

Beyond Greed is Good: Pop Culture in the Business Law Classroom

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Popular culture often projects a narrow view of what lawyers do and of what lawyering entails. Many movies, television shows, cartoons, and novels portray lawyers primarily as litigators, with the climax of the story consisting of an epic courtroom battle.¹

The very architecture of law schools, with their lavish moot court and trial advocacy courtrooms, quietly enshrines a normative vision of what the practice of law means.² Of course, the readings that comprise most of a casebook are appellate decisions that feed the conception that the lawyers' natural place is in the courtroom and that law is produced by appellate courts. Given these messages, it is no wonder that some students take business organizations classes, believing the subject is tangential to some of the "big" issues discussed in classes such as constitutional or criminal law. Many students fear that they have little or no background in business, or that there will be too many "numbers." For some, the very concept of a business organization is abstract, opaque, and passionless.³

This article explores how popular culture can be used in business organizations courses to expand students' horizons, while also raising crucial

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1. See, e.g., *Suits* (USA Network 2011-current); *The Good Wife* (CBS 2009-2016); *Law and Order* (NBC 1990-2010); *To Kill a Mockingbird* (Universal Pictures 1962).
2. See, e.g., Jay Gary Finkelstein, *Practice in the Academy: Creating "Practice Aware" Law Graduates*, 64 J. LEGAL EDUC. 622 (2015); R. Michael Cassidy, *Reforming the Law School Curriculum from the Top Down*, 64 J. LEGAL EDUC. 428 (2015).
3. See, e.g., Pamela Bucy Pierson, *Economics, EQ, and Finance: The Next Frontier in Legal Education*, 65 J. LEGAL EDUC. 864 (2016); Finkelstein, *supra* note 2; Neil J. Dilloff, *Law School Training: Bridging the Gap between Legal Education and the Practice of Law*, 24 STAN. L. & POL'Y REV. 425, 426 & nn.1-6 (2013); Robert E. Lutz, *Reforming Approaches to Educating Transnational Lawyers: Observations from America*, 61 J. LEGAL EDUC. 449 (2012); Paul R. Joseph, *Law and Pop Culture: Teaching and Learning about Law Using Images from Popular Culture*, <http://www.socialstudies.org/sites/default/files/publications/se/6404/640402.html>.

questions about capitalism, regulation, and the role of corporations. In tackling these big issues, popular culture can also bring a sense of delight, surprise, and humor into the classroom, and provide the material for hypotheticals that are located not in a courtroom, but in a variety of geographical and temporal spaces. The article addresses several of the foundational topics covered in business organizations, including limited liability, the purpose of a corporation, fiduciary duties of the board of directors, and insider trading. It addresses primarily an audience of business law professors, but we hope others will find it rich and generative.

As we learned from Andy Warhol's Campbell's soup cans and Brillo boxes, popular culture can make us see the everyday anew and recognize our own position in a post-industrial economy saturated with commodities.⁴ Integrating popular culture into business organizations' courses allows students to recognize that often-unnoticed results of business transactions and business law are omnipresent. Pop culture can help students take off their blinders and see clearly how abstract concepts are strikingly relevant to their lives. In other words, the fictitious can make us see "the real" more intensely. Just asking a class to scout for pieces of popular culture related to the law of business organizations provides students with a different perspective on what they do, see, hear, and taste in the course of their lives, which then connects the classroom experience to a temporal and concrete reality.

First, we turn to limited liability, which is a foundational concept in business organizations. That a corporation or LLC provides shareholders with limited liability is a familiar concept to lawyers, but it is theoretical and removed from students' experiences. Here, popular culture can provide levity, which can then lead to more sophisticated conversations and hypotheticals.

Silicon Valley is a witty and critically acclaimed HBO comedy series that follows six young ethnically diverse male techies.⁵ They live and work in a Silicon Valley "incubator" that resembles a fraternity for nerds. The owner of the incubator allows the men to live in the house in exchange for equity in any company they create. The group endlessly seeks to invent new code, apps, virtual reality, chat services, and even a new internet. Their ultimate dream is to find capital to develop their various projects and perhaps be acquired by a much larger company, making them multimillionaires. Some of the group's endeavors are initially successful, and they deliver hundreds of pitches to various venture capital funds, but inevitably they often fail. Certainly one of the takeaways is how difficult it is for a startup to raise capital, even in Silicon Valley.

4. Of course, part of the irony of Warhol is that he replicated a mass-produced commodity and created a new commodity, which was then traded on the art market. For a recent documentary on this point see *Brillo Box (3 Cents Off)* (HBO June 13, 2016).
5. *Silicon Valley* (HBO broadcast 2014-current).

In one episode, the group encounters unexpected legal issues that derail their company.⁶ The synopsis is as follows: Unable to find funding, CEO and inventor Richard Hendricks resigns as CEO from the company he founded, Pied Piper. In his place, Dinesh Chughai becomes the CEO and promotes its online chatting app, Piper Chat. Dinesh is transformed from Pied Piper's software coder with one wrinkled polo shirt to a slick-haired, powerful CEO of a startup. With his newfound position, confidence, and style, he flaunts the remarkable number of new users of Piper Chat and gives numerous media interviews. The golden ring is within sight—real capital and perhaps an acquisition. However, Dinesh has forgotten to include a terms-of-service agreement for new users, resulting in many children signing up for and using the app. Dinesh's lawyer informs him that allowing children under thirteen to have their own accounts is a violation of the Children's Online Privacy Protection Act (COPPA), which carries a penalty of \$16,000 per child per use.⁷ This, we are told, would create potential fines of \$21 billion. Dinesh, along with his small band of equity owners, is horrified that they will be personally liable for these fines and lose both the company and all their individual assets. Luckily, Richard remembers that as LLC members they have limited liability. Thus, they are not personally liable for the fines.

For a brief moment, all breathe a sigh of relief. Richard then tells Dinesh that as CEO of Pied Piper he may have personal liability to the Pied Piper members for breach of the fiduciary duty of care, given that he omitted the service agreement. At that moment, the CEO of Hooli, a Googlelike company, invites Dinesh to dinner. They are all certain he will offer to buy Pied Piper, and Dinesh struggles with whether he should disclose the COPPA violations. At dinner, Hooli's CEO instead informs Dinesh that Pied Piper has violated many of Hooli's patents and Dinesh must turn over the company immediately to Hooli to avoid a crushing lawsuit. Although Dinesh apparently intends to tell the CEO about the COPPA violations, he literally cannot get a word in, and the deal closes.

This scenario provides students with an experience they can associate with limited liability, demonstrating how it protects shareholders and LLC members. The students are asked to imagine that they are Dinesh's lawyers and must explain to him exactly what limited liability is and how it works.

The episode also raises questions of Dinesh's fiduciary duties as CEO. Coupling the episode with *Van Gorkom*, *Francis*, or even *Caremark*, one might query whether Dinesh's conduct constitutes gross negligence.⁸ The class can also draft an indemnification provision for Dinesh—one he should have negotiated before becoming CEO. Of course, the final lessons from the episode are how

6. *Id.* at *Terms of Service* (Seas. 4, Ep. 2, Apr. 23, 2017).

7. Children's Online Privacy Act of 1998, 15 U.S.C. §§ 6501-6505 (2012).

8. *In re Caremark Intern. Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996); *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985); *Francis v. United Jersey Bank*, 412 A.2d 791 (N.J. 1980) (all discussing the fiduciary duty owed by a corporation's officers and directors).

crucial it is for even a young company to consult an attorney early on and the numerous legal pitfalls companies unknowingly face.

One of the elements that makes *Silicon Valley* comedic is the characters' mixture of greed, ego, creativity, and the desire to produce social good. Indeed, a theme throughout business organizations is the purpose of a corporation. Is it to make money for its shareholders, or does it have some other social function and responsibility to stakeholders such as employees, consumers, the surrounding community, or society at large?⁹

The Trouble with Antibiotics, a PBS Frontline documentary, investigates the rise of antibiotic-resistant bacteria, and at first blush seems an unlikely candidate for business organizations.¹⁰ Coupling it with *Bartlow v. Costigan* and *Dodge v. Ford*, however, allows for generative questions about a corporation's role in society.¹¹ The documentary explores the health crisis surrounding the rise of antibiotic-resistant bacteria and the growing number of people facing life-threatening infections. One segment of the documentary discusses a pharmaceutical company's decision to close a research division that specialized in developing new antibiotics capable of fighting resistant strains. The scientist who had headed that division explains that the now-shuttered lab was close to a breakthrough. We learn, however, that there is little profit to be made by pharmaceutical companies from antibiotics that people take for an acute infection versus drugs that people use on a long-term basis such as Crestor (a blood pressure medicine) or Viagra. Thus, the board of directors decided to stop researching new antibiotics, even though as a society we need such drugs.

Class discussion can begin with whether it is socially responsible for a pharmaceutical company to close this theoretically nonprofitable but socially beneficial division. The discussion question can then be flipped, and the class asked: If a pharmaceutical company had continued its research on antibiotics, could a shareholder have brought a suit against the board for a breach of the fiduciary duty of care? After all, even if the researchers created a new antibiotic, its sale would not be as profitable as that of other drugs. Would such a decision by the board be protected by the business judgment rule? This documentary fuels discussion of who should benefit from corporate activity and what happens when societal good conflicts with shareholder profitability.

9. For arguments on both sides see, e.g., Martin Petrin, *Reconceptualizing the Theory of the Firm—From Nature to Function*, 118 PENN. ST. L. REV. 1 (2013); KAREN HO, *LIQUIDATED: AN ETHNOGRAPHY OF WALL STREET* (2009); Kent Greenfield, *Reclaiming Corporate Law in a New Gilded Age*, 2 HARV. L. & POL'Y REV. 1 (2008); Kent Greenfield & D. Gordon Smith, *Debate: Saving the World with Corporate Law?* 57 EMORY L.J. 947 (2008); Lisa M. Fairfax, *Easier Said than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771 (2007); Lyman Johnson, *New Approaches to Corporate Law*, 50 WASH. & LEE L. REV. 1713 (1993).
10. *PBS Frontline* (PBS television broadcast, Seas. 33, Ep. 1 Oct. 13, 2014).
11. *Bartlow v. Costigan*, 974 N.E.2d 937 (Ill. App. 2012); *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919) (discussing whether a corporation may engage in philanthropic activity that may not directly benefit shareholders.)

Similar issues arise in the Showtime series *Billions*,¹² which follows Chuck Rhoades, the U.S. Attorney for the Southern District of New York, as he tries to take down the hedge fund titan Bobby “Axe” Axelrod. The Rhoades character is loosely based on Preet Bharara, and the Axelrod character on Steven Cohen. Part of what makes the series compelling is that Axelrod and Rhoades are complicated characters who crave different types of power while often ignoring ethics and laws in their various pursuits. Each, however, also has redeeming traits, and the charismatic Axelrod seduces the viewer while Rhoades’ elite coldness and ruthlessness make him less sympathetic. The series provides an opportunity to discuss hedge funds—what they are, how they function, and their effects on the financial markets.

In the episode “YumTime,”¹³ Axe Capital makes a significant equity investment in Yum Time Co., producer of the Scrumpet, Axe’s favorite childhood treat. Axe eats one for the first time in many years and realizes that the company has substituted ingredients like corn syrup for sugar, which has affected the taste. Axe bullies his way onto the board of Yum Time as an activist investor, intending to restore the Scrumpet to its glory. The previous CEO, now ousted by Axe, had altered the recipe to cut costs and drive revenue. These events produce several delightfully delicious questions.¹⁴ Was the old board’s decision to alter the recipe and sacrifice quality for profit a decision protected by the business judgment rule? Flipping the problem, did Axe and the new board breach their fiduciary duties by restoring the traditional recipe and sacrificing profits? Perhaps the price of a Scrumpet will increase such that it is no longer affordable to the average young Scrumpet consumer. Even worse, Axe’s taste buds might be atypical, and a majority of Scrumpet eaters might prefer the altered recipe. Has this become a situation in which a strong CEO is now dominating the board and making decisions out of self-interest or personal whim? After exploring the issue of whether the board breached its fiduciary duties of care or loyalty to shareholders, the class can discuss what the best practice would be for the board to engage in before deciding on the recipe.

Of course, no essay on popular culture and business law would be complete if it did not discuss director Oliver Stone’s 1987 movie *Wall Street*. Not since Mr. Potter battled with George Bailey’s Building and Loan in Frank Capra’s 1946 classic *It’s a Wonderful Life* had a film about various approaches to responsibility in finance so captured the public’s imagination. *Wall Street* spawned a genre of films about the financial industry, and later films are in direct dialogue with it.¹⁵ The movie provides a relatively accurate portrayal of Wall Street in the

12. *Billions* (Showtime 2016-current).

13. *Id.* at Seas. 1, Ep. 3 (Jan. 31, 2016).

14. Pun intended.

15. See, e.g., *The Big Short* (Plan B. Entertainment & Regency Enterprises 2015); *The Wolf of Wall Street* (Paramount Pictures 2013); *Wall Street: Money Never Sleeps* (Dune Entertainment 2010); *Other People’s Money* (Warner Bros. 1991).

late 1980s and allows one to set the scene by discussing Michael Milken, Ivan Boesky, the creation of junk bonds, leveraged buyouts, and insider trading.¹⁶ *Wall Street* focuses upon Gordon Gekko, a takeover specialist who is always on the hunt for inside information, his ambitious working-class apprentice Bud Fox, and Bud's father Carl, a longtime employee of the troubled Blue Star Airlines and staunch union officer. After watching the film, students are asked to react to Gekko's famous "greed is good" speech and articulate its relationship to neoliberalism and shareholder primacy.

The film's narrative evokes sympathy for Bud's father and encourages audience identification with the union's determination to keep the airline flying in the face of Gekko's plans to acquire it and sell it off in parts. The sentiment taps into the widely held belief that taking over a company and then dismembering it constitutes a societal evil. But it is important to push the class on why this is objectionable or why this raises core moral questions. If a corporation is worth more to its shareholders when sold off than as an ongoing concern, shouldn't the company be sold? Isn't this what shareholders are entitled to require the board to do? Perhaps anything else is mere sentimentalism.¹⁷

Wall Street also provides some fascinating case scenarios about insider trading. Here are just three of about six that appear on screen. The first involves Carl innocently mentioning to Bud that a federal agency was about to rule that Blue Star Airlines was not responsible for a plane crash. Carl has learned of this information in his role as union shop steward. Bud passes this information to Gekko, who trades on it. The next instance involves Lawrence Wildman, a takeover specialist and white knight, who is Gekko's nemesis. Gekko demands that Bud follow Wildman around New York City to determine whether he is involved in a takeover, and if so, of what company. Figuring this out by observing with whom Wildman is meeting and where he is flying, Gekko and Charlie buy the stock of the acquiree and then inform a financial reporter of the still-confidential takeover. In the last scenario, Bud arranges for Gekko to meet with Blue Star's union representatives as Gekko wants to obtain concessions from the unions and then acquire the airline. He informs the union representative that he will be able to build a more profitable airline while providing employees with stock options. Bud, however, soon discovers that despite his representations to the unions, Gekko plans to close the airline

16. For nonfiction books that also discuss the takeover craze of the 1980s, see BRYAN BURROUGH & JOHN HELYAR, *BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO* (2009); CONNIE BRUCK, *THE PREDATORS' BALL: THE JUNK BOND RAIDERS AND THE MAN WHO STAKED THEM* (1989). For a recent article providing a historical perspective see William W. Bratton, *The Separation of Corporate Law and Social Welfare*, 74 WASH. & LEE. L. REV. 767 (2017).
17. For the human cost of takeovers in lost jobs, see Bratton, *supra* note 16, at 15-16; Patrick J. Ryan, *Corporate Directors and the "Social Costs" of Takeovers—Reflections on the Tin Parachute*, 64 TUL. L. REV. 3 (1989) (focusing on social responsibility in decision-making). For a fascinating discussion of Wall Street films, see Keith B. Wagner, *Giving Form to Finance Culture: Neoliberal Denizens in Wall Street (1987)*, *Boiler Room (2000)* and *Margin Call (2011)*, 68 J. OF FILM AND VIDEO 46 (2016).

and sell it off. Bud forwards this information to Wildman, who makes his own play to acquire the airline.

Using these scenarios, one can ask the class to write a short paper identifying who might be guilty of Rule 10b-5 violations. What is the material nonpublic information? Who is a tipper or tippee? Who has a fiduciary duty and who has breached it? What benefit has the tipper received, and what constitutes insider trading in the context of relatives innocently providing other family members with tips? The answers to such questions are surprisingly difficult.¹⁸

Beyond the specifics of legal rules, one might compare Axe in *Billions* to Gekko. Both elicit audience emotions of revulsion and titillating enticement. They reflect larger themes, often in tension, in the political, social, and cultural economy of post-industrial America. We superficially despise wealthy traders and investment bankers whose empires are built entirely on a sort of nonproductive financial labor.¹⁹ Instead, we pay lip service to men who produce concrete things like airplanes or hotels. We worship the supposedly self-made man who, like Axe, claims a special affinity to and knowledge of the working class. Such narratives fuel the long-standing myth of an America without a class system in which all (or at least all white men) have limitless opportunity and class mobility. Yet, as we learn, Axe's big break as a trader came on September 11, 2001. As the World Trade Center burned and his own brother-in-law, a fireman, died, he shorted the market.

This brief article demonstrates how one can use a variety of forms of popular culture in teaching business organizations. Doing so grabs students' attention and provides a sort of fun-house mirror that exaggerates potential legal issues and then requires students to exercise analytical skills and engage ultimately in a critique not only of law but of the everyday reality of capitalism. Such critical thinking is crucial not only to learn about business organizations, but to wake students up to the world in which they live and will work—a world in which global corporations and financial markets increasingly define the parameters of our lives.

18. See, e.g., *Salman v. United States*, 137 S. Ct. 420 (2016) (discussing liability of a tipper in the context of a family relationship).

19. STEVEN FRASER, *THE AGE OF ACQUIESCENCE: THE LIFE AND DEATH OF AMERICAN RESISTANCE TO ORGANIZED WEALTH AND POWER* (2015); THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014).