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No Imagination: The Marginal Role of Narrative in Corporate Law

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PREFACE

Though the public has at times been intrigued by spectacular villains, economic power holders rarely attract the attention of poets, playwrights, or novelists. The Venetian trader Antonio is not a great figure in Shakespeare's Merchant of Venice. Countinghouse men and entrepreneurs are occasionally depicted in Victorian and Edwardian writing—one must remember John Galsworthy—but these are exceptions. As a rule, businessmen and financial and economic statesmen receive notice and are dealt with only when they are associated with high political events and figures. Literature has always preoccupied itself with the personality of emperors, kings, princes, and generals. Skipping the middle position of economics and business, it today interests itself in the poor, the neglected, the rejected . . . . So we must treat of economic power without heroes, observing it for what it is, wondering, rather than describing, what effect it may have on the men who hold it.[1]

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† Professor of Law, Michigan State University. I presented a talk based on this Article at a panel of the International Conference on Narrative, sponsored by the Society for the Study of Narrative Literature and co-sponsored by Georgetown University, on March 16, 2007. I wish to thank the Sloan Foundation for sponsoring the Summer Retreat in July 2000 for the Study of Business in Society in Warrenton, Virginia, and for including me as a fellow. The breadth of discussion, which drew upon experts in the areas of sociology, psychology, and economics, was useful as a means of reviewing the competing languages in which a broadly critical and theoretical corporate law analysis might occur. I am also grateful to participants in the London summer 2000 meeting of the Society for the Advancement of Socio-Economics for their comments on my initial public presentation of the thesis in this Article. I wish to express particular gratitude to Adam Candeub, Lyman P.Q. Johnson, Brian Kalt, Peter Kostant, Amy McCormick, Ruth Mendel, Robert Rich, Aaron Veldheer, Robert K. Vischer, and David A. Westbrook for their stimulating critiques and suggestions.

1. ADOLF A. BERLE, POWER 147 (1969).

Whether narrative techniques can advance law or enrich legal studies has been a subject of contention,[2] but there is no doubt narrative methods have claimed ground in some fields of law, such as criminal law and the legal treatment of minorities.[3] Moreover, popular culture remains an outlet for narratives that command public fascination on many topics and events, confirming the hold of narrative on the imagination. Yet few try to invest the legal form of the modern corporation with narrative interest. Among the hardy souls who try, to judge by the long-standing and pervasive tradition of dismissing business as a subject of interest to readers, few succeed. Authors of judicial opinions, academicians seeking to attract a broad readership with comprehensible accounts of corporate logic, and popular writers hoping to create persuasive social narratives about the contemporary corporation fail to create narratives that attract avid interest. Outcomes that help indicate the courts' apparent direction in setting the law affecting large-scale finance give the courts' opinions sustained readership in the corporate bar and among academic consumers as doctrinal developments of large import, but not as fascinating tales.[4]

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2. *See* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1992).

3. Signs of success include the collection LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gerwitz eds., 1996), a large body of material written for law reviews or presented in conferences to provide outsider perspectives on law, see, e.g., Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 516 (1991) and the Foundation Press series of Law Stories.

4. *But see* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997) (on Delaware corporate law as folk tales for corporate lawyers); Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control* (U. of Penn., Inst. for Law & Econ. Research, Working Paper No. 06-16), *available at* http://ssrn.com/abstract=919881 (using a combination of business press, law firm records, institutional statements (ISS), and popular press to construct "happy stories" about hedge fund activism that manage to create an understanding of typical interactions between hedge funds and companies that treat hedge funds as protagonists in an account about their tactics and achievements).

INTRODUCTION

In saying that business does not produce heroes,[5] Adolph Berle, the key theorist in the twentieth century about the corporation, identified a persistent feature of the place business occupies in the popular imagination. Books, both fiction and nonfiction, about corporate clashes in the world of takeovers tend to be reviewed as failures for readers,[6] filled with boring details about finance and dominated by the figure of money, a subject of endless fascination and desire, yet invariably seen as a nonstarter for a good read.[7]

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5. *See* DAVID A. WESTBROOK, CITY OF GOLD: AN APOLOGY FOR GLOBAL CAPITALISM IN A TIME OF DISCONTENT 112 (2004) (explaining that global capitalism lacks community meanings that, like political discourse on virtue, identify citizens as heroes); *see also* JAMES BUCHAN, FROZEN DESIRE: THE MEANING OF MONEY 26 (1997) ("[M]oney cannot coexist with an epic picture of the world . . . .").

6. *See* Bryan Burrough, *Fox in the Henhouse: Two Books Examine the Scandals at Archer Daniels Midland and the Man Who Blew the Whistle*, N.Y. TIMES, Sept. 17, 2000, § 7 (Book Review) at 12 (reviewing KURT EICHENWALD, THE INFORMANT: A TRUE STORY (2000) and JAMES B. LIEBER, RATS IN THE GRAIN: THE DIRTY TRICKS AND TRIALS OF ARCHER DANIELS MIDLAND (2000)) ("[T]here's also a sense that the genre itself may be limited: once readers have embraced one good book on an uproarious takeover battle, a vicious proxy fight, a tale of Hollywood excess, a high-tech startup or an insider-trading scandal, it hasn't been shown that they're left hungering for more.").

7. In the field of literary studies, there are claims that various novels have greatly to do with an interpretation of capitalism, with one strong claim being that that every nineteenth century novel was a reworking of Adam Smith's *The Wealth of Nations* in fictional form. Michael Tratner, Professor, Bryn Mawr College, Panel Presentation on Economics and Narrative, Uncovering Capital: Adam Smith and the Narrative Form of the Classic English Novel (Mar. 16, 2007). Tratner also argued that the twentieth century literary representation of debt as permissible is related to representations of sex before marriage and involve a movement from a logic of saving and production to a logic of circulation, with the Keynesian idea of pent-up demand as a problem being likened to the Freudian view of repression. MICHAEL TRATNER, DEFICITS AND DESIRES: ECONOMICS AND SEXUALITY IN TWENTIETH-CENTURY LITERATURE 1-7 (2001). Such a claim, needless to say, owes a debt to Michael Foucault. *See id.* at 2. In the course of making a virtually all-encompassing claim about the connection between much literature about basic human drives and economics, Tratner notes at the very beginning of his book: "In the last hundred years, economics has become such a technical subject that most literary studies have found it as useless for interpreting texts as electrical engineering or molecular biology." *Id.* at 1.

Away from the context of literary studies, the observations about business

The legal materials governing the corporation parallel and reinforce the popular view of business as empty of narrative possibility. A variety of points from the body of corporate law and related commentary give support to the initial observation that corporate law is an area of the law that filters out narrative as a source of knowledge, a criterion of relevance, or a standard of justification. These points are a mixture—an odd lot—of partially unrelated characterizations of the texture of corporate law. Taken together, they portray a body of corporate law and associated written material that resist narrative, lack narrators, and sometimes fail to attract readers. Indeed, it is telling that the corporate material invested with the greatest potential for narrative import is that which is imagined to have told a story but to have been suppressed by an imaginary master corporate narrator—the corporate agent who shreds documents thought to have been selected for destruction because of the revelatory power of their narrative.

Four distinct observations about the corporation and narrative establish a picture of the marginal place of narrative in business and corporate law. First, business, and hence the modern corporation, has not commanded narrative interest in the past and has relatively little potential to generate successful narratives today. Second, corporate law does not produce legal materials that deploy narrative techniques with any success, despite the large stakes and portent involved in many of the corporate cases. Third, legal scholarship on the corporation reflects the underlying cultural facts about business and is dominated by theory with little attempt at narrative, and no notable success in producing narrative. Fourth, the corporation

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and narrative are more earthbound. For example, reviews of books about corporate decision-making often remark on the failure of the book as a coherent account of anything. *See, e.g.*, Adam Liptak, *Millions for Defense: Microsoft, Two New Books Seem to Show, Lost Its Antitrust Case by Defending Too Much Too Often*, N.Y. TIMES, Feb. 4, 2001, § 7 (Book Review), at 10 (remarking of Ken Auletta's book on the Microsoft antitrust trial that "little of it is engaging as narrative or valuable as commentary" and that Auletta "leaves it to the reader to make sense of a mountain of jumbled facts and impressions"); *see also* Burrough, *supra* note 6 ("[T]he last few years have not produced an abundance of memorable nonfiction narratives set in corporate America. Among those who have attempted the genre, there's been some debate why. It's true the world of balance sheets and stock charts hasn't exactly been a magnet for the most creative and inspired writers of this generation.").

supports a form of purely instrumental discourse that can be called alien in a strict sense: it has to do with the actions[8] of complex and highly fluid entities with legal personality and forms of expression that displace the discourse involving the contradictory emotions and motives of people who exist within the corporation and, while there, spend time telling one another stories. This discourse is an erasing discourse that renders the human narratives within the corporation irrelevant to the discourse of the corporate enterprise[9] and, as a consequence, uninformative about business and largely unpromising as a source for stories about human concerns.

The discourse generated by the corporation is imperturbable and thus immune to the intervention of other discourses that attract human interest. Yet it is a product of human activity and human genius, is powerful and functional, and gives clear direction to certain aspects of life.[10] It is ours.[11]

These observations support a conclusion that reforms aimed at the production of a large narrative about the corporation or of specific narratives are fruitless. Corporate law is abstract, because its subject is not readily reducible to human stories.

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8. The notion that corporate discourse is about action is expressed in many different ways and in many contexts. For example, Presidential candidate Rudolph Giuliani scorned the Senate's interest in passing a nonbinding resolution about military strategy in Iraq as follows: "In the business world, if two weeks were spent on a nonbinding resolution, it would be considered nonproductive . . . ." Michael Finnegan, *Giuliani Praises Bush's Iraq Policy, Foresight*, L.A. TIMES, Feb. 11, 2007, at 23.

9. *Compare* WESTBROOK, *supra* note 5, at 112 (saying that in the "City of Gold" constituted by global capitalism, "the experience of transcendent value" is "exiled to private life") *with* ADRIANA CAVARERO, RELATING NARRATIVES: STORYTELLING AND SELFHOOD 36 (Paul A. Kottman trans., 2000) (equating the lack of a story of a human being with "the absurd story of an unexposed identity, without relations and without world").

10. I wish to thank my colleague Adam Candeub for helping me to clarify this statement of the separation of corporate discourse from other discourse, combined with its power and function in our lives.

11. *See* WESTBROOK, *supra* note 5, at 111 ("We need not fall down and worship money, as Mark Twain said of late-nineteenth-century Americans, but in order to live in the City of Gold we are forced to acknowledge that price creates our reality, and so price is a god, if not necessarily our own.").

I. ORGANIZATION OF THE ARTICLE

This article will place primary emphasis on the texture of the body of corporate law itself as the cultural result and the visible sign of the underlying dearth of promising narrative materials in business. The next section, Part II, will address the basic features of narrative, the manner in which legal studies have deployed narrative to gain insight about law, and the status of narrative in cultural treatments of business. Part III will examine corporate law as a body of writing and enumerate features that demonstrate the absence of narrative. This section constitutes the case in chief. It focuses on the texture of corporate law and examines the concern expressed in corporate reform movements about the function of readership in cultural control over the corporation and in detection of corporate incompetence or fraud. Part IV will revisit cultural evidence, found in commentary on corporate events and reviews of efforts to depict and describe business in literature and movies, that business does not generate comprehensible narratives. This section will also consider how other theoretical writing relates to the thesis here about the dearth of narrative, including general writings about capitalism and modern organization that suggest that alienation, or at any rate, challenges to social imagination are an outcome of large scale rationalization of economic life. The Conclusion suggests that narrative is not a promising source for reform of corporate law despite the sense that corporate law discourse lacks a richness that narrative provides.

II. ON NARRATIVE, LEGAL SCHOLARSHIP, AND BUSINESS

A. *General*

Narrative, in basic terms, is an account of what recognizable characters say and do, with a time sequence that lends support to depictions of cause and effect, motives and consequences.[12] Narratives are told by competent

12. *See, e.g.*, NORTHROP FRYE ET AL., THE HARPER HANDBOOK TO LITERATURE 309, 443 (1997) (treating story as synonymous with narrative and defining story as a "sequence of events"); *see* M.H. ABRAMS, A GLOSSARY OF LITERARY TERMS 173 (1999) (defining narrative as a story involving events, characters, and what the characters say and do); *see also* Paul de Man, *The Epistemology of*

narrators, heard by rapt listeners, and repeated in predictable formats and in rituals of telling and listening. Narratives have a narrator, a point of view, devices such as prefiguring, and a sense of time. In general, the reader or listener is guided, given a sense of place, sequence, and significance. Events and characters are made recognizable and given familiarity even while told as news. Narrative occurs in many genres and is carried out in many mediums. In a broader conceptual sense, narrative refers to sweeping accounts involving a chronology, social forces, and cause and effect in society.

The narrative forms that carry meaning do not arise from a raw accumulation of facts in lives and activities but rather at their best capture an "emplotment" that is present in lives and activities.[13] Despite the artifice, the manipulation and the professional intervention associated with storytelling,[14] it is worthwhile to contemplate that the law's material at hand consists of a set of narratives and discursive styles employed by the participants.[15] Thus, bodies of legal material should vary as a result of the underlying narratives and associated language of participants.[16]

The colloquial use in the legal academy of the term

Metaphor, *in* ON METAPHOR 11, 21-22 (Sheldon Sacks ed., 1979) (suggesting the "temporal deployment of an initial complication, of a structural knot" indicates the "relationship between trope and narrative, between knot and plot"); *id.* at 28 (referring to "temporal articulations, such as narratives or histories").

13. *See* DONALD E. POLKINGHORNE, NARRATIVE KNOWING AND THE HUMAN SCIENCES 153 (1988) (citing ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 117 (1981), on the relationship between plots and life).

14. *See id.*

15. Since the participants cannot anticipate how later events will alter the significance of earlier events, *see* POLKINGHORNE, *supra* note 13, at 50 (citing Danto on the historian's ability to write sentences linking later events to earlier events, such as: "In 1717, the author of *Rameu's Nephew* was born."), there may seem to some limit to the emplotting possible by participants in events. But participants do clearly create new events invested with significance in light of earlier events and intended to reconfigure earlier events.

16. For a consideration of the rhetorical strategies of legal scholars, with a suggestion that law's prescriptive mandate pushes scholars toward "technocratic forms of discourse," see Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155 (2006).

"stories"[17] or "counter narratives" is a loose description of

17. *See* Peter C. Kostant, *Team Production and the Progressive Corporate Law Agenda*, 35 U.C. DAVIS L. REV. 667, 671 (2001) (arguing that the "team production" model of corporate governance "tells a coherent story about how the law allows corporations to act"); *see also* William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275 (2001). Bratton provides four alternative "stories" of what happened in Enron. He uses the term with a fair degree of rigor, in that each one is offered as a "causation story" of Enron's collapse (the stories are *Enron as a Conventional Market Reversal*, *Enron as Derivative Speculation Gone Wrong*, *Enron as a Den of Thieves*, and *Enron as a Bank Run*). Nonetheless, the complexity of the materials that Bratton deploys as the stuff of the narrative, including as the requisite foreshadowing the Enron effort to realize the full implications of the Coase theory of the firm and related contractarian theories about the firm as a nexus of contracts only held together by the calculation of a cost tradeoff between permanent arrangements and spot purchases and adding as atmosphere a loose version of tournament theory, challenges the conventions of narrative that revolve around matters of accessible human interest and better vindicates the conventions of academic theory. Bratton concludes that all four stories figure into an account of Enron's collapse, thus confirming that narratives need not be tested by truth but suggesting greater variety than law may prefer for conclusions. *See id.* at 1326. David Westbrook provides two counter stories, one in which a conflict of interest between Enron's management and shareholders created massive fraud, and another in which the mutual interest of management and shareholders in generating wealth led to a business failure. Westbrook makes a choice, lending some support to narrative as a source of insight. *See* David A. Westbrook, *Corporation Law After Enron: The Possibility of a Capitalist Reimagination*, 92 GEO. L.J. 61 (2003). In Bratton's account, to the extent a story with a beginning, middle, and end, and with characters, is detectable, it emerges from a picture of Jeffrey Skilling as a figure driven by a deep understanding of the Coasean theory of the firm, a commitment to a tournament approach to personnel, a possible rational choice to gamble in a manner typical of the "end period problem," and as a scapegoat victimized by an ex post reassessment of the benefits of interested director transactions. Perhaps Enron is a cultural moment permitting narrative to be made of the adventures of an MBA trying to actualize the highlights of his courses on economic and organizational theory and bringing economic disaster to untold thousands. But the narrative concludes in the ambiguities of complex explanation and the need of multi-variant analysis. *See* Bratton, *supra*, at 1331-32. By contrast, a different academic use of the terms "narrative" and "story" appears more successful. Goodwin Liu writes about the cultural narrative of the Bakke case, in which there is a story of a white applicant who is displaced by a minority applicant favored by affirmative action. In the story, belied by the causation fallacy explained by Liu through statistical analysis, a more qualified applicant is displaced by a less qualified applicant. *See* Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045-46 (2001). The cultural success of the narrative is illustrated by Liu's recollection of the political advertisement that depicted two white hands crumpling a job application and a voice saying, "'You needed that job . . . And you were the best qualified. But they had to give it to a minority because of a racial quota. Is that really fair?'" *Id.* at 1047 (quoting Peter Applebome, *Subtly*

accounts that give either a positive or negative assessment of certain corporate practices or forms. In the world of corporate scholarship, the term "story" lends a frisson of interest or fashion to standard debates about the significance to assign the basics of corporate law and practice. It has some rhetorical power to suggest an account containing comprehensible, accessible elements with listener appeal. At conferences, at the mention of a story, heads turn and members of the audience shift in their seats. But the use of the term is by no means rigorous nor associated with rich narrative accounts of corporate life and it usually ends with a sense that a pleasant but ultimately fruitless diversion has passed. Even in scholarly legal writing, references to narrative and storytelling tend not to be rigorously distinguished.[18]

A useful example of a narrative technique that has social power is the description by Joan Didion in her book, *Political Fictions*, of a successful and powerful social narrative. Didion argues that there is an inside group of political elites, located in Washington, D.C., who impose a narrative on American political life.[19] The narrative is sustained by an attentive audience and is designed to maintain an illusion that national political life is characterized by broad consensus, in which the citizen's choice, based on an evaluation of small differences and an assessment of the candidate's character, is a vital

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and Not, Race Bubbles Up as Issue in North Carolina Contest, N.Y. TIMES, Nov. 2, 1990, at A1.). While populist appeals relating to business have some currency, they do not have the impact as cultural narrative that the "story" of affirmative action has had.

18. Farber & Sherry, *supra* note 2, at 807 (collapsing the categories of narrative and storytelling). Indeed, a skeptic about the practice of legal scholarship might well question whether the term "narrative" means anything in the writing of legal academics. *See* Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 184-85 (1990) (describing the life cycle of the word "freedom" as a rhetorical lever and its loss of meaning in an inflationary spiral of over and instrumental use). In a personal conversation with Stephen Schulman, he suggested that that the term "narrative" adds little to discourse about corporations because, like the term "adumbrate," it doesn't mean anything. Conversation with the late Stephen H. Schulman, Professor Emeritus, Wayne State University Law School, in Ann Arbor, Mich. (June 16, 1996).

19. *See* JOAN DIDION, POLITICAL FICTIONS 22 (2001) (referring to "the handful of insiders who invent, year in and year out, the narrative of public life").

determinant of the national course.[20] The candidate's biography is deployed to invent a character useful to the political narrative.[21] Staged events, in which all who participate in the retailing of the narrative about the candidate are aware of the staging, become part of the drama by which the character of the candidate is linked to a story of citizen choice.[22] Although the narrative is contrived (as narrative is), the thesis implicitly is that it is effective with an audience. It influences the cultural understanding of our politicians and it makes memorable our leaders, whose supposed traits are linked to our national history. Didion's claim is that the candidates are influenced to stage narratives that are then reported by the cultural keepers of the forms of predominant political narrative. Thus, the characteristic language and performances associated with national politics lend themselves to narrative and help develop expert narrators. Both the enterprise and the culturally prominent writing about it are infused with narrative techniques.

An area of law in which scholars create successful narrative accounts is instructive in its resemblance to political narrative. Bankruptcy law has been analyzed, with a degree of power, as drawing upon narratives and counter-narratives about risk management. The body of bankruptcy law and commentary provides considerable detail about the human effects of financial reversal, the differing candidates in American history for debt relief and the political import of the law's variable response, and the ebb and flow of policy under differing historical conditions, driven by the effect of financial risk on the middle class.[23] While bankruptcy as a legal subject is regarded as dry and technical, the story of bankruptcy is nonetheless a human story about the needs and emotions of people, the peril of financial dislocation and moral condemnation, and the ebb

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20. *See id.* at 37-44.

21. *See id.* at 41.

22. *See id.* at 43-44.

23. *See, e.g.*, John Fabian Witt, *Narrating Bankruptcy/Narrating Risk*, 98 NW. U. L. REV. 303, 305-06 (2003) (reviewing EDWARD J. BALLEISEN, NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA (2001), BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE (2002), and DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OR BANKRUPTCY LAW IN AMERICA (2001)).

and flow of narratives and counter-narratives used to influence bankruptcy policy.[24]

B. *In Legal Scholarship*

Many legal writers associate narrative storytelling with particularity that resists attachment to legal conclusions.[25] Robert Cover presents a different picture in *Folktales of Justice* whereby a core story elucidates and yields a judicial conclusion.[26] But other writers contrast the empirical element in legal reasoning with legal storytelling, because stories are seen as nonempirical in that they focus on a narrator's experience of events.[27] The storytelling movement is associated with feminism and critical race theory and with the idea of "voice"—giving a hearing to the unheard perspectives of non-dominant groups, which law is said to silence.[28] The term "narrative" has come to be associated in legal scholarship with "outsider" stories the telling of which disrupts a dominant discourse, whatever its form. Dominant discourse, without consideration of its narrative content, is treated as a presence which marginalizes outsider accounts of the realities that law mediates. In scholarly journals, there has been some degree of effort to "foreground" narratives that arise from individual stories told by whomever is selected to have her or his voice amplified.

Thus, most attention in legal writing about narrative has been focused on allowing individuals to soften the law's rules with claims of perceptions and histories that might

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24. *See id.*

25. *See* Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1030 (1991); Farber & Sherry, *supra* note 2, at 807-08.

26. *See* Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179-82 (1984).

27. *See* Daniel A. Farber & Suzanna Sherry, *Legal Storytelling and Constitutional Law: The Medium and the Message*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW, *supra* note 3, at 7 (contrasting the feminist wellspring of the legal storytelling movement with "grand theory" in law). RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE (1995) has been well received for using a technique of storytelling, in which the protagonist author reports conversations with a fictional student. The Chronicles succeed in raising issues about race through trenchant observations, which, though not empirical in nature, are nonetheless sharply observed and useful as a source to generate and evaluate theoretical frameworks on race.

28. *See* Farber & Sherry, *supra* note 2, at 827 n.113.

undermine the authority of the law's claim to neutrality and objectivity. There is less examination of the function of narrative throughout the body of law as an expression of dominant or recurring social interpretations that yield, support and legitimate legal outcomes[29] than there is of narrative's role in the exposition of recurring social interpretations imbedded in law. Thus, narrative has been described as "a form of countermajoritarian argument, a genre for oppositionists intent on showing up the exclusions that occur in legal business-as-usual . . . ."[30]

But, narrative as a general term concerns a form of expression which carries human meaning; as such, elements of narrative necessarily appear in the legal expressions of majority will and elements of narrative are necessarily present in a large variety of contexts: the expression of majority will, the explanation of social and economic practices, the claims of the privileged as well as the unprivileged.[31] The creation of a series of books for law school basic classes that use stories prepared for various legal subjects emphasizes the sense that narrative is a source of insight and knowledge about the content and

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29. *But see* Paul Gewirtz, *Introduction* to LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW, *supra* note 3, at 4-5.

30. Peter Brooks, *The Law as Narrative and Rhetoric*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW, *supra* note 3, at 16.

31. The basis for my interest in narrative differs from the "storytelling movement," which, according to Farber and Sherry, has "argued that stories can change the mindsets that underlie current social institutions," and has likewise "asserted that existing mindsets like racism and sexism have been created by stories told by dominant groups . . . ." Farber & Sherry, *supra* note 27, at 37, 44. According to Farber and Sherry, the storytelling movement argues that only storytelling can genuinely persuade; logical argument cannot. Claims that valorize storytelling in the abstract, particularly associated with issues of substance, draw upon sentimentality and rhetoric. *See id.* at 44. While my thesis could support a view that conscious attention to narrative may be a beneficial supplement to the law and practice of the corporation, compare Farber & Sherry, *id.* at 43, I do not suggest, and instead dispute, that a clearer view of the role of narrative in corporate law calls for a new "mindset" about corporations. To say that the public corporation draws its power from a dominant group narrative would have some rhetorical appeal, but to specify that narrative—its content, its voices, its evolution, its devices—would be a formidable task indeed. It seems just as plausible that, as hypothesized, the public corporation and its law have arisen in response to business needs and have derived some of their power, but also suffered in popular regard, from the relative void in stories of corporate governance.

derivation of law.[32] A reason for close attention to narrative as a form in which society creates and conveys meaning has much to do with an assessment, albeit one that attracts ample critique,[33] of narrative as a form of knowledge and insight.[34]

In another professional context, Robert Coles lauds the facility in clinical psychiatry of a doctor's "being a good listener" to the stories of patients rather than becoming overly theoretical in the course of devising a treatment. Coles's point includes the idea that the jargon of the psychiatric profession obscures the underlying narratives that patients carry with them. While Coles suggests that patients would benefit from telling these narratives to "an active listener," who would have an effect on the shaping of the story,[35] there is no suggestion that narratives are unmediated manifestations of the real. It is presumably clear that none of the proponents of narrative believe that narrative is a form of transmitting reality free of categories that organize, frame and "construct" meanings. Nonetheless, the suggestion is made that attention to narrative by a professional carries with it a humanity that emphasizes, as in the doctor-patient relationship, sensitivity to the place stories hold in the making and examination of a person's life or of certain critical

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32. Foundation Press has launched a series of "law stories" books for use in law school classes, beginning with Tax Stories. The Foundation website explains as follows: "In the new Law Stories titles from Foundation Press, the General Editors and their guest contributors bring famous cases to life by telling the true, never-heard-before stories behind landmark cases. This fascinating series of texts covers significant cases in major areas of law, including tax, torts, constitutional law, civil procedure and property." Westacademic.com Product Lines, http://www.westacademic.com/Professors/ /ProductLines.aspx?tab=1 (last visited May 7, 2007).

33. Robert Weisberg describes, with overtones of skepticism, the claims of some proponents of narrative method in law that judges with an ability to discover "true" narratives underlying legal abstractions are in possession of a superior "moral craft." Robert Weisberg, *Proclaiming Trials as Narratives: Premises and Pretenses*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW, *supra* note 3, at 66; *see also* Martha Minow, *Stories in Law*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW, *supra* note 3, at 24, 32 (describing "exploration" by several scholars of Hannah Arendt's methodological commitment to narrative in preference to the prevailing methods of social science).

34. *See* ROBERT COLES, THE CALL OF STORIES 23, 25 (1989).

35. *See id.* at 17-19.

affiliations. There is some implication that attention to client stories reduces the displacement of authentic narratives by professionals employing legal abstractions, thus in some possible, but perhaps ephemeral, way empowering clients rather than attorneys. A critic, Robert Weisberg, has suggested that certain genres of storytelling in scholarship, such as poverty law stories, carry with them an air of discovery about the simple facts of law life—lawyers collect facts and put them into some sort of persuasive order that advances the interests of their clients.[36] Weisberg also suggests that much of the talk surrounding narrative in law really takes the form of a speech act—lawyers or scholars congratulating themselves for their demonstration of the moral superiority required to recognize that clients have stories.[37]

C. *About Business*

Business provides an occasional setting for narratives, but, at bottom, the narratives are not about business and do not create a large story or narratives that demand to be repeated by storytellers. The predominant form in which business is conducted and studied is a formalized entity with which people have no deep affinity. Their emotions are banished from the cognizable discourse of the entity.[38] While there are some efforts to tell a good story in a business setting, such stories are not about the corporation or about business. The parts, meaning the human needs and emotions, do not equal the whole. Moreover, as will be discussed, readers abandon official corporate text, reading it only fitfully and in dribs and drabs. The reading of corporate text is not done as "real reading," in which the reader attempts to take in and digest a whole.

Legal scholarship's occasional efforts to address the human emotions in the business setting are done by way of the law and behavior movement without concerning

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36. *See* Weisberg, *supra* note 33, at 63-64 (maintaining consistent posture of intellectual skepticism about the "speech acts" associated with the storytelling movement and implying that many insights of the storytelling movement are trivial).

37. *See id.*

38. *See* WESTBROOK, *supra* note 5, at 112 (saying the City "seems to have no place for whatever is appropriate to being human but outside the marketplace," and commenting that the City "embodies no meaning that unifies the people").

themselves with accounts of human particulars.[39] They suggest that quantifiable information about behavior can help to shape doctrines toward greater fit with the human materials but they do not support the need for or the production of specific narratives: they are technocratic efforts[40] at refinement of the organizational logic. The location of the work is in the social sciences, not the humanities.[41]

Law review articles have touched on the discursive character of popular depictions of business and the rhetorical character of corporate law from several angles. Such articles include suggestions that the popular depiction of business is primarily negative,[42] especially as revealed in movies; investigations of how certain types of rhetoric, as about stakeholders,[43] might figure in the construction of doctrine with real effect; treatment of the rhetorical strategy of the Delaware courts;[44] and recent commentary on the absence of religious faith from corporate discourse as a shortfall of the corporate form and culture.[45] That popular culture transmits a negative view of business[46] appears to suggest that there is a popular narrative about the

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39. For an example, see Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735 (2000).

40. *See* Balkin & Levinson, *supra* note 16.

41. *See id.* at 155-56.

42. *See* Michael Asimow, *Embodiment of Evil: Law Firms in the Movies*, 48 UCLA L. REV. 1339, 1373 (2001) (arguing that law firms are treated negatively in business as a reflection of a universally negative treatment of business in movies); *see also* Anthony Chase, *Civil Action Cinema*, 1999 MICH. ST. L. REV. 945, 952-57 (1999); Larry E. Ribstein, *Imagining Wall Street*, 1 VA. L. & BUS. REV. 165 (2006) [hereinafter Ribstein, *Imagining Wall Street*]; Phillip Lopate, *The Corporation as Fantasy Villain*, N.Y. TIMES, Apr. 9, 2000, at B24; Larry Ribstein, *Wall Street and Vine: Hollywood's View of Business* (Ill. Law and Econ. Working Papers Series, Paper No. LE05-010, 2005), *available at* http://ssrn.com/abstract=563181 [hereinafter Ribstein, *Wall Street and Vine*].

43. *See* Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675 (2005).

44. *See* Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1 (2005).

45. Lyman P.Q. Johnson, *Faith and Faithfulness in Corporate Law*, 56 CATH. U. L. REV. (forthcoming 2007).

46. *See* Ribstein, *Wall Street and Vine*, *supra* note 42 (claiming view is heavily negative).

corporation: one that deploys accessible narratives to make a case against business for a mass audience. While there may be a grain of truth in the notion that business is sometimes a setting for tropes of corruption and evil in the modern world, the better view is that movies produce plots about sinister power that is exercised in secret,[47] and business is sometimes the setting for that type of narrative. Further, the argument, sometimes made, that movie producers are hostile to capital, given their need to beg for it for their art, and hence portray a negative view of capitalism,[48] is countered by the view that movies may well ignore recent corporate scandals because movie studios are part of corporate conglomerates.[49]

A more likely explanation is that business is not fertile ground for generating profit from a mass market for entertainment.[50] Indeed, some of the same writing that claims movies portray business in a negative light makes the point that the facts about business are too complex to be portrayed.[51] While narrative is not tested by truth, and it might be possible to identify narratives about business that are misleading, narrative nonetheless arises from an impulse to report or portray a human experience that bears telling to an interested listener. Hence, narrative places the listener in the circumstance of the narrator, with access to a comprehensible account of the events reported and their significance for the listener. Even the critics of business movies who fear their influence on public opinion agree that

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47. *See* Dave Kehr, *Seeing Business Through Hollywood's Lens*, N.Y. TIMES, July 14, 2002, § 4, at 5 (equating postwar film noir thrillers with "economic as well as metaphysical implications" in which "apparently respectable businessmen who were actually fronts for crime and corruption" served as heavies).

48. *See* Ribstein, *Imagining Wall Street*, *supra* note 42, at 198.

49. *See* Kehr, supra note 47, at 5.

50. *Working Girl* and *Nine to Five* are examples of successful mass market movies in a business setting. WORKING GIRL (20th Century Fox 1988); NINE TO FIVE (20th Century Fox 1980). They explore issues of gender and old-fashioned sexism without revealing much about business. *Working Girl* is probably best classified as a romantic comedy, and *Nine to Five* as a farce. Their highest claim to being a serious narrative about business might be as a latter day stab at portrayal of the gender ideology in corporations that is depicted in the work of ANGEL KWOLEK-FOLLAND, ENGENDERING BUSINESS: MEN AND WOMEN IN THE CORPORATE OFFICE, 1870-1930 (1994).

51. *See* Ribstein, *Imagining Wall Street*, *supra* note 42, at 197.

they do not achieve this mission. There is a dearth of accessible, compelling narratives that give comprehensibility and interpretation for a mass audience to the affairs of the corporation as witnessed and relayed by a competent narrator. In short, business is dull.

Thus, although law in general is said to minimize narrative forms of knowledge,[52] and, further, some say that narrative has lost ground in the contemporary culture, the corporation is particularly unlikely to produce narratives that account for and explain the corporation, business practice, or the legal outcomes in corporate law. A movie like *Wall Street*,[53] analyzed as intentionally conveying a negative view of business,[54] is more correctly seen as an effort to evoke an excitement and energy that is associated with the production of wealth. A play on a 1950s television play called *Patterns*,[55] about corporate intrigue, similarly did not generate either a pat conclusion or a comprehensible narrative about business, corporate finance, or securities fraud.[56] Business movies explore themes about money, greed, sex, the pace and excitement of velocity in trading, fathers and sons, and modern gadgetry,[57] but they virtually never present a coherent narrative of corporate financial logic or point to a conclusion about business, except at the highest level of generality about the emptiness of modern organizational culture.

In the relatively simple terms by which I have defined narrative and excluded informal uses of the term "story," it seems fair to say that corporate law, and the corporation itself, and the practices and culture of the corporation, generate relatively little of narrative interest or explanatory power for any potential audience brought together by the narrative. Stated more strongly, the

52. *See* Balkin & Levinson, *supra* note 16.

53. WALL STREET (20th Century Fox 1987).

54. *See* Ribstein, *Imagining Wall Street*, *supra* note 42, at 198.

55. PATTERNS (United Artists 1956).

56. *See* Raymond Rosenthal, *TV Drama*, COMMENTARY, Jan. 5, 1958, at 455-56 (criticizing the absence of a coherent moral lesson or resolution in Serling's television play as well as his discussion of it in his book of plays and additionally describing Madison Avenue offices as a usefully "suave" setting for the depiction of illicit feelings).

57. *See, e.g.*, WALL STREET, *supra* note 53.

corporation evacuates meaning and resists comprehensibility in the terms in which matters of general human interest are communicated. Corporate law provides comprehensibility of a self-referential nature for a relative few who prize its abstractions and embrace its codification as a constructed narrative of the possibility of narrative.[58] Certain statutes, for example, purport to establish a story about how some restraint on the process of indemnification is established through procedures that tend to create opportunities for moral narratives within the corporation.[59] Corporate law scholars have suggested that the Securities and Exchange Commission devised an approach to insider trading prosecution that allows the agency to tell a story—one that involves an idea of criminality—that gives the agency advantages in competing for resources.[60]

What of the efforts to use narrative to critique the corporation? The critiques of the corporation by progressive scholars and activists fail as narrative, tending to register as a complaint in search of a cause. The anti-globalization eruptions might be seen as attempted narrative, but they lack the drama or coherent message their proponents hope to generate.[61] The lack of narrative interest in the corporation infects those who aspire to make a critical narrative about the corporation and extends the aridness of

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58. *See* Mae Kuykendall, *Assessment and Evaluation: Retheorizing the Evolving Rules of Director Liability*, 8 J.L. & POL'Y. 1, 58 (1999).

59. *See id.*

60. *See* STEPHEN M. BAINBRIDGE, CORPORATION LAW & ECONOMICS 585 (2002) (referring to the public choice "story" of insider trading and arguing that it explains the SEC's interest in a "budget-enhancing enforcement program"); Donald C. Langevoort, *Seeking Sunlight in* Santa Fe's *Shadow: The SEC's Pursuit of Managerial Accountability*, 79 WASH. U. L.Q. 449, 452 (2001) (describing the SEC's use of rhetoric and symbols). The effort to create a story about the SEC and not about the content of the law itself is perhaps necessitated by the logical structure of the insider trading law, illustrated by the thorough and systematic analysis of insider trading legal logic: whether insider trading has a victim, whether it can be considered fraud by analogy to other types of fraud, whether variants on classical insider trading withstand logical scrutiny as an actionable transgression, and what the remedies can be under federal securities law. *See* William K. S. Wang, *Reuschlein Lecture: Stock Market Insider Trading: Victims, Violators and Remedies—Including an Analogy to Fraud in the Sale of a Used Car With a Generic Defect*, 45 VILL. L. REV. 27 (2000).

61. *See* WESTBROOK, *supra* note 5, at 3 (referring to "arguments that the protesters might have made had they been sufficiently coherent").

corporate logic and practice to attacks on it.[62] As an example, the matter of executive compensation eludes striking narratives, despite the obvious possibilities of social resentment about extravagant pay.[63] The recent *Disney* case, while attracting great interest, sustains very little interest as a story with twists and turns: Eisner gave Ovitz a lot of money, and the board went along, at the front end and the back end.[64] The business judgment rule applies.

The absence of narrative from corporate law is substantially explained by the nature of the undertaking of producing wealth and by the social formation of business. The absence of narrative is not a nefarious scheme to undermine critique, although it tends to have that effect. Rather, the underlying project of generating wealth does not produce rich human stories. Nostalgia about a supposedly innocent time before the corporate form gained social and legal power attempts to locate a social loss (of a moral narrative) in the destruction of a pastoral innocence when states began to charter corporations freely and thus to tell a social story,[65] but it is a nostalgia with few who

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62. *See id.* at 11 (describing globalization as "widely understood to be unstoppable, about as responsive to political thought as the weather").

63. A recent effort to explain executive compensation by offering an interpretation of class, and not simply individual greed, is the effort of Professor Westbrook to account for executive compensation as a form of behavior in which paying more for an item bespeaks status. *See* David A. Westbrook, Notes Toward a Theory of the Executive Class (July 31, 2006) (unpublished manuscript, on file with author). The account is cultural interpretation and not narrative, however.

64. *See In re* Walt Disney Co. Derivative Litigation, 906 A.2d 27 (Del. 2006).

65. In 1981, Professor Werner described what he called the "erosion doctrine" as a part of the "folklore of big corporations." Walter Werner, *Corporation Law in Search of its Future*, 81 COLUM. L. REV. 1611, 1613 (1981). He summarized the folklore as follows:

> This view would have it that the corporation once behaved as it was supposed to. The shareholders who owned the corporation controlled it. They elected a board of directors to whom they delegated management powers, but they retained residual control, uniting control and ownership. In the nation's early years the states created corporations sparingly and regulated them strictly. The first corporations, run by their proprietors and constrained by law, exercised state-granted privileges to further the public interest. The states then curtailed regulation, shareholders abdicated control, and this Eden ended. The corporation expanded into a huge concentrate of resources. Its

partake. Efforts to make of the business narrative void a narrative about an intentional void are not successful strategies to create narrative in the sense used here but are at best generalized complaints about capitalism and even about modern life in a complex, interdependent society. They are not successful narrative interventions within the framework of business culture, business law, and business practice. Within the frame of modern life, the social formation that is business is unpromising as a source of narrative, and narrative is unpromising as a means of critiquing or reforming the corporation.

III. CORPORATE LAW: NO IMAGINATION

Telltale signs of a troubled relation to narrative in corporate law, which provides the legal engine of modern business logic and practice and the written record of the more salient and contested corporate events of the day, are the lack of success in embodying shareholders as flesh-and-blood participants in corporate battles; judicial doctrines that purposely occlude the details of corporate board deliberations by presuming most board conduct normal and unconflicted (the business judgment rule); the lack of a sense of place in the cases (and in movies only occasional depictions of cathedral-like boardrooms that dwarf the participants); the adequacy of the abstraction of the corporate construct to carry the ultimate dream forward, that of money; the mastery of corporate insiders over non-expressive forms of speech; the failure of businessmen to function comprehensibly as characters related to a plot about corporate law; statutes designed to check the impulse of judges to impose moral frameworks on business dealings in corporations; the disappearance from the cases of a trope of gender from which the cultural confidence for early corporate law decisions was derived and which, using the figure of manliness, provided a wedge for moralizing about standards of corporate conduct; the resistance of corporate law to moralistic and narrative forms of critique; the uncertain staying power of villains

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operation vitally affected society, but it was run by managers who were accountable only to themselves and could blink at obligations to shareholders and society. Thus, it is believed, the need was born to reexamine the social role and internal structure of big corporations.

Id. at 1612.

such as Ken Lay as cultural bogeymen; and the elusiveness of corporate text to its putative readers, such as shareholders drafted to be readers of complex regulatory filings, business journalists, corporate readers in the boardroom, and judges themselves.

Moving from the text to the intended readers, we see a revealing characteristic of our relationship to business and to business law, two matters that are distinct yet part of an overall group of phenomena clustered within capitalism, business, corporate law opinions, legislation about the corporation, and scholarly literature on the corporation. We are faced with our collective absenteeism as readers of critical corporate text and business disclosures. The recurring unmasking of most of us as derelict readers of corporate text reveals the "convention of the unread" and releases a predictable alarm of the school master as a recurring feature of corporate discourse. Further, it brings to the surface anxieties about our relationship to corporate text and business culture and finds a focal point for concern about the elusiveness of corporate social logic.

Through Enron we learned that a company's board, its analysts, its lawyers and accountants, and its shareholders failed as readers, whether the reading involved corporate reports, corporate disclosures, or corporate documents. The response has been efforts to install a hypothetical reader by increasing legally mandated reporting requirements and imagining a readership that could have been and that will be. The outraged reaction to shredding of unread documents functions as a marker for a simultaneous recognition and rejection of our derelictions. Denouncing shredding gives hopes of introducing a seemingly absent moral dimension associated with cultural narrative because the destruction is a marker of concealment, suggesting there is something to be concealed. Documents destroyed in bulk, and surely doomed to have been unread if allowed their repose, are given iconic narrative import and the status of revelatory but missing text.

Ironically, then, we are most fascinated by corporate text that cannot present itself for us to read. Documents rendered unreadable are given significance because the notion of concealment reinserts the corporation into the knowable world of everyday moral insight. Not surprisingly, this occurs at the moment that the corporation enters the domain of the criminal. Yet, given the failures of corporate

text, reforms that posit a hypothetical reader of more documents than are now disclosed, but that remain unread, are certain to fail.

In her story about Enron, Bethany McLean repeats often that people think Enron is about numbers, but it's really about people.[66] Georg Simmel provides the reason why, in truth, Enron was about numbers, i.e., a flawed business model: "The personality as a mere holder of a function or position is just as irrelevant as that of a guest in a hotel room."[67] When large sums of money are lost after unusual corporate events, there is a wish to see human agency attached to personality in a narrative that supplants mechanical position or function. The raw materials for a monitored narrative of corporate decision-making do not present themselves from the hypothetical being—a merger of abstract, unreportable human complexity,[68] and summary money figures—that is the corporation. Enron was in the end about abstraction, not about people.

A. *The Convention of the Unread in Corporate Speech and the Predominance of the Language of Accounting*

The mastery of corporate legal speech and the unvoiced content of corporate ritual is conveyed by the example of senior lawyers to junior lawyers, who "show" by writing and rewriting.[69] For those who do not become novitiates

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66. BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON (2003).

67. GEORG SIMMEL, THE PHILOSOPHY OF MONEY 296 (Tom Bottomore & David Frisby trans., 1990).

68. *See* BAINBRIDGE, *supra* note 60, at 232-33; Bayless Manning, *The Business Judgment Rule and the Director's Duty of Attention: Time for Reality*, 39 BUS. LAW. 1477 (1983) (explaining the lack of specific decision points by boards in a process of fluid interaction); *see also* Philippe Carrard, *When Wall Street Sighs: Narratives of the Market and Personification* (unpublished manuscript, on file with author) (discussing, in connection with AP writers about the market, the difficulty of unpacking a rhetorically unconvincing personification of the market into all the transactions that take place in a day).

69. *See* BAINBRIDGE, *supra* note 60, at 280 ("Reading long and boring legal documents is what boards pay their lawyers and subordinates to do."). While documents are written with care to govern legal rights, it is also true that a substantial function met by the production and reproduction of corporate documents is the demonstration to junior lawyers of the art of writing such

learning to ape the mannerisms of internal corporate speech, the speech of the corporation eludes attention and masks narratives of modern life that might emerge from corporate intrigue.

1. *The Corporate Law Firm.* In a story of a corporate firm, Louis Auchincloss gives an ironic account of a senior partner whose sanity was placed under stress when a voice tied to the ghost of a former partner broke through to assert a vulgar and unmasking narrative voice in a corporate biography of the founding partner.[70] On regaining his composure and restoring his corporate authorial persona, the senior partner reestablished the correct tone of a firm history. Auchincloss provides his inner thoughts: "Was there not something restful, dignified, even rather noble about the well-prepared, the well-documented, the well-printed, the well-bound, and the unread?"[71] The speech of corporate legal governance is a speech for a legal person eluding the claims of narrative, disjoined from the human details of motive, plot, and setting, or the perennial interest created by such matters as gender, greed, and betrayal. It is a speech that resists the need for readers—but "what [does] it matter so long as there [is] peace?"[72] Yet it occupies space

documents. Their readership serves as one significant function the internal creation and maintenance of a corporate clerisy, catechized in the forms of ritual contained in "deal" documents bound in books, sometimes embossed in gold with the name of the lawyers who helped create and entomb them. I am grateful to Lyman Johnson for the term "corporate clerisy."

70. Louis Auchincloss, *The Senior Partner's Ghosts*, *in* TRIAL AND ERROR 357 (Fred R. Shapiro & Jane Garry eds., 1998).

71. *Id.* at 367. A literary critic gives a degree of validation to the impulse to create corporate bodies of text that are bereft of readers by his thesis that reading is a solitary act with few consequences for public life—"the pleasures of reading . . . are selfish rather than social." HAROLD BLOOM, HOW TO READ AND WHY 22 (2000). The corporate practice of public text that provides a social surface but repels readers in search of "the idiosyncratic," *see id.* at 23, may then sacrifice little in the way of insights usable for corporate law or morality. The edifice of nominal text creates a social effect that a text for actual readership does not. But what is the act done by those who study the words of corporate law and absorb its meaning? For a suggestion, see Douglas Litowitz, *The Corporation as God*, 30 J. CORP. L. 501, 506 (2005) (describing the inability of Arthur Levitt, the former chair of the SEC, to comprehend the disclosure documents of his mutual fund investments).

72. Auchincloss, *supra* note 70, at 372. A writer about Catholic moral theology has made an interesting claim about the intentional rhetorical strategy of Catholic moral teaching about sex: "What we complain of as the

and creates legal mass. Indeed, commercial contracts and similar documents are not read by decision-makers; many may not be read by any one person, and perhaps not read at all. The social role of such writing is unclear, although it has a function as a form of writing that is read to be mastered and emulated by lawyers, whose job in reading it is to learn to produce it for reading by other lawyers learning to produce it. It is written to be pulled from the file room in the future and read and re-used, and for the immediate corporate function it serves.

The form of the discourse serves a function of erasing the self of the corporate lawyer. In contrast to the litigator, the corporate lawyer sets out to produce text that erases his identity, rendering him a perfect servant of the formalized corporate entity. The corporate lawyer has no narrative purpose. He has rhetorical strategies encapsulated in the Auchincloss coda: "the well-prepared, the well-documented, the well-printed, the well-bound, and the unread."[73] And corporate lawyers have attained a mastery of corporate discourse that can only be admired. They are corporate paladins who bring a healing quality to corporate speech by a gentle displacement of the observably human with imperturbable and expert corporate text.

2. *Lay views of corporate text.* The power of what I refer to as a corporate "convention of the unread" is repeatedly manifested in common reactions to corporate law and scholarship and the practice of readers presented with corporate materials. The usual theme is the lack of a sense of recognizable agency cast in comprehensible human terms. In commenting on a law review article about corporate governance, a nonlawyer writer/editor, whose mother was a lawyer and occasional teacher of law classes,

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'tedium' of official moral theology is a defensive rhetoric that protects the claims of authoritative speakers on obedient hearers. Tedium is, in short, part of the now prevailing rhetorical program of modern Catholic morals." MARK D. JORDAN, THE SILENCE OF SODOM: HOMOSEXUALITY IN MODERN CATHOLICISM 54 (2000). Some parts of semi-official corporate rhetorical conventions seem to bear some similarity to the asserted uses of tedium in conveying an un-arguable claim of authority. But tedium in corporate speech may arise from the nature of the material as much as from a strategy of rhetoric. Nonetheless, as a social structure, the corporate edifice contains conventions of speech that include as a purpose suppressing an opening for revision, complexity or corporate ambiguity.

73. Auchincloss, *supra* note 70, at 367.

and who was involved herself with an internet magazine about entrepreneurship, commented, "All the things that make reading—indeed law—interesting to me were missing. Human motivation, cultural context, human agency."[74] Similarly, a well-known writer of critical social interpretation commented to me that she took corporate law for an entire year in law school and still has no idea of how to read the tables in the *Wall Street Journal*. The implicit theme—that corporate law is impenetrable and not made to connect to the one thing, stock tables, that it would appear to connect to—is a common refrain among law students who have taken corporate law but developed no interest in the subject.[75] More simply, the numbers, which are understood as the real action, do not emerge from the body of corporate law as an understandable subject of the cases. The doctrine, and the related material about the holders of the functions that produce money, do not make the real subject-numbers-comprehensible to those for whom they are not a natural interest.

Barbarians at the Gate[76] tells a story of corporate finance and provides narrative interest by setting a stage for the numerous characters with background about their family history, whether their fathers played a role in passing on a business interest to them, and the history of the firms that become involved in the battle for RJR Nabisco. Despite the discipline and story-telling skill of the authors, the threads of the story do not weave a simplifying message about the corporate rules for fundamental change nor do they present a readily narratable tale to be repeated and relished. In addition, reviewers were not sold on the human interest imparted by the characters, or the setting, or the action. According to Michael Thomas:

> the public wants personalities, vivid in conflict, glamorous, and preferably detestable (the publishers of Barbarians have emphasized the book's likely appeal to fans of Tom Wolfe and Dominick Dunne). But when all is said and done, deals like this

74. Interview with Jacqueline Lapidus, Boston-based Editor and Writer, in Provincetown, Mass. (July 29, 2000).

75. Personal Conversation with anonymous source, in Provincetown, Mass. (July 27, 1996).

76. BRYAN BURROUGH & JOHN HELYAR, BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO (1990).

> stand or fall on their true costs, and I've yet to see balance sheet bought for a miniseries.[77]

In addition, "reading [the] two books [is] an exhausting and not altogether agreeable diversion [and] . . . .is the story of a number of men of no particular . . . distinction . . . ."[78]

The predominant student reaction to the subject of corporate law in law school provides further evidence. Despite all efforts by professors of corporate law, students conclude time after time that "corporate law is dry." The claim by corporate professors that the field is intricate, fascinating, and intellectually challenging persuades a tiny few—a corps of future corporate law professors, and, at the best schools, those instinctively drawn to the malleability of the corporate form and the excitement of facilitating conceptual arrangements that relocate money and power. But the attraction for the few to corporate law is their own conceptual power, not the nourishment provided by vivid stories about the players in corporate law. The average student, whose imagination is not caught by the link between the corporate abstraction and self-actualization, maintains a resistance to the appeal of corporate law.[79]

Scholarship on narrative takes into account audience

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77. Michael M. Thomas, *Greed*, N.Y. REV. OF BOOKS, Mar. 29, 1990, at 3 (reviewing BRYAN BURROUGH & JOHN HELYAR, BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO (1990) and HOPE LAMPERT, TRUE GREED: WHAT REALLY HAPPENED IN THE BATTLE FOR RJR NABISCO (1990)).

78. *Id.*

79. In explaining why he "does not teach *Van Gorkom*," Professor Lawrence Hamermesch notes that *Van Gorkom* contains complex facts about such matters as "reported earnings and cash flow" and that "*Van Gorkom* cannot be fully grasped without understanding factual matters that must surely be alien to most law students." Lawrence Hamermesch, *Why I Do Not Teach* Van Gorkom, 34 GA. L. REV. 477, 480-82 (2000). Professor Lyman Johnson urges law professors to teach, and hence engage and challenge, corporate law students by infusing technical corporate terms like care and loyalty with their more common moral meanings. *See* Lyman P.Q. Johnson, *The Social Responsibility of Corporate Law Professors*, 76 TUL. L. REV. 1483, 1499 (2002) (suggesting that law professors generally "introduce students to corporate law discourse through words that are technical, professional, and lacking any connection to the larger social milieu"). It is Professor Johnson's concern that a law professor's use of terms that have moral meaning in a technical way will truncate the moral imagination of eventual corporate lawyers, but a related effect is the disengagement of law students with a body of material that lacks connection to "the larger social milieu." *Id.*

reaction, and the engagement that types of narrative generate.[80] Narrative is treated as having a magic, whatever the source and true power of the magic[81] we all know. So law professors make occasional, and somewhat feeble efforts, to lay claim to narrative interest based on a few facts lying about in cases but mostly unexplored.[82]

3. *Shying from Using Language to Convey Meaning.* One common claim is that, "[a]ccounting is the language of business."[83] The statement is perhaps belied by the substantial body of observations that business does not speak and is not heard. Pungent observations about the divide between business language and the usual function of language to provide information are not hard to find. In explaining the extraordinary reaction to former Treasury Secretary Paul O'Neill's blunt speech, Michael Lewis has written: "It violates the central tenet of Washington financial life: never use the English language to convey meaning."[84] While the convention of Washington speech about finance is arguably a distinct construct, it is nonetheless not surprising to associate the speech of business-in-government with the opaque. Other political

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80. *See* JAMES PHELAN, NARRATIVE AS RHETORIC: TECHNIQUE, AUDIENCES, ETHICS, IDEOLOGY 28 (1996) (referring to the intellectual and emotional engagement asked by a writer of an audience).

81. *See id.* at 8-15.

82. *See, e.g.*, WILLIAM A. KLEIN, J. MARK RAMSEYER & STEPHEN M. BAINBRIDGE, CASES AND MATERIALS ON BUSINESS ASSOCIATIONS: AGENCY, PARTNERSHIPS, AND CORPORATIONS 93 (4th ed. 2000) (describing Martin v. Peyton as follows: "Martin v. Peyton . . . is important for its discussions of legal doctrine and for what it reveals about business relationships. Beyond that, its facts can evoke thoughts about human relationships and feelings—about friendships, trust and distrust, greed, honesty and dishonesty, self-delusion, anger, fear, and so on—that form the background from which the cases emerges. Imagine the tale behind this case being turned into a novel or short story by Henry James, John Cheever, or John Updike. Appreciation of the insights of such authors may be as essential to good lawyering as is mastery of legal doctrine").

83. CLYDE P. STICKNEY & ROMAN L. WEIL, FINANCIAL ACCOUNTING: AN INTRODUCTION TO CONCEPTS, METHODS, AND USES 3 (9th ed. 2000).

84. Michael Lewis, *O'Neill's List*, N.Y. TIMES MAG., Jan. 13, 2002, at 20, 23; *see also* Edmund L. Andrews, *Fed Chief Swears Off Improvising*, N.Y. TIMES, May 24, 2006, at C1 (asserting that, as a result of market reaction to a remark by Federal Reserve chairman Ben S. Bernanke, Bernanke "is likely to be a lot less interesting at dinner parties from now on").

speech is sometimes described as having devious purposes, but the purpose has more to do with conveying distorted or demagogic meanings, rather than avoidance of all communicative content. The prose that arises in the corporate setting characteristically aspires entirely to defeat the ordinary purpose of speech—the exchange of information or the promulgation of a viewpoint.[85] Perhaps the true language of business—one rich in expression and interest—is the off-the-books speech, the private interpretations of wise guys, the argot (often intensely gendered), the gossip.[86] Such grounded, informed, and information-rich business speech as there is presumably private. One might claim that the occluded nature of corporate language is no accident—that those who hoard the language, read it, and make it difficult to understand have a power agenda. While the thesis is appealing, it assigns a large element of intentionality to an evolution of speech for a cultural setting. This paper embraces a view that the speech adapts to the cultural artifact in which it arises and takes a form shaped by the setting and the tasks.

4. *Smith v. Van Gorkom—Positing Readers.* The canonical and yet contested case of *Smith v. Van Gorkom*[87] captures the distressed relationship of narrative to

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85. Milton C. Regan, Jr., *Teaching Enron*, 74 FORDHAM L. REV. 1139, 1246 (2005) (stating that transactional lawyers may face a distinctive ethical challenge because their stock in trade is the creative manipulation of legal form: "[L]aw's wide tolerance of some divergence between legal form and economic substance helps create a background assumption that such divergence is normal and not problematic"). The creative manipulation of legal form has as a primary purpose the creation of a bland surface and not a promulgation of a strong message. Corporate text succeeds by draining away reader interest, not by persuasion.

86. In "genre" analysis, there is examination of professional conventions that are not readily communicated to those who have not already mastered them, such as non-native English speakers. *See* John M. Swales, *Occluded Genres in the Academy: The Case of the Submission Letter*, *in* ACADEMIC WRITING 45 (Eija Ventola & Anna Mauranen eds., 1996); *see also* Uijay K. Bahita, *Genres and Styles in World Englishes*, *in* THE HANDBOOK OF WORLD ENGLISHES 391-92 (Braj B. Kachru, Cecil L. Nelson & Yamuna Kachru eds., 2006) (comparing genres of writing according to the level of creativity permitted in them and their consequent variation across cultures). Corporate writing has little variation but also little in the way of communication, while more creative speech about the corporation is likely to lack interpreters for any but those already steeped in its code.

87. 488 A.2d 858, 874 (Del. 1985).

corporate law and corporate culture. In *Van Gorkom*, the Delaware court attempted to construct a factual account of a fast-breaking business deal and to write a rule about proper board conduct in responding to deal offers. The Delaware court has taken criticism for the failure of its account of the deal as a convincing or helpful narrative.[88] Interestingly, the case itself illustrates the attenuated connection of an internal audience—the board of directors—to an ongoing corporate "narrative."

One of the most salient facts that emerged from *Van Gorkom* was the virtually universal neglect by corporate players to read merger documents.[89] One explanation is that the text of the deal was located in the real literary artifact—money. As an abstraction, the deal could be communicated in price and structure; it did not have details that a sophisticated set of readers would treat as a narrative for them to monitor. The documents relating to a mega deal do not have the power to transfix the most trained corporate readers. Even those who might be expected to be receptive to the uncluttered business documents, often creating a deal involving many millions of dollars, understand the text is not for reading. The corporate readers in *Van Gorkom* understood and manifested in their reading strategy that the narratives of the deal were multiple, private, only partial, and heavily displaced by (1) the raw appeal of dollars; (2) the business premise that change is a guiding premise of business; and (3) the understanding that corporate textual materials mainly exist to fill the requirement for "the well-prepared, the well-documented, the well-bound, and the unread."[90] An interpretation of *Van Gorkom* that restates a common interpretation—that it deepens the need for management to manage cosmetics[91]—might take the form of saying that the

88. *Id.* at 897 (McNeilly, J., dissenting) (referring to facts "explod[ing] like popcorn"); *see also* William T. Quillen, *Trans Union, Business Judgment, and Neutral Principles*, 10 DEL. J. CORP. L. 465, 470 (1985) (referring to "factual excess").

89. *See Van Gorkom*, 488 A.2d at 869.

90. Auchincloss, *supra* note 70, at 367.

91. For a description of one line of attack on the process requirement of *Van Gorkom*, see Lynn Stout, *In Praise of Procedure: An Economic and Behavioral Defense of* Smith v. Van Gorkom *and the Business Judgment Rule*, 96 NW. U. L. REV. 675, 676 (2002) ("The second type of attack centers on what the business

case was an effort to re-mask the convention of the unread in the corporation. The *Van Gorkom* court takes the stance that corporate text matters—its own legal text (with the dissent differing sharply) and that of the corporation. Thus, *Van Gorkom* briefly serves to expose the corporate convention of the unread and then instates a ritual readership for the sake of appearance. Our self-conception remains culturally wedded to a functioning as readers, and the process of acknowledging the evacuation of us collectively from the status as readers vis-á-vis corporate affairs prompted a protective judicial reaction symbolically re-positioning us as readers. As a result of *Van Gorkom*, companies have to provide much *more* paper.[92]

In *Liljeberg v. Health Servs. Acquisition Corp.*, a Supreme Court case providing a faint echo of *Van Gorkom*, the Court addressed the question of whether a federal judge had actual knowledge, as a member of the board of Loyola University, of a substantial deal ($6.69 million) between Loyola and a litigant in a separate matter before his court.[93] The Court accepts the fact-finding below: although the judge had been present at a meeting of the Board at which the University's business interest in land was discussed, he had no actual knowledge of the University's interest in the land, which was subject to litigation in his court, and thus no knowledge of his own fiduciary obligation vis-á-vis a subject matter of the lawsuit.[94] The Court expresses a degree of astonishment at the judge's having

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judgment rule *does* do—create incentives for directors to adopt elaborate and costly decision-making routines (for example, scheduling longer meetings, keeping detailed formal records of their determinations, and hiring expensive outside consultants)."); *see also id.* at 676 n.5 (noting the derisive description of *Van Gorkom* as the "investment bankers' full employment doctrine"). For examples of commentary critical of *Van Gorkom*, *see id.* at 690-91 nn.55-58. Bayless Manning, although critical of the case, wrote that "it is an overstatement to consider the *Van Gorkom* case as the Investment Bankers' Relief Act of 1985 . . . ." Bayless Manning, *Reflections and Practical Tips on Life in the Boardroom After* Van Gorkom, 41 BUS. LAW. 1, 3 (1985).

92. Fred S. McChesney, *A Bird in the Hand and Liability in the Bush: Why* Van Gorkom *Still Rankles, Probably*, 96 NW. U. L. REV. 631, 647 n.69 (2002) (citing Robert W. Hamilton, *Reliance and Liability Standards for Outside Directors*, 24 WAKE FOREST L. REV. 5, 28-29 (1989) (stating that after *Van Gorkom*, general counsel recommended improving "the paper record of [Boards'] decisional process")).

93. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988).

94. *See id.* at 864.

completely forgotten the business matter, which was of some importance to the University.[95] The Court casts about for a source of the obligation to read, or on the facts to listen and pay attention (he forgot board discussions), and locates it for the Court's purposes in the statute being applied, the Judicial Code provision on judicial disqualification, 28 U.S.C. § 455.[96]

According to the Court, "Although [the judge] did not know of his fiduciary interest in the litigation, he certainly should have known. In fact, his failure to stay informed of this fiduciary interest may well constitute a separate violation of § 455."[97] Of further interest is the Court's documentation, through reciting the facts, of an Article III legal officer/Board member's approach to documents:

> The details of the transaction were discussed in three letters to the trustees dated March 12, 15, and 19, 1982, but Judge Collins did not examine any of those letters until shortly before the Board meeting on March 25, 1982. Thus, he acquired actual knowledge of Loyola's interest in the litigation on March 24, 1982.[98]

In contrast to the majority's chastisement of the judge for his inattention, including his inclination to postpone examination of corporate documents until just before the board meeting, Chief Justice Rehnquist offers judicial recognition of a different view: that a board member's postponement to the last minute of the task of reading corporate documents is sufficiently ordinary as to be an absolute bar to a claim that the board member should have known of a conflict raised by the materials affecting his other role of judge.[99] The format of the majority opinion, however, bears a resemblance to *Van Gorkom*: judicial construction of evidence about board activity as conclusively demonstrating board inattention (despite a formal norm that board members should actively supervise), the

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95. *See id.* at 865.

96. *See id.* at 868. Section 455(c) provides: "A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household." 28 U.S.C. § 455(c) (2000).

97. *Liljeberg*, 486 U.S. at 867-68.

98. *Id.* at 858.

99. *See id.* at 872-73 (Rehnquist, J., dissenting).

expression of shock, and the re-emphasizing of a formal expectation of readership by board members. Although the Supreme Court cites no corporate law, its citation of the judicial code depends for plausibility on judicial installation of a normative reader on corporate-style boards. Thus, like *Van Gorkom*, *Liljeberg* both acknowledges, finding as fact, the absenteeism of corporate readers and destabilizes the finding as a representative fact by hypothesizing an abstract corporate reader.

5. *Enron: The Entire Class Gets Caught and We Discover There Are No Readers for the Juiciest Corporate Text.*[100] The most stunning illustration of the convention of the unread in corporate texts is the mass dereliction of everyone—investors, corporate participants, and, most of all, business journalists—in the Enron debacle.[101] The entire structure of readers of corporate text—in my argument here, an empty dwelling—stands exposed. The reasons that corporate observers offer are several. One common claim is that the Enron text defeated readers. No one had the readers' skills to decipher the reams of printed matter distributed by Enron and posted on the government's sites for corporate text. The SEC website presupposes readers, yet the prime candidates for the reading task—business journalists—have come forward to confess. They write, but reading corporate text brings them to the limits of their resources for absorption and translation. "The whole thing was so opaque and so difficult to conceive and so well hidden that it was just beyond the tools of journalists."[102] Moreover, a journalist celebrated for being the first to note in public "absence of crucial information in [Enron's] financial reports"[103] continues with her odd practice of noting informational holes by observing

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100. MCLEAN & ELKIND, *supra* note 66, at 237-38 (describing the S & P credit-rating analysts as claiming that Enron had duped them by not explaining certain financial arrangements that amounted to disguised loans in meetings and responding, when shown that Enron disclosed the items in public disclosure, that "they had not read the document").

101. Short sellers were the conspicuous exception. *See infra* text at notes 105-06.

102. Felicity Barringer, *10 Months Ago, Questions on Enron Came and Went With Little Notice*, N.Y. TIMES, Jan. 28, 2002, at A11 (quoting Mark Roberts, research director of Off Wall Street Consulting in Cambridge, Mass.).

103. *Id.*

the mismatch between the language of business, i.e., accounting, and the expectations of a reader. "'When you come out of a liberal arts background, . . . you want to know why something is the way it is.' In accounting, 'there is no reason why. There is no fundamental truth underlying it. It's just based on rules.'"[104] While accounting may be the language of business, it seems fair to suggest that it is not a language with a large expressive or communicative capacity. But business readers have little record of complaint, certainly not on the order of the possible readers of other recondite languages, such as, for instance, aspiring readers of jargon-ridden academic prose.

In the Enron example, the fascinating exception to the high absenteeism among purported readers of corporate disclosure was the investment communities' version of wise guys, who trade in argot and the meaning of silence—the short seller.[105] Enron stock had a large position of short sellers. Arguably short sellers constitute the one set of readers of corporate text with a finely tuned ear for the variations in text that convey meaning within a convention that drafts language for uses other than the conveyance of meaning. Moreover, short sellers seek to occupy the territory of private speech, gossip and shrewd guesses about the unspoken. Short sellers are the Greek chorus of the corporate world, cutting through the facade that posits readers and writers where there is only the form of reading. Are short sellers readers? It seems most correct to say they read the situation and have good antennae for text that is working to do more than merely to vindicate the convention

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104. *Id.* (quoting Bethany McLean, author of the Fortune Magazine article that raised early questions about Enron and about the absence of comprehensibility of its accounting disclosure. *See* Bethany McLean, *Is Enron Overpriced?*, FORTUNE, Mar. 5, 2001, at 122.).

105. Short sellers are investors who make money by betting that a stock will go down, not up. . . . Short sellers tend to be a suspicious lot, and as they looked closer they began to wonder about [debt created by a failure of an Enron entity called Azurix with a guarantee of one billion dollars of debt of an entity called Marlin] and about how Enron was going to pay back that debt [which was revealed in public financial disclosure]. They also started to wonder what the existence of that strange Marlin structure and the flameout of Azurix suggested about the rest of Enron.

MCLEAN & ELKIND, *supra* note 66, at 258.

of the unread. Short sellers detect that such overly occluded text differs from standard corporate disclosure. It places an opaque covering of incomprehensibility over more information than the conventions of business language ordinarily mask. The significance of opaque disclosure becomes obvious to the short seller, who can distinguish the opaque from the occluded and who is alerted by the difference. The ordinary work of short sellers creates no crisis of exposure and no need on the part of short sellers to reposition other participants as readers, through a restatement of norms of corporate readership, as the facts of *Van Gorkom* did for judges in Delaware. Enron seems likely to call for some sort of mass resolution to demonstrate—to ourselves—that corporate text is readable and is read. The documentary *Enron: The Smartest Guys in the Room*,[106] when it succeeds, conveys the brilliance of the Enron "smart guys" in exploiting the collective fact that corporate text lacks a readership by exploiting the insecurity and credulity of everyone—bankers, analysts, employees, journalists—with the intimation, wrapped in intimidation, "If you don't understand it, we can't explain it to you." In the usual case, faith in the organizational grasp of a text that eludes readers but has a form created by mutual dependency and entity logic that exclude the personal works. The mostly ineffectual efforts to tell a story grasp at opportunities in what Simmel refers to as the fact that "the dependency of human beings upon each other [in a money economy] has not yet become wholly objectified, and personal elements have not yet been completely excluded."[107] Hence, the documentary focuses on a con about readership, the extravagant personal behavior of the executives, especially Jeffrey Skilling and former CEO Lou Pai, and the unreadability of the Enron financials. A key image is the shredded papers, which might be thought to hide revelations, but in truth represent the ultimate visual depiction of the general reader's relationship to corporate text. The shredded text, though in truth an occluded form of text that may well have had little import if publicly printed and disseminated, becomes a symbol of a lost chance to read corporate text.

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106. ENRON: THE SMARTEST GUYS IN THE ROOM (Magnolia Pictures 2005).

107. SIMMEL, *supra* note 67, at 296.

B. *The Relative Absence of Characters from the Body of Corporate Law*

Corporate life and governance are human interactions.[108] Nonetheless, the law that reflects more than a century of corporate affairs produces little in the way of characters whose doings and sayings are the subject or the fulcrum of narratives. A salient exception is Henry Ford, whose personality, philosophy, and specific statements about his corporate purposes with respect to capital, workers, and consumers are located in a rich set of texts.[109] The extent to which he serves as a character in a story about corporate governance shows, by contrast, the usual

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108. Among the stronger intimations in corporate law scholarship of the human nature of the board are efforts under the rubric of behavioral law and economics to address features of human nature as they affect the functioning of a board and to potentially suggest useful legal doctrines to provide direction for good board conduct. *See, e.g.*, Donald Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797 (2001); Margaret M. Blair & Lynn A. Stout, *Director Accountability and the Mediating Role of the Corporate Board*, 79 WASH. U. L.Q. 403, 438 (2001) (arguing that directors have internalized beliefs that serve the purpose of trustworthy behavior).

109. *See* Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919) (celebrated demonstration of Henry Ford's ego in a legal setting). Books about Ford have been published for almost a century, both lionizing him as a hero and critiquing him as a powerful eccentric. Among the books are RUDOLF ALVARADO & SONYA ALVARADO, DRAWING CONCLUSIONS ON HENRY FORD (2001); JONATHAN A. BROWN, HENRY FORD (2005); MICHAEL BURGAN, HENRY FORD: AN INDUSTRIAL GIANT (2002); ROGER BURLINGAME, HENRY FORD: A GREAT LIFE IN BRIEF (1955); ANNE JARDIM, THE FIRST HENRY FORD: A STUDY IN PERSONALITY AND BUSINESS LEADERSHIP (1970); BEVERY RAE KIMES, THE CARS THAT HENRY FORD BUILT: A COMMEMORATIVE TRIBUTE TO AMERICA'S MOST REMEMBERED AUTOMOBILES (2005); DAVID LANIER LEWIS, THE PUBLIC IMAGE OF HENRY FORD: AN AMERICAN FOLK HERO AND HIS COMPANY (1976); WILLIAM C. RICHARDS, THE LAST BILLIONAIRE, HENRY FORD (1948); WILLIAM LE ROY STIDGER, HENRY FORD: THE MAN AND HIS MOTIVES (1923); KEITH SWARD, THE LEGEND OF HENRY FORD (1948); DONN PAUL WERLING, HENRY FORD: A HEARTHSIDE PERSPECTIVE (2000); JEFFREY ZUEHLKE, HENRY FORD (2007). This list of books demonstrates that Henry Ford became a major cultural presence for Americans, and as such he occupied an important place in the American consciousness in connection with many aspects of the politics and culture of the country. Whether there is a narrative about Henry Ford that provides an account of business logic or law is harder to say. To read all the writing about Henry Ford and summarize what sort of narrative it contains would be a daunting task. It seems likely, however, that much of the narrative is about a striking person who made himself a public figure as a result of his genius for manufacturing automobiles in the early twentieth century.

impoverishment of the corporate texts as a setting for characters and their motivations and impact. In addition, the manner in which his status as a character confounded a legal outcome suggests the disruptive effect on the conventions of corporate law that the emergence of a narrative with a character at the center could create. Ford famously lost *Dodge v. Ford*[110] because he insisted, too publicly, on personal vision,[111] and the court had to remind him that Ford Motor Company was a business corporation. *Dodge v. Ford* is a case that embodies the transition of the corporation from a "man's" business, with an assertion that a man's character is embedded in its governing logic,[112] to a public, bureaucratic, impersonal company deriving its legal rationale and its governing constraints from its status as an artificial person. The inconvenience and ultimate unmanageability of the disruption to the abstraction of the corporation creates law that is discounted for precedential effect. In the usual corporate case, there is no assertion of personal belief to unmask the depersonalizing premises of the entity. When a personality asserts its presence, the law is explained away for having had too much to do with what a character said and did; the baldness of Ford's agency and the connection of a story about a whole person to a legal outcome cannot be absorbed into corporate law. There is no place to put Henry Ford in the accounts of corporate law, and perhaps less than one might think in cultural reference. Though there is substantial cultural interest in Henry Ford, with due attention to negative features of his political and social beliefs,[113] the larger meaning of his biography is unclear.

Other parts of the law record and interpret stories concerning who did and said what; it is a rare corporate case that contains a quotation. When they do, they are remembered. Henry Ford embodied vanity when he testified that he wished to aid the workingman by making

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110. Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).

111. For Ford's assertion about his personal business creed, see HENRY FORD, MY LIFE AND WORK 19-20 (1922).

112. *See infra* notes 174-198 and accompanying text.

113. *See, e.g.*, NEIL BALDWIN, HENRY FORD AND THE JEWS: THE MASS PRODUCTION OF HATE (2001).

more cars more affordable.[114] In a lesser known case, a corporate disputant made a critical admission when he testified that he was merely curious to see the list of his fellow shareholders and did not know what he would do with it.[115] In *State ex rel. Pillsbury v. Honeywell, Inc.*, the implicit words of a motivated and principled shareholder, understood to concede a motive apart from profit when a pretext would have done, critically damaged his chance for success in court.[116] In cases where corporate actors are actually quoted, their words linger—by contrast to the bulk of corporate law. The pleasure of the rare narrative, recalling that narrative in its basic sense concerns what characters say and do, intrudes on the body of corporate law and brings a smile to those accustomed to interpreting the predominating texture of corporate law. In addition, the breaking out of personality often turns the law toward a conclusion that is left to stand as an anomaly from which generalization is difficult.[117]

In addition to the problematic status of specific individuals in the corporation as characters, the shareholder as a role has lost a sense of embodiment or complexity.[118] With the exception of raiders, the shareholder plays no role that can be well captured by a story of characters and what they say and do. Rather, the shareholder serves nicely as a disembodied force handsomely captured by scientific language presupposing a set of actions and reactions.[119]

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114. *Dodge*, 170 N.W. at 671.

115. Security First Corp. v. U.S. Die Casting & Dev. Co., 687 A.2d 563, 570 (Del. 1997) (rejecting demand for shareholder list because plaintiff "admitted that he had no idea what he would do with such a list").

116. State *ex rel.* Pillsbury v. Honeywell, Inc., 191 N.W.2d 406, 407 (Minn. 1971).

117. *See, e.g.*, Smith v. Van Gorkom, 488 A.2d 858 (Del. 1986); *Dodge*, 170 N.W. at 671; *Pillsbury*, 191 N.W.2d at 407.

118. *See, e.g.*, Jennifer Hill, *Visions and Revisions of the Shareholder*, 48 AM. J. COMP. L. 39, 39 (2000) ("The most abiding vision of shareholders in public companies in the 20th century was one-dimensional.")

119. *See* William J. Carney, *The Political Economy of Competition for Corporate Charters*, 26 J. LEGAL STUD. 303 (1997) (applying economic language to the debate over charter competition).

C. *Abstraction: Lost in Time*

Corporate law tends not to contain reference to sequence, does not present vivid characters, lacks a sense of place, and shies away from theories of cause and effect. Foundationally, corporate law disclaims any search for cause in the basic plot development business can produce—the business failure.[120] Much of corporate law exists outside any sense of chronology. Stock has characteristics, shareholders have rights, management has authority. The most specific concern with chronology in the public corporation occurs with respect to progressive law arguments about the time-specific investment of labor in an enterprise for which the return, it is argued, must be institutional loyalty,[121] efficiency arguments for golden parachutes,[122] and the court-written accounts of periods of negotiation and confrontation in takeovers.[123] In close corporations, participants offer chronologies, which the courts give more or less voice to as official narratives of business life and co-venturer duties.[124] Yet the role of chronology is always at risk from the legal significance of the abstracted corporate form. Likewise, settings are mostly irrelevant: interactions are not given a narrative weight or portent by their location.[125] The corporation is not at any

120. Leading cases that articulate the rule that directors are not responsible for bad outcomes or for bad judgment include Joy v. North, 692 F.2d 880, 885 (2d Cir. 1982); Shlensky v. Wrigley, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968); and Kamin v. Am. Express Co., 383 N.Y.S.2d 807, 811 (N.Y. Sup. Ct. 1976). For an argument that the business judgment rule should stand for a rule of judicial abstention from consideration of the decisions of corporate directors except in narrowly circumscribed exceptions, see Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83 (2004).

121. *See, e.g.*, Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189 (1991).

122. *See* William J. Carney, *Controlling Management Opportunism in the Market for Corporate Control: An Agency Cost Model*, 1988 WIS. L. REV. 385, 420-21 (1988).

123. *See* Rock, *supra* note 4, at 1028-59.

124. *See* Ingle v. Glamore Motor Sales, Inc., 5 N.E.2d 1311 (N.Y. 1989); Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928).

125. The signing of deal papers, described in *Smith v. Van Gorkom*, at the intermission of the Lyric Opera is an exception, although narrative techniques are not used in the case to create narrative tension. 488 A.2d 858, 869 (Del. 1985). The place is used to suggest a casual approach to business details, but it

particular place in the legal imagination: it is a set of transactions. It is "a situation without any specific time or place."[126]

D. The Resistance of Corporate Law to Critique and the Perfection of the Abstract Logic of Corporate Law

Largely, the doctrines of corporate law exhaust themselves with solutions to economic questions. In a somewhat assertive way, corporate law generally insists on separating questions of human personality from questions of economics.[127] In this way, corporate law and the related

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is not in truth a setting that carries narrative purpose. When a business transaction is occurring, the description of where is wooden, since the physical location does not play any role in the business logic that drives the interaction. For the business transaction, the truism—everybody has to be somewhere—means that location is inconsequential.

126. WESTBROOK, *supra* note 5, at 97.

127. Even without adopting the perspective of law and economics, which is criticized by the proponents of socioeconomics as underanalyzing the interpersonal dimension of economic exchange, *see, e.g.*, Jeffrey L. Harrison, *Law and Socioeconomics*, 49 J. LEGAL EDUC. 224, 226 (1999), law about the corporation places little reliance on insights about human personality. Indeed, the business judgment rule accords to directors a rare exemption from assumptions of self-interested behavior; in the normal case, directors are assumed to act on the basis of institutional interest and not with regard for their own maximization. It is commonplace to say that the business judgment rule presumes that directors act on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the corporation. *See* BAINBRIDGE, *supra* note 60, at 269 (citing cases that recite the formula). The fact of their ordinary human embodiment and concern for enrichment is recognized in the effort to purchase their loyalty with golden parachutes, *see* Carney, *supra* note 122, at 421-22, and in the concern that stock option compensation may dilute their loyalty during a takeover scenario. *See id.* at 423. But the price paid is simply given to reinforce the plausibility of the normative treatment of them as human repositories of institutional motives. There is little retail treatment of the individuals, the bargaining for loyalty, and the true price of loyal conduct, except for relatively abstract economic theories of the utility of compensation to managers. *See id.* at 416-23. Shareholders have less potential than directors to assert personality and command even less overt attention in their human particulars; they assert themselves in disembodied market transactions or in voting by proxy. *See, e.g.*, Victor Brudney, *Revisiting the Import of Shareholder Consent for Corporate Fiduciary Obligations*, 25 J. CORP. L. 209, 214 (2000) (referring to votes of disinterested shareholders in conflict of interest transactions as "sanitized consent"); *see also* Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1406, 1413 (critiquing the treatment of shareholders in public corporations as involved in a bargain and arguing that it is "erroneous to use the term 'contract' to describe dispersed stockholders' relation to the 'original

scholarship are less intellectually ambitious than broad theories of society and law.[128] But despite its narrow gauge of concern, corporate law, and particularly business law, sprawls, drawing in logic and discourse relating to form,[129] a recondite language,[130] finance theory and terminology,[131] economic incentives and human motives,[132] the rudiments

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owner' or to corporate management" and discussing the limited information provided to shareholders when they vote).

128. The intellectual ambitions and complexity of Peter Drucker, who takes on the study of the modern organization and the corporation as the site for the study of the condition of the human being in relation to work, with concern and "insight . . . not into trade but into manners and the human psyche," JACK BEATTY, THE WORLD ACCORDING TO PETER DRUCKER 142 (1998), can be contrasted with the concerns of corporate law with economic return. When classic corporate law has fretted about the legitimacy of managerial power, it has done so with primary attention to the justification of management's control over investors' capital—other people's money being the summarizing phrase. The phrase, other people's money, is taken from the title of a book by LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT (1914). The phrase originated in Brandeis's concern with corporate power being amassed by combinations through sinister types of collusion but came to stand generally for the control over investments exercised by corporate management. By contrast, Peter Drucker postulates a concern with power in a much broader sense of power over the routine conditions of human lives and the sources of satisfaction that are affected by one's calling. *See* PETER DRUCKER, THE NEW SOCIETY: THE ANATOMY OF INDUSTRIAL ORDER 28 (1993) (describing the question of our time as: "[O]n what basis of values and beliefs, and to what purpose are the problems of the enterprise to be solved?"). He is concerned with the matter of "the necessary social sanction to serve as the integrating nucleus of the postwar industrial society." BEATTY, *supra*, at 131. At least as an overt matter, corporate law is not concerned with such broad issues of societal health. Even progressive corporate law, which looks at issues of trust, does so in service to an interest in economic justice more than in the effect of the corporate enterprise on the human personality. *See, e.g.*, O'Connor, *supra* note121.

129. *See, e.g.*, Steven L. Schwarcz, *Collapsing Corporate Structures: Resolving the Tension Between Form and Substance*, 60 BUS. LAW. 109, 109 (2004) (examining different contexts that present the question of when the law should disrespect corporate form in favor of substance).

130. For a discussion of the disjunction between the language of the corporation and that of language spoken by corporate actors in their personal lives, see Johnson, *supra* note 45.

131. *See id.* at 5 (referring to "the financial/economic vocabulary that has so powerfully shaped corporate theory since the 1970s").

132. Langevoort, *supra* note 108. The literature on management's choice of the state of incorporation is overtly about human motive: the possible preference of managers for state corporate laws that permit management the freest hand in running the corporation to their own personal advantage rather than for the good of the shareholders. If literal, one can imagine mangers plotting to select states that loosen the rules, and finding ways to communicate

of plot and character,[133] and a large range of organizational types,[134] functions, and problems.[135] Even with its sprawl, corporate law has a tight doctrinal core.

As a logical construct, corporate law resists critique. The tool of narrative, often effective to reconfigure a governing narrative, lacks power to dilute the logic of corporate law. If critiqued as arid by lay readers and non-specialists among lawyers, the governing model gains power with the perfection of its abstract logic. The fascination that money has over the imagination impoverishes imagination about the making of money and leaves business an empty narrative category.[136] The site for the making of money lacks interest compared with the central literary trope of money itself. As such it occupies a point in the mind of abstraction—where human interactions produce a result that overpowers interpretations of the human motives, disappointments, and causes and effects. Business produces wealth, in part from the rejection of the role of narrative as a preservation of social understanding, a snapshot of reality. The

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blackmail threats of reincorporation elsewhere if the state rules are not kept weak. The literature does not generally have that quality. The principal exposition of the argument is typified by Carney. *See* Carney, *supra* note 122.

133. *See Ringling Wrangling: Three Sets of Heirs Squabble for Control of the Circus*, *infra* note 169.

134. A good comprehensive treatment of the types of organization that have assumed a roughly corporate form is contained in ALFRED CONARD, CORPORATIONS IN PERSPECTIVE 2-11 (1976) (describing the "multiplicity" of corporation codes and the phenomenon of special purpose corporations).

135. A good overview of the predominating methods and, in fact, language of corporate scholarship that emphasizes economic argumentation and finance theory is provided by FOUNDATIONS OF CORPORATE LAW (Roberta Romano ed., 1993).

136. This is not to say there are not individual narratives constructed about a particular business and its connection to the lives of those constructing and nurturing the narrative. But such narratives are fragile and have little power to prevail over the ultimate fascination with money. The book about the RJR-Nabisco takeover generated many vignettes and quotes that crystallized the cultural triumph of money as cultural symbol over business as narrative. An employee of RJR Nabisco who refused to move from Winston-Salem to New York captured the point: "I don't feel like I work for a company anymore . . . I work for an investment." BURROUGHS & HELYAR, *supra* note 76, at 511. The comment is more than a narrative statement about historical trends in finance and takeover logic. It is also a deeper comment on the weakness of narrative about business as a cultural icon compared with the excitement attendant on a market for businesses as engines of wealth.

imagination is content with the power of the idea and unmoved by the stories under the surface. The idea does not need stories to sustain its logic.

The result is the predominance of a model of corporate law that transcends narrative categories or concrete language and that has a cultural certainty highly resistant to any effort to alter its explanatory and rationalizing principles. The leading corporate scholars can say with justification and with confidence, "There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value."[137] The authors argue that efficiency and the force of logic are key factors pointing toward a convergence in corporate law that eliminate competing models.[138] Further, it has become commonplace that "state corporate law is an empty shell that has form but no content."[139] Professor Bayless Manning long ago explained that corporations, as economic enterprises, lack significant personal relationships.[140] While large social narratives may not require personal relationships, there is little evidence of a compelling social narrative, other than wealth as an end, that holds the place of narratives anchored to the element of the personal.

The minimalism of state corporate law suggests the lack of compelling narrative to which to respond. While the shorthand explanation for the emptiness of state law is competition for charters that erodes state law,[141] the lack of content nonetheless remains a marker for the corporate enterprise. The social accomplishment of emptying out content may have local explanations, but the match of the corporate undertaking for form without content is an

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137. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law* 1 (Harvard Law Sch., Paper No. 280, 2000), *available at* http://www.law.harvard.edu/programs/olin_center/corporate_governance/papers/No.280.00.Hansmann-Kraakman.pdf.

138. *Id.* at 12.

139. Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 544 (1990).

140. *See* Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 230 (1962) (describing the trend, consistent with general trends in law, "to relegate the shareholder's claim of 'ownership' to the status of a fungible dollar claim").

141. *See* Black, *supra* note 139, at 548-49.

overriding fact of global import. The enterprise has a deep form that makes practicable and likely the effacement of social comprehensibility and the loss of persuasiveness provided by legal narratives tied to a theory of regulation.

E. *The Transformation of Gender in Corporate Cases from a Trope of Manhood to an Irrelevancy*

In 1879, a court called the board of directors a "constituted body of men clothed with the corporate powers."[142] Today, boards are called "human capital,"[143] a usage designed to draw attention away from individuals and toward a functional component of the corporate entity. "Internal team governance structures" constrain board misconduct.[144] Gender has gradually disappeared from corporate cases, which are written as though the world has in fact begun to function as a gender-free zone in which those who fill roles are only incidentally male or female. Popular culture produces commentary on the persistence of gendered interactions in the corporation,[145] but corporate law has no apparatus for recognizing gender as relevant to corporate law. Some recent writings attempt to undo the invisibility of gender as a category in corporate law by addressing how the culture of the corporation is gendered, including law review symposia on women and the corporation.[146] It is not yet clear whether such writings

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142. Baldwin v. Canfield, 1 N.W. 261, 270 (Minn. 1879).

143. *See, e.g.*, Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 335 (2007), *citing* William R. McLucas et al., *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. CRIM. L. & CRIMINOLOGY 621, 622 (2006) (discussing the loss of "the most qualified human capital" and the resulting inefficiency when prosecutorial power discourages board service).

144. BAINBRIDGE, *supra* note 60, at 266.

145. *See, e.g.*, Johnny Roberts & Evan Thomas, *Enron's Dirty Laundry*, NEWSWEEK, Mar. 11, 2002, at 22, *available at* http://www.msnbc.msn.com/id/5405918/site/newsweek/ (stating that the Enron scandal has been told as "a battle of the sexes").

146. The Maryland Law Review has recently done a symposium issue on women and the corporation, *see* Symposium, *Women and the "New" Corporate Governance*, 65 MD. L. REV. 301 (2006), and St. John's Law Review did one on people of color, women, and the public corporation, *see* Symposium, *People of Color, Women, and the Public Corporation*, 79 ST. JOHN'S L. REV., 887 (2005). In addition, there is a recent book: DOUGLAS M. BRANSON, NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM

have any potential to strip away the surface gender neutrality of corporate logic, or whether they are simply a form of social commentary about one venue in which the social progress of women can be assessed.

The observation follows the form of similar observations about the replacement of personalities with bureaucracy in the expression of power. The replacement of personality by system necessarily displaces narrative and occludes gender as social narrative or a basis for authority. The law has created categories for rationalizing and superintending corporate power that avoid deployment of the continuing force of gender as a wellspring of authority. The category is suppressed, not necessarily as an intentional strategy, but because, whatever its social power, it lacks conceptual relevance to corporate power or economic principles. The four stories of Enron told by Bill Bratton in his important law review treatment of the scandal have no story of gender, despite the prominence of the gender subtext in popular accounts.[147] A feminist argument for narrative might claim that the law justifies in neutral language forms of personal dominance that are detectable in the unvoiced narratives suggested by case facts. Cases are at hand in which a narrative can be built out of the materials in the court's un-narrated but linguistically mandated acknowledgment of the sex of the litigants. Examples include *S. L. & E. v. Lewis*, in which a group of brothers behaving as the majority interest treats the interests of a family corporation with only a subset of sisters and one brother as identical to the interests of a family corporation with all the family members.[148] But whatever stories happen in the corporation that demonstrate the social

(2006); *see also* Erica Beecher-Monas, *Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?* (Wayne State Univ. Law Sch. Legal Studies Research Paper, Series No. 07-17, 2007), *available at* http://ssrn.com/abstract=985339 (suggesting that gender and ethnic diversity may aid monitoring by helping foster a culture of dissent on boards); Joan MacLeod Hemmingway, *Sex, Trust, and Corporate Boards* (Working Paper, 2006) (asserting that gender diversity on boards contributes value but is difficult to achieve).

147. *Compare* Bratton, *supra* note 17, at 1286, *with* Roberts & Thomas, *supra* note 145, at 22. *See also* Westbrook, *supra* note 17, at 86 (the conventional story about Enron as a breakdown) and 97 (the story retold as managers acting in the interests of shareholders).

148. S. L. & E., Inc. v. Lewis, 629 F.2d 764, 766-67 (2d Cir. 1980); *see also* Alaska Plastics v. Coppock, 621 P.2d 270, 276 (Alaska 1980).

power of gender, they are engulfed by the conceptual power of the abstraction of the corporation, and they do not emerge in the canon of corporate law as a relevant category, nor do they function in a critical narrative about corporate doctrine. The fact of gender adds no usable conceptual materials to corporate law. Gender has no power at all to explain the outcomes of corporate cases and none to inform the judgment of the corporate jurist.

The invisibility of gender in the cases might be seen in narrative terms as a form of dominance, a character that dominates by her absence, or at any rate the case of the missing trope. The glass ceiling is a feature of corporations, for example, but it has nothing to do with corporate law as a social enterprise or with the study of corporate governance. Yet, if the circumstance of women or "women's voice" has no place in imagining the corporation, neither does the concept of manhood. If men dominate the corporation, nothing about men or maleness informs the contemporary social/legal understanding of corporate law or practice. Yet, social history suggests that understandings about "manliness," or virtue, once played a role in cultural understandings of business propriety, and of the expected behavior of businessmen.[149]

As noted, the absence of gender as a feature of reasoning about the corporation is placed in sharp relief by comparison with older corporate law. Cases in the past often took a turn to a rhetoric of manhood when the courts sought a firm basis for a holding or a rationale. The imperatives of manhood supplied certitude. The figure of "men" held large sway. For example, "the addition of these qualified men would, under other circumstances, be . . . appropriate . . . ."[150] An idea of character, implicitly connected to an ideal of manliness, figured: depositors have a right to "rely upon the character of the directors and officers . . . that they will . . . devote to its affairs the same diligent attention which ordinary, prudent, diligent men pay to their own affairs . . . ."[151] The dignity of men who served in corporations was at stake in legal determinations:

149. *See, e.g.*, KWOLEK-FOLLAND, *supra* note 50, at 45-49 (explaining evolving views of manly character appropriate to success in business).

150. Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 656 (Del. Ch. 1988).

151. Campbell v. Watson, 50 A. 120, 124 (N.J. Ch. 1901).

"Men's fortunes may not be subjected to such uncertain and speculative conjectures."[152] Business men had knowledge associated with their manliness and character as businessmen, traces of which have appeared in dissents relatively recently: "These men knew Trans Union like the back of their hands and were more than well qualified to make on the spot informed business judgments . . . [and] [t]hese men were at the time an integral part of that world, all professional business men, not intellectual figureheads."[153] The association of maleness with the underlying moral logic of the corporation was once common and unreflective.[154]

The evolution of corporate law to gender-neutral language, while consistent with a general trend in the culture and in legal writing, underlines the depersonalization of corporate law and the suitability of the corporation for a language that drains away human narratives in favor of an entity focus, in which the corporation as a legal person displaces other personal

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152. Barnes v. Andrews, 298 F. 614, 617 (S.D.N.Y. 1924).

153. Smith v. Van Gorkom, 488 A.2d 858, 895 (Del. 1985) (McNeilly, J., dissenting).

154. *See, e.g.*, SEC v. Chenery Corp., 318 U.S. 80, 85-86 (1943) ("[T]o say that a man is a fiduciary only begins analysis . . . ."); Memphis & C.R. Co. v. Wood, 7 So. 108, 113 (Ala. 1889) ("[W]hen one man stands in a fiduciary relation to another, any contract or bargain and sale had with the beneficiary is invalid at the mere option of the latter, if seasonably expressed."); Cookies Food Prod. v. Lakes Warehouse, 430 N.W.2d 447, 454 (Iowa 1988) (referring to majority shareholder as Duane "Speed" Herrig, quoting the board as noting that "he was the driving force in the corporation's success," and asserting that "he has done the work of at least five people"); Goodwin v. Agassiz, 186 N.E. 659, 661 (Mass. 1933) ("Fiduciary obligations of directors ought not to be made so onerous that men of experience and ability will be deterred from accepting such office . . . . On the other hand, directors cannot rightly be allowed to indulge with impunity in practices which do violence to prevailing standards of upright business men."); Alfred F. Conard, *Cook and the Corporate Shareholder: A Belated Review of William W. Cook's Publications on Corporations*, 93 MICH. L. REV. 1724, 1737 (1995) ("'You might as well ask the clouds in the air to propel the railroad locomotives. The stockholders are multitudinous, widely scattered, many of them women and estates. They give their proxies to whomsoever is in control— blindly and automatically . . . . They are derelicts adrift on an unknown sea, without chart, compass, landmark or pilot.'" (quoting William W. Cook, *A Plan for the Nationalization of Railroads*, 24 YALE L.J. 370, 374 (1915))); Harold Marsh, *Are Directors Trustees? Conflicts of Interest and Corporate Morality*, 22 BUS. LAW. 35, 36-43 (1966) ("[E]ven though they might not be the same men as sat on the board of the parent corporation.").

narrative. One can imagine narratives of collectives, such as nations, that deploy recognizably gendered characters—father figures, iron maidens, and politicians' consorts. The iconic figures within collectives that are not themselves persons can function in a narrative in which gender still figures. Thus, something about the corporate form defeats our remaining and still hardy concern with gender. In popular culture, men are from Mars and women are from Venus, but in the corporation, executives are from the market for executives. The corporation and its legal interpreters have "no imagination" about gender as a feature of the institutional apparatus and the legal review of risk. Risk is a quantifiable feature of investments rather than a story about male energy or personal will associated with men.

Before the entity and its investment profile became the dominating person in the legal imagination, the business man presented by the incipient judicial narrators of corporate law and culture was a distinctly gendered figure, with all that gender signaled. "Men" constituted a conceptual wedge for a moral element in the cases, directed at an implicit narrative about a code of behavior or ethics. In the early cases, it was possible to make confident assertions about "the businessman," or "prevailing standards of upright business men,"[155] and "[m]en's fortunes,"[156] and thereby to imply something human situated in cultural understanding about a good society and its human constituents. The WASP male, with a certain ethos and morality could have his behavior judged (in literal terms) by his social peers in accordance with a human (cultural) standard. The corporate board as "the constituted body of men clothed with . . . corporate powers,"[157] was imagined as recognizable individuals who, in their humanity and status as carriers of cultural meaning, created a distinctive authority arising from their combination; the nineteenth century board was a collective but with human constituents that gave it a meaning partly derived from individual characteristics with cultural specific referents. This assumption that the corporation was

155. *Goodwin*, 186 N.E. at 661.

156. *Barnes*, 298 F. at 617.

157. Baldwin v. Canfield, 1 N.W. 261, 270 (1879).

grounded in its culturally specific human members was sometimes quite specific: depositors have the right to "rely upon the *character* of the directors and officers that they will devote to its affairs the same diligent attention which ordinary, prudent, diligent men pay to their own affairs."[158]

Language about "men" and their character is foreign to corporate discourse today, which focuses on the functions of due care, process, accountability, and the installation of defensible systems of monitoring. The language of the cases today is so clearly functional that cultural markers of the personality, such as manhood, have fallen away. The contemporary manager/director/shareholder is not human, not even a "businessperson." Explanations of the business judgment rule argue that "team-specific human capital" creates dynamics that make judgments about individuals impractical. Human capital is a resource of an entity and not a fit subject for stories and consequent judgment about individuals.

By contrast, cases from the past demonstrated an understanding that corporate law was about the affairs of "men," whose culturally expressed masculinity carried forward a portion of the cultural understanding that generated legal conclusions and judicial understandings.[159] The cultural confidence judges needed to draw conclusions came from a culture of manhood and is not present in corporate law today. The usage that openly assumed a gendered world and hence a gendered business law—the trope of manhood—has disappeared and been supplanted by formal role explained by abstract understandings of efficiency rather than the manhood of businessmen. Economic theory at an abstract level has sufficient power to supplant the power of male authority.

So cases today overlook the gender of the participants, both in terms of assigning significance to their gender and in terms of narrative conventions that trigger narrative tension. Only a determined reader may assign significance to the gender of the participants that the judicial authors do not explore or even foreground with narrative tension. The cases are written for a world of gender neutrality, in which disembodied economic actors go their maximizing way.

158. Campbell v. Watson, 50 A. 120, 124 (N.J. Ch. 1901).

159. *See* KWOLEK-FOLLAND, *supra* note 50, at 41-69.

Feminists are wrong to suggest corporate law contains the materials for the construction of narratives of gender about corporate law but the absence of gender is a critical marker of the corporate form as a category that defies the insertion of human factors. Again, the entity contains a cauldron of human emotions, but they are nothing more than vignettes unconnected to the cognizable discourse of the corporation, understood either as a formal legal construct or as a set of social meanings that those who live in corporations can articulate. Hence, in the corporation, there can be talk investing interpersonal relationships with subterranean import, and water cooler talk explaining internal dynamics, but the talk is ephemeral and wandering.

Indeed, the power of the entity as a conceptual magnet is such that popular treatments of business foregrounding gender make little headway in assigning it a coherent place in the account of business. Tom Wolfe reports:

> In the year 2000, it was standard practice for the successful chief executive officer of a corporation to shuck his wife of two to three decades' standing for the simple reason that her subcutaneous packing was deteriorating, her shoulders and upper back were thickening like a shot-putter's—in short, she was no longer sexy.[160]

Enron, naturally, that moment of cultural revelation, brought forth trenchant observations on gender.[161] According to a successful producer of investigative journalism, the cinematic framing for the story is the fact that, "'It's about the women up against the men.'"[162] Noting

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160. TOM WOLFE, HOOKING UP 6 (2000).

161. Robert Bryce offers "the sexual shenanigans" of Enron executives as one theory of what went wrong. ROBERT BRYCE, PIPE DREAMS: GREED, EGO, AND THE DEATH OF ENRON 11 (2002).

162. Maureen Dowd, *Barbie Loves Math*, N.Y. TIMES, Feb. 6, 2002, at A21 (quoting Lowell Bergman, former "60 Minutes" producer). For more details of the popular culture narrative about sex in Enron, implicitly connected to the business outcome, see Roberts & Thomas, *supra* note 145:

> At Treasures, a "gentleman's club" in Houston, the strippers began to look for the flash of an Enron credit card. "That's like having a platinum card," one stripper told NEWSWEEK. "If it's an Enron guy, they got money." (Or did.) In the high-rolling days, Enron traders on their lunch break would buy a bottle of Cristal champagne (up to $575) and repair upstairs to the "VIP Room." The Treasures manager, who identified himself as "Mitch," said he was "unaware" of sexual favors

the emerging theme that women were the principal whistle blowers and skeptical outsiders in the Enron course of events,[163] the trenchant columnist Maureen Dowd describes the "slicked-back Gordon Gekko C.E.O. and his arrogant coterie in the Houston skyscraper—where men were wont to mess around and to leave wives for secretaries—dismiss[ing] female critics."[164] She writes that "[s]ome men suggest that women, with their vast experience with male blarney, are experts at calling guys on it."[165] The revelations and gender lineup of Enron hints at a gender narrative that gives form to corporate life and underpins the empirical assertions of power in corporations and sustains business energy. Yet it also reveals that providing

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being bestowed in the VIP Room. Said a stripper: "If a guy's going to pay you $1,000, use your imagination."

Sex suffused the Enron atmosphere. Skilling divorced his wife and became engaged to an Enron secretary, whom he promoted to a $600,000 job and whom insiders immediately dubbed "Va Voom!" One top executive, Lou Pai, divorced his wife and married a former stripper. Several women who were believed to be sleeping with their bosses were called "The French Lieutenants' Women." Staffers fearful of the next rank-and-yank session worried that these women were acting as spies. The most celebrated affair was between two top executives, Ken Rice and Amanda Martin. Their affection, described by Enron staffers to NEWSWEEK as "touchy feely" and "obscene," was visible through the windows of Martin's office.

It is worth noting that Newsweek issued the following correction:

In our March 11 article on Enron ("Enron's Dirty Laundry"), we incorrectly reported that former CEO Jeffrey Skilling was "engaged to an Enron secretary [Rebecca Carter], whom he promoted to a $600,000 job." In fact, she was elected 'Corporate Secretary' by the company's board of directors. Ms. Carter, who has a master's degree in accounting, had previously served in several senior-level positions at Enron, including senior vice president. NEWSWEEK regrets the error.

Roberts & Thomas, *supra* note 145.

163. *See, e.g.*, Dan Schneider, *Review of* ENRON: THE SMARTEST GUYS IN THE ROOM, May 14, 2006, http://www.cosmoetica.com/B371-DES310.htm ("The first to catch on to the con was Bethany McLean, a soft-spoken, attractive, and very feminine reporter for *Fortune* magazine, who brought out the first questions about the company after the 2000 Dot.com collapses.").

164. Dowd, *supra* note 162, at A21. The National Enquirer also attempted to fashion a narrative out of gender to attract reader interest. *See Enron: The Untold Story*, NAT'L ENQUIRER, Feb. 15, 2002 (calling Enron "a 'sin city' of greed, adultery and corruption where top executives lived the high life—and ordinary investors lost their shirts"), *available at* http://www.nationalenquirer.com/crime/21010#.

165. Dowd, *supra* note 162, at A21.

a narrative shape to the gender "subtext" of the corporation in any way that attaches to either probable legal conclusions or a systematic understanding of the relationship between conventions of the corporation and gender as an explanatory construct is a conceptual dead end. On paper, the corporation is a perfectly ungendered world, in which roles are only formal and the individuals have arrived at a state of androgynous nirvana. Again, the corporation does not support the production of successful narrative.

F. Implications

The implications of the claim about the marginality of narrative in corporate law are polarized and abundant and convenient to entirely inconsistent conclusions. Critics of corporate "domination" likely would see the insight as proof of the alienating implications of the large corporation.[166] A contrasting view is that the predominant academic theories of corporate law as a sphere of economic efficiency are superior to insight not disciplined and given general power by a rigorous model, replete with necessary assumptions, of a distinctively abstract sphere of activity.[167] Yet the lack of narrative is only a neutral fact about business, and the related legal and popular writing about business, and thus describing it constitutes neither a critique nor an apology. The neutrality of the point cuts two ways—it does not claim that corporations are good or bad, and it does not suggest

166. For a popular view imagining that the Enron narrative "proves" problems with the free market and the corporate form, see Schneider, *supra* note 163 ("If this film does not prove, once and for all, that the glorious myth of the free market, and Adam Smith's invisible hand, is a fraud, nothing will.").

167. Stephen Bainbridge provides a good example of a rich set of writings that create explanations based on economic efficiency and are addressed to the explanation of abstractions rather than to the fine-grained texture of corporate life. Recent examples include Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 877 (1997); Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735 (2006) (presenting a set of economic arguments refuting Professor Bebchuk's proposals to give shareholders greater ability to initiate changes in corporate governance); Stephen M. Bainbridge, *Precommittment Strategies in Corporate Law: The Case of Dead Hand and No Hand Pills*, 29 J. CORP. L. 1 (2003); Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1 (2002).

that narrative can reform the corporation by humanizing it or help to explain it to critics. Hence, the assertion lacks a utility for the emotional investment of scholars or general observers in a point of view.

There are some grounds to argue that corporate cases do contain high drama and riveting figures and implicit intrigue. Obvious examples are *Ringling Brothers-Barnum & Bailey Combined Shows v. Ringling*[168] and *Bayer v. Beran*.[169] Further, corporate law contains grand social narratives—meta-narratives (of which Berle and Means are the primary instance)—about the relationship between the suppliers of capital and the managerial class, as well as treatments of the history of the corporation. The problem with the first is that in corporate law classes, there is little evidence that the background stories about family intrigue, as in the fallout from the catastrophic Ringling Brothers circus fire,[170] engage students with the subject of voting agreements or with the effect on family dynamics on corporate conflict. Claims about sweeping historical interpretations as narrative have some real merit, but historical narrative is somewhat marginalized in the academy and is not executed in a way that connects a story of social trends to corporate rules.

The observation that corporate law is distinctly inhospitable to narrative has an organizing power for the field in revealing that the marginal status of narrative in corporate law is a good fit for the project of corporate law. Features of corporate law might be seen in a fresh light with a recognition of its evolution as a body of knowledge in which the narrative component may have ebbed. Some may conclude that the attenuated character of narrative in corporate law, if established, would be a useful insight in support of change, because it might suggest the usefulness of narrative interventions to provide a richer human

168. 53 A.2d 441 (Del. 1947) (concerning the enforceability of a shareholders' voting agreement, with a backdrop of a famous circus, a tragic fire, and family dynamics).

169. 49 N.Y.S.2d 2 (Sup. Ct. 1944) (concerning a claim about a failure of a board of directors to exercise their business judgment about the expenditure of corporate funds to permit a corporate spouse to record singing commercials).

170. *Ringling Wrangling: Three Sets of Heirs Squabble for Control of the Circus*, FORTUNE, July 1947, at 114.

context for the corporation.[171] Hope that a conscious attention to narrative openings in corporate law and scholarship have promise, either as a source of critique or as a practically beneficial intervention that might render the enterprise less "hypothetical," is likely to persist. It is unlikely to bear fruit, because the business setting is too inhospitable to narrative to allow it to take root in a manner that sustains comprehensibility or interest. Further, the "public choice" account of legislation and of the SEC comes close to creating a story, but its effect is to blunt the effort of regulators to sell a story of enforcement.[172] Economic analysis has just enough story to veto narratives that link business people with allegedly bad motives to social results.

Thus, those who rationalize corporate law with theories that purport to capture its essence and, in recent years, to incorporate the insights of psychology as part of a whole account of the efficiency of corporate law,[173] might see the claim that it lacks narrativity as both an epistemological critique and a substantive, even ideological, claim from the progressive wing of corporate law. The progressive corporate law scholar might similarly see the claim as a threat to a project that seeks to re-humanize business, or enterprise, law. If the claim of lack of narrativity is a claim of the irrelevance of human stories to corporate law, arguments about "trust"[174] and "the human nature of boards"[175] could seem devalued, and indeed, judged as fruitless.[176] Narrative strategies, or, at any rate, strategies

171. *See, e.g.*, Johnson, *supra* note 45.

172. *See* BAINBRIDGE, *supra* note 60; Langevoort, *supra* note 60.

173. *See, e.g.*, Lawrence A. Cunningham, *Behavioral Finance and Investor Governance*, 59 WASH. & LEE L. REV. 767, 770 (2002) (arguing for "a model of market and investor behavior that can be used as a lens through which to analyze a wide variety of legal rules and policies bearing on market regulation and corporate governance").

174. *See* O'Connor, *supra* note 121. "[T]he thesis that trust is a constitutive element in many business relationships has been a focal point of recent scholarship. Of particular interest is the role of trust when parties enter a relationship in pursuit of individual economic advantage." Deborah A. Demott, *Trust and Tension Within Corporations*, 81 CORNELL L. REV. 1308, 1309-10 (1996).

175. *See* Langevoort, *supra* note 108.

176. In conferences, the claim that business and business law is thin in narrative generates an anxiety which itself might merit examination.

that attempt to embody the social qualifications of a purely economic account of the corporation, would be viewed as threatened by a claim that the very nature of the epistemology of the corporation is resistant to such a project of re-infusing corporate law with the material of human psychology.

IV. THE MISSING STORY: CULTURAL EVIDENCE

A. *Nineteenth-Century Literature and Twentieth-Century Movies*

The great historian Richard Hofstadter cited the conclusion of a business journalist writing in Fortune Magazine that "American novelists have consistently done rank injustice to American businessmen. In the entire body of modern American fiction, he pointed out, the business man is almost always depicted as crass, philistine, corrupt, predatory, domineering, reactionary, and amoral."[177] Hofstadter suggested that the writer overstated one point: the Fortune writer had argued that the novelist disliked the business man "out of doctrine."[178] Hofstadter suggests that "perverse intent" is not the reason for the poor showing of businessmen in novels but instead, in the absence of a "unitary elite," writers rarely are in a position to observe businessmen at close quarters. He goes on to note the uncomfortable circumstance of the intellectual, who, in depending on patronage rather than government, "extends one hand for the institutional largesse of dead businessmen . . . ."[179] Unlike Larry Ribstein, who argues that the movie-maker resents the people who are the source of capital for the need to beg from them,[180] Hofstadter suggests the intellectual class has a degree of gratitude but proceeds

177. RICHARD HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE 233 (1963).

178. *Id.* at 234. David Brooks describes contemporary business leaders as having accepted the critique and sought to become intellectual visionaries. DAVID BROOKS, BOBOS IN PARADISE: THE NEW UPPER CLASS AND HOW THEY GOT THERE 117-18 (2000).

179. HOFSTADTER, *supra* note 177, at 236.

180. *See* Ribstein, *Imaging Wall Street*, *supra* note 42, at 198; *see also* Ribstein, *Wall Street and Vine*, *supra* note 42, at 4, 33-36.

with criticism of business anyway (out of lack of knowledge of businessmen as characters and out of inclinations toward progressivism and the like).[181]

Ralph Waldo Emerson, at first unable to "understand what motivated apparently 'solid' men to risk security and reputation in pursuit of more profits than any of them could comfortably dispose of in a lifetime[]" eventually understood that they resembled him, Emerson, in that "tycoons were poets who chose to write their epics in cash."[182] But their poetry is incommunicable except by the commonly shared fascination with money; Emerson could imagine the tycoon's acquisition of cash was poetry, although he could not apprehend the content of the poetry.

The claim that literature and movies are hostile to business supports the interpretation that business does not produce narratives the culture uses to interpret business law or the connection between individual agency and business outcomes. If we accept Ribstein's account of the general anti-business message of the movies, there is little reason to credit the movie makers with having devised a narrative that provides an accessible cultural account of the corporate form. Ribstein acknowledges as much when he says that the movie *Wall Street* was too complex for the audience, which can more readily understand a "backstory about war and Vietnam"[183] and points out that Oliver Stone's production of *Wall Street* did only a third of the business of his Vietnam movie, *Platoon*.[184] Further, Ribstein attacks the narrative competence of Stone, arguing that the "story" in *Wall Street* about Gordon Gekko is an amalgam of two figures who are entirely different corporate players, Ivan Boesky the arbitrageur and consumer of information, and Michael Milliken, the finance genius who created a new form of financing to help wrest value from moribund companies.[185] Ribstein rejects the explanation that Stone was simply looking for a villain by which to sustain dramatic tension, using as the basis of his claim the

181. HOFSTADTER, *supra* note 177, at 234-36.

182. B.L. PACKER, EMERSON'S FALL: A NEW INTERPRETATION OF THE MAJOR ESSAYS 96 (1982).

183. *See* Ribstein, *Imaging Wall Street*, *supra* note 42, at 197.

184. *Id.* at 197.

185. *Id.*

fact that Stone did make the movie complex by introducing nuance into Gekko's character with scenes in the "Teldar" shareholders meeting in which he appeals to American interest in creating sound companies and by creating a father-son theme with Gekko's memories of his father, Bud Fox's father, Carl the machinist, and the father-son relationship Gekko lost with Bud, to his regret.

While Ribstein is not wrong to say the American literary tradition, including movies, contains a strong dose of anti-business themes, he does not suggest he has identified a coherent narrative about business nor does he demonstrate that Stone's motives were other than the use of movie formulae to create dramatic tension in a setting that interested him and that has striking images such as the arrival of the hordes of finance industry workers on the subway and the tech gadgets that fascinate us still. The movie formulae requires villains, and Gekko is almost a villain but one with a strong appeal as a male with heroic strengths. Gekko flatters our interest in money by showing us the energy associated with a drive to amass wealth. The impulse in American art to portray business negatively is present as a sort of default theme, but the movie does rather well by business by glamorizing its energy and drive and creating complex, intersecting story lines about human interactions. Yet, a commanding social narrative it is not; it is, instead, a depiction of a scene, a milieu, with the fascination that Wall Street engenders.

To a large degree, it is about money and about conspicuous consumption—not about business, the securities market players, or the American corporation. As such, it is consistent with observations throughout the twentieth century about the marginal place of business in the American imagination, except for the spasms of negative portrayal of the business man in literature. A critic of American individualism wrote in his book on the tendency of Americans to follow the Emersonian rejection of society for the self: "Why did industrialism have no imaginative consequences proportionate to the profound changes it worked?"[186] A later writer argued that

186. QUENTIN ANDERSON, THE IMPERIAL SELF: AN ESSAY IN AMERICAN LITERARY AND CULTURAL HISTORY 244 (1971), *cited in* Peter Shaw, *The Imperial Self and American Literature*, *in* EMERSON AND HIS LEGACY: ESSAYS IN HONOR OF QUENTIN ANDERSON 214, 219 (Stephen Donadio et al. eds., 1986).

nineteenth century American literature was in fact driven by an imaginative reaction to industrialism, rendering "[l]iterary rejections of society in that period . . . really political protests against the dangers of incorporation."[187]

As a culture, Americans look for mirrors to view a

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187. *Id.* at 219-20 (explaining the interpretation offered by Alan Trachenberg in THE INCORPORATION OF AMERICA (1983)). Readers of the draft of this article frequently mentioned Tom Wolfe's *Bonfire of the Vanities* as a possible example of narrative that weaves a story about business into a persuasive interpretation of a social milieu. The book is generally meant to be about the effects on an individual of joining the 80's culture of Wall Street "greed," and the effects of his encounter with the culture of poverty located in physical proximity to his life as a "master of the universe." A quick search does not reveal much in the way of legal citations to the novel in connection with the corporation. Victor Fleischer cites the book as an illustration of the "surprising stress of maintaining a wealthy lifestyle." Victor Fleischer, *The Missing Preferred Return*, 31 J. CORP. L. 77, 101 n.94 (2005). Another article compares Enron to *Bonfire*: "The Enron culture is eerily reminiscent of Tom Wolfe's fictionalized account, in which securities traders, or 'Masters of the Universe,' produced amazing profits in a single morning." Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 965 (2003). The phrase "Masters of the Universe" attracts citations. *See, e.g.*, Robert Prentice, *Enron: A Brief Behavioral Autopsy*, 40 AM. BUS. L.J. 417, 431 & n.69 (2003); Linda O. Smiddy & Melissa Ihnat, *Introduction: Conference on Enron, Worldcom, and Their Aftermath*, 27 VT. L. REV. 817, 817 (2003). One law review writer suggests a confluence of New York, sex, money, and greed. *See* G. Edward White, *New York Faces the Millenium*, 3 GREEN BAG 2D 161, 167 (2000) ("In Bonfire of the Vanities almost all of the characters are corrupt in one fashion or another, and Wolfe invites the reader to ask whether that corruption is one engendered by place. One possible answer is yes: the bonfire is New York's bonfire, and the vanities center around greed. Money, or power leading to money, or sex leading to power leading to money, drives New York."). Many citations find something more akin to narrative interest in the portrait of lawyers. *See, e.g.*, Stephen Ellmann, *Empathy and Approval*, 43 HASTINGS L.J. 991, 997 n.24 (reciting dialogue between a poor client and her lawyer about his fee). Judge Posner has produced the only law review article that addresses *Bonfire of the Vanities* as its topic. *See* Richard Posner, *The Depiction of Law in* The Bonfire of the Vanities, 98 YALE L.J. 1653 (1989). He primarily addresses what the book has to say about law, with virtually no attention to corporate greed. He concludes that "it is not the sort of book that has anything interesting to say about law or any other institution." *Id.* at 1655. Posner notes that the book, seen by many as having something to say about Wall Street, has a "plot and character [that] are merely threads connecting a series of tableaux . . . ." and has shallow characters that result in part from Wolfe's misanthropy. *Id.* at 1658. Posner's conclusion that the book has little to say about law may buttress a view that law is generally inhospitable to narrative, but its treatment of an investment banker as its main character may well help to push it toward a weak review from Judge Posner, as he acknowledges that literature can successfully use law to explore the human experience, or have something to say about law. *See id.* at 1654-55.

reflection of their lives. Given the pervasive effect in American society of notions of the "imperial self,"[188] Americans analyzing their lives turn on occasion to business as a setting for themes of the self, efforts to work through deeply imbedded tropes affecting the American consciousness. Hence, numerous business movies dwell on the father-son or father-daughter relationship; *Patterns* is a critical example,[189] as is *Executive Suite*.[190] *Boiler Room*[191] is a contemporary, perhaps derivative example. Quentin Anderson, interestingly, argues that the father is an absent figure in the emotional lives of key formative figures in our national literature[192] and is absent from their portrait of the society and the challenges of the self. That business movies seem to have a degree of fascination with father-son relationships hints at some sort of recovery of the father in the context of business, or some sense that immersion in business may accelerate a crisis about the authority of the father and the construction of the self, but gives us little in the way of a narrative about business. Or it simply imports into the business setting, which emphasizes male characters, an American concern with fathers. *The Man in the Gray Flannel Suit*[193] developed a theme of the demands of suburban and business conformity against family connection and, as such, illustrates that business provides one setting to explore the general tension between society and self dating from Emerson. But, ultimately, exploring these themes does not create a narrative-based social understanding of the business culture or its legal logic.

B. *Texture of Corporate Law: General Observations*

With one notable exception,[194] the place of narrative in the life and law of the business enterprise has received

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188. *See* QUENTIN ANDERSON, THE IMPERIAL SELF (1971).

189. *See* PATTERNS, *supra* note 55.

190. EXECUTIVE SUITE (Metro-Goldwyn-Mayer (MGM) 1954).

191. BOILER ROOM (New Line Cinema 2000).

192. ANDERSON, *supra* note 188, at 15-16 ("[M]ost of our major figures whom we have come to think of as offering a sense of our distinctive qualities were men who had either been let down by their fathers or acted as if they had.").

193. THE MAN IN THE GRAY FLANNEL SUIT (20th Century Fox 1956).

194. *See* Rock, *supra* note 4.

little attention from scholars. In literature, even a writer who took a financier as his subject assumed that his subject's knowledge, and thus his subject's field, is something other than "the emotions and subtleties of life."[195] Georg Simmel captures the erasure of personality in business:

> [A] personality [as described by Simmel] is almost completely destroyed under the conditions of a money economy. The delivery man, the money-lender, the worker, upon whom we are dependent, do not operate as personalities because they enter into a relationship only by virtue of a single activity such as the delivery of goods, the lending of money, and because their other qualities, which alone would give them a personality, are missing.[196]

In part, the social place of business accounts for the unimportance of narrative in corporate law. In addition, business attracts specialized languages that resist translation into terms that are either usable by readers or rendered accessible by a coherent narrative in which recognizable characters dominate the understanding. The fundamentals of characters, plot, and causal attribution are under pressure in presenting an account of corporate affairs.

Indeed, the legal treatment of the corporation intensifies the marginal place of narrative in corporate law. The formal rules of the corporation, implanted in state corporate codes and given a gloss in judicial opinions, encourage the development of roles in which opportunity to recognize the human element is minimized. According to Simmel, under conditions of the need for capital, "people gain their significance for the individual concerned solely as representatives of those functions, such as owners of capital and suppliers of working materials."[197] The business judgment rule posits a norm of business propriety, in which human activity is interpreted by formal assumptions about institutional interest. Causation is elusive because responsibility is collective and the canon of interpretation resists a recognition of standard human motivations

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195. THEODORE DREISER, THE FINANCIER 11 (revised edition 1995) (contrasting the knowledge of a financier to that of a poet).

196. SIMMEL, *supra* note 67, at 295.

197. *Id.*

relating to personality. The Enron morass highlighted the cultural futility of attempting successful narratives to account for striking business occurrences, as well as the effect of specialized languages in frustrating readers of corporate text.

Law and economics give a bloodless rationale for forms of compensation that reach astronomic sums with no sense of embodiment of the personalities involved.[198] Critics complain that the amounts are excessive and not really tied to performance or to a functioning market in executive talent. Yet, until Enron, there was virtually no real portrait of the human dynamics attendant upon lavish compensation, either in terms of the personalities or character of those compensated in multiples of our previous ideas of avarice, or in term of corporate outcomes. Now, the popular press has begun to suggest that lavish compensation tied to the performance of a company's stock has caused executives to become more concerned with manipulating accounting figures than achieving actual results.[199] Yet the sense of a vivid narrative is still not widespread. Terms like plutocracy have recently gained currency in occasional critiques of the business elite. Yet there is still little that amounts to an accessible narrative with a sweeping explanatory power. One writer, who writes about politics and business, provides an example of the possibility of vivid narrative that embodies a sweep. In *Wealth and Democracy*, Kevin Phillips sets forth a thesis about corporate corruption of an economic system, social and global cycles and the international implications of an era of corporate dominance and obsession with wealth: "[The face of Americans], presented internationally, was the aging visage of the leading world economic power—purple-veined with years of high living, lips curled with the insolence of great wealth, eyes bloodshot with the late vigils of increasingly frequent financial crises."[200] Without evaluating the merits of the statement, the language presented here is a contrast with the register of language in which business is conducted, reported and analyzed, either in the business press or popular writing. In Phillips's view,

198. *See* Carney, *supra* note 122.

199. *See* Westbrook, *supra* note 17.

200. KEVIN PHILLIPS, WEALTH AND DEMOCRACY 409 (2002).

the disappearance of terms like plutocracy is a twentieth century phenomenon. Other writers of business, of course, have suggested that business rarely produces figures who attract celebration of any kind. Here I argue that the language and conventions of business resist translation into such vivid interpretations and the efforts to create narrative are at best episodic and unsuccessful.

Despite the confidence that Enron would produce a body of well-read and successful books,[201] the sense of interest wore thin quickly, as did the hopes for comprehensibility. Ken Lay's sudden death was almost emblematic of the frustration generated by the wish to attach a business story to a life; efforts to embody a business story were defeated in an instant, with no remaining human meaning and the loss of whatever human center a business fiasco might have had.

The lack of narrative impact is a great weakness for which writers pay dearly in the eyes of reviewers. Further, the academy is an unlikely source of narrative punch for an undertaking that produces memoirs "with a deservedly mediocre reputation."[202]

The characteristic quest for theory and rigor encounters a fit match in an enterprise that takes as its focal point an abstraction incapable of emotions or rebuke.[203] That the central figure is a fiction is no help in the search for narrative interest. The corporation is a fiction wanting for readers, by no means an entrant in the genre of fiction that keeps wide-eyed readers awake at night. Ribstein acknowledges one portion of the insight when he notes that the Exchange Act of 1934 offers "shareholders more information, although the Berle & Means theory would predict shareholders would not read and could not use the newly available information."[204] This excess of information

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201. *See* Maggie Shiels, *I Lost so Much on Enron, I Bought the Book*, BBC NEWS, Feb. 22, 2002, http://news.bbc.co.uk/1/hi/uk/1833638.stm.

202. Holman W. Jenkins Jr., *Life According to Jack Welch*, WALL ST. J., Sept. 21, 2001, at W1, W12 ("Business memoirs have a deservedly mediocre reputation . . . .").

203. *See* Kent Greenfield, *Ultra Vires Lives!: A Stakeholder Analysis of Corporate Illegality*, 87 VA. L. REV. 1279, 1290 n.28 (2001) (summarizing the literature on the problem of holding corporations accountable because of their entity nature and referring to lack of conscience).

204. Ribstein, *Imaging Wall Street*, *supra* note 42, at 168.

does not become manageable through the efforts of movie producers, novelists, or business journalists; we see glimpses of the business scene and portent of drama, but like readers of corporate documents, viewers lost the thread of narrative except for that of the modern self at sea in complexity. Ribstein notes that the key scene in *Wall Street*, when Bud Fox sees investment bankers planning to dismember Bluestar, is a pastiche of nonsensical takeover argot, none of which coheres in a story about the business logic of takeovers. It is really just a glimpse of something to which, in some ways, none of us are privy, not even the participants, who are at a loss to give riveting accounts of what they do or have done.[205] While Ribstein sees it as a piece with the artists' determination to blaspheme the business man,[206] I find it more pungently an illustration of an artist flailing to give a portrait of the texture of business excitement, with no grasp at all of a story line.

C. *Judicial Imagination*

Business lawyers have observed that, in commercial law cases of all sorts, judges resist the introduction of facts about disputes,[207] pushing the parties to resolve problems without an involvement of the court in hearing narrative and counter narrative. One scholar asks whether judges in corporate cases use the business judgment rule as a means of shirking, minimizing the need to engage in analysis of complexity by the shorthand rule.[208] He concludes that some corporate law doctrines may be at least partly explained by bounded rationality and incentives in judges to shirk.[209] By contrast to criminal law or domestic law, in business matters, courts resist an immersion in the stories

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205. *See* TOM WOLFE, BONFIRE OF THE VANITIES 222-26 (1987) (scene in which a bond trader cannot explain his job to his daughter and is mocked by his wife).

206. Ribstein, *Imagining Wall Street*, *supra* note 42, at 189-90 ("Despite these lacunae in the scenario, the sleazy atmosphere at the "carve-up" meeting, and Bud's reaction to it, are all that is necessary to give a financially unsophisticated audience the impression of callous greed.").

207. Interview with an anonymous business attorney, in East Lansing, Mich. (June 2003).

208. *See* BAINBRIDGE, *supra* note 60, at 254-55.

209. *See id.* at 256.

of the litigants. In a curious way, the fictional person that is a corporation, or a business, contains within it occluded personalities and clashes of such complexity and fluidity that skepticism about narrative, with the attendant irony that literary criticism invites, may be the refuge of courts that otherwise indulge the older human thirst for narrative. However little confidence we may have in narrative, we allow more of it to enter the courtroom, and judges are drafted to hear more of it, and they are seduced by it more,[210] in areas outside business. Narrative is most fascinating as an exercise in the "construction of self" that is implicated in confession;[211] the law more readily cedes the necessity of narrative in fields where the self is in effect litigated than in business, where selves may abound but the prevailing premise opposes any effort to render them transparent or compare them for the sake of truth or justice.[212] By contrast, in copyright, the romantic myth of the author places the self at stake[213] and implants an implicit narrative in law. The narrative core of copyright law is the status of the author as an owner of property whose authorship asserts the significance of human personality. The proprietor of intellectual property is called an author. And an author is someone who imbues a text with his subjectivity. Thus, authorship is an expression of self and is imbued with subjectivity. In contrasts to a

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210. *See* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW, *supra* note 3 (1996).

211. *See* PETER BROOKS, TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW & LITERATURE 52-55 (2000).

212. The exception is the norm of "reasonable expectations" in close corporations, in which the aspirations of an individual at the outset of an enterprise, in terms of a role as well as economic return, is given weight in determining the rights of participants by some state courts. *See, e.g.*, *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984). There is considerable criticism of the effort to reconstruct the story of a given enterprise for the purpose of protecting non-economic, and even economic, interests. *See* Douglas K. Moll, *Shareholder Oppression v. Employment At Will in the Close Corporation: The Investment Model Solution*, 1999 U. ILL. L. REV. 517, 580 (1999) ("[J]udicial efforts to explain oppression's protection of close corporation employment in the face of the at-will doctrine have been woefully inadequate."). But it is arguably an instance in corporate law of a strand of discourse and legal decision-making in which legal treatment of the "self" is at stake.

213. *See* Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, *in* THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 15 (Martha Woodmansee & Peter Jaszi eds., 1994).

fictional person, it naturally triggers narratives.

Criminal law seemingly provides an example of a judicial interest in a narrative,[214] although it is one that occurs without reference to individual characters and guides the legal imagination of an appellate judge. It has been argued that Chief Justice Warren created a compelling narrative out of a record of secrecy and occlusion in his portrait of the confession room.[215] He "create[s] a dramatic story of the closed room, and the dramas of humiliation, deception, and coercion played out behind the locked door."[216] The portrayal of the confession room is a compelling narrative because it has an implicit character and a sense of immediacy. One can feel the emotion of being trapped in a confession room. The room even has the quality of a stage.

The boardroom may have such a quality; several movies use the board room as an emblematic setting for power. The cinematic boardroom has tall windows akin to cathedral windows—stylized board rooms are seen in *Patterns*, *Executive Suite*, and *The Hudsucker Proxy*.[217] Yet the human imagination is stymied in giving the characters a sense of embodiment. They stand in the board room, dressed for drama, but in our imagination, they are shadowy figures set to speak hidden lines. They clash but the human meaning of the contest and the result is veiled. The exaggerated presentation of the board room in *Patterns* and in *The Hudsucker Proxy* seems to suggest that the corporation dwarfs the human personality (as of course does Chaplin's classic silent movie *Modern Times*[218] using the spectre of mechanization in business). In many advertisements, business meetings in conference rooms are

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214. For a treatment of juror interest in narrative in criminal cases, see John H. Blume, Sheri L. Johnson & Emily C. Paavola, *Every Juror Wants a Story, Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense* (Cornell Legal Studies Research Paper No. 06-042, 2006), *available at* http://ssrn.com/abstract=942653. For a careful treatment of the function of narrative in trials, see Robert P. Burns, *The Distinctiveness of Trial Narrative* (Northwestern Univ. Sch. of Law Research Paper No. 04-07), *available at* http://ssrn.com/abstract=595143.

215. *See* BROOKS, *supra* note 211, at 14.

216. *Id.* at 13.

217. THE HUDSUCKER PROXY (Warner Bros. Pictures 1994).

218. MODERN TIMES (Charles Chaplin Productions 1936).

filled with absurd people, grasping for small economies and little victories over their peers. Business is absurd. Larry Ribstein might maintain this lends credence to his argument that movies portray business as bad, but it more of a depiction of the futility of telling an understandable story in human scale about the production of wealth. Is a depiction of the banality of business interactions a narrative? Seemingly, it is a single-premise joke about the culture—not a narrative about the corporation but one about one-upmanship and forms of detachment from group undertakings. And, we are told by some business practitioners, judges do not want to hear it.

By contrast, even without characters who say and do things, the fact of characters and of characteristic speech is palpable in Warren's image. The narrative is compelling, because it has an idea of particularity shared with an emblematic quality of a universal plight that embodied persons can imagine.

D. *Corporate Biography*

It is perhaps only to be expected that corporate law is no more concerned with business leaders than is general literature or popular or other academic interest. The efforts to record the lives of business men often seem to yield little of enduring interest or narrative quality. A slight volume, self-published by a business man about a fifty-year business career in reinsurance in London in the late nineteenth and early twentieth century, yields the thinnest of social history or linkage of persons and their habits and opinions to business practice.[219] Thicker volumes about the personalities in large corporate fortunes or in recent corporate battles contain richer detail and fewer bromides than the self-reporting of the business man of earlier days, but may often overwhelm with information that is difficult to organize.[220] Books about businesses strain to acquire

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219. EDWIN JOHN SPENCER, RECOLLECTIONS OF MY BUSINESS LIFE 57 (1927) (self published, concluding that "I seldom won by being cleverer than others, but by trying harder").

220. Tad Friend, *Mickey Mouse Club: Playing by Michael Eisner's Rules*, THE NEW YORKER, Apr. 24/May 2, 2000, at 212 (generally favorable review of book by Kim Masters about executive personalities at Disney, but with reference to "thorough but frequently unsifted reporting").

narrative thrust but often fail.[221] Indeed, even those who have been credited with generating interesting narratives about business have asserted that periods pass without the production of interesting narrative about business.[222] It is further suggested that writing about business has limited appeal.[223] And as noted, a real-life business disaster, rife

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221. A book on the Schwinn bicycle company was reviewed as coming "[t]oo much . . . in the uninspired prose of the business pages." The authors of the book strained to tell Schwinn's story "as a full-dress industrial epic," but "[s]ometimes a bike is just a bike." Fred Andrews, *It's a Schwinn: A History of the Company That Before its Decline was the Nation's Premier Bike Maker*, N.Y. TIMES BOOK REVIEW, Dec. 1, 1996, at 25. (reviewing JUDITH CROWN & GLENN COLEMAN, NO HANDS: THE RISE AND FALL OF THE SCHWINN BICYCLE COMPANY, AN AMERICAN INSTITUTION (1996)). It seems significant that the statement "sometimes a bike is just a bike" rings true when a bicycle is viewed as the primary focus of a business enterprise and not when it is seen as a memory of Christmas or poverty in post-War Italy. The movie THE BICYCLE THIEF (Produzioni De Sica 1948) demonstrates that a bicycle could be the fulcrum of a narrative of personal calamity. A review in *The New York Times* of a book that sought to portray a fascinating relationship between business journalists and chief executive officers as a "kind of cult figure" struggles to find words sufficient to denounce the book for its narrative failure. The book uses "movie-music portent . . . to cover over the essentially repetitive, even monotonous quality to [the] story," the author "never manages to give much shape to many stories he tells," the author has "confounded the verbal style of his subjects with effective, lively narrative prose," the characters, even where interesting, do not "substantiate the overall thesis of [the] book," which is that moving markets is easy, the author "gives us a great heap of . . . personalities, but he does not sort very carefully through his own material for some clear conclusions," as to his characters emotions, "Who cares? one wants to ask[]", and the "narrative approach . . . fails to pick up much thematic momentum . . . ." Richard Bernstein, *Hear All About It: The New Business Reporters*, N.Y. TIMES, Sept. 11, 2000, at B6 (reviewing HOWARD KURTZ, THE FORTUNE TELLERS: INSIDE WALL STREET'S GAME OF MONEY, MEDIA AND MANIPULATION (2000)). The interest in Jack Welch's biography was accompanied by disclaimers about the usual interest that can be generated by business biography. *See, e.g.*, Holman W. Jenkins Jr., *Life According to Jack Welch*, WALL ST. J., Sept. 21, 2001, at W1, W12 ("Business memoirs have a deservedly mediocre reputation . . . .").

222. *See* Bryan Burrough, *Fox in the Henhouse: Two Books Examine the Scandals at Archer Daniels Midland and the Man Who Blew the Whistle*, N.Y. TIMES, Sept. 17, 2000, at 12 (reviewing KURT EICHENWALD, THE INFORMANT: A TRUE STORY (2000) and JAMES B. LIEBER, RATS IN THE GRAIN: THE DIRTY TRICKS AND TRIALS OF ARCHER DAVID MIDLAND (2000)) ("[T]he last few years have not produced an abundance of memorable nonfiction narratives set in corporate America. Among those who have attempted the genre, there's been some debate why. It's true the world of balance sheets and stock charts hasn't exactly been a magnet for the most creative and inspired writers of this generation.").

223. *See id.* ("[T]here's also a sense that the genre itself may be limited; once readers have embraced one good book on an uproarious takeover battle, a vicious proxy fight, a tale of Hollywood excess, a high-tech startup or an insider-

with candidates to be villains, generally fails to generate sustained cultural attention and is judged wanting as a story by observers as "a dull business story."[224] The possibility that a female cultural figure who is also a CEO may have strayed over the line of trading propriety is seen as a peg on which to hang a reaction otherwise lacking a focal point or comprehensibility.[225] Moreover, the argument is made that there is a propensity to choose female villains not even part of the business scandal rather than indulge in hating male protagonists in business frauds,[226] perhaps because the males, as functional components of the business machine, cannot carry the burden of narrative. The impossibility of using gender within the corporation to account for a story line is made poignant in the effort to introduce comprehensibility by elevating marginal female players as emblematic villains.

The link between business and people is sought to be preserved in a quaint volume, *Corporate Eponymy: A Biographical Dictionary of the Persons Behind the Names of Major American, British, European and Asian Businesses.*[227] The effort to link firm names to their

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trading scandal, it hasn't been shown that they're left hungering for more."). Reviews of books about corporate decision-making often remark on the failure of the book as a coherent account of anything. *See, e.g.*, Adam Liptak, *Millions for Defense*, N.Y. TIMES, Feb. 4, 2001, at 10 (remarking of Ken Auletta's book on the Microsoft antitrust trial that "little of it is engaging as narrative or valuable as commentary" and that Auletta "leaves it to the reader to make sense of a mountain of jumbled facts and impressions"); *see also* HOWARD KURTZ, THE FORTUNE TELLERS: INSIDE WALL STREET'S GAME OF MONEY, MEDIA AND MANIPULATION (2000); DALE ARTHUR OESTERLE, THE LAW OF MERGERS AND ACQUISITIONS 427 (1999) (describing *Barbarians at the Gate* as "a rather bad HBO movie"). It is interesting by contrast that the compelling narratives about corporate wrongdoing tend to be from genres that sound in tort or criminality and lend themselves to the detective format. *See, e.g.*, ERIN BROCKOVICH (Jersey Films 2000); THE INSIDER (Touchstone Pictures 1999).

224. Randall Patterson, *Houston Does Not Believe in Tears*, N.Y. TIMES, June 9, 2002, § 6 (Magazine), at 82, 86 (quoting the *Houston Post* gossip columnist).

225. *See* Leslie Savan, *In Defense of Martha*, N.Y. TIMES, June 27, 2002, at A29 ("Martha Stewart is above all an individual, and it's always easier to focus on individuals rather than corporations.")

226. *See id.* (arguing that we don't love to hate Kenneth Lay from Enron or Dennis Kozlowski from Tyco, rather focusing our "love-to-hate paroxysm" on Kenneth Lay's wife for saying she and her husband had "lost everything").

227. ADRIAN ROOM, CORPORATE EPONYMY: A BIOGRAPHICAL DICTIONARY OF THE PERSONS BEHIND THE NAMES OF MAJOR AMERICAN, BRITISH, EUROPEAN AND

founders is pleasantly quixotic, the product an elegant little book that is difficult to classify. In noting the difficulties of research, the author describes a protypical reaction to inquiries about the provenance of a firm name: "'If you find out anything about him, let us know,' was the reaction of one well known firm when cheerfully admitting they had no information of any kind of their founder."[228]

The son of the founder of Kresge protested when Kresge became K-Mart, saying that "'the company name should relate to the founder.'"[229] The vote by shareholders was 89.4 million to 11.3 million,[230] thus confirming a widespread cultural predisposition to treat corporate identity as corporate, or anyway to yield to business preference for depersonalization,[231] little needful of a link to a family, and implicitly social and regional, narrative.

There are, of course, counter examples provided by the perennial cultural fascination with money. According to Maureen Dowd, one of our more insightful cultural observers, "[t]he sexiest thing in America is no longer sex. It's money."[232] Reacting to the payment of a record book

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ASIAN BUSINESSES (1992).

228. *Id.* at x.

229. *Id.* at 138 (quoting Stanley Kresge). Family members of founders frequently make a fuss of retaining the family name in the face of corporate bureaucratization. Nancy Reynolds, in the decade before R.J. Reynolds became a pawn in the debt-fueled restructuring of corporations, "fought a proposal to take 'Reynolds' out of the company name, writing letters to board members that said, in effect, 'Over my dead body.'" BURROUGHS & HELYAR, *supra* note 76, at 283. Given the future of the company as the battle ground of mobs of strangers and as a proving ground for ownership of techniques of finance and approaches to reconfiguring business assets, an effort to preserve a family name appears retrospectively to be a futile stab at preserving a narrative that could not stand against the power of a financial logic applied to assets, not stories.

230. ROOM, *supra* note 227, at 227.

231. The narrative of corporate law reminds us that the shareholder vote reflects passive compliance with board recommendation rather than active monitoring. To support a proposal that shares be severed from control and only entitle holders to investment return, Peter Drucker early on drew on the narrative of shareholder passivity to advocate recognizing the "de facto situation" that rights of control associated with shares are fictional and, in his view, unjustified. DRUCKER, *supra* note 128, at 340-41.

232. Maureen Dowd, Op-Ed., *Liberties: The $7 Million Man*, N.Y. TIMES, July 16, 2000, § 4, at 15; *see also* ROBERT J. SHILLER, IRRATIONAL EXUBERANCE 23 (2000) (arguing that feelings about "amassing substantial and quick riches . . . have transformed our culture into one that reveres the successful

advance of $7.1 million to Jack Welch, the celebrated CEO of General Electric, Dowd talks about the "literature of lucre, the Bildungsroman[233] of the bottom line."[234] But businessmen do not write about money as much as they do about the art of leadership. When contemporary businesspeople undertake to write about business, they take as their subject the generalized concept of leadership. A search for books about business movies turned up several books that purport to derive lessons for doing business, or for leadership, from various movies.[235]

Plainly, the culture periodically looks to celebrated business men as sources of possible insight or inspiration and even makes of them a sometimes celebrity. Lee Iacocca, Bill Gates, Henry Ford, John D. Rockefeller,[236] J.P. Morgan, or Andrew Carnegie command interest, but the extent to which the interest produces engaging narratives about business that helps explain business law or even business logic is minimal. There is no singular narrative that gives these business figures embodiment as an exemplar of business practices or meanings. Even more sharply, there is no readily comprehensible link between narratives about founders of fortunes to the legal outcomes in business law.

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businessperson as much as or even more than the accomplished scientist, artist, or revolutionary").

233. It should be noted that the term "Bildungsroman," applied to the manager of a corporation, is suffused with irony and mockery. Bildungsroman refers to a novel of formation about a protagonist, often an artist, who undergoes a spiritual crisis. *See* ABRAMS, *supra* note 12, at 193. The anomaly of applying the term to a work by a business executive demonstrates that, even when business and money are being praised, or sent up as "sexy," the background assumption is that they are not the stuff of literature and, thus, a culture that elevates businesspeople to be objects of something akin to literary interest is auditioning account books as a replacement for real literary forms. The likelihood of success is low, and so understood.

234. Dowd, *supra* note 232, at 15.

235. *See, e.g.*, JOHN K. CLEMENS & MELORA WOLFF, MOVIES TO MANAGE BY: LESSONS IN LEADERSHIP FROM GREAT FILMS (1999); STEPEHEN DENNING, THE LEADER'S GUIDE TO STORYTELLING: MASTERING THE ART OF AND DISCIPLINE OF BUSINESS NARRATIVE (2005); SHAUN O'L HIGGINS ET AL., MOVIES FOR BUSINESS: BIG-SCREEN LESSONS IN CORPORATE VISION, ENTREPRENEURSHIP, LOGISTICS AND ETHICS (2003); SHAUN O'L HIGGINS & COLLEEN STRIEGEL, MOVIES FOR LEADERS: MANAGEMENT LESSONS FROM FOUR ALL-TIME GREAT FILMS (1999).

236. John D. Rockefeller's renown was such that a major author turned to him for the name of a novel. *See* Nathanael West, *A Cool Million*, *in* THE COMPLETE WORKS OF NATHANAEL WEST 142 (1957) ("John D. Rockefeller would give a cool million to have a stomach like yours.").

E. *Money.*

The money well-known businessmen earn commands attention. But an interest in the possession of money does not sustain interest in business. Desire for money does not portend an obsession with the details of its generation. Indeed, part of money's magic is its self-generation, its velocity and expansion.[237] As such, money is well studied as a source of fascination and, in the terms of literary theory, mystification.[238] In addition, money can be seen as having a literary quality, in that it arises from the same medium that confers belief in literature.[239] Grand theorists have said that the story of culture is also the "story of money."[240] But the principal site for the generation of wealth in the modern culture, i.e., the corporation, evades claims about narrative, which theorists about money associate with the nation-state,[241] and spiritual magic, which theorists

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237. *See* PATRICK BRANTLINGER, FICTIONS OF STATE: CULTURE AND CREDIT IN BRITAIN, 1694-1994 26 (1996) (citing HANS BINSWANGER, MONEY AND MAGIC: A CRITIQUE OF THE MODERN ECONOMY IN THE LIGHT OF GOETHE'S FAUST (J.E. Harrison trans., 1994)); *see also* David Brooks, *Why the U.S. Will Always Be Rich*, N.Y. TIMES, June 9, 2002, § 6 (Magazine), at 88 ("We keep sprouting money . . . .").

238. George Simmel described money as a "universal representative and solvent of all values" that becomes itself of spiritual significance. BRANTLINGER, *supra* note 237, at 23; *see also id.* ("[M]oney is involved in the general development which in every domain of life and in every sense strives to dissolve substance into free-floating processes." (quoting SIMMEL, *supra* note 67 at 16)). Ralph Waldo Emerson is described as having "had faith that, properly employed, money is, 'in its effects and laws, as beautiful as roses . . . .'" Wesley T. Mott, *The Age of the First Person Singular: Emerson and Individualism*, *in* A HISTORICAL GUIDE TO RALPH WALDO EMERSON 78 (Joel Myerson ed., 2000) (citing THE COLLECTED WORKS OF RALPH WALDO EMERSON 136 (Alfred R. Ferguson, Joseph Slater & Douglas Emory Wilson eds., 1971)).

239. *See* BRANTLINGER, *supra* note 237, at 24 (quoting MARK SHELL, MONEY, LANGUAGE AND THOUGHT: LITERACY AND PHILOSOPHICAL ECONOMICS FROM THE MEDIEVAL TO THE MODERN ERA 7 (1982)).

240. *Id.* (quoting JACQUES DERRIDA, GIVEN TIME: I. COUNTERFEIT MONEY 129 (1992)); *see also* Michael Gross, *This Gore's No Bore*, GEORGE, Oct. 2000, at 91 (quoting Gore Vidal asserting that General Motors, General Electric, and other corporations "decide the sort of lives we lead and what we eat and drink and think" because "[t]he greatest ideology in America is greed").

241. *See* BRANTLINGER, *supra* note 237, at 10 ("Nation-states produce a variety of more or less official narratives, or forms of national representation, to create and sustain their legitimation.").

associate with money and economic growth.[242] Rather, the corporation is "vertiginously complex, electronic, and hypothetical."[243] It is more akin to an idea than to a story, or anyway, its complexity and its fluidity do not readily offer interpretations that analogize to literary artifacts.

The principal character in the story of corporate law is capital, its imperatives and its power to alter cultures and create wealth. The plot is change of such daily mass as to defy a chronicle. The human element recedes in the face of the story of money,[244] even where we know that human dramas and personal motives may abound. So they do. But they are not what the field concerns itself with. That human stories lack point in business law is neither good nor bad. It is simply the way it is.

The observation nonetheless has an element of irony: the moral imperative of the corporate enterprise is not demonstrable, reasons for ironic distance abound. Yet, the corporation is a site where narrative recedes as the attachment to wealth generation and its nourishment of the spirit provides the occasion for activities that lend themselves to a non-narrative epistemology. Narrative loses out both as a conveyor of legitimacy and as critique. The corporation is a place where lives are located but narrative imagination about them loses point. Narrative interest is transferred from the getting to the spending of money.

There have been substantial narrative projects in other fields. With one exception,[245] corporate scholarship has had no such movement. With only preliminary investigation, one is struck that work in corporate law does not gravitate

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242. *See id.* at 26 (citing BINSWANGER, *supra* note 237).

243. BRANTLINGER, *supra* note 237, at 24.

244. Indeed, a review of a novel billed as a legal thriller concludes that the author is unable to develop any aspect of the story, given the grip on his imagination of a pile of cash in the sum of $3,118,000. According to the reviewer:

> The cash at [the work's] center has emboldened Grisham to dispense with all of the other anxieties of authorship. The money displaces character and narrative, tension and resolution. Everyone in the book talks and thinks about little else. . . . The money is the most engaging character in the book, the most fully developed, the most lifelike.

Adam Liptak, *Take the Money*, N.Y. TIMES, Feb. 24, 2002, at 13 (reviewing JOHN GRISHAM, THE SUMMONS (2002)).

245. *See* Rock, *supra* note 4.

to narrative; there is no inclination to examine corporate law as a series of narratives, nor is there any salient movement to reform corporate law by the infusion into it of narratives to counter prevailing narratives. The work in corporate law pits theories against theories. In addition, as will be discussed further, other fields, as a matter of legal practice, generate lawyers whose gift is the construction of a persuasive narrative. The corporate calling for lawyers is not thought about as a storytelling craft in the same way as the criminal lawyer's work. The delegitimation and disruption of nascent narratives about corporate authority or plot lines and characters within the corporation is more characteristically the calling of the corporate lawyer. Perhaps the corporate lawyer should understand narrative, but not for the purpose of becoming a narrator of the corporation.

CONCLUSION

The abstract models that have gained prominence in corporate law have a relentless capacity to displace narrative as a source of cultural power, to disrupt critical narratives, and to generate powerful rationales for mainstream corporate law. The resistance of the predominant model to "progressive" critique is no surprise, given the power of the abstraction, the factually marginal status of narrative, and the capacity of corporate law for bracketing narratives of all kinds. To the extent the power of the governing framework draws on any "meta-narrative," it is a sweeping story about the critical importance of change and the relative unimportance of who said what and why.

The absence of narrative from corporate law could be seen as the diagnosis of a problem, or, alternatively, might be thought a virtue of a body of law that addresses the affairs of people whose involvement in various of the favorite subjects of narrative, such as greed, betrayal, loyalty, the search for and the use of power, and the creation and expansion of enterprises that alter daily life, are only incidental to the enterprise logic. The law of corporations supplants morality tales with authoritative outcomes based on organizational logic. The law reinforces the cultural indisposition to generate narratives about business that provide a general understanding of the

corporate enterprise. The law cannot generate stories that the culture lacks.

Efforts to undermine the heavily economic approach to corporate law as a nexus of contracts and the narrow focus of the predominating model of corporate law as having to do mainly with the relation between management and shareholders have an implicit aspiration to social narrative not captured by economic logic. The argument is that a contract view, coupled with a goal of profit maximization, creates a narrative void. A communitarian approach brings to the surface the elements of narrative. Specifically, a communitarian corporate law draws upon concrete characters in specific companies (labor), textured settings (a local community), chronology (the creation of the enterprise and the promises of management to the community and the counter promises of labor and the community), and effects of managerial decisions on their friends and neighbors. The attempt to critique the body of corporate law, in some ways, appears to be an effort to inject narrative into the enterprise and thereby cement the economic arrangements with affective social bonds given imaginative power by the force of a story anchored to people with personal ties to the corporation. The dissatisfaction with treating labor as a separate body of law must be seen in certain respects as an insistence on the narrative relating to the role labor plays in the history of any enterprise and the dialogue that is created between management, shareholders, labor, and the community.

The absence of reading is a comment on both the reader and the corporate text. The absence of reading is a commonplace: "Nobody seriously expects boards to read merger agreements cover to cover . . . ."[246] Also wanting for readers are the routine texts of the corporation: bonds, articles of incorporation, most of proxy statements. Lawyers pore over them, not to absorb text about any given corporation, but to master the art of writing them—they are a text written to be re-written in forms of copying that require both meticulous imitation and studied departures by lawyers both tied to rote and alert for nuance. The keepers of corporate text read them in the act of writing them. If the texts were to be read by readers not working to

246. BAINBRIDGE, *supra* note 60, at 280.

reproduce them in the act of reading them, literally representing disparate aspects of the corporation, or constituency, the reader would be reminded of the cobbled-together nature of the company by the effort to absorb the whole of a text. The corporate body requires, or at least benefits from, the fact that its texts are unread. Enron became the ultimate example of text not created for readers. Nobody could read all the texts. Law firms with dozens of associates and unlimited resources, in the Powers report, admitted to only scratching the surface. Enron was the perfected corporate text, a text beyond reading. In the shredding, and in the reaction to the shredding of some portion of it, the shredders and the prosecutors flatter us all and serve as collaborators in a structure of belief we need. The destruction, and the outrage, are tributes required for us to believe corporate text is a means of communication.

Characterizing the narrative content of both corporate law and corporate conventions of speech and operational text is, to be sure, no small task. It implies a comparison of corporate "talk" to the talk that adheres to other legal phenomena. It implies comprehensive classification of the body of material attached to corporate law for its "literary" form. It raises the question of the intellectual approach of those who are involved in corporate scholarship and the sources of raw material for speech by those in the corporation or writing about it in the popular press. As such, the claim is readily disputed and critiqued.

I am open to conclusions about the significance of the lack of narrative: I reject the assumption, tending to come from the left, that narrative is needed to give voice to the interests of different constituencies or to incorporate "outsider voice." Rather, narrative can have no other purpose than capturing the texture of a world. Narrative could celebrate the corporation as well as critique it.[247]

247. Efforts to provide narrative accounts of major businesses tend to contain some celebratory element about the industrialists who have helped build major corporations, even where accompanied by a critique. *See generally* JOHN A. BYRNE, THE WHIZ KIDS: THE FOUNDING FATHERS OF AMERICAN BUSINESS AND THE LEGACY THEY LEFT US (1993) (attributing vast influence to the Ford Motor Company "whiz kids" but also suggesting that their genius for cutting costs and establishing control damaged product quality, customer satisfaction, and individual initiative). The governance of the corporation as envisioned in corporate law—the role of the board, the passive nature of stockholding—eludes either critique or celebration in narrative treatments of our major corporations.

Narrative has no message until someone creates it. For the corporation, its creation is unlikely. If this observation is a critique, at best it is a critique of the getting and spending of money, a complaint long known to the western world but not one well aimed at the shape of corporate law.

Thus, the examination of the disjunction between narrative and both the activities of business and the content of corporate law does not yield any firm prescription about the corporation or the economy. The implications depend upon the perspective of the reader. An implication for the business man, the corporate lawyer, or the corporate scholar may well be that business enterprise has a distinctive logic that makes efforts at global critique beside the point. The point of business is efficiency, whether in the service of shareholders in the corporation, the entrepreneur, or the wealth of the society. The claim underpins the calling of all those with a practical or rationalizing bent, affirming that business is about money. The study of the corporation and of the law of the corporation is for the purpose of maintaining its soundness as an economic engine that functions within the assumptions of a political system.[248] On the other hand, the implication of the observation that corporate law does not generate narrative for some students of the corporation might be a pressing need to find entry points for intervention in its discourses, to enrich the legal and business language that guides managers, judges, and scholars. Here, the emphasis is on the importance of language for one's ethical and even spiritual welfare. There is less overt concern with money and more with the aspirations of being a human being, with human understandings that find expression in narrative and with abiding recognition of language as a medium in which

248. For a recent restatement of that view, see Stephen M. Bainbridge, The Shared Interests of Managers and Labor in Corporate Governance: A Comment on Strine 3 (May 10, 2007) (unpublished manuscript, on file with author), *available at* http://ssrn.com/abstract=985683 (arguing that "it would be a serious error to view the corporation . . . in communal terms," as there is only a lowest common denominator of values among the diverse groups whose interests are affected by the corporation); *see also* D. Gordon Smith, The Dystopian Potential of Corporate Law 9 (Mar. 2007) (unpublished manuscript, on file with author), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976742 (arguing that changes in corporate governance giving greater input to non-shareholder constituencies does not, and cannot, alter the profit-maximizing incentives of corporate managers).

honor and integrity are transmitted and maintained.[249] Still others would perceive the lack of narrative as a deep critique of the corporation and favor transformation of the corporation in the service of social and economic justice.[250] Others analyze the language of the corporation as a form of social control, an intentional masking of power, and even as a master narrative that justifies the form political power assumes. One such writer calls for a re-imagining of the corporation through the creation of a master narrative that disables the mythical stature of corporate law and challenges its priests and servants[251] to defend their claims about the corporation from deconstruction of its symbols and meanings. The likelihood of such a turn in the discourse about business and business form is minimal, particularly given the thesis presented here that business, and indeed the money economy, does not foster narrative. One is presumably left with a view that the corporation is not a project for narrators or for poets but for technocratic mastery. Yet human beings reside in the corporation and will try to find a place in it for the language they speak about themselves. They deserve support, but it is unclear who can provide it, or, indeed, if anyone has the imagination to supply more than a few evanescent vignettes.

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249. *See* Lyman Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27, 27 (2003) (arguing for an affirmative duty of loyalty that draws on literary and religious stories).

250. *See* Kent Greenfield, Saving the World with Corporate Law (Apr. 3, 2007) (unpublished manuscript, on file with author), *available at* http://ssrn.com/ abstract=978242 (arguing for changing corporate law to make corporations a progressive force that both creates wealth and spreads it more equitably).

251. *See* Litowitz, *supra* note 71, at 535.