

## THE CORPORATION AS GOD

Corporate scholarship is dominated by the law and economics movement.<sup>1</sup> This provides a useful framework for understanding the *economic* functions of the modern corporation, but it has precious little to say about the *social* and *cultural* meaning of the corporation. Just as nuclear physicists can explain the workings of an atomic bomb but not what it means for the human race, the proponents of law and economics can describe the economics of the corporation but not its broader meaning within our culture. To fully understand the corporation we must pass beyond economics to the fields of anthropology and cultural criticism, viewing the corporation in the same way that we would view other cultural institutions and practices. In other words, we must extend “the cultural study of law” to corporations.<sup>2</sup>

From the perspective of cultural theory, I will argue that the modern corporation is fundamentally a religious and mythological entity – to put it bluntly, the corporation is a secular God and corporate law is a secular religion. This means that we must take seriously (and then deconstruct) Henry Ford’s statement that, “There is something *sacred* about a big business,”<sup>3</sup> and we must see the hidden truth in Nehru’s famous quip that, “Dams are the *temples* of modern

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<sup>1</sup> See, e.g., Stephen Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 857 (1997)(“It is virtually impossible to find serious corporate law scholarship that is not informed by economic analysis.”).

<sup>2</sup> PAUL W. KAHN, *THE CULTURAL STUDY OF LAW* 139 (1999)(“A cultural approach sees that all of law’s texts, including those of the legal scholar, are works of fiction”).

<sup>3</sup> See C. WRIGHT MILLS, *WHITE COLLAR* 107 (1951)(quoting Ford)(emphasis added).

India.”<sup>4</sup> Although the business world is typically thought to be a realm of hard-headed pragmatism and real-world practicality, it rests upon fundamentally religious and mythological notions. At the core of both corporate law and religion is an invisible and hard-to-define entity (‘God,’ or ‘the corporation’) which miraculously becomes ‘in-corporated’ and ‘made flesh.’<sup>5</sup> Just as priests and rabbis spend their lives divining God’s will, corporate directors and officers dedicate themselves to serving the ‘best interests of the corporation.’ We may ridicule the so-called pagan who carves a deity from a chunk of wood and then imbues it with magical powers, yet lawyers do much the same thing when they file papers with the secretary of state to create an invisible and artificial entity whom they serve.<sup>6</sup> And no one can deny that the cult of worship surrounding business leaders (such as Donald Trump) has an unmistakably religious undertone. The connection between business and religion calls out for an explanation.

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<sup>4</sup> See ARUNDATHI ROY, *THE COST OF LIVING* 8 (1999)(quoting Nehru)(emphasis added).

<sup>5</sup> The act of ‘incorporation’ (which literally means ‘to become a body’) has obvious parallels with the Biblical notion of ‘incantatio’ -- God’s word being made flesh in the body of Jesus Christ. See *Book of John 1:14*, “And the Word was made flesh, and dwelt among us . . . .”

<sup>6</sup> Organizing a corporation has much in common with a conjurer’s trick: magic words must be submitted to the State, which then issues a certificate of incorporation under the State’s seal (much like a birth certificate), followed by an organizational meeting to create the rules of the corporation and to appoint directors and officers. Out of this sequence arises an “artificial being, invisible, intangible, and existing only in contemplation of law.” See *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 89, 107 S. Ct. 1637, 95 L. Ed. 2d 67 (1987), quoting *Trustees of Dartmouth Coll. v. Woodward*, 4 Wheat. 518, 636 (1819)(Marshall, J.).

In what follows I want to draw a parallel between the corporation and God, and then analyze corporate law as a system of mythology. For reasons that will become clear, I tend to follow the critical theory approach (with roots in Marxism) which sees mythology as an attempt to resolve underlying contradictions in a culture and to legitimate systemic injustices that would otherwise seem objectionable. I will argue that corporate law serves these two purposes (mediation and legitimation) by papering over the smoldering class contradictions in American culture and by lending a veneer of legitimacy to the structural inequalities of the marketplace. The corporation is essentially a magical and mysterious entity that smooths over the contradictions in our culture and makes inequities seem natural.

### **The Corporation as God**

There is an odd parallel between the modern corporation and the God of monotheism in that both are ephemeral beings that resist definition. The National Catholic Almanac defines God as,

almighty, eternal, holy, immortal, immense, immutable,  
incomprehensible, ineffable, infinite, invisible, just, loving,  
merciful, most high, most wise, omnipotent, omniscient,  
omnipresent, patient, perfect, provident, supreme, true.<sup>7</sup>

In similar language, Justice Marshall once defined the corporation as “an artificial being,

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*See* GEORGE SMITH, *ATHEISM: THE CASE AGAINST GOD* 48 (1989).

invisible, intangible, and existing only in contemplation of law,”<sup>8</sup> to which we would now add ‘capable of perpetual existence,’ ‘with potentially unlimited size,’ ‘capable of residing anywhere.’ Indeed, corporations are noteworthy for the *absence* of qualities; the only persistent quality of the modern corporation is limited liability, that is, the absence of a quality that would otherwise apply to an actual person.

What is this abstract ‘corporation’ that magically comes into being when paperwork is filed with the secretary of state? No one seems to know. In fact, the struggle to define the corporation is a problem dating back to the dawn of the modern corporation. Writing in the 1920s, professor Maurice Wormser (author of *Frankenstein Incorporated*, a cautionary analysis of the modern corporation) said, “Just what the corporation is, no two legal authorities are in accord.”<sup>9</sup> A typical treatise from the dawn of the century gave an unwieldy definition running eighty words.<sup>10</sup> Law dictionaries simply define it as an entity distinct from shareholders without saying precisely what this means.<sup>11</sup> The courts have referred to the corporation as a “robot,”<sup>12</sup> a

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<sup>8</sup> Trustees of Dartmouth Coll. v. Woodward, 4 Wheat. (U.S.) 518, 636 (1819).

<sup>9</sup> I. MAURICE WORMSER, DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATION PROBLEMS 3 (1927).

<sup>10</sup> CHARLES ELLIOTT, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS 2 (1911).

<sup>11</sup> See BLACK’S LAW DICTIONARY 365 (2004)(“An entity having authority under law to act as a single person distinct from the shareholders who own it; a group or succession of persons established in accord with legal rules . . .”).

<sup>12</sup> Wrigley v. Nottingham, 141 S.E. 2d 859, 861 (Ga. App. 1965), *rev’d on other grounds*, 144 S.E. 2d 749 (Ga. 1965).

“set of contractual relations and entitlements,”<sup>13</sup> a “fictional person,”<sup>14</sup> and an “incorporeal, artificial creature of the law.”<sup>15</sup> Most contemporary corporate codes resort to circular definitions: for example, the Ohio corporate statutes define a corporation as “a corporation for profit formed under the laws of this state.”<sup>16</sup> In other words, ‘a corporation is a corporation is a corporation.’

This is the same problem that theologians face. If they list an affirmative quality as an attribute of God (say, patience) then it might contradict a different quality that they would also like to include (say, swiftness). Philosopher George Smith explains the dilemma:

On the one hand they favor a notion of a supernatural being, a being without restrictions, a being of infinite nature. On the other hand, they want a god with characteristics, a god that can be identified. But this enterprise is doomed from the start. An unlimited attribute is a contradiction in terms.<sup>17</sup>

In other words, theologians want God to be both infinite and finite, human and divine, forgiving

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<sup>13</sup> Loving & Assocs. v. Carothers, 619 N.W.2d 782, 785 (Minn. App. 2000).

<sup>14</sup> Martinez v. Posner, Martinez, & Padgett, 385 So. 2d 525, 528 (La. App. 1980). On the question of personhood, it is interesting that Holmes once pointed out that “A ship is not a person. It cannot do a wrong or make a contract,” Tyler v. Judges of Court of Registration, 175 Mass. 71, 77 (1900), and yet while we take this point as axiomatic, it is perhaps just as odd to assert that an *incorporeal* thing is a person.

<sup>15</sup> Smithfield Voters for Responsible Dev. v. LaGreca, 755 A.2d 126, 129 (R.I. 2000).

<sup>16</sup> OHIO REV. CODE ANN. 1701.01(A)(West 1994).

<sup>17</sup> SMITH, *supra* note 7, at 49.

yet just, merciful yet vengeful, permissive of human freedom yet capable of divine intervention when necessary. All of these attributes are stuffed into the concept of ‘God’ to the point where it becomes a ball of contradictions. When the question arises of how a single being can have so many contradictory attributes, the matter simply gets pushed further back by asserting that it is all a giant mystery. The problem, again, is that we place so many contradictory demands on God that we render the entire concept contradictory. The solution is to create a catch-all, vague concept that subsumes all attributes. In the end we are back in the book of *Exodus* where God tells Moses, “I AM WHO I AM . . . Thus you will tell the Israelites, I AM has sent me to you.”<sup>18</sup> This is precisely what the Model Business Corporation Act provides when it defines a corporation as “a corporation for profit, which is not a foreign corporation, incorporated under or subject to the provisions of this Act.”<sup>19</sup>

The bottom line is that no one knows for certain what a corporation is. This would not be a problem except for the fact that most controversies in corporate law ultimately turn on what type of being the corporation is. For example, is it a democracy? A member of the community? A profit-driven machine? A rights-bearer? A taxpayer? An economic relation? Or is it simply nothing?

Just as theologians cannot agree on whether God exists in physical space or is merely a concept, legal scholars cannot agree on whether a corporation is an entity or a nexus of contracts.<sup>20</sup> On the one hand, corporations own land, hire workers, file lawsuits, and so forth, so

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<sup>18</sup> See THE NEW OXFORD ANNOTATED BIBLE 72-3 (1991)(*Exodus* 3:14).

<sup>19</sup> See REV. MODEL BUS. CORP. ACT 1.40(4).

<sup>20</sup> See the discussion in STEPHEN BAINBRIDGE, CORPORATION LAW AND ECONOMICS 199

they would seem to be entities; and indeed the corporate statutes refer to the corporation as a “body corporate,” implying the existence of an actual entity.<sup>21</sup> On the other hand, there is no specific thing that can be isolated as ‘the corporation’ – if one goes to a corporate headquarters one sees only people milling about, which suggests that talk about an entity is tantamount to speaking of a ghost in the machine. For this reason, legal scholars nowadays tend to view the corporation as a nexus of contracts among shareholders, managers, bondholders, employees and suppliers.<sup>22</sup> Courts and treatises are equally divided on the entity/nexus question: some insist that the corporation has a “real existence [but] no physical existence,”<sup>23</sup> that it is an “artificial being”<sup>24</sup> that exists “only on paper.”<sup>25</sup> Others say that it possesses “real individuality”<sup>26</sup> and is a “person” but not an “individual” under certain statutes.<sup>27</sup>

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(2002)(“The dominant model of the corporation in legal scholarship is the so-called nexus of contracts theory”).

<sup>21</sup> DEL. GEN. CORP. LAW, sec. 106 (2003).

<sup>22</sup> See HENRY BUTLER AND LARRY RIBSTEIN, *THE CORPORATION AND THE CONSTITUTION* 4 (1995)(“Contractarians view the corporation as a set of private contractual relationships among providers of capital and services.”).

<sup>23</sup> See 1 FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, sec. 7 at 414 (1999).

<sup>24</sup> *Doughty v. CSX Transp. Inc.*, 905 P.2d 106, 113 (Kan. 1995).

<sup>25</sup> *In Re Estate of Steinberg*, 274 N.Y.S. 914, 919 (Kings County 1934).

<sup>26</sup> *Noble v. Farmers Union Trading Co.*, 216 P.2d 925, 927 (Mont. 1950).

<sup>27</sup> *Consol. Rail Corp. v. Gallatin State Bank*, 173 B.R. 146, 147 (N.D. Ill. 1992).

Obviously, questions of corporate ontology cannot be settled *empirically*, that is, we cannot simply look at the modern corporation and decide whether it is a nexus or an entity, since these are not observable features but competing *interpretations* and *models* of the modern corporation. My point is simply that a full century after its emergence, we are still unsure about what the corporation is.

The analogy with God is bolstered by the manner in which the corporation, like God, subsumes contradictory attributes. If we say that the modern corporation is wholly rapacious, we are reminded that a corporation can take charitable actions; if we say that the corporation has no loyalty to the community, we are reminded of that corporations may choose to remain in a community even if it hurts the bottom line; if we say that corporations are private entities, we are reminded that they exist by charter from the government; if we insist that they are taxpaying citizens, we are reminded that they can move offshore to avoid taxation; if we insist that they are persons under the law, we are reminded that they can live forever and cannot be threatened with physical harm or incarceration; if we say that they have the constitutional right to give perks to politicians, we are reminded that they cannot vote.

The puzzles surrounding the modern corporation are magnified by the elasticity of the corporate form. That is, generalizing about corporations can be tricky because they come in so many different forms and can be designed (and managed) in just about any way. Indeed, critics have long complained that corporate law is *trivial* because it permits so much freedom in designing the modern corporation.<sup>28</sup> That is, aside from a few minor requirements – minimum

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<sup>28</sup> See, e.g., Bayless Manning, *The Shareholder's Appraisal Remedy – An Essay for Frank Coker*, 72 YALE L. J. 223, 245 (1962) (“We have nothing left but our great empty corporation statutes –

capital, a registered office in the state, one class of common stock – the remaining terms are left up to the discretion of the incorporators who design the articles of incorporation and the bylaws. For example, the modern corporation can be funded with billions or with a few thousand dollars; it can have fifteen directors or one director (or even zero directors if the shareholders agree); it can have several classes of stocks or it can have a single class of stock; it can have extensive takeover defenses or no defenses whatsoever; it can have a limited purpose or any purpose whatsoever; it can have straight voting or cumulative voting; and so forth.<sup>29</sup> This elasticity is precisely what creates a stalemate in most debates surrounding the American corporation, since the very concept is indeterminate and contradictory.

If I am correct that the modern corporation is an inherently mythical figure, then corporate law is best understood as a mythological narrative concerned with the life of this deity – its birth, organic change, governance and death. Like other areas of law, corporate law is grounded in foundational narratives and myths, or in the words of Robert Cover, “For every constitution there is an epic; for every decalogue a scripture.”<sup>30</sup> Just as the Bible is premised on

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towering skyscrapers of rusted girders, internally welded together and containing nothing but wind.”)

<sup>29</sup> For a full discussion of this point, see Bernard Black, *Is Corporate Law Trivial?*, 84 NW. U. L. REV. 542 (1990)(concluding that freedom to vary the default rules of corporate law effectively renders the default rules trivial).

<sup>30</sup> Robert Cover, *The Supreme Court, 1982 Term: Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 9 (1983). Cover pointed out that myth is the conceptual backdrop and complement to legal doctrine: “No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. . . . A legal tradition is part and parcel of a complex normative world. The tradition

God's existence, corporate law is premised on the existence of an invisible, intangible, immortal being whose "best interests" are to be discerned by a team of directors and officers, much in the same way that priests try to discern God's will.<sup>31</sup> Beyond the mythical figure of the corporation, there are a number of myths at the heart of corporate law. For example, consider the longstanding myth of "corporate democracy," a term used repeatedly by the Delaware courts.<sup>32</sup> A recent study by Professor Bebchuk of Harvard Law School found that corporations are extremely undemocratic in that management's candidates ran unopposed in over 99% of elections.<sup>33</sup> After comparing the rhetoric of corporate democracy with the reality of one-party rule, Bebchuk concluded morosely that, "Although shareholder power to replace directors is

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includes not only a corpus juris, but also a language and a *mythos* – narratives in which the corpus juris is located . . ." *Id.*

<sup>31</sup> See REV. MODEL BUS. CORP. ACT, sec. 8.30(a), cmt. 1 (2002)(mandating that directors act in the best interests of the corporation, and then adding cryptically, "the term 'corporation' is a surrogate for the business enterprise as well as a frame of reference encompassing the shareholder body.")

<sup>32</sup> See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 949 (Del. 1985), quoting *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984)("If the stockholders are displeased with the actions of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out."); *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. 1988)("The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests.").

<sup>33</sup> Lucian Arye Bebchuk, *The Case for Shareholder Access to the Ballot*, 59 BUS. LAW. 43, 46 (2003)(emphasis added); See also JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET* 537 (1995)(management candidates ran unopposed in 99.8% of elections and were elected 99.9% of the time).

supposed to be an important element of our corporate governance system, it is largely a *myth*.”<sup>34</sup>

Bebchuk’s use of the word *myth* is telling. One needn’t look very far to find other myths running through corporate law. For example, Delaware courts have long insisted that a corporation’s articles of incorporation and bylaws constitute a voluntary contract between shareholders and the corporation,<sup>35</sup> even though most shareholders wouldn’t know where to locate these documents and have no idea what they contain. This can be seen as a myth of consensus. Another myth involves the widespread belief that corporations are transparent because they report all material information to the Securities and Exchange Commission. In reality, almost no one can decipher these documents, and even the head of the SEC was unable to comprehend the disclosure documents for mutual funds when federal law required him to invest in mutual funds.<sup>36</sup> This is a myth of transparency. Another cluster of myths surround the ‘annual meeting,’ a term that implies a forum for deliberative discussion between management and shareholders. In reality, these meetings are pre-scripted and mechanical affairs purposely designed to *avoid* meaningful discourse, to avoid any genuine meeting with shareholders.<sup>37</sup>

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<sup>34</sup> Bebhuk, *id.*, at 45 (emphasis added).

<sup>35</sup> Centaur Partners v. Nat’l Intergroup, Inc., 582 A.2d 923, 928 (Del. 1990); Waggoner v. Laster, 581 A.2d 1127, 1134 (Del. 1990).

<sup>36</sup> ARTHUR LEVITT, TAKE ON THE STREET 44 (2003).

<sup>37</sup> See, e.g., Patrick McGeehan, *This Year, More Boards Feel Pressure to Show Up*, N.Y. TIMES, March 31, 2004, at C1 (The chairman of Morgan Stanley didn’t require directors to attend the annual meeting because he was “trying to be efficient” and didn’t want to waste their time).

Finally, the greatest myth of corporate law is that the corporation is a ‘person,’<sup>38</sup> and according to some courts, a person with a particular race,<sup>39</sup> while also remaining invisible, intangible, immortal, and unrestricted as to size or purpose. Upon close examination, then, the hardheaded and sober world of corporate law turns out to be invested and occupied with mythical constructions.

In pointing out these myths, it is not my goal to heap ridicule on corporate law as somehow primitive or groundless. As far as I know, corporate law is no more nor less imbued with myth than any other area of law. Rather, I want to take seriously the notion that some aspects of corporate law are best explained not as the result of *economic* forces, but as the result of *cultural* forces. To do this, I will look at the reigning corporate myths and try to figure out why they exist. What precisely is accomplished by these myths? Who stands to gain from them, and why? Is there any underlying logic or structure to the corporate mythology? And is it even possible – or desirable – to have corporate law without myths?

I approach these questions from the framework of critical theory, especially the work of Marx, Nietzsche, Levi-Strauss, and Barthes, all of whom insist that myths pervade Western culture (and law) despite our tendency to relegate myth to other, primitive cultures and epochs.

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<sup>38</sup> Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394, 6 S. Ct. 1132, 30 L. Ed. 118 (1886) (Supreme Court decision recognizing a corporation as a ‘person’ under the Fourteenth Amendment).

<sup>39</sup> See *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053 (9<sup>th</sup> Cir. 2004) (a minority-owned corporation is a person with standing to sue for race discrimination).

According to these thinkers, myths have two functions – *mediation* and *legitimation*.<sup>40</sup> The first function (mediation) takes place on a very abstract level, where myths are formulated as a conceptual working-through of contradictions that cannot be resolved at the level of material life, so they are resolved on a symbolic level. To use a nonlegal example, the Greek figure of Achilles can be read as a mediation between opposing forces in the Greek worldview such as freedom/fate, life/death, and divine/human: Achilles was half-human and half-nymph, educated by a centaur, and endowed with both human vulnerability and divine invincibility after being dipped in the river Styx which separates this life from the afterlife.<sup>41</sup> The opposition of life/death cannot be mediated in real life (people do not die and return to life) but the myth offers a *symbolic* resolution of the conceptual oppositions by integrating them into a coherent narrative. In the same way, a legal concept such as ‘the corporation’ can function as a mediator between opposing cultural oppositions such as public/private, individual/collective, profit/justice, owners/workers, and so on. The myth is pregnant, as it were, with the underlying contradictions of the culture, or to put it differently, the myth is a mirror into which we gaze to learn about ourselves.

Myth’s second function (legitimation) takes place on a more practical level, where myths naturalize and reify what are essentially contingent regimes of power, thereby disabling criticism. An historical example might be the ‘divine right of kings’ as invoked to support royal prerogative, or the myth that we have reached the ‘end of history’ characterized by liberal

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<sup>40</sup> See Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 209, 218 (1979)(referring to the mediating and legitimating functions of law).

<sup>41</sup> See, e.g., *The Childhood of Achilles*, in MYTHOLOGY 213 (C. Scott Littleton ed., 2002).

democracy and a free market.<sup>42</sup>

Corporate law can be seen as a vast mythology that serves the functions of mediation and legitimation. In its role as a mediating force, corporate law bridges the chasm between two inconsistent aspects of the corporation – it is both an economic set of relations as well as a social actor. We need the engine of large corporations for our nation to prosper as an industrial powerhouse, and yet we are appalled when these corporations engage in antisocial behavior in search of profits. Corporate law resolves this tension (‘defuses’ would be more accurate) by creating a vague, hollow, catch-all entity of mythical proportions that subsumes these contradictory demands for profit and justice. As an empty signifier, the corporation is all things to all people: it is a frugal profit-maximizer yet it doles out princely salaries to managers; it is ‘publicly-held’ yet has no enforceable obligations to the community; it is a democracy yet it holds uncontested elections; its ‘transparency’ is based on public filings that are indecipherable; it is a taxpaying citizen yet it can move overseas to avoid taxation; it is a person with Constitutional rights yet it cannot vote; it is subject to criminal law yet cannot be put into prison. In short, the corporation is at war with itself; it is a fictional entity and a contested terrain where contradictions of the culture play out. This tension is illustrated by our love-hate attitude toward corporations, for example, in the fact that the largest American corporation (Wal-Mart) is simultaneously the *most admired* and *most hated* company in America.<sup>43</sup>

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<sup>42</sup> FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1993).

<sup>43</sup> See, e.g., Anthony Bianco and Wendy Zellner, *Is Wal-Mart Too Powerful?*, *BUSINESS WEEK*, October 6, 2003, at 100 (“Wal-Mart might be both America’s most admired and most hated company.”); Jerry Useem, *Should We Admire Wal-Mart?*, *FORTUNE MAGAZINE*, March 8, 2004, at 118.

As a force of legitimation, corporate law lays down a thick rhetorical gloss to convey the impression that corporate governance is a realm of procedure, fairness, consensus, and business judgment. The indignant American who is appalled at mass layoffs, overseas sweatshops, insider deals, tax avoidance, toxic products, overzealous lobbying, and mistreatment of workers can find little leverage in the corporate law to combat such practices, and for good reason: prohibiting these behaviors would grind much corporate behavior to a halt. Corporate law is a symbolic gesture, an *apologia*, a simulation, a parallel universe standing above the *realpolitik* of corporate practice, where the behavior that shocks our conscience is christened as ‘legal’ and seemingly accords with our commitments to justice and democracy. Corporate law is an *official story* written by insiders to correspond with *their* notion of what modern capitalism *should* look like. In this way, corporate law ratifies, enables, and sanctifies a corporate system of property holdings which leads to vast inequalities of power and shocking concentrations of capital in a few hands.

Thinking about law as a species of mythology requires that we move beyond the currently dominant framework for understanding corporate law, namely the law and economics movement. The economic approach must be supplemented with an understanding of corporate law as a system of *signs* – we must pay attention to myths, rituals, ceremonies, consecrations, and corporate folklore. Corporate law is not just about dollars and cents but about *meaning*, so we can never fully grasp the corporation by viewing it solely through the lens of economic theory. To make this point, I will begin with a general discussion of myth and its relation to law, and then I will look specifically at the myths of corporate law.

## Myth and its Relation to Law

The English term “myth” derives from the Greek *mythos*, a multivalent term which originally meant ‘the thing spoken,’ ‘story,’ and ‘arrangement of plot.’<sup>44</sup> Over time, the term came to be associated with any fictitious narrative having supernatural overtones, particularly the religious stories surrounding the Greek gods.<sup>45</sup> Current usage of the English term “myth” goes beyond the religious dimension and applies to any widely-held notion to which people cling with religious fervor.<sup>46</sup> In this latter sense, we might speak of the ‘myth’ that social security is an actual fund where our money is held until we retire, or the ‘myth’ of the liberal media.

“Myth” also functions as a derogatory word. This goes back to the Socratic dialogues in

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<sup>44</sup> See PHILLIP STAMBOVSKY, *MYTH AND THE LIMITS OF REASON* 38 (2004).

<sup>45</sup> See “Myth,” *RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY* 1131 (1998).

There is a common grey area between the overlapping concepts of myth, allegory, and legend, and the terms are often used interchangeably. See “Myth,” *THE OXFORD ENGLISH DICTIONARY* 177 (1989).

<sup>46</sup> See “Myth,” *NEW SHORTER OXFORD ENGLISH DICTIONARY* 1874 (Lesley Brown ed., 1993)(“1. A traditional story, either wholly or partially fictitious, providing an explanation for or embodying a popular idea concerning some natural or social phenomenon or some religious belief or ritual; specifically involving supernatural persons, actions, or events . . . 2. A widely-held story (esp. untrue or discredited popular) story or belief; an exaggerated or idealized conception of a person, institution, etc.; a person, institution, etc., widely idealized or misrepresented.; *see also* “Myth,” *NEW AMERICAN HERITAGE DICTIONARY* 1164 (2000)(“A traditional, typically ancient story dealing with supernatural beings, ancestors, or heroes that serves as a fundamental type in the worldview of a people . . . A fiction or half-truth, especially one that forms part of an ideology.”).

which *mythos* is denigrated as an illogical way of explaining events in the world when compared to *logos*, a Greek term that refers to systematic explanations based on reasoning and logic.<sup>47</sup> It is a central tenet of the West that culture is moving (that is, evolving) from *mythos* to *logos*,<sup>48</sup> at least since the Enlightenment.<sup>49</sup>

There is strong disagreement on whether one may characterize myths as ‘true’ or ‘false.’ For example, the creation myth of the Bible is factually false – the earth was not created in seven days – but the truth-value of this Biblical claim is not up for consideration by those who espouse it; they will say that the language is metaphoric, for example. This is what philosopher Alasdair MacIntyre had in mind when he said that, “You cannot refute a myth because as soon as you treat it as refutable, you do not treat it as a myth but as a hypothesis or history.”<sup>50</sup> Along these

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<sup>47</sup> See WILLIAM DOTY, *MYTHOGRAPHY: THE STUDY OF MYTHS AND RITUALS* 463 (2000)(defining *logos* as “The Greek term alongside *mythos* for ‘word’ but after Plato, taken to represent the logical/rational rather than the mythical/expressive.”) The suffix ‘ology’ derives from the word *logos* to denote the systematic and rational study of a given phenomenon: biology, sociology, and so forth.

<sup>48</sup> STAMBOVSKY, *supra* note 44, at 40 (“By Plato’s time, the polar opposition of *mythos* and *logos* was fully realized.”)

<sup>49</sup> MAX HORKHEIMER AND THEODOR ADORNO, *DIALECTIC OF ENLIGHTENMENT* 3 (John Cummings trans., 1991)(“The program of the Enlightenment was the disenchantment of the world; the dissolution of myths and the substitution of knowledge for fancy.”); IMMANUEL KANT, *On the Question: What is Enlightenment?*, in *PERPETUAL PEACE AND OTHER ESSAYS* 41 (Ted Humphrey trans., 1983)(defines enlightenment as man’s emergence from superstition and immature belief systems).

<sup>50</sup> See Alasdair MacIntyre, *Myth*, 5 *THE ENCYCLOPEDIA OF PHILOSOPHY* 434, 435 (Paul

lines, myths are often described as ‘ways of seeing,’ ways of being-in-the- world,<sup>51</sup> or in the words of anthropologist Bronislaw Malinowski, myth “is not an intellectual explanation . . . but a pragmatic charter of primitive faith and moral wisdom.”<sup>52</sup> Under this view myth is not true/false but only living/dead; as a *charter* for other beliefs, it is a criterion for judging other statements but its own truth value is not up for consideration. It functions as what Kelsen called a *grundnorm*: a foundational rule that serves as a criterion for subsidiary rules but which is itself ungrounded in a higher rule.<sup>53</sup> And yet we must also recognize that people are not fated to be dupes to their mythological systems, and that they can switch frameworks and occasionally stand outside their myths, even renounce them, as happens in political and scientific revolutions. Indeed, critical theory is premised on this very possibility.

There is also wide disagreement on whether it is possible to get *beyond* myth, to ground a system (such as law, or ethics, or politics) on pure *logos*. This seems to be the driving idea

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Edwards ed., 1967). In other words, a mere false belief doesn’t rise to the level of myth unless there is also some kind of justificatory or legitimating function tied up with the belief.

<sup>51</sup> LAWRENCE HATAB, MYTH AND PHILOSOPHY: A CONTEST OF TRUTHS 19 (1990)(“A myth is a narrative which discloses a sacred world.”).

<sup>52</sup> BRONISLAW MALINOWSKI, MAGIC, SCIENCE AND RELIGION 202 (1948).

<sup>53</sup> HANS KELSEN, THE GENERAL THEORY OF LAW AND STATE 116-117 (Anders Wedberg trans., 1946)(“It [the basic norm] is valid because it is presupposed to be valid. And it is presupposed to be valid because without this presupposition, no human act could be considered as legal, especially a norm-creating act.”).

behind much of modern jurisprudence.<sup>54</sup> Indeed, the Legal Realist movement of the early Twentieth Century was an attempt to remove the last vestiges of ‘transcendental nonsense’ and place the law on a firm footing of social science. Nowadays, most lawyers and even law professors simply assume that the legal system has been completely denuded of mythology or that the few remaining traces are being eliminated.<sup>55</sup> Perhaps this explains why so little has been written about the connection between law and mythology, although one might argue more cynically that legal scholars are simply ashamed to acknowledge the mythological elements beneath the seeming rigor of legal ‘science.’

Critical theory begins by rejecting the conceit that mythology has been erased from Western culture, by recognizing that we, too, have our myths.<sup>56</sup> As applied to the realm of law,

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<sup>54</sup> See THURMAN ARNOLD, *THE SYMBOLS OF GOVERNMENT* 58 (1962)(“We may define jurisprudence as the shining but unfulfilled dream of a world governed by reason.”).

<sup>55</sup> See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 400 (1986)(accepting the common law trope that law is ‘working itself pure’ over time).

<sup>56</sup> Few people will openly admit that their own fields of study are imbued with myths; instead, myth is often relegated to a distant culture or, alternatively, to one’s opponents. See, e.g., Mickey Z., *My Back Pages*, *ABUSE YOUR ILLUSIONS: THE DISINFORMATION GUIDE TO MEDIA MIRAGES AND ESTABLISHMENT LIES* (Russ Kick ed., 2003)(“Mythology, for most Americans, evokes images of Zeus, Hercules, and Thor; it is something that primitive ancients engaged in before modernity reared its enlightened head. But America is a nation built upon a foundation of myth, and many forms of mythology have taken hold: free markets, Western supremacy, the cult of science and technology, and fundamentalist demagoguery, to name a few.”).

the leading thinker in this area is without doubt Peter Fitzpatrick, author of *The Mythology of Modern Law*, who makes a strong case that myths undergird our legal systems despite rhetoric to the contrary.<sup>57</sup> Fitzpatrick says that the English and American legal systems are riddled with mythologies about such things as the founding of the social order in a social contract, the existence of a unified nation ('we the people'), assumptions about the contours of basic human autonomy, *mens rea*, and the 'reasonable man.' Our founding documents refer to laws of nature, and our courtrooms are riddled with religious iconography, oaths to God, judges in black robes, wigs, and so forth.

For Fitzpatrick, the dominant myth of modern law is precisely the pretense that we lack myths, a pretense that earns wide acceptance because the more outrageous elements of legal mythology have been stripped over time, leaving a series of secularized myths.<sup>58</sup> This notion comes from the work of French philosopher and deconstructionist Jacques Derrida, who argues that mythology survives in modern times as 'white mythology' – the mythology of Western (white) superiority based on the notion that we no longer possess the outrageous myths held by

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<sup>57</sup> PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* ix (1992) ("The very idea of myth typifies 'them' – the savages and ancestors we have left behind.").

<sup>58</sup> *Id.* at ix ("[M]yth is vibrantly operative in modernity. It is not confined to the fitful traces of antiquity nor is it a matter of mythopoetic aspiration. The obvious conundrum, then, is how this presence of myth can be reconciled with its denial in modernity. The answer is that the denial is the myth."). Compare HORKHEIMER AND ADORNO, *supra* note 49, at 28 ("In the enlightened world, mythology has entered into the profane.").

primitive cultures.<sup>59</sup> As Derrida explained in a seminal essay called *White Mythology*: “[T]he white man takes his own mythology, Indo-European mythology, his own *logos*, that is the *mythos* of his idiom, for the universal form of that he must still wish to call Reason . . . White mythology – metaphysics has erased within itself the fabulous scene that has produced it.”<sup>60</sup> In other words, the overt mythology has been largely erased from the legal system, and what remains is rather watered-down and secularized but still mythic. In a similar vein, Albert Camus once quipped that in replacing the King with the social contract we merely exchanged a visible God for an abstract one.<sup>61</sup>

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<sup>59</sup> Derrida, of course, is well-known for his emphasis on the symbolic construction of structures and how they ‘play’ off each other in relations of force and signification; these constructions can then be *deconstructed* through a close reading of foundational texts. See JACQUES DERRIDA, *Structure, Sign and Play in the Discourse of the Human Sciences*, in *WRITING AND DIFFERENCE* 280 (Alan Bass trans. , 1978). Derrida claims that Western culture is built on a series of ostensible binary concepts and elaborate boundaries (subject/object, speech/writing, public/private, law/violence) that fall apart on a close reading because one term is artificially privileged over the other. See, e.g., JACQUES DERRIDA, *POSITIONS* 71 (Alan Bass trans., 1981)(“[W]e are not dealing with the peaceful coexistence [of binary terms] but rather with a violent hierarchy. One of the two terms governs the other . . . or has the upper hand. To deconstruct the opposition, first of all, is to overturn the hierarchy at a given moment.”).

<sup>60</sup> JACQUES DERRIDA, *White Mythology*, in *MARGINS OF PHILOSOPHY* 213 (Alan Bass trans. 1982).

<sup>61</sup> ALBERT CAMUS, *THE REBEL* 86-7 (Anthony Bower trans., 1954)(“The king must die in the name of the social contract . . . The new God is born.”).

Beyond arguing that myths remain *within* the law, Fitzpatrick argues that law itself takes on a mythical status as a kind of divine and transcendental resource containing all answers, a mega-force standing above and within society:

The mythic composition of law can be made out in its contradictory attributes. Law is autonomous yet socially contingent. It is identified with stability and order yet it changes and is historically responsive. Law is a sovereign imperative yet the expression of a popular spirit. Its quasi-religious transcendence stands in opposition to its mundane temporality. It incorporates the ideal yet it is a mode of present existence.<sup>62</sup>

We are not accustomed to speaking in this way about the mythological elements in the law, but once we start thinking along these lines, it becomes relatively easy to spot colorful instances of full-blown mythology in the law. For example, here are two passages from first-year casebooks on the law of contracts, as the authors try to explain why contract law is necessary:

Consider, for example, a society consisting exclusively of full time hunters and full time potato farmers. No one will have a balanced diet without exchange of potatoes for meat . . . Consider the

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<sup>62</sup> FITZPATRICK, *supra* note 57, at x. *See also* ARNOLD, *supra* note 54, at 58 (“The legal scientist is compelled by the climate of opinion in which he finds himself to prove that an essentially irrational world is constantly approaching rationality; that a cruel world is constantly approaching kindness, and that a changing world is really stable and enduring.”).

following in our meat and potatoes society. A hunter, H, returns laden with 50 pounds of meat to his potato-less hut. Meanwhile, H's potato farming neighbor, F, has 90 pounds of potatoes in his hut. H and F may be willing to exchange 30 pounds of potatoes for 16 pounds of meat.<sup>63</sup>

[P]eople enter into exchange relationships with one another--trading this for that--for the sole and sufficient reason that it makes them feel better off to do so. Thus, imagine a world of only two commodities--apples and oranges--and only two consumers--A and B--each with different preferences but each wanting to consume *some* quantity of both commodities. We can be quite sure that, unless already satisfied with the allocation of those commodities, A and B will at once commence to negotiate a trade, with A giving up some of his apples, say, in exchange for some of B's oranges and B doing the opposite. The trading process is not a poker game in which one player wins and another loses; rather it is a kind of joint undertaking which increases the wealth of both parties and from which both emerge with a measure of enhanced utility.<sup>64</sup>

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<sup>63</sup> IAN MACNEIL, *CASES AND MATERIALS ON THE LAW OF CONTRACTS 2-4* (1978).

<sup>64</sup> MARVIN CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 2* (1993).

These are both narratives of a mythical origin for contract law -- a tale of autonomous and rational parties who come to market already laden with resources.<sup>65</sup> Surely the authors do not posit this as a historical reality -- it is more akin to a thought experiment -- but their depiction is telling. By starting from a pre-legal homeostasis of commodity exchange among cavemen, as it were, every legal restraint on contract comes to appear as a deflowering of the sanctity of the original condition, which suggests that the best approach is to allow a free market; in this way, the myth has legal and political consequences.

Corporate law operates in much the same way: it is a series of myths that have important social and political consequences. I have already alluded to some of the key myths of corporate law (e.g., that the corporation is a democracy, that it is transparent, etc.), but the mythical status of corporate law can be seen most clearly in its centerpiece, namely the corporation itself – an invisible and ephemeral being that is brought to life with texts, much like a medieval Golem.<sup>66</sup> Around this mythical being there arises a narrative (namely corporate law) which charts its birth,

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<sup>65</sup> Marx long ago ridiculed such Robinson Crusoe justifications: “Do not let us go back to some fictitious primordial condition as the political economist does, when he tries to explain. Such a primordial condition explains nothing. He merely pushes the question away into a grey nebulous distance.” See Karl Marx, *Economic and Philosophical Manuscripts of 1844*, in THE MARX-ENGELS READER 71 (Robert Tucker ed., 1978).

<sup>66</sup> In Jewish folklore, a Golem is an artificial man made out of clay who is brought to life through Kabbalistic incantations and magic. In some versions of the legend, he is created to protect the Jews but ends up spinning out of control and must be destroyed. See, e.g., ALAN UNTERMAN, DICTIONARY OF JEWISH LORE AND LEGEND 86 (1991).

maintenance, and passage through organic changes.

Starting from the basic notion that corporate law has parallels with mythology, we now seek a framework for analyzing this mythology. Within critical theory, the dominant framework for understanding mythology begins with the work of Marx and Nietzsche, and then passes to the two foremost theorists of myth in the last half century, Claude Levi-Strauss and Roland Barthes: the former stressed the *mediating* function of myth, while the latter focused on its *legitimizing* function.<sup>67</sup>

### **Critical Theory of Mythology**

For Marx, the law was similar to other cultural institutions in that it arose in a mediation of the underlying contradictions of the capitalist system, particularly the conflict between classes (bourgeois versus proletarian).<sup>68</sup> To explain how class conflict played out within the legal system, Marx devoted an entire chapter of *Capital* to the legal battles over the length of the working day, which he described as “protracted civil war, more or less dissembled, between the capitalists and the working class.”<sup>69</sup> In other words, this was a physical and material struggle

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<sup>67</sup> See JEREMY HAWTHORN, A GLOSSARY OF CONTEMPORARY LITERARY THEORY 222 (2000)(citing Levi-Strauss and Barthes as the two most influential contemporary thinkers on myths).

<sup>68</sup> See Karl Marx, *A Contribution to the Critique of Political Economy*, in THE MARX-ENGELS READER, *supra* note 65, at 5 (“Just as one does not judge an individual by what he thinks about himself, so one cannot judge a period of transformation by its consciousness, but on the contrary, its consciousness must be explained from the *contradictions* of material life.”).

<sup>69</sup> See KARL MARX, CAPITAL VOL 1, in 35 MARX-ENGELS COLLECTED WORKS 302 (1991).

over working hours and conditions, a struggle that might otherwise have been fought in the streets and factories, that was instead sublimated to a more abstract level and played out in the court system. The underlying contradiction simmering beneath the surface (the poor want limits on the working day while capitalists do not) are then glossed over with the enactment of a single legislative decree that is wrapped in the mantle of universality and reason, cloaked with abstract rationalizations about freedom, autonomy, democracy, and equality. The resulting legislation does not, on the surface, bear the marks of a class struggle; to the contrary, it appears as the product of deliberation by a representative assembly in the finest tradition of democracy. In other words, the surface of legal doctrine gives no indication of its class bias. Perhaps the best illustration of this is Anatole France's quip, "The majestic equality of the law forbids the rich as well as the poor from sleeping under bridges, to beg in the streets, and to steal bread"<sup>70</sup> – his point being that such laws are meant to apply only to the poor (since the rich have no need to sleep under bridges) but they are couched in universal terms as applying to all people rich and poor, since a law that too clearly betrays its class bias would offend the sensibilities of the ruling class.<sup>71</sup> Therefore, the law is the product of mediation between classes, but this mediation is

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<sup>70</sup> ANATOLE FRANCE, *LE LYS ROUGE* (1894), *quoted* in THE OXFORD DICTIONARY OF QUOTATIONS 322 (Angela Partington 1992).

<sup>71</sup> See Friedrich Engels, *Letter to Joseph Bloch, September 21-22, 1890*, THE MARX-ENGELS READER, *supra* note 65, at 762-3 ("In a modern state, law must not only correspond to the general economic condition and be its expression, but it must also be an internally coherent expression which does not, owing to inner contradictions, reduce itself to naught. And in order to achieve this, the faithful reflection of economic conditions suffers increasingly. All the more so the more rarely it happens

skewed by the imbalance of power between the classes and then camouflaged by the surface universalism of the law which seems to apply equally to all persons of all classes.

The *Communist Manifesto* denounces legal doctrine as a thinly-veiled bourgeois construction wrapped in universal language: “your jurisprudence is but the will of a class made into a law for all, a will whose essential character and direction are determined by the economic conditions of existence of your class.”<sup>72</sup> The problem with jurists, according to Marxist theory, is that instead of realizing that the law contains a class bias, they imagine that they are dealing with pure concepts devoid of history and struggle – they refuse to see the *mediated* quality of the law.<sup>73</sup> Engels later illustrated this point with the law of inheritance – it has a particular economic function in capitalist societies (e.g., concentrating capital and power in the hands of a few men in a few families) but is justified by jurists as a universal human right derived from man’s primordial relation to property; thus a contingent social arrangement is grounded in human nature, and an economic function is elevated to the level of a legal right.<sup>74</sup> The goal of the

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that a code of law is the blunt, unmitigated, unadulterated expression of the domination of a class – this would offend the ‘conception of right.’”)

<sup>72</sup> Karl Marx and Friedrich Engels, *Manifesto of the Communist Party*, THE MARX-ENGELS READER, *supra* note 65, at 487.

<sup>73</sup> In addition to chastising natural law, Marx lambastes the historical school of law for inventing an idealized ‘German history’ and then trying to ground a legal system on it, which merely “legitimizes today’s infamy by yesterday’s.” See Karl Marx, *Contribution to the Critique of Hegel’s Philosophy of Right*, THE MARX-ENGELS READER, *supra* note 65, at 55.

<sup>74</sup> See Engels, *supra* note 71, at 763 (“The reflection of economic relations as legal

critical theorist is to cut beneath the halo of universality and point out that law does not derive from ideas but from the material contradictions and power struggles already operative within the culture.<sup>75</sup>

Precisely because the law is buffeted by the rhetoric of reason and universality, it functions as an intellectual rationalization for the ruling class. In *The German Ideology*, Marx applied this analysis to the law of contracts. Given that most contracts are one-sided, he found it odd that contract law is grounded in the idealized (mythical) figure of the sovereign individual who freely enters into contracts without coercion. Why should contract law be based on the notion of free exchange when most individuals have no power to set the terms of their employment or to freely negotiate most agreements that they sign, which are generally standardized forms? Marx lambasted contract law for its “illusion that law is based on the will,” that is the notion that the unequal distribution of property is the result of consensual agreements.<sup>76</sup> The puzzling idea that modern society (replete with inequalities and imbalances of

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principles is necessarily also a topsy-turvy one: it goes on without the person who is acting being conscious of it; the jurist imagines that he is operating with a priori propositions, whereas they are really only economic reflexes; so everything is upside-down.”)

<sup>75</sup> Karl Marx, *The German Ideology*, in THE MARX-ENGELS READER, *supra* note 65, at 172 (“The ideas of the ruling class are in every epoch the ruling ideas . . . The class which has the means of material production at its disposal, has control at the same time over the means of mental production, so that thereby, generally speaking, the ideas of those who lack the means of mental production are subject to it.”)

<sup>76</sup> *Id.* at 187-188 (“Hence the illusion that law is based on the will, and indeed on the will

power) is the outcome of consent instead of force offers powerful consolation to those who have power and are charged with administering the law, because it means that they took their positions by merit instead of domination.

Marx saw the dominant legal concepts of his day as a kind of “modern mythology,”<sup>77</sup> which is invoked to justify the existing arrangement. Marx’s comments on religion would seem to apply with equal force to law: “Religion is the generalized theory of this world, its encyclopedic compendium, its logic in popular form, its spiritualistic point of honor, its enthusiasm, its moral sanction, its solemn complement, its general ground of consolation and justification.”<sup>78</sup> The task for the critical thinker is to look below the surface of religion (and below the surface of law) to expose the underlying contradictions that drive the surface doctrines, and then to ask how the doctrines lend an unwarranted legitimacy to existing arrangements.

These themes of mediation and legitimation appear a few decades later in Nietzsche’s *The Birth of Tragedy*, where Nietzsche reads the great Attic tragedies as mediation between Dionysian and Apollonian forces operative in the Greek world at the time.<sup>79</sup> The Dionysian

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divorced from its real basis – on *free* will. . . . In civil law the existing property relations are declared to be the result of the general will.”).

<sup>77</sup> See Karl Marx, *Letter to Friedrich Adolph Sorge, October 19, 1877*, 45 MARX-ENGELS COLLECTED WORKS 282, 283 (1991), referring to “modern mythology with its goddesses of Justice, Freedom, Equality, and Fraternity.”

<sup>78</sup> Karl Marx, *supra* note 73, at 53-54.

<sup>79</sup> FRIEDRICH NIETZSCHE, *THE BIRTH OF TRAGEDY* (Walter Kaufmann trans., 1967).

force, named for the god of wine, was characterized by boundless energy, drunkenness, chaos, music, and creative destruction. At the other extreme was an Apollonian force is characterized by measure, order, form, architectonic, and sculpture. These two opposing traditions squared off within Greek culture, creating a tension that is visible in Greek tragedy, where the Dionysian force is represented by the chorus while the Apollonian is represented by the structure of the narrative and the dialogue. For example, in the Oedipal drama, the hero discovers the ultimate Apollonian rule of order (the incest taboo) only after he impulsively transgresses this rule in Dionysian fashion (by sleeping with his mother). In other words, to understand Greek tragedy, one must understand how it serves to mediate the underlying tensions within the culture.

Eschewing the Enlightenment position that seeks to move *beyond* mythology, Nietzsche insisted that some degree of mythology was essential as a counterweight to science. Nietzsche goes so far as to chastise Socrates as the prototypical man of science (the precursor to modern man) who spends his life elevating the power of reason. The problem with this, Nietzsche says, is that science needs art (and hence mythology) to give it purpose and direction. Commenting on Socrates' decision to learn music prior to his death, Nietzsche imagines Socrates finally recognizing the value of art, wondering "Perhaps there is a realm of wisdom from which the logician is exiled? Perhaps art is even a necessary correlative of, and supplement for science."<sup>80</sup> Based on these passages we can say that Nietzsche saw a role for *mythos* as a counterweight to *logos*, and in his later works, Nietzsche called for the creative fashioning of new myths, so long

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*Id.* at 93.

as they are life-affirming, something that he found lacking in Christian mythology.<sup>81</sup> Nietzsche, then, refused to herald a post-mythical period where science would replace myth: rather, the ‘Death of God’ creates an opportunity for new myths, something that Nietzsche attempted in *Thus Spake Zarathustra*.

Beyond the *mediating* function of Attic tragedy, the Greek myths served to *legitimate* the hardships of Greek life:

The Greek knew and felt the terror and horror of existence. That he might endure this terror at all, he had to interpose between himself and life the radiant dream-birth of the Olympians . . . It was out of the direct necessity to live that the Greeks created these gods . . . How else could these people, so sensitive, so vehement in its desires, so singularly constituted for suffering, how could they have endured existence, if it had not been revealed to them in their gods, surrounded by a higher glory.<sup>82</sup>

People can see themselves in the stories of the Gods, with the Olympians serving as a kind of “transfiguring mirror” in which we can gaze to learn about ourselves.<sup>83</sup> Putting these elements

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<sup>81</sup> His disgust with Christianity can be seen perhaps most clearly in the later works, *TWILIGHT OF THE IDOLS* and *THE ANTI-CHRIST* (R. J. Hollingdale trans., 1990). The last sentence of his self-evaluation was, “Have I been understood? – Dionysus versus the Crucified.–” See FRIEDRICH NIETZSCHE, *ECCE HOMO* 335 (Walter Kaufmann trans., 1989).

<sup>82</sup> NIETZSCHE, *supra* note 79, at 43.

<sup>83</sup> *Id.* at 42-3. See also LUDWIG FEUERBACH, *THE ESSENCE OF CHRISTIANITY* 5 (George

together, we can say that the Nietzschean view is that myth is a play of opposing forces, couched in a narrative that legitimates a particular way of life.

From Marx and Nietzsche we get the notion that a given text (say, corporate law) must be analyzed in terms of the underlying tensions that it expresses. In addition, we must ask what type of social and political arrangement is legitimated by the text. These nascent themes of mediation and legitimation found expression in Twentieth Century in the work of French anthropologist Claude Levi-Strauss and French semiotician Roland Barthes.

Levi-Strauss explicitly identifies himself as a structuralist in the tradition of Freud, Marx, and Saussure, and like these figures he insists that seemingly unitary phenomena such as the self, society, and language can only be understood as a struggle between opposing components held in dynamic tension.<sup>84</sup> Levi-Strauss insisted that the purpose of myth is to mediate between opposites that do not admit of a strict reconciliation, or as he says, “the purpose of myth is to provide a logical model capable of overcoming a contradiction (an impossible achievement if, as it happens, the contradiction is real).”<sup>85</sup> The contradictions worked out in myths cannot be overcome in real life because they are intractable given the social and epistemological framework in which they arise – thus they are overcome only in symbolic form, much in the

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Eliot trans., 1989)(“In the object which he contemplates, therefore, man becomes acquainted with himself . . . We know the man by the object, by his conception of what is external to himself; in it his nature becomes evident; this object is his manifested nature, his true objective ego.”).

<sup>84</sup> See CLAUDE LEVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* 206 (Claire Jacobson and Brooke Schoepf trans., 1963).

<sup>85</sup> *Id.* at 228.

same way that a dream will use symbols to express and overcome a real-life conflict. Levi-Strauss used this framework to analyze the Oedipus myth and Native American myths, breaking them down into complicated series of oppositions: life-death, raw-cooked, foreign-native, village-town, human-divine, and so forth. In other words, myth is dialectical – two oppositions are mediated with a third term, forming a triad that *symbolically* resolves the conflict and thereby eases the tension of the conflict without, it must be noted, actually solving the contradiction in real life. This last point is worth emphasizing: the oppositions mediated by myth are not solvable: Levi-Strauss says cryptically that they are akin to Hamlet’s dilemma ‘to be or not to be’ – and so we go on forever spinning myths to mediate cultural oppositions. The only difference between the ‘savage’ and the civilized man is the materials that he uses to spin the myths; the mental operation is identical. The job of the anthropologist is to read the surface text of the myth, break it down into structured oppositions (a “basic antinomy”<sup>86</sup>) and then show how the myth resolves the antinomy at a symbolic level. Thus in a tortuous reading he claims that the Oedipus myth is a symbolic attempt to reconcile the belief that one is born from the earth with the knowledge that one is born of human beings, a conclusion that he reaches after breaking the myth into structural oppositions, e.g., between *overrating* blood relations in the guise of having sex with one’s mother versus *underrating* blood relations by killing one’s father, the killing of *monsters* versus the killing of *humans*, walking upright versus walking with difficulty, and so on. All of this mediation takes place within people at the unconscious level: just as I know the rules of grammar unconsciously but cannot state them explicitly, so I am familiar with the reigning

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<sup>86</sup> *Id.* at 208.

myths of my culture but I cannot comprehend them schematically. The task of the anthropologist is to identify the underlying structures beneath the surface of the myths. The novelty and power of Levi-Strauss' approach was due to his scrupulous attention to detail, as evidenced in volume upon volume of myth analysis. Like the other structuralists, he was searching for universal structures common to all people beneath the diversity of culture.

French semiotician Roland Barthes took a different approach. Instead of seeing myths as expressions of deep-seated contradictions of the human condition across cultures, Barthes insisted that myths are symbolic expressions of localized power struggles. Their purpose is not to mediate deep conflicts of human nature, but rather to naturalize a dominant way of life as inevitable, or in his words, "I resented seeing Nature and History confused at every turn, and I wanted to track down, in the decorative display of *what-goes-without-saying*, the ideological abuse which, in my view, is hidden there."<sup>87</sup> Barthes' primary target was contemporary French popular culture -- toys, cars, museum exhibits, wrestling matches, wine, milk, soap commercials, etc. Thus one could 'read' a soap commercial, a museum display, a tube of suntan lotion, or a magazine cover in the same way that one could read a novel. Beneath the obvious falsity of advertising and popular culture, there were subtle messages that justified and perpetuated the current economic and political arrangement. To be sure, this is a much expanded notion of 'myth,' and this is precisely Barthes' point -- that we are surrounded by myths that are pernicious precisely because they do not appear to us as myths. Modern man does not sit around the campfire telling mythical narratives about spirits, but he certainly goes shopping and buys

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ROLAND BARTHES, MYTHOLOGIES 11 (Annette Lavers trans., 1972).

different toys for boys than for girls, and in so doing (in buying guns and cars for boys) he perpetuates a myth about gender roles.

Barthes argues that myth freezes history. It presents the current world as the only possible world, papering over the historical struggles that simmer beneath the surface. It also consecrates the existing order as common sense, thereby disabling alternatives. Barthes' classic example of this is a cover of *Paris Match* depicting a black soldier saluting the French flag, which he saw as a myth about minorities consenting to French colonialism. The actual contradictions of colonialism – France versus the colonies, white versus black, first world versus third world, Christian versus pagan – all of these conflicts are magically defused by the mass media in the depiction of an obedient colonial subject.

Barthes sees myth as largely (but not wholly) allied with the bourgeois worldview, to the point where myth is a type of 'depoliticized speech' that flattens out and harmonizes conflicts: "[I]t does away with all dialectics . . . it organizes a world without contradictions."<sup>88</sup> This benefits the class who owns the productive apparatus for the mass transmission of symbols (television, newspapers, magazines, movies), as well as those who have a stake in the current arrangement. The job of the critic, says Barthes, is to deconstruct myths and expose them as a naked attempt to naturalize a contingent arrangement, thereby returning language to responsible usage, returning meaning to words and images that have been hijacked, as it were.<sup>89</sup> Barthes

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<sup>88</sup> *Id.* at 143.

<sup>89</sup> *Id.* at 156 (noting that the unveiling of myths is "founded on a responsible idea of language").

tended to draw his examples from *French* popular culture, but his basic point can be found in *American* folk tales, for example in the Horatio Alger myth that anyone in America can make it with hard work.<sup>90</sup>

Barthes also makes the deeper point that myth becomes an official language among those with power. In one of his few essays relating to law he offered some comments on the trial of a rural landowner who killed two campers, noting the stark difference between the language used by the legal officials and that of the defendant: “Naturally, everyone pretends to believe that it is the official language which is common sense, that of [the defendant] being only one of its ethnological varieties, picturesque in its poverty.”<sup>91</sup> Barthes says that the judge and prosecutor are ‘at home’ in the language of law but this language appears as an alien discourse to outsiders. As he puts it, the law “depicts you as you *should be*, and not as you are.”<sup>92</sup> In this sense, the law foists an alien narrative and an alien language upon those who stand outside the circle of officials and those with power.

Myth often naturalizes contradictions through the creation of an ‘empty signifier,’ a kind of symbolic black hole that swallows up contested narratives like a dead letter office. Barthes

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<sup>90</sup> Film-maker Michael Moore recently tried to debunk this myth by pointing out that it is statistically inaccurate, since people generally stay in the class to which they are born regardless of hard work. Moore argues that the myth prevents the working class from endorsing reforms that negatively impact the upper class because they the myth has convinced them that they might be in that class one day. See MICHAEL MOORE, DUDE, WHERE’S MY COUNTRY 137 (2003)(“Horatio Alger Must Die”).

<sup>91</sup> BARTHES, *supra* note 87, at 44-5.

<sup>92</sup> *Id.* at 44.

cites the Eiffel Tower as an example of an empty sign that no longer serves any material purpose: “This pure – virtually empty sign – is ineluctable, because it means everything: the symbol of Paris, of modernity, of communication, of science in the Nineteenth Century, rocket, stem, derrick, phallus, lightning rod or insect, confronting the great itineraries of our dreams, it is the inevitable sign.”<sup>93</sup> This phenomenon occurs frequently with respect to words and concepts like ‘patriotism’ and ‘freedom,’ or symbols such as the flag. In the empty sign we can unpack the contradictory forces at work in the culture.

Because I will argue that the modern corporation is an empty signifier, I want to spend a little time focusing on how this concept plays out in contemporary critical theory. The leading figure in this area is the obscure and enigmatic critic Slavoj Žižek, who is heavily influenced by the work of French psychoanalyst Jacques Lacan, especially Lacan’s notion that selfhood is characterized by a profound absence, a lack around which a self is constructed through language and symbols. In a similar fashion, Žižek argues that all systems of meaning are structured around a negative void of signification that serves as a placeholder. In other words, the empty signifier is a key structural foundation for discourse – it is a signifier (a concept) that lacks a clear signified but which ties together other signifieds, much in the same way that zero is not a number itself but functions as a placeholder for other numbers.<sup>94</sup> Žižek speaks of the empty

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<sup>93</sup> ROLAND BARTHES, *THE EIFFEL TOWER AND OTHER MYTHOLOGIES* 3, 4 (Richard Howard trans., 1997).

<sup>94</sup> See, e.g., ERNEST LACLAU, *Why Do Empty Signifiers Matter to Politics?*, *EMANCIPATIONS* 36-46 (1996).

signifier as a “master signifier” that does not refer to anything but simply functions as a “nodal point” that “quilts” other signifiers.<sup>95</sup> As he explains, “In order for the series of signifiers to signify something (to have a determinate meaning), there must be a signifier (a ‘something’) that stands for ‘nothing,’ a signifying element whose very presence stands for the absence of meaning.”<sup>96</sup> Since the entire symbolic edifice is built around an empty center, it can shift precipitously during power struggles. To use examples from our culture, consider how the term “feminist” went from a badge of honor to a pejorative, or how the term “liberal” has shifted from its original meaning into the dreaded ‘L word.’ In other words, power struggles are fought not only in the streets but as contests over the control of symbols and meaning, on a stage where meaning is fluid.

Zizek’s example of the empty signifier is the figure of the Jew in Nazi Germany, who (Zizek claims) is detested not for any particular qualities he possesses, but rather as a kind of repository of German negativity. The Jew is an empty category onto which Germany projected its ridiculous obsession with racial categories, its fetish for order, its insane scapegoating, its herd mentality. Zizek claims that the Jew is an empty signifier for Germans since it subsumes opposites: the Jew is simultaneously declaimed as dirty (‘dirty Jew’) and fastidious (‘See how well they hide their dirt!’), elitist yet vulgar, educated but ignorant, disloyal yet insistent on citizenship, and so forth. The Jew “is the point at which social negativity as such assumes

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<sup>95</sup> SLAVOJ ZIZEK, *THE SUBLIME OBJECT OF IDEOLOGY* 87, 95, 124 (1989).

<sup>96</sup> SLAVOJ ZIZEK, *THE ABYSS OF FREEDOM* 39 (1997).

positive existence.’<sup>97</sup>

A similar point was made with less jargon by cultural theorist Frederic Jameson in his analysis of the figure of the shark in the movie *Jaws*<sup>98</sup>. The dreaded shark actually plays a very small role in the movie, only appearing toward the end. For the bulk of the picture, the background presence of the shark serves to simply highlight tensions running beneath the surface on the resort island: the greed of the mayor versus the sheriff’s concern for public safety, the ostentatious tourists who litter the beaches versus the marine biologist’s demand that we respect nature, the repressive surface of village life versus the rebellious forces of youth, and so forth. The shark matters very little in this economy of tensions – its part could just as well have been played by a hurricane or killer octopus; the ‘shark’ is not significant for its positive attributes but rather for the constellation of tensions that it illuminates. In a similar vein, I will argue below that the modern corporation is not significant for its positive qualities (it has very few) but rather for the underlying tensions within our culture that it reveals.

Mediation, legitimation, and empty signifiers – these, then, are our leading concepts for the mythological analysis of corporate law. By seeing corporate law as a system of meaning, that is, by reading it as a text, we can locate the underlying tensions that drive it. As we have seen, myths arise as a way of mediating contradictions. The same holds true for the corporation, a mythical entity (a secular God) that arises to mediate and defuse the tensions between capitalism and justice.

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<sup>97</sup> SLAVOJ ZIZEK, *THE PLAGUE OF FANTASIES* 76 (1997).

<sup>98</sup> FREDERIC JAMESON, *SIGNATURE OF THE VISIBLE* 26 (1992).

## The Mediating Function of Corporate Law

Historically speaking, the American corporation has a split personality because it is simultaneously an *economic* set of relationships and a *social* institution.<sup>99</sup> As a economic arrangement it is a vehicle for investment and concentration of capital under a centralized management. As a social actor, its decisions affect millions of people in terms of employment, pensions, products, and political and cultural influence. Historically speaking, the earliest corporations were social actors such as universities or municipalities, or they were public service entities that brought together large concentrations of capital for big projects like building a bridge or tunnel. Only in the last century was it possible for private parties to form a corporation for profit without a specific legislative edict. Over time, then, the corporation has become less tied to its social role and more tied to its economic dimension.

This Janus-faced status of the corporation (economic and social) reflects a deep contradiction at the heart of American culture – this is the contradiction between profit and fundamental justice. On the one hand, our entire way of life is grounded in a capitalist system driven by corporations and the restless pursuit of profit – let us call this the commitment to profit. On the other hand, we are deeply committed to democracy, fairness, equality, welfare,

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<sup>99</sup> See COLOSSUS: HOW THE CORPORATION CHANGED AMERICA 11 (Jack Beatty ed. 2001)(“The corporation is a human enterprise. Entrepreneurs, managers, workers, and stockholders act in a social as well as economic dimension.”).

and due process in all areas of our lives – let us call this the commitment to justice. There is a real flesh-and-blood conflict between the corporation as an economic tool versus the corporation as a social actor. Indeed, this is at the heart of all burning questions about the conduct of corporations nowadays.

To see how our commitments to profit conflicts with our commitment to justice, and how both are reflective of the dual nature of the corporation as an economic relation and as a social actor, consider what noted business writer Michael Lewis recently had to say about the scandals rocking Wall Street:

\$17 trillion or so is invested [in the stock market] with the implicit instruction: “Just give me back as much money as possible. Gouge consumers, cheat employees, poison the environment, lie to the public markets – just do it all sufficiently artfully that it doesn’t dent my portfolio.” Then, when the market falls and one of the people on the receiving end of their beastly demands is caught behaving badly, investors collapse to the floor in disbelief and beg for their money back. It is at that moment – and not a minute before – that they discover the novel idea that businessmen in possession of other people’s capital should be held to the highest ethical standards . . . This sort of hypocrisy is woven deeply into the fabric of American business life.<sup>100</sup>

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<sup>100</sup> Michael Lewis, *The Irresponsible Investor*, THE N.Y. TIMES MAG., June 6, 2004, at 68.

This ‘hypocrisy’ is on display in the contradictory emotions that most Americans feel towards Wal-Mart, America’s biggest company, which is both loved and hated, often by a single person.<sup>101</sup> A profile of the company in *Fortune* captured this shifting range of emotion:

Where you stand on Wal-Mart, then, seems to depend on where you sit. If you are a consumer, Wal-Mart is good for you. If you’re a wage earner, there’s a good chance it’s bad. If you’re a Wal-Mart shareholder, you want the company to grow. If you’re a citizen, you probably don’t want it growing in your backyard. So, which one are you? And that’s the point: Chances are, you’re more than one . . . It’s important that this debate continue. But in holding the mirror up to Wal-Mart, we would do well to turn it

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<sup>101</sup> At the same time that Wal-Mart was named *Fortune*’s Most Admired Company of 2003, it was named as the defendant in the largest class-action lawsuit for gender discrimination in American history, representing over a million female employees; it was also named (and recently lost) a huge lawsuit for keeping workers after their shifts without pay. See *Wal-Mart’s New Spin*, N.Y. TIMES, September 14, 2004, at 22; Wendy Zellner, *No Way to Treat a Lady?*, BUSINESS WEEK, March 3, 2003, at 63. This is a company that systematically avoids paying health care and other benefits to its workers, yet receives massive government benefits to build its huge warehouses. See David Moberg, *The Wal-Mart Effect*, IN THESE TIMES, July 5, 2004, at 22-23. It is virulently anti-union and prevents workers from freely joining unions, yet its founder Sam Walton received the Presidential Medal of Freedom from President Bush (the first), who said that Walton epitomized the American dream. See *Walton Honored*, USA TODAY, March 17, 1992, at 4A.

back on ourselves. Sam Walton created Wal-Mart. But we created it, too.<sup>102</sup>

This suggests that we demand contradictory things from the corporate entity: low-priced consumer goods based on low labor costs *but* fair treatment of workers; increasing stock price *but* good behavior toward the environment and the community; stalwart leadership by captains of industry *but* corporate democracy. Considering the extent of our involvement with corporations (not just as investors or employees, but as consumers) it becomes clear that these contradictions go to the heart of our lifestyle. If we cannot resolve this tension within ourselves, it should come as no surprise that corporate law merely restates the tension without resolving it. In what follows, I want to mention a few ways that the tension between profits and justice gets played out in corporate law. Again, all of these tension are based on the fundamental division in the corporation as both an economic unit and a social actor.

First, corporate law never comes down one way or the other on whether the modern corporation is a public entity (hence a social actor) or a purely private entity (and hence an economic relationship).<sup>103</sup> A little over a century ago, corporations were irreducibly public – they could arise only by special charter from the legislature after demonstrating some public

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<sup>102</sup> See Useem, *supra* note 43, at 118.

<sup>103</sup> See, e.g., MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 at 113 (1977)(noting that corporations exist in a legal twilight zone “sometimes conceived as public instrumentality, at other times regarded as a private entity.”)

purpose.<sup>104</sup> Yet with the rise of general incorporation statutes in the late Nineteenth Century, any private person could organize a corporation without a specific legislative grant simply by filing paperwork with the secretary of state, and without demonstrating a public purpose other than private gain. Today, the modern corporation requires a pro forma ‘charter’ from the state and must pay an annual franchise fee, something that a purely private organization such as a partnership does not, and in this sense it is still a public creature, but there is no need to demonstrate social utility in order to receive the charter. So the corporation is not really public nor private – it exists in a kind of netherworld between the two, which is why theorists disagree on whether the corporation has duties to the general public.<sup>105</sup>

As Chancellor Allen pointed out, the law does not *resolve* this tension but simply papers over it by allowing corporations the maximum leeway to favor either their economic function (justified as a short-term interest) or the social function (rationalized as a long-term interest):

Two inconsistent conceptions have dominated our thinking about corporations since the evolution of the large integrated business corporation in the late nineteenth century. Each conception could

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<sup>104</sup> For this history, see Douglas Litowitz, *Are Corporations Evil?*, 58 U. MIAMI L. REV. 811 (2004).

<sup>105</sup> See, e.g., BUTLER AND RIBSTEIN, *supra* note 22, at 20 (“The fact that corporations are brought into existence by a perfunctory state filing does not justify a ‘state creation’ view any more than does the role of obtaining a birth certificate indicate state creation of a child.”); CHARLES DERBER, CORPORATION NATION 256 (1998)(calling for ‘public chartering’ of large corporations with statutory obligations to protect employees, the environment, and the local community).

claim dominance for a particular period, or among one group or another, but neither has so commanded agreement as to exclude the other from the discourses of law or the thinking of business people. In the first conception, the corporation is seen as the private property of its stockholders-owners . . . The second conception sees the corporation not as the private property of stockholders but as a social institution [tinged] with a public purpose . . . The law ‘papered over’ the conflict in our conception of the corporation by invoking a murky distinction between long-term profit maximization and short-term profit maximization.<sup>106</sup>

In other words, the law punts on this issue by permitting a corporation to do anything: it can benefit the community (the public) by invoking the need for long-term benefits or it can ruthlessly pinch pennies by invoking the need for short-term benefit. The Model Business Corporation Act simply refuses to decide on whether a corporation should maximize profits in the short term, as the official comment makes clear: “In determining the corporation’s best interests, the director has wide discretion in deciding how to weigh near-term opportunities versus long-term benefits as well as making judgements where the interests of various groups within the shareholder body or having other cognizable interests in the enterprise may vary.”<sup>107</sup>

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<sup>106</sup> William Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264 (1992).

<sup>107</sup> See MODEL BUS. CORP. ACT, sec. 8.30, cmt. 1 (2002).

The American Law Institute stepped into this debate but came up equally powerless to provide a clear way of deciding how the economic function of the corporation should balance the social function:

2.01 The Object and Conduct of the Corporation

(a) Subject to the provisions of subsection (b) . . . a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.

(b) Even if corporate profit and shareholder gain are not thereby enhanced, the corporation in the conduct of its business:

(1) Is obliged, to the same extent as a natural person, to act within the boundaries of law;

(2) May take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business; and

(3) May devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.<sup>108</sup>

Notice the flip-flops here: the corporation *should* seek profit and shareholder gain, but *may* take actions that do not enhance profit and shareholder gain: in other words, the *should* is not mandatory. And notice the prodigious use of the term ‘reasonable,’ a sure tip-off that the drafters are simply invoking the status quo. In other words, this rule merely restates in legalese the tensions that already exist between profit and justice, between the economic and social function of the corporation. By using legalese, it creates the impression that the conflict is resolved, when in fact the conflict is merely restated in legal form.

This dual nature of the corporation gets played out in so-called ‘constituency’ or

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<sup>108</sup> American Law Institute, Principles of Corporate Governance: Analysis and

Recommendations, sec. 2.01 (1994).

‘stakeholder’ statutes which arose in the 1980s amid hostile takeovers, restructurings and plant closings in the Midwest, particularly in Pennsylvania and Illinois. The idea was to allow directors of a target company to resist a takeover at a premium price by appealing to the destructive effect it would have on employees, suppliers, and the community. The classic constituency statute enacted in Pennsylvania *allows* (but does not require) a board of directors to use their business judgment to consider the effects of a transaction on such stakeholders and not merely on shareholders.<sup>109</sup> This, then, was an attempt to mediate profit and justice, but the law refused to come down on either side. These statutes are generally *permissive* – they allow, but do not mandate, a board of directors to consider the effects of a decision on stakeholders.<sup>110</sup> Rather than force the recognition of the conflict and impose an ordering of priorities, the statutes merely create the impression that all interests of all parties can be harmonized through the proper exercise of business judgment. This *symbolic* resolution of a real conflict is a sure tip-off that we are dealing with myth – in this case, the myth of the American corporation as both a socially responsible actor *and* a profit machine.

Another puzzle concerns whether a corporation is a democracy. In its capacity as a voluntary association, it would seem to require democratic structure. On the other hand, if a

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<sup>109</sup> See Pa. Bus. Corp. Law, 15 P.C.S.A. 1715 (West 1995)(the board of directors “may, in considering the best interests of the corporation, consider to the extent they deem appropriate” the effects on stakeholders.)

<sup>110</sup> See, e.g., Ill. Bus. Corp. Act, 805 ILCS 5/8.85 (West, 2004)(the board “may” consider long and short-term effects on the corporation, employees, suppliers, and customers, as well as “all other pertinent factors”).

corporation is simply a private vehicle for passive investment there is no basis for democracy, just as buying a certificate of deposit from a bank does not entitle one to vote on how the bank should be governed. The great size of many corporations and their vast power over our lives often exceeds that of the government (in fact, we are more likely to look to a corporation instead of the state when it comes to health care and retirement), which leads us to think that corporate power must be balanced with a flourishing democratic counterweight, at least in the form of effective voting by shareholders, if not by workers and other constituencies.

This raises an important question as to the *meaning* of the American corporation. Is it a purely economic entity where democracy is out of place, or is it a cultural institution (a mini-government) that must retain features of participatory democracy? Rather than resolving this question, corporate law once again papers over the conflict by allowing corporations to *appear* as nominal democracies while actually functioning as single-party oligarchies most of the time. Thus the Delaware courts can speak of ‘corporate democracy’ even though virtually all corporate elections are uncontested.<sup>111</sup>

The underlying dilemma is that corporations have tremendous economic and political power (not to mention their power to shape public opinion) but they are ruled by a handful of

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<sup>111</sup> As this question has come to the fore in the last few years, the SEC announced some proposed rules that allow, under certain limited conditions, large shareholders to nominate directors for election. *Proposal to Increase Shareholder Access to Director Nominations Sparks Debate*, 72 U.S.L.W. 2364 (December 23, 2003)(the current proposals before the SEC allow large shareholders to nominate director candidates on the company’s proxy card only when certain procedural barriers have been met, which can take several years).

appointed managers. When a giant corporation decides to pull out of a city (for example, General Motors' decision to shutter its plants in Flint during the late 1980s, or General Electric's decision to pull operations from Schenectady), the decision affects the lives on hundreds of thousands of residents who have little input into the decision. In such a situation, the company had more power to influence the lives of local residents than the local government did. One could even argue that the leaders of the top corporations in America possess a power equal to the members of the House of Representatives in terms of resources at their disposal for impacting people's lives (short of declaring war) when we factor in their ability to influence legislators and their possession of a private arsenal of lawyers that puts the government's resources to shame. This situation has been known for some time. Consider how little has changed in the seventy years since Berle and Means published their groundbreaking treatment of the modern corporation:

[T]he stockholder is practically reduced to the alternative of not voting at all or else of handing over his vote to individuals over whom he has no control and in whose selection he did not participate. In neither case will he be able to exercise any measure of control . . . . When ownership is sufficiently subdivided, the management can thus become a self-perpetuating body even though its share in the ownership is negligible. This form of control can properly be called 'management control.'<sup>112</sup>

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ADOLPH BERLE AND GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE

Berle was concerned about how this situation would lead to managerialism (dominance by managers) although he tended to believe that corporations would develop a social conscience spontaneously.<sup>113</sup> For a while it was hoped that the condition of shareholder powerlessness would be remedied by the rise of institutional shareholders who own large blocks of stock and were expected to play an active role in controlling the managers. Unfortunately, this hasn't exactly worked, since the costs of running a proxy contest are still far beyond the gains that a shareholder (even a large one) can expect after spending time and money to challenge management's candidates, and in any event such exorbitant costs are not recoverable unless the contest is successful. The end result of all of this is that the modern corporation is essentially a self-perpetuating oligarchy of managers largely immune from input by shareholders, employees, and directors. Over the last two decades, any number of new ideas have been trotted out to find

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PROPERTY 79, 82 (1968, orig. 1932). Professors Berle and Means pointed out that the modern corporation emerging in the Twentieth Century is an entirely new form of property: whereas all earlier forms of property gave control (management) to the owner, the modern corporation is characterized by a separation of ownership and control because the widely-dispersed owners have little power over the managers. Although one could quibble with this historical claim by citing instances of massive corporations in earlier epochs (e.g., the East India Company, a few large banks of the antebellum period), there is no question that the separation of ownership and control has been accentuated by the general incorporation statutes which removed preexisting barriers as to size and the ability of one corporation to own shares in another.

<sup>113</sup> A.A. Sommer, Jr., *Whom Should the Corporate Law Serve? The Berle-Dodd Debate Revisited Sixty Years Later*, 16 DEL. J. CORP. L. 33, 39 (1991).

a way to align the interests of managers with shareholders and employees – stock option plans, 401k plans, employee stock ownership plans, and so forth: and yet today the modern corporation is not controlled by the persons most affected by it – namely shareholders, employees, and the community. Just as no one can figure out what a corporation is, no one can figure out whom the corporation is supposed to serve.

The ‘economic entity versus social actor’ conflict within the modern corporation also gets played out over the question of whether corporations ought to be transparent to investors and third parties. The profit motive has always favored secrecy, but justice requires transparency. In the wake of the stock market crash of 1929 and the dawn of the Great Depression, the government enacted the Securities Act of 1933 and the Exchange Act of 1934, which were supposed to usher in a new regime of regulated public markets based on full disclosure by corporations. And yet companies struggle to find ingenious ways to hide bad news. In the recent corporate scandals, most of the companies indicted (Enron, WorldCom, Adelphia, ImClone, Global Crossing, Sprint, Tyco International) were exchange-traded companies that purported to disclose all material information to the public. Most of these companies submitted fraudulent reports for years, undetected by the Securities and Exchange Commission.

The current disclosure regime parades as full disclosure but encourages companies to bury information in plain sight. *Business Week* magazine recently profiled a professional stock analyst at a large fund who needed two weeks to decipher a single report from Xerox, raising the important question, “If a professional stock analyst has that much trouble getting her arms

around a company's financials, what hope is there for the average investor?"<sup>114</sup> Annual reports often reach one thousand pages of small print, with dozens of pages of risk factors, whereas investors nowadays typically hold a stock for only a brief period, and given the time needed to review all the relevant filings, no one can seriously sift through the disclosures. The bottom line is that very few investors actually read the filings, and those who do are usually clueless to detect wrongdoing. Prior to the implosion at Enron, only a handful of nay sayers had the temerity to complain that Enron's SEC filings were opaque, and even this was restricted to a few short-sellers (those who sell borrowed shares and then return them later, hoping to profit from a fall in price); most people simply didn't read the disclosures and didn't care.<sup>115</sup> The best example of this comes from the man who headed the Securities and Exchange Commission under President Clinton – Arthur Levitt. After decades on Wall Street he took the position as head of the SEC, which required him to immediately sell his stocks or invest solely in mutual funds, to avoid conflicts of interest that might arise if he was heavily invested in a single company that reported to the SEC. Levitt confessed his inability to read the mutual fund disclosures:

As I poured over fund prospectuses, what really got under my skin was that the documents were impossible to understand. At first I

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<sup>114</sup> Nanette Byrnes, *The Downside of Disclosure*, BUSINESS WEEK, August 26, 2002, at 100.

<sup>115</sup> BETHANY MCLEAN AND PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON* 320 (2003)(describing one short seller's reaction to Enron's third quarter 2000 filing with the SEC: "No matter how many times he read it, he still couldn't understand what it said. He showed it to derivative specialists, corporate lawyers and other experts; they couldn't figure it out either.").

was embarrassed. Then it hit me: if someone with twenty-five years in the securities business couldn't decipher the jargon, imagine the frustration of the average investor. Mutual fund prospectuses were written in impenetrable legalese, by and for securities lawyers.<sup>116</sup>

The whole idea of public disclosure and transparent markets falls apart when so few investors read these disclosures and even fewer can understand them. The common rejoinder to this is that customers can benefit from the work of intermediaries to help decipher the filings (e.g., stockbrokers, mutual fund managers) yet the recent corporate scandals made clear that much of the fraudulent behavior is accomplished with the willing cooperation of stock analysts, brokers, lawyers, and mutual fund managers, which suggests that these intermediaries are part of the problem instead of the solution.

The SEC is supposed to catch wrongdoing by publicly-traded companies, but their presence is mostly symbolic. The SEC's Corporate Finance division employs some 100 lawyers to monitor the voluminous filings of 17,000 public corporations, and the entire staff turns over every three years because staff members often leave for higher-paying private sector positions.<sup>117</sup>

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<sup>116</sup> LEVITT, *supra* note 36, at 44.

<sup>117</sup> Joseph Nocera, *System Failure*, FORTUNE, June 24, 2002, at 62 ("For months it has been the underlying question – surfacing with the Enron collapse and again with GlobalCrossing, and again with Kmart, and again with the scandal over Wall Street research: Where in the heck is the SEC? Where is the watchdog? The answer, certainly, is MIA.").

One staff accountant recently admitted that the agency can afford to review only one in fifteen annual reports.<sup>118</sup> In any event, the SEC brings less than one hundred insider-trading cases per year while the New York Stock Exchange and NASDAQ execute more than a billion trades per year.<sup>119</sup> This leaves the task to shareholders and their attorneys who stand to make money from exposing corporate fraud; but even here the voice of pessimism makes itself heard due to the passage in 1995 of the Private Litigation Securities Reform Act, which placed a series of procedural barriers to recovery in lawsuits for securities fraud. One solution to this problem is to make disclosures readable by ordinary investors. This was the basic idea behind the SEC's new 'Plain English Rules,' but these apply only to initial registration statements and not periodic reports.<sup>120</sup> In the end, given the impenetrable disclosures, the high stock turnover rates, and the subtleties by which corporations can hedge their disclosures, the entire disclosure system holds mostly *symbolic* value. The end result is not true transparency but the *impression* of transparency, a condition that satisfies neither those who see the corporation as an economic engine nor those who see it as a social actor with a duty to report the truth to investors.

All of this confusion over the ontology of the corporation – and the contradictory demands that we place upon it – get played out in the question of corporate taxation. On the one

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<sup>118</sup> *Id.*

<sup>119</sup> Landon Thomas Jr., *Psst. Why Insider Trading Keeps Going*, N.Y. TIMES, May 16, 2004, Sunday Business Section, at 1. (noting that prosecutors in New York have gone after wrongdoers with more alacrity than the SEC).

<sup>120</sup> *See Plain English Disclosure, Sec. Act. Rel. No. 33-7497, Sec. Exch. Act Rel. No. 34-39593, 1998 WL 36880 (Jan. 28, 1998).*

hand, corporations make money like regular people and so we expect them to pay taxes; on the other hand, the corporation is reducible to human beings who pay individual taxes, and so there seems to be something excessive about taxing corporations.<sup>121</sup> Calls for an end to ‘double taxation’ can be heard from the President on down, and yet at the same time, the corporate tax rules are so lax that a majority of corporations pay little or no taxes – and nowhere near the rate that individuals pay.<sup>122</sup> And the situation is compounded by the ability of corporations to obtain a charter in the Caribbean to avoid taxation altogether, something that an individual cannot do.<sup>123</sup> Here again we see the contradictory ‘X and not-X’ quality of the corporation: it a taxpayer but can avoid taxation.

I have gone into depth in describing a series of contradictions that go to the heart of our conception of the modern corporation: it is a democracy – and not; it has duties beyond profit-seeking – and not; it is transparent – and not; it is an entity – and not; it is a voluntary nexus of

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<sup>121</sup> See George W. Bush, Remarks in Albuquerque (May 12, 2003), in *Weekly Compilation of Presidential Documents*, March 19, 2003 (“Congress needs to get rid of the double taxation of dividends.”).

<sup>122</sup> See Steve Bailey, *It’s Share and Share Unlike*, BOSTON GLOBE, June 16, 2004, at C1 (A study by the federal government’s General Accounting Office found that greater than 60% of corporations paid no taxes at all during 1996-2001).

<sup>123</sup> David Cay Johnston, *Officers may gain more than Investors in Move to Bermuda*, N.Y. TIMES, May 20, 2002, at A1 (“Simply by changing their corporate addresses to Bermuda, which has no income tax, a growing number of American businesses are saving tens of millions each in United States taxes . . .”).

contracts – and not; it is a person – and not; it is public – and not; it is a taxpayer – and not. All of this reflects the backbreaking load that we place on the modern corporation. On the one hand, we demand an economy of advanced industrial mass production spurred by the profit motive, and to achieve this we permit corporations to grow to massive size, dwarfing even the government’s own resources. On the other hand, we recoil when this creature refuses to behave as a social actor with a conscience and cuts benefits, pollutes, runs sweatshops, and flexes political muscle. It is said that, ‘At 40 you get the face you deserve,’ and the same can be said of the modern corporation – we get an entity that reflects but does not resolve our deepest contradictions. Corporate law does not solve these contradictions but merely creates a vague, catch-all, mystery being (the ‘corporation’) and then instructs directors and officers to pursue the corporation’s ‘best interests’ without telling them what that means. The analogy with religion should be obvious.

The existence of contradictions within the heart of the American corporation (and within our culture) helps to explain the strange phenomenon where people simultaneously admire and despise large companies such as Wal-Mart, which is a ball of contradictions. Founder Sam Walton purported to be concerned with workers, whom he magnanimously labeled “associates,” yet the company is virulently anti-union. As reported in a recent profile in *Fortune* magazine, “Wal-Mart is the nation’s largest employer, and not a single one of its 1.3 million workers (‘associates’ in Wal-Martese) is a union member . . . In February 2000 the meat-cutting department at one Wal-Mart store voted to establish a union. Two weeks later the company

disbanded its meat-cutting departments.”<sup>124</sup> And yet Wal-Mart was named *Fortune’s* most admired company in 2004. Even Robert Reich, the Secretary of Labor under President Clinton, was puzzled by how we schizophrenically lavish praise on companies that yield high returns yet treat workers badly: “We have split brains. Most of the time, the half of our brain that wants the best deal prevails.”<sup>125</sup> Even people who hate Wal-Mart find themselves shopping there, revealing a deep conflict within Americans.

The contradictions listed above were prominently displayed in Enron Corp.<sup>126</sup> For example, it had a corporate code of ethics, yet behaved unethically; it filed annual and quarterly disclosure documents but no one could decipher them; it had an employee stock plan but ended up destroying the lives of its employees; it was greedy yet made lavish gifts to the Houston community; it heralded energy deregulation so that customers could get lower prices, yet it manipulated the energy supply to practically drive the State of California to bankruptcy; its CFO won *CFO Magazine’s* highest honor for financial prowess, yet he and his wife were later indicted.<sup>127</sup> When it was all over, there was nothing for the perpetrators to do except blame the entire corporate system: “I did it because I was trying to maximize profits for Enron,” said one

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<sup>124</sup> Cora Daniels, *Up Against Wal-Mart* FORTUNE, May 17, 2004, at 112.

<sup>125</sup> See Abigail Goldman and Nancy Cleeland, *An Empire Built on Bargains Remakes the Working World*, LOS ANGELES TIMES, November 23, 2003, at A1 (quoting Reich).

<sup>126</sup> My description is drawn from LOREN FOX, ENRON: THE RISE AND FALL (2003).

<sup>127</sup> See ROGER LOWENSTEIN, ORIGINS OF THE CRASH: THE GREAT BUBBLE AND ITS UNDOING 66-7 (2004).

trader.<sup>128</sup>

Just as we love and hate big corporations, we love to canonize corporate executives as mythical figures and *wunderkinds*, and then we express outrage when the same people turn out to be criminals.<sup>129</sup> A few decades ago the greatest adulation was lavished on financiers like Ivan Boesky and Michael Milken, who used debt financing to spur corporate takeovers, arguing that the pressure of repayment would spur management to efficiency. Boesky – an arbitrageur with sketchy background and few outside interests – was worshiped to the point where he was invited to address the 1986 graduating class at Berkeley business school, where he said, “Greed is all right, by the way. I think greed is healthy. You can be greedy and still feel good about yourself.”<sup>130</sup> Before the speech he pompously told a local newspaper that business students needed to follow his example to become a new nobility to advance the betterment of mankind. A few years later, Boesky was headed to jail for massive securities fraud. Similarly, Michael Milken was hailed as the inventor of junk-bond financing, and was once the most important player in the takeover game. Universally praised and emulated, he was invited all over the world to give speeches on such topics as how to solve the Latin America debt crisis. His central idea was to issue high-yield debt securities to finance takeovers at a time when debt was considered a conservative investment restricted to low yields. Within a decade of his meteoric rise, Milken

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<sup>128</sup> David Lazarus, *Energy Industry's Dirty Little Details About to See Light*, SAN FRAN.

CHRON., October 20, 2002, at G1.

<sup>129</sup> This has been called ‘the myth of the corporate leader as a creature of rare genius.’ See Froma Harrop, *The Mail Boy Could Do Better*, PROVIDENCE JOURNAL-BULLETIN, April 27, 2003, at K9.

was in jail for insider trading, while the companies that he leveraged to the hilt were in terrible shape.<sup>131</sup> Neither Milken nor Boesky were particularly interesting people, nor did they accomplish any social purpose beyond financial machinations: when Milken’s defense team asked the billionaire to list his personal achievements so that he could be positioned as a sympathetic figure to the American people, he mentioned a dance contest that he won in fifth grade.<sup>132</sup> Looking back on the giants of the 1980s, noted business writer and television commentator James Cramer lamented that, “All of my heroes turned out to be crooks.”<sup>133</sup> A few years later, one of Cramer’s proteges would write an expose of Cramer himself, alleging that Cramer used his publicity to manipulate the markets illegally.<sup>134</sup> The same cycle of worship and disgust continues today. *CFO Magazine* gave its 1998 Excellence award to Scott Sullivan of WorldCom, its 1999 award to Andrew Fastow of Enron, and its 2000 award to Tyco International’s Mark Swartz – all three have now been indicted!<sup>135</sup> Most of the finance icons of the 1990s fell away into disgrace: Bill Gates of Microsoft was embroiled in antitrust actions; Jack Welch of GE was exposed for his wasteful retirement package while laying off employees

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<sup>130</sup> Quoted in JAMES B. STEWART, *DEN OF THIEVES* 223 (1991).

<sup>131</sup> *Id.* at 449.

<sup>132</sup> *Id.* at 376. See also Benjamin Stein, *The Biggest Scam Ever?*, *BARRON’S*, February 19, 1990, at 8.

<sup>133</sup> James Cramer, quoted in STEWART, *supra* note 130, at 462.

<sup>134</sup> NICHOLAS MAIER, *TRADING WITH THE ENEMY: SEDUCTION AND BETRAYAL ON JIM CRAMER’S WALL STREET* (2002).

<sup>135</sup> See LOWENSTEIN, *supra* note 127, at 66-7.

en masse; Al ‘Chainsaw’ Dunlop was barred from serving as an officer of a public company; and Donald Trump, perhaps the biggest mythical figure of the last twenty years (even having his own reality show) keeps his finances private, but rode the casino portion of his empire into bankruptcy reorganization.<sup>136</sup> Against all evidence, we want to believe that great fortunes can be made with honest effort, that a corporation can serve an economic as well as a social purpose, that it can bring high returns to everyone simultaneously (managers-workers-shareholders), that it can be transparent and honest, democratic and hyper-efficient.<sup>137</sup> But in the real world, this isn’t true: only in the myth-heavy world of corporate law do we find a super-entity staffed by *wunderkinds* that can satisfy these contradictory demands without making tragic choices between social versus economic benefits. And that is precisely why the myth exists – to reassure us that the underlying contradictions are not fatal.

### **The Legitimizing Function of Corporate Law**

Corporate law legitimates the status quo in two ways. First, it is so permissive that it sanctifies virtually all corporate conduct (even objectionable conduct) as ‘legal’ and thereby presumptively immune from criticism. And second, it redescribes socially destructive corporate

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<sup>136</sup> See James Traub, *Trumpologies*, N.Y. TIMES MAG., September 12, 2004, at 34.

<sup>137</sup> See, e.g., Steven Hayward, *The Triple Bottom Line*, FORBES, March 17, 2003, at 42 (to claim that socially responsible behavior improves the bottom line “requires the artful torture of financial data”).

behavior in a gloss of palatable terms and concepts such as ‘business judgment,’ ‘corporate democracy,’ and ‘efficient markets.’ This upbeat gloss obscures the dark side of having a culture that is dominated by corporations, including the antisocial tendencies of large corporations and their role in concentrating capital in a few hands.

The term “legitimacy” was originally used with reference to situations where a man accepted a child as the product of his marriage instead of leaving the child unclaimed as a ‘bastard.’<sup>138</sup> Over time, the term was also used to describe political arrangements where people subject to power acquiesce in the stated grounds by which power is exercised over them, in other words, consensual arrangements of power.<sup>139</sup> Most political authority is backed by physical force in the last instance, and perhaps this is why Chairman Mao once said that, “Political power grows out of the barrel of a gun,”<sup>140</sup> but a regime that relies solely on raw power will be inherently unstable compared to a regime where people feel that the governing system is legitimate. Sociologist Max Weber long ago pointed out that raw physical coercion is an unstable method of governance compared to arrangements where the people believe in the

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<sup>138</sup> See “Legitimate,” AMERICAN HERITAGE DICTIONARY 1001 (4<sup>th</sup> ed. 2000).

<sup>139</sup> See A. John Simmons, *Legitimacy*, THE ENCYCLOPEDIA OF ETHICS 960, 961 (Lawrence and Charlotte Becker eds., 2001)(“Following the lead of Max Weber, it has become common to treat the extent of a regime’s legitimacy as equivalent to the extent to which it is approved or accepted as legitimate by its subjects. . . . Many contemporary theorists similarly view legitimacy as the ‘reservoir of loyalty’ on which leaders can rely or the attitudes that make subjects willingly bear the burdens of societal membership.”)

<sup>140</sup> MAO TSE-TUNG, 2 SELECTED WORKS 224 (1965).

justness of the system under which they are ruled – thus every relation of domination seeks to justify itself in the eyes of its subjects, whether by appealing to tradition (‘this is how things have always been’), appealing to charisma (‘we place our trust in the leader to guide us’), or appealing to formal-rational procedures (‘our representatives acceded to their positions in conformity with rules laid out in advance’).<sup>141</sup> Weber argued forcefully that the modern era in the West is characterized by the weakening of religion and tradition, leaving formal-rational enactment as the dominant method of legitimation in modern society: “Today the most common form of legitimacy is the belief in legality, i.e., the acquiescence in enactments which are formally correct and which have been made in the accustomed manner.”<sup>142</sup> In laymen’s terms, people will accept a given social and political arrangement as ‘legitimate’ so long as it bears the stamp of legality. A recent illustration of this attitude can be found in California Governor Schwarzenegger’s reaction when the city of San Francisco issued marriage certificates for gay couples: he said that he was neutral on the question of whether gays should be allowed to marry or whether it should be restricted to heterosexuals, and he didn’t see it as a question of higher principles, but merely insisted that city stop issuing licenses until the courts issued a clear rule that gay marriage was legal. In his mind, legitimacy was conterminous with legality.<sup>143</sup> As Weber and other have pointed out, the collapse of legitimacy onto legality erases any critical

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<sup>141</sup> See MAX WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 4, 335 (Max Rheinstein ed., 1967).

<sup>142</sup> *Id.* at 5.

<sup>143</sup> *Governor Claims No Opinion*, SAN FRANCISCO CHRONICLE, June 25, 2004, at A7.

distance: there is no ‘outside’ from which to declare the law illegitimate, reducing lawyers to “specialists without spirit” who are stuck inside the “iron cage” of rationalized legal systems without seeing their limits.<sup>144</sup>

This attitude (conflating legitimacy with legality) is a problem for corporate law because it is extremely permissive. Virtually anything is legal, which means that virtually anything is legitimate in the eyes of most observers. A corporation can have one director or twenty; it can pay dividends every quarter or never; it can have one class of stock or five classes; it can pursue elusive synergies in speculative mergers; it can have overseas sweatshops; and so on. The law is so loose that it permits a corporation’s directors to enter into contracts that violate their duty of loyalty to the company (say, by having the corporation hire their spouses as ‘consultants’) so long as the transaction is deemed ‘fair.’<sup>145</sup> Virtually anything is permissible so long as a nominal business purpose can be ascribed to the behavior, something that is easily supplied by willing

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<sup>144</sup> MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 181-2 (Talcott Parsons trans. ,1992).

<sup>145</sup> LAWRENCE MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA’S NEWEST EXPORT 204 (2001). Professor Mitchell explains that even in a case where a director convinces the board to hire his girlfriend in a critical position -- a clear conflict of interest -- Delaware law allows the decision to be sanitized by a vote of the other directors, a vote of the shareholders, or by evidence that the contract is fair, which is easy to procure. And even if one of these ‘outs’ is not forthcoming, a derivative suit by an aggrieved shareholder can be dismissed by an ‘independent’ committee appointed by the directors. The fiduciary duty of loyalty is so easily skirted that, “We might as well not have fiduciary duty at all.” *Id.* at 204. And yet we *do* have a rule, perhaps to give the *impression* of rigor and legitimacy.

consultants. The practical effect of this is to consecrate the widest possible range of corporate behavior as ‘legal’ and therefore ‘legitimate.’ This creates insurmountable difficulties when trying to criticize corporate behavior, since virtually all behavior is *de facto* legitimate – tax avoidance schemes, overseas sweatshops, outrageous perks for directors and officers, insider transactions, and so forth.

To see how this works, take the question of executive compensation, which is set by the board of directors under the rubric of their exercise of business judgment. The fiduciary duties of care and loyalty would seem to mitigate against the awarding of excessive salaries to executives, but in reality they do nothing to prevent it. The average CEO of a major corporation now gets \$10.8 million a year, an almost twenty-fold increase since 1981, and more than 400 times what an average worker makes.<sup>146</sup> Such princely salaries are the product of winking and nodding among a network of insiders: the board hires sympathetic consultants to suggest massive salaries, and this fulfills the board’s requirement of seeking outside advice in their exercise of business judgment, and the lawyers who draft the compensation packages defer to the board, who are then reappointed for election by the very officers whom they have rewarded.<sup>147</sup> This

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<sup>146</sup> Nicholas Kristof, *Millions for Moochers*, N.Y. TIMES, March 6, 2004, at A15.

<sup>147</sup> GRAEF CRYSTAL, IN SEARCH OF EXCESS 9, 14 (1991)(“For most of my working life, I have been a compensation consultant. Compensation consultants operate in a world that defies the laws of economics: they are given relatively large sums of money by a company’s shareholders to increase that company’s costs by raising the pay of the company’s senior executives. I always liked to think that I was working for the shareholders . . . [but] I eventually discovered what many economists had known all along, that CEOs are not perfect agents of their shareholders, that they have their own interests which

reached the height of absurdity when the Delaware Chancery Court refused to allow a lawsuit to go forward against the Disney board of directors for approving a nearly \$90 million severance package for Michael Ovitz that was triggered after one year of disastrous service.<sup>148</sup> When this opinion came down, one law professor said to this author, “If this is allowed, then anything is allowed” – and that is precisely the point: when everything is legal, then everything is ‘legitimate.’ This came to a head in the recent Tyco International scandal, where two executives were paid half a billion dollars under suspicious circumstances, and their lawyer argued that there couldn’t be any fraud involved since the transactions were fully disclosed and approved by the board of directors, the accountants, and the lawyers: “The auditors knew what was going on . . . There was no shredder or second set of books . . . [Everything was] on the books and records of the company.”<sup>149</sup> In other words, the injustice, the market failure, the absurdity had become *part of the system itself*.

Corporate law operates from a baseline assumption of business judgement, which is remarkable when we consider that businessmen in America have not always enjoyed this

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often diverge considerably from those of their shareholders”).

<sup>148</sup> See *Brehm v. Eisner*, 731 A.2d 342, aff’d in part, rev’d in part, 746 A.2d 244 (Del. 2000). After the corporate fiascos had made national headlines, the Chancery Court let stand a revised complaint alleging roughly the same facts. See *In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275 (Del. Ch. 2003).

<sup>149</sup> Andrew Ross Sorkin, *Tyco Defense Begins Closing Argument*, N.Y. TIMES, March 16, 2004, at C6.

presumption.<sup>150</sup> The so-called robber barons of the late Nineteenth Century created brutal monopolies, crushed competitors, manipulated markets, lied to investors, intimidated judges, and in some cases hired thugs to shoot striking workers.<sup>151</sup> Much of this behavior was outlawed by the corporate laws of the Twentieth Century, including the Sherman Antitrust Act, the Delaware General Corporation Law, the Securities Act of 1933 and the Exchange Act of 1934. What these statutes do is to *domesticate* corporate behavior. The result is that we no longer have *individual* robber barons that we look upon with suspicion, but multinational corporations that operate with a presumption of legitimacy. How much have things really changed? Consider that Andrew Carnegie locked union supporters out of his steel mills and erected barriers with gun holes in case workers decided to storm the factory; nowadays Wal-Mart forces its ‘associates’ to watch videos on the dangers of unions and has a squad of union-busters on twenty-four hour hotlines.<sup>152</sup> We are inclined to think of the former as *greedy* and the latter as *business savvy*; the former as *illegitimate* while the latter is *just business*. Historian Howard Zinn explains how the raw conflicts are smoothed over and rationalized in the modern legal system:

The rule of law in modern society is no less authoritarian than the

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<sup>150</sup> See DENNIS BLOCK ET AL., THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS 18 (1998)(“The business judgment rule is a presumption protecting conduct by directors that can be attributed to any rational business purpose. . . . The courts frequently have stated that the business judgment rule as a presumption in favor of director conduct is a powerful, strong, substantive rule of law, and not merely a defense.”).

<sup>151</sup> See MATTHEW JOSEPHSON, THE ROBBER BARONS (1962).

<sup>152</sup> Daniels, *supra* note 124, at 112.

rule of men in pre-modern society; it enforces the maldistribution of wealth and power as of old, but does this in such complicated and indirect ways as to leave the observer bewildered: he who traces back from cause to cause dies of old age inside the maze. What was direct rule is now indirect rule. What was personal rule is now impersonal. What was visible is now mysterious. What was obvious exploitation when the peasant gave half his produce to the lord is now the product of a complex market society enforced by a library of statutes.<sup>153</sup>

The role of corporate law here is to christen corporate behavior as legal and therefore legitimate. The reverse is also true: any demand for change in the existing corporate law is deemed a request to move beyond the law and therefore is presumptively illegitimate.

The legitimating function of corporate law (specifically the Delaware General Corporation Law and the federal securities laws) operates by presenting an idealized picture of the modern corporation – a model that is not based on reality but on the idea of what a legitimate system of power might look like. The basic idea is that of a consensual pyramid. At the bottom are ideal shareholders who are rational, informed, and autonomous; they keep abreast of the company by virtue of its disclosures under the federal securities laws. These shareholders come together to elect directors as managers-fiduciaries at the annual meeting, and these directors

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<sup>153</sup> Howard Zinn, *The Conspiracy of Law*, in *THE RULE OF LAW* 15, 18 (Robert Paul Wolff ed., 1971).

appoint officers who prove their mettle by generating high returns. All the while, the directors chosen by the shareholders act as fiduciaries to ensure that agents of the corporation act in its best interests. If the shareholders choose to sell their stock or buy additional shares, they can rest assured that the market is highly efficient, so the market price will reflect all relevant information about the company.

This model has tremendous appeal for those who have a stake in perpetuating the corporate system, such as members of the business elite and those who serve them. Indeed, there are whole groups of corporate insiders (and scholars) who live inside the model, as it were.<sup>154</sup> Of course, this idealized picture constantly comes up short. In fact, the model gets refuted at every turn. Most recently, a wave of corporate scandals made painfully clear that shareholders were largely uninformed about what was really happening at companies, boards of directors were clueless about wrongdoing by officers, lawyers and accountants were participants in frauds they were supposed to detect, officers were manipulating stock prices to trigger their bonuses, stockbrokers were pumping and dumping stocks – and all of this took place amid an irrational stock bubble that the SEC and the stock exchanges didn't lift a finger to stop. But rather than discard the model, we are told (by the President no less) that the basic system is sound and that

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<sup>154</sup> For example, corporate insiders will publicly claim that the annual meeting is a chance for all stockholders to get a hearing, while outsiders know that this is false. *Compare* REV. MODEL BUS. CORP. ACT sec. 7.01(a)(the annual meeting is “the appropriate forum for a shareholder to raise any relevant questions about the corporation’s operations”) with TED NACE, GANGS OF AMERICA 229 (2003)(the annual meeting is “a piece of choreography disguised as a democratic proceeding”).

we merely need to plug a few holes that have been exploited by a few “bad apples.”<sup>155</sup>

The law, then, papers over corporate reality by translating corporate conduct into terms that are palatable. As Barthes said, the law “depicts you as you should be, and not as you are.”<sup>156</sup> In other words, the law is a master narrative that assigns each of us a role, it re-describes our experiences in its own categories. Standing alone, this is not *per se* objectionable – all systems rely on models and narratives – but a danger arises when the models and narratives become mere official stories for the imposition of power. The currently dominant master narrative of corporate law is a story of informed shareholders, efficient markets, democratic corporations, fiduciaries who act in the best interests of the corporation, and business entities who effectively balance their commitments to justice and profit. This discourse holds allure for captains of industry, corporate lawyers, consultants, and judges – all of whom stand to benefit from the narrative. Outside of this small world of insiders are millions of people – workers, minorities, the poor, activists – who find the narrative unbelievable.

In his masterpiece *The Concept of Law*, philosopher H.L.A. Hart mused about what a *pathological* legal system would look like. He concluded that it would be a situation where a small group of officials accepted the law as reasonable and morally binding while the great mass of people subject to the law saw it as the naked expression of raw power by insiders and

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<sup>155</sup> See, e.g., Jeff Madrick, *Bush Talking Tough on Corporate Ethics, But Where is the Regulatory Bite?*, N.Y. TIMES, July 11, 2002, at C2.

<sup>156</sup> BARTHES, *supra* note 87, at 44.

officials.<sup>157</sup> This is precisely the situation of corporate law today: it is an attempt by corporate insiders (and their priests and servants) to christen whatever they wish to do as rational, efficient, and wrapped in a presumption of business judgment.

## Conclusion

I have been arguing that a great deal of corporate law is better understood through the lens of culture than the lens of economics, and that corporate law must be situated against other cultural institutions and narratives. As a “legal fiction,”<sup>158</sup> the corporation is created by symbols and texts, a feature that it shares with other symbol-laden aspects of our culture, including religion, folklore, literature, politics, and history.<sup>159</sup> On my reading, the modern corporation resembles a deity, and corporate law has strong parallels with mythology. In particular, the corporation functions as an empty signifier which absorbs the contradictory forces of our culture,

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<sup>157</sup> H.L.A. HART, *THE CONCEPT OF LAW* 117, 118 (1994)(claiming that such a society might be ‘sheep-like’ and the sheep might end up in the slaughterhouse, yet it would still have a ‘legal system’ according to Hart).

<sup>158</sup> *See* *Agley v. Tracy*, 719 N.E.2d 951, 954 (Ohio 1999)(“A corporation . . . is a legal fiction for the purpose of doing business.”).

<sup>159</sup> CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 5 (1973)(“Believing, with Max Weber, that man is an animal suspended in webs of significance that he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of laws but an interpretive one in search of meaning.”)

specifically our demands for capitalism and justice. My general point is that corporations are imbricated within broader symbolic systems (texts and institutions) and should not be understood solely as one-dimensional economic engines.

By advocating a ‘cultural turn’ in corporate legal scholarship, I hope to shift the dialogue away from the law and economics approach that currently dominates scholarship on the corporation. The timing is right for a shift away from economic models, given that the recent corporate scandals – Enron, WorldCom, GlobalCrossing, Adelphia – laid bare the poverty of law and economics. It turns out that the system was broken at every possible level – illegal insider deals, bogus accounting, complicit attorneys, useless boards, deceptive disclosures, corrupt stock analysts, conniving mutual fund managers, all amid a modern Tulipmania. A seven trillion dollar disaster, an orgy of greed and lawbreaking, cannot be captured with terms like ‘rationality,’ ‘efficiency,’ and ‘transparent markets.’ A deeper problem with viewing corporate governance in economic terms is that it ignores the fundamental tenet that all lawmaking is profoundly symbolic and textual, that corporate action takes place against a backdrop of shared *meanings* about the nature of a corporation, its relation to the state, its purpose, its powers and limits. John Dewey made this point long ago by explaining that the whole question of corporate personality (i.e., whether a corporation is a ‘person’) depends on “non-legal considerations: considerations popular, historical, political, moral, philosophical, metaphysical, and in connection with the latter, theological.”<sup>160</sup> More recently, anthropologist Clifford Geertz

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<sup>160</sup> John Dewey, *The Historical Background of Corporate Legal Personality*, 35 YALE L. J. 655, 655 (1926).

suggested that legal studies undertake an interpretive turn, “away from functionalist thinking about law . . . and a shift toward hermeneutic thinking about it.”<sup>161</sup> This requires taking corporate law and corporate behavior as texts that need to be deconstructed. This has revolutionary implications for corporate scholars – they need to put down the volumes by Coase and Posner and instead start reading Geertz, Gramsci, Freud, Marx, and others who see behavior as irreducibly symbolic. The pressing issues of corporate law – whether a corporation should resemble a functioning democracy, whether it has duties to a community, whether it should be allowed to move offshore, whether it has a race or gender, whether it has rights to free speech, whether it must favor shareholders over employees, and so forth – are questions about the *meaning* of the modern corporation. This article has been one attempt to get at the deep cultural meaning of the American corporation by viewing it as a modern deity. Hopefully others will view the corporation through the lens of cultural studies, history, literary criticism, sociology, and so forth, to balance out the economic approach that so dominates corporate scholarship.

By describing the corporation as a modern deity and by characterizing corporate law as mythology, it is not my intention of somehow blazing a path beyond mythology, where corporate law would be solidly placed on a foundation of rationality – *logos* instead of *mythos*.<sup>162</sup> To be

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<sup>161</sup> CLIFFORD GEERTZ, LOCAL KNOWLEDGE 232 (1983).

<sup>162</sup> The operative question to be explored is whether *logos* can ever be fully separated itself from *mythos* – or whether this separation is itself merely another myth. See PAUL RICOEUR, *Myth as the Bearer of Possible Worlds*, A RICOEUR READER 482, 486 (Mario Valdes ed., 1991) (“If we take the relation of *mythos* and *logos* in the Greek experience, we could say that myth has been absorbed by the *logos*, but never completely so; for the claim of the *logos* to rule over *mythos* is itself a mythical claim.

sure, there is an intellectual tradition associated with the Enlightenment which holds that myths (and religion) are a type of error which can be overcome with rationality, and that once we realize we have created our own myths, we will abandon such illusions and deal directly with social reality instead of mediating through myths. The problem with this view, frankly, is that there is no evidence of any person or society ever reaching such a post-mythical stage. For example, Marxism called for abandoning bourgeois myths in favor of ‘scientific’ socialism, but ended up reverting to equally absurd myths (‘the new Soviet man,’ ‘the withering away of the state,’ ‘iron laws of history’).<sup>163</sup> Rather than ridicule this failure, we should be humble and accept a certain intractable dimension to myth. The point is not to get beyond myth, but to adopt Nietzsche’s suggestion that myths are a ‘transfiguring mirror’ in which we can face our deepest conflicts.

Anyone who reads corporate law as a cultural text will be struck by the endless contradictions between our commitment to the pursuit of profit and to ensuring justice and fairness. The question to be asked is whether these factors are adequately balanced within corporate law, and here is where Duncan Kennedy’s comments on the mediating effect of law are relevant:

[Law] mediates with a bias toward the existing social and economic order. It asserts that we have overcome the fundamental

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Myth is thereby reinjected into the *logos* and gives a mythical dimension to reason itself.”).

<sup>163</sup> See ARTHUR KOESTLER, *THE YOGI AND THE COMMISAR* 131 (1945)(“Soviet Myth and Reality”).

contradiction through our existing practices. Or that we can achieve that blissful state through minor adjustments of a legal regime that is basically sound, and needs only a little tinkering to make it perfect. Or that there are many and serious flaws in the existing order that we can remedy by bringing our tawdry practice into line at last with our noble (non-contradictory) ideals.<sup>164</sup>

So the skewed mediation (biased toward the existing order) creates the impression that a neutral body of law has sanctified the world as it exists, thereby lending it an aura of legitimacy

The poverty of the existing corporate mythology is obvious from the absurdities and doublespeak that it creates: we have ‘elections’ in a ‘corporate democracy’ where one party always wins; we have articles of incorporation and bylaws that form a ‘contract’ even though shareholders have not agreed to them in advance; we have ‘transparency’ in the guise of indecipherable documents that no one reads; we have ‘constituency’ statutes that don’t force directors to take account of constituencies; we have ‘annual meetings’ where no one really meets; we have corporate personality without any of the burdens of personhood; we have systems to avoid double taxation yet most corporations pay no taxes in the first place and can move offshore to avoid taxation; and we have gatekeepers like lawyers and accountants who often participate in the very frauds that they are supposed to detect. All of this would be a harmless comedy of errors if it didn’t affect the lives of hundreds of millions of Americans. When Barthes suggests that myths can be challenged by insisting on the “responsible idea of

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<sup>164</sup> Kennedy, *supra* note 40, at 217.

language,”<sup>165</sup> he was envisioning precisely this situation where a system clings to power (and reveals its weakness) in the proliferation of empty buzzwords.

Beyond the responsible use of *language*, it is also a question of the responsible use of *imagination*. If mythical thinking is necessary as a substratum of corporate law, and we must rely on our imagination to dream up new entities, new rules, and new institutions, then we have the right to demand that these creations are brought into harmony with fundamental values. The creative people who dreamt up new entities such as the Limited Liability Company and the Family Limited Partnership can surely use their imagination to dream up a new form of business law that balances the demands of capitalism and justice in a way that doesn't shortchange workers, destroy the environment, and concentrate wealth in the hands of a tiny elite. This is another way of saying that our myths, our own creations, should not grant legitimacy to a system that cripples so many of us.

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<sup>165</sup> BARTHES, *supra* note 87, at 156.