

1-1-2008

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### Recommended Citation

Kuykendall, Mae (2008) "The Ship of State and the Abandoned Yacht," *Penn State International Law Review*: Vol. 26: No. 3, Article 7.  
Available at: <http://elibrary.law.psu.edu/psilr/vol26/iss3/7>

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# The Ship of State and the Abandoned Yacht

Mae Kuykendall\*

## Abstract

*The corporation is a fluid entity dominated by the logic of investment, a logic disjoined from the human stories that exist within corporations and which are rendered marginal to the subject of corporate law by the dominant persona of the corporate entity. It is not clear that this feature of the corporation, which naturally arises from the logic of financial markets, displaces law so much as, with growth of capital deployed in the corporation, it makes less accessible to political understanding more sectors of human experience in which law might seek a role. The corporation is a site, not of jurisdiction or gubernaculum, but of fleeting interconnections based on exchange, all embedded in a whirlwind of words, and defying reification. Hence, the Ship of State sails on with the cargo it can hold, but the Yacht, where human desire fed by financial exchange is gathered, sails to an unknown destination.*

The life, corporate maneuverings, and enduringly mysterious death of the media mogul and corporate takeover titan Robert Maxwell encapsulate the slipperiness of the corporate domain to cultural narrative and political understanding. As a corollary, Maxwell's corporate life and truncated personal story line suggest the slipperiness of the corporate form as an institutional form that expresses law as power,<sup>1</sup> and in which

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\* Professor of Law, Michigan State University College of Law. I wish to thank Larry Catá Backer, Adam Candeub, and David A. Westbrook for their helpful interest in the body of writing of which this essay is one part. I also thank Stephanie T. Goecke for her help with the manuscript.

1. Larry Catá Backer, *Reifying Law—Government, Law and the Rule of Law in Governance Systems*, 26 PENN ST. INT'L L. REV. 521, 523 (Winter 2008) ("The omnipresence of power: not because it has the privilege of consolidating everything under its invincible unity, but because it is produced from one moment to the next, at every point, or rather in every relation from one point to another.") (quoting MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 93 (Robert Hurley trans., Vintage Books 1990) (1978)).

law is reified as a repository of accessible meanings imposed by the state. The living Maxwell, and his bodily and corporate remains, provide a glimpse at the logic of the corporate financial world: its velocity, malleability, indifference to local context, focus on monetary exchange, and slipperiness as a human-scale story.

In brief, Maxwell was a media mogul whose life was as pliable and vaporous as the corporate form. Maxwell acquired names (he was born Jan Ludwik Hock); a home country (he was born in Carpathia and became a citizen of the United Kingdom); a total of four hundred companies by takeover; the appearance of wealth (he was pledging the same assets to multiple lenders); lavish personal possessions and political clout;<sup>2</sup> a corporate family (into which his son achieved his second, authentic birth as corporate officer) that enabled him to shift assets from public corporations to private ones by using deferred payments that never materialized; and a form of immortality in a death without the tracings of conventional human departure (he disappeared from his yacht, leaving an empty stateroom said by the crew to be locked from the inside, and a body that has refused to surrender up a cause of death).<sup>3</sup> Maxwell came into being, assumed a corporate name, selected a jurisdiction in which to do business as Robert Maxwell, bought and sold assets by using persuasive talk,<sup>4</sup> and then dissolved. Like a corporation, he was a fictional entity, given a form and identity using default rules, but resistant to simple description in a language suited to a story of a life, a nation, or even an enterprise.

Without doubt, Maxwell occupied space and created effects in a domain. His death and parts of his life were the stuff of tabloids. Yet his transaction-centered existence, strictly speaking, was not an expression of law. His baffling ending as a tabloid headline did not leave tracings of a comprehensible account of anything at all: a life, power, or the corporate entity as a set of meanings. The Maxwell "story" at most is a series of glimpses at the whirlwind of texts in which economic exchange occurs, but which defy summary, the impact of economic logic joined to

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2. As a Holocaust survivor, Maxwell kept a close affiliation with the leaders of Israel. John A.E. Pottow, *The Maxwell Case*, in *BANKRUPTCY LAW STORIES* 224 (Robert K. Rasmussen ed., 2007).

3. This account is based on Pottow, *supra* note 2, at 222-37. In turn, Pottow's account draws on TOM BOWER, *MAXWELL: THE FINAL VERDICT* (Harper Collins 1996), and NICK DAVIES, *DEATH OF A TYCOON: AN INSIDER'S ACCOUNT OF THE FALL OF ROBERT MAXWELL* (St. Martin's Press 1993).

4. Deirdre McCloskey, *How to Buy, Sell, Make, Manage, Produce, Transact, Consume with Words* (June 28, 2007) (on file with author), available at <http://deirdremccloskey.org/docs/words.pdf> (examining the extent of the language used by economic actors to persuade). See also Deirdre N. McCloskey, *Creative Destruction vs. the New Industrial State: The "embedded" capitalism of Joseph Schumpeter and John Kenneth Galbraith*, 39 *REASON* 59, 64 Oct. 2007, ("Capitalism . . . is talk, talk, talk. . .").

human desire, and the ultimate mystery about the payoff of desire in stable common meanings. In loose proximity to merger agreements, standstill agreements, earnouts, lines of credit, indentures, and the like, are the types of startling personal events that recede into the background of collective human awareness. The shards of meaning that might be located in the materials of Maxwell and his enterprises do not fit together.

The contribution of the global corporation to the store of human narrative is well represented by the almost empty yacht from which Maxwell's ambiguous person disappeared, to later be found in the waters of the Mediterranean Sea. A mysterious disappearance from a lavish yacht sounds like it could be a good story, fraught as stories of tragedy on the seas can be,<sup>5</sup> but it is hard to say what it is about. Maxwell is a figure to personify corporate fluidity in a global age. Having assumed a name suited to his corporate niche, he attained a form of perpetuity in the curious blank in the story of his end. In the image of his ending, one's mental picture does not figure the end of a speaking, living Maxwell, but traces a yacht, abandoned with the relics of desire to a skeleton crew sealed off from consuming its meanings, and without the charter of desire authorized by legal title, lacking a destination. We can safely call the yacht a vessel for human desire, and yet, we have little sense of it as more than a wandering derelict, filled with returns of global capital but lacking much in human substance. The yacht did nobody harm, but left an unsettling image of lost meaning, or meaning that never quite happened. Does anyone mourn Robert Maxwell?

An apt expression of our last glance at Robert Maxwell can be found in the elegant expressions of the fluidity of the corporation as expressed by the well-developed facility of the Delaware Supreme Court for elegant expressions of the fluidity of the corporation. There is a gradual recognition and increasingly acute expression of the emptiness of an idea of a qualitative measure of any given corporation's selection of investments in the global corporate environment. The court that once relied on the insights of a director's deposition in stating that, "business history is not 'compelling'" and "many companies go down the drain because they try to be 'historic,'"<sup>6</sup> now states in its own voice, "[t]he

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5. OWEN CHASE, NARRATIVE OF THE MOST EXTRAORDINARY AND DISTRESSING SHIPWRECK OF THE WHALE-SHIP ESSEX; OF NANTUCKET WHICH WAS ATTACKED AND FINALLY DESTROYED BY A LARGE SPERMACETI-WHALE, IN THE PACIFIC OCEAN; WITH AN ACCOUNT OF THE UNPARALLELED SUFFERING OF THE CAPTAIN AND THE CREW (New York, W.B. Gilley 1821). The sinking of the *Titanic* and the torpedoing of the *Lusitania* provide examples of human interest in endings on the seas with an enduring fascination as a story.

6. *Gimbel v. Signal Cos., Inc.*, 316 A.2d 599, 608 (Del. Ch. 1974).

*Telegraph* sale does not strike at International's heart or soul, if that corporation can be thought to have either one."<sup>7</sup> Take away one newspaper from an assemblage of media properties called Hollinger International and one still has the vessel, loaded with the returns on capital, but lacking the human substance of which narrative can be made. Does anyone mourn *The Telegraph*?

In business conceived as business, meaning the ongoing process of arranging economic exchange as well as combining and recombining the financial claims on the economic value generated by association with human activity, an event with human effects, of any scale, is defined as a transaction. For the employees of a paper, selling a paper is a big deal, but its coming or going from a corporate enterprise is not. For Maxwell, his disappearance was a huge deal. In global capital, the drama is outside the transaction. The transaction is something a bunch of lawyers and bean counters do that has no spectacle value. Hence, Robert Maxwell incidentally encountered the mortal end of us all, but the nature of his end, given the corporateness of his persona in our minds,<sup>8</sup> matches the emotional weight of a business transaction. The corporate mogul in a startling ending, stranded on his yacht, rivals the weightlessness of the passing of the feckless salesman whose wife groped for words to claim significance for his life.<sup>9</sup> For Willie Loman and the rest of those who occupy the City of Gold,<sup>10</sup> the payoff of a transaction has to do with how the fruits of the transaction are spent. You can take money and go watch King Lear or you can buy a boat, or, if you are rich, you can buy a paper and dine with the Queen.<sup>11</sup> On a global scale, large transactions dwarf the human details of lives, rendering lives incomprehensible as case material and dinners with royalty of marginal interest in assessing the stakes in corporate change.<sup>12</sup> The details of lives remain comprehensible to friends and family, apart from their connection to global business

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7. *Hollinger Inc. v. Hollinger Int'l, Inc.*, 858 A.2d 342, 384 (Del. Ch. 2004).

8. *See Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, at 1264 n.1 (Del. 1989), (The Delaware Supreme Court helped capture his corporateness in a sentence: "Unless the context otherwise indicates, the plaintiffs will be referred to collectively as 'Maxwell.'").

9. ARTHUR MILLER, *DEATH OF A SALESMAN*, Act I (quoting Linda, Willie's wife): I don't say he's a great man. Willie Loman never made a lot of money. His name was never in the paper. He's not the finest character that ever lived. But he's a human being, and a terrible thing is happening to him. So attention must be paid. He's not to be allowed to fall in his grave like an old dog. Attention, attention must be finally paid to such a person.

*Id.*

10. *See generally* DAVID A. WESTBROOK, *CITY OF GOLD: AN APOLOGY FOR GLOBAL CAPITALISM IN A TIME OF DISCONTENT* (Routledge 2004).

11. *Hollinger Inc.*, 858 A.2d at 384.

12. *See id.*

transactions, unless a life has merged with the corporate abstraction so thoroughly that one doubts the significance of such a detail as death. As a public matter, Maxwell's death does not tell or complete a story, but confirms the quality of corporate abstraction and fluidity. As a personal matter, as for Willie Loman, comprehensible human significance may be vindicated in private memory, or not.

If death becomes of dubious significance, drawing attention mainly for the crashing halt of any hope to make sense of one person's life as a public human artifact, what prospect might there be to explain the corporation as a realm of law-giving that, in any manner can be made manifest through accessible human-level discourse, governs contestable areas of human concern? If we can make little sense of Maxwell as a life, or of the corporate events in his many holdings as a comprehensible narrative, and yet we watched him and his companies come and go and some of us tried our best to tell a human story,<sup>13</sup> what sense can we make of the corporation as a site for law fashioned to mediate our common life? It seems not exactly right to say the corporation has occupied a space as a law-giver and that law is giving ground to the corporation as law-giver in a process of attrition or relocation. Instead, it occupies a space where the velocity of transactions, the abstraction of the corporation, and the logic of exchange supplant much of the stuff of law while absorbing personal energies and portions of human lives.<sup>14</sup> It does not require claiming that law mediates stories to say that, in the absence of narrative understandings and accounts, law recedes. It recedes for lack of need, having a shrinking domain. The perfection of corporate logic imports more of the fruitlessness of trying to describe and supervise economic exchange into entity contexts, which increases the domain in which words abound but cannot be gathered into a matter for law-giving.

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13. In his effort at a summation that makes of Maxwell a "bankruptcy story," Pottow explains that the protocol created for the international bankruptcy case left in Maxwell's wake is "fuzzy," since it concerns "a touchy and inchoate area like international bankruptcy." Pottow tops off the story of a fuzzy regime of law with an effort to create a connection between an account of international bankruptcy law and Maxwell's life:

As for Maxwell himself, while he lies in peace in Israel (although sometimes with broken glass thrown at his grave), whatever can be said about his bending or in some instances outright breaking of the laws, this Holocaust survivor built up an enormous empire—much of which survives—turned around several major business ventures on the verge of demise, and remains, without a doubt, one of the most interesting entrepreneurs (or spies) of the Twentieth Century. One can only hope that his assassins will be brought to justice soon.

Pottow, *supra* note 2, at 236.

14. See *Int'l Broth. of Teamsters Gen. Fund v. Fleming Cos., Inc.*, 975 P.2d 907, 911 (Okla. 1999) (The court, in the course of vindicating certain formal rights of shareholders, inadvertently encapsulated the unnarratable feature of economic exchange in large corporations by referring to the "perhaps thousands of stockholders" as "relatively attenuated people").

They elude the grasp of law as a construct addressing something that can be expressed in accessible human terms. This is not to say, though, that the form of words in the corporation is not human, only that corporate words are a form of talk that does not speak of local stories.<sup>15</sup>

The arrangements of finance, meaning the trading and re-arrangement of claims associated exclusively with finance rather than the contracts for manufacture and transportation, are not like the contracts Backer describes under which “relations (and behavior) [are] managed.”<sup>16</sup> Indeed, in the course of a talk on the implications of globalization for the effective regulation of corporate behavior in the interests of human freedom, Chancellor Strine establishes a vivid exception to the scope of his talk:

For those of you who came to hear me speak about deal protection measures, the proper way to go about considering a leveraged buyout in which management will participate, the backdating of stock options, the benefits and costs of Sarbanes-Oxley, or Conrad Black, now would be a good time to exit.<sup>17</sup>

In contrast to contracts that regulate industrial activity, the processes of finance, corporate creations, and recreations of assemblages of claims relate instead to a set of abstractions that take place in the “language of economics”<sup>18</sup> and effectuate forms of trade and the movement of capital. Backer explains that global businesses, through multinational

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15. DEIRDRE McCLOSKEY, *BOURGEOIS TOWNS: HOW CAPITALISM BECAME VIRTUOUS, 1300-1776* (forthcoming 2009), available at <http://www.deirdreMcCloskey.com/docs/towns2.doc> (last visited Jan. 6, 2008).

Most controversially, to speak of material actualities, [the draft of *Bourgeois Virtues*] claims that the rhetorical and ethical change *caused* modern economic growth, which at length freed us from poverty. People came to accept the creative destruction of the old ways of doing things, and the economy paid them back with interest. The change was the cause, too, of a liberalism which at length abolished slavery and freed women.

*Id.* It should be noted that McCloskey is arguing that capitalism is a bourgeois virtue, a good thing that came about because of a recognition that commerce, and profit, are good. Hence, the claim about the vacuum in coherence at a local human level in corporate logic is not a critique aimed at the corporation as legal form. McCloskey’s suggestion that a transformation in the rhetoric of the economy has political effects differs somewhat from the argument here that the logic of the corporation makes law less relevant but does not seem at odds with the view that the domain of law may shrink as a certain neutrality in the logic of exchange is accepted.

16. Catá Backer, *supra* note 1, at 550.

17. Leo E. Strine, *Human Freedom and Two Friedmen: Musings on the Implications of Globalization for the Effective Regulation of Corporate Behavior 1* (Oct. 15, 2007) (on file with U. Pa., Inst. for Law & Econ., Research Paper No. 07-26), available at <http://ssrn.com/abstract=1024506> (last visited Feb. 10, 2008).

18. Catá Backer, *supra* note 1, at 550.

corporations, create a system based on private law making.<sup>19</sup> He is describing the actual operations in the world of the physical entities that create value that is traded in the arena of corporate finance and the way in which their operations and customs displace law. Writers, though, as far apart in time and sensibility as industrialist Henry Ford<sup>20</sup> and progressive corporate law professor Lawrence Mitchell<sup>21</sup> have argued that finance is a separate domain than the activities of the businesses to which finance is attached.

Hence, the controversy described by Backer for the twenty-first century, between the power of institutions and the continuing adherence to the concept of “an autonomous reified complex of law,”<sup>22</sup> may well not be fully engaged in the case of the structures associated with the culture of corporate transactions and commerce in the control of enterprises. The reasons are several. First, the corporation at its most abstract level does not produce material that can be made readily accessible by narrative to the process of law-making and law-giving. I argue that the reason for this is the form that discourse concerning business assumes. The linguistic construct that business fosters does not produce accessible stories with import for the law-giver.<sup>23</sup> The Foucaultian view of masking power may be irrefutable as a literary device, but it describes something about the words embedded in capitalism and in the practice of exchange and not necessarily about a conscious undertaking to occlude and thereby increase power. The form of corporate text may tend to communicate little, but one must consider that the text is a discourse that replicates its form through a logic created by the task. Courts look for and find locutions to explain their reluctance to insist that business produce a discourse translatable to the terms in which they deal as adjudicators. Where they reach a shortfall in the explanation of a corporate convention, they do not demand a richer language, or translation.

Even if we ourselves did not perceive a good rationale for these [golden] parachutes, courts should be loath to condemn a business practice simply because they do not perceive a good reason for a given practice. Condemning poorly understood practices simply for

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19. *Id.* at 550-51, 524.

20. See generally HENRY FORD, *MY LIFE AND WORK* (Doubleday 1923).

21. See generally Lawrence E. Mitchell, *The Speculation Economy: How Finance Triumphed Over Industry* (2007) (on file with GWU Legal Studies, Research Paper No. 366), available at <http://ssrn.com/abstract=1017923> (last visited Feb. 10, 2008).

22. Catá Backer, *supra* note 1, at 561.

23. But see Larry E. Ribstein, *Imagining Wall Street*, 1 VA. L. & BUS. REV. 165 (2006) (arguing that negative movies about business cause a mass audience to demand laws that control and regulate business).



lack of a clear rationale would substitute the court's business judgment for the corporation's.<sup>24</sup>

Second, the form of corporate discourse and the economic exchange it engenders do not produce law. As Backer notes, much that supplants law in some domains is simply custom and practice.<sup>25</sup> In the case of the corporation, the void in narrative that is characteristic of business means that what is happening in the practice of economic exchange is not precisely law, and in some respects is best seen as a form of energy—cunning and manipulation of formal ground rules, rather than custom. Corporate codes are written to evacuate the common law overhang from corporate law and to allow corporations to proceed on the basis of deal making among the participants in a corporation under an anti-reification rationale.<sup>26</sup> In conditions of maximum velocity of capital, corporations are temporary assemblages of claims and activities, available for rapid recombination and exchange. The corporation is not a thing. What happens in the assembling, combination, and recombination of capital, investors, and assets is a series of transactions loosely bound in a firm—the nexus of these transactions—which are not themselves a thing.<sup>27</sup> Perhaps, one may say, Foucault meets Coasean economics: the *thing* (power, rules, and deal activity), whatever it is, “is produced from one moment to the next, at every point, or rather in every relation from one point to another.”<sup>28</sup> The corporation is “vertiginously complex, electronic, and hypothetical.”<sup>29</sup> Its creation and re-creation are propelled by ingenuity and energy supplied by capital and by those drawn to the fluidity created by the velocity of capital. The corporation, in which transactions produce a nexus of activities loosely bound by the idea of the firm, differs from the nation-state, which largely assumes stable identity and draws upon narratives to sustain its domain.<sup>30</sup>

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24. *Campbell v. Potash Corp. of Saskatchewan, Inc.*, 238 F.3d 792, 800 (6th Cir. 2001).

25. Catá Backer, *supra* note 1, at 551.

26. STEPHEN M. BAINBRIDGE, *MERGERS AND ACQUISITIONS* 32 (2003).

27. *Id.* at 30 (“The firm is a legal fiction representing the complex set of contractual relationships between . . . inputs. In other words, the firm is not a thing, but rather a nexus or web of explicit and implicit contracts establishing rights and obligations among the various inputs making up the firm.”).

28. Catá Backer, *supra* note 1, at 541 (quoting FOUCAULT, *supra* note 1, at 93).

29. PATRICK BRANTLINGER, *FIXIONS OF STATE: CULTURE AND CREDIT IN BRITAIN, 1694-1994* 24 (Cornell U. Press 1996).

30. *Id.* at 10 (“Nation-states produce a variety of more or less official narratives, or forms of national representation, to create and sustain their legitimation.”). It is argued, though, that processes of privatization are reducing the state role in the affairs of its citizens, and, thus, implicitly, may be stunting the narratives of nation-states. See Tony Judt, *The Wrecking Ball of Innovation*, 54 N.Y. REV. OF BOOKS, Dec. 6, 2007.

The real impact of privatization, like welfare reform, deregulation, the

Third, the strongest critique of the corporation in academic writing has receded to a large degree, despite a continuing search by academics for critical traction against the conception of the corporation as a set of voluntary transactions.<sup>31</sup> In this critique, a battle was fought on behalf of “an autonomous reified complex of law” against the “enablingism”<sup>32</sup> brought to corporate codes beginning in the 1950’s. The receding “thing” that law might control frustrates the domain of law, but does not become a site of law. Hence, the business court is about mastering the rule of deference to economic exchange, giving minimal input of a legal mandate to the velocity of the exchange. Law is present, but is modest in its relation to the basic impulse of economic exchange.<sup>33</sup>

The reaction to the growing scope of corporate logic, and its attendant lack of human level narrative and sense of context, parallels the description Professor McCloskey gives to the serial conceptual attacks on capitalism over the last century, in which a disposition to conclude that capitalism is a bad system produces periodic, but always refuted and ultimately discarded, new efforts at critique.<sup>34</sup> These efforts at critique

technological revolution, and indeed globalization itself, has been to reduce the role of the state in the affairs of its citizens: to get the state “off our backs” and “out of our lives”—a common objective of economic “reformers” everywhere—and make public policy, in Robert Reich’s approving words, “business-friendly.” *Id.*

31. For a strong statement of the corporation as a set of voluntary transactions, *see, e.g.*, BAINBRIDGE, *supra* note 26, at 32 (“This contractarian account of this (wealth maximization) norm rests not on an outmoded reification of the corporation, but on the presumption of validity a free market society accords voluntary contracts.”).

32. Professor Elvin Latty captured the concept of enablingism as “consisting of four facets: freeing corporations from centuries-old fetters deriving from the theory that a corporation was a sovereign concession, providing a useful blueprint for the paper to create, operate, and end a corporation, committing the main initiative and powers to management, and avoiding concern with reform.” Mae Kuykendall, *Reflections on a Corporate Law Draftsman: Ernest L. Folk’s Lessons for Writing and Judging Corporate Law*, 35 RUTGERS L.J. 391, 430 n.138 (2004) (citing Elvin R. Latty, *Why are Business Corporations Largely “Enabling”?* 50 CORNELL L.Q. 599, 602 (1965)).

33. Larry E. Ribstein, *The Rise of the Uncorporation* 6 (2007) (U. of Ill. College of Law, Ill. Law & Econ. Research Paper Series, Research Paper No. LE07-026), available at [http://papers.ssrn.com/pape.tar?abstract\\_id=1003790](http://papers.ssrn.com/pape.tar?abstract_id=1003790) (last visited Jan. 6, 2008) (describing the “uncorporation” as a means of designing financial arrangements around the corporate form and hence allowing the governance rules involving capital to recede further from sight).

[E]quipped with unincorporation incentive and other governance devices, firms can waive fiduciary duties, minimize the control powers allocated to the public owners, or deny the power to trade control rights, thereby nullifying the market for control. Thus, the unincorporation may be able to preserve the diversification and information benefits of public markets while reducing some of the costs of being publicly held.

*Id.*

34. Deirdre McCloskey, *Creative Destruction*, *supra* note 4, at 63.

Thus the major indictment of capitalism by the socialists of the 1850s was for

can be seen as failed attempts to deploy narrative to undermine the sway of capitalism, attempts that are frustrated by the void of story material in capital. Critics of capitalism might be seen as failed narrators, who cast about for material to inspire a negative response to the forms of economic exchange in a free market. At best, their efforts confirm the absence of material for their narrative, and name the features of economic effort that disjoin business affairs from human level stories.<sup>35</sup> Such writings do not create a coherent narrative about the economics of the corporate form from which a program of political action follows.

One might, with some fairness, describe corporate law as having a characteristic of detachment that renders even critique abstract. Indeed, the relationship of judges to the questions presented by corporate disputes brings to mind the insights of an essay on the temperament of Justice Holmes, in which the essence of the judge was captured in the attitude of a spectator.<sup>36</sup> Rogat argued that Justice Holmes's philosophy and judicial decision-making could only be understood by a deep appreciation of the extent of Holmes's detachment.<sup>37</sup> The argument about the source of Justice Holmes's intellectual detachment has to do

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immiserating the working people. When this proved scientifically wrong, the socialists of the 1890s indicted it for imperialism. When that too proved wrong, at any rate by the lights of the best economic scientists who troubled to look into the matter (among them Joseph Schumpeter), the socialists of the 1950s indicted it for alienation. When this accusation seemed less fresh, the socialists of the 1990s indicted it for environmental decay. Schumpeter wrote that "such refutation," rationally proving the latest indictment wrong, "may tear the rational garb of attack [on capitalism and all its work] but can never reach the extra-rational driving power that always lurks behind it." Schumpeter stressed the robustness of capitalism in the economy, the vigor with which new entrants dissolve the monopoly profits of the first mover, and the enormous dividends it leaves for the poor. Robust, yes, but in a certain important respect still fragile: "The *emotional* attachment to the social order," wrote this conservative, in an almost Burkean way, was "the very thing capitalism is constitutionally unable to produce." No one loves a Rockefeller. Everyone loves a Virgin Queen.

*Id.*

35. See, e.g., RICHARD SENNETT, *THE CORROSION OF CHARACTER* 30 (Norton & Co. 1998).

What is missing between the polar opposites of drifting experience and static assertion is a narrative which could organize (a young corporate manager's) conduct. Narratives are more than simple chronicles of events; they give shape to the forward movement of time, suggesting reasons why things happen, showing their consequences. . . . (The manager) lived in a world marked . . . by short-term flexibility and flux; this world does not offer much, either economically or socially, in the way of narrative. Corporations break up or join together, jobs appear and disappear, as events lacking connections.

*Id.*

36. See Yosal Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213 (1964).

37. *Id.* at 226.

with the distancing from American society that a class of patricians at the turn of the century assumed vis à vis both culture and power.<sup>38</sup> Nonetheless,<sup>39</sup> the portrait of detachment suggests an intellectual stance that judges find themselves unable to avoid in the area of the financial logic of the corporate form. Holmes's personal distaste for American culture created a disinterest in politics, an insistence on the independence of laws and morals;<sup>40</sup> the withdrawal "from important areas of shared human experience;"<sup>41</sup> the hiding of private identity behind a public mask; and an interest, expressed most strongly by his contemporary Henry Adams, in a mechanical, or pseudo-scientific, theory of history based upon "the unyielding and inappropriate language of physics."<sup>42</sup>

In the Holmes treatment of law and morals, there is an idea that the sovereign's views might be distorted if the judge "associated legal rules with moral ideas."<sup>43</sup> In the relatively minimal role claimed by judges to referee the formation and recombination of corporate enterprises, the understanding that moral ideas may not be relevant to law gains greater force as the relevance of law itself recedes in the minimalist involvement of courts as "spectators" of corporate logic and the whirlwind of corporate events. Judges act as spectators of the operations of internal corporate logic within the parameters of abstract rules that permit a type of corporate game to proceed. For the most part, they decline to intervene in a broad range of disputes, either because of a view that there is no corporate essence that a given manipulation of the corporate code for a business goal violates, or because of detachment from the culture of the public corporation.

For example, the Delaware courts decline to credit theories that the design of the corporate code is violated if the corporate order is manipulated to achieve the substantive result of a corporate merger while bypassing the provisions of the merger code.<sup>44</sup> The Delaware courts, and other American courts, try to be agnostic about the scale of pay arrangements that make sense for a corporate officer in business culture and that often deliver huge exit packages to executives.<sup>45</sup> The agnosticism in corporate legal disputes about the corporate form itself is of an order beyond that which Holmes described for applying criminal law. There is both a suspension of moral assessment and a bracing

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38. *Id.* at 228-30.

39. *Id.*

40. *Id.* at 225.

41. Rogat, *supra* note 36, at 230.

42. *Id.* at 236.

43. *Id.* at 225.

44. *See, e.g.,* Hariton v. Arco Elecs., Inc., 188 A.2d 123 (Del. 1963) (rejecting the concept of de facto mergers).

45. *See Campbell*, 238 F.3d 792.

degree of skepticism about the scope or relevance of norms, drained even of moral aspiration, that might be supplied by law to constrain the operation of corporate logic or culture. The Delaware courts claim their most definite role in laying down a legal rule when they protect what they refer to as the “franchise of the shareholders,” which creates an opening for the courts to opine on an underlying legal premise of the corporate form that requires the court as legal guardian<sup>46</sup> and purports to protect citizens when they are shareholders. This may be the one departure from detachment the Delaware courts permit themselves, and it provides the basis for a deep embrace of detachment regarding the remaining domain of the corporate logician.

The character of the corporate form, and of business as a social enterprise, lends itself, in the consideration of legal governance over the relationships in business ventures, to a detached approach. Such an approach minimizes the particular, replaces the underlying facts about the human component of enterprises with public masks, and promulgates quasi-scientific language that minimizes the study of business in the language of popular culture, or of business, itself prone to depersonalization.

The predominating nature of the construct leaves a narrative surplus unneeded to resolve legal issues and un-deployed to provide readability to the corporate language of finance and business. The narrative extra material is largely unrecorded in legal materials, or is revealed in bits and pieces, leaving outside readers floundering for the texture that anchors their understanding of other legal materials. Indeed, much of the inner spirit of corporate law resides in the minds and files, and now the laptops, of corporate lawyers. Its outer shell appears soulless to some. The courts, acting as spectators, do not infuse it with a meaning provided by the content of law as an authoritative guide to our common values.

The position of the courts as spectators of the clashes over control of public corporation puts their ability to maintain detachment to the test. Agnosticism, or a studied indifference, is more difficult to achieve when management comes to the table as a player<sup>47</sup> and becomes differentiated from the amorphous avatars of business judgment, who generally occupy the judicial imagination. Confronted with the transformation of corporate managers into bidders for corporate control and with serial corporate raiders, the Delaware courts began to write fact-laden accounts of takeover battles with characters given some flesh and blood. Robert

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46. See, e.g., *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437 (Del. 1971); *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988).

47. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1101 (1997) (characterizing Delaware cases as morality tales for lawyers).

Maxwell came close to personification in a key Delaware case on board management of auctions for corporate control; actions and treatment of “Maxwell” are recounted, but the name Maxwell refers to plaintiffs collectively.<sup>48</sup> These accounts lack the use that dramatists would make of a clearly drawn figure with a personality and typicality that makes the course of the story instructive socially. In the strict standards for narrative, as used by experts in literature, the fact-laden essays of the Delaware courts do not merit classification as narrative.<sup>49</sup> The essays lack recurring concrete characters, narrative conventions, and simplicity. They seem more like open ruminations, or even diaries written by someone who is reporting second-hand information, than narrative, which implies a coherent and predictable structure with a narrator and a reader who are bonded by a common understanding of the narrative structure and rituals.<sup>50</sup>

A further feature of Delaware takeover law is that it is criticized as having indeterminate legal rules. Such indeterminacy fuels litigation and makes planning for certain types of corporate transactions unpredictable and subject to the creation of new tests or the application of unclear tests.<sup>51</sup> A summary of the critique of Delaware law explains how Delaware law partly fails in its mission of being a basis for corporate transactions that are voluntary in nature and self-regulating, with the premises supplied by a set of stipulated rules for a game that needs no more than an occasional call by a referee:

Many of these decisions involved changes in Delaware’s law, and they occurred in areas involving review of important transactions,

48. See *Mills Acquisition Co.*, 559 A.2d 1261.

49. Without a doubt, the cases contain some narrative materials. For definitions of “narrative,” “narrativity,” and related concepts, see GERALD PRINCE, *DICTIONARY OF NARRATOLOGY*, REVISED EDITION, 56-57 (2003); Rock, *supra* note 47, at 1071-72 (describing the genre of memoranda to clients concerning takeover law developments, to wit):

[R]eading these memos is very hard going. Although the discussions of legal doctrine are extremely sophisticated, the memoranda are filled with enormous factual detail about the cases. Compared to more academic discussions, the case discussions seem only partly digested: one finds only summaries of the factual background without the synthesis that makes such case-by-case presentation unnecessary.

*Id.* at 1071-72.

50. Rock, *supra* note 47, at 1071-72. Rock suggests that the corporate client constitutes a reader for the genre of memos to clients, and that this reader understands that clarity is not possible if accuracy is to be preserved. See also PRINCE, *supra* note 49, at 61 (defining narrative audience).

51. William J. Carney & George B. Shepherd, *The Mystery of Delaware Law’s Continuing Success* 11-12 (2007) (Emory School of Law, Law & Econ. Research Paper Series, Research Paper No. 07-17), available at <http://ssrn.com/abstract=999477> (last visited Jan. 6, 2008).

such as mergers and acquisitions. The important observation here is not that rules are difficult to discern once announced, but that new rules have been announced with remarkable regularity. These rules represent surprises for those who have recently completed transactions that are now subject to challenge in an unexpected way, and new risks of liability for participants.<sup>52</sup>

One may well ask if this picture of Delaware law is consistent with the argument that corporate transactions are a domain that eludes the claims of law as *jurisdictio* or *gubernaculum*. The answer is that Delaware court opinions are produced because the corporations they affect have chosen Delaware law to be applied to their inter- and intra-corporate transactions. Corporate counsel has the expectation that the primary role of the courts will be that of a referee, whose only function is to provide a service that permits the game to operate. The referee is not asked to formulate a theory of the game or to seek substantive justice, but merely to make calls that have to be made within the stipulated premises. The fact that the referee makes errors on occasion does not alter the fundamental conception of the referee's role as a facilitator and not a law-giver.<sup>53</sup> Ask any sports fan.

Unlike the referee in sports, however, courts rendering corporate opinions must explain themselves in writing.<sup>54</sup> The requirement that the referee explain himself creates an odd genre. One possible explanation of the form of takeover opinions may be that the courts struggle in them to record social history and even to report an emerging change in the personality of management, rather than providing any deep critique, based on cultural norms, of the behavior of investment bankers, managers bidding to buy their company, and lawyers. At the edges, these opinions draw on the rules of the game to explain why a corporate action is one of three possible types: formally disallowed as not effective in the game premises that authorize further play,<sup>55</sup> a violation that constitutes a foul,<sup>56</sup> or acceptable.<sup>57</sup> The related commentary is not law,

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52. *Id.* at 13.

53. The court often conceives of its modest role as an effort to skirt a "risk that the normative preferences of the judiciary will replace those of the General Assembly." *Hollinger Inc.*, 858 A. 2d at 377. Further, the enablingism adopted by the legislature is a first-order statement of a modest role for law-giving for internal corporate affairs.

54. Referees in sporting events are known to give simple oral explanations of their calls, but the convention of court opinions requires the court to undertake an account of its reasoning that challenges the scope of the function of referee and introduces a degree of commentary that magnifies error.

55. *Blasius*, 564 A.2d 651 (disallowing a corporate board's use of bylaw provisions to frustrate a stockholder vote).

56. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) (holding that defensive maneuvers violated a corporate board's duties as auctioneer of the company, in the circumstances).

but instead the referee's explanation of his understanding of the game and, often, of the referee's role. While corporations cannot escape entirely from the use of state-authorized referees, they have considerable choice among referee candidates.<sup>58</sup> Furthermore, the concession theory<sup>59</sup> of the corporation, which was used to justify strong intervention into the logic of the corporation with judicial theories about a public purpose and a corporate deal with shareholders that gave them a claim on the corporate personality, was abandoned long ago.<sup>60</sup> Hence, corporations are able to proceed with deals amongst themselves, propelled by the force and logic of economic exchange, with minimal state refereeing by state-based courts that do not impose legal norms per se.

While analyzed as indeterminate and productive of litigation,<sup>61</sup> the opinions of the Delaware courts can be seen as a form of minimalist refereeing, with the necessity of displaying a degree of literacy about corporate affairs and a charge to record aspects of corporate and economic history. Indeed, the purpose of the display of business literacy is to reassure corporate lawyers that judges will not misapprehend the scope of their task as being the imposition of norms drawn from a general political culture. The opinions produced by judicial business "literates" are not a source of norms that are either derived from the culture in general or brought from the bottom up. They are an ongoing project to provide refereeing services, and in the bargain, by providing their bona fides as judges for corporate law, to record the manners of the corporate game.<sup>62</sup> In a sense, the Delaware courts combine the functions of a referee and sports writer,<sup>63</sup> with episodic accounts that are not

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57. See, e.g., *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) (upholding the validity, under Delaware law, of a company's selective self tender of its shares).

58. For an argument that the market for corporate law resembles the market for other types of law, in which the ability to shop to avoid mandatory regulatory schemes is not unique to corporate governance and in which some mandatory law is unavoidable, see Larry E. Ribstein & Erin A. O'Hara, *Corporations and the Market for Law*, U. ILL. LAW REV. (forthcoming 2008).

59. See Kuykendall, *supra* note 32.

60. William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 433-36 (1989).

61. Carney & Shepherd, *supra* note 51, at 11-12.

62. The recent Cerberus-URI case provides a good example of the Delaware courts as referees and as scribes used to record the manners of the corporation. See *United Rentals, Inc., v. Ram Holdings, Inc.*, No. 3360-CC (Del. Ch., filed Dec. 21, 2007), available at [http://lawprofessors.typepad.com/mergers/files/uri\\_opinion\\_12\\_21\\_07.pdf](http://lawprofessors.typepad.com/mergers/files/uri_opinion_12_21_07.pdf) (last visited Jan. 6, 2008) (providing a virtually instant decision with heavy description of the deal and with use of a concept of the "forthright negotiator" as the basis of decision).

63. To the extent the analogy of Delaware judges to sports writers bears further development, it may be of interest to Delaware judges to learn that sports writers have joined athletes in the free agency market, commanding larger and larger salaries for their services in media outlets such as ESPN. See Richard Perez-Pena, *The Top Player in This*



necessarily consistent in the selection of details for emphasis or definitive about the game chronicled. Corporate opinions about takeovers resemble the form of novels, in which details are included that do not serve to support the central moral theme of the writing.<sup>64</sup>

In this regard, the thesis that American jurisprudence has tended to take the stance of the observer is of interest.<sup>65</sup> If seen as a form of novel, the takeover opinions are a repository of data about the manners of the corporate culture, but not one that creates an authoritative set of meanings about the task of refereeing a game. Courts handling corporate takeover issues offer ruminations on the deep structural issue that has dominated corporate law and theory: the legitimacy of management. While critiquing the specific behavior of managers who vie to buy their company or who resist takeovers despite the contrary preference of shareholders, the courts are also transcribing features of social and economic history. The result is to create a repository of writing that is superior to any other writings on salient corporate events, in the process of combination and recombination, but not necessarily to provide a coherent legal or moral account. In truth, the fact-rich opinions are not morality tales,<sup>66</sup> but they are fitful efforts to record corporate transactions, provide refereeing services, and contribute the comments of informed observers to the record. The result is an unsystematic but interesting body of writing about corporate logic and, to a degree, corporate mores. A key aspect of the corporate form that the courts capture in their writings is the alteration of the posture of management from faceless bureaucrats to individuals seeking new forms of power and justifying their exercise of power by new social rituals.<sup>67</sup> Indeed, in *The Age of Discontinuity*, Peter Drucker describes the frustration of the knowledge worker, who requires a renewal and growth that organizations have difficulty providing.<sup>68</sup> The courts also reinforce the awareness of the formality of the rules by which corporations are created and altered. They explain the rules in the relatively simple manner of a game's

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*League? It May Be the Sports Reporter*, N.Y. TIMES, Dec. 25, 2007. The market value of legal opinions, compared with other compensated commentary, is an unexplored but potentially rich subject in an era that commodifies intellectual property for large profits.

64. Interview with Robert Hass, Ann Arbor, Michigan (July 2001), regarding how novels differ from apologues.

65. *Id.*

66. Rock, *supra* note 47.

67. PETER DRUCKER, *THE AGE OF DISCONTINUITY: GUIDELINES TO OUR CHANGING SOCIETY* 188 (Transaction Books 1992). Peter Drucker has discussed the social incomprehensibility of faceless power, exercised by mandarins. The emergence of "princes" of the corporation, while recorded with an accompanying critique, may also be an interesting social development, with implications that the courts strive in their writings to understand, announce, and rationalize. *Id.*

68. *Id.* at 287-90.

moderator checking the rule book and reminding the players of the game's premises.

It is unclear what the courts' effort to record social events of some import in the corporate world produces as a cultural artifact. As those who struggle to interpret corporate contest cases discover, the law produced is not clear. The effort to classify the material as a type of narrative, to extract from it a legal holding capable of summation and generalization, may produce analysis that strives to fit cases into a narrative classification.<sup>69</sup> Such classification may be chosen to support legal conclusions about the cases. What one sees in judicial opinions may be best understood, however, as a set of writings by judges who are detached from the business culture and who use the opinions to chronicle business developments and to provide minimalist restatements of the ground rules by which courts maintain their detachment.

The result is a domain of human activity that lies within sight, that is intensely imbedded in words,<sup>70</sup> and which is fashioned with a recondite vocabulary of law as a *lingua franca*, but not as a medium in which to fashion a normative regime derived from meanings generally accessible in the culture. There are sightings from the Ship of State of the vessel in which the returns of capital are gathered, but the understandings that guide the Ship of State are not those that chart the course for those sailing with a compass made of silver.

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69. Rock, *supra* note 47, at 1016 (suggesting that Delaware courts produce corporate parables for moral instruction).

70. McCloskey, *supra* note 34.

