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Recommended Citation

Miller, Geoffrey P., "Narrative and Truth in Judicial Opinions: Corporate Charitable Giving Cases" (2009). *New York University Public Law and Legal Theory Working Papers*. Paper 155.

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Narrative and Truth in Judicial Opinions: Corporate Charitable Giving Cases

Geoffrey Miller¹

Abstract: judicial opinions map events into narrative. Errors in mapping are inevitable but are exacerbated when the adversary system breaks down. This paper explores these problems of narrative distortion through an analysis of corporate charitable giving cases: *Dodge v. Ford Motor Co.*, *A.P. Smith Co. v. Barlow*, and *Shlensky v. Wrigley*. Each of these cases contains evidence of significant distortion in the mapping process. In *Dodge*, the distortion was due to the fact that neither party wanted to acknowledge what was really going on. In *A.P. Smith*, the evidence suggests that the litigation was collusive and that all parties, including the judge, were in on the scam. In *Wrigley*, the opinion may have had more to do with Chicago politics than with the accurate presentation of the facts. I conclude with tentative thoughts about the implications of narrative distortion in American law.

* * *

Legal narratives are a means for recording, transmitting, and applying information pertaining to the organization of society. Compared with other approaches to handling legal information, such as (for example) statutes or rules derived from case decisions, narratives offer potentially greater availability, salience, flexibility, and ease of transmission within the culture. On the other hand, narratives have shortcomings, including intrinsic ambiguity and the potential for biased application. Efficient legal systems can be expected to utilize narratives together with other strategies for managing legal information. This is what we observe in American law, where narratives occupy a place alongside other methodologies of social control.

The construction of narrative in litigation involves three steps. Events occur in the world and leave traces in the form of memories, physical evidence, or effects on other phenomena. Some of those traces are then packaged by lawyers and observed by the judge in

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the context of an adversarial proceeding in which parties present competing narratives or interpretations. Based on his or her observations of the competing views, the judge composes a narration of the events and ties that account to certain legal consequences.

An important question for judicial opinions – and indeed for all non-fiction narratives -- concerns the accuracy of the mapping between the underlying facts and the description of those facts in the narrative. This process is inevitably subject to distortion. The events being narrated are in the past and cannot be recovered other than through observation of the traces they have left behind. Those traces only partially disclose the underlying events: even videotapes present an imperfect image because they are framed in time and space. Moreover, the narrative composed by the judge must selectively edit among the traces if it is not to become unmanageable. The judge will stress some things, downplay others, and omit others entirely.

The American judicial system seeks to minimize this distortion through the adversary system and closely related rules of procedure, evidence, and legal ethics. If judges are impartial, if the evidence shown to them is balanced, relevant, truthful and not prejudicial, if the competing narratives are presented with equal (or at least adequate) skill by the party advocates, then the result can be expected to bear a reasonable resemblance to the underlying events even if it has been edited, simplified, and diffracted in various ways.

The adversary system, however, does not always function well. When key elements of the system break down, the narrative that emerges is likely to be metamorphic rather than sedimentary: the underlying facts will be distorted in the process of their translation into a judicial opinion. Witnesses may lie under oath or documents may be fabricated or withheld; there may be gross disparities in the competence, energy, or loyalty of the attorneys; judges may fail to correctly assess the meaning or importance of the evidence presented to them. Judges

themselves may be biased, either through corruption, political influence, or ideological zeal. The litigation may be collusive or at least lacking in adversity between the parties with respect to key issues. Sometimes both parties, for different reasons, are unwilling to present the true facts to the judge, even though their interests in the litigation are at odds.

This paper explores these problems through an analysis of leading cases in the area of corporate charitable giving: *Dodge v. Ford Motor Co.*,² *A.P. Smith Co. v. Barlow*,³ and *Shlensky v. Wrigley*.⁴ I attempt a form of reverse engineering, hoping to uncover some of the true underlying facts and to correct for the distorting effects of partiality in the presentation of facts or the composition of the narrative. It turns out that each of these cases contains evidence of distortion in the process of translation from fact to narrative. In the *Dodge* case, the distortion was due to the fact that neither party wanted to acknowledge what was really going on. In *A.P. Smith*, the evidence suggests that the litigation was collusive and that all parties, including the judge, were in on the scheme. In *Wrigley*, the opinion may have had more to do with Chicago politics than with the accurate presentation of the facts. I conclude with tentative thoughts about the implications of the types of narrative distortion we can discover through the analysis of these opinions.

I. *Dodge v. Ford*

One of the most famous corporate cases of all time, this litigation grew out of a conflict between giants of America's early automobile industry: Henry Ford, on the one hand, and John

² 204 Mich. 459, 170 N.W. 668 (Mi. 1919).

³ 98 A.2d 581, 586 (N.J. 1953).

⁴ 237 N.E.2d 776 (Ill. App. Ct. 1968).

and Horace Dodge, on the other.⁵ The narrative of the case, drawn from the opinion, runs as follows.

The Dodge brothers were among the initial investors in Ford Motor Company at the time of its formation in 1903. By 1915 they owned 10% of Ford stock. Henry Ford owned the majority of the stock and dominated the business. The venture was hugely successful, selling ever-increasing amounts of cars and returning fantastic special dividends to shareholders, including the Dodges. Over the years Ford progressively reduced the price of its Model T, from \$900 at the outset to \$440 in 1916, each year selling more automobiles than the year before.

Despite all this success, relations between Ford and the Dodges became acrimonious. The trigger for the lawsuit was Ford's decision in 1915 to expand the production of automobiles while dropping the price still further from \$440 to \$360. To fund the expanded production, including the construction of a new smelting plant, Ford ceased making any special dividends in 1916 and announced that the company would not make such payments in the future. The Dodges sued in Michigan state court in an attempt to force Ford to declare a special dividend and to invalidate the smelter construction project. A trial court agreed with the Dodges with respect to the dividend issue. Ford appealed to the Supreme Court of Michigan.

The court, in a decision issued in February 1919, confirmed the order that Ford had to pay out a special dividend. The key factual findings were as follows:

[Ford's] plan called for the reduction in price of \$80 a car. The capacity of the plant . . . would produce more than 600,000 cars annually. This number, and more, could have been sold for \$440 instead of \$360, a difference in the return for capital, labor, and materials employed of at least \$48,000,000. In short, the plan does not call for and is not intended to produce immediately a more

⁵ For prior discussions of the case, see, e.g., Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, in *The Iconic Cases in Corporate Law* 1, 2 (Jonathan R. Macey ed., 2008) (criticizing the opinion as a "mistake"); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 *N.Y.U. L. Rev.* 733, 773 (2005) (observing that the case does not impose a duty on corporate directors to maximize profits but merely limits their discretion to share profits with non-shareholders).

profitable business, but a less profitable one; not only less profitable than formerly, but less profitable than it is admitted it might be made. The apparent immediate effect will be to diminish the value of shares and the returns to shareholders.⁶

Why would Henry Ford adopt a business strategy that reduced profits? The Dodges had an answer: he was acting, at least in part, out of eleemosynary motives. Ford's trial testimony supported that impression: "he thinks the Ford Motor Company has made too much money, has had too large profits, and that, although large profits might be still earned, a sharing of them with the public, by reducing the price of the output of the company, ought to be undertaken."⁷ Given this evidence, the court was confident that "certain sentiments, philanthropic and altruistic, creditable to Mr. Ford, had large influence in determining the policy to be pursued"⁸

The case therefore turned on whether the humanitarian purposes attributed to Henry Ford could justify corporate directors in undertaking actions which were certain to reduce a company's profitability and to negatively impact the value of its stock. The court concluded that Ford had gone too far: "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes."⁹

The narrative of the *Ford* case has a Shakespearian feel: like King Lear, Henry is an absolute monarch brought down by hubris in confusing his personal wishes with the obligation to carry out his official duties. One of the richest men in the world, the dominating figure in a

⁶ *Dodge v. Ford Motor Co.*, 170 N.W. at 683.

⁷ *Id.* at 683-84.

⁸ *Id.* at 684.

⁹ *Id.*

company whose bank account would be the envy of many nations, forgets that in his capacity as corporate director he is the servant of the company and its shareholders, and instead haughtily decrees that henceforth the company will sacrifice profits for the benefit of all mankind. While not criticizing his sentiments, the court brings him to heel by reminding him that his company is a business like every other, distinguished by its phenomenal success but still subject to the rules that apply to all corporations. Even Henry Ford is not above the law of fiduciary duty that requires directors to subordinate their personal values and attitudes in the service of the company they serve.

This narrative may be satisfying as moral drama. But it grossly distorts the facts.

Reading between the lines of the opinion, it is not difficult to discern that Henry Ford was *not* acting out of charity – and that the Dodges were well aware of his true motivations even when they accused him of being too public-spirited. The back story, which is dimly apparent in the opinion itself, is that the fight between Ford and the Dodges had little to do with the fiduciary duties of managers and much to do with competition between commercial rivals. Ford had originally purchased most of the parts for his automobiles from the Dodges. The early Ford Motor Company was essentially an assembly operation which put together parts supplied by others.¹⁰ But Henry Ford disliked the lack of control implicit in subcontracting for parts and eventually moved to vertically integrate his operations, including building an in-house capacity to manufacture parts. Ford tried to lease the Dodge's factory, but the Dodges refused, deciding instead to build a car of their own to compete with Ford. By 1913 they had announced that they

¹⁰ See generally Douglas G. Brinkley, *Wheels for the World: Henry Ford, His Company, and a Century of Progress* (2003); James Flink, *America Adopts the Automobile, 1895-1910* (1970); Allan Nevins and Frank Ernest Hill, *The Times, The Man, The Company* (1954).

would stop supplying parts to Ford and instead would design, build, and market an automobile of their own. By November 1914 the first Dodge cars were rolling off their assembly line.¹¹

The Dodges and Ford were, in short, bitter rivals locked in a struggle for market share. In light of this background, Henry Ford's supposedly charitable strategy of increasing production and dropping price appears in a different light. Far from being a money-losing effort to benefit all humanity, it was a nefariously clever strategy to kill off a worrisome threat of competition.

Ford's strategy had three elements. First, by eliminating the special dividends Ford hoped to deprive the Dodges of financing to operate their venture. Because large amounts of capital were needed to achieve the economies of scale which were driving the automobile industry at the time, the Dodges would need to seek other sources of financing when the expected dividend income from Ford disappeared.

Second, Ford put competitive pressure on the Dodges by dropping the price of the Model T. Dodges were already priced about a hundred dollars above the earlier, higher price for Ford cars; the new lower Ford price was potentially devastating to their market. Ford undoubtedly hoped that the Dodges would not be able to sell many cars at their higher price and that lower production rates would prevent them from achieving the necessary economies of scale.¹²

Third, the planned increase in production could choke the burgeoning market for new cars, thus meeting consumer demand which would otherwise benefit the Dodges. The increase

¹¹ Douglas G. Brinkley, *Wheels for the World: Henry Ford, His Company, and a Century of Progress* (2003).

¹² Meanwhile it is unlikely that the new, lower price for the Model T was below Ford's cost of production. Ford had been making gigantic profits at \$440 and probably still would make a profit at \$360. The increased production and vertical integration into smelting could have achieved economies of scale or scope that reduced costs further. Even if \$360 was below Ford's cost of production, moreover, the company had a war chest to cover losses while it drove Dodge out of the market – and the economies of scale in the industry suggested that Ford could reap substantial benefits thereafter by raising prices without fear that new entry would erode profits going forward.

in production and the decrease in price were intimately linked, although the court did not see it that way. Recall that the court had concluded that Ford could increase production from 500,000 cars to 600,000 cars annually and still sell them all at the previous price of \$440. The assumption appears to be that Ford confronted a horizontal demand curve such as that faced by a wheat farmer or other supplier in an atomistic market. The automobile market in 1916, however, was anything but atomistic. It was dominated by Ford, and accordingly Ford was facing a downward-sloping demand curve similar to that of the market as a whole. Under such conditions Ford could not greatly increase production *without* dropping price. The proposed price reduction, in other words, was not due to an eleemosynary wish to benefit all mankind but rather a sensible decision about pricing strategy given increased production in the highly concentrated automobile market.

None of this appears explicitly in the Court's narrative.¹³ Why was the account at such odds with reality?

The answer is that neither party had an incentive to disclose the true facts. Henry Ford could not acknowledge that his real purpose was to drive the Dodges out of business. Although such a purpose may have been good for Ford Motor Company, its acknowledgement would have made Ford less appealing as a litigant. Worse, it could have provoked public anger. And any acknowledgement of an intention to price the Dodges out of the market could have drawn unwanted attention from government officials.

The Dodges, for their part, also could not comfortably disclose the true state of affairs. They had positioned themselves as aggrieved shareholders and based their legal claims on the concept that corporate managers had a duty to maximize company profits. Acknowledging their

¹³ The plaintiffs did allege that Ford's plans would stifle competition by other manufacturers, but the Court did not emphasize the point.

true purpose – to advance their own interests at the expense of Ford and its other shareholders – would have seriously undermined the force of their legal claims. Their objection to Ford’s expansion plan, moreover, was premised on the idea that managers should place the interests of the firm over their own personal agendas – an argument that was in tension with their efforts to force Henry Ford to manage the company in the service of their competition with Ford.

II. *A.P. Smith Co. v. Barlow*

A.P. Smith Co. v. Barlow is often cited in contrast to *Ford v. Dodge* as an example of the modern, favorable judicial attitude toward charitable giving.¹⁴ The narrative of the case goes as follows. The A.P. Smith Company, a fire hydrant manufacturer located in East Orange, New Jersey, made a \$1,500 donation to Princeton University. After a shareholder (Barlow) questioned the legality of the gift, the company brought an action in the New Jersey court of chancery against Barlow and others seeking a declaration that the gift was *intra vires* (within the scope of its legally authorized activities). The chancery court declared the gift to be legal and the shareholder appealed the case directly to the New Jersey Supreme Court, which affirmed the chancery court’s decision in a broad-ranging opinion.

The facts and decision in *A.P. Smith* are not in themselves remarkable: a controversy between a company and one of its shareholders over a management decision, resulting in a decision following the usual pattern of upholding actions undertaken by a company’s management in the exercise of business judgment. The court’s narrative is of greater interest, however. It presents elements of a bodice-ripper of the sort commonly found in convenience stores and pharmacies. A poor but worthy suitor pays court to an aristocratic young woman; the path of true love is interrupted by dark and unexpected forces; the paramour proves his mettle

¹⁴ For commentary, see Faith Stevelman Kahn, Pandora's Box: Managerial Discretion And The Problem of Corporate Philanthropy, 44 UCLA L. Rev. 579 (1997); Nancy J. Knauer, The Paradox of Corporate Giving: Tax Expenditures, the Nature of the Corporation, and the Social Construction of Charity, 44 DePaul L. Rev. 1 (1994).

by taking on the threat to his beloved; the obstacles to true love are overcome in a dramatic and glorious victory; and the happy partners are finally free to consummate their union (although that event is chastely excluded from the narrative). Virtue triumphs over venality and everyone lives happily ever after.

Much of this narrative is nonsense.

Viewed realistically, the story simply doesn't add up. It is not clear, in the first place, why a fire hydrant manufacturer in East Orange – a working class suburb of New York and Newark – would have seen fit to contribute money to a tony university forty miles down the road (perhaps they wanted to increase the prestige of their product, an object otherwise known as a popular facility for dogs). It is also unclear why Barlow – whose identity and motivations are never described in the opinion – would have objected to the gift. The A.P. Smith Company had made charitable contributions to local educational institutions in the past, apparently without objection. The amount of the gift, while not insignificant, was relatively small, and hardly seems enough to warrant a major legal battle. Other features of the case are equally perplexing. Given the shareholder's objection, why did the company bring a lawsuit rather than simply capitulating? Did it care so much about Princeton University that it was willing to incur the legal fees necessary to establish its right to make the gift? Even if it did care, why didn't it go ahead with the gift and force the shareholder to sue to prevent or rescind the contribution, rather than act proactively by suing the shareholder? Why did the objecting shareholder, when sued, bother to defend – and to take the matter all the way to the New Jersey Supreme Court? He (or she) surely could not have had a big stake in the outcome. What motivation other than spite could have sparked such intensity of purpose? And if spite was behind the lawsuit, why didn't the company bring this to the attention of the court?

The course of the trial also seems odd. The A.P. Smith Company paraded as witnesses an A-List of luminaries from the corporate and educational sectors, including Frank W. Abrams, chairman of the board of the Standard Oil Company of New Jersey, Irving S. Olds, former chairman of the board of the United States Steel Corporation, and Dr. Harold W. Dodds, President of Princeton University. Why were these grandees trotted out in the service of a minor corporate dispute involving \$1,500? And why did the shareholder, although willing to defend the action, make only the most cursory of efforts? The New Jersey Supreme Court’s opinion makes no mention of any defense trial witnesses. Perhaps there were none. If there were such witnesses, they were not very impressive. The shareholder, moreover, appeared surprisingly docile in his litigation strategy. He restricted his arguments to technical and formalistic points which appeared unlikely to hold much sway with the Supreme Court of New Jersey, which had taken the appeal directly from the trial court in light of what it deemed “the public importance of the issues presented.”¹⁵ The shareholder, moreover, did not take issue with any of the expert testimony advanced by the company. He conceded that educational institutions perform an important public service, that such institutions have a compelling need for private financial support, that the New Jersey legislature had strongly encouraged charitable donations by corporations, and so on. Why give these points away?

Consider also the court’s treatment of the company’s witnesses. Two of those individuals – Hubert O’Brien, the president of the A.P. Smith Company, and Dr. Dodds, president of Princeton University – had an obvious interest in the subject matter of the litigation. Yet they were allowed, apparently without challenge, to testify as expert witnesses on matters of general knowledge and opinion. The New Jersey Supreme Court opinion credulously accepted the testimony of Mr. O’Brien, the fire hydrant manufacturer, to the effect that the public expects

¹⁵ A.P. Smith Co. v. Barlow, 98 A.2d at 583.

companies to make charitable gifts; that such gifts create a favorable environment for business; and that corporate giving to educational institutions enhances the supply of qualified managers. Why was Mr. O'Brien qualified to make such opinions?

The testimony of Princeton's Dr. Dodds, who was grasping at \$1,500, was even more over the top. Dodds warned that if charitable giving to universities were not encouraged, higher education would soon be absorbed by the government, leading to the death of private enterprise and the American way of life: "[i]f the time comes when all these centers [of private education] are absorbed into government, then freedom as we know it, I submit, is at an end."¹⁶ Not bothering to ask whether freedom as we know it was absent in countries like France and Germany, where private universities were nearly unknown, the court cited this outburst as the expression of uncontestable truth. Indeed, it went further, playing the card that Dodds had only flashed from his hand: "we are faced with other, though nonetheless vicious, threats from abroad which must be withstood without impairing the vigor of our democratic institutions at home . . . otherwise victory [in World War II] will be pyrrhic indeed."¹⁷ Writing in 1953 at the height of the Red Scare, the court was alluding to the Cold War and to the fear that the institutions of capitalism, democracy and free enterprise would be destroyed by the Soviet Union. The implication was that unless we allow fire hydrant manufacturers to make gifts to Princeton University the country would be at risk of falling into communism and tyranny. Surely no court could allow that to happen!

What was really going on? Overwhelming evidence suggests that this was a collusive lawsuit brought and funded for the twin purposes of authorizing companies to make charitable gifts and encouraging them to make such gifts going forward.

¹⁶ Id. at 583.

¹⁷ Id. at 586.

The problem was this. Like many other companies, the A.P. Smith Company, established in 1896, had no explicit authority to make charitable gifts. A New Jersey statute passed in 1930 authorized corporations to make gifts to charity. This statute, however, did not in itself change the charter of the A.P. Smith Company because it became effective after A.P. Smith's formation. However, another statute, enacted in 1846 before the A.P. Smith Company was formed, reserved to the New Jersey legislature the right to alter, suspend or repeal all corporate charters subsequently granted.¹⁸ The 1846 reserve power statute might have provided the necessary authorization for legislation altering A.P. Smith's charter. But an 1867 decision by the New Jersey Supreme Court had ruled that the reserve power conferred in 1846 did not extend to fundamental changes, which still required the consent of the shareholders.¹⁹ Thus, if making charitable gifts was a fundamental change, the 1930 statutory authorization for charitable giving would be ineffective as to the A.P. Smith Company. The upshot was that there was a cloud on the power of companies formed prior to 1930 to make charitable contributions in the State of New Jersey.

New Jersey charities could easily have obtained help from the legislature, but the problem could not be resolved by statute. Only a decision by the Supreme Court of New Jersey could remove the difficulty, since the source of the difficulty was a Supreme Court decision which could not be legislatively overruled. But a Supreme Court decision was not going to be forthcoming in the ordinary course, simply because it would be in no private shareholder's interest to challenge a gift, much less take a lawsuit all the way to the state Supreme Court. The New Jersey Attorney General probably had the power to challenge corporate charitable giving, but doing so would have been politically dangerous since the public was unlikely to understand

¹⁸ Id. at 587.

¹⁹ *Zabriskie v. Hackensack & New York Railroad Company*, 18 N.J.Eq. 178 (Ch.1867).

that the government was bringing an action it hoped to lose.²⁰ Companies, of course, could make gifts notwithstanding the possibility that the actions were *ultra vires*, and could be reasonably confident that the gifts would not be challenged in court. But over-scrupulous corporate counsel still might raise questions about the legality of such gifts. Perhaps more importantly, the legal cloud provided cover for companies that wished to resist pressure to make charitable gifts, thus presumably reducing the frequency and volume of corporate charitable giving in the state.

The obvious solution was to concoct a collusive lawsuit. As would be expected in such a situation, the parties selected for the central roles were out of central casting: the old-line, traditional manufacturing firm, paragon of integrity and virtue, wishing to make a small contribution to a valuable cause, motivated by a benign mix of idealism, patriotism, and enlightened self-interest, and the state's most elite university, founded before the Declaration of Independence, framer and shaper of the leaders of tomorrow – all played out against the backdrop of an insidious threat of subversion at home and danger abroad. In this posture the matter was presented to New Jersey judges who were more than willing to wink at the collusion, provide the necessary legal authorization, and, for good measure, deliver a heartfelt encomium to the virtues of corporate charitable giving.

So understood, the *A.P. Smith* case presents multiple ironies. In the name of defeating threats to American political institutions the New Jersey courts participated in a subversion of one of the most important of such institutions, the adversarial lawsuit. Fearing Stalin's disrespect for truth and suppression of dissent, they conducted a show trial worthy of the most cynical of apparatchiks. Witnesses with obvious conflicts of interest and questionable

²⁰ The Attorney General in fact participated in the oral argument in the case on behalf of the A.P. Smith Company.

credentials were enlisted to support dubious assertions about social policy and historical change. Overall the opinion can be seen as a sorry spectacle.

Despite these problems, one's evaluation of the opinion may depend on whether in this context the ends are thought to justify the means. Indeed, the opinion itself, rife as it is with ominous foreboding about the communist threat, can be understood as a plea to forego the strict adherence to legal rules, even to sacrifice truth itself, in the interest of furthering overriding public policy objectives. *A.P. Smith* is a judicial water-boarding, to be sure, but it is one which arguably contributed to beneficial results – not the defeat of communism, but the freeing up of corporations to make gifts to worthy institutions in the spirit of public service.

III. *Shlensky v. Wrigley*

In the cases just discussed, the gap between fact and narrative occurred because the advocates did not present an accurate account to the narrator – in *Dodge v. Ford* because neither party wanted to acknowledge the true facts, even though the parties were at odds; and in *A.P. Smith* because the parties appear to have engaged in a collusive lawsuit in which the true facts were disguised by mutual consent. The *Wrigley* case presents a different situation, one where the parties were truly adverse and presented the court with non-deceptive accounts of the facts, but where the court itself may have been influenced by political considerations to present a distorted analysis of the evidence.²¹

The narrative presented by the court is as follows. Philip K. Wrigley was president and 80% owner of a corporation that owned the Chicago Cubs baseball team and its stadium, Wrigley Field. William Shlensky, a dissenting shareholder, filed a derivative lawsuit claiming

²¹ For commentary see, e.g., Judd F. Sneirson, Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance, 94 Iowa L. Rev. 987 (2009); Douglas G. Baird, Other People's Money, 60 Stan. L. Rev. 1309 (2008); Christopher M. Bruner, The Enduring Ambivalence of Corporate Law, 59 Ala. L. Rev. 1385 (2008).

that the company had sustained operating losses from its baseball operations due to the refusal of management to install lights in Wrigley Field. Lights would permit night games, Shlensky argued, and night games would increase attendance and enhance broadcast revenues. Every other major league baseball team had installed lights; the Cubs were the lone holdout. Shlensky claimed that Wrigley refused to install lights, not out of a wish to enhance shareholder value, but rather because of his concern for the ambiance of the neighborhood and belief that baseball was a daytime sport. Relying on *Dodge v. Ford*, Shlensky argued that protecting the neighborhood or maintaining baseball's identity as a daytime sport were not proper corporate purposes when the effect was to reduce profits.

Notwithstanding these apparently persuasive allegations, the trial court refused even to allow Shlensky to take evidence, instead dismissing the complaint on the ground that it failed to state a claim. On appeal, the Illinois Court of Appeals for the First District (in Chicago) upheld the trial court's decision. "We are not satisfied," the court wrote, "that the motives assigned to Philip K. Wrigley, and through him to the other directors, are contrary to the best interests of the corporation and the stockholders."²² The court proceeded to speculate on possible adverse consequences to the company from a decision to install lights: night games might cause the neighborhood to deteriorate, which in turn would drive patrons away or cause the company to lose more money from the reduction in the value of its real estate holdings than it would gain in ticket sales and media revenues. In the absence of allegations of fraud, illegality or conflict of interest, these potential benefits were enough, in the court's view, to justify the dismissal of the complaint without even allowing the plaintiff to take evidence on the alleged misconduct.

The narrative in *Shlensky v. Wrigley* resonates with dramas such as *Other People's Money* in which the proprietor of an old and established company resists the depredations of a

²² *Shlensky v. Wrigley*, 237 N.E.2d at 780.

cynical opportunist interested only in maximizing profits. In place of Jorgy Jorgenson, the crusty proprietor of New England Wire and Cable, we can substitute Philip K. Wrigley, son of the ball club's founder and dominating figure in the Cubs organization since 1932.²³ Like Jorgenson, Wrigley seeks to protect values such as tradition and concern for neighbors, even at the expense of short term profit. In place of Larry the Liquidator, the ruthless corporate raider, the narrative casts William Shlensky, the named plaintiff – a man who, like his movie counterpart, thinks in terms of profit and the bottom line and ignores the costs his actions might impose on others.

The narrative in *Wrigley* appears to bear a closer resemblance to the underlying facts than the other two cases discussed in this paper. Nevertheless, the court does turn somersaults in an effort to justify Wrigley's behavior. The arguments so credulously accepted by the judges were thin at best: there was little evidence that night games would damage the neighborhood, and even less reason to think that the cost to the Cubs organization of such deterioration, if it occurred, would be greater than the increased revenues from ticket sales and broadcast coverage. Given the court's analysis, there would appear to be precious little – in fact, essentially nothing – in the way of managerial foolishness or caprice that could be successfully challenged under the business judgment rule.

Why were the Illinois judges willing to engage in such gymnastics? Political considerations may have played a role. Philip Wrigley was a respected figure in Chicago. His companies were significant employers. And his decision to operate the Cubs as a daytime ballclub was popular with the citizens of the community surrounding the park for the obvious reason that eschewing night games contributed to a the peace and quiet of neighborhood.

²³ For general background on Wrigley, see Paul M. Angle, *Philip K. Wrigley: A Memoir of a Modest Man* (1975).

During the pendency of the litigation Wrigley reportedly collected 3,000 signatures from neighborhood residents supporting his decision.²⁴ Shlensky, on the other hand, was a nobody. He was a young Chicago lawyer²⁵ who reportedly owned only two shares of Wrigley stock²⁶ and who later acted as something of a professional plaintiff.²⁷ While it would be rash to say that courts in Chicago decide cases on political grounds, one cannot help but wonder whether the extreme deference to managerial discretion displayed in the opinion might have somehow been related to the popularity of the decision under review.

IV. Implications

This article has set forth a theory of legal narrative and identified ways in which failures in the adversary system can introduce distortions in the transmission of information from historical events to judicial opinion. In *Dodge v. Ford*, the failure was due to the desire of both parties to disguise the matters at stake in the litigation; in *A.P. Barlow*, it was due to apparent collusion among the litigants; in *Shlensky v. Wrigley* the problem was possible political influence on the courts. I now consider whether and to what extent one should view these distorting influences as problematic. Should it really matter if the court presents a distorted picture of the underlying facts? If the case itself is rightly decided, and if the rule of law that comes out of the facts so presented is sensible, then what is the harm from twisting the facts to fit the result?

While the answer to this question may seem self-evident – we should never countenance distortion in judicial opinions – the analysis is not quite so simple. Human cultures are replete

²⁴ Beth Eiseman Grey GM Bankruptcy Changes Business Rules?, American Thinker, August 30, 2009 (available at http://www.americanthinker.com/2009/07/gm_bankruptcy_changes_business.html).

²⁵ See *Centennial Laundry Co. v. West Side Organization*, 55 Ill.App.2d 406, 204 N.E.2d 589 (Ill.App. 1965); *Austin Congress Corp. v. Mannina*, 46 Ill.App.2d 192, 196 N.E.2d 33 (Ill.App. 1964).

²⁶ Beth Eiseman Grey GM Bankruptcy Changes Business Rules?, American Thinker, August 30, 2009 (available at http://www.americanthinker.com/2009/07/gm_bankruptcy_changes_business.html).

²⁷ Someone of his name participated as a named plaintiff in several shareholders derivative cases during the 1970s. See *Shlensky v. Dorsey*, 574 F.2d 131 (3d Cir. 1978); *Barnett v. Pritzker*, 73 F.R.D. 430 (S.D.N.Y. 1977).

with narratives that have been distorted in order to serve some purpose deemed important enough to justify the deformation. This phenomenon is especially pronounced in the case of narratives designed to encourage public-regarding actions. Hagiographies – the lives of saints that were so popular in the Middle Ages – tend to portray their subjects as relentlessly selfless, idealized figures. Similar enhancement of the subject’s virtues may be discerned in adulatory biographies of political figures and in accounts of heroic deeds performed by soldiers in battle. The possible exaggeration in these narratives serves a valuable purpose: by portraying and endorsing exceptionally public-regarding actions, the narratives encourage ordinary people to emulate the behavior of these socially constructed heroes. Even if we ourselves fall short of sainthood – and nearly everyone does – perhaps having an ideal to aspire to can change our behavior in small but useful ways.

Viewed in this light, several of the legal narratives analyzed above might be justified despite the distortions they introduce into the recounting and analysis of history. Certainly the result in *Dodge v. Ford* seems justifiable – not for the reasons stated in the opinion, but rather because Henry Ford enjoyed at the time an unhealthy dominance in the automobile industry, a power that would only be enhanced if he were allowed to deny the Dodges financing for their venture. One could also explain the outcome in *A.P. Barlow*, despite the distortion in the opinion. A \$1,500 gift to Princeton University was not going to hurt anyone very much, and it is probable that the company’s managers also bore a substantial share of any losses associated with the gift. *Wrigley*, too, might make a degree of sense in terms of outcome: while Philip K. Wrigley no doubt reduced his company’s profits by refusing to place lights in Wrigley Field, he was also an 80% owner of the company and incurred the lion’s share of the losses; many other

shareholders were probably fans whose investments were made more out of team loyalty than a wish for profit.

All that said, narrative distortions introduced by breakdowns in adversarial processes remain a subject of concern. Distortions may not always be problematic, but often they are. Collusive lawsuits may establish bad rather than good rules of law; political influence may skew the law in socially undesirable directions; interest of the parties in disguising the facts may induce the courts to issue erroneous opinions or to articulate socially undesirable rules. These risks suggest that narrative distortion is a complex topic from the standpoint of social policy. This paper has attempted to identify the issue, illustrate its operation, and offer tentative thoughts about its pros and cons.