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INTRODUCTION: UNSETTLING QUESTIONS, DISQUIETING STORIES

Mae Kuykendall & David Westbrook***

2009 MICH. ST. L. REV. 817

In 2007, Mae Kuykendall published “No Imagination: The Marginal Role of Narrative in Corporate Law” as an essay in the *Buffalo Law Review*.¹ Interest in the essay was strong, and so the *Michigan State Law Review*, with Mae’s assistance, convened the Business Law and Narrative Symposium at Michigan State University on September 10-11, 2009. This issue of the *Law Review* publishes papers based on symposium presentations.

As a not entirely innocent bystander, let me, David Westbrook, exercise the privilege of not being the author of “No Imagination” to introduce Professor Kuykendall’s text in a way she herself cannot, and thereby to introduce the problems that the Symposium addressed. (Once I’m done complimenting her, Mae will be invited back onto these pages.) “No Imagination” maintains that corporation law lacks strong narratives: public stories that situate the corporation in the web of contemporary legal, economic—and most broadly—social contexts. Corporation law thus fails to achieve what might be thought, if perhaps with a determined naiveté, to be the basic requirement of law in any republic; that is, to explain matters of social importance in publicly cognizable fashion. We all know that corporation law matters—is a *res publica par excellence*. But we mandarins entrusted with training the next generation of corporate lawyers, and who claim to be scholars of the area, and who sometimes even have the temerity to suggest how corporate matters ought to be handled by people with power over such affairs, do not do a very good job of articulating what corporate law actually means, how the law matters to everyone. We play our cards rather close to the vest. Of course it would be impolite to suggest that we do not know. Kafka the lawyer springs to mind.²

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** Floyd H. & Hilda L. Hurst Faculty Scholar, Professor of Law, University at Buffalo, State University of New York. My thanks to the Michigan State Law Review and to Mae for organizing all of this, and for inviting me to play in the sandbox. All infelicities are to be attributed to me.

1. Mae Kuykendall, *No Imagination: The Marginal Role of Narrative in Corporate Law*, 55 BUFF. L. REV. 537 (2007).

2. David A. Westbrook, *Triptych: Three Meditations on How Law Rules After Globalization*, 12 MINN. J. GLOBAL TRADE 337, 376 (2003) (noting that Kafka, a lawyer, used images treating formality as the only available reality).

Having failed to fulfill our obligations to the republic, those of us who both teach business associations and foolishly read more deeply into Mae's essay discover that matters only get worse. Although popular culture might make a celebrity out of a business titan, rivaling even the fame and infamy usually reserved for athletes and actors, corporation *law*, as an academic and professional discourse, has "rigorously" confined itself to interactions among sexless rational actors (we may no longer write "businessmen" in law reviews), who may or may not be engaged in regulatory arbitrage as they did or did not incorporate in Delaware, or perhaps organized themselves as LLCs. The fact that corporations, or business associations more generally,³ are central to American life as lived, and especially as globalized, matters not at all to the field. Barely clothed in Mae's essay is the assertion that corporate law scholars are wasting their time on a project so abstracted as to be intellectually sterile—empty girders indeed!⁴ Not only are we a dead weight upon the back of the body politic, we're not even intellectually amusing.⁵

Mae is too modest to say so, but I can and will: this essay is important. The odds are always long, of course, but "No Imagination" bids fair to be a turning point for the corner of the legal academy that concerns itself with business associations. Perhaps it is merely masochism of a refined sort, but Mae's withering critique appears to have struck a chord among legal scholars, not least the many prominent and gifted folks who journeyed to East Lansing in September of 2009 to participate in the Business Law and Narrative Symposium. The participation of so many fine scholars is also, of course, a tribute to the widespread respect and affection for Mae among the professoriate, something else she is too modest to say but that I am delighted to report.

It should not be denied that "No Imagination" presents serious difficulties, as an essay, literally an attempt, should. This is an especially good thing for present purposes: the essay's ambiguities and generally suggestive

3. And the argument could easily be extended to not-for profits, which we barely bother to teach in the law school curriculum.

4. For the unlikely reader who has proceeded this far without being a teacher of business associations, the reference is to Bayless Manning's *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223 (1962), in which Manning memorably characterizes the state of the corporation statute: "[C]orporation law, as a field of intellectual effort, is dead in the United States. . . . We have nothing left but our great empty corporation statutes—towering skyscrapers of rusted girders, internally welded together and containing nothing but wind." *Id.* at 245, n. 37.

5. Mae demurs. While there is no doubt that one form of evidence for her thesis about the distance between narrative and corporate law (as variously characterized below) included commentary on forms of personal and intellectual distance from the enterprise emanating from respectable quarters, she would also remind Bert that part of the thesis was that business produces a discourse that suits it, and those drawn to it are really good at it.

qualities have proven to be the symposium's gains, intellectual opportunities, and jumping-off points, as this volume so nicely demonstrates.

But what do I mean by "difficulties"? Much could be and has been said, but most basically, it is not completely clear what "No Imagination," or law professors generally, mean by "corporate law." A few plausible understandings, by no means entirely distinct (indeed inseparable if hardly synonymous) seem to be on the table, and variously have been addressed by different symposium participants. Consider the following possibilities:

- The practice of teaching business associations, i.e., the contents of the basic course, with perhaps a bit of scholarship and fragments of more advanced courses (accounting, bankruptcy, tax, securities) as icing.
- The questions that structure the professional texts generated by corporation law scholars, and those who wish to become scholars, along with packs of diligent law students in the (primarily) U.S. legal academy, the endless recycling of the Cary/Winter debate, discussions of shareholder voting rights, the purpose of corporations, and the like.
- The cases and statutes of Delaware, and maybe other states, along with the collections of publicists, notably the Model Business Corporation Act.
- The work done by transactional lawyers in large and especially financial legal practices (for which the basic course is hardly an obvious introduction).
- The work actually done by large and small corporations (large and small?) in the United States, and even the global economy.
- Regulation pertaining to corporations, including securities law, the recent nationalization of certain aspects of corporation law, and the willingness of the federal government to provide capital to institutions deemed systemically important.
- Those aspects of life organized and lived through corporate institutions, the world of Dilbert, sexual harassment, the road warrior, and the pious dream of corporate social responsibility.
- The political economy, either national or global, implied by some or all of the foregoing.
- The bureaucratization of contemporary life and its consequences for whatever bureaucratization is not.

It would be a simple-minded move, if one all too common in the academy, to insist on a more "rigorous" definition for corporate law, and for that matter, for "narrative." We could then proceed to work out the existing relationships between the two concepts, if any. Ordinarily, law professors—who are practical sorts, to say nothing of good citizens—would prob-

ably make some normative suggestions, and, the day's work done, move on. Right.

Instead, I want to flag the sheer difficulty of the question that Mae has raised: what do we mean, worse, *how* do we mean, when we legally represent certain collective modes of action, that class of institutions known as the corporation, to ourselves as a society, even using state power to enforce such representations? The symposium participants had much to say, which Mae and I introduce below.

* * *

One way to respond to Mae's claim that corporation law is narratively thin, and hence puzzling at best and meaningless at worst, is to rebut it directly, by telling a story about corporation law. ("You want a narrative? Here's a narrative, and in fact, it's a narrative you already know.") The obvious place to find such narratives is within cases. Every case tells a story, the story of the legal harm that is the complaint. And cases, with their stories, are the backbone of American legal education, including corporations. Thus it might be said that corporate law in America, understood as a professional field, is narrative from its inception.

So, in "Narrative and Truth in Judicial Opinions: Corporate Charitable Giving Cases,"⁶ Geoffrey Miller analyzes three well-known cases⁷ to explore, in the corporate law setting, the role of narrative in producing law. Each case presents a concern regarding the reliability of the adversarial system to produce a story corresponding to underlying facts. Miller retells, to considerable surprise and good effect for a group of legal scholars, *A.P. Smith*, the story of litigation surrounding whether corporate gifts to a charity (well, Princeton) are precluded by the idea of the business corporation as an entity that makes money for its shareholders. In Miller's retelling, we encounter a story of a collusion undertaken to produce a case with no real adversaries, thus contributing to business law a synthetic story in a case brought to remove a cloud in New Jersey over corporate charter authority and, to our symposium, a making-law story about the production of narrative in the adversary process.

In "Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles,"⁸ Lyman Johnson elaborates the familiar story of the Disney litigation. At the obvious level, a company's directors made serious mistakes, but such mistakes eventually are held by the Delaware courts (in mul-

6. Geoffrey Miller, *Narrative and Truth in Judicial Opinions: Corporate Charitable Giving Cases*, 2009 MICH. ST. L. REV. 831 (2009).

7. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919); *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581 (N.J. 1953); *Shlensky v. Wrigley*, 237 N.E.2d 776 (Ill. App. Ct. 1968).

8. Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 MICH. ST. L. REV. 847 (2009).

tiple litigations spanning many years) not to represent a breach of the board's duties to shareholders. But Lyman also tells a more worldly tale, in which courts not only protect directors from shareholder suits through expansive readings of the business judgment rule, but also attempt to shame boards into better behavior. Miller and Johnson both focus on strategies used by courts to create an image of the corporation and invite us to contemplate how well these judicial strategies work.

The reader will have to judge whether such stories are satisfying. "No Imagination" did not claim that corporation law was completely without narrative, but that the narratives were inadequate, raising the question, "inadequate for whom?" The skill with which Miller and Johnson rescue the embedded stories about business law is only discernible to lawyers and other adepts. Indeed, in retelling widely told tales, Miller and Johnson perforce argue that the accounts usually received by experts are not expert enough, under the motto "you know these cases, but what these corporate law tales *really* mean is _____." Stepping back, if one has to be a corporate law professor, or a lawyer in the trenches, to follow the revised story and so to "get" corporate law, and by extension, much of capitalism, then can it be said that corporate law is sufficiently well articulated to be of service to its broader publics?

Interestingly, the fact that corporate law is articulated in some fashion, involving the telling of *some* narrative, however arcane, is not seriously up for grabs. As narrative theorist Porter Abbott relates in "Law, Agency, and Unnarratable Events,"⁹ we cannot help but tell stories; telling stories is something that humans just do. Law addresses aspects of life that are always already narrated. There is even a debate, that need not be resolved here, over whether narrative is the exclusive way to make meaning out of jumbled events. For present purposes it suffices to note that we in fact employ narrative all the time, and cannot imagine *not* narrating those conflicted social jumbles that concern the law. That said, our narrations have a distressing tendency to be cartoonish, too simple minded. The interactions of people, like other emergent phenomena, are radically difficult to model, and so our stories are almost always significantly wrong—a well-established problem in criminal law (Abbot's examples are from criminal law), which doctrinally relies on accounts of the world substantially at variance from that of psychology.

"Narrative" may be required, perhaps even unavoidable, if we are to have a serious understanding of business life, and hence our commercial society, but it is hardly assured that our common understanding will be improved if only we adopt narrative approaches. (In "No Imagination" Mae

9. H. Porter Abbott, *Law, Agency, and Unnarratable Events*, 2009 MICH. ST. L. REV. 875 (2009).

insisted that she was not advocating some sort of “personal stories” approach to corporate law.) In “Essay: Literature and Business: Hostility and Dullness,”¹⁰ James Seaton notes that the antagonism between literature and politics (bracketing certain difficulties, including political economy) goes back at least to Plato. Moreover, the dominant literary traditions over the last several centuries have been openly hostile to capitalism. While there are exceptions, e.g., Willa Cather, the exceptions hardly dwell on the details of business life. One can read a great deal of Cather without understanding much about business.¹¹ This is not to say that literature is right and business is wrong; Seaton argues, pace Lionel Trilling, that literature is a partial discourse, and its claims, however beautiful, must not be taken at face value. (It bears remembering that Plato, remembered for condemning literature, uses a literary form, and legend has it, wanted to be a tragedian—when he talked about lies, he knew exactly what he meant.)

In a philosophically similar vein, Donald Langevoort has for years discussed advances in behavioral economics that cast doubt on the orthodox understandings of corporate behavior, and might be expected to undermine the classic tales in the chestnuts taught to every law student, and, reduced to blackletter doctrines, tested on bar exams. In “The SEC and the Madoff Scandal: Three Narratives in Search of a Story,”¹² Langevoort discusses a succession of simple stories in which Bernie Madoff eludes the SEC, stories which cannot, in the nature of things, be very accurate, but which nonetheless may be politically powerful. Out of these partial explanations, Langevoort synthesizes a far more sophisticated, and probably more accurate, account—which is almost certainly politically irrelevant by comparison with simple accounts that command ready consumers.

Langevoort, like several symposium participants, responds to Mae’s challenge by telling stories set in the context of the corporation, and of the laws informing corporate activities. In such stories, neither the institution nor corporation law in general plays the role of (anti)hero. Instead, the story is about people who happen to be situated within corporations, subject to corporate and related laws. So, for example, in “The Personal is International: Sexual Harassment Narratives and the Corporation,”¹³ Angel Kwolek-Folland discusses different ways of understanding workplace sexual

10. James Seaton, *Essay: Literature and Business: Hostility and Dullness*, 2009 MICH. ST. L. REV. 885 (2009).

11. Jennifer Schuessler, *Essay: Take This Job and Write It*, N.Y. TIMES, Sunday Book Review, Mar. 11, 2010, available at <http://www.nytimes.com/2010/03/14/books/review/Schuessler-t.html> (discussing the call for fiction writers to write about work).

12. Donald C. Langevoort, *The SEC and the Madoff Scandal: Three Narratives in Search of a Story*, 2009 MICH. ST. L. REV. 899 (2009).

13. Angel Kwolek-Folland, *The Personal is International: Sexual Harassment Narratives and the Corporation*, 2009 MICH. ST. L. REV. 915 (2009).

harassment. Despite similar fact patterns, and the fact that the corporate workplaces are often transnational in scope (or are at least understood as “modern,” i.e., on a transnational model), sexual harassment is narrated differently in different countries, and different understandings of the offense emerge. While the corporation is a form for organizing and wielding power, and, while sexual harassment is often said to be about power, the conceptual link between corporate law and sexual harassment in the corporate setting is weak. Harassment, a legal construct intended to check power, happens in a setting that is also a legal construct about power, yet seems largely a separate matter. Corporation law, in short, just doesn’t seem to matter very much.

In “Corporate Theory and the Role of Narrative,”¹⁴ Jeffrey Nesteruk compares different versions of the AIG scandal. As with Langevoort and Kwolek-Folland, a few points are clear about the role of narratives in AIG. First, a story will be told; some kind of narrative is unavoidable. The event is too important to pass without some explanation, some account of “how did this happen?” Second, complex facts lend themselves to more than one telling. Third, telling the story in one way or another tends to place the specific corporation, AIG, and the institution of the corporation itself, in a different light. So, for example, depending on how the company’s failure is recounted, AIG may look rapacious because that is the nature of corporations, especially ones driven by quarterly earning statements in a permissive regulatory environment. Or AIG may look bumbling because that is the nature of collective institutions and the human condition. Thus, in stories like Langevoort’s, Kwolek-Folland’s, and Nesteruk’s, narratives encourage us to understand the corporation obliquely, much as *Huckleberry Finn* tells us about the Mississippi.

In “Evil Has a New Name (and a New Narrative): Bernard Madoff,”¹⁵ Christine Hurt describes the transmutation of corporate-based stories of malfeasance from their background location within a larger complexity involving investment, corporate governance, and finance into a foreground placement featuring simple accounts of fraud and deep evil. Prosecutors select them for their intuitive appeal to juries, victims recite them to ready listeners, and the popular press purveys them as horror stories. Bernie Madoff becomes a salient story not because he represents a useful microcosm of financial elites in our time, but because he triggers a contemporary anxiety about impoverishment in retirement. The sideshow, she believes, has become the main attraction.

14. Jeffrey Nesteruk, *Corporate Theory and the Role of Narrative*, 2009 MICH. ST. L. REV. 933 (2009).

15. Christine Hurt, *Evil Has a New Name (and a New Narrative): Bernard Madoff*, 2009 MICH. ST. L. REV. 947 (2009).

Other symposium participants used exogenous narratives—stories ostensibly about something else—to deepen our understanding of corporation law. For example, in “Nonprofits and Narrative: Piers Plowman, Anthony Trollope, and Charities Law,”¹⁶ Jill Horwitz discusses Piers Plowman and the roots of nonprofit law. Horwitz argues that the understanding of charity that animates nonprofit law has been developed in, and can be understood through, literature. Thus, whether or not the Statute of Charitable Uses should be understood as derived from Piers Plowman, we can understand both the legal and the literary text better by thinking about them vis-à-vis one another. Somewhat similarly, in “Martha Stewart and the Forbidden Fruit: A New Story of Eve,”¹⁷ Joan Heminway uses the Biblical story of Eve’s “misappropriation” of information to illuminate Martha Stewart’s insider trading case. Such arguments suggest that, quite apart from the analogical understanding of law that we are supposed to learn from the study of cases, we might imagine an analogical understanding of corporate life—that is, we understand life in corporations not in independent fashion (requiring narrative articulation, a story of “the corporation”), but within a broader web of narrative understandings.

In “Essay: Telling Stories of Shareholder Supremacy,”¹⁸ Daniel Greenwood makes this notion—of corporate law animated by cultural narratives exogenous to the law itself—much more explicit. He argues that corporate law, standing alone, cannot work. As suggested by Horwitz and Heminway, corporate law is underdetermined (Mae’s point), and therefore requires additional content in order to function. So, for example, as a matter of positive law, shareholders are effectively powerless. In order to invest, shareholders have to believe, despite considerable legal evidence to the contrary, that they are really the owners of the company, and are therefore due the profits of the business. By the same token, directors have to believe that they owe duties to shareholders, and should occasionally declare a dividend . . . and, cases like Disney aside, by and large this works pretty well. But as Disney demonstrates, it is not law—rules one can get enforced in court—that makes the shareholder-centered corporation work. Greenwood in effect concedes the point that corporation law has little real narrative of its own, i.e., the legal account of the corporation is simply not enough to create the functional institutions we know as corporations. Instead of positive law backed by judicial enforcement, Greenwood argues, corporation law in

16. Jill Horwitz, *Nonprofits and Narrative: Piers Plowman, Anthony Trollope, and Charities Law*, 2009 MICH. ST. L. REV. 989 (2009).

17. Joan MacLeod Heminway, *Martha Stewart and the Forbidden Fruit: A New Story of Eve*, 2009 MICH. ST. L. REV. 1017 (2009).

18. Daniel J.H. Greenwood, *Essay: Telling Stories of Shareholder Supremacy*, 2009 MICH. ST. L. REV. 1049 (2009).

practice relies on mostly tacit cultural understandings in order to generate the consensus that such institutions require to do business.

If corporation law is only understandable within a cultural context, then law professors should welcome—and study—the recent examinations of finance by cultural anthropologists, such as Karen Ho, Douglas Holmes, Bill Maurer, Annelise Riles, Gillian Tett, Caitlin Zaloom, and others.¹⁹ (Indeed Frank Partnoy’s first book, which in the Malinowskian tradition might have been titled *Life Among the Derivatives Traders*, can be read as amateur ethnography rather than, as is usual, sophisticated memoir cum expose.²⁰) At another level, the refunctioning of the ethnographic encounter to account for the collective imaginary through which corporations function—toward which contributions of Horwitz, Heminway, and Greenwood point—suggests that law, as a discipline, might reimagine its own intellectual domain.²¹ Conversely, law has much to offer ethnography: nowhere else are the commitments of a culture (ours) so forcibly if not always clearly stated.

One should not, however, become too excited about the possibilities of working with ethnographers to think through the culture of finance—the legal academy has had such multidisciplinary opportunities before, with generally disappointing results.²² As no less an eminence than Coase noted, and the recent financial crisis conclusively demonstrated, even the most successful such effort, the transaction-cost account of the firm, has been less evidence-based than it might have been.²³ Despite the vogue for multiple degrees in the legal academy, lawyers have real trouble taking other disciplines seriously, and vice versa.

So we must try try again. From professors of English like Philippe Carrard, we law professors might learn to attend more carefully to the conventions of expression that inform our understandings of finance. In “Essay: When Wall Street Sighs: Narratives of the Market and Personification,”²⁴ Carrard analyzes the way that AP writers personify Wall Street, the market, and individual companies. Business life may have a dearth of sustained narratives, but it is positively teeming with characters. Many things,

19. See, e.g., KAREN HO, *LIQUIDATED: AN ETHNOGRAPHY OF WALL STREET* (2009).

20. FRANK PARTNOY, *F.I.A.S.C.O.: BLOOD IN THE WATER ON WALL STREET* (1997).

21. See, e.g., DAVID A. WESTBROOK, *NAVIGATORS OF THE CONTEMPORARY: WHY ETHNOGRAPHY MATTERS* (2008).

22. See JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM & EMPIRICAL SOCIAL SCIENCE* 245-48 (1995).

23. R. H. Coase, *The Nature of the Firm: Influence, in THE NATURE OF THE FIRM: ORIGINS, EVOLUTION, AND DEVELOPMENT* 73 (Oliver E. Williamson & Sidney G. Winter eds., 1993) (discussing the need for empirical work to “enlighten us about the real rather than an imaginary world” in the study of the firm).

24. Philippe Carrard, *Essay: When Wall Street Sighs: Narratives of the Market and Personification*, 2009 MICH. ST. L. REV. 1083 (2009).

like “Wall Street,” “the market,” and most ubiquitously companies, which are not people, are generally thought about and discussed as if they were. Finance is animistic. (This point goes much deeper than Carrard takes it here: the legal instruments at the heart of financial markets, almost all of which are fundamentally contracts, rely on such personifications to function at all.)

In “Narrative, Myth, and Morality in Corporate Legal Theory,”²⁵ Thomas Joo maintains that “grand narratives”—what do we mean by, expect from, “the corporation”?—shift over time and imply entire political economies. Should we understand our associations as a delegation of state power, the social contract once removed? Or is the corporation itself a replication of the social contract, the voluntary creation of a legal order? Much of the perennial argument among scholars and others over “the corporation” can be reduced to contests over the character of these somewhat inchoate imaginaries.

By this point, however, the republican complaint against corporate law with which we began is made with a vengeance: what is the chance for Enlightened rationality if corporate law is a rather shadowy intellectual game played on a hardly articulated field, its content imported from somewhere else (but where?), its purposes obscure? As the Supreme Court has recently reinforced in its *Citizens United* decision,²⁶ such questions are not merely intellectual. How we imagine the corporation—what role we give it in our society—importantly structures how we conduct politics. In the absence of a sustaining vision of the corporation, we lose some part of our collective access to a large narrative of the nation.

Three symposium participants presumed that corporate law was constructed through less than enlightened processes, and examined ways through which corporate meanings might be constructed: theater, film, and history.

In “The Drama of Corporate Law: Narrator Between Citizen, State, and Corporation,”²⁷ Larry Catá Backer skillfully dissects my (Westbrook’s) introduction to corporation law, *Between Citizen and State*, which accepts what strikes Mae as a noteworthy void, the fact that corporation law is radically underdetermined. But, as Backer demonstrates, that’s not just a bug, that’s also a feature: the corporation is best understood as a framework for organizing social activity. In theatrical terms, corporation law is a genre,

25. Thomas W. Joo, *Narrative, Myth, and Morality in Corporate Legal Theory*, 2009 MICH. ST. L. REV. 1091 (2009).

26. *Citizens United v. FEC*, 558 U.S. 50 (2010).

27. Larry Catá Backer, *The Drama of Corporate Law: Narrator Between Citizen, State, and Corporation*, 2009 MICH. ST. L. REV. 1111 (2009) (reviewing DAVID A. (BERT) WESTBROOK, *BETWEEN CITIZEN AND STATE: AN INTRODUCTION TO THE CORPORATION* (Boulder, CO: Paradigm Press 2007)).

with stock characters and generally understood “rules.” Specific content—this or that deal, this or that case, and our political judgments about whether the law is working here and now—is necessarily dependent on particularities, and often reflects social realities that are unarticulated in corporate law strictly speaking, as virtually every participant noted in one way or another. From a conservative stance (which *Between Citizen and State* suggests is necessarily the real stance of the professoriate), this separation between frame and content, corporate law and individual transactions, is not too troubling. The questions that we care about rarely concern “theater” in the abstract, but instead concern how “this play” is performed. Backer points out how complacent this stance is: a society’s adoption of a given genre says things (not necessarily nice things) about the society. By way of illustration and provocation, Backer shows how much the same questions, and even institutional forms, that structure corporation law can be found in illegal organizations like the Italian Mafia and the Japanese Yakuza.

In “How Movies Created the Financial Crisis,”²⁸ Larry Ribstein argues that, in a media soaked world, corporation law is essentially background information about a socially important character. Corporations matter, and most people are at least dimly aware that they are legalistic creatures. What corporation law is not is a socially authoritative text, for the simple reasons that society does not know and does not care where the Model Business Corporation Act differs from Delaware law. By extension, corporate law scholars, or even judges, are deluding themselves if they think they are somehow writing the signification of the corporation in our society. That process of cultural writing happens elsewhere, Hollywood preeminently. Hollywood, however, has its own essentially romantic narratives, in which appealing protagonists must overcome difficulties to win comely mates and our affections. In a tradition going back at least to Rousseau, society itself is the obstacle to individual happiness, and the role of the artist is to oppose (oppressive) social mores. In a commercial society, which places corporations in the role of villain, the duty of the filmmaker is to expose corporate villainy. Hollywood thus has an almost structural suspicion of corporations. Rather than an adequately articulated, and valued, part of a well functioning social order, the corporation, and by extension corporation law, is slandered, even demonized.

As an aside, one might presume that the content of corporate law, which is after all about the structure of a business organization, might come from economics, which is concerned with interactions among marketplace actors. Indeed, one way to understand the success of “law and economics” approaches to corporation law over the last decades is that economics

28. Larry E. Ribstein, *How Movies Created the Financial Crisis*, 2009 MICH. ST. L. REV. 1171 (2009).

seemed to allow legal scholars to more finely articulate—or to characterize, to use a dramatic word—the players on the corporate stage, and hence their supposed or desired relations. Economics promised more precise descriptions, and hence more thoughtful prescriptions. Unfortunately, much of the economics that law professors so enthusiastically adopted has proven to be much too simple, and the question for behavioral economics is whether we can amend our psychological imagination of corporate actors in some serious way.

Unfortunately, although it would be an advance, substantial improvement of our psychological understanding of business actors would hardly resolve corporation law as such. To what extent would we ever be justified in grounding an institutional structure on an understanding of individual actors? To what extent could we ever hope to say, because we are like this, our business associations must be structured in this way? More darkly, such arguments, essentially arguments from nature, tend to provide bureaucrats (and their apologists in the academy) with rationalizations for the exercise of power without the bother of taking personal responsibility, so that it can be said, anonymously of course, that “it is required by the order of things” rather than “we have decided and the faults are ours.” All of which suggests that if legal scholars wish to engage how we as a society have made and are making sense out of business life we should turn toward history, which is not least the study of how power was in fact exercised, by particular people in certain times and places.²⁹

David Skeel provides the turn to history in a legal/business setting, the bankruptcy court, that demands an explicit attempt to make sense out of business life. In “Competing Narratives in Corporate Bankruptcy: Debtor in Control vs. No Time to Spare,”³⁰ Skeel considers the evolution of social presumptions about firms, creditors, and the role of the law in reorganization or resolution of insolvent operations. Bankruptcy law, Skeel argues, requires a narrative understanding so that the different actors have some sense of what to do in a situation that is, by definition, un-looked for if perhaps not entirely unanticipated. Bankruptcy law sets forth scripts, or to switch metaphors, provides charts, that can be used to navigate the institutional crisis. Narrative is not everything, but it is the “vessel,” in Skeel’s phrase, that allows bankruptcy proceedings to move forward. In his book *The Match King*,³¹ Frank Partnoy also takes a historical approach to under-

29. For a discussion of why the reconstruction of cultural anthropology to confront the present situation in finance and elsewhere should be significant to lawyers and others, see generally WESTBROOK, *supra* note 21.

30. David A. Skeel, Jr., *Competing Narratives in Corporate Bankruptcy: Debtor in Control vs. No Time to Spare*, 2009 MICH. ST. L. REV. 1187 (2009).

31. FRANK PARTNOY, *THE MATCH KING: IVAR KREUGER, THE FINANCIAL GENIUS BEHIND A CENTURY OF WALL STREET SCANDALS* (2009).

standing our markets, especially securities markets centered in New York but tenuously committed to investments everywhere. *The Match King* is about the strange and again highly relevant life of Ivar Kreuger, a financier of the twenties and thirties who ran a confidence scheme of vast proportions in the sovereign debt and equity markets. After his death in 1932 of a bullet wound (still unresolved), the Kreuger scandal was a major impetus behind the passage of the securities laws of the 1930s.

In “*The Match King*, Chapter 9: The Author’s Cut,”³² Partnoy considers some of the writing, and the reasons for the writing, of his book. First, and rather straightforwardly, Kreuger was important in financial history. Some of the weaknesses he exploited explain much of the contemporary structure of market regulation. Other weaknesses, for example involving over-the-counter obligations held by banks, still exist today, in often surprisingly similar form. The second point, however, falls hard upon the first: Kreuger was fairly quickly, and almost completely, forgotten, so that today, even financially sophisticated people have no idea who he was. (Indeed, discovering that he did not know somebody so significant within his own field inspired Partnoy to (re)discover Kreuger.) But more than historical ignorance is at issue here: we have entered a financial crisis with many similarities to the Depression. As a society, and worse, the community of financial market regulators, we do not appear to have learned that much about the dangers entailed in tightly integrated financial markets. And so forgetfulness of history does carry a real risk of condemnation to repetition.

In response, Partnoy falls back on, what else, narrative. He tells a very intriguing story, and tells it very well. Much of Partnoy’s article is devoted to a breezy yet fairly technical discussion of rhetoric—how Partnoy intends to make Kreuger significant, relevant, and memorable to his readers. Nonetheless, Partnoy is driven to ask whether he can achieve his ulterior aims. After all, this is not the first book on Kreuger. And much of finance is—in those details where devils live—boring. It is simply hard to remember much finance. Besides, the riskier corners of financial markets tend to be youthful games, played by people who are by selection and necessity very bright, generally of a mathematical bent, energetic, fanatical, radically self-centered yet deeply conformist, and sure of themselves to the point of arrogance. Much the same could be said of leverage cycles more generally: recent success breeds overconfidence in those too young to know anything else, and who tend to misunderstand their good luck as mastery. (The reader is invited to ponder the extent to which these characterizations correlate with gender as well as age.) Learning from experience plays a negligible part in this world, and learning from history, erudition, is virtually un-

32. Frank Partnoy, *The Match King*, Chapter 9: *The Author’s Cut*, 2009 MICH. ST. L. REV. 1207 (2009).

known. As Charles Kindleberger so masterfully demonstrated, finance is repetitive to the point of ennui.

Such ennui is of course dangerous. Oscar Wilde said that “It is only by not paying one’s bills that one can hope to live in the memory of the commercial classes.” Kreuger did not pay his bills on a grand scale, and the generation he bilked did not forget him, but their children and certainly their children’s children were more than willing to invest with Madoff. It appears that we all get the Ponzi we deserve. And we have returned to where Mae began—corporation law, however defined, seems incapable of learning much, for long. Business stories don’t really compete all that well for a lasting spot in our brains.

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If we understand corporate law as a setting for the telling of stories, a setting that presents itself as at least well established and perhaps even natural, then surely we law teachers have a central role to play as directors, even if we did not write the script. The narrations that corporate law, in the classroom, offer to students are inevitably also stories (and somewhat complimentary ones) about the narrators, the teachers and their models, the judges. Thus, as suggested above, teaching (and its analogue, parenting) are fundamentally conservative enterprises. And it cannot be surprising that one of the classroom’s messages is respect for the teachers as authoritative representatives of the culture we are trying to inculcate.

To be clear: making the interests of the professoriate explicit is not delegitimizing the professoriate. Of course we, like good parents, teach what we feel to be important. Which raises the mystery of corporate law, on a new, more personal, and existentially more serious, level: what do we feel important enough to transmit? What do we know that’s really worth passing on? As the symposium’s papers variously demonstrate, in the moment before lawyerly arguments begin, we could ask corporate law scholars to consider more deeply the imaginations within law and business that render arguments compelling and teaching needful. It is of course a provocation to say that corporation law has *no* imagination—the law literally cannot function without an imagination. The question is why do we settle on this imagination, as opposed to some other?

Regardless of the substance of our answers, as intellectuals, with democratic commitments, we might hope that our answers are well articulated, that our imaginations of corporate law are available to ourselves and to others. In that case, we might hope to use corporate law to come to better terms with our lives in global capitalism, that is, with an incredibly alienating aspect of contemporary life. That enterprise, however, would require a much more literary sensibility than the law of business associations has heretofore had. This symposium has taken quite a few steps in the right direction.