OF CORPORATE DIRECTORS

A. *Attention in the Boardroom*

Corporate law specifies that every corporation “shall be managed” by a board of directors.⁶⁶ The board acts only by majority decisions taken at board meetings.⁶⁷ Corporate directors owe to the corporation and its shareholders the fiduciary duties of care and loyalty.⁶⁸ The duty of care requires directors to work diligently to advance the interests of the firm and its shareholders.⁶⁹ The duty of loyalty requires directors to privilege the interests of the

⁶⁴ *Id.* at 46. Another line of research finds that meditation practice can change, and perhaps *strengthen*, mental function by thickening or building up regions of the brain associated with executive function. *Id.* at 41–42 (citing studies). Of course, the brain is neurologically changed by everything that it encounters, be it prose, poetry, or footnotes in legal scholarship. The point is that meditation can *strengthen* the brain and improve its executive functioning.

⁶⁵ *Id.* at 42 (“[T]he explicit implications of long-term meditation practice on specific characteristics of self-generated thought and mind wandering, such as the frequency, duration, content, and affect of spontaneous thoughts, have remained relatively unexplored.”).

⁶⁶ DEL. CODE ANN. tit. 8, § 141(a).

⁶⁷ *Id.* § 141(b) (“The vote of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors . . .”).

⁶⁸ *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 367 (Del. 1993) (“Each of these duties is of equal and independent significance.”). For an overview of canonical corporate law doctrine on the fiduciary duties of directors, see generally YOSIFON, CORPORATE FRICTION, *supra* note 13, at 60–96.

⁶⁹ See *Cede*, 634 A.2d at 360.

firm and its shareholders over their own interests.⁷⁰ Loyalty requires directors to act in good faith in all their dealings related to the corporation.⁷¹

Carrying out these obligations requires a particular kind of cognitive effort. In a touchstone formulation, the Delaware Supreme Court has said: “the duty of care requires a director, when making a business decision, to proceed with a ‘critical eye’ by acting in an informed and deliberate manner respecting the corporate merits of an issue before the board.”⁷² The “critical eye” referenced here is, of course, a metaphor, for it is not the eye that must be critical, and certainly an unsighted person could serve as a corporate director. But a person without critical mental faculties could not perform the function of a director. And a director who does not actively deploy those faculties during a board meeting, but instead allows the mind to drift, does not satisfy the obligation to act with a critical eye. Corporate law circumscribes the duty of care with the “business judgment rule.”⁷³ Under this rule, courts will not second-guess the substance of business decisions directors make, so long as the decisions are lawful, disinterested, informed, and deliberate.⁷⁴ If, but only if, these conditions are met, then the duty of care has been satisfied.⁷⁵

From these straightforward requirements, we can discern that, sometimes, at a specific time, during board meetings, it is important that directors be focused on what is being discussed in their midst, and not let their minds wander from thinking about it. They must be focused on the external stimulation of the presentation being made to them, or the discussion being had by the board itself. Internally, they must be focused on their own thinking about the matter under consideration. The specification

⁷⁰ *Id.* at 361–62.

⁷¹ *See In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006) (discussing the concept of good faith in corporate governance law).

⁷² *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).

⁷³ *Id.*

⁷⁴ *See In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996).

⁷⁵ *Id.* (“That is, whether a judge or jury considering the matter after the fact, believes a decision substantively wrong, or degrees of wrong extending through ‘stupid’ to ‘egregious’ or ‘irrational’, provides no ground for director liability, so long as the court determines that the process employed was either rational or employed in a good faith effort to advance corporate interests.”).

that directors must act “with a critical eye” and “in an informed and deliberate manner”⁷⁶ dictates a particular kind of cognitive process, one which is focused and attentive to a specific stream of content and evaluation. This doctrinal standard establishes a cognitive task against which we might condemn distraction or mental drift as a breach of fiduciary duty.

At other times, and over other time periods, it may be perfectly appropriate, even important or necessary, for a corporate director to let their mind wander in furtherance of their responsibilities to the firm. Creative thinking, innovation, the search for new big ideas, all of these are certainly within the broad responsibilities of the corporate director, and sometimes, in furtherance of that duty, directors should, cognitively speaking, let go.⁷⁷ But I am not addressing those functions now. Here, I am specifically considering directors’ cognitive responsibilities in the boardroom during a board of directors meeting, or board committee meetings, where particular decisions are being made. I focus on these contexts here only to firmly establish in a simple, clear area, the existence of these cognitive components to the corporate fiduciary task, and the reality that a wandering mind can be a fiduciary breach.

If my depiction is correct, then modern corporate governance law reflects formal scientific conclusions (and common sense) that concentration is a better mental mode for dealing with important issues and solving hard problems than is working from impulse, or with a loose and wandering mind.⁷⁸ However, it is not necessary to prove that mind wandering inhibits critical task performance, or that concentration improves it, in order to show that mind wandering can be a fiduciary breach. The law stands on its own sovereign authority and does not depend upon science or common sense.⁷⁹ My point right now is a doctrinal one. The law requires a particular kind of mental process, characterized

⁷⁶ *Id.* at 873.

⁷⁷ See Dane, *supra* note 19, at 180 (“[W]hile the performance-related costs of mind wandering merit attention and concern, most research highlighting these costs has focused on the consequences of mind wandering for single-episode (i.e., ‘one-shot’) tasks as opposed to task performance *over time* [T]he benefits of mind wandering are more evident for the latter than for the former.”).

⁷⁸ See Brandmeyer & Delmore, *supra* note 23, at 42.

⁷⁹ Cf. THOMAS PAINE, THE WRITINGS OF THOMAS PAINE 99 (Moncure Daniel Conway ed., G.P. Putnam’s Sons 1st ed. 1894) (“[I]n America the law is king.”).

by the intentional, deliberate cognition of executive function. Instinctual decision-making will not cut it, and a wandering mind does not satisfy it. The black letter has it that mind wandering in the boardroom during crucial corporate decision-making is a fiduciary breach.

This cognitive requirement of conscious attention has not received sustained attention in cases or corporate law scholarship. There is, in general, very little discussion in reported cases about actual director behavior of any kind during board meetings. In a sense, this is by design and reflects the essence of corporate governance law: the board has vast discretion to run the affairs of the corporation, and it is not for the law to say, or even for the law to know, how they do it.⁸⁰ Yet, corporate law *does* have fundamental substantive requirements for how directors are supposed to behave in board meetings, and the lack of attention given to such behavior has left those requirements with a doctrinal treatment that is too thin.

The lack of juridic and scholarly attention to the dynamics of fiduciary cognition is especially glaring in light of the fact that such matters are widely understood by observers “in the trenches” to be of the utmost importance in corporate governance. Per usual, the plainest truth is spoken in the jokes. Robert Townsend, the iconoclastic business executive who helped make Avis into one of the world’s most successful rental car companies, discussed the issue in his popular book, *Up the Organization*.⁸¹ Townsend was sincere in his antipathy towards corporate boards, because of his pro-CEO convictions.⁸² Thus, his tongue-in-cheek prose about board of directors meetings should be taken seriously: “[B]e sure to serve cocktails and a heavy lunch before the meeting. At least one of the older directors will fall asleep (literally) at the meeting, and the consequent embarrassment will make everyone eager to get the whole mess over as soon as possible.”⁸³ Townsend continued: “Caution: let sleeping directors lie. If one ever

⁸⁰ See *supra* text accompanying notes 73–75 (discussing the business judgment rule).

⁸¹ See ROBERT TOWNSEND & WARREN BENNIS, *UP THE ORGANIZATION: HOW TO STOP THE CORPORATION FROM STIFLING PEOPLE AND STRANGLING PROFITS* 25–27 (2011).

⁸² *Id.*

⁸³ *Id.* at 26.

finds out that you rely on his somnolence, he will come to life with fierce and angry energy.”⁸⁴ Another corporate titan, Carl Ichan, characterized typical board meetings like this: “Literally, half the board is dozing off. The other half is reading the Wall Street Journal. And then they put slides up a lot, and nobody can understand the slides, and when it gets dark, they all doze off.”⁸⁵ Scholars and commentators routinely note the crucial problem of director attention, or inattention: “in this author’s experience at least, the portion of a board meeting devoted to committee reports generally is the portion that garners the least attention from fellow directors. They are opening mail, scanning their board packet or are otherwise distracted.”⁸⁶

Ironically, corporate law has actually become more alert to the problem of *unconscious* thought, and subconscious motivation, in the boardroom than it has to the requirements of conscious thinking there. For example, courts frequently emphasize that one of the reasons for using a stricter standard to evaluate board decisions involving conflicted transactions, as compared to the deference given to unconflicted ones, is to guard against the influence

⁸⁴ *Id.*

⁸⁵ *Asleep in the Boardroom*, WASH. POST (May 23, 2002), <https://www.washingtonpost.com/archive/opinions/2002/05/23/asleep-in-the-boardroom/7659322e-e216-48aa-9821-956e7aa34b31/> [<https://perma.cc/4UZ2-LAG8>].

⁸⁶ See Douglas M. Branson, *Enron—When All Systems Fail: Creative Destruction or Roadmap to Corporate Governance Reform?*, 48 VILL. L. REV. 989, 1019 (2003). Important recent scholarship has examined the problem of director “busyness,” conceived as directors serving on too many corporate boards and having too many professional responsibilities to devote sufficient time and energy to any particular firm. This is an important vantage on the problem of director inattention, but it is distinct from the evaluation of the dynamics of cognitive attention owed in the course of particular fiduciary occasions, which I am assessing here. The literature on board busyness has found that the performance of firms with overly busy directors suffers relative to other boards. See generally Jeremy C. Kress, *Board to Death: How Busy Directors Could Cause the Next Financial Crisis*, 59 B.C. L. REV. 877, 891–94 (2018); Jeremy McClane & Yaron Nili, *Social Corporate Governance*, 89 GEO. WASH. L. REV. 932, 1015 (2021) (collecting studies). See also Elizabeth A. Nowicki, *Director Inattention and Director Protection Under Delaware General Corporation Law Section 102(b)(7): A Proposal for Legislative Reform*, 33 DEL. J. CORP. L. 695, 718 (2008) (noting the general problem of director inattention in the oversight context and emphasizing the importance of threats of discipline to inspire director attention in the boardroom).

of unconscious self-interest in directors' decision-making.⁸⁷ When examining if conflicted directors' actions can be cured of the taint of suspicion by the approval of *disinterested* directors, again the focus is on unconscious cognitive influence.⁸⁸ Courts recognize that business, family, friendship, and even alumni relationships can compromise independent judgment in ways that fiduciaries do not consciously recognize.⁸⁹

While corporate law doctrine has become relatively rich in its treatment of subconscious cognition, its discussion of *conscious* thought processes is relatively impoverished. The subconscious

⁸⁷ See, e.g., *Bayer v. Beran*, 49 N.Y.S.2d 2, 6 (1944) (stating that the duty of loyalty applies in "every situation in which a trustee chooses to deal with another in such close relation with the trustee that possible advantage to such other person might influence, consciously or unconsciously, the judgment of the trustee.").

⁸⁸ See *Cahall v. Lofland*, 107 A. 769, 769–70 (Del. Ch. 1919) ("[W]e must be mindful that directors are passing judgment on fellow directors in the same corporation The question naturally arises . . . whether inquiry as to independence, good faith and reasonable investigation is sufficient safeguard against abuse, perhaps subconscious abuse[.]").

⁸⁹ See *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 947 (Del. Ch. 2003) (holding that a Special Litigation Committee could not be considered independent of directors whose actions they were charged with evaluating, in part because many of the interested directors and the committee members had strong ties to Stanford University). The *Oracle* Court was at pains to specify that it was concerned only with unconscious influence, the sway of which, the court said, did not reflect on the moral character of the directors:

[P]ersons of integrity and reputation can be compromised in their ability to act without bias when they must make a decision adverse to others with whom they share material affiliations. To conclude that the Oracle SLC was not independent is not a conclusion that the two accomplished professors who comprise it are not persons of good faith and moral probity[.]

Id. at 947. The assertion that unconscious bias does not reflect adversely on the moral character of an agent is a long-standing trope in judicial opinions. Evidence of it can be found in Delaware going back to 1919 (just a few years after Freud's early writings hit the intellectual scene in the United States). See *Cahall*, 107 A. at 769–70 ("[I]t is unwise and unfair . . . for the court to appoint, or the receiver to select, as his adviser his personal counsel This involves no reflection upon the moral integrity either of the receiver, or his counsel. It is based on the frailties of human nature, and the effects of unconscious influences upon conduct where there are ties of business, professional, or social connection.").

mind is, perhaps, easier to address than is conscious cognition.⁹⁰ The actual operation of subconscious thinking is opaque to any direct observation, so we accept that discussion of it not only can but has to be done through abstraction and conjecture. Reference to the *unconscious* in legal analysis never has that sense of being “not really the way it is,” which bedevils efforts to discuss conscious thinking, because, by supposition, we do not know how the unconscious really is.⁹¹ We do, however, know what our conscious thinking really is like, and how it really is cannot be exactly depicted in language, let alone legal writing. This inability to say clearly the thing that is most obvious, even as we can describe better what cannot be seen, is especially embarrassing to legal doctrines, such as those I am highlighting here, that emphasize the importance of deliberate, critical thought processes.

To overcome these limitations, we can read against the grain and tease out of corporate law discourse some fuller understanding of the cognitive state required of corporate directors by examining corporate law’s requirement of director *presence* when formal corporate decisions are taken.⁹² Directors cannot vote by proxy. Directors must be present at the board meeting before they can count towards a quorum and act on business.⁹³ In the course of explaining why proxy voting is impermissible, an older Delaware case gives substance to the notion of director presence:

Discretionary powers, questions of policy, business administration, all imply [] personal attendance at the meeting If not present in person to give out, or receive, business knowledge needed in conducting the affairs of the company [a director] has not performed his duty, because he has not in fact participated in the deliberations of the board.⁹⁴

⁹⁰ See also Anthony Page, *Unconscious Bias and the Limits of Director Independence*, U. ILL. L. REV. 237, 240 (2009) (discussing psychological studies demonstrating unconscious biases).

⁹¹ *Id.* at 293.

⁹² See DEL. CODE ANN. tit. 8, § 141(b) (“The vote of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors[.]”).

⁹³ *Id.*

⁹⁴ *Lippman v. Kehoe Stenograph Co.*, 95 A. 895, 899 (Del. Ch. 1915). See also *Applied Energetics, Inc. v. Farley*, 239 A.3d 409, 428 (Del. Ch. 2020) (“Each member of a corporate body has the right to consultation with the

While presence is required, the law does not actually require *physical* presence. What is required is *mental* presence. The statute allows attendance at board or committee meetings “by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this subsection *shall constitute presence* in person at the meeting.”⁹⁵ By giving up the connection between presence and physical attendance, the statute allows us to adopt a *substantive* notion of what presence means in corporate law. In common parlance, and especially among the denizens of mindfulness practice, it is said that when a person’s mind wanders, they are no longer *present*—they have followed their mind to the past, the future, or to some other place. The instruction about presence in the corporate governance statute tells us that presence means that you must be there in the sense that you are cognitively engaged in the present, focused deliberation with your fellow directors.

We can also see a requirement of directorial cognitive engagement in caselaw treatment of what constitutes a “meeting,” for the purpose of satisfying the statute’s requirement that corporate action be taken only at board meetings.⁹⁶ *Fogel v. U.S. Energy Systems* involved an embattled CEO, Asher Fogel, who sought

others and has the right to be heard upon all questions considered, and it is presumed that if the absent members had been present they might have dissented and their arguments might have convinced the majority of the unwisdom of their proposed action, and thus have produced a different result.”).

⁹⁵ See DEL. CODE ANN. tit. 8, § 141(i) (emphasis added). I cite Delaware’s corporate code because Delaware is by far the most influential corporate law jurisdiction in the United States, and probably the world. See generally Omari Scott Simmons, *Branding the Small Wonder: Delaware’s Dominance and the Market for Corporate Law*, 42 U. RICH. L. REV. 1129 (2008) (giving an overview of the history and scope of Delaware dominance in corporate law). See also CAL. CORP. CODE § 307(a)(6) (allowing telephonic presence at board meetings, on the same terms as Delaware). There is a kind of ableism in the statute, as by its terms it would seem to exclude telephonic participation if any of the directors were deaf. Surely the statute would be interpreted to allow for written or other visual communication to deaf directors. Then again, excluding the issue of deaf directors, it seems clear that presence only by “chat room” would in the ordinary course not be permissible.

⁹⁶ DEL. CODE ANN. tit. 8, § 141(b) (“The vote of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors . . .”).

to stymie the company's directors, who were intent on firing him, by appealing directly to the firm's shareholders to instead replace the directors who opposed him.⁹⁷ The board claimed that it terminated Fogel before he called the shareholder conclave and that he therefore did not have the authority to call such a meeting. Chancellor Chandler held that the board's purported firing of Fogel was not valid, in part because the directorial gathering at which the purported action was taken could not substantively be called a "meeting."⁹⁸ Giving notice and having sufficient directors physically present together to constitute a quorum, Chandler held, are necessary but not sufficient.⁹⁹ "The mere congregation of a corporation's directors in the same room does not necessarily result in a board meeting."¹⁰⁰ The occasion must be a meeting in substance, and the gathering that purported to fire Fogel did not have it:

There was no discussion of the issue and no vote of the board members. Such a hasty, unhelpful gathering cannot satisfy section 141's conception of a meeting, the primary vehicle that drives corporate action. Meetings represent more than a mere technicality; they are a substantive protection. A proper meeting should be informative and should encourage the free exchange of ideas so that a corporation's directors—through their active, meaningful participation—may keep themselves fully informed and in compliance with their fiduciary duty of care.¹⁰¹

Of course, we cannot interpret corporate governance law as requiring directors to have any special kind of cognitive ability or skill in mindfulness. Shareholders are not entitled to intelligent

⁹⁷ *Fogel v. U.S. Energy Sys., Inc.*, No. CIV.A. 3271-CC, 2007 WL 4438978, at *2 (Del. Ch. Dec. 13, 2007), *overruled on grounds not relevant here by* *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035 (Del. 2014) (emphasis added).

⁹⁸ Chandler began by emphasizing the importance of the meeting: "If there is a bedrock foundation of Delaware corporate law, it is encapsulated in section 141 of the General Corporation Law: 'The business and affairs of every corporation . . . shall be managed under the direction of a board of directors,' and '[t]he vote of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors.'" *Fogel*, 2007 WL 4438978, at *2.

⁹⁹ *Id.* at *4.

¹⁰⁰ *See id.* *4.

¹⁰¹ *Id.* at *3.

directors, and they are not entitled to Zen mastery over the mind in the boardroom. They are entitled only to the quality of director that the voting shares have elected.¹⁰² Although the law allows for boards of directors to have just one director,¹⁰³ most companies, in fact, have multiple directors, in part, perhaps, out of a recognition that at some point during important meetings any individual director's mind will wander, and so it is useful to have multiple other directors who may be alert while another daydreams. Some margin of mind wandering is inevitable, and some margin of mind wandering, from the shareholder perspective, may not be worth the cost of constraining.¹⁰⁴ Undoubtedly, corporate law must be interpreted to look past *de minimis* wool-gathering. But it is *not* the case that corporate law defers entirely to directors to determine the kind of mental effort to be given to the firm they serve. There *is* a bottom-line affirmative cognitive obligation that can be gotten wrong, that can be breached, and that is what I am capturing here. Corporate law imposes a decisive, substantive requirement to concentrate and engage in active critical thinking in the course of board deliberations. Some features of our mental lives are opaque to our understanding and are beyond our control. At some level, we can neither observe nor escape the

¹⁰² See *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 968 (Del. Ch. 1996) ("If the shareholders thought themselves entitled to some other quality of judgment than such a director produces in the good faith exercise of the powers of office, then the shareholders should have elected other directors."); see also *Barnes v. Andrews*, 298 F. 614, 618 (S.D.N.Y. 1924) ("True, he was not very well-suited by experience for the job he had undertaken, but I cannot hold him on that account . . . Directors are not specialists, like lawyers or doctors . . . Can shareholders call him to account for deficiencies which their votes assured him did not disqualify him for his office?").

¹⁰³ DEL. CODE ANN. tit. 8, § 141(b) ("The board of directors of a corporation shall consist of 1 or more members.").

¹⁰⁴ PRINCIPLES OF CORP. GOVERNANCE VII 1 INTRO. NOTE (AM. L. INST. 1994) ("Monitoring in particular is cost-efficient only up to the point that additional expenditures spent on monitoring avert a greater discounted loss in the future.") (citing Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976)). Spiritual aspirants devote enormous time and energy to developing extreme levels of concentration, in pursuit of highly subtle spiritual experiences that require it. Such expenditure might be regarded as profligate in the agency context.

influence of subconscious pressures, motivated reasoning, and other biases in our cognition. But we *can* determine and control the mode of cognition in which we will be engaged, as between focus and wandering, in the course of a given thinking occasion, at least as a point of departure. This is the discretion that corporate law requires directors to exercise.

B. Monitoring the Mind

Let us try to deepen this investigation of directors' cognitive duties in the boardroom by examining corporate law jurisprudence concerning the "oversight" obligations of corporate directors. Directors, generally speaking, have an obligation to oversee corporate operations.¹⁰⁵ Just as shareholders might sue directors (on a long shot) for poorly made decisions, they might also sue directors for *inaction* on oversight, that is, for failing to know things or take action that could have prevented losses at the firm.¹⁰⁶ Canonical oversight cases involve corporate failures to comply with regulatory regimes—e.g., health and safety, or financial reporting obligations—which result in large fines paid by the firm to the government.¹⁰⁷ In principle, however, the oversight obligation reaches beyond regulatory compliance and could touch any aspect of corporate operations.¹⁰⁸ The oversight obligation requires directors to pay attention to corporate operations. I want to examine this jurisprudence *analogically* to understand the nature of the obligation directors may be said to have with respect to overseeing their own minds. I want to be clear that

¹⁰⁵ See generally *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019) (summarizing requirements).

¹⁰⁶ *In re Goldman Sachs Grp., Inc. S'holder Litig.*, No. CIV.A. 5215-VCG, 2011 WL 4826104, at *1 (Del. Ch. Oct. 12, 2011).

¹⁰⁷ See, e.g., *In re Caremark*, 698 A.2d 959 (Del. Ch. 1996).

¹⁰⁸ *In re Goldman Sachs Grp.*, 2011 WL 4826104, at *22 (acknowledging the possibility of oversight liability for failing to oversee excessive risk-taking by lower-level managers, although stating that such a claim would be "formidably difficult to prove."). The *Marchand* case, the basis of the vignettes in Part I, involved shareholders seeking recompense for, inter alia, corporate losses stemming from tort liability associated with a *Listeria* outbreak in the firm's ice cream products. It did not exclusively concern liability relating to government fines for the firm's lapse in health protocols. See *Marchand*, 212 A.3d at 805.

the oversight jurisprudence on its own terms does not set out a duty to literally sustain attention in the course of any particular occasion. Rather, the oversight jurisprudence concerns an ongoing, iterative duty of the board, which can and must take place across different meetings over extended periods of time.¹⁰⁹ Nevertheless, the language and analytic framework developed in this jurisprudence gives us a corporate law grammar with which to evaluate a director's fiduciary obligation (which is real) to monitor their own mind to ensure focus and concentration in the course of distinct discursive occasions (i.e., in a meeting).

An early line of oversight cases held that directors were essentially not liable for operational failures unless they were actually on notice of some corporate problem and did nothing about it.¹¹⁰ This passive approach was abandoned in the 1990s in favor of a doctrine that requires directors to take some affirmative steps—"i.e., try,"¹¹¹ in the poetic plain-speak of Delaware corporate law—to establish and monitor a board-level oversight system regarding firm operations.¹¹² When "red flags"—indications about some operational or compliance problem—are brought to their attention, directors must respond deliberately.¹¹³ Further to the norms of the business judgment rule, directors have great latitude to determine how best to respond when they see a red flag.¹¹⁴ But they cannot just ignore it.¹¹⁵

¹⁰⁹ PRINCIPLES OF CORP. GOVERNANCE, *supra* note 104, § 2.01, comment a & b.

¹¹⁰ See *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963) ("[A]bsent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists.").

¹¹¹ *Marchand*, 212 A.3d at 821 ("[T]he board must make a good faith effort—i.e., try—to put in place a reasonable board-level system of monitoring and reporting.").

¹¹² In *Caremark* itself, the court had used the older formulation, "duty of attention," in discussing what is now usually termed the "duty to monitor," or the "oversight duty." The language of "attention" gives some focus to the doctrine for our purposes here. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 960, 967 (Del. Ch. 1996).

¹¹³ *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 373 (Del. 2006).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

As this doctrine took shape, it became important for courts to clarify whether the oversight obligation was an aspect of the duty of care or the duty of loyalty. Working out this distinction might otherwise be regarded as needless scholasticism, but it matters doctrinally because corporate law allows firms to adopt charter provisions exculpating their directors from personal liability for breaches of the duty of care, but *not* for violations of the duty of loyalty.¹¹⁶ Motivated, perhaps, to keep too many fiduciary breaches by corporate directors free of sanction, Delaware courts have specified that an abject failure to comply with the monitoring obligation is an act of bad faith, which is a violation of the duty of loyalty.¹¹⁷

The feature of the corporate oversight obligation that I want to emphasize here is the requirement that directors must *respond* when a problem is brought to their attention.¹¹⁸ “When faced with the knowledge that the company controls are inadequate, the directors must act, i.e., they must prevent further wrongdoing from occurring.”¹¹⁹ The language of “red flags” (a train metaphor) is pervasive here, and directors who ignore red flags are said to be “asleep at the switch” (another train metaphor).¹²⁰

¹¹⁶ DEL. CODE ANN. tit. 8, § 102(b)(7).

¹¹⁷ See *Marchand*, 212 A.3d at 820–21 (“[T]o satisfy their duty of loyalty, directors must make a good faith effort to implement an oversight system and then monitor it.”). This is not to say that Delaware has made it easy for shareholders to recover against directors for monitoring breaches. Far from it. Even while the oversight obligation falls outside of exculpation protections, case law insists that oversight claims are the “the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.” *Stone*, 911 A.2d at 372.

¹¹⁸ *Caremark* set out two prongs to the oversight obligation: a duty to establish a monitoring system, and a duty to respond to red flags raised by that system. I am focused here on examining the second prong, which recent cases refer to as a “Red-Flags Claim.” See *Lebanon Cnty. Employees’ Ret. Fund v. Collis*, 287 A.3d 1160, 1176 (Del. Ch. 2022).

¹¹⁹ *Rich ex rel. Fuqi Int’l, Inc. v. Yu Kwai Chong*, 66 A.3d 963, 984–85 (Del. Ch. 2013), *reargument denied*, 2013 WL 3353965 (Del. Ch. 2013) (emphasis in original).

¹²⁰ *Reiter ex rel. Capital One Fin. Corp. v. Fairbank*, C.A. No. 11693-CB, 2016 WL 6081823, at *1, *8–*9, *12–*13 (Del. Ch. 2016) (“[A] sufficient connection between the corporate trauma and the board,’ could be shown if there was evidence ‘that the board knew of evidence of corporate misconduct—the

Let us apply this framework analogically to the problem of the wandering mind. Directors have an obligation to think about the corporate issues before them in the boardroom.¹²¹ They must undertake, in some fashion, to monitor their mind to ensure that this crucial duty is satisfied. That is to say, they must “try”¹²² to pay attention. Certainly, there is no obligation to adopt any *particular* kind of mindfulness practice or discipline. But directors must pay attention during the board meeting, and they must pay attention to whether they are paying attention. And then, if a director *realizes* that they are no longer paying attention (a red flag), they must *act*. Once a director is alert to the fact that their mind has wandered from an external stimulus, or an internal focus, to which their attention is obligatory, they cannot simply ignore it. If they realize they are no longer mentally present, they must not allow the mind wandering to continue, but must instead bring their mind back to the matter under review at the meeting. Failure to do so is a failure to act in the face of a known duty to act, and is thus an act of bad faith, and a non-exculpable breach of the duty of loyalty.¹²³ The fiduciary breach I have identified does not occur when the mind wanders from a board subject that the director has with intention resolved to focus on. As Nietzsche said, “a thought comes when ‘it’ wishes, and not when ‘I’ wish.”¹²⁴ Rather, the fiduciary breach comes in not paying attention in the first place, or in failing to call the mind back from its wandering once the wandering is realized.

It is easy to act like you have been paying attention, and to pretend to yourself and to others that you have been paying attention when, in fact, your mind has been wandering. A director who knows that their mind has been wandering in the course

proverbial red flag—yet acted in bad faith by consciously disregarding its duty to address that misconduct.”) (citation omitted).

¹²¹ See *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).

¹²² See *supra* text accompanying note 112 (quoting *Marchand*, 212 A.3d at 821 (“[T]he board must make a good faith effort—i.e., try—to put in place a reasonable board-level system of monitoring and reporting.”)).

¹²³ *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006) (“A failure to act in good faith may be shown . . . where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.”).

¹²⁴ FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* 24 (Walter Kaufmann trans., New York: Modern Library 1966) (1886).

of an important presentation or deliberation has an obligation to reveal their cognitive absence to the rest of the board. Their fellow directors rely on the fact that they are present, listening, and assessing what is being said. Fiduciaries have a responsibility to report their own breach of duty to their principal, or their principal's representative (here, fellow directors). This is an element of the fiduciary's duty of communication.¹²⁵ A director who has zoned out during an important discussion must say, "I was not paying attention" (or it would surely suffice to say, politely, "Could you please repeat that?"). A secret breach kept secret is bad faith compounded.¹²⁶

My account to this point is *descriptive*. I am saying what the law *is*, teasing out what we must understand the law to already be, in light of what the cases and statutes say about corporate duties. Undoubtedly, it would be exceedingly hard to prove this type of fiduciary violation in court. The doctrinal insight here is nevertheless important. Not everything about the law that is worth saying can be put in the grammar of the plaintiffs' bar. It is unlikely that a shareholder could effectively pursue a derivative suit against a director on the basis of a wandering mind, unless a director admitted to not paying attention in the boardroom. This does *not* mean that the issue is unimportant as a matter of corporate governance law, theory, or practice, or even as far as litigation is concerned.

Consider, as analogy, academic treatment of the law of corporate purpose: in whose interests or towards what end should the corporation be run? The correct answer to this question, I have argued elsewhere, is that American corporate governance

¹²⁵ See RESTATEMENT (THIRD) OF AGENCY § 8.11 (2006) ("An agent has a duty to . . . provide the principal with facts that the agent knows . . . [when] the facts are material to the agent's duties to the principal . . .").

¹²⁶ Directors must be honest and transparent with each other as it concerns company business. See *OptimisCorp v. Waite*, No. 523, 2015, 2016 WL 2585871, at *3 (Del. 2016) ("[I]t has long been the policy of our law to value the collaboration that comes when the entire board deliberates on corporate action and when all directors are fairly accorded material information Nothing in our [law] should be read as endorsing [the] view . . . that a board faction may engage in deception toward other board members."); see also *Pfeffer v. Redstone*, 965 A.2d 676, 684 (Del. 2009) ("[The board's fiduciary duty of disclosure] is not an independent duty, but derives from the duties of care and loyalty.").

law requires directors to manage their firm in the interests of the shareholders, and not in service of any other competing purpose.¹²⁷ Some commentators disagree and claim that directors are permitted to sacrifice corporate profits in favor of other stakeholders.¹²⁸ Regardless of the position one holds on the corporate purpose debate, the issue *matters*, even though the business judgment rule makes it usually impossible for a shareholder to challenge a decision on the grounds that it was profit sacrificing, unless the directors admit to a forbidden purpose. Directors can always *say* they made corporate donations, treated workers well, or made costly but environmentally friendly changes to production methods because they sincerely believed doing so would be more profitable “in the long run.” They can say this, and usually get away with it, even if they are lying, to themselves or others. The issue of corporate purpose is nevertheless widely and properly regarded as of crucial importance and worthy of careful, accurate study. First, violation of the law of corporate purpose *can* be used in litigation and has been used in cases where directors *do* admit, accidentally or cavalierly, to some purpose other than serving the shareholder interest, even if such occasions are rare.¹²⁹ Second, because it *can* be used, the rule of corporate purpose influences corporate decision-making as a practical matter. It shapes directorial attitudes and efforts. It shapes what lawyers say to directors when they brief them about their duties, and it shapes how board meetings are held, what is said there, and what cannot be said there. It matters to other stakeholders outside of the boardroom, and to regulators, who seek to understand, promote, constrain, or reform corporate behavior. Wandering mind as fiduciary breach matters for these same reasons, even if most of the time the individual director will be the only one who really knows whether they were true to their cognitive duty or not.

¹²⁷ See generally YOSIFON, CORPORATE FRICTION, *supra* note 13.

¹²⁸ See *id.* (reviewing these claims).

¹²⁹ For cases in which directors admitted corporate decision-making was made for some purpose other than advancing shareholder interests, and in which breaches of fiduciary duty were therefore found, see *Dodge v. Ford*, 170 N.W. 668, 685 (Mich. 1919) and *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 46 (Del. Ch. 2010). There are no cases in which directors have admitted to a profit-sacrificing purpose and have been let off the hook.

Or, if the corporate purpose parallel is not compelling, consider another analogy stemming from jurisprudence on board oversight obligations. When Chancellor Chandler wrote in *Goldman Sachs* that it would be extremely difficult to prove a claim of failure to oversee business risk (as compared to more ordinary claims concerning board failure to oversee regulatory compliance),¹³⁰ he was certainly not saying that directors do not have any real obligation to oversee business risk, or that shareholders have no real right to have the firm's business risk overseen. It may be that a right that cannot even in principle be enforced is no right at all, and so cannot be said to give rise to a legal obligation. But this cul-de-sac in legal philosophy is not delved into here. I am talking about a real legal obligation that is actually enforceable, even though it may only rarely be practicable to enforce.

Clarifying the cognitive dimensions of the fiduciary duties owed by corporate directors, as I have done here, also might arouse directorial attention, and perhaps shareholder litigation with respect to those duties. Further to this inquiry, in the course of a deposition about an alleged corporate governance failure, a director might be asked: "Were you paying attention during this meeting? Did you notice at all in the course of this discussion that your mind was wandering to other subjects? Do you routinely employ any techniques to ensure that you are maintaining focus and attention in the course of a meeting? Do board training programs or onboarding protocols involve any element of mindfulness practice?"¹³¹

¹³⁰ *In re Goldman Sachs Grp., Inc. S'holder Litig.*, No. CIV.A. 5215-VCG, 2011 WL 4826104, at *22 n.217 (Del. Ch. Oct. 12, 2011) (acknowledging the theoretical possibility of oversight liability for excessive risk-taking, but stating that such a claim would be "formidably difficult to prove").

¹³¹ Time was that it was customary for directors to smoke in the boardroom. One of the known effects of nicotine is that it aids in mental concentration. Perhaps corporate governance deliberations were in the past given some focus by that old habit. Today, smoking is forbidden in the boardroom, but corporate culture is becoming alert to the value of mindfulness, and mindfulness may be emerging as a kind of best corporate practice. Evidence of this is seen in a growing publishing and consulting industry promoting mindfulness in business. Book titles range from a volume in the Harvard Business Review's *Emotional Intelligence* series titled, simply, *Mindfulness*, to the inevitable *Mindful Leadership for Dummies* (2016). See generally HARVARD BUSINESS REVIEW PRESS, *MINDFULNESS* (2017); JULIET ADAMS, *MINDFUL LEADERSHIP FOR DUMMIES* (Marina Grazier ed., 2016). Board consultants have in particular taken up the

It is the domain and responsibility of legal scholarship and legal theory to explicate *what the law is*, even where, or perhaps especially where, recovery for its breach is unlikely. This is one of the most important contributions that legal scholarship can make since there really is no other agent who will otherwise produce it. We want to understand what our law requires, what it is doing, and what plan of life and activity it is specifying. People by and large want to comply with the law and find instruction in the law's dictates.¹³² It does matter whether a course of conduct is a fiduciary breach, even if no one other than the agent could ever know it happened, or bring suit about it, unless the agent confessed it. Agents sometimes lie, but for most people, there is a psychological cost in doing so, and so at the margin corporate directors may avoid behavior that they know will require them to lie.¹³³

C. Return to the Vignettes

Let us now return to the mind wandering vignettes that I set out above concerning the board meeting of an ice cream company.¹³⁴ At the start of the meeting, our director, Marchese,

issue. A thoughtful item, titled *The Mindful Director*, appeared in an international trade magazine for corporate directors in 2016, written by a consulting firm with international scope. After summarizing the extensive responsibilities borne by corporate directors, the piece asserts that, "mindfulness is a foundational skill for an effective director." Gillian Coutts et al., *The Mindful Director*, 43 AUSTL. INT. CO. DIRS. GOVERNANCE LEADERSHIP CTR. 1, 1 (2016). Referencing scientific evidence for the effectiveness of mindfulness practice, the authors promise a truly expansive return: "[M]indfulness training includes helping individuals enhance their focus and awareness—critical skills for today's boards. Focus is about training the mind to maintain sharp focus on a particular topic, conversation or task, with minimal distraction, for as long as you want, with minimal effort." *Id.* at 3. The most accomplished adepts might be capable of maintaining focus for as long as they want, but this is an unlikely outcome even for talented, dedicated practitioners.

¹³² See MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. (AM. BAR. ASS'N 2023) ("Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.").

¹³³ See generally Isabel Thielmann & Benjamin E. Hilbig, *No Gain Without Pain: The Psychological Costs of Dishonesty*, 71 J. ECON. PSYCH. 126, 127 (2019) (reviewing literature).

¹³⁴ *Supra* Section I.A.

intentionally turned his mind to the presentation being made to the Board. This was good faith compliance with the commands of corporate governance law. If he had not done so but had instead sat there and intentionally thought about something else from the start, or intentionally had let his mind wander, or had been willfully indifferent to his state of mind, then he would have been in violation of the duty of care, which requires a critical eye in corporate decision-making.¹³⁵

To the ordinary observer, physical presence implies mental presence. To be physically present but only pretending to be mentally present is to act in bad faith.¹³⁶ This is the fiduciary violation witnessed in the first vignette, in which the director's mind wanders to his other business. In that first vignette, Marchese did not realize his mind was wandering until just before the vote was taken. He cannot be blamed for the fact that his mind wandered after he, in good faith, set the intention to concentrate. But it is a violation for him to nod along, pretending that he had heard and thoughtfully considered what was said. He should not vote but should instead ask for the crucial information to be repeated, or at least reveal that he is abstaining because he has not critically assessed the proposal that is being put to a vote.

In the second vignette, the director *realizes* during the presentation that his mind has wandered, that he is not paying attention, and yet he does nothing about it. He ignores this epistemological "red flag," and in the face of a known duty to act, that is, a known duty to be mentally present to the board deliberation, he allows his mind to stay with the obsessive personal matter to which it has wandered. He then votes on the proposal. Here, Marchese has violated both the duty of care (by acting in an uninformed manner) and the duty of loyalty (failing to act in the face of a known duty to act, thereby acting in bad faith).¹³⁷

¹³⁵ See *supra* text accompanying notes 72–77.

¹³⁶ See *supra* text accompanying notes 133–34.

¹³⁷ In his *Disney* opinion, Chancellor Allan noted that the same act (or omission) could be a violation of both care and loyalty. He imagined a secretly hostile director:

[W]here a director, because of subjective hostility to the corporation on whose board he serves, fails to inform himself of, or to devote sufficient attention to, the matters on which he is

The third vignette, in which the director's mind wanders to a brilliant urban water supply solution, presents the same doctrinal issues as the first two but makes prominent the reality that mind wandering is not always banal or solipsistic.¹³⁸ It can involve breakthrough creative thinking of genuine social import.¹³⁹ Here, the director's mind wandering involves a crucial breakthrough that could save far more lives than will be lost in the impending *Listeria* outbreak. But prevailing corporate governance law does not address itself, in individual cases, to broad social concerns.¹⁴⁰ In *that* boardroom, during *that* meeting, *that* director is required to pay attention only to the interests of *those* shareholders.¹⁴¹ The socially useful breakthrough to which Marchese's mind wanders is a fiduciary breach if he does not reveal his cognitive absence to his fellow directors and instead votes as if he had really been present.

The fourth and fifth vignettes concern sexual fantasy, a subject of mind wandering too widely known to warrant citation. In my analysis, it matters whether the sexual fantasy is deliberately undertaken, or whether the mind wanders to it. Deliberately focusing the mental faculties on something other than the business before the board in the course of a meeting is a violation of both the duty of care and the duty of loyalty. If, however, the mind wanders into sexual fantasy after a director has set the intention to focus on the matter at hand, the doctrinal consequence may be different. If the director notices the cognitive deviance and diligently brings the mind back to the presentation, then

making decisions as a fiduciary. In such a case, two states of mind coexist in the same person: subjective bad intent (which would lead to a finding of bad faith) and gross negligence (which would lead to a finding of a breach of the duty of care). Although the coexistence of both states of mind may make them indistinguishable from a psychological standpoint, the fiduciary duties that they cause the director to violate—care and good faith—are legally separate and distinct.

In re Walt Disney Co. Derivative Litig. v. Brehm, 906 A.2d 27, 65 (Del. 2006).

¹³⁸ See generally *supra* Part II.

¹³⁹ See *supra* text accompanying notes 38–40 (addressing the relationship between the wandering mind and creative thinking).

¹⁴⁰ Or even to a shareholder's diversified portfolio.

¹⁴¹ See generally YOSIFON, CORPORATE FRICTION, *supra* note 13, at 60–96 (discussing requirements of shareholder primacy norm).

listens to and thinks about the thrust of the presentation in good faith before voting, or abstains because they were not paying attention, then they have done all that corporate law requires.

The sixth and seventh vignettes repeat themes from the previous ones but are depicted here to emphasize that as both a practical and a legal matter, there may be little difference between being actually asleep and dreaming during a meeting, and being actually awake during a meeting, but daydreaming. Neither cognitive state involves the “critical eye” that corporate law commands directors to deploy in corporate decision-making. Nevertheless, under my analysis, neither situation constitutes an actual fiduciary violation, until the director realizes he has not been cognitively present, then pretends in bad faith that he has been present all along, and votes.

The eighth vignette, concerning micro-dosing gone wrong and hallucination in the boardroom, presents distinct concerns. The black letter does not say, I think, that having a cocktail, a puff of marijuana, or even micro-dosing hallucinogens before coming into the boardroom is, *per se*, a fiduciary violation. But here the director has taken too much of his drug of choice, just as a director might drink too much before a meeting. The doctrinal challenge is that our director, despite the ill-conceived substance intake, *has* set the intention to pay attention during the meeting (has perhaps even taken the drug because he believes in good faith that it will lend him focus and insight).¹⁴² Let us say further that our director, because of the drug he is on, does not realize that his mind is no longer present, and does not know that his mind is not functioning critically, before he votes. Where then is the conscious disregard of the duty to act in the face of the known duty to act? What has happened here certainly feels like a fiduciary violation, but the situation is, I think, undertheorized in current fiduciary doctrine. It would call for some sound Delaware assessment, which no doubt Chancery would be ready to supply. An essential principle of fiduciary law is that it cannot be reduced to technical, deductively applicable rules, but must

¹⁴² Oliva Solon, *Under Pressure, Silicon Valley Workers Turn to LSD Microdosing*, WIRED (Aug. 24, 2016, 8:28 AM), <https://www.wired.co.uk/article/lsd-microdosing-drugs-silicon-valley> [<https://perma.cc/YAD6-YALY>] (“[The substance] makes me work in such a focused way . . .”).

be applied flexibly in response to unforeseen circumstances. As to the tripping director, equity will find a way to hold him steady in the dock.

The ninth and final vignette concerns a director whose mind has not wandered but who has simply not well-understood what he has listened to in good faith. Shareholders are not entitled to a director of any particular level of intelligence or expertise. They are not even entitled to *reasonable* intelligence or expertise.¹⁴³ They are only entitled to the good faith attention and deliberation of the directors elected to the board.¹⁴⁴ Certainly, a director who is confused should ask questions and try to clarify their thinking. But the director who listens and makes a good faith effort to understand the issues and come to a sound decision for the firm has gained the hallowed protections of the business judgment rule. For not having daydreamed, this dim director can sleep easily at night.

The phenomenology of mind wandering that I depict in these vignettes is admittedly artificial, as any representation of mental life must necessarily be artificial.¹⁴⁵ Most of the work in the vignettes is being done by variations of the phrase, “Did not really hear what was said.” But what exactly, cognitively, is indicated by those words? The formulation is neither scientifically nor doctrinally precise. But it nevertheless rings true as a familiar and distinct kind of mental experience. I am trying to signify and assess the fiduciary consequences of that real mental phenomenon. There is undoubtedly a grey area between paying attention and mind wandering.¹⁴⁶ But the non-binary nature of

¹⁴³ See *supra* note 103 and accompanying text.

¹⁴⁴ *Id.*

¹⁴⁵ See *supra* notes 87–89 and accompanying text (noting the law’s difficulty in discussing conscious, as compared to unconscious, thought).

¹⁴⁶ Pun intended. As a student, and sometimes teacher, of mindfulness, my outlook is that we should not worry so much about fleeting task-independent thoughts, images, or emotions that emerge in the course of deliberate concentration. We should instead worry about a wandering mind when we find that we are *dwelling* on some line of thought other than the intended point of focus. When we are no longer thinking about what we intended, but are thinking about something else, then the mind has wandered and must be brought back. We might find some useful guidance for thinking about what counts as mind wandering by looking at related areas of fiduciary jurisprudence. For example, we might draw on the agency law concepts of “frolic and detour” which courts have long used to ascertain whether an agent was operating in the course of

these cognitive states presents no insurmountable problem to a legal tradition that is otherwise content to find liability when something is done with “knowledge,” as compared to mere “reasonable belief,” or when something is done “reasonably,” as compared to “unreasonably.” The inexact nature of my representation does not negate the doctrinal requirement I have revealed. A director who does not pay attention during a board meeting and yet participates in a vote is in breach of their fiduciary obligations.

IV. MIND WANDERING AND THE FIDUCIARY SELF

A. *The Secret Profits of Fiduciary Duty*

This is me, and maybe it is you too:

A gas man, Edwards, came to fix a residential gas leak.¹⁴⁷ Without any doubt, he *knew*, intellectually, the extreme danger of the situation. He did not consciously decide to disregard or ignore the threat. Indeed, what conscious thoughts he had were concerned with taking care. As he approached the darkness of the basement looking for the leak, he was cognizant of the fact that he could not even flick the light switch, since a spark from so doing could ignite the gas. It was best to use a flashlight, but he realized he did not have one with him. He went back out to his truck to get one. But then he returned from the truck to the basement without having brought the flashlight. Realizing he still did not have the flashlight, he undertook again to make his way through the house to go back to his truck, but he could not see his way in the darkness. Reluctant, as said, to flick the light switch for fear of igniting the gas, he instead struck a match.

“He got out of the hospital eight weeks later.”¹⁴⁸

There was significant property damage from the mishap, for which Edwards’s principal was sued (Edwards himself being judgment-proof).¹⁴⁹ In the course of its discussion, the court

an agency relationship, or too far from it, when they committed a tort against a third person. *See generally* RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. LAW INST. 2006); *see also* Fiocco v. Carver, 137 N.E. 309, 310–11 (N.Y. 1922) (“He was still far away from the point at which he had first strayed from the path of duty, but his thoughts were homeward bound.”).

¹⁴⁷ *See* Shimer v. Bangor Gas Co., 188 A.2d 734, 735 (Pa. 1963).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 734.

reviewing this claim refers to the faulty agent as the “wool-gathering Edwards”¹⁵⁰ (a popular term for mind wandering in the mid-twentieth century). It also calls him the “preoccupied Edwards,” and finally, the “catalytic Edwards.”¹⁵¹ It was not that Edwards did not know that he should not light a match. He was not stupid. He was not corrupt. It was not that he decided to take the chance that the match would not blow the gas. His mind just wandered from the important issue at hand.

We are Edwards, and as our minds wander, we burn away all that is actually present before us. Burned away is the present occasion for genuine connection with the child, the friend, the stranger right in front of us. Burned away are the words, genius words, in cases, in books, seen but not read, read but not held long in our conscious awareness. The game we meant to be watching, but instead think of work. The work we meant to be doing, but instead think of the game. The God we meant, like Donne, to give our attention, but instead think of banal things: “I throw my selfe downe in my chamber, and I call in, and invite God, and his Angels thither, and when they are there, I neglect God and his Angels, for the noise of a fl[y], for the rattling of a Coach, for the whining of a doore.”¹⁵² Our minds wander as we struggle to grope through the mystery of being. Our minds wander as we meant to be finding a better way through it. The next thing we know, eight more weeks of our lives have passed, and we are walking again in the gas, vaguely thinking a flashlight might help, fumbling again for a match.

The sages of old and the social scientists of new are in accord as to the suffering—the disutility—consequent to the wandering mind. It keeps us from accomplishing what we set out to do with our lives. And it pays no compensatory pleasure for the taking. A widely cited study by prominent research psychologists Matthew Killingsworth and Daniel Gilbert found that “people were less happy when their minds were wandering than when they

¹⁵⁰ *Id.* at 737.

¹⁵¹ *Id.* at 735–36.

¹⁵² John Donne, *Preached at the Funerals of Sir William Cokayne Knight, Alderman of London, December 12. 1626*, in *LXXX SERMONS PREACHED BY THAT LEARNED AND REVEREND DIVINE, JOHN DONNE, DR. IN DIVINITY, LATE DEAN OF THE CATHEDRAL CHURCH OF S. PAULS LONDON*, 816, 820 (John Donne ed., London, Richard Royston & Richard Marriot 1640).

were not.”¹⁵³ It did not matter whether subjects meant to be looking for a gas leak, reading a law review article, or thinking about ice cream safety—the association of mind wandering with unhappiness “was true during all activities, including the least enjoyable.”¹⁵⁴ While noting other research findings that negative moods can trigger mind wandering, Killingsworth and Gilbert found strong evidence that the wandering mind is an important *cause* of unhappiness, not just the result of it.¹⁵⁵ Working without the guardrails of peer review, the Buddha reached the same conclusion 2,500 years ago: “I know not of any other single thing that brings such woe as the mind that is untamed, uncontrolled, unguarded and unrestrained.”¹⁵⁶

This is description in aid of prescription. The mind can be monitored and the irritation that mind wandering entails can be constrained. The mind that has left can be brought back, limiting psychic discontent. Habits of attention can be cultivated, and the mind can be made to wander less often than it otherwise would. If we sew an attentive mind, we can reap a joyful spirit. When a subject’s mind was “present,” focused on the here and now, concentrating on the activity they meant to be concerned with, Killingsworth and Gilbert found the subject was happier. They concluded, “What people were thinking was a better predictor of their happiness than was what they were doing.”¹⁵⁷ The Buddha said: “I know not of any other single thing that brings such bliss as the mind that is tamed, controlled, guarded and restrained.”¹⁵⁸

¹⁵³ Killingsworth & Gilbert, *supra* note 18, at 932.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* (“time-lag analyses strongly suggested that mind wandering in our sample was generally the cause, and not merely the consequence, of unhappiness.”).

¹⁵⁶ GRADUAL SAYINGS (ĀṄGUTTARA NIKĀYA), *supra* note 1, at 109.

¹⁵⁷ Killingsworth & Gilbert, *supra* note 18, at 932.

¹⁵⁸ GRADUAL SAYINGS (ĀṄGUTTARA NIKĀYA), *supra* note 1, at 109. I reference here the relationship between Buddhism and mindfulness, and have a few times throughout this Article, in respect of the great influence that tradition has had on developing and spreading mindfulness practice. My own personal meditation practice, in contrast, stems from a line of yogis who stress that meditation practice is a universal feature of all world cultures. Nevertheless, one might reasonably think, in the context of prevailing socio-cultural concerns, that insisting on the universality of mindfulness practice is akin to

We ought to control our wandering minds, the better to improve our sense of well-being. And we can do it, if we commit to monitoring and affirmatively regulating our course of thinking. Spiritual traditions give this instruction in their liturgy and research psychologists reach this conclusion in their laboratories. In this Article, I have argued that the injunction to mindfulness, the instruction to concentrate the mind and recover it when it wanders from important intentional thinking, is an implicit, important element of corporate governance law, and the fiduciary duties of corporate directors. This black letter responsibility, I now want to submit, can be leveraged as an opportunity to vitalize personal ambitions of wellness, excellence, and meaning. This suggestion is further to a broader project that I have undertaken in related work, exploring the ways in which fiduciary discourses can advance our personal pursuit of an engaging, affirming way of being in the world.¹⁵⁹

In our society, at this time, once trusted sources of meaning—religion, politics, and culture—have become examples of suspect ones. All around us the storm of existential confusion, despair, and nihilism rages. Here is a port. I submit that we can look to the law's conception of the fiduciary way of being for a crisp, fortifying resource that might give some rescue to this crisis of meaning in our moment. Fiduciary scriptures describe a pathway through which we might get through to a better way of being our better selves. Previously, I have focused on the utility of familiar fiduciary concepts such as the duty of care, the duty of loyalty, and the business judgment rule, in fleshing out the existential nourishment that fiduciary instructions can provide. Identifying mindfulness as a component of corporate fiduciary duties, while giving new depth to doctrinal understanding, simultaneously

insisting that American jazz is an amalgam of many different ethnic musical traditions, rather than acknowledging it as a distinct contribution of African American culture. While references can be found in the Judeo-Christian tradition regarding the importance of focusing the mind ("Be still, and know that I am God." Psalms, 46:10), the Indian yogic and Buddhist traditions developed detailed, programmatic methods of mindfulness meditation which continue to inform most mindfulness practice today. Respecting the particularity of this legacy is what makes its incorporation into secular pursuits a thoughtful act of pluralism rather than a rough cultural appropriation.

¹⁵⁹ See *supra* note 7.

adds a valuable component to this project, which I call “the fiduciary self.”¹⁶⁰

This is a philosophical conceit—by which designation I mean to signify both that it is powerful and that it is cheap. (If it fits, wear it as purple; if not, leave it with the other rags). It is intended for anyone who loves a spectacle of wisdom. Plato’s exegesis on types of city-states, and what they have to say about the best kind of individual human soul, did not make the *Republic* an inquiry for political scientists or city planners. The sentiment of being I find depicted in fiduciary scriptures, and which I say may serve as a resource for understanding how we can approach a course of personal wellness, and finally transcendence, is not a secret profit for corporate elites. Rather, I submit the fiduciary self-conception as one that might be drawn on by anyone who wants to embrace its cogency to enhance their ideas about living a good life. This is a body of material that offers wisdom, insight, power, and excellence independent of the legal and institutional arrangements in which it was developed. It is available to anyone, students, thinkers, and readers of any stripe or station who give their attention to it and find vitality in it.

B. Mindfulness for What?

Some Buddhist writers have expressed aggravation and concern about the widespread secular adoption of mindfulness practices. In Buddhism, the practice of mindfulness is regarded as a tool that is to be used in service of *particular* spiritual aims that involve specific ethical commitments.¹⁶¹ That spiritual endeavor is the essence of Buddhism, and that tradition uses

¹⁶⁰ This is not to say that flourishing requires always keeping the mind in a state of concentration. As previously discussed, that is neither possible nor desirable. See *supra* text accompanying notes 30–40. The point, rather, is to develop sufficient knowledge and efficacy with respect to different modes of mental operation so as to be intentional with respect to the timing and contextual indulgence of mind wandering. We ought sometimes to let the mind wander. The point is the *letting*, rather than being led. This wisdom of diverse cognitive practices, too, is found in a proper depiction of the cognitive duties of corporate directors, as I have described them above. See *supra* text accompanying note 78.

¹⁶¹ See, e.g., Kin Cheung (George) Lee, *Demystifying Buddhist Mindfulness: Foundational Buddhist Knowledge for Mindfulness-Based Interventions*, 5 SPIRITUALITY CLINICAL PRAC. 218, 218–20 (2018) (summarizing complaints).

mindfulness as a means toward that hallowed end. Buddhists are anxious to emphasize that mindfulness practice alone *does not* inexorably lead to the desired spiritual result. The aspirant must be guided there by other instruction.¹⁶² Mindfulness, without such spiritual purpose and guidance, some warn, can actually move a person efficaciously down another path, the *wrong* path.¹⁶³ It can strengthen a person's ability to pursue a personally or socially destructive way of being.¹⁶⁴

Among the most terrifying scenes in the *Star Wars* saga comes early in *The Empire Strikes Back*, when the audience is given a glimpse of Darth Vader sitting in meditation.¹⁶⁵ An evil mind focused on its depraved intentions, the audience understands implicitly, is far more dangerous than is a dark mind wandering. Thus, Vader sitting quietly alone, working on controlling his mind,

¹⁶² *Id.* at 219 (“Mindfulness practice can enhance the quality of awareness but it does not naturally result in compassion or morality.”). *But see* James N. Donald, *Does Your Mindfulness Benefit Others: A Systematic Review and Meta-Analysis of the Link Between Mindfulness and Prosocial Behavior*, 110 BRIT. J. PSYCH. 101, 102, 117–19 (2019) (finding a positive relationship between mindfulness and prosocial behavior in both intervention and correlational studies).

¹⁶³ *See* Lee, *supra* note 161, at 223 (“[I]f you are mindfully and diligently moving forward without a clear direction, you could be lost and misguiding others.”). The following Buddhist scripture shows that the Buddha was concerned not just with the problem of mind wandering in general, but rather was concerned to keep the mind from wandering *to particular subjects*:

[A]n elephant tamer, driving a great post into the ground, ties a forest elephant to it by his neck so as to subdue his forest ways, so as to subdue his forest aspirations, and so as to subdue his distress, his fretting and fever for the forest, so as to make him pleased with villages and accustom him to human ways—even so . . . [the practices of] mindfulness are ties of the mind so as to subdue the ways of householders and to subdue the aspirations of householders and to subdue the distress, the fretting and fever of householders; they are for leading to the right path.

Dantabhumi-sutta, Majjhima-Nikaya No. 125 (I.B. Horner trans., 1998). Neither the lust of the forest nor the neurosis of the village ought distract the fiduciary from the work of their agency.

¹⁶⁴ *See* Lee, *supra* note 161, at 219; *see also* RONALD PURSER, *McMINDFULNESS: HOW MINDFULNESS BECAME THE NEW CAPITALIST SPIRITUALITY* 13–23 (2019) (ruing corporate adoption of mindfulness techniques, from the perspective of a sincere adherent to Buddhism).

¹⁶⁵ *See* STAR WARS, EPISODE V: THE EMPIRE STRIKES BACK (Lucasfilm Ltd. 1980).

is more foreboding than any scene of him flourishing a lightsaber. But what is Vader's mind trying to wander to? In the deeper context of that story, it could be that Vader practices meditation because he knows that there is still good in him, and he wants to remain mentally alert to its lurking presence, lest that goodness sneak back in to overthrow his dark commitments. Vader practices mindfulness to further his fiduciary obligations to the Empire. Under circumstances that call for restraint of cognitive freedom, the wandering mind might spontaneously propose a liberating thought, even where executive function would not dare, or would not willingly, undertake it. Mindfulness then becomes a sentinel in service of a malign project.

If my assessment of corporate cognitive duties is correct, then shareholder primacy in corporate governance law restrains not only what can be said in the boardroom, but also what can be thought there. The injunction to mindfulness serves that limitation. Among the functions of the fiduciary requirement of concentration is to keep thoughts of social conscience from entering into the boardroom. It is not just the "thought of the self"¹⁶⁶ which "is to be renounced, however hard the abnegation,"¹⁶⁷ but also the thought of the other—that is, other stakeholders, other values, anything other than value to the shareholders.¹⁶⁸

This profit-oriented mind-discipline begins in the boardroom but it does not end there. Corporate directors are increasingly alert to the benefits of keeping their subagents' minds from wandering from corporate duties. Early in the Covid-19 pandemic,

¹⁶⁶ *Meinhard v. Salmon*, 164 N.E. 545, 548 (N.Y. 1928).

¹⁶⁷ *Id.*

¹⁶⁸ Other stakeholders, like consumers or workers, of course can be thought of *instrumentally*, in terms of how they can be leveraged to serve the shareholder interest. "The law does not say that there shall be no cakes or ales, but only such cakes and ales as are of service to the company." *Hutton v. W. Cork Ry. Co.*, 23 Ch. D. 654, 673 (1883). Of course, proponents of shareholder primacy in corporate law insist their model, operating across the economy and society as a whole, ends up advancing broad social interests far better than does any alternative corporate governance system. *See generally*, YOSIFON, CORPORATE FRICTION, *supra* note 13, at 7–17 (reviewing such arguments). My point, for present purposes, is that shareholder primacy forbids *individual* directors, or *particular* boards, from entertaining a social conscience in the course of corporate thinking, where doing so would involve sacrifice of corporate profits and shareholder value.

as firms undertook to move operations online, Zoom, Inc. trumpeted that its technology had an “attention tracking” function that could identify if a participant was not paying attention.¹⁶⁹ There was outcry about this, as it was seen by many to be an invasion of privacy, and Zoom quickly announced it had disabled the function.¹⁷⁰ Other, more advanced programs, however, already exist and are emerging into widespread use in the workplace.¹⁷¹ It is not too speculative to imagine that technology will soon be available that can track an agent’s cognitive state by evaluating eye movement, pupil dilation, and facial movement, alerting the principal when the agent’s mind has wandered.¹⁷² These efforts reach beyond professional work. A new corporate wellness program at Amazon prompts warehouse laborers once every hour to stop what they are doing and practice mindfulness for thirty seconds.¹⁷³ During this practice, workers are instructed to repeat these affirmations: “Even in chaos, I can feel peaceful,” and, “I

¹⁶⁹ Essentially the software tracked when a user clicked away from Zoom for more than thirty seconds. Susan Berson, *Top Ten Tips for Lawyers “Zoom”ing into Remote Work During the Pandemic to Maintain Confidentiality, Privacy and Productivity*, 89 KAN. B. ASS’N 10, 11 (2020) (quoting Zoom, *Tips for Educators: Attendee Attention Tracking*, (January 26, 2018) (no longer available online).

¹⁷⁰ Eric S. Yuan, *A Message to Our Users*, ZOOM (Apr. 1, 2020), <https://blog.zoom.us/a-message-to-our-users/> [<https://perma.cc/S8X6-YCDS>].

¹⁷¹ See Darrell M. West, *How Employers Use Technology to Surveil Employees*, BROOKINGS INSTITUTE (Jan. 5, 2021), <https://www.brookings.edu/articles/how-employers-use-technology-to-surveil-employees/> [<https://perma.cc/U2WV-2U7M>]; see also TERAMIND, *Employee Monitoring and Focus Dashboard*, <https://democompany.teramind.co/#/report/Focus+> [<https://perma.cc/SX5M-CFZ2>] (showcasing an invasive surveillance software program and business intelligence dashboard for monitoring and tracking employee activity).

¹⁷² See Drew Harwell, *Contract Lawyers Face a Growing Invasion of Surveillance Programs that Monitor Their Work*, WASH. POST (Nov. 11, 2021, 8:00 AM), <https://www.washingtonpost.com/technology/2021/11/11/lawyer-facial-recognition-monitoring/> [<https://perma.cc/N2XF-4Y95>] (“[T]he software judges their level of attention or distraction and kicks them out of their work networks if the system thinks they’re not focused enough”).

¹⁷³ See Press Release, Amazon, *From Body Mechanics to Mindfulness, Amazon Launches Employee-Designed Health and Safety Program called Working-Well Across U.S. Operations* (May 17, 2021), <https://press.aboutamazon.com/2021/5/from-body-mechanics-to-mindfulness-amazon-launches-employee-designed-health-and-safety-program-called-workingwell-across-u-s-operations> [<https://perma.cc/3TPJ-T5V4>].

notice the good.”¹⁷⁴ One might say that this is an answer to the problem of labor alienation that works by keeping the mind from wandering into class consciousness.¹⁷⁵

What I have said here concerning the vitalizing, personally enriching power of fiduciary concepts generally, and the fiduciary requirement of mindfulness in particular, should not be read as a normative embrace of prevailing corporate governance law. I am trying to understand some of what makes the corporate form so powerful, in order to repurpose that power for personal, transformative uses. My own hope is that the efficacy so gained can then be used to cultivate intellectual critiques, and energize social movements, in favor of transforming corporate governance law in a more socially responsible direction. Those arguments, and those intentions, can be fueled by what has been discerned here, but they cannot be *deduced* from it. Buddhist ethics do not derive from a practice of mindfulness, and neither do such practices lead inexorably to a repudiation of prevailing corporate governance law in favor of a progressive alternative. Such ideas and arguments have to stand on their own. Mindfulness may dispose a person to greater calm and compassion in the course of the intellectual rough and tumble, but it does not offer an alternative to the crucible of debate.

In a similar way, mindfulness practice, while offering great potential for personal transformation, does not dictate the terms or direction of that transformation. It presents no inexorable global truth ready for private consumption. Mindfulness can aid us in thinking intentionally and living deliberately. The point of thinking intentionally and living deliberately is to discover who

¹⁷⁴ See Edward Ongweso, Jr., *Amazon's New 'Amazen' Program Will Show Warehouse Workers Meditation Videos*, VICE (May 17, 2021, 1:19 PM), <https://www.vice.com/en/article/3aqb43/amazons-new-amazen-program-will-show-warehouse-workers-meditation-videos> [<https://perma.cc/5226-MDFN>]; see also Lydia Kostopoulos, *The Emerging Artificial Intelligence Wellness Landscape: Benefits and Potential Areas of Ethical Concern*, 55 CAL. W. L. REV. 235 (2018) (providing a compendium of startling technological innovations in the wellness area, and emphasizing the urgency of having ideas and intentionality around wellness).

¹⁷⁵ Antonio Carvalho & Rita Gracio, *The Dark Side of Mindfulness: Workplace Socialization, Neoliberalism and the Self*, 8 COMMUN & LANGUAGE AT WORK 63 (2022) (making this kind of argument).

and what you might become. We energize ourselves at the risk of empowering our malignity. We do so despite this threat, with faith that our goodness can contain our bigness, or that our goodness can grow with our bigness. The alternative is a smaller, quieter death. The corporation is powerful, and the corporate imaginary offers a distinct approach to an energizing sentiment of being and an invigorated pursuit of a life project. Fiduciary doctrines cannot say for us what that project should be. The fiduciary self is a conception through which you might find out. It uses a scaffold of doctrine in order to enable the agent finally to transcend the terms of that framework. The treatises provide no script for what happens next.