

## THE ROMANTIC CORPORATION: TRADEMARK, TRUST, AND TYRANNY

Malla Pollack \*

### ABSTRACT

Humans in the United States, and many other market-centric nations, live in a world extensively populated by friendly, helpful, honest, charitable, patriotic beings worthy of our respect and support—none of whom exist. Yet these fellow-beings speak to us humans so often that they must be part of our ingrained perception of the world. Who are they? They are the marketing personas created by totally self-interested businesses. They harm humans not only by misdirection in specific instances, but by providing cover for our government's improper prioritization of corporate interests over human interests. This systemic distortion of public perception is one aspect of the ongoing war between those who prioritize property and those who prioritize humans.

In trade identity law, the romantic corporation is embodied in Judge Learned Hand's classic statement that "a reputation, like a face, is the symbol of its possessor and creator and another can use it only as a mask." Hand did not acknowledge that business entities with merely juristic personhood do not have faces; they only have masks.

This article opens by interrogating Hand's famous statement. Second, it places in historical perspective the big lie, used by corporate advocates to blind voters, that the welfare of large corporations is central to the United States' national interest. Third, this article provides analytical and empirical support for the non-personhood of business entities and the mask-quality of their indicia of trade identity. Fourth, this article discusses and illustrates several ways businesses use their masks to manipulate the human public. Finally, the article explains the difficulty of using law to limit such manipulative tactics.

"[F]or a reputation, like a face, is the symbol of its possessor and creator and another can use it only as a mask."<sup>1</sup>

---

\* Malla Pollack is the co-author (with Louis Altman) of CALLMANN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES (Thomson Reuters 4th ed. 2012).

“A final truth that needs to be emphasized—the most basic of all—is that corporations are not people. . . . When companies are invested with anthropomorphic qualities . . . the public is misled into thinking companies resemble people.”<sup>2</sup>

## INTRODUCTION

Humans in the United States, and many other market-centric nations, live in a world extensively populated by friendly, helpful, honest, charitable, patriotic beings worthy of our respect and support—none of whom exist. Yet these fellow-beings are alive to so many of us that they must be part of our ingrained perception of the world. Who are they? They are the marketing personas created by totally self-interested businesses. These personas are legally protected by trademark, copyright, and the First Amendment. They harm humans not only by misdirection in specific instances, but by providing cover for our government’s improper prioritization of corporate interests over human interests.

This paper addresses the myth of the romantic corporation,<sup>3</sup> which is embedded in many areas of law, including contemporary trademark doctrine.<sup>4</sup> (For purposes of this article, “corporation” means any business form legally separable from its human controller and owners.<sup>5</sup>) The myth of the romantic corporation both reflects and reinforces attitudes underlying the current existence (threat?) of the United States as a “corporatocracy.”<sup>6</sup> Extreme critics of

- 
1. *Yale Elec. Corp. v. Robertson*, 26 F.2d 972, 974 (2d Cir. 1928).
  2. ROBERT B. REICH, *SUPERCAPITALISM: THE TRANSFORMATION OF BUSINESS, DEMOCRACY, AND EVERYDAY LIFE* 216 (2007).
  3. *Cf.* Roger Merino Acuña, *Fundamental Rights for a New Leviathan?: Corporations and Fundamental Rights in the Global Capitalism* 19–20 (Dec. 1990) (unpublished master’s thesis) (on file with author) (referring to “romantic rhetoric” used to cloth corporations with fundamental rights which should belong only to natural persons).
  4. *See, e.g., FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1181, 1184–85 (2011) (holding that corporations are not protected by the FOIA exception for materials involving “personal privacy,” but acknowledging that corporations are persons under the law and have Fourth Amendment protection of their privacy interests).
  5. This type of status is strongly tied to limited liability, which starting in the 1980s, gradually became available in the United States to firms with disparate organizational forms. *See, e.g., Grant M. Hayden & Matthew T. Bodie, The Uncorporation and the Unraveling of “Nexus of Contracts” Theory*, 109 MICH. L. REV. 1127, 1139 (2011) (reviewing LARRY E. RIBSTEIN, *THE RISE OF THE UNCORPORATION* (2010)).
  6. REICH, *supra* note 2, at 216 (“A final truth that needs to be emphasized—the most basic of all—is that corporations are not people. . . . When companies are invested with anthropomorphic qualities—when they are described in the media or by political leaders as being noble or scurrilous, patriotic or treasonous, law-abiding or criminal,

corporatocracy view the business firm (of which the multinational corporation is the archetype) as a machine for making money and perpetuating the power of money-making-machines.<sup>7</sup> The stereotype of a giant multinational corporation is an institution somewhat like the horror-movie characterization of a shark—an extremely efficient, inhuman thing, which does only two things (but both very well): eats prey-animals (including *Homo sapiens*) and produces little sharks (capital that needs to be invested at the highest possible return and, therefore, joins with additional capital to build more money-making-machines).<sup>8</sup>

Why use trademark law as a tool for understanding corporate power? Trademark law is not an abstruse niche of law important only to marketing directors and legal specialists.<sup>9</sup> Trademark law (more properly trade identity law) grounds advertising. Advertising provides humans living in western market-economies a ubiquitous looking-glass self<sup>10</sup>—but a purposefully distorted one. The world seen through advertising is a world formed by advertisers to influence potential customers for the benefit of the advertisers.<sup>11</sup> Many of these

---

or other qualities that human beings possess—the public is misled into thinking companies resemble people.”).

7. See, e.g., Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 933–35 (2005).
8. Cf. Kent Greenfield, *New Principles for Corporate Law*, 1 HASTINGS BUS. L.J. 89, 97 (2005) (“[Corporations] are specially constructed so that making money is their comparative advantage. It is a mistake, therefore, to assume that corporations should act altruistically in the same way as churches, families, schools, or social service organizations. Corporations are institutions with a distinctive purpose: to create wealth.”).
9. See, e.g., Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2100 (2004).
10. See CHARLES HORTON COOLEY, *HUMAN NATURE AND THE SOCIAL ORDER* 195–99 (Schocken Books, Inc. 1964) (1902) (introducing the concept of the looking-glass self, the self-image obtained in reliance on other’s reactions and perceptions). Alternatively, advertising is part of the cultural world that has a dialectical relationship with each human’s self-consciousness. See PETER L. BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* 16 (Anchor Books paperback ed. 1990) (1967) (“The individual is socialized to be a designated person and to inhabit a designated world . . . . It is possible to sum up the dialectical formation of identity by saying that the individual becomes that which he is addressed as by others. . . . [B]oth identity and world remain real to himself only as long as he can continue the conversation.”).
11. See Collis A. Stocking, *Modern Advertising and Economic Theory*, 21 AM. ECON. REV. 43, 43 (1931).

customers are also citizens who have the right to vote.<sup>12</sup> Thus, votes are influenced by the world-view projected by advertising (both political and commercial).<sup>13</sup>

Corporations are not *Homo sapiens*, but the current high level of trademark protection both relies on and helps perpetuate the myth of the romantic corporation—the view of business entities as “people” worthy of the same autonomy rights as living humans and trustworthy because they have the same goals as human beings.<sup>14</sup> This myth confounds flesh-and-blood persons with those merely juridical.<sup>15</sup> Since corporations are potentially eternal and are unlimited by human desires for non-monetary goals, they obtain more *de facto* political and legal protection than mere humans.<sup>16</sup> Thus, trademark is one part of the corporate subjugation of the mere human.

Part I of this article interrogates the opening quotation, and explains the slippage of thought from sole proprietorships to business firms in general—a difference that has become of increasingly greater importance. Part II explains the political importance of the

12. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 889 (2010) (noting that those who view advertisements may also be voters); cf. Paul Allen Beck et al., *The Social Calculus of Voting: Interpersonal, Media, and Organizational Influences on Presidential Choices*, 96 AM. POL. SCI. REV. 57, 57 (2002) (discussing how media affects a voter's decision).
13. See, e.g., HERBERT MARCUSE, *ONE-DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY* 250 (Routledge 2d ed. 1991) (“[T]he mere absence of all advertising and of all indoctrinating media of information and entertainment would plunge the individual into a traumatic void where he would have the chance to wonder and to think, to know himself . . . .”); cf. Donald J. Smythe, *The Rise of the Corporation, the Birth of Public Relations, and the Foundations of Modern Political Economy*, 50 WASHBURN L.J. 635, 669, 675 (2011) (noting that “[t]he power of corporate public relations and its impact on American politics, law, and society is difficult to assess;” rejecting the view of “radical scholars,” such as Noam Chomsky, that corporations “manufacture consent,” but recognizing that “corporate public relations programs” have had “great success,” including “humanizing” the corporation). See generally Margaret Jane Radin, *Rhetorical Capture*, 54 ARIZ. L. REV. 457, 457 (2012) (explaining power of word choice in democratic discourse).
14. See, e.g., *FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1182–83 (2011) (acknowledging that the word “person” often refers to artificial entities such as corporations); *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888).
15. Cf. *Hayden & Bodie*, *supra* note 5, at 1127 (“The nexus of contracts theory is meant to point up the voluntary, market-oriented nature of the firm and to dismiss the notion that the corporation owes anything to the state.”).
16. See JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA*, at xv (2005) (“Companies have proved enormously powerful not just because they improve productivity but also because they possess most of the legal rights of a human being, without the attendant disadvantages of biology: they are not condemned to die of old age and they can create progeny pretty much at will.”).

romantic corporation. This myth is a major support for the big lie being used to shift government power and resources from the needs of actual humans to the perpetuation of a corporatocracy. Part III.A sketches the nature of the human self and then, in contrast, summarizes the major literature on the nature of corporations in order to demonstrate the unanimous recognition that corporations lack such selves. Working from this basis, Part III.B discusses the mask-nature of corporations' reputations/trade-indicia compared to the embedded nature of humans' reputations/names. Part IV discusses three specific business practices used in masking: personification, name change, and storytelling. Part V briefly explains why merely legal solutions are unlikely to unmask businesses.

#### I. LEARNED HAND IN CONTEXT: THE CHANGED FORM OF BUSINESS FIRMS

In 1928, Judge Learned Hand, writing for the Second Circuit, said that “a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask.”<sup>17</sup> Learned Hand's statement has been quoted or closely paraphrased in at least eighty-six opinions.<sup>18</sup> Many more, of course, rely on the legal conclusions the quotation originally supported.<sup>19</sup> The Hand quote epitomizes the continuing judicial disapproval of second-comers even approaching earlier businesses' trademarks and other indicia of trade origin.<sup>20</sup> This paper argues that Hand's attitude confuses the proper treatment of human persons with the proper treatment of merely juristic persons. Describing businesses as the alter egos of individual businessmen, even if generally correct in 1928, was not accurate

---

17. *Yale Elec. Corp. v. Robertson*, 26 F.2d 972, 974 (2d Cir. 1928).

18. The author searched the Westlaw databases for cases in which the word “face” appeared in the same sentence as the word “reputation” and which also included the word “yale” within the same sentence as a word beginning with the letters “elec” (i.e., the search string read: (face /s reputation) & (yale /s elec!)).

19. The proposition originally supported by the Hand quote was that “unless the borrower's use [of the trademark] is so foreign to the owner's [use] as to insure against any identification of the two, it is unlawful.” *E.g.*, *Team Tires Plus, Ltd. v. Tires Plus, Inc.*, 394 F.3d 831, 834 (10th Cir. 2005) (quoting *Yale Elec. Corp.*, 26 F.2d at 974) (relying on the proposition supported by the Hand quote without making explicit reference to the quote).

20. *See, e.g.*, *AMP, Inc. v. Foy*, 540 F.2d 1181, 1187 (4th Cir. 1976) (“[T]he second comer has a duty to so name and dress his product as to avoid all likelihood of consumers confusing it with the product of the first comer.”) (quoting *Harold F. Ritchie, Inc. v. Chesebrough-Pond's, Inc.*, 281 F.2d 755, 758 (2d Cir. 1960)).

regarding the parties in the case before Judge Hand. Today, as discussed below, it is doubtful even as a general statement.

The case in which the quotation first appeared originated when Yale Electric Corporation (Electric) applied to register “Yale” as a trademark for “batteries, battery cells, flashlights, [and] lighting outfits, such as are particularly adapted for Christmas trees and similar decorative purposes.”<sup>21</sup> The application was denied by the Examiner of Trade-Mark Interferences in response to an opposition filed by Yale & Towne Manufacturing Company (Towne).<sup>22</sup> Electric had been incorporated in 1912 as the International Electric Novelty Company.<sup>23</sup> In 1919, it renamed itself Franco Electric Corporation; in 1922 it again renamed itself, becoming the Yale Electric Corporation.<sup>24</sup> In contrast, Towne’s tie to “Yale” as an indicia of trade identity was traced to two sole proprietorships dealing in locks, one founded by Linus Yale, Jr. in 1865 and the other by Linus Yale, Sr. during the 1850s.<sup>25</sup> While both of these firms had gone through several names and owners, by the time of the dispute, both had been absorbed by Towne, a Connecticut corporation.<sup>26</sup>

Learned Hand’s well-known simile was part of a section justifying the then-recent expansion of the law to allow injunctions against firms using similar trademarks on goods that were not directly competitive:

Therefore, so far as we can see, only two points of law need be considered: . . . [second,] whether, in view of the fact that [Towne] makes no flash-lights or batteries, it may complain of the plaintiff’s use of its name. The law of unfair trade comes down very nearly to this—as judges have repeated again and again—that one merchant shall not divert customers from another by representing what he sells as emanating from the second. This has been, and perhaps even more now is, the whole Law and the Prophets on the subject, though it assumes many guises. Therefore it was at first a debatable point whether a merchant’s good will,

---

21. *See* Yale Elec. Corp. v. Robertson, 21 F.2d 567, 468 (D. Conn. 1927), *aff’d as modified*, 26 F.2d 972, 974 (2d Cir. 1928).

22. *Id.* While the defendant named in Electric’s suit was Thomas E. Robertson, Commissioner of Patents, the real party-in-interest was Towne, which also counter-claimed alleging that Electric was infringing Towne’s trademark rights. *See id.* at 468–69.

23. *Id.*

24. *Id.* at 468.

25. *Id.* at 469.

26. *Id.*

indicated by his mark, could extend beyond such goods as he sold. How could he lose bargains which he had no means to fill? What harm did it do a chewing gum maker to have an ironmonger use his trade-mark? The law often ignores the nicer sensibilities.

However, it has of recent years been recognized that *a merchant* may have a sufficient economic interest in the use of *his mark* outside the field of his own exploitation to justify interposition by a court. *His mark is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control.* This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask. And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful. . . . The defendant need not permit another to attach to its good will the consequences of trade methods not its own.<sup>27</sup>

This section starts by discussing “a merchant” who is grammatically marked as an individual *Homo sapiens* by repeated use of the pronoun “his.”<sup>28</sup> Yet it also employs more general terms suitable for merely juristic persons, such as “owner.” *Homo sapiens* have faces physically; corporations have faces only metaphorically. Both parties before the court were corporations—even though one of these corporations was successor-in-interest to two *Homo sapiens*—(both of whom had used their shared surname for business purposes).<sup>29</sup> Oddly, even though both firms at bar had a history of name changes, the court ignored this fact.<sup>30</sup>

Perhaps Learned Hand's failure to distinguish between businesses legally equivalent to individual *Homo sapiens* and those without such an alter ego made sense in 1928. Seemingly at that time, most businesses in the United States were owned and controlled by individual *Homo sapiens*.<sup>31</sup> However, the contemporary business

---

27. *Yale Elec. Corp. v. Robertson*, 26 F.2d 972, 973–74 (2d Cir. 1928) (emphasis added).

28. *See id.*

29. *Yale Elec. Corp.*, 21 F.2d at 468–69.

30. *See Yale Elec. Corp.*, 26 F.2d at 973.

31. *See infra* note 33.

world involves a large percentage of corporations and other forms of merely juridical “persons.”<sup>32</sup> Available IRS figures show that only about five percent of businesses in the United States were corporations in 1957, while corporations and limited partnerships accounted for roughly one quarter of the businesses filing United States income tax returns in 2007.<sup>33</sup> Additionally, we (though not Hand) have been warned about the military-industrial complex.<sup>34</sup> We have also been warned about the influence of corporate ownership on our sources of information, including those purporting to be fair and balanced.<sup>35</sup>

---

32. See *infra* note 33.

33. Neither the IRS nor the Census Bureau supplies statistics on the number or percentage of businesses in the United States that were sole proprietorships, partnerships, or limited liability entities in 1928. However, some historical data from 1957 through 2007 confirms this apparent trend. Sole proprietorships filed 8,737,665 income tax returns during the year from July 1957 through June 1958. See U.S. TREASURY DEP'T, IRS, PUB. NO. 438, STATISTICS OF INCOME 1957-58: U.S. BUSINESS TAX RETURNS 7 tbl.1 (1960), available at <http://www.irs.gov/pub/irs-soi/57cosppaar.pdf>. Active partnerships filed 970,627. *Id.* at 11 tbl.4. Corporations showing profits filed only 572,936. *Id.* at 15 tbl.8. The IRS historical table on business forms for 1980-2007, available at <http://www.irs.gov/taxstats/bustaxstats/article/0,,id=152029,00.html> (choose Table 1), reports that in 1980, 13,021,094 income tax returns were filed by businesses. Of these, 2,710,538 were some form of corporation; 170,336 were limited partnerships; 1,209,318 were general partnerships; 8,931,712 were non-farm sole proprietorships. *Id.* In 2007, income tax returns were filed by 32,087,881 businesses. *Id.* Of that number 5,868,849 were some form of corporation; 1,818,681 were LLC partnerships; 536,145 were limited partnerships; 741,509 were general partnerships; 23,122,698 were non-farm sole proprietorships. *Id.* See generally MICKLETHWAIT & WOOLDRIDGE, *supra* note 16, at *passim* (discussing historic rise of the corporation). Nevertheless, the amount of trade or money controlled by corporations seemingly was a greater percentage of the national trade or money. See, e.g., Hayden & Bodie, *supra* note 5, at 1134 (stating that the corporation became the dominant business form in the late nineteenth century and retained this dominance for about the next century).

34. See Dwight David Eisenhower, President of the U.S.A., Farewell Address from the White House (Jan. 17, 1961), <http://www.eisenhowermemorial.org/speeches/196100017%20farewell%address.htm> (“[W]e must guard against the acquisition of unwarranted influence . . . by the military-industrial complex. The potential rise of misplaced power exists and will persist.”).

35. Consider the impact of Fox News on voters. Fox News became available on cable shortly before the 2000 election and is “significantly to the right of all the other mainstream television networks (ABC, CBS, CNN, and NBC).” See Stefano DellaVigna & Ethan Kaplan, *The Fox News Effect: Media Bias and Voting* 1, 2 (Nat'l Bureau of Econ. Research, Working Paper No. 12169, 2006), available at <http://www.nber.org/papers/w12169>. Empirical analysis implies “that Fox News convinced between 3 and 8 percent of its non-Republican listeners to vote Republican.” *Id.* at 3. This media-produced shift was “likely to have been decisive in the close presidential 2000 elections.” *Id.* at 2. Fox News had an even stronger effect on convincing its viewers “erroneously” that weapons of mass destruction had been found in Iraq. See

## II. THE POLITICAL IMPORTANCE OF THE ROMANTIC CORPORATION

The economy is not an autonomous arena; economic relationships are inherently part of society.<sup>36</sup> The Industrial Revolution in Great Britain ravaged the working class because the industrialists' drive to increase their own wealth under the banner of progress and economic efficiency was not blunted by sufficient political attention to more humanistic values.<sup>37</sup> However, humans can choose to protect non-economic values—including the moral<sup>38</sup> value of more equitable distribution of economic resources.<sup>39</sup> To do so, however, humans need to band together and use the power of government; the market is not constructed to support moral goals.<sup>40</sup>

In the United States, however, any drive to blunt the power of money must surmount the Founding Fathers' partial conflation of

---

*id.* at 3 (citation omitted). Fox News' pro-Republican effect seems to be a "generalized ideological shift," as opposed to one in favor of specific candidates focused on by Fox. *See id.* at 24. The effect appears to be caused by viewers' failures to sufficiently discount the biases—even known biases—of supposed "experts." *See id.* at 4, 31. Most importantly, "the Fox News effect was smaller in towns with more cable channels, consistent with competition reducing the media effect." *Id.* at 2 (citation omitted).

36. *See, e.g.,* Amanda Perry-Kessaris, *Reading the Story of Law and Embeddedness Through a Community Lens: A Polanyi-Meets-Cotterrell Economic Sociology of Law?*, 62 N. IR. LEGAL Q. 401, 403–04 (2011) (Ir.), available at [http://eprints.soas.ac.uk/13088/1/NILQ\\_62.4.3\\_PERRY-KESSARIS.pdf](http://eprints.soas.ac.uk/13088/1/NILQ_62.4.3_PERRY-KESSARIS.pdf).
37. *See* ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 4 (1993) (arguing that moral and economic valuations are incommensurable); KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 79 (Beacon Paperback 2d ed. 2001) (1944); MICHAEL J. SANDEL, *DEMOCRACY AND ITS DISCONTENTS* 17 (1996) (arguing that liberalism destroys its own insight into human freedom by not recognizing that humans need community for personal fulfillment); MICHAEL WALZER, *SPHERES OF JUSTICE* 97 (1983) (arguing that money is not the correct metric for moral values).
38. Confusingly, the French term for a juristic entity is a "moral person." *See, e.g.,* Acuña, *supra* note 3, at 3.
39. "A normatively disembedded approach [in Polyani's terms] is one that puts *economy before society*. . . . It produces regimes which privilege economic values and interests, usually claiming this to be for the good of all types of social action, including other instrumental action, and also affective, belief-based and traditional actions." Perry-Kessaris, *supra* note 36, at 45.
40. *See, e.g.,* REICH, *supra* note 2, at 166–67 (explaining how global competition has increased consumers' power to find desired goods at low prices, but not citizens' ability to effect social policy).

economic property with freedom.<sup>41</sup> Eighteenth century American revolutionaries saw themselves as the heirs of the English deponents of the early Stuarts.<sup>42</sup> The English Civil War was prompted in large part by the Crown's assertion that it could tax as it wished because it (as the Lord's Anointed) was the true owner of all property within the kingdom.<sup>43</sup> Others merely held subservient rights subject to the crown's primary claim.<sup>44</sup> Locke's *Two Treatises of Government* rejected this claim.<sup>45</sup> Locke went much further; he asserted that the prime purpose of government was to protect the property of those governed.<sup>46</sup> However, the protected "property" included both what moderns would call "property" and what moderns would call "rights."<sup>47</sup> Locke defined property as anything "[t]he nature whereof is, that *without a Man's own consent it cannot be taken from him.*"<sup>48</sup>

The American revolutionary slogan that "taxation without representation is tyranny" declared that humans should not be subject to a property-taking government without their consent; it did not reach the extent to which a consent-based government could take property.<sup>49</sup> This article will not attempt to summarize the voluminous literature fighting over the extent to which various American Revolutionaries, Federalists, and Anti-Federalists desired human rights, human equality, or protection of property (in the narrow

- 
41. See Kim R Holmes & Matthew Spalding, *Why Does Economic Freedom Matter?*, THE HERITAGE FOUND. 3 (Apr. 7, 2011), [http://thf\\_media.s3.amazonaws.com/2011/pdf/UA7.pdf](http://thf_media.s3.amazonaws.com/2011/pdf/UA7.pdf).
  42. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 34 (Harvard Univ. Press enlarged ed. 1992) (1967) (stating that though ideological foundations of the American Revolution may be traced back to many sources, its ultimate origin lies with the social and political thought associated with the English Civil War).
  43. Cf. W.H. GREENLEAF, *EMPIRICISM AND POLITICS: TWO TRADITIONS OF ENGLISH POLITICAL THOUGHT 1500–1700*, at 58–61, 184–86 (1964) (stating that James I and other English monarchs analogized their power to that of God, which included the complete power over money and taxation).
  44. See ROBERT FILMER, *Patriarchia*, in *PATRIARCHIA AND OTHER WRITINGS* 1–68 (Johann P. Sommerville ed., 1991).
  45. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 152–55 (Peter Laslett ed., 1988).
  46. See *id.* at 350.
  47. See *id.*
  48. *Id.* at 395.
  49. See Judge Grant Dorfman, *The Founders' Legal Case: "No Taxation Without Representation" Versus Taxation No Tyranny*, 44 HOUS. L. REV. 1377, 1395 (2008) (quoting DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS (1774), reprinted in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 1, 2 (1927); 30 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 6345, at 475 (1977)).

sense).<sup>50</sup> However, a large block of literature sees the more egalitarian ethos of those who fought the war being tempered (or rejected) by the more socially conservative gentlemen who drafted what became the United States Constitution.<sup>51</sup>

For example, consider James Madison's views as explained by Jennifer Nedelsky's *Private Property and the Limits of American Constitutionalism*.<sup>52</sup> Nedelsky's thesis is that Madison valued both republican principles (government required the consent of the governed) as well as private property.<sup>53</sup> However, Madison saw the behavior of state governments post-independence as proof that the majority (which was largely without property) could not be trusted to treat the richer-minority's rights justly.<sup>54</sup> Furthermore, Madison did not conceive of the possibility that the majority could learn to govern justly.<sup>55</sup> Therefore, Madison supported institutional devices that

---

50. See, e.g., LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 285 (1988) (arguing that we lack the sources to determine "original intent"); LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT 4 (Ellen Frankel Paul & Howard Dickman eds., 1990) (collecting essays regarding the Framers' different approaches); DAVID McCULLOUGH, JOHN ADAMS 377 (2001) (asserting that John Adams believed in a natural aristocracy as opposed to human equality); JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 7 (1990) ("[T]he Constitution of 1787 institutionalized the principle of consent in ways that left open important questions about what to do in a conflict between the rights of the people to implement their will through their representatives and the independent rights of property."); JACK N. RAKOVE, ORIGINAL MEANINGS 5 (1997) (arguing that interpretations of the Framers' original intent have always been polluted by the interpreters' current political agendas); Patrick J. Charles, *Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History*, available at <http://ssrn.com/abstract=1839205> (posted May 2011) (arguing that the original meaning of Jefferson's famous phrase was the utilitarian principle that the aim of government was the greatest good for the greatest number).

51. See, e.g., BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 331 (1992) (concluding that the Anti-Federalists were the ones who kept faith with the Revolution); JOSEPH J. ELLIS, FOUNDING BROTHERS 9 (2000) (stating that critics of the Constitution are "historically correct" in labeling it "a betrayal of the core principles of the American Revolution"); NEDELSKY, *supra* note 50, at 7 (stating that the balance was tipped in favor of property by the Constitution); GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 229–30 (1991) (recognizing that the Constitution was intended to limit the social changes supported by the Revolution's idealism); cf. GARRY WILLS, LINCOLN AT GETTYSBURG 147 (1992) ("For most people now, the Declaration [of Independence] means what Lincoln told us it means, as a way of correcting the Constitution itself.").

52. NEDELSKY, *supra* note 50, at 14.

53. *Id.* at 16.

54. *Id.* at 18.

55. *Id.*

tilted the political playing field in favor of the rich.<sup>56</sup> Many of these devices were incorporated into the United States Constitution.<sup>57</sup> The document's pro-property slant was turned by the Federalist-leaning judiciary into libertarian economic rights.<sup>58</sup> While the Civil War Amendments and later social changes have supported more equality, the inbuilt constitutional bias has not been overcome.<sup>59</sup> Nor has the public coped with the ideological changes necessary to dethrone the over-protection of private property.<sup>60</sup> The protection of private property has remained the American archetype of the protection of an individual's rights, thus undermining the drive for equality.<sup>61</sup> Worse, according to some moderns, the federal government has been transformed into a machine for increasing economic inequality.<sup>62</sup>

Madison's leading explication of the need to filter public participation through elite-empowering institutional structures depicts inequality of property as morally just:

The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.<sup>63</sup>

Madison's words were wrong when written and are wrong today. Economic inequality is not predominantly tied to any natural

---

56. See Jonathan M. Riley, 36 AM. J. LEGAL HIST. 213, 213–14 (1992) (reviewing NEDELSKY, *supra* note 50).

57. See Daryl J. Levinson, *Rights and Votes* 2 (N.Y. Univ. Sch. of Law, Public Law & Legal Theory Research Paper No. 11-54, 2011) available at <http://ssrn.com/abstract=1889264> (“[T]he Framers of the U.S. Constitution attempted to protect the rights of property owners, [among others] . . . by creating a structure of government that would politically empower these groups to block any attempt by overbearing majorities to trample their interests.”).

58. See NEDELSKY, *supra* note 50, at 2, 194.

59. See *id.* at 9.

60. See *id.* at 1.

61. See *id.* at 1.

62. See LAWRENCE LESSIG, *REPUBLIC, LOST* 157 (2011) (“[C]hanges in government policy . . . account for the radical change in the distribution of American wealth.”).

63. THE FEDERALIST NO. 10 (James Madison).

difference among humans that is deserving of our support.<sup>64</sup> Enforcing a libertarian-style sanctification of private property contradicts any claim to treat humans as equal.<sup>65</sup> Even if, arguendo, moral worth were synonymous with political worth, wealth does not correlate with moral worth.<sup>66</sup> Even if, arguendo, the United States currently provided equal economic opportunity to all, in a country built on expropriation of a prior population and enslaving of an imported population,<sup>67</sup> all lines of property descent are tainted.<sup>68</sup> Leaving aside the specific historical sins of the United States, property ownership throughout the world echoes past-power—even if, arguendo, one ignored open expropriation by military might.<sup>69</sup> For example, Locke argued that adding one's labor to land is what makes land valuable, giving one the moral right of ownership.<sup>70</sup> Nevertheless, the global rule seems to be that working on land to which another holds legal title is lightly rewarded and does not change the land's ownership.<sup>71</sup> Instead of assuming that most property claims are morally justified, a realist should assume that no property holder has met Nozick's requirements of a line of just acquisition and just transfer.<sup>72</sup> Perhaps the bias toward judging the status quo to be just is inherent in humanity's fear of chaos—it appears in both the Bible<sup>73</sup> and the Protestant ethic.<sup>74</sup> Repeated

- 
64. Athena D. Mutua, *Introducing ClassCrits: From Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56 *BUFF. L. REV.* 859, 882–83 (2008).
65. See Book Note, *Private Property, Civic Republicanism, and the Madisonian Constitution*, 104 *HARV. L. REV.* 961, 961–62 (1991) (reviewing NEDELSKY, *supra* note 50).
66. The ability to earn money, furthermore, may not even correlate with what economists term efficiency. See LESSIG, *supra* note 62, at 53–54.
67. See, e.g., Matthew L.M. Fletcher, *The Comparative Rights of Indispensable Sovereigns*, 40 *GONZ. L. REV.* 1, 2–4 (2004); Julie A. Nice, *Forty Years Of Welfare Policy Experimentation: No Acres, No Mule, No Politics, No Rights*, 4 *NW. J. L. & SOC. POL'Y* 1 (2009).
68. See Guyora Binder, *The Slavery of Emancipation*, 17 *CARDOZO L. REV.* 2063, 2078 (1996).
69. Cf. Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 *OR. L. REV.* 453, 476–77 (2010) (arguing that wealth is passed from one generation to the next).
70. See LOCKE, *supra* note 45, 295–96.
71. See PIERRE-JOSEPH PROUDHON, *WHAT IS PROPERTY?* 81–86 (Donald R. Kelley & Bonnie G. Smith eds. & trans., 1994).
72. See RICHARD NOZICK, *ANARCHY, STATE & UTOPIA* 151–54 (1974).
73. See, e.g., *Deuteronomy* 28:1–69 (explaining that national prosperity will be the reward of obeying God's commandments, but warning that disobedience will be punished with national disaster).

studies show modern humans still tend to blame the unsuccessful, even those whose distress is clearly linked to another's misbehavior.<sup>75</sup>

In addition to indirectly empowering the upper class, Madison also asserted the relative trustworthiness of large property holders.<sup>76</sup> He portrayed them as having little incentive to undermine the non-property rights of others: "As the holders of property have at stake all the other rights common to those without property, they may be the more restrained from infringing, as well as the less tempted to infringe . . . the latter."<sup>77</sup>

No one doubts Madison's accuracy in recognizing the effect of relative wealth on humans' support for differing government actions. This is hardly a merely-modern phenomenon.<sup>78</sup> For example, at Alexander Hamilton's insistence, the federal government paid off—primarily to speculators—the securities issued to finance the Revolutionary War at face-value.<sup>79</sup> Hamilton insisted this was essential to the survival of the United States<sup>80</sup>—maybe it was. Nevertheless, the public outcry made clear that the decision helped wealthy financiers and harmed former soldiers.<sup>81</sup>

However, Madison was not accurate in forecasting that disparate monetary goals would not correspond to antagonistic goals regarding other human aspirations.<sup>82</sup> Even if, *arguendo*, the wealth holders of his America were such paragons of virtue, his world is not our

- 
74. See generally MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 53–54 (Talcott Parsons trans., 1958) (arguing that hard work to earn money is one outcome of the belief that wealth may be a sign that you are among the elect).
75. See Adam Benforado, *Don't Blame Us: How Our Attributional Proclivities Influence the Relationship Between Americans, Business, And Government*, 5 *ENTREPRENEURIAL BUS. L.J.* 509, 516–22 (2010) (providing overview of research sources); Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 *MINN. L. REV.* 1275, 1278–79 (2012) (stating that strong empirical evidence supports refusal of United States' residents to credit discrimination as a reason for someone's lack of success in most circumstances because of background belief that country is a meritocracy).
76. See James Madison, Speech of August 7 (Aug. 7, 1787), in 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 199, 203 (Max Farrand ed., Yale Univ. 1966) (1911).
77. James Madison, Note to Speech on right of Suffrage, in 3 *RECORD OF THE FEDERAL CONVENTION OF 1787*, *supra* note 76, at 450, 450–51.
78. See NEDELSKY, *supra* note 50, at 222.
79. See James Willard Hurst, *Alexander Hamilton, Law Maker*, 78 *COLUM. L. REV.* 483, 520–21 (1978).
80. See *id.* at 520.
81. See, e.g., Saul K. Padover, *First Report on Public Credit*, in *THE MIND OF ALEXANDER HAMILTON* 197, 203 (1958); 2 *ANNALS OF CONG.* 1224 (1790–1797) (discussion on public credit); Hurst, *supra* note 79, at 492–93.
82. See NEDELSKY, *supra* note 50, at 179.

world.<sup>83</sup> His world lacked all of governmental social safety nets, enormously expensive foreign wars, and statutes allowing incorporation without specific legislative approval or any tie to public need.<sup>84</sup> Modern business corporations have no human aspirations,<sup>85</sup> their drive for wealth is not tempered by a need for human flourishing; thus they are not constrained in the way Madison hypothesized.

Nevertheless, corporations have long been adept at wearing the mask of personification to manipulate humans into overlooking corporations' alien nature. The U.S. Supreme Court first held that a business corporation was a "person" for purposes of the Fourteenth Amendment in 1886.<sup>86</sup> Purposeful public relations campaigns to convince American humans that giant corporations were not soulless go back at least to the late 1890s,<sup>87</sup> spurred by public reaction to the consolidations which killed 1,800 existing businesses between 1895 and 1904.<sup>88</sup> Moving closer to the present, Thurman W. Arnold, the Yale law professor who became the first head of the New Deal Anti-Trust Division of the Department of Justice,<sup>89</sup> was vehement about the distinction between corporate and human flourishing.<sup>90</sup> He was also eloquent about the powerful effect of corporate personalization in the preceding period:

- 
83. See Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 83 (1993).
84. See Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1, 2 (1945); Takayuki Usai, *Corporate Governance of Banking Organizations in the United States and in Japan*, 28 DEL. J. CORP. L. 563, 563–64 (2003); William M. Wiecek, *America in the Post-War Years: Transition and Transformation*, 50 SYRACUSE L. REV. 1203, 1207 (2000).
85. STEPHEN L. ELKIN, RECONSTRUCTING THE COMMERCIAL REPUBLIC: CONSTITUTIONAL DESIGN AFTER MADISON 54 (2006); John F. Coverdale, *Why the Bottom Line is Not the Bottom Line: John Paul II's Concept of Business*, 45 J. CATHOLIC LEGAL STUD. 473, 500 (2006). Corporations were relatively rare in the colonial and early post-revolution period. See, e.g., Handlin & Handlin, *supra* note 84, at 6; Maier, *supra* note 83, at 83.
86. See *Cnty. of Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394, 417 (1886).
87. See ROLAND MARCHAND, CREATING THE CORPORATE SOUL: THE RISE OF PUBLIC RELATIONS AND CORPORATE IMAGERY IN AMERICAN BIG BUSINESS 3 (1998).
88. See *id.* at 7.
89. William O. Douglas, *The Heyday of Legal Realism, 1928-1954*, YALE L. SCH., <http://www.law.yale.edu/cbl/3085.htm> (last visited Dec. 11, 2012) (short biography of Thurman W. Arnold created for the Yale Law School Center for the Study of Corporate Law).
90. See THURMAN W. ARNOLD, THE FOLKLORE OF CAPITALISM 185–90 (1937).

One of the essential and central notions which give our industrial feudalism logical symmetry is the personification of great industrial enterprise. . . .

The origin of this way of thinking about organization is the result of a pioneer civilization in which the prevailing ideal was that of the freedom and dignity of the individual engaged in the accumulation of wealth. The independence of the free man from central authority was the slogan for which men fought and died. This free man was a trader, who got ahead by accumulating money. There was something very sacred in the nineteenth-century conception of this activity. In the 'seventies the most popular text in economics was one originally written by a clergyman, Bishop Francis Wayland, and revised in 1878 by A. L. Chapin, President of the Congregational College at Beloit. . . .

It was this identification of great organizations with the dignities, freedom, and general ethics of the individual trader which relieved our federation of industrial empires from the hampering restrictions of theology which always prevent experiment. Men cheerfully accept the fact that some individuals are good and others bad. Therefore, since great industrial organizations were regarded as individuals, it was not expected that all of them would be good. Corporations could therefore violate any of the established taboos without creating any alarm about the "system" itself. Since individuals are supposed to do better if let alone, this symbolism freed industrial enterprise from regulation in the interest of furthering any current morality. The *laissez faire* religion, based on a conception of a society composed of competing individuals, was transferred automatically to industrial organizations with nation-wide power and dictatorial forms of government.

. . . The Supreme Court of the United States, because it could express better than any other institution the myth of the corporate personality, was able to hamper Federal powers to an extent which foreigners, not realizing the emotional power of the myth, could not understand. This court invented most of the ceremonies which kept the myth alive and preached about them in a most dramatic setting. It dressed huge corporations in the clothes of simple farmers and merchants and thus made attempts to regulate them appear as attacks on liberty and the home. So long as men

instinctively thought of these great organizations as individuals, the emotional analogies of home and freedom and all the other trappings of “rugged individualism” became their most potent protection.

.....

The mantle of protection which this attitude threw over corporate government is illustrated in the popular reaction to the sit-down strike when it was first used as a weapon against General Motors Corporation by John L. Lewis. So firmly fixed in popular imagination was the belief that General Motors was a big man who “owned” the plant that the public became alarmed over possible dangers to their own homes because of this method of conducting a strike. Many sincerely felt that this insult to the sanctity of property justified the shedding of blood and that Governor Murphy’s conciliation of the General Motors strike in 1937 was a compromise with the Devil that endangered individual freedom. If General Motors had been pictured as a governing organization, exercising the governing power over thousands of people, the right of these people to security in their jobs might have been recognized as on somewhat the same level as the rights of security holders in the corporation. The concept of the “ownership” of General Motors prevented that attitude from developing. The sit-down strike, though much more orderly than the strikes in past depressions had been, actually gave the impression of greater disorder and anarchy because it could be dramatized as the taking away of property from an individual. This kind of dramatization was, of course, more keenly felt by the respectable people than by the masses, with whom the personification of the corporation as an individual was disappearing. For example, a temperate and impartial analysis of the principles of labor law by Dean Landis of the Harvard Law School in 1937 during the initial activities of the C.I.O. provoked outspoken hostility among the alumni of that great institution.<sup>91</sup>

Without discussing personalization, Marvit has explicated how the United States Supreme Court turned the National Labor Relations Act into a statute protecting employers (as opposed to the employees

---

91. *Id.* at 185–92.

whom Congress had intended to help) by prioritizing employers' property interests.<sup>92</sup>

In contemporary politics, corporations pose as national champions; they keep the American economy running.<sup>93</sup> Perhaps the heroic American corporate champion existed in a bygone era.<sup>94</sup> According to Robert Reich, during the post-World War II economic boom, the United States' market was dominated by industry-wide oligopolies—such as the Big Three automakers.<sup>95</sup> These corporations, the federal government, and big labor worked out an informal relationship.<sup>96</sup> The workers got good pay and stable jobs.<sup>97</sup> The corporations got a stable economy in which they could make money.<sup>98</sup> The government provided enough regulation so that mega corporations were profitable despite the higher wages.<sup>99</sup> This system survived as long as competition was largely national.<sup>100</sup> It broke down when competition became global.<sup>101</sup> Global competition cut into the profitability of the big corporations.<sup>102</sup> They could no longer afford to play statesmen.<sup>103</sup> Therefore, what is good for General Motors (or General Electric<sup>104</sup>) is not necessarily good for the United States—if by “United States” you mean the people of the United States.<sup>105</sup> Goods, and services of many kinds, can easily be produced outside the boundaries of the United States, where workers are less used to high wages, then sold in the

- 
92. See Moshe Zvi Marvit, *On the Greatest Property Transfer that Wasn't: How the National Labor Relations Act Chose Employee Rights and the Supreme Court Chose Property Rights*, 38 S.U. L. REV. 79, 80, 94 (2010); cf. Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497, 499 (2010). “The conceptualization of corporate speech in *Citizens United*—how it is created, the ends that it serves, and the protection it should receive—is inconsistent with conceptualizations of the corporate form and a corporate—‘voice’ in other areas of the law.” *Id.* It is also inconsistent with the reality of how corporations operate. *Id.*
93. See ROBERT B. REICH, *THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST-CENTURY CAPITALISM* 119 (1991).
94. See *id.* at 131.
95. *Id.* at 46–47.
96. See *id.* at 55–58.
97. See *id.* at 48.
98. See *id.* at 58–59.
99. See *id.* at 67.
100. See *id.* at 69–70.
101. *Id.* at 70.
102. *Id.* at 73–74.
103. *Id.* at 140.
104. See David Kocieniewski, *At G.E. on Tax Day, Billions of Reasons to Smile*, N.Y. TIMES, Mar. 25, 2011, at A1.
105. See REICH, *supra* note 93, at 119–20.

United States.<sup>106</sup> Today major corporations are international, therefore, even without subcontracting, they can move any part of their operations to any nation in which they have a presence.<sup>107</sup> Higher international intellectual property standards make international production and service operations less risky.<sup>108</sup> International corporations, in their own economic interests, move jobs and tax money out of the United States.<sup>109</sup>

Perhaps the clearest evidence that corporate good does not correspond with benefits to the humans of the United States is the “jobless and wageless recovery” from the Great Recession of 2007–2009.<sup>110</sup> While the increase in Gross Domestic Product that created the recovery was overwhelmingly due to increase in workers’ productivity, the only substantial beneficiaries of the recovery were corporate profits and large players in the stock market.<sup>111</sup> The extent to which the revitalization of the U.S. economy has been slanted in favor of corporations and against workers is statistically “extraordinar[ly].”<sup>112</sup> “The ratio of profits to wages is higher than it’s been since before the Great Depression.”<sup>113</sup>

Nevertheless, businesses, including major international corporations, want the United States government to support their agenda; an agenda that is no longer tied to the welfare of the majority of the population of the United States.<sup>114</sup> Just considering intellectual

---

106. *Id.* at 69.

107. *See id.* at 114–15.

108. *See* Howard C. Anawalt, *International Intellectual Property, Progress, and the Rule of Law*, 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 383, 385–87 (2003).

109. *See* REICH, *supra* note 93, at 210.

110. *See* ANDREW SUM ET AL., CENTER FOR LABOR MARKET STUDIES, THE “JOBLESS AND WAGELESS” RECOVERY FROM THE GREAT RECESSION OF 2007–2009: THE MAGNITUDE AND SOURCES OF ECONOMIC GROWTH THROUGH 2011 I AND THEIR IMPACTS ON WORKERS, PROFITS, AND STOCK VALUES 23 (2011), *available at* <http://www.employmentpolicy.org/sites/www.employmentpolicy.org/files/field-content-file/pdf/Mike%20Lillich/Revised%20Corporate%20Report%20May%202027th.pdf>.

111. *See id.* at 11–12, 16–17, 23 (clarifying that people with savings and money market accounts were not gainers because interest rates were low).

112. *See id.* at 20 (“The extraordinarily high share of national income (88%) received by corporate profits was by far the highest in the past five recoveries from national recessions.”).

113. Robert Reich, *The Corporate Pledge of Allegiance*, ROBERTREICH.ORG (Nov. 8, 2011), <http://robertreich.org/post/12517879252>. Furthermore, an increasing share of corporate profits is being used to pay top executives; “CEO pay was 40 times the typical worker in the 1980s; it’s now upwards of 300 times.” *Id.*

114. Consider, for example, the spring 2011 public discussion of how General Electric, and other mega-corporations incorporated within the United States legally deflect their tax

property examples,<sup>115</sup> high patent protection raises prices and lowers competition.<sup>116</sup> So does longer copyright protection.<sup>117</sup> Yet the United States government pushes these as if the welfare of Pfizer<sup>118</sup>

---

liability to the U.S. government. *See, e.g.*, David Kocienewsky, G.E.'s Strategies Let It Avoid Taxes Altogether, N.Y. TIMES ECONOMIX BLOG (Feb. 24, 2011, 5:56 PM) <http://economix.blogs.nytimes.com/2011/02/01/the-details-on-corporate-taxes/>; David Kocienewsky, G.E.'s Strategies Let It Avoid Taxes Altogether, N.Y. TIMES (Mar. 24, 2011), <http://www.nytimes.com/2011/03/25/business/economy/25tax.html?pagewanted=all>; *Reforming Corporate Taxes: Getting Corporations to Cough Up*, THE ECONOMIST (April 28, 2011), <http://www.economist.com/node/18621038>; David Leonhardt, *The Details on Corporate Taxes*, N.Y. TIMES (Feb. 1, 2011)

115. *See, e.g.*, Gaëlle Krikorian, *Free-Trade Agreements and Neoliberalism: How to Derail the Political Rationales that Impose Strong Intellectual Property Protection*, in ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY 293, 301–11 (Gaëlle Krikorian & Amy Kapczynski eds., 2010) (explaining that a small group of business lobbyists obtained United States' international pressure to raise intellectual property protections as part of WTO treaties; describing misdirection and semantic shifts used to support this alleged tie between economic health of industrial nations and high intellectual property protection).
116. Cecilia Oh, *Patents and Monopoly Prices*, THIRD WORLD NETWORK, <http://www.twinside.org.sg/title/twr131b.htm> (last visited Dec. 11, 2012).
117. Peter Tschmuck, *EU Copyright Term Extension in Sound Recordings to 70 Years—An Economic Assessment*, MUSIC BUS. RES. (Sept. 15, 2011).
118. Pfizer's corporate headquarters is in New York City, N.Y., *Pfizer Company Fact Sheet*, PFIZER, [http://www.pfizer.com/about/leadership\\_and\\_structure/company\\_fact\\_sheet.jsp](http://www.pfizer.com/about/leadership_and_structure/company_fact_sheet.jsp) (last visited Dec. 11, 2012), but it has a corporate presence in over forty other countries. *Global Sites*, PFIZER, [http://www.pfizer.com/general/global\\_sites.jsp](http://www.pfizer.com/general/global_sites.jsp) (last visited Dec. 11, 2012). Pfizer is a Delaware corporation. *Pfizer Inc., Annual report (Form 10-K) cover page (Dec. 31, 2010)*, available at [http://www.pfizer.com/files/annualreport/2010/form10k\\_2010.pdf](http://www.pfizer.com/files/annualreport/2010/form10k_2010.pdf). In 2010, 57% of Pfizer's revenues (\$38.8 billion) were from outside the United States. *Id.* at 7. Pfizer is quite candid about its economic strength being linked to high intellectual property protection: "One of the main limitations on our operations in some countries outside the U.S. is the lack of effective intellectual property protection for our products. Under international and U.S. free trade agreements in recent years, global protection of intellectual property rights has been improving. . . . A number of countries have made improvements. We have experienced significant growth in our businesses in some of those nations, and our continued business expansion in other participant countries depends to a large degree on further patent protection improvement." *Id.* at 10. "[P]atents covering several of our best-selling medicines have recently expired or will expire in the next few years, and patents covering a number of our best-selling medicines are the subject of pending legal challenges. We expect we will lose exclusivity for Lipitor in the U.S. in November 2011 and, as a result, will lose the substantial portion of our U.S. revenues from Lipitor shortly thereafter. In addition, our revenues could be significantly impacted by the timing and rate of commercial acceptance of key new products." *Id.* at 22. "Lipitor sales in 2010 were approximately \$10.7 billion, accounting for approximately 18% of our total 2010 Biopharmaceutical revenues." *Id.* at 21. Pfizer also admits its financial interest in the

and Disney<sup>119</sup> meant the welfare of the United States.<sup>120</sup> Interestingly, the copyright industries' report supporting the last extension of the copyright term spoke of foreign sales—not sales of products exported from the United States.<sup>121</sup> When attempting to obtain enactment of a

---

details of United States health care law reform, *id.* at 13–16, including the question of whether drugs should be legally importable from foreign countries with stricter price controls. *Id.* at 16.

119. The Walt Disney Company is incorporated in Delaware, but has its principle offices in California. The Walt Disney Co., Annual Report (Form 10K) cover page (Oct. 2, 2010), *available at* [http://corporate.disney.go.com/media/investors/form\\_10k\\_fy2010.pdf](http://corporate.disney.go.com/media/investors/form_10k_fy2010.pdf). “The Walt Disney Company, together with its subsidiaries, is a diversified worldwide entertainment company with operations in five business segments: Media Networks, Parks and Resorts, Studio Entertainment, Consumer Products and Interactive Media. . . . The Company employed approximately 149,000 people as of October 2, 2010.” *Id.* at 1. “Revenues for the year increased 5%, or \$1.9 billion, to \$38.1 billion” in 2010 over 2009. *Id.* at 28. The Consumer Products Division produced a net income of \$677 million in 2010, compared to the firm total of \$7,586 million. Comparable figures for 2009 are 609/6672; for 2008 778/8484. *Id.* at 30. I highlight consumer products because these are presumably not manufactured within the United States but their profitability is dependent on strong copyright protection. Disney’s desire to extend copyright protection for Mickey Mouse is widely considered the motive force behind the most recent extension of the copyright term. *See, e.g.*, Stephen G. Breyer, *The Uneasy Case for Copyright: A Look Back Across Four Decades*, 79 GEO. WASH. L. REV. 1635, 1641 (2011). Disney also has successfully lobbied for changes in other areas of United States law. *See, e.g.*, Kit Johnson, *The Wonderful World of Disney Visas*, 63 FLA. L. REV. 915, 922–25 (2011) (discussing Disney’s successful attempt to change U.S.A. immigration law and arguing that Disney’s practices do not fulfill the intended goals of the statute).
120. *See* Glen Shapiro, *U.S. Government Pushes for Patent Law Reform*, TAX-NEWS.COM (June 7, 2011), [http://www.tax-news.com/news/US\\_Government\\_Pushes\\_For\\_Patent\\_Law\\_Reform\\_\\_\\_49691.html](http://www.tax-news.com/news/US_Government_Pushes_For_Patent_Law_Reform___49691.html); Christopher Johnson & Daniel J. Walworth, *Protecting U.S. Intellectual Property Rights and the Challenges of Digital Piracy* 1 (U.S. Int’l Trade Comm’n, Working Paper No. ID-05, 2003), *available at* [www.usitc.gov/publications/332/working\\_papers/wp\\_id\\_05.pdf](http://www.usitc.gov/publications/332/working_papers/wp_id_05.pdf).
121. *See* PIRACY OF INTELLECTUAL PROPERTY: HEARING ON S 989 BEFORE THE SEN. SUBCOMM. ON INTELLECTUAL PROPERTY OF THE COMM. ON THE JUDICIARY, 109TH CONG. (2005) (statement of Eric H. Smith, President, International Intellectual Property Alliance, conflating foreign sales and exports), *available at* <http://www.gpo.gov/fdsys/pkg/CHRG-109shrg38864/pdf/CHRG-109shrg38864.pdf>; COUNTERFEITING AND THEFT OF TANGIBLE INTELLECTUAL PROPERTY: CHALLENGES AND SOLUTIONS: HEARING ON S. 771 BEFORE THE SENATE COMM. ON THE JUDICIARY, 108TH CONG. (2004) (statement of Jon W. Dudas, acting Under Sec. of Commerce for Intellectual Property and acting Director of the U.S. Patent and Trademark Office, conflating foreign sales and exports), *available at* <http://www.gpo.gov/fdsys/pkg/CHRG-108shrg98207/pdf/CHRG-108shrg98207.pdf> (last visited Dec. 11, 2012); Malla Pollack, *Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47, 94–95 (1999)

statute protecting the industrial design of automobile parts (to prevent off-brand parts being used for repairs), the Big Three refused Big Labor's price for support—a legal requirement that the protected parts be made inside the United States.<sup>122</sup>

Thus, some of the biggest property holders in the United States, international corporations, do not share the interests of the humans who vote within the United States. Furthermore, human United States residents with the largest incomes are predominantly high corporate officers.<sup>123</sup> Additionally, ownership of corporate stock is heavily concentrated among the United States' most wealthy humans.<sup>124</sup> The personal interests of these humans are tied to the economic well-being of the mega-corporations.<sup>125</sup> Additionally, unlike merely middle-class and poor humans, the rich can buy substitutes when budget cuts decimate public police forces, public schools, public libraries, and public transportation.<sup>126</sup> Now that the military draft is dead, the rich rarely need to deal with the rest of us.<sup>127</sup> Certainly their children do not have to die in the wars that produce profits for military contractors and suppliers of all types.<sup>128</sup> Therefore, despite Madison's contrary argument, even rich humans

---

(discussing Congress' reliance while considering DMCA on Stephen E. Siwek & Gale Mosteller, International Intellectual Property Alliance, Copyright Industries in the U.S. Economy: The 1998 Report (1998), which discusses "foreign sales" as if they are exports from the United States).

122. See DESIGN INNOVATION & TECHNOLOGY ACT OF 1991, HEARING ON H.R. 1790 BEFORE THE SUBCOMM. ON INTELLECTUAL PROPERTY AND JUDICIAL ADMIN., H. COMM. ON THE JUDICIARY, 102D CONG. 40, 46–47, 59–50 (1993); Norman Hawker, *The Automobile Aftermarket: Crash Parts, Design Patents, and the Escape from Competition* 6–7, 23 (March 22, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1576671> (discussing more recent attempts by American car manufacturers to stifle competition in the aftermarket for parts).
123. See, e.g., PAUL KRUGMAN, *THE CONSCIENCE OF A LIBERAL* 47 (2009) (“[T]oday’s wealthy receive much of their income from employment (think CEOs and their stock-option grants) . . . .”); Paul Krugman, Op-Ed., *Oligarchy, American Style*, N.Y. TIMES, Nov. 4, 2011, at A31 (“[A]round 60 percent of the top 0.1 percent either are executives in nonfinancial companies or make their money in finance. . . . Add in lawyers and people in real estate, and we’re talking about more than 70 percent of the lucky one-thousandth.”).
124. See Stephen B. Cohen, *Inequality and the Deficit* 19 (Georgetown Public Law and Legal Theory Research Paper No. 11-101, 2011), available at <http://ssrn.com/abstract=1890645>.
125. See Nelson D. Schwartz, *Striking Gold in Stock Options*, N.Y. TIMES, Apr. 4, 2010, at 1.
126. See MICKEY KAUS, *THE END OF EQUALITY* 56–57 (1995).
127. See *id.* at 49–52.
128. See *id.*

do not share the interests of the rest of the human population.<sup>129</sup> Nevertheless, the United States government pays much more attention to the rich.<sup>130</sup>

Additionally, trade identity law allows a multi-national firm to have numerous apparent nationalities.<sup>131</sup> For example, the firm now called Diageo (formerly Guinness), which is headquartered in London, England, owns all of Pillsbury, Totinos Pizza, Green Giant, Hagen Daaz, and Burger King.<sup>132</sup>

Trademark law does allow famous brands to raise prices,<sup>133</sup> it does allow mark holders to squelch competition that benefits consumers.<sup>134</sup> I disapprove of these wealth transfers. I also disapprove of the cultural effects of the related advertising.<sup>135</sup> However, the direct wealth transfer effects of trademark overprotection seem minor in comparison to other inequitable wealth transfers United States law encourages.<sup>136</sup> This paper raises a different inequitable effect supported by trade identity law, corporations' ability to frame

129. *Cf. id.* 563–57 (suggesting that due to economic disparities the rich do not have the same property interests as the rest of the population).

130. See LARRY M. BARTELS, *UNEQUAL DEMOCRACY* 252–53 (2008) (providing empirical research showing unequal government responsiveness); Thomas Ferguson & Robert Johnson, *When Wolves Cry “Wolf”: Systemic Financial Crises and the Myth of the Danaid Jar* 17–19 (April 2010) (unpublished manuscript), available at [http://ineteconomics.org/sites/inet.civicaactions.net/files/INET%20C@K%20Paper%20Session%208%20-%20Ferguson%20\(Rob%20Johnson\)\\_0.pdf](http://ineteconomics.org/sites/inet.civicaactions.net/files/INET%20C@K%20Paper%20Session%208%20-%20Ferguson%20(Rob%20Johnson)_0.pdf) (explaining that when considering the openness of a political system “the right question to ask is whether ordinary people can afford to control any political party in the system,” which they cannot “in a system as thoroughly driven by money as the current U.S. system, is. . . . as even the briefest glance at the recent U.S. financial crisis shows, major donors repeatedly influenced policymakers and helped shape the responses of both major political parties”).

131. See Linda A. Mabry, *Multinational Corporations and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality*, 87 *GEO. L.J.* 569, 632–33 (1999).

132. Laurent Muzellec & Mary Lambkin, *Does Diageo Make Your Guinness Taste Better?*, 16 *J. PROD. & BRAND MGMT.* 321, 323 (2007).

133. See, e.g., Mark A. Lemley & Mark P. McKenna, *Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP*, 100 *GEO L.J.* 2055, 2087 (2012) (explaining empirical evidence showing price inelasticity solely based on brand name).

134. See *id.* at 2082.

135. Marcuse taught that focusing the general public on materialistic goods as objects whose ownership brought happiness prevented recognition of the need to change the basic social system. See MARCUSE, *supra* note 13, at 50.

136. Corporations use many other ploys, including dehumanizing themselves on occasion. See Adam Benforado, *Don't Blame Us: How Our Attributional Proclivities Influence the Relationship Between Americans, Business, and Government*, 5 *ENTREPRENEURIAL BUS. L.J.* 509, 531, 534, 539 (2010).

themselves as human, one of the mainstays for manipulating humans into under-appreciating corporate self-serving.<sup>137</sup>

Why is this important? Any revolt of humans against corporations must start with humans recognizing the need for revolution.<sup>138</sup>

### III. CORPORATIONS HAVE MASKS, NOT FACES

#### A. *The Self-Lessness of a Corporation*

##### 1. The Human Self

Each individual human being includes a corporeal body and an integrated non-corporeal component.<sup>139</sup> Despite lack of agreement regarding the interaction between the bodies and the non-corporeal aspects of human personhood, the existence of such non-corporeal aspects (at least during much of the lifetime of the corporeal component for most humans) is hardly controversial.<sup>140</sup> At a minimum, a healthy, non-infant *Homo sapiens* has a subjective feeling state of having a self.<sup>141</sup> This feeling is largely taken for granted while present; however, its importance is evidenced by the overwhelming panic a human experiences at any involuntary loss of the feeling state.<sup>142</sup>

Social psychologists disagree about much regarding such feeling-state “selves.”<sup>143</sup> But they do agree that selves are integrative and that, while some aspects of a self change over time, each self has a core that is organized, coherent, and consistent.<sup>144</sup> Lack of such a

---

137. *See id.* at 545–55.

138. *See* Jalil A. Muntaqim, *Towards a New Amerikan Revolution*, in *THIS COUNTRY MUST CHANGE: ESSAYS ON THE NECESSITY OF REVOLUTION IN THE USA* 5, 30–31 (Craig Rosebraugh ed., 2009).

139. *See* PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 50 (Anchor Books paperback 1st ed. 1967) (1966) (emphasis omitted) (footnote omitted) (“This relationship is an eccentric one. On the one hand, man is a body . . . . On the other hand, man has a body. That is, man experiences himself as an entity that is not identical with his body.”).

140. *See* Seymour Epstein, *The Self-Concept Revisited: Or a Theory of a Theory*, 28 *AM. PSYCHOL.* 404, 404 (1973).

141. *See id.* at 405.

142. *Id.*

143. *See* Jonathan F. Zaff & Elizabeth C. Hair, *Positive Development of the Self: Self-Concept, Self-Esteem, and Identity*, in *WELL-BEING: POSITIVE DEVELOPMENT ACROSS THE LIFE COURSE* 235, 236–38 (Marc H. Bornstein et al. eds., 2003) (providing basic definitions).

144. “[R]esearch from the 1980s yielded impressive evidence for . . . longitudinal consistency . . . of personality traits.” Dan P. McAdams, *Personality, Modernity, and the Storied Self: A Contemporary Framework for Studying Persons*, 7 *PSYCHOL. INQUIRY* 295, 300 (1996); *see also* Deborah Cobb-Clark & Stefanie Schurer, *The*

cohesive core correlates with lack of a feeling of well-being.<sup>145</sup> Well-being also correlates with perceptions both of one's own worthiness,<sup>146</sup> and of one's own authenticity, i.e., the feeling that one's attributes are self-chosen, rather than forced on one by outside pressures such as the roles one plays in society.<sup>147</sup> As all variants of symbolic interactionism learned from George Herbert Mead,<sup>148</sup> an adult in modern Western society constructs a self by creating a life story; well-being requires this narrative both to be "coherent" and to have "generative integration."<sup>149</sup>

In philosophical terms, "man is a self-interpreting animal",<sup>150</sup> to be a "person" requires a sense of self, a notion of the future and the past, the ability to hold values and make choices, adopt life plans, and to respond based on internal valuation.<sup>151</sup> This type of "person" is a member of the Kantian kingdom of ends.<sup>152</sup> In legal and political

Stability of Big-Five Personality Traits 6 (Melbourne Inst. Working Paper Series, Working Paper No. 21/11 Aug. 2011) (reporting empirical study evidencing stability of major personality traits in working-age adults), available at <http://ssrn.com/abstract=1919414>.

145. See Epstein, *supra* note 140, at 407; e.g., Steven Hitlin, *Values as the Core of Personal Identity: Drawing Links between Two Theories of Self*, 66 SOCIAL PSYCHOL. Q. 118, 119 (2003); Kennon M. Sheldon et al., *Trait Self and True Self: Cross-Role Variation in the Big-Five Personality Traits and Its Relations With Psychological Authenticity and Subjective Well-Being*, 73 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 1380 (1997); Stephen Soldz & George E. Vaillant, *The Big Five Personality Traits and the Life Course: A 45-Year Longitudinal Study*, 33 J. OF RESEARCH IN PERSONALITY 208, 209 (1999). The same phenomenon can be approached from the point of view of sociology. See, e.g., Berger & Luckmann, *supra* note 139, at 100–01 ("[S]ubjective identity is a precarious entity. . . . The 'sane' apprehension of oneself as possessor of a definite, stable, and socially recognized identity is continually threatened. . . . [Legitimization] 'means that the individual can live in society with some assurance that he *really* is what he considers himself to be as he plays his routine social roles, in broad daylight and under the eyes of significant others.'").
146. See, e.g., Epstein, *supra* note 140, at 406; David A. Snow & Leon Anderson, *Identity Work Among the Homeless: The Verbal Construction and Avowal of Personal Identities*, 92 AM. J. SOC. 1336, 1339 (1987).
147. See, e.g., Hitlin, *supra* note 145, at 118; Sheldon, *supra* note 145, at 1381.
148. See, e.g., Simon Susen, *Median Reflections on the Existential Ambivalence of Human Selfhood*, 17 Studies in Soc. And Political Thought 62–81 (forthcoming 2010) (manuscript at 62-63), available at <http://ssrn.com/abstract=1700179>.
149. See McAdams, *supra* note 144, at 314.
150. CHARLES TAYLOR, HUMAN AGENCY AND LANGUAGE: PHILOSOPHICAL PAPERS I 43 (1985).
151. See *id.* at 97–103.
152. "Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means."

discourse, this evaluative, cohesive aspect of humans is commonly referred to as “human dignity.”<sup>153</sup>

In terms of biblical religious tradition, humans are special because they are made in the image of the divine.<sup>154</sup> Since the Divine Person (in the same tradition) is without a body, what does this description mean? Is it merely a species-centric conceit used to justify the claim that humans by divine choice have dominion over all living things and over the earth itself?<sup>155</sup> Perhaps. However, I choose to join those who read “image” as referring to the moral characteristics of the Divine.<sup>156</sup> Specifically, I embrace the Jewish traditional focus on the first sentence in what Christians call the Ten Commandments: “I am the Lord your God, who brought you out of the land of Egypt, out of the house of slavery.”<sup>157</sup> The aspect of the Divine most important to humans is the Divine’s gift of freedom; the divine aspect of humanity is the urge for individual autonomy for both oneself and all other humans.<sup>158</sup> In the Jewish tradition, one may not separate oneself from the community.<sup>159</sup> As the great sage Hillel said:

If I am not for myself, who will be for me?

---

IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 36 (James W. Ellington trans., 1981).

153. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at art. I (Dec. 10, 1948) (“All human beings are born free and equal in dignity and rights.”); Naomi Rao, *Three Concepts of Human Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 185 (2011) (“In the last Term alone, the Supreme Court referred to dignity in a number of cases touching on diverse issues such as gun rights under the Second Amendment, free speech and campaign finance rules, and the death penalty.”).
154. See *Genesis* 1:26–28.
155. See *id.* at 1:26–31.
156. See, e.g., THOMAS AQUINAS, *Treatise on Man*, in *SUMMA THEOLOGICA* III 1.4.a.1 (Fathers of the English Dominican Province, New York, Benziger Bros., trans., 1947) (linking human worth to humans being made in the image of G-d, which is interpreted to mean the ability to know and love G-d). But other texts from Aquinas put more emphasis on the ability to reason. See, e.g., *id.* at I-II 583 (“[A]n intelligent being, having free will, and self-movement”). The Greeks often equated the worth of humanity with their ability to reason. See, e.g., CICERO, *ON THE COMMONWEALTH AND ON THE LAWS* 113 (James E. G. Zetzel ed., 1999).
157. *Exodus* 20:2. In the Jewish tradition this is the first “statement” (a better translation of the Hebrew word commonly translated as commandment in “ten commandments”). See, e.g., *THE TORAH: A WOMEN’S COMMENTARY* 417 (Tamara Cohn Ezkenazi & Andrea L. Weiss eds., 2008) (commentary on *Exodus* 20:2).
158. I will not take space in this paper to support my choice. Many persons from many traditions agree. Those who disagree will not be dissuaded by argument.
159. *MISHNAH PIRKEI AVOT*, *ETHICS OF THE FATHERS* 2:5, <http://www.shechem.org/torah/avot.html> (last visited Dec. 11, 2012) (attributed to Hillel).

*Yet, if I am for myself only, what am I?  
And if not now, when?*<sup>160</sup>

I have been unable to locate any mainstream approach to corporations that asserts that corporations have the characteristics central to any of these conceptions of human personhood in actuality—as opposed to metaphorically.<sup>161</sup>

## 2. The Nature of the Business Firm

Corporations are persons, at least juristically, but corporate personhood is not the same as human personhood.<sup>162</sup> Clear analysis requires resisting the slide into the fallacy of the transplanted category,<sup>163</sup> and rejection of the linguistically enabled assumption that a person, is a person, is a person.<sup>164</sup>

From the mid-nineteenth century through the early twentieth century, legal scholarship regarding business firms centered on the dispute over “personhood.”<sup>165</sup> Contemporary academics assume

160. *Id.* at 1:14 (attributed to Rabbi Hillel).

161. Grounding my argument on human personhood has the additional advantage of using the new legal traction of dignity claims (as opposed to equality claims) in the U.S. Supreme Court’s approach to the Constitution. *See, e.g.,* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011) (“[T]he Court has moved away from group-based equality claims . . . to individual liberty claims . . .”).

162. Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 106–07 (2009).

163. *See* WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 154–63 (2002) (discussing this common error in reasoning); Moffatt Hancock, *Fallacy of the Transplanted Category*, 37 CAN. B. REV. 535, 547 (1959) (“When a legal category, . . . is imported into a different context where a different legal result (involving different policies) is in issue, the transplanted category may well suggest a result which frustrates the relevant policies which should control the determination of the new issue.”). The classic discussion of the constructive nature of the word ‘person’ as applied to businesses is John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 658–59 (1926) (“[t]he root difficulty in present controversies about [the nature of the corporation is that] what we really need to do is to overhaul the doctrine of personality which underlies” all of the theories; recommending abandonment of “[t]he postulate . . . usually made unconsciously. . . . that before anything can be a jural person it must intrinsically possess certain properties, the existence of which is necessary to constitute anything a person”).

164. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶ 119 at 48 (G.E.M. Anscombe trans., 3d ed. 1971) (“The results of philosophy are the uncovering of one or another piece of plain nonsense and of bumps that the understanding has got by running its head against the limits of language.”).

165. Ripkin, *supra* note 162, at 103, 107, 109–10, 112.

personhood and focus on organizational issues.<sup>166</sup> However, no major theory in either the classic or the modern set describes the corporation as possessing a conscious self, let alone a self whose well-being requires coherence, consistency, and autonomy.<sup>167</sup> No theory asserts that corporations are made in the image of the Divine, regardless of one's view of what the "Divine Image" means.<sup>168</sup> Certainly, corporations are not focused on the liberation of human beings.<sup>169</sup> Any likeness between a Kantian-self and a business firm is purely metaphorical.<sup>170</sup> Corporate personhood is not the

---

166. See, e.g., *id.* at 131–33.

167. See Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business*, 63 WASH. & LEE L. REV. 1421, 1421–77 (2006) (discussing the three major theories of corporate personhood, none of which describe a corporation as possessing a conscious self).

168. Corporations were created by humans to serve the interests of humans. See Jack Balkin, *Corporations and the Thirteenth Amendment*, BALKINIZATION (Jan. 28, 2012 10:27 AM), available at <http://balkin.blogspot.com/> ("You can own for-profit corporations (or shares of corporations) and buy and sell them. You can auction off corporations in markets (sometimes called stock exchanges). Finally, the owners of corporations can force corporations to work for them and take all the profits of their labor. Put differently, for-profit corporations are by nature designed to be 'slaves.' That is what distinguishes them from natural persons.") (discussing paper authored by Jack Balkin and Sanford Levinson for Columbia L. Rev. symposium).

169. Cf. Acuña, *supra* note 3, at 2 (stating how corporations transfer costs to society).

170. The metaphor of corporation as person argues that corporation is not just a legal entity recognized by the law, actually is a person that has an intrinsic value and for that reason, it has constitutional protection. Indeed, this metaphor transforms a tool into a goal, a means into an end. The leap from "entity liability" to "legal personhood" to "person" ends by treating the business corporation as if it were a Kantian ultimate value, a person. . . . In fact, just as a contract permitted Hobbes to find freedom in autocracy, it permits us to find democracy in corporate hierarchy. Acuña, *supra* note 1, at 9–11 (referring to Thomas Hobbes, *THE LEVIATHAN* (first published 1651)); see also, e.g., Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 WASHINGTON & LEE L. REV. 1409, 1409 (1993) ("Metaphors are unavoidable but dangerous components of human thought . . . [d]espite the appearance of precision, treatments of corporate governance in the literature of economics, public policy, and law also have often been controlled by metaphors."); Daniel J.H. Greenwood, *Introduction To The Metaphors Of Corporate Law*, 4 SEATTLE J. FOR SOCIAL JUSTICE 273, 275 (2005) ("The metaphors of corporate law so dominate our thinking that it is often the metaphors that determine the legal treatment of our largest institutions, rather than social usefulness, underlying reality or even conscious political debate."). But see, e.g., Susanna Kim Ripken, *Corporations Are People Too: A Multi-Dimensional Approach To The Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 124–29 (2009) (discussing various commentators' arguments for the moral personhood of corporations).

physiological, psychological,<sup>171</sup> social, or moral equivalent of human personhood, and therefore, cannot provide a theoretical basis for treating corporations as if they were human persons.<sup>172</sup>

*a. Classic theories of the corporation*

The three classic theories of the corporation (in the order in which they were popular in the United States) are the artificial entity theory, the aggregate theory, and the natural entity theory.<sup>173</sup> The artificial entity theory sees the corporation as created by the state, and therefore, having only such powers as the state chooses to grant.<sup>174</sup> The aggregate theory views the corporation as similar to a partnership or other voluntary association, a separate entity created by a group of businesspersons; a corporation may, therefore, be the repository of its owners' rights.<sup>175</sup> The natural entity theory describes the corporation as created by the natural working of society in its commercial mode.<sup>176</sup> Of the three classic theories, only the last provides even superficial support for corporate personhood;<sup>177</sup> this article, therefore, turns to the natural entity theory of the corporation.

---

171. Corporations lack ids, egos, and superegos. Not having biological parents or upbringings, their behaviors cannot be unconscious reactions to the birth trauma, their relationships to one or more of their parents, their potty-training, or any such life-cycle event.

172. *See generally* Greenwood, *supra* note 170, at 275, 290 (discussing how metaphors in corporate law confuse and attribute to corporations a personhood those corporations do not actually have).

173. *See* Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 283–97 (1990); Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business*, 63 WASH. & LEE L. REV. 1421, 1421–77 (2006); Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1441–47 (1987).

174. *See, e.g.*, *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”).

175. *See, e.g.*, Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 259 (1911) (“Any group of men, at any rate any group whose membership is changing, is necessarily an entity separate and distinct from the constituent members.”).

176. *See, e.g.*, Harold J. Laski, *The Personality of Associations*, 29 HARV. L. REV. 404, 404 (1916).

177. *See id.* at 404–05

Consider Laski's argument that corporate persons are natural persons:

Certainly no lawyer dare neglect the phenomena of group life, even if on occasion he denies a little angrily the need for him to theorize about them. For man is so essentially an associative animal that his nature is largely determined by the relationships thus formed. The churches express his feeling that he has need of religion. His desire for conversation and the newspapers results in the establishment of clubs. The necessity of social organization gave birth to the state. As his commercial enterprise began to annihilate distance, the trading company came into being. It would not, one urges, be over-emphasis to assert that in every sphere of human activity associations of some kind are to be found. They are the very life-breath of the community.

And, somehow, we are compelled to [personalize] these associations. They demand their possessive pronouns; the church has "its" bishops. They govern a singular verb; the railway company "employs" servants. The United States of America is greater than all Americans; it becomes a single individual, and [fraternizes], Jonathan-wise, with a John Bull in whom all Englishmen have their being.

... [I]t is evident that the state is compelled to do remarkable things with the bodies it has called into being. It fails to regulate them with the ease that might be desired. . . . Corporations will have a curious habit of attempting perpetually to escape from the rigid bonds in which they have been encased [by the doctrine of ultra vires]. . . . A corporation will possess itself of an empire, and resent interference with its domain. An American colony will incorporate itself; and when its creator shows signs of wanton interference, will take the lead in rebellion against the state which, in legal theory, at any rate, gave it birth.

... Clearly, the problem of whether a corporation can have a *mens rea* has, if sometimes a little doubtfully, been answered in the negative [in criminal cases]. Taken with the cases in tort, we must collect the opinion that it cannot have a mind at all.<sup>178</sup>

---

178. See *id.* at 415.

Yet we cannot, in fact, do without that mind. Just as we have been compelled by the stern exigencies of events to [recognize] that the corporation is distinct from its members, so, too, we have to [recognize] that its mind is distinct from their minds. A corporation votes an annual pension to a servant; its gratitude is not merely the gratitude of the individual members expressed in a single term, for one of those members will [endeavor] to restrain its generosity. So it may well be urged that in the cases of manslaughter noted above a penalty ought to be exacted in some wise commensurable with the offence. When we talk of a company as a “bad master,” there is surely reality behind that phrase. Individually its members are probably meek and kindly; but the company is differently constituted. Where that “badness” passes into the region in which it becomes criminally culpable, the company ought to suffer the penalty for its blameworthiness. Certainly it does so suffer when it is morally but not legally at fault. Its men work for it with less zeal. It finds it difficult to retain their services. The quality of its production suffers. It loses ground and is outstripped in the industrial race. Why the courts should refuse to take cognizance of that which is an ordinary matter of daily life it is difficult indeed to understand. Take, for example, the charge of manslaughter. Any student of workmen’s compensation cases will not doubt that in a choice between the adoption of a completely protective system and the possibility of an occasional accident, there are not a few corporations anti-social enough to select the latter alternative. . . . But admit the existence of the corporate mind and that mind can be a guilty mind. It can be punished by way of fine; and if it be mulcted with sufficient heaviness we may be certain that it will not offend again. What is the alternative? To attack some miserable agent who has been acting in the interest of a mindless principal . . . . But if that somewhat be mindless, how can it have selected an agent? For selection implies the weighing of qualities, and that is a characteristic of mind.<sup>179</sup>

Laski’s argument for a corporate mind (a potential “self”) is an interesting combination of logical errors. First, it confuses metaphor

---

179. *Id.* at 415–16.

and grammatical rules with reality: “They govern a singular verb.”<sup>180</sup> Second, it conflates many different types of associations: so that a representative government’s status is tied to that of a business corporation. Third, it presents a false, exclusive dichotomy: treat corporations identically to *Homo sapiens* or treat the *Homo sapiens* involved within a corporation as entirely separate individuals. Laski repeatedly uses this approach to enlist the readers’ probable desire to do justice to those harmed by corporate acts. Despite Laski’s argument, many nuanced solutions are possible. The law could require compensation to persons harmed by corporate wrongdoing or *ultra vires* acts without granting the benefits of personhood to corporations.<sup>181</sup> Additionally, whatever the value of Laski’s position, he is not claiming a corporate stream of consciousness, moral core, or reflection of the divine—alternative views of the central element of the *Homo sapiens*’ “self.”

*b. Contemporary theories*

Contemporary theories of the nature of the firm build on three formative works: Berle’s *The Modern Corporation* (1932),<sup>182</sup> Coase’s *Nature of the Firm* (1937),<sup>183</sup> and Manne’s *Mergers and the Market for Corporate Control* (1965).<sup>184</sup> Berle focused analysts’ attention on the agency problems created by the separation of ownership from control.<sup>185</sup> Coase taught that transaction costs were related to the boundary between a firm and the surrounding market system.<sup>186</sup>

---

180. *Id.* at 404.

181. Accord Susanna Kim Ripken, *Corporations Are People Too: A Multi-Dimensional Approach To The Corporate Personhood Puzzle*, 15 *FORDHAM J. CORP. & FIN. L.* 97, 124 (2009) (footnotes omitted) (“However, an alternative, more nuanced approach may be to say that corporations are moral actors for purposes of having moral responsibilities, but are not full-fledged moral persons entitling them to exercise moral rights.”).

182. ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION & PRIVATE PROPERTY* (1933).

183. R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

184. Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 *J. POL. ECON.* 110 (1965).

185. See BERLE & MEANS, *supra* note 182, at 207–18 (discussing the legal position of “control”). However, Berle and Means may not have considered the principle-agent problem to be the core of their book’s teaching. See, e.g., Kenneth Lipartito & Yumiko Morii, *Rethinking the Separation of Ownership from Management in American History*, 33 *SEATTLE U. L. REV.* 1025, 1027 (2010) (arguing that the prime issue was corporate power to act without social responsibility).

186. See Coase, *supra* note 25, at 389 (stating that the distinguishing feature of the firm is the suppression of the market’s price-mechanism in favor of a decision-maker operating by fiat); e.g., Stephen M. Bainbridge, *Director Primacy: The Means and*

Manne explained the stock market as a market for corporate control which disciplined firm management and lowered agency costs.<sup>187</sup>

Currently, most scholars view the firm as a nexus of contracts.<sup>188</sup> At the extreme, nexus theory renders meaningless the concept of the firm as an entity owned by shareholders.<sup>189</sup> Other theoreticians deal with the firm in terms of organizational structure; a firm is a set of related productive activities whose contours are decided by fiat by one in authority while the market exists where transactions are negotiated.<sup>190</sup> The efficiency of the hierarchy may be discussed in terms of property,<sup>191</sup> information,<sup>192</sup> specialized investments,<sup>193</sup> or

---

*Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 555 (2003) (ascribing this insight to Coase).

187. See Manne, *supra* note 26, at 113 (explaining stock price as an objective valuation of corporation's management); e.g., William J. Carney, *The Legacy of "The Market for Corporate Control" and the Origins of the Theory of the Firm*, 50 CASE W. RES. L. REV. 215, 230 (1999) (discussing the place of this article in Manne's work as a whole).
188. See Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 859 (1997) ("Most law and economics scholars embrace a model of business organizations known as the 'nexus-of-contracts theory of the firm.'"); e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 12 (Harv. Univ. Press paperback 1996) ("More often than not a reference to the corporation as an entity will hide the essence of the transaction. So we often speak of the corporation as a 'nexus of contracts' or a set of implicit and explicit contracts.").
189. See, e.g., Bainbridge, *supra* note 188, at 859 ("The firm is simply a legal fiction representing the complex set of contractual relationships between these inputs. In other words, the firm is not an individual thing, but rather a nexus or web of explicit and implicit contracts establishing rights and obligations among the various inputs making up the firm."); G. Mitu Gulati, William A. Klein & Eric M. Zolt, *Connected Contracts*, 47 UCLA L. REV. 887, 891–92, 897 (2000) (arguing against reification of the firm as an entity owned by shareholders, and challenging the "utility, and even the meaningfulness, of 'ownership' as applied to complex, or even not so complex, economic activity").
190. See Dan L. Burk, *Intellectual Property and the Firm*, 71 U. CHI. L. REV. 3, 5 (2004) ("The economic literature on the firm generally uses the term to denote an area of economic activity characterized by hierarchical organization and command production, rather than by market negotiation. The production center thus denoted is generally conceived to encompass an entrepreneur controlling a variety of inputs, including employees, via a complex of relationships, usually contractual in nature.").
191. See *id.* at 4 ("I examine whether existing intellectual property law provides for efficient allocation of intellectual property rights within firms in a manner that comports with property-based theories of the firm.").
192. See B. Kogut & U. Zander, *Knowledge of the Firm and the Evolutionary Theory of the Multinational Corporation*, 34 J. INT'L BUS. STUD. 516, 517 (2003) (advancing thesis that the boundaries of a firm depend in part on the organizational form that is more

some unspecified resource.<sup>194</sup> For organizational-structure theoreticians, “the economic firm is not necessarily a legally recognized organization, although some legally recognized firms are also economic firms.”<sup>195</sup> Thus, the corporate entity vanishes. Certainly, it lacks a stream of consciousness, a moral core, or a semblance of the divine.

The existence of agency costs (the possibility that individuals within a firm may act in their own best interests, rather than that of the firm) demonstrates that the firm has no single cohesive self—let alone a moral one.<sup>196</sup> The lack of cohesion inside the firm is especially clear in the literature that discusses firms from the vantage of organization theory.<sup>197</sup> A firm is not a single decision maker, it is a structure formed of the intersection of multiple decision makers who often, both potentially and actually, act in tension with each other’s goals.<sup>198</sup> Of course, one could say that a Homo sapiens’ actions are similarly disorganized due to internal conflicts, but the conflicting “entities” within the Homo sapiens’ self are not other Homo

---

sued to transfer (or coordination) of knowledge of the type required to be transferred (or coordinated) for greatest productive advantage).

193. See, e.g., Margaret M. Blair & Lynn A. Stout, *A Team Production Theory Of Corporate Law*, 85 VA. L. REV. 247, 249–51 (1999) (explaining corporation as a mediating hierarchy that helps incentivize specialized investment by members of a production team).
194. See Raghuram G. Rajan; Luigi Zingales, *The Firm as a Dedicated Hierarchy: A Theory of the Origins and Growth of Firms*, 116 Q.J. ECON. 805, 811 (2001) (“[A]n entrepreneur uses control over access to the resource and specialized employees, as well as the allocation of ownership over the resource to design the right balance of power between herself and her managers.”).
195. Burk, *supra* note 190, at 5.
196. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 309 (1976) (“The firm is not an individual. It is a legal fiction which serves as a focus for a complex process in which the conflicting objectives of individuals . . . are brought into equilibrium within a framework of contractual relations.”).
197. See, e.g., Gregg P. Macey, *Coasean Blind Spots: Charting the Incomplete Institutionalism*, 98 GEO. L.J. 863, 880-81 (2010).
198. See, e.g., Blair & Stout, *supra* note 193, at 333 (“A second lesson to draw from team production theory concerns the fundamentally political nature of the corporation. Scholarly and popular debates about corporate governance need to recognize that corporations mediate among the competing interests of various groups and individuals that risk firm-specific investments in a joint enterprise. These groups will inevitably use political tools, in addition to economic and legal tools, to try to capture a larger share of the rents produced by team production.”); Macey, *supra* note 197, at 882 (discussing the complexity of decision-making within an institution); Fernando Estrada, *Economics And Rationality Of Organizations: An Approach To The Work Of Herbert A. Simon* (April 2010) (discussing effected of bounded rationality), available at <http://ssrn.com/abstract=1583199>

sapiens.<sup>199</sup> The likeness between internal conflict within individual humans and within firms is merely metaphorical.<sup>200</sup>

In sum, corporations lack “selves” of the type found in *Homo sapiens* by social psychology, philosophy, and religion.<sup>201</sup> A corporation lacks both internally felt self-consciousness and the religious/moral equivalent of self—a soul.<sup>202</sup> However, many scholars recognize that firms have internal cultures; therefore, the next subject is whether a corporation’s culture could be termed a personality in the sense this term is applied to *Homo sapiens*.<sup>203</sup>

Corporate culture has been defined in the following ways: “[A] socially constructed attribute of organizations that serves as the social glue binding an organization together”;<sup>204</sup> “the set of shared attitudes, values, goals, and practices that characterize a company or corporation”;<sup>205</sup> “the selected equilibrium in a game with multiple equilibria”;<sup>206</sup> “a reputation for dealing in a specific way with unforeseen contingencies.”<sup>207</sup> Edgar H. Schein<sup>208</sup> defines “culture” as:

[A] pattern of basic assumptions—invented, discovered, or developed by a given group as it learns to cope with its problems of external adaptation and internal integration—that has worked well enough to be considered valid and,

---

199. See Colin P. Marks, *Jiminy Cricket For The Corporation: Understanding The Corporate “Conscience,”* 42 VAL. U. L. REV. 1129, 1149–50 (2008).

200. See *id.* at 1168.

201. Corporations also lack the souls some religions recognize within *Homo sapiens*, but this paper does not address that complexity.

202. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 134 (3d ed. 2005) (stating that most people view corporations as soulless); Marks, *supra* note 199, at 1144 (“[T]he corporation does not have a ‘conscience’ in the traditional sense.”).

203. See Charles R. P. Pouncy, *The Rational Rouge: Neoclassical Economic Ideology in the Regulation of the Financial Professional*, 26 VT. L. REV. 263 (2002); Susanna Kim Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 134–39 (2009).

204. Kim Cameron, *A Process for Changing Organization Culture*, in *THE HANDBOOK OF ORGANIZATION DEVELOPMENT* 431 (Thomas G. Cummings ed., 2008).

205. Chip Jarnagin & John W. Slocum Jr., *Creating Corporate Cultures Through Mythopoetic Leadership*, 36 ORGANIZATIONAL DYNAMICS 288, 290 (2007), available at <http://www.sciencedirect.com>.

206. Eric Van den Steen, *On the Origin of Shared Beliefs (and Corporate Culture)* 16 (MIT Sloan School of Management Working Paper 4553-05, 2005), available at <http://ssrn.com/abstract=793884>.

207. *Id.* at 16-17.

208. See, e.g., *id.* at 16 (“Probably the most influential and most cited perspective on corporate culture is that of Schein.”).

therefore, to be taught to new members as the correct way to perceive, think, and feel in relation to those problems.<sup>209</sup>

Schein reserves “culture” for the deepest and most preconscious level of group identity, separating out underlying values (intermediate level) and artifacts (most visible, but often not decipherable).<sup>210</sup> Schein does not equate organizational culture with some type of personality, rather, he explains that “[c]ulture should be viewed as a property of an independently defined stable social unit,”<sup>211</sup>—recognizing that “culture” requires interaction of multiple human persons.<sup>212</sup>

Therefore, a firm’s culture (or personality) is not equivalent to a Homo sapiens’ self-concept. In addition to the nonexistence of an internal stream of consciousness, corporate culture differs from human self-concept in both level of manipulability and requirements for well-being. A firm is healthy when it is profitable.<sup>213</sup> Experts on corporate personality teach that corporate culture is one factor affecting a firm’s profitability.<sup>214</sup> However, while a few merely argue for a strong culture, one which exerts cohesive pressure on employees,<sup>215</sup> the more nuanced analyses clarify that profitability depends on the corporate culture’s norms meshing with the needs and goals of the particular firm.<sup>216</sup> Firm culture may grow naturally,<sup>217</sup>

---

209. EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP 9 (1991).

210. *See id.* at 13–14.

211. *Id.* at 7 (emphasis added); *see also id.* at 8 (explaining that his “concept of [organizational] culture is rooted . . . in theories of group dynamics and group growth”).

212. “Without a group there can be no culture . . .” *Id.* at 50.

213. *Id.* at 52 (“Every new group or organization must develop a shared concept of its *ultimate survival problem* . . . . In most business organizations, this shared definition revolves around the issue of economic survival and growth . . . .”); *see also e.g.*, Greenfield, *supra* note 8, at 97 (2005) (“If [corporations] stop creating wealth, they are failures.”).

214. Jarnagin & Slocum, *supra* note 205, at 288–90.

215. *See, e.g.*, Aron Gottesman & Matthew Morey, *Mutual Fund Corporate Culture and Performance*, 21 REV. FIN. ECON. 69 (2012); Jarnagin & Slocum, *supra* note 205, at 288–90.

216. *See, e.g.*, Cameron, *supra* note 204, at 430; Jeffrey Kerr & John W. Slocum, Jr., *Managing Corporate Culture Through Reward Systems*, 1 ACAD. MGMT EXEC. 99, 104 (1987); SCHEIN, *supra* note 209, at 315 (“[D]o not assume that ‘strong’ cultures are better than weak cultures. What is correct or whether strength is good or bad depends on the match between the cultural assumptions and environmental reality.”); *id.* at 33 (“[C]ulture constrains strategy.”); *id.* at 29–33 (providing two examples of a firm being unable to meet a goal due to cultural constraints and one example of a firm intentionally using its culture to support an expansion).

but it may be, and often is, carefully manipulated by management for the purpose of business goals.<sup>218</sup> Corporations exist separately from their employees; therefore, a new owner or manager can force change on a reluctant corporate culture by replacing personnel who do not fit the newly chosen corporate vision.<sup>219</sup>

In sum, a corporation's culture is not equivalent to a human's self. Corporations lack the human need for self-definition (i.e., authenticity or autonomy); they also lack the human need for their public faces to match their inner souls or self-conceptions.<sup>220</sup>

### *B. Reputation: Face or Mask?*

Contrasting a “mask” with a “face” implicitly contrasts the temporary with the permanent, and the fraudulent with the authentic.<sup>221</sup> Name stability is tied to reputation<sup>222</sup> stability. The

---

217. See, e.g., Jarnagin & Slocum, *supra* note 205, at 290 (stating that the culture of most corporations is created without planning).

218. See, e.g., SCHEIN, *supra* note 209, at 2, 5 (warning against the “incorrect assumption that culture can be changed to suit our purposes” without realizing that such change may involve “destroying the group and creating a new [group]”; nevertheless, arguing that “the only thing of real importance that leaders [as opposed to managers and administrators] do is to create and manage culture”) (emphasis omitted); *id.* at 244–310 (discussing culture change and its manipulation); Cameron, *supra* note 204, at 430–32, 441; Gary F. Gebhardt, Gregory S. Carpenter & John F. Sherry Jr., *Creating a Market Orientation: A Longitudinal, Multifirm, Grounded Analysis of Cultural Transformation*, 70 J. MARKETING 37 (Oct. 2006); Yasuhiro Ishizuna, *The Transformation of Nissan – The Reform of Corporate Culture*, 23 INT'L J. STRATEGIC MGMT. 9–15 (1990); Jarnagin & Slocum, *supra* note 205, at 291–302; Kerr & Slocum, *supra* note 216 [Reward Systems 1987], at 99–108; Golnaz Sadri & Brian Lees, *Developing Corporate Culture as a Competitive Advantage*, 20 J. MGMT DEV. 853–59 (2005), available at <http://www.emerald-library.com/ft>; James G. Clawson & Gary Yamen, *WD-40 Company: Squeak, Smell and Dirt Business (B)*, (Univ. of Va., Darden Sch. of Bus. Case Paper UVA-OB-765, 2008), available at <http://ssrn.com/abstract=911097>.

219. See, e.g., SCHEIN, *supra* note 209, at 235 (“[C]ultural change can be accelerated if one recruits and selects new members according to criteria that fit the new cultural assumptions.”).

220. *But see id.* at 109 (“If there is a cognitive drive for order and consistency in the human brain, we can assume that human groups will gradually learn sets of assumptions that are compatible and consistent.”).

221. See *Yale Elec. Corp. v. Robertson*, 26 F.2d 972, 974 (2d Cir. 1928) (“[F]or a reputation, like a face, is the symbol if its possessor and creator and another can use it only as a mask.”).

222. For the purposes of this article, “reputation” is the publicly displayed visage of an entity, because Learned Hand’s opinion uses the word in that sense. See, e.g., Laurent Muzellec, *What is in a Name Change? Re-Joycing Corporate Names to Create Corporate Brands*, 8 CORP. REPUTATION REV. 305, 305 (2006) (“[C]ompany names

easiest way to lower the probability that a stranger will judge you based on that stranger's possession of information regarding your past behavior is to create the impression that you are not the same person.<sup>223</sup> Hence, criminals use aliases.<sup>224</sup> Name instability is to be distrusted.<sup>225</sup>

Naming is a powerful ingredient in shaping the human-lived world.<sup>226</sup> Naming is part of humans' self-stories, their interpretations of the world, and their impact on other humans' interpretations of the world.<sup>227</sup> Reactions, understanding, love, and hate are manipulated by giving and rejecting names.<sup>228</sup> A human who practices fraud by

---

are the receptacle of corporate brand and reputation.”). *But see* Michael L. Barnett, John M. Jermier & Barbara A. Lafferty, *Corporate Reputation: The Definitional Landscape*, 9 CORP. REPUTATION REV. 26–38 (2006) (surveying the multitude of definitions in the academic management literature and suggesting one specific definition which distinguishes among corporate reputation, corporate image, corporate identity, and corporate reputational capital).

223. The fabled invisible hand of the market requires buyers to have information about the past practices of sellers. *See, e.g.*, Eric Goldman, *The Regulation of Reputational Information*, in *THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET* 293, 295–96 (Berin Szoka & Adam Marcus eds., 2011) (explaining the centrality of reputational information to the efficiency to market efficiency).
224. *See, e.g.*, *Almendarez-Torres v. United States*, 523 U.S. 224, 268 (1998) (describing how illegal alien felons assumed multiple aliases to avoid detection by law enforcement).
225. *See* Larry Downes, *A Market Approach to Privacy Policy*, in *THE NEXT DIGITAL DECADE*, *surpa* note 223, at 509, 517.
226. *See* M.D. Tschaepe, *Halo of Identity: The Significance of First Names and Naming*, 6 *JANUS HEAD* 67, 67–68 (2003) (“[T]he first name not only grants one a specific identity as a language user, but also directs who that person is and will be through the name’s physiognomy and reference to the world.”).
227. *See generally id.* (discussing the effect of a name in defining one’s future self; how his name affects his perception of the world as well as the world’s perception of him).
228. *See* PIERRE BOURDIEU, *LANGUAGE AND SYMBOLIC POWER* 105–16 (John B. Thompson ed., Gino Raymond & Matthew Adamson trans., 1991) (discussing the power of naming); JAMES PAUL GEE, *SOCIAL LINGUISTICS AND LITERACIES* 12 (3d ed. 2008) (“Meanings are ultimately rooted in negotiation between different social practices. . . . Power plays an important role in these negotiations.”); *e.g.*, Michael V. Bhatia, *Fighting Words: Naming Terrorists, Bandits, Rebels and Other Violent Actors*, 26 *THIRD WORLD Q.* 5, 6 (2005); Leonard A. Jason et al., *Stigma and the Term Chronic Fatigue Syndrome*, 14 *J. DISABILITY POL’Y STUD.* 222, 224 (2004) (reporting results of a survey regarding possible effect of changing official name of a diagnosis); Jane Ogden et al., *What’s in a Name?: An Experimental Study of Patients’ Biews of the Impact and Function of a Diagnosis*, 20 *FAM. PRAC.* 248, 248, 251–52 (2003) (reporting empirical study showing that choice of medical terms used changed patients’ perceptions of a diagnosis); Mia Swart, *Name Changes as Symbolic Reparation After Transition: The Examples of Germany and South Africa*, 9 *GER. L.J.* 105, 106 (2008) (explaining healing practice of naming public spaces for victims).

using an alias misuses the power of naming.<sup>229</sup> But the power of naming is also misused when the namer purposely chooses a name that does not match reality.<sup>230</sup> In contrast to Hand's valorization of businesses' self-naming habits, this author argues that business names and self-descriptions are masks, which among other flaws, are self-dealing attempts to claim human identity for the nonhuman for the purpose of manipulating humans.

Therefore, this article tests Hand's position against the author's by considering the frequency of and reasons for name changes.

### 1. Naming and Renaming Humans

In the United States, as in most western nations, a human's name is legally quite malleable.<sup>231</sup> Nevertheless, *Homo sapiens* generally do not change their birth names without an accompanying change of basic social identity.<sup>232</sup> immigrating to a country with a different language,<sup>233</sup> embarking on a career as a movie star,<sup>234</sup> or rejecting

---

229. See generally Neal Rendleman, *False Names*, 169 WEST J. MED. 318 (1998) (detailing the effect of alias usage in a medical context and emphasizing the importance of maintaining the indelible characteristic of a name).

230. *Using the Name or Likeness of Another*, CITIZEN MEDIA L. PROJECT, <http://www.citmedialaw.org/legal-guide/using-name-or-likeness-another> (last visited Dec. 11, 2012).

231. See 65 C.J.S. §§ 21 & 22 (2002) (explaining that, in general, an adult may change the name he or she uses freely absent fraud and that a request to a court for a legal change of name is generally granted absent good cause). Personal names are protected in article 24-2 of the International Covenant on Civil and Political Rights and in article 8 of the European Convention for the Protection of Human Rights and Fundamental Liberties. See generally Aeyal M. Gross, Comment, *Rights and Normalization: A Critical Study of European Human Rights Case Law on the Choice and Change of Names*, 9 HARV. HUM. RTS. J. 269 (1996) (discussing case law); Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 IND. L.J. 381, 445 (2011) ("Except in limited circumstances, we can change our [personal] names and keep our identities the same or change our identities and keep our names the same[;]" discussing and collecting examples from the United States); see also Carlton F.W. Larson, *Naming Baby: The Constitutional Dimensions of Parental Naming Rights*, 80 GEO. WASH. L. REV. 159, 163–71 (2011) (providing overview of legal limitations on naming choices throughout the United States; arguing for a constitutional right against government interference with humans' name choices).

232. See Darrel W. Drury & John D. McCarthy, *The Social Psychology of Name Change: Reflections on a Serendipitous Discovery*, 43 SOC. PSYCHOL. Q. 310, 311 (1980) ("[E]fforts to alter surnames by legal means occur rarely in the United States. . . . [T]he only formal changes that occur as a matter of course through the life cycle are those in the female surname through marriage and sometimes through divorce.").

233. See *id.* at 311. See generally Leonard Broom, Helen P. Beem & Virginia Harris, *Characteristics of 1,107 Petitioners for Change of Name*, 20 AM. SOC. REV. 33 (1955).

one's birth culture.<sup>235</sup> The most frequent reason for a legal name change in western countries is change in marital status.<sup>236</sup> In the United States, changing one's legal name is easiest at marriage because at that crossroads women (and in some states men) may change their legal names by the simple act of filling out the same paperwork needed to obtain legal recognition of marital status.<sup>237</sup> Nevertheless, choosing to change (or retain) one's birth surname at marriage is still an emotionally charged,<sup>238</sup> widely recognized<sup>239</sup>

- 
234. See Drury & McCarthy, *supra* note 232, at 311 (“Marion Michael Morrison, for example, becomes John Wayne and, among friends, simply ‘Duke.’”); cf. Betsy Rymes, *Naming as Social Practice: The Case of Little Creeper from Diamond Street*, 25 LANGUAGE SOC’Y 237 (1996) (explaining various social functions of nicknames given to males who join street gangs).
235. Stanley Lieberman & Kelly S. Mikelson, *Distinctive African American Names: An Experimental, Historical, and Linguistic Analysis of Innovation*, 60 AM. SOC. REV. 928, 940–41 (1995) (“[I]n 1964, heavy-weight champion Cassius Clay changed his name to Muhammad Ali; in 1971, the basketball star, Lew Alcindor became Kareem Abdul-Jabbar; and playwright LeRoi Jones became Imamu Amiri Baraka.”) (reporting increasing choice of African names for children born to African American couples starting in the 1970s ); Broom, Beem & Harris, *supra* note 233, at 33 (1955) (stating that during World War I the British royal family changed its name from the House of Saxe-Coburg-Gotha to the House of Windsor).
236. See Syed Malik Khatib, *Personal Names and Name Changes*, 25 J. BLACK STUD. 349, 351 (1995); Marret K. Noordewier, Femke van Horen, Kirsten I. Ruys & Diederik A. Stapel, *What's in a Name? 361.708 Euros: The Effect of Marital Name Change*, 32 BASIC & APPLIED SOC. PSYCHOL. 1, 3 (2010).
237. See Michael Rosensaft, Comment, *The Right of Men to Change Their Names Upon Marriage*, 5 U. PA. J. CONST. L. 186, 187–88 (2002) (stating that all fifty states allow women this easy method of changing their surnames at marriage, and listing those which give men the same option). The Social Security Administration of the federal government accepts as proof of name change a “[m]arriage document,” “a [d]ivorce decree,” or a “[c]ourt order for a name change.” I submitted a Freedom of Information Request for statistics regarding the number of name change requests received and the reasons provided for these requests. However, the response was that the SSA does not maintain records of this information. See Letter from Mona Finch, Freedom of Information Officer, Social Security, to Malla Pollack (Oct. 25, 2010) (on file with author).
238. See, e.g., Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 762 (2007) (“Because states historically reinforced a regime of patrilineal descent of names, what might seem a neutral default regime is inadequate. States should set defaults and frame choices to encourage more egalitarian decisions about whether to change names and how.”); Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 IND. L. J. 893, 893–94 (2010) (“[L]anguage plays a critical role in reflecting and reinforcing gender hierarchy within the status category of marriage. . . . [W]omen almost universally adopt their husbands' last names upon marriage, despite the formal freedom of women to retain their names and of men to adopt their wives' last names.”).

symbol of social identity. In sum, most humans have long-term (if not permanent) connections to their personal names.

Why are humans' names so stable? One's personal name is part of one's identity.<sup>240</sup> Humans are primarily socialized<sup>241</sup> as named individuals; each name indicating a special social location in a network of other individuals.<sup>242</sup> Parents agonize over the choice of the proper name.<sup>243</sup> Strong magical<sup>244</sup> and religious<sup>245</sup> power has

- 
239. See Noordewier, van Horen, Ruys & Stapel, *supra* note 236, at 1 (reporting results of empirical study showing different perception of women depending on post-marital name choices, including effects on ability to obtain employment and on salary level); Laurie Scheuble & David R. Johnson, *Marital Name Change: Plans and Attitudes of College Students*, 55 J. MARRIAGE & FAM. 747, 748 (1993) (reporting that Hilary Rodham seems to have taken her husband's last name, Clinton, due to voters' negative responses to her earlier failure to do so).
240. "Because names are symbols used by society in the assignment of statuses and roles to individuals and groups, name changing, with a concomitant greater or lesser change of identity, affords social scientists insight into such phenomena as mobility, acculturation, group identification, and self-definition." Broom, Beem & Harris, *supra* note 233, at 33. See also, e.g., Khatib, *supra* note 236, at 349 (stating that naming practices are studied in psychology, sociology, anthropology, history, and political science); Heymann, *supra* note 231, at 381 ("[W]e think about names in a very personal way, as a core part of our identity" even though names are legally malleable).
241. See, e.g., Berger & Luckmann, *supra* note 139, at 129–38 (discussing primary socialization).
242. *Id.* at 132 ("To be given an identity involves being assigned a specific place in the world. As this identity is subjective appropriated by the child ('I am John Smith'), as is the world to which this identity points."). Cf. Jay A. Schwarz, Evidence for Signaling: Parsing Out Parents' Naming Motivations with Presidential Data 10 (Aug. 2010) (arguing that data regarding United States' parents naming children after sitting presidents "offers clean evidence" that parents' baby-naming is intended to signal information to other persons), available at <http://ssrn.com/abstract=1661189>.
243. Larson, *supra* note 231, at 162 (arguing for a constitutional right against government interference with humans' name choices). "[T]he selection of a child's name, which he or she will likely bear for the rest of his or her life, is one of the most significant decisions parents will ever make." *Id.*; see also Rosensaft, *supra* note 237, at 189–90 (footnotes omitted) ("One's name is a person's first possession in the world, and one that a person lives with, in many cases, for the person's entire life. Parents agonize over what to name their children—as well they should. No one calls such a parent's agony trivial, because it is deemed very important by society. A person's name is what that person is known by in society, and as the district court of Hawaii correctly observed, '[o]ne's name becomes a symbol for one's self.' Could one even imagine a democratic society where parents did not have the right to name their own children? In fact, in Nazi Germany, this was one of the first dehumanizing efforts of the Nazi regime: to force Jewish males to take the name 'Israel' and Jewish women to take the name 'Sarah' if their own name was not 'Jewish enough' so that Nazis could readily identify them as Jews.").
244. See, e.g., Richard Breen, *Naming Practices in Western Ireland*, 17 MAN 701, 706 (n.s. 1982) (discussing modern Ireland) ("In naming a child after a saint, the relationship

often been ascribed to names; some empirical research even supports a relationship between a person's name and life outcomes.<sup>246</sup> Throughout our human lives, “[o]ur names objectify our presence as participants in interpersonal transactions, not only for others, but for ourselves as well. The very production of one’s name signals that the transactions about to transpire are taking place between uniquely identified individuals rather than interchangeable role incumbents.”<sup>247</sup> Names, therefore, create connections between selves—selves striving to be cohesive, coherent, and autonomous.

Furthermore, in practice, human individuals are not allowed to sever ties with their former names.<sup>248</sup> Job applications, credit forms, applications for professional licenses, or permission to take professional gate-keeper exams all routinely ask for former names.<sup>249</sup> In the United States, name changes do not disrupt the continuity of the most ubiquitous tracker of humans, the social security number.<sup>250</sup> A human’s name change unaccompanied by a change in social status<sup>251</sup> is stigmatized—this is the behavior of criminals.<sup>252</sup> Such a new name is a mask, not a face.

---

between the two was felt to be personalized, so that the saint was directly amenable to prayer from or on behalf of that person. In time of illness or misfortune this saint would be prayed to. Similarly this saint was also charged with watching over the person's spiritual and moral well-being.”); Nathan Miller, *Some Aspects of the Name in Culture-History*, 32 AM. J. SOC. 585, 591–94 (1927) (discussing magical use of personal names in several non-western, non-industrialized cultures). Name magic appears in many legends about biblical figures. See, e.g., HYMAN E. GOLDIN, *THE BOOK OF LEGENDS* 217 (1929) (stating that because the Angel Gabriel added one holy letter to Joseph’s name, Joseph was able to learn seventy languages in one night).

245. In Genesis, the Deity supplies new names for Sarah (from Sarai), Abraham (from Abram), and Jacob (Israel). See *Genesis* 17:5, 15; 32:28–29; Joseph Fleishman, *On the Significance of a Name Change and Circumcision in Genesis 17*, 28 J. ANCIENT NEAR E. SOC. 19 (2001) (discussing meaning of Sarah and Abraham’s new names).
246. See Drury & McCarthy, *supra* note 232, at 311 (1980) (collecting literature); Noordewier, van Horen, Ruys & Stapel, *supra* note 236, at 3–4 (collecting literature); Annette U. Rickel & Lynn R. Anderson, *Name Ambiguity and Androgyny*, 7 SEX ROLES 1057, 1057 (1981) (collecting literature and reporting empirical study finding link between name ambiguity and score on androgyny scale).
247. See Drury & McCarthy, *supra* note 232, at 310 (1980) (discussing importance of nicknames and use of alternative name formats).
248. See generally Julia Shear Kushner, *The Right to Control One's Name*, 57 UCLA L. REV. 313, 320 (2009) (discussing name usage as recognized by the state in order to function in society).
249. See, e.g., Rosensaft, *supra* note 237, at 206.
250. See Kushner, *supra* note 248, at 321.
251. As disused above, name change is most commonly tied to a change in marital status. *But see* Kushner, *supra* note 248, at 316.
252. *But see* Heymann, *supra* note 231, at 385 (stating that name changes are not viewed with skepticism and not generally of legal or moral concern)

## 2. Naming and Renaming Businesses

Perhaps in 1928, at least for businesses carrying into the world the names (and reputations) of their individual human owners, a business's name was as emotionally charged and as tied to a human's attempt to create his autonomous identity as a human's personal name still is.<sup>253</sup> For a time (but no longer), an individual human person was considered to have a "natural right" to use his own surname as his business name.<sup>254</sup>

Business names are one form of mark;<sup>255</sup> as with the names of commercially available products and services, corporate names are both created to communicate an "image" calculated to reach a targeted set of consumers and are modified and changed for the same purposes.<sup>256</sup> Furthermore, new business names are backed with promotional material invoking the newly asserted persona—a persona that exists at that point only in the advertising copy.<sup>257</sup>

---

253. *See generally id.* at 391–92 (explaining how personal and business names serve connotative, denotative, and associative functions).

254. *See generally* LOUIS ALTMAN & MALLA POLLACK, *CALLMANN ON UNFAIR COMPETITION, TRADEMARKS, & MONOPOLIES* §§ 22:54–22:58 (4th ed. 2012) [hereinafter "CALLMANN"] (describing historical change on this issue in United States law).

255. *See, e.g.*, Muzellec, *supra* note 222, at 305 (“[A]s companies are becoming increasingly aware of the importance of corporate reputation, they are managing their corporate names more actively and treating them as corporate brands rather than merely trade names. Newly created brand names are now consciously designed to evoke associations with a set of core corporate values that typically focus on themes such as life, competence, unity, vision and performance.”).

Business's names (i.e. "trade names") are recognized as common-law marks in the United States. While the U.S. Patent & Trademark Office will not allow registration of matter used only as a trade name, it does allow registration of the same matter (with the possible deletion of the term for the business's legal form, such as "Inc.") as a service mark or trademark if the proper specimen is submitted. *See generally* CALLMANN, *supra* note 254, §§ 17A:4; 17A:10; 17A:11; 18:65; 21:62–21:64; 26:27.

256. *See, e.g.*, KENNETH E. CLOW & DONALD BAACK, *INTEGRATED ADVERTISING, PROMOTION, AND MARKETING COMMUNICATIONS* 35–38 (2006) (discussing importance of names chosen for firms and products); Eric Delattre, *Business Name Changes: The French Experience*, 40 J. SMALL BUS. MGMT. 360, 360 (2002) (“The name is the main component of any organization's identity.”); Alan Finder, *To Woo Students, Colleges Choose Names That Sell*, N.Y. TIMES, Aug. 11, 2005, at A1, (“Changes in names generally reveal significant shifts in how a college wants to be perceived.”); Wendy Lomax, Martha Mador & Angelo Fitzhenry, *Corporate Rebranding*, 4 (Kingston Univ. Occasional Paper Series No 48, Feb. 2002) (“The most common objective [of the corporate rebrandings studied by the authors] was to develop a new image.”).

257. “Advertising personas, like literary ones, share three general characteristics – they are created, distinctive, and changeable.” Barbara Stern, *Integrated Communication: The*

Unlike new, nonmarital names for humans, a business name change is not a stigmatized alias.<sup>258</sup> Nor are businesses legally required to put their old names on their advertisements and promotional materials.

Furthermore, while full statistics are unavailable,<sup>259</sup> and the number of changes is generally understated because of the difficulty of obtaining information,<sup>260</sup> empirical work demonstrates that very large businesses change their names fairly frequently.<sup>261</sup> A major consulting firm counted 3,893 changes of corporate name in the stock exchanges of 57 countries for the year 2000, of which 2,976 were in the United States.<sup>262</sup> According to some empirical research, since the turn of the century, the rate of corporate name change has been rising,<sup>263</sup> especially in the United States.<sup>264</sup> One study found 1,993

---

*Company "Voice" and the Advertising Persona*, in INTEGRATED COMMUNICATION: SYNERGY OF PERSUASIVE VOICES 87, 89 (Esther Thorson & Jeri Moore eds., 1996).

258. See Heymann, *supra* note 231.

259. See, e.g., Delattre, *supra* note 256, at 360 (asserting that business name changes are underestimated due to the difficulty of obtaining information, especially regarding smaller entities); Panagiotis Andrikopoulos, Arief Daynes & Paraskevas Pagas, *The Long-Term Market Performance of UK Companies Following Corporate Name Changes 2* (July 22, 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=1002188>.

260. See Delattre, *supra* note 256, at 365.

261. Cf. Mark P. Defanti, *The Effect Of A Corporate Name Change Related To A Change In Corporate Image Upon A Firm's Stock Price 1* (Aug. 2006) (unpublished PhD dissertation, Texas A&M University) ("Numerous large U.S. firms have changed their corporate names since 1966. Some well publicized examples include Standard Oil of New Jersey (Esso) to Exxon, International Harvester to Navistar International, Consolidated Foods to Sara Lee, Dayton-Hudson to Target, UAL to Allegis to UAL, Allegheny Airlines to US Air to US Airways, U.S. Steel to USX, Connecticut General and INA to CIGNA, United Aircraft to United Technologies, Philip Morris to Altria, Time Warner and AOL to AOL Time Warner to Time Warner, KPMG Consulting to BearingPoint, and Andersen Consulting to Accenture.").

262. See Defanti, *supra* note 261, at 98 (locating 814 corporate name changes between 1987 and 2002 when relying on only official announcements of corporations making name-changes); Dellatre, *supra* note 256, at 360 (regarding other countries, 250 changes were in the United Kingdom; 186 in Canada; 74 in Germany; 56 in France; and 35 in Japan) (mentioning a study which identified 1,041 corporate name changes in 1985; 1,864 in 1988; and 1,600 in 1989 in the U.S; mentioning another study estimated 2,000 corporate name changes in the United States during 1989); Muzellec, *supra* note 222, at 306 (estimating 1000 to 2500 name changes globally per year); Andrikopoulos, Daynes & Pagas, *supra* note 259, at 6 (locating 1,282 business name changes between April 1987 and April 2002 by stocks listed on the UK stock exchange).

263. See Laurent Muzellec, Manus Doogan & Mary Lambkin, *Corporate Rebranding – An Exploratory Review*, 16 IRISH MKTG. REV. 31, 31 (2003) ("[T]here has been a marked increase in the number of high-profile [international] companies rebranding or

name changes globally in the first half of 2001 (1,761 of these within the United States), up seven percent from 2000.<sup>265</sup> An upward spike was confirmed by empirical research of French business names.<sup>266</sup>

In sum, businesses often change their names.<sup>267</sup> In the temporal sense, business names are like masks, not like faces. Business name changes are emotionally easy because corporations themselves (as opposed to their employees and customers) have no emotions. Business name changes, however, are expensive;<sup>268</sup> therefore, if businesses are rational, name changes must be either legally required or expected to increase profitability.<sup>269</sup> Since no relevant legal requirement exists, businesses presumably change their names for the purpose of increasing profitability.<sup>270</sup>

#### IV. THE MASKED BUSINESS

Business names are masks in a number of senses. Two<sup>271</sup> are important for this discussion: (i) business names imply personhood when none exists,<sup>272</sup> and (ii) business names are manipulated to disassociate the unchanged corporation from its past.<sup>273</sup> The first is

---

renaming their organizations in the past few years. . . .”); Delattre, *supra* note 256, at 360–61.

264. See Jack G. Kaikati & Andrew M. Kaikati, *A Rose by Any Other Name: Rebranding Campaigns that Work*, 24 J. BUS. STRATEGY 17, 18 (2003).

265. See *id.* at 17–18 (UK had 65; Canada 41; Germany 24; Japan 21).

266. See Delattre, *supra* note 256, at 36062 (explaining that France has better records of business name changes than most other countries; recorded name-changes gradually rose from 1995 through 1999; 39, 510 name-changes were recorded for 1999).

267. See Defanti, *supra* note 261, at 89; Delattre, *supra* note 256, at 360; Dan Horsky & Patrick Swyngedouw, *Does It Pay to Change Your Company's Name? A Stock Market Perspective*, 6 MKTG. SCI. 320, 320 (1987).

268. See, e.g., Defanti, *supra* note 261, at 1–2; Horsky & Swyngedouw, *supra* note 267, at 320–21 (stating that Esso spent \$200 million dollars in the early 1980s to change its name to Exxon); Muzellec, Doogan & Lambkin, *supra* note 263, at 39.

269. See Delattre, *supra* note 256, at 362–63, 365; Horsky & Swyngedouw, *supra* note 267, at 321–22, 333.

270. See Delattre, *supra* note 256, at 362–63; Heymann, *supra* note 231, at 385–86; Horsky & Swyngedouw, *supra* note 267, at 320–22.

271. A third type of masking occurs when a business operates under a “fictitious” name, i.e. under a name which does not belong to a juristic entity. This problem, however, is handed by fictitious name registries. See generally CALLMANN, *supra* note 254, §21:7.

272. See generally CALLMANN, *supra* note 254, §§ 20:67, 26:35 (discussing how a business name that implies personhood could lead to confusion and a false sense of personal connection).

273. See Heymann, *supra* note 231, at 431–32, 434, 440.

more important because it is a systemic problem.<sup>274</sup> Concentrating on the second would erroneously imply that the problem can be cured by eliminating a few rotten apples from a soundly constructed basket.<sup>275</sup> Furthermore, in conjunction with using the power of naming to mask their identities, businesses disguise themselves by telling self-serving stories about themselves.<sup>276</sup>

#### *A. Personalizing the Nonperson*

Corporate officers who decide on name changes are employing what they have learned from marketing studies, not legal academics' theories of trademark law.<sup>277</sup> Therefore, legal academics should consult marketing literature to understand branding behavior. Marketing experts teach that firm "[n]ames are the critical, core sign of the brand; they constitute the basis for the corporate communications program[] and for consumers' awareness and images. A brand name is associated with a set of attributes and psychological associations which give a brand its meaning."<sup>278</sup> "In a conventional branding perspective, the name is an instrument at the disposal of the marketing team, who can use symbolism in order to affect consumers' perceptions of products or corporations' attributes."<sup>279</sup> As with other brands, firm "names need to be actively managed in order to influence external stakeholders."<sup>280</sup> "Corporate rebranding aims, therefore, at modifying the stakeholders' perceptions. Like many corporate branding [programs], it may do so by projecting the 'company distinctiveness by using the total corporate communication mix (advertising, press conferences and releases, staged media events etc. . . . ) to impress external audiences."<sup>281</sup>

---

274. See generally Laurent Muzellec & Mary Lambkin, *Does Diageo Make Your Guinness Taste Better?*, 16 J. PROD. & BRAND MGMT. 321 (2007) (stating personality traits are used to characterize businesses).

275. See generally Muzellec, Doogan & Lambkin, *supra* note 263, at 33 (discussing why businesses change their names).

276. See discussion *infra* Part IV.C.

277. See generally Muzellec & Lambkin, *supra* note 274 (providing a market study of how corporate brand changing affects the corporate image).

278. *Id.* at 321; accord Margaret M. Blair, *The Four Functions of Corporate Personhood* 1 (Vanderbilt Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 12-15, & Law & Econ., Working Paper No. 12-15, 2012), available at <http://ssrn.com/abstract=2037356>.

279. Muzellec & Lambkin, *supra* note 274, at 322.

280. *Id.* at 322.

281. *Id.* at 322 (internal citation omitted).

When discussing, projecting, and evaluating the attributes of a firm name, businesses are considered in terms of human personality traits.<sup>282</sup> The leading analytical tool is Aaker's Brand Personality Scale.<sup>283</sup> Aaker defined a "brand personality" as "the set of human characteristics associated with a brand."<sup>284</sup> She recognized that consumers commonly related to brands as if they were famous contemporary or historical people; thus, the brand could be manipulated to create a strong emotional tie between the product and its potential users—a tie similar to those consumers fantasized between themselves and a human celebrity.<sup>285</sup> A brand personality based tie between a consumer's actual or (more likely) ideal self and the constructed personality of the brand creates a more robust, enduring consumption preference than one based on factual product characteristics; they create a bond of trust and loyalty.<sup>286</sup> To this point, Aaker's work reiterated concepts that had already been generally accepted by marketing experts.<sup>287</sup> Aaker's lasting contribution to marketing was to create a numerically analyzable set of general factors—each incorporating smaller facets—that could be used during empirical research intended to measure an existing brand personality or to choose a new brand personality.<sup>288</sup> The factors and facets are *Sincerity* (domestic, honest, genuine, cheerful); *Excitement* (daring, spirited, imaginative, up-to-date); *Competence* (reliable, responsible, dependable, efficient); *Sophistication* (glamorous, pretentious; charming, romantic); and *Ruggedness* (tough, strong,

---

282. See *id.* at 324. The "Big Five" character traits commonly used to study human personality are neuroticism (e.g. mood swings; introspection), extraversion, openness (to change), agreeableness, and conscientiousness. See, e.g., Stephen Soldz & George E. Vaillant, *The Big Five Personality Traits and the Life Course: A 45-Year Longitudinal Study*, 33 J. RES. PERSONALITY 208, 215 (1999).

283. See Muzellec & Lambkin, *supra* note 274, at 324.

284. Jennifer L. Aaker, *Dimensions of Brand Personality*, 34 J. MKTG. RESEARCH 347, 347 (1997).

285. See *id.* at 347–48. Sports personalities are widely used for advertising purposes, as are sports teams. See, e.g., Timothy D. DeSchraver & Paul E. Jensen, *What's in a Name? Price Variation in Sport Facility Naming Rights*, 29 E. ECON. J. 359, 360 (2003) ("With the rapid expansion of naming rights deals in the mid-1990s, more than half of all major professional sport facilities now bear the name of a corporation.").

286. See Aaker, *supra* note 284, at 387–48, 354; Gary Davies et al., *A Corporate Character Scale to Assess Employee and Customer Views of Organization Reputation*, 7 CORP. REPUTATION REV. 125, 126–27 (2004) (acknowledging and continuing long line of marketing and organizational research characterizing business firms as if they had human character traits; recognizing that such schema are used to access an emotional bond which contributes to consumers trust of the business firm).

287. See Aaker, *supra* note 284, at 347–48.

288. See *id.* at 354.

outdoorsy, rugged).<sup>289</sup> Of these five major factors of brand personality, three correlate with standard factors used in evaluating human personality, but two, sophistication and ruggedness, do not.<sup>290</sup> Sophistication and ruggedness relate more to superficial qualities humans generally desire, than to deeply internalized qualities humans may innately possess—in other words, these two target human fantasies to a greater extent than the others.<sup>291</sup> The major alternative<sup>292</sup> to Aaker's approach, Davies' Corporate Character Scale, is also based on humanizing brands.<sup>293</sup> Davies' empirical research led to a more complex construction consisting of seven dimensions, each including facets, which in turn, include items:<sup>294</sup>

Dimension	Facets	Items
Agreeableness	Warmth	Friendly, pleasant, open, straightforward
	Empathy	Concerned, reassuring, supportive, agreeable
	Integrity	Honest, sincere, trustworthy, socially responsible
Enterprise	Modernity	Cool, trendy, young
	Adventure	Imaginative, up-to-date, exiting, innovative
	Boldness	Extrovert, daring
Competence	Conscientiousness	Reliable, secure, hardworking
	Drive	Ambitious, achievement oriented, leading
	Technocracy	Technical, corporate
Chic	Elegance	Charming, stylish, elegant
	Prestige	Prestigious, exclusive, refined
	Snobbery	Snobby, elitist
Ruthlessness	Egotism	Arrogant, aggressive, selfish
	Dominance	Inward-looking, authoritarian, controlling

289. *See id.* at 351.

290. *See id.* at 353; Davies et al., *supra* note 286, at 129 (explaining relationship between his more complex schema for a business entity and the standard measures for human personalities).

291. *See* Aaker, *supra* note 284, at 353.

292. *See* Muzellec & Lambkin, *supra* note 274, at 324.

293. *See* Davies et al., *supra* note 286, at 125.

294. *See id.* at 135.

Informality	None	Casual, simple, easy-going
Machismo	None	Masculine, tough, rugged

Interestingly, Davies characterized this scale as designed to evaluate how both customers and employees conceived the reputation of the business, evoking in the law oriented the echo of Judge Learned Hand's quip.<sup>295</sup>

While marketing and organizational professionals recognize that a business is merely a person metaphorically,<sup>296</sup> the advertising presented to the general public revels in projecting human faces for nonhuman corporations: Burger King's King; McDonald's Ronald McDonald; Oceanspray's two men in a cranberry bog; Ben and Jerry selling ice cream; Camel cigarette's Joe Cool;<sup>297</sup> the girl who actually cooks the chicken at KFC;<sup>298</sup> and the ever helpful service employees depicted by all those businesses consumers routinely curse for bad service,<sup>299</sup> etc., etc., etc.

Personalizing nonpersons is almost ubiquitous in corporate promotions.<sup>300</sup> This false-projection is part of the constant media-background-noise in which United States humans live.<sup>301</sup> Advertising encourages humans to form emotional, personal relationships with

295. See Davies et al., *supra* note 286, at 125; Yale Elec. Corp. v. Robertson, 26 F.2d 972, 974 (2d Cir. 1928). While Davies sought to define "reputation" as based on actual interactions with a firm and to distinguish this from less-reality based "image," see Davies et al., *supra* note 286, at 125, this has not limited others' use of his schema. See, e.g., Muzellec & Lambkin, *supra* note 274, at 324 (employing Davies' schema for measuring brand personality).

296. See, e.g., Davies et al., *supra* note 286, at 141–43.

297. See Joseph R. DiFranza et al., *RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children*, 266 J. AM. MED. ASS'N 3149, 3151 (1991) (discussing strong pull of Joe Camel on young children); Paul M. Fisher et al., *Brand Logo Recognition by Children Aged 3 to 6 Years*, 266 J. AM. MED. ASS'N 3145, 3148 (1991) (discussing same); John P. Pierce et al., *Does Tobacco Advertising Target Young People to Start Smoking*, 266 J. AM. MED. ASS'N 3154, 3157 (1991) (discussing same).

298. See STACEY ACKERMAN, TOM BASS, JULIETTE BURGUIERES & BRIAN CASH, RESEARCH TEAM KFC FINAL RESEARCH PLAN BOOK 36 (2009), available at <http://www.slideshare.net/imctommyb/kfc-research-analysis> ("The commercial most participants could recall was the KFC 'Chef in Every Kitchen' ad.").

299. See *infra* Part IV.C.

300. See Davies et al., *supra* note 286, at 133, 136 (analyzing the corporate advertising of a representative cross section of 49 *Fortune 500* companies to establish its "Corporate Character Scale").

301. See, e.g., JERRY VASS, *SOFT SELLING IN A HARD WORLD: PLAIN TALK ON THE ART OF PERSUASION* 8, 10 (2d ed. 1998).

these nonexistent celebrities.<sup>302</sup> If we play with Mickey Mouse, we are less likely to think of The Walt Disney Corporation as an inhuman machine taking advantage of its (always smiling) employees or lobbying Congress into stealing from the general public by extending the copyright term.<sup>303</sup> Even talking about “corporate democracy” is an attempt to reshape perception; at corporate annual meetings the rule is not one person one vote, it is one share one vote.<sup>304</sup>

### B. *Changing Names*

A number of empirical studies have concluded that corporate name changes are commonly undertaken for the purpose of creating a new corporate image—“rebranding” in marketing terminology.<sup>305</sup> Very recent research reports that 81% of new names for large corporations are coined not to be recognizable as related to the old name.<sup>306</sup> Names adopted by big businesses during the twenty-first century tend to be less informative and more global than those they replace.<sup>307</sup>

Changing a corporate name to hide from bad publicity is easier to recognize as evil than (the more wide-spread) false personification of

---

302. See, e.g., DiFranza et al., *supra* note 297, at 3151 (explaining that a substantial portion of children tested “thought Old Joe was ‘cool’” and the children “wanted to be friends with [Joe]”).

303. See, e.g., Guy Pessach, *Copyright Law as a Silencing Restriction on Noninfringing Materials: Unveiling the Scope of Copyright’s Diversity Externalities*, 76 S. CAL. L. REV. 1067 (2003) (arguing that strong copyright protection of cultural icons such as Mickey Mouse stifles cultural diversity); Lawrence Lessig, *Copyright’s First Amendment*, 48 UCLA L. REV. 1057, 1069–70 (2001) (explaining the general public’s negative view of the Disney-inspired extension of copyright protection).

304. See Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445, 446–47 (2008) (briefly discussing history of corporate voting schemes); Mike Burkart & Samuel Lee, *One Share – One Vote: The Theory*, 12 REV. FIN. 1, 2 (2008) (discussing same).

305. See Defanti, *supra* note 261, at 82 (collecting studies); Delattre, *supra* note 256, at 362 (analysis of 2,838 name changes by small French firms during 2000 showed that 40% were merely for the purpose of changing the corporation’s image with no legal change having been made to the firm itself); Muzellec, Doogan & Lambkin, *supra* note 263, at 36 (reporting an empirical study in which changing the brand image was the precipitating cause of a rebranding in 17.5% of the cases, below only mergers/acquisitions and spin-offs).

306. See Muzellec, *supra* note 222, at 312 (81.3%; study was published in 2006). An older study classified 37% of corporate name changes as “new name[s],” i.e. names, which were not recognizable as modifications of the old name. See Delattre, *supra* note 256, at 365 tbl.3.

307. See Muzellec, Doogan & Lambkin, *supra* note 263, at 38.

business firms.<sup>308</sup> Nevertheless, it is quite legal.<sup>309</sup> Nothing in the law prevents legally related corporations from disassociating themselves from the taint of a product—such as tobacco—that has received bad press.<sup>310</sup> Neither does the law prevent a firm from changing its name to something completely different when its old name has been tarnished by well-deserved negative publicity.<sup>311</sup> Such marks are given the same protection as any other marks—if not merely descriptive they may be protected at common-law and validly registered on the Principle Register as soon as they are used as trademarks in commerce.<sup>312</sup> No law requires the new name to be accompanied for a minimum period of time with a scarlet letter or asterisk pointing out its old badge of shame.<sup>313</sup> No “former name” register exists.<sup>314</sup> Bad corporate citizens do not have to register with a directory in the manner of convicted sex offenders.<sup>315</sup>

Of course, humans may remember the bad conduct,<sup>316</sup> but how many and for how long? Furthermore, how many will know that the new Shining Star Safe Shipping Lines is the same firm as the old Our Biggest Boat Sank Cruise Line of former headlines? How many who do not know will do independent research to find out former corporate names and behaviors? How many will bother to research the connection between the tobacco-centered Altria (formerly Philip

---

308. See Heymann, *supra* note 231, at 431–32 (noting the “consternation” caused by corporations changing their names as a result of negative publicity); ARNOLD, *supra* note 90, at 188–89 (noting the American tradition of personification of corporate entities).

309. Heymann, *supra* note 231, at 386, 436.

310. *Id.*

311. See *id.* at 386, 436–37 (recognizing both legality of such name changes and their purpose of misdirection).

312. See 15 U.S.C. § 1052 (2006) (describing which trademarks are registerable on the principal register without reserving an exception for name changes).

313. See *id.* § 1057 (describing the process of registering a trademark without noting any requirement for the new corporate names of existing companies to be accompanied by a scarlet letter or asterisk).

314. See generally *id.* §§ 1051–1096 (2006) (lacking any reference to a “former name” registry). *But see* Muzellec, Doogan & Lambkin, *supra* note 263, at 35–36 (describing a pilot study compiling the name change information of select companies).

315. See generally 15 U.S.C. §§ 1051–1096 (lacking any reference to a “bad corporate citizens” registry).

316. See, e.g., Steve Huettel, *ValuJet Crash Prompted Changes: Successor AirTran Avoids Anniversary*, BALT. SUN, May 12, 2006, at 1E, 6E (illustrating that, despite the corporate name change and re-branding efforts, memories still linger from the 1996 ValuJet crash).

Morris) and the wine brands they routinely purchase?<sup>317</sup> Humans tend to budget their time and energy quite carefully; they are “rationally” ignorant about much more important subjects than corporate histories.<sup>318</sup> Furthermore, they tend to respond to the “personality” embodied in a new name, even when they do remember the old one.<sup>319</sup>

While not as obviously akin to criminals’ use of aliases, corporations also manipulate the public by changing names to disassociate themselves from more diffuse negative publicity.<sup>320</sup> While not as nefarious, these changes are also purposeful manipulation of public perception for the specific goal of distancing a firm from its history.<sup>321</sup> Additionally, firms mislead the public by not changing the names of entities they acquire; this verbal continuity lowers the possibility of the public recognizing that the management with which they are doing business is not the one that earned their trust.<sup>322</sup> This phenomenon is especially distressing because small firms that focus on more than the economic bottom line, if financially

---

317. See *At-A-Glance*, ALTRIA, [http://www.altria.com/en/cms/About\\_Altria/At\\_A\\_Glance/default.aspx?src=top\\_nav](http://www.altria.com/en/cms/About_Altria/At_A_Glance/default.aspx?src=top_nav) (last visited Dec. 11, 2012). The Altria Group includes Ste Michelle Wine Estates, which is described as one of the top-ten producers of premium wine in the USA. *Id.* Its wine labels include Columbia Crest, Col Solare, Northstar, Stag’s Leap Wine Cellars, and Snoqualmie. *Id.*

318. See, e.g., LESSIG, *supra* note 62, at 167 (discussing voters’ rational ignorance of and indifference to politics and elections; stating that loss of trust “leads any rational soul to spend less time exercising her democratic privileges”); Jonathan R. Macey, *Cynicism and Trust in Politics and Constitutional Theory*, 87 CORNELL L. REV. 280, 289–90 (2002) (“[I]n the public sector, it is much more difficult to identify the constraints that deter politicians and bureaucrats from engaging in corrupt or selfish policies. Even worse, collective action problems, such as rational ignorance, cause citizens in democracies to tolerate poor governmental performance until it becomes rational for voters to displace the incumbents.”); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422 (2011) (presenting discussion of methods of counteracting rational ignorance of public’s agents for purpose of improving outcomes).

319. See Muzellec & Lambkin, *supra* note 274, at 326.

320. *Company Naming*, STRATEGIC NAME DEV., <http://www.namedevelopment.com/company-naming.html> (last visited Dec. 11, 2012).

321. Accord Rebecca Tushnet, *Towards Symmetry in the Law of Branding*, 21 FORDHAM INTEL. PROP. MEDIA & ENT. L.J. 971, 972 (2011) (objecting as unfair to corporations’ desire “to be able to walk away from their own reputations whenever that would benefit them by making it harder for us to figure out who they are”).

322. See, e.g., John Schwartz & Brian Stelter, *Fans Howl After Weather Site Buys Out Rival*, N.Y. TIMES (July 3, 2012), <http://www.nytimes.com/2012/07/04/us/as-weather-channel-buys-weather-underground-fans-fear-change.html>.

successful, are routinely taken over by major corporations that do not look past the balance sheet.<sup>323</sup>

This table lists some relatively recent name changes by large corporations where the new name seemingly has been chosen with the intention that it not conjure up the old name (or names, if an acquisition or merger is involved).<sup>324</sup> Each change is correlated with my, perhaps incorrect, suggestion regarding the apparent reason(s) for the change. In recognition that business, professional, charitable, and ideological associations also employ name changes, a few nonprofit entities are included in the list. The list is far from complete; it omits both many examples and a number of entire classes of name changes. It provides no examples of the way businesses change their names to track the expansion and contraction stages of market bubbles; for example, the relatively recent rush to include some reference to the internet to take advantage of the so-called “dot.com bubble” followed by the rush to disassociate from the internet.<sup>325</sup> This list also omits the recent burst of name changes by institutions of higher education.<sup>326</sup> Nor does it attempt to link the names of think tanks and research foundations with these entities’ economic sponsors.<sup>327</sup>

---

323. See Tina Rosenberg, *A Scorecard for Companies with a Conscience*, N.Y. TIMES (April 11, 2011) (mentioning Ben & Jerry’s, Silk Soymilk, Horizon Organic Milk, Cascadian Farms, Muir Glen, Tom’s of Maine, Odwalla, Stonyfield Farms, The Body Shop, Kashi, Naked Juice, Back to Nature, and Boca Burger).

324. Of course, not all of these maskings are successful – especially at first.

325. See, e.g., Malcom Baker, Richard S. Ruback & Jeffrey Wurgler, *Behavioral Corporate Finance*, in 1 HANDBOOK IN CORPORATE FINANCE: EMPIRICAL CORPORATE FINANCE 145, 166 (B. Espen Eckbo ed., 2007) (regarding internet bubble); Michael J. Cooper, Orlin Dimitrov & P. Raghavendra Rau, *A Rose.com by Any Other Name*, 56 J. FIN. 2371, 2371–88 (2001) (regarding internet bubble); Michael J. Cooper et al., *Managerial Actions in Response to a Market Downturn: Valuation Effects of Name Changes in the Dot.com Decline*, 11 J. CORP. FIN. 319, 322 (2005) (mentioning similar phenomena regarding railroad and mining stocks in the 1850s; automobiles in the 1910s; airplanes in the 1920s; high-tech in the 1960s; and bio-genetics in the 1980s).

326. See, e.g., Finder, *supra* note 256, at A1 (reporting that many of these name changes have sparked large increases in applications for admission).

327. See, e.g., *Portal Front Groups*, SOURCEWATCH (Apr. 22, 2011, 3:56 PM), [http://www.sourcewatch.org/index.php?title=Portal:Front\\_groups](http://www.sourcewatch.org/index.php?title=Portal:Front_groups) (listing “organization[s] that purport[] to represent one agenda while in reality [they] serve[] some other interest whose sponsorship is hidden or rarely mentioned -- typically, a corporate or government sponsor”)

Old Name	New Name	Precipitating Event(s) or Reason(s) for Name Change
Allegheny Airlines	US Air; then to US Airways	To show increased flight coverage. <sup>328</sup>
American Trial Lawyers' Association	American Association for Justice	To counteract negative public perceptions of "trial attorney" created by, for example, the movement for "tort reform." <sup>329</sup>
Armstrong Rubber	Armtek <sup>330</sup>	Perhaps to distance itself from colonial image of rubber plantations; name change accompanied a "reorganization." <sup>331</sup>
Blackwater	Xi, and then to Academi	"[T]o shed a troubled legacy [as] a symbol for mercenaries and impunity in Iraq." <sup>332</sup>

328. The change occurred on October 28, 1979, following deregulation of the airlines. William Lehman, *US Airways: A Heritage Story*, USAIRWAYS.COM (Nov. 17, 2012), <http://www.usairways.com/en-US/aboutus/pressroom/history/allegheny.html>. Due to the time-lapse, the name change does not seem to have been precipitated by the collision of an Allegheny plane with a private airplane on Sept. 9, 1969. The FAA did not blame Allegheny. NAT'L TRANSP. SAFETY BD., AIRCRAFT ACCIDENT REPORT ALLEGHENY AIRLINES, INC., DC-9, N988VJ AND A FORTH CORPORATION, PIPER PA-28, N7374J NEAR FAIRLAND, INDIA SEPTEMBER 9, 1969, 16 (July 15, 1970), available at <http://libraryonline.erau.edu/online-full-text/ntsb/aircraft-accident-reports/AAR70-15.pdf>.
329. *Am. Ass'n for Justice v. Am. Trial Lawyers Ass'n*, 698 F. Supp. 2d 1129, 1132 (D. Minn. Mar. 18, 2010); Stephanie Francis Ward, *ATLA Trades "Lawyers" for "Justice"*, ABA JOURNAL E-REPORT (July 28, 2006).
330. Steven Greenhouse, *Company News: Allegis? That's the Old UAL*, N.Y. TIMES, Feb. 19, 1987, at D4.
331. See Susan Okula, *Armstrong Shareholders Approve Name Change*, AP ONLINE, (Feb. 18, 1987), <http://www.apnewsarchive.com/1987/Armstrong-Shareholders-Approve-Name-Change/id-7d5507480b8836e5af1d8f93ead7f9b5>. Armstrong Rubber began as a tire manufacturing firm in 1912. See *Tire Company Histories*, ITEC-TIRESHOW.COM, <http://www.itec-tireshow.com/history/Tire%20company%20histories.pdf> (last visited Dec. 11, 2012). After becoming Armtek (and diversifying), Armtek was taken over by hostile bidder Mark IV, which sold off the tire business to the Italian tire firm Pirelli. See *Pirelli to Buy Armstrong from Armtek*, N.Y. TIMES (April 19, 1988); *Company Briefs*, N.Y. TIMES (Aug. 31, 1988); *Armtek Accepts Takeover*, CHICAGO TRIBUNE (Sept. 13, 1988); Myron Magnet, *Mark IV This Gang Finally Shot Straight*, CNN MONEY (Jan. 19, 1994).
332. See Jason Ukman, *Ex-Blackwater Firm Gets a Name Change, Again*, WASHINGTONPOST.COM (Dec. 12, 2011, 9:26 AM ), [http://www.washingtonpost.com/blogs/checkpoint-washington/post/ex-blackwater-firm-gets-a-name-change-again/2011/12/12/gIQAXf4YpO\\_blog.html](http://www.washingtonpost.com/blogs/checkpoint-washington/post/ex-blackwater-firm-gets-a-name-change-again/2011/12/12/gIQAXf4YpO_blog.html).

Blinder International Enterprises Incorporation	Intercontinental Enterprises Incorporation	Fraud investigations by federal and state governments. <sup>333</sup>
British Petroleum	BP	Gain global image, <sup>334</sup> disassociate firm from Great Britain (and its colonial history), portray itself as a “clean energy company” as opposed to one centered on environmentally-dangerous petroleum. <sup>335</sup>
Connecticut General & INA	CIGNA	Name does not conjure up either partner to the merger, but may escape censure as duplicitous since it consists of their initials. <sup>336</sup>
Consolidated Foods	Sara Lee	Resolving an identity crises by adopting a popular brand as the name for the entire entity <sup>337</sup>
Dayton-Hudson	Target	Raise stock prices by distancing firm from image of department stores which were a distressed form of retail business. <sup>338</sup>
Guinness	Diageo	Globalize image <sup>339</sup>
Internorth-Houston Natural Gas	Enron <sup>340</sup>	Generalize image of firm with a name which sounds good, but means nothing. <sup>341</sup>

333. See David T. Robinson & YiLin Wu, What’s In a Name? Causes and Consequences of Corporate Name Changes 7 (May 2008) (unpublished), *available at* <http://front.cc.nctu.edu.tw/Richfiles/13856-WhatinaName.pdf>.
334. See Jack G. Kaikati & Andrew M. Kaikati, *A Rose By Any Other Name: Rebranding Campaigns That Work*, 24(6) J. OF BUS. STRATEGY 17, 18 (2003).
335. See REICH, *supra* note 2, at 191–93.
336. See *Cigna Milestone*, CIGNA, [http://cigna.com/about\\_us/company\\_history.html](http://cigna.com/about_us/company_history.html) (last visited Dec. 11, 2012).
337. See Defanti, *supra* note 261, at 2.
338. See *Company News; Dayton Hudson Says it Will Change its Name to Target*, N.Y. TIMES (Jan. 14, 2000), <http://www.nytimes.com/2000/01/14/business/company-news-dayton-hudson-says-it-will-change-its-name-to-target.html>.
339. See Muzellec & Lambkin, *supra* note 132, at 323 (noting that change reflected firms’ ownership of major brands whose images were unrelated to Ireland; for example, Pillsbury, Totinos Pizza; Green Giant; Hagen Daaz; Burger King; corporate headquarters are in London, England).
340. See Greenhouse, *supra* note 330.
341. See Thayer Watkins, San Jose Univ., Dep’t of Economics, *The Rise and Fall of Enron: The Formation of Enron*, ENRON,

International Harvester	Navistar International	Expand image beyond original main product and imply continuing technological development by combining “navigate” and “star.” <sup>342</sup>
Kentucky Fried Chicken	KFC	Signal expansion of product line <sup>343</sup> beyond fried foods which have become linked with ill-health and obesity. <sup>344</sup>
KPMG Consulting	BearingPoint	To distance spin off from both its parent firm and its own disappointing IPO. <sup>345</sup>
Libby Owens Ford	Trinova <sup>346</sup>	Separate firm from its history as a manufacturer of automotive glass. <sup>347</sup>
Lincoln Bankcorp	C U Bankcorp	To distance firm from scandals about unrelated Lincoln Savings & Loan. <sup>348</sup>
Nissan	Datsun, then to Nissan	(1960 when entering USA market) Used Datsun to distance the brand from Nissan’s WWII ties to the Japanese army and abuse of Chinese laborers in occupied Manchuria; (1984) change to Nissan unified the brand name globally, but seen by commentators as an attempt to raise stock prices on the New York Stock Exchange. <sup>349</sup>

<http://www.sjsu.edu/faculty/watkins/enron.htm#> (last visited Dec. 11, 2012) (stating that name was chosen with help from paid consultants; name change was supposedly prompted by awkwardness of merely combining the names of the parties to a merger).

342. See Greenhouse, *supra* note 330.

343. See Defanti, *supra* note 261, at 96.

344. See Kathleen M. Zelman, *10 Foods that Are Health Horrors*, WEBMD.COM, <http://www.webmd.com/diet/features/10-foods-that-are-health-horrors> (last visited Dec. 11, 2012).

345. See *KPMG to Test the Waters with \$1.9 Billion IPO*, FORBES.COM (Feb. 2, 2001), [http://www.forbes.com/2001/02/07/0207ipo\\_print.html](http://www.forbes.com/2001/02/07/0207ipo_print.html); *KPMG Becomes BearingPoint*, ITWORLD (Oct. 2, 2002), <http://www.itworld.com/021002bearingpoint>.

346. See Greenhouse, *supra* note 330.

347. The name change was accompanied with a corporate restructuring and divestiture of all interests in the firm’s original industry’s loss of profitability. See generally *Trinova Corporation*, in COMPANY HISTORIES, FUNDING UNIVERSE, <http://www.fundinguniverse.com/company-histories/trinova-corporation-history>.

348. See Robinson & Wu, *supra* note 333, at 7.

349. DAVID A. AAKER, *MANAGING BRAND EQUITY: CAPITALIZING ON THE VALUE OF A BRAND NAME* 57 (1991).

Philip Morris	Altria	To distance itself from negative image of cigarette smoking following settlement of consolidated law suit filed by numerous state attorney generals. <sup>350</sup>
The Spastics Society	Scope	To lower negative image of persons suffering from the disease. <sup>351</sup>
Sperry & Burroughs	Unisys <sup>352</sup>	Choosing a forward-looking but vague name to allow for a continuing image of being on the cutting-edge of technology advancement. <sup>353</sup>
UAL	Allegis	To raise falling stock prices (according to stock analyst); to generate new image by combining meanings of “allegiance” and “aegis” which means protection (according to the UAL/Allegis). <sup>354</sup>
United Aircraft	United Technologies	To separate from no-longer cutting-edge aircraft technology; corporation had already begun research related to space travel. <sup>355</sup>
US Steel	USX	Disassociate firm from public perception that steel making in the USA was moribund. <sup>356</sup>

350. M.L. Myers, *Philip Morris Changes its Name, but not its Harmful Practices*, 11 TOBACCO CONTROL 169–70 (2002), available at <http://tobaccocontrol.bmj.com/content/11/3/169.full.pdf+html?sid=1e02a6b1-32b1-4f49-8b25-769d9abf8680>.

351. See Wendy Lomax, Martha Mador & Angelo Fitzhenry, *Corporate Rebranding: Learning from Experience* at 3, KINGSTON BUSINESS SCHOOL, Kingston University Occasional Paper Series No 48 (Feb. 2002) (discussing UK charity devoted to victims of cerebral palsy).

352. See Greenhouse, *supra* note 330.

353. The name change marked the merger of two then-leading computer firms. See *Company History*, UNISYS.COM, <http://www.unisys.com/unisys/about/company/history.jsp?id=209&pid=201> (last visited Dec. 11, 2012); Gary Thompson, *Pssst! What's A Unisys? Burroughs, Sperry Choose New Name*, PHILA. DAILY NEWS (Nov. 11, 1986), [http://articles.philly.com/1986-11-11/business/26092674\\_1\\_burroughs-and-sperry-unisys-chairman-michael-blumenthal](http://articles.philly.com/1986-11-11/business/26092674_1_burroughs-and-sperry-unisys-chairman-michael-blumenthal).

354. See Greenhouse, *supra* note 330.

355. See *UTRC Historical Highlights*, UTC.COM, [http://www.utrc.utc.com/pages/OurCompany/our\\_history.html](http://www.utrc.utc.com/pages/OurCompany/our_history.html) (last visited Dec. 11, 2012).

356. See Defanti, *supra* note 261, at 96.

ValueJet	AirTran	Crash of passenger jet in the Florida everglades on May 11, 1996. <sup>357</sup>
WorldCom	MCI	Criminal prosecution for stock manipulation. <sup>358</sup>

### C. Telling Stories

Corporations also tell the public stories about the intentions, missions, objectives, and good practices<sup>359</sup> of their nonexistent personifications. The stories are often stronger on myth than details, but carefully skirt the type of specific false statement of fact that could be the basis of a false advertising suit.<sup>360</sup> Either they misdirect attention<sup>361</sup> or they are sufficiently unspecific to constitute mere puffery.<sup>362</sup> Simultaneously, businesses may attempt to prevent public access to the factual details, which would allow independent analysis.<sup>363</sup> Consider a few examples of these techniques.

- 
357. NAT'L TRANSP. SAFETY BD., AIRCRAFT ACCIDENT REPORT IN-FLIGHT FIRE AND IMPACT WITH TERRAIN VALUJET AIRLINES, FLIGHT 592 DC-9-32, N904VJ EVERGLADES NEAR MIAMI, FLORIDA MAY 11, 1996, 16 (Aug. 19, 1997), available at <http://www.nts.gov/doclib/reports/1997/aar9706.pdf>.
358. See, Dennis Moberg & Edward Romar, Santa Clara Univ., *WorldCom*, SCU.EDU, <http://www.scu.edu/ethics/dialogue/candc/cases/worldcom.html>.
359. Similarly, empirical research supports the proposition that acts of corporate social responsibility correlate with acts of corporate social irresponsibility, especially in industries where firms' bad acts are publicly scrutinized. See Mathew J. Kotchen & Jon Jungbien Moon, *Corporate Social Responsibility for Irresponsibility* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 17254, 2011), available at <http://www.nber.org/papers/w17254>.
360. See CALLMANN, *supra* note 254, §§ 5:8, 5:15 (discussing the concept of false and misleading advertising); J. Francis Davis, *Power of Images: Creating the Myths of Our Time*, CENTER FOR MEDIA LITERACY, <http://www.medialit.org/reading-room/power-images-creating-myths-our-time> (last visited Dec. 11, 2012).
361. See Elana Shever, *Engendering the Company: Corporate Personhood and the "Face" of an Oil Company in Metropolitan Buenos Aires*, 33 POL. & LEGAL ANTHROPOLOGY REV. 26, 27 (2010) (providing detailed analysis of Shell's use of symbol and rhetoric to simultaneously create a female persona of its allegedly-caring relationship with the poor living near one of its plants while deflecting responsibility for these persons living conditions).
362. See generally CALLMANN, *supra* note 254, § 5:26 (discussing concept of puffery and collecting relevant cases).
363. Corporations may invoke the law of trade secrets or insist on confidentiality agreements with all entities testing their services or products. See generally CALLMANN, *supra* note 254, § 5:26.

Chrysler personifies itself as a quintessential American corporate hero.<sup>364</sup> Because of its alleged importance to the United States economy, Chrysler was bailed out by the United States government twice—in 1979 and in 2009.<sup>365</sup> In 2011, Chrysler began attempting to ensure its long-term survival by convincing United States consumers to buy Chryslers.<sup>366</sup> The publicity campaign began with a splashy new advertisement during the Super Bowl touting Chryslers as “[i]mported from Detroit.”<sup>367</sup> The campaign includes promotional merchandise—part of each purchase allegedly supports a local Detroit charity—as well as videos by local residents about Detroit food, art, music, and history.<sup>368</sup> The site leaves out a few details. First, Chrysler’s profitability is dependent on car sales within the United States, though it is trying to increase its foreign sales.<sup>369</sup> Second, even for those Chrysler automobiles, which are assembled in the Rust Belt typified by Detroit, the parts being assembled are increasingly manufactured in foreign countries.<sup>370</sup> Third, since no one else wanted to buy out the U.S. government’s shares, Fiat intends to do so, thus increasing that Italian firm’s stake in the Chrysler Group to 57%.<sup>371</sup>

---

364. Dana Milbank, *Auto Execs Fly Corporate Jets to D.C., Tin Cups in Hand*, WASH. POST, Nov. 20, 2008, at A3.

365. See Julie Halpert, *It Pains Me*, NEWSWEEK, Apr. 29, 2009, <http://www.newsweek.com/2009/04/29/it-pains-me.print.html> (discussing the 1979 bailout); Chrysler Grp. LLC, Annual Report (Form 10-K), at 3–5 (May 6, 2012) [hereinafter Chrysler (Form 10-K)] (explaining terms of a 2009 agreement with federal government), [http://www.chryslergroupllc.com/en-us/investor/sec/ChryslerDocuments/Form\\_10\\_Registration\\_Statement.pdf](http://www.chryslergroupllc.com/en-us/investor/sec/ChryslerDocuments/Form_10_Registration_Statement.pdf).

366. See Chrysler (Form 10-K), *supra* note 365, at 10–11.

367. See *Chrysler Eminem Super Bowl Commercial*, YOUTUBE (Feb. 5, 2011), [http://www.youtube.com/watch?v=SKL254Y\\_jtc](http://www.youtube.com/watch?v=SKL254Y_jtc) (posting of original SuperBowl advertisement); *Imported from Detroit*, CHRYSLER, <http://www.chrysler.com/en/commercials/> (last visited Dec. 11, 2012) [hereinafter CHRYSLER] (main page on Chrysler’s web site for this promotion).

368. See CHRYSLER, *supra* note 367.

369. See Chrysler (Form 10-K), *supra* note 365, at 28 (saying North America). *But see id.* at 8 (referring to the United States as Chrysler’s “primary market”; total sales for the 2010 calendar year were 1,516,000 automobiles, of which 1,085,000 were sold in the United States, 205,000 in Canada, 79,000 in Mexico, and 147,000 in the rest of the world).

370. See Timothy J. Sturgeon et al., *The North American Automotive Value Chain: Canada’s Role and Prospects*, 2 INT. J. TECH. LEARNING, INNOVATION & DEV. 25, 37 (2009) (“US imports of auto parts nearly doubled between 1995 and 2005, from just under US \$35 billion to US \$68.5 billion.”).

371. See Tommaso Ebhardt & Mark Clothier, *Fiat Plans to Boost Chrysler Stake to 57% Buying Shares from U.S. Treasury*, BLOOMBERG (May 27, 2011),

Chrysler does employ a large number of people in the United States, but its manufacturing is increasingly robotic,<sup>372</sup> overseas, or outsourced.<sup>373</sup> As of December 31, 2010, Chrysler reported to the Securities and Exchange Commission (SEC) that it:

. . . [O]wn[ed] . . . [thirty-three] . . . principal manufacturing facilities, of which . . . [twenty-two] were located in the U.S., six in Mexico, four in Canada[,] and one in South America. These manufacturing facilities primarily include vehicle assembly plants, powertrain plants, and metal stamping plants. Manufacturing facilities in the U.S. are primarily located in Michigan, Indiana, Ohio, and Illinois.<sup>374</sup>

In 2010 Chrysler invested \$155 million in its manufacturing plants, but except for a quality-control software system that was introduced in all plants, Chrysler did not state that any of this money was spent on United States plants.<sup>375</sup> In contrast, Chrysler specified that it had made major improvements in its Mexican facilities.<sup>376</sup> Chrysler had applied for \$7 billion in loans from the U.S. Department of Energy; such loans would only be available for manufacturing technology installed in the United States for energy-efficient products.<sup>377</sup> Chrysler did not indicate any intent to invest large sums in United States manufacturing facilities if it did not receive these loans.<sup>378</sup> Nor does its SEC report state that any such loans received would be spent near Detroit, as opposed to less union-friendly locations.<sup>379</sup>

Chrysler has cut down drastically on the number of people it employs in the United States.<sup>380</sup> It closed five of its United States plants between October 2008 and December 2010.<sup>381</sup> Globally

---

<http://www.bloomberg.com/news/2011-05-27/fiat-says-it-plans-to-purchase-chrysler-group-stake-held-by-u-s-treasury.html>.

372. See MICHAELA D. PLATZER & GLENNON J. HARRISON, CONG. RESEARCH SERV., R40746, *THE U.S. AUTOMOTIVE INDUSTRY: NATIONAL AND STATE TRENDS IN MANUFACTURING EMPLOYMENT* 8 (2009).

373. See Steve Inskeep, *Chrysler Considers Outsourcing Work to Nissan*, NPR.ORG (Aug. 7, 2008), <http://www.npr.org/templates/story/story.php?storyId=93364753>.

374. Chrysler (Form 10-K), *supra* note 365, at 43.

375. Chrysler Grp. LLC, General Form for Registration of Securities (Form 10-12G) 8-9 (Feb. 25, 2011).

376. *See id.*

377. *See id.* at 36.

378. *See id.*

379. Chrysler (Form 10-K), *supra* note 365, at 89-90.

380. See Micheline Maynard, *Chrysler to Cut 13,000 Jobs in Overhaul*, N.Y. TIMES, Feb. 15, 2007, <http://www.nytimes.com/2007/02/15/business/15chrysler.html>

381. See PLATZER & HARRISON, *supra* note 372, at 3 tbl.1.

Chrysler employed 80,267 people as of December 31, 2006 (21,507 salaried; 58,760 hourly); as of December 31, 2010, it employed only 51,623 (13,706 salaried; 37,917 hourly).<sup>382</sup> Of its United States and Canadian employees, most of the hourly workers and about one-quarter of the salaried are unionized, but the Unions agreed to major reductions in compensation during 2009,<sup>383</sup> these were intended to make Chrysler's pay equivalent to the pay of United States autoworkers in nonunion states.<sup>384</sup> Older workers who are allegedly covered by the previously created defined benefit pension programs—which are not available to more recently hired workers—are at great risk of losing those benefits because the plans are “underfunded.”<sup>385</sup> Chrysler does not provide its employee figures for the United States.<sup>386</sup> I could not ascertain, therefore, how many United States employees Chrysler had discarded during its most recent reformation.

The United States has lost an alarming number of manufacturing jobs in the automotive industry, but these figures do not separate out Chrysler.<sup>387</sup> The United States Bureau of Labor Statistics figures estimates the number of persons working in “motor vehicle manufacturing” (including professionals and executives) somewhere in the United States at 154,740 during 2010; of these, 101,280 were in “production occupations.”<sup>388</sup> “Motor vehicle body and trailer manufacturing” employed 105,410, of whom 69,700 were in “production occupations.”<sup>389</sup> “Motor vehicle parts manufacturing” employed another 411,620, of whom 255,960 were in “production

---

382. See Chrysler (Form 10-K), *supra* note 365, at 27.

383. *Id.*

384. See *id.* at 28. Of course, the form does not use the term “no-union state,” instead it refers to plants in other parts of the United States. Such plants are, primarily, in southern, non-union states. See PLATZER & HARRISON, *supra* note 372, at 28.

385. See Chrysler (Form 10-K), *supra* note 365, at 36.

386. *Id.* at 27.

387. PLATZER & HARRISON, *supra* note 372, at 8–9.

388. *May 2010 National Industry-Specific Occupational Employment and Wage Estimates: NAICS 336100 - Motor Vehicle Manufacturing*, U.S. BUREAU OF LABOR STATISTICS, available at [http://www.bls.gov/oes/2010/may/naics4\\_336100.htm](http://www.bls.gov/oes/2010/may/naics4_336100.htm) (last visited Dec. 11, 2012).

389. *May 2010 National Industry-Specific Occupational Employment and Wage Estimates: NAICS 336200 - Motor Vehicle Body and Trailer Manufacturing*, U.S. BUREAU LAB. STAT., [http://www.bls.gov/oes/2010/may/naics4\\_336200.htm](http://www.bls.gov/oes/2010/may/naics4_336200.htm) (last visited Dec. 11, 2012).

occupations.”<sup>390</sup> This totals to 671,734 jobs, of which 426,940 are production work.<sup>391</sup> To compare, the job total for 1990 was 1,118,000.<sup>392</sup> Since 1990, therefore, U.S. automobile manufacturing has lost 446,266 jobs (even though foreign car companies have added U.S. workers).<sup>393</sup> Most of this loss has occurred recently, the post-1990 total only dipped below one million in 2007; it stood at 880,000 in 2008.<sup>394</sup>

United States job losses from the automobile industry are not confined to production.<sup>395</sup> To increase its own profitability, Chrysler has been canceling independently owned United States dealerships,<sup>396</sup> this process was “accelerated” during the bankruptcy of the current legal entity’s immediate predecessor-in-interest when 789 dealerships were terminated.<sup>397</sup> Of course, not being very happy about being dumped, many of these dealerships are suing Chrysler.<sup>398</sup> The remaining dealerships have been pressured to use their own money to burnish Chrysler’s image; dealers have committed to “invest more than \$300 million in new construction and major renovations in their dealerships.”<sup>399</sup>

In sum, Chrysler is moving its own expenditures out of the United States while it continues to derive its income from the United States;<sup>400</sup> nevertheless, it portrays itself as the champion of the U.S. rustbelt, the importer from (not to) Detroit.<sup>401</sup>

In 2000, British Petroleum became BP and launched a massive advertising campaign (complete with a new logo and color scheme)

---

390. *May 2010 National Industry-Specific Occupational Employment and Wage Estimates: NAICS 336300 - Motor Vehicle Parts Manufacturing*, U.S. BUREAU LAB. STAT., [http://www.bls.gov/oes/2010/may/naics4\\_336300.htm](http://www.bls.gov/oes/2010/may/naics4_336300.htm) (last visited Dec. 11, 2012).

391. *See* PLATZER & HARRISON, *supra* note 372, at 910 (explaining that these three BLS statistical sets together constitute the automotive manufacturing industry); *supra* notes 388–59.

392. PLATZER & HARRISON, *supra* note 372, at 10.

393. *See id.* at 4.

394. *See id.* at 2.

395. *See* Chrysler (Form 10-K), *supra* note 365, at 16 (describing dealership job loss).

396. *See id.*

397. *Id.*

398. *See id.* at 16, 139.

399. *See id.* at 17. But they should be happy because about 82% were profitable at the end of 2010. *Id.*

400. *See id.* at 33 (stating that Chrysler will rely upon North American car sales for income while increasing sales in other countries).

401. *See also* Benjamin Levin, *Made in the U.S.A.: Corporate Responsibility and Collective Identity in the American Automotive Industry*, 53 B.C. L. REV. 821, 828–29, 857, 873–74 (2012) (using “Imported from Detroit” campaign as one illustration of corporate manipulation of consumers’ nationalism to obtain income while avoiding responsibility).

about its focus on clean energy (as opposed to merely drilling for dirty petroleum)<sup>402</sup> and its strong commitment to safety.<sup>403</sup> Nevertheless, its profits continued to be overwhelmingly tied to petroleum.<sup>404</sup> Furthermore, repeated problems demonstrated its failure to perform minimally required upkeep and safety procedures.<sup>405</sup> On April 20, 2010, a BP off-shore rig in the Gulf of Mexico exploded, killing eleven persons on the drilling platform and starting a massive oil leak which continued to pump contaminants into the gulf for eighty-seven days.<sup>406</sup> BP has consistently referred to the explosion as an “accident” and portrayed itself as acting with utmost compassion and probity after the unfortunate occurrence. According to BP’s publicity, “BP has taken full responsibility for the cleanup,” continued to “work on the beaches,” and has “already spent

---

402. See *Our Logo*, BP, <http://www.bp.com/sectiongenericarticle.do?categoryId=9038317&contentId=7019193> (last visited Dec. 11, 2012); Press Release, *BP Launches in Los Angeles*, BP (May 22, 2001) <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=2001409>.

“Beyond petroleum’ sums up our brand in the most succinct and focused way possible. It’s both what we stand for and a practical description of what we do. We take concrete actions to push traditional boundaries and meet the challenges of our time in a sustainable way. ‘Beyond petroleum’ is shorthand for what we do:

-exploring, developing and producing more fossil fuel resources to meet growing demand

-manufacturing, processing and delivering better, more advanced products

-enabling the material transition to a lower carbon future.

It doesn’t mean we’re abandoning oil and gas, getting out of hydrocarbons, or focusing only on alternative energy. It means we’re at the heart of all these areas, ensuring we can supply the world with energy now and far into the future.”

*Beyond Petroleum*, BP, <http://www.bp.com/sectionbodycopy.do?categoryId=3316&contentId=7073644> (last visited Dec. 11, 2012). Our advertising brings this to life with examples of going beyond in our business activities. REICH, *supra* note 2, at 191–92.

403. See *Safety*, BP, <http://www.bp.com/subsection.do?categoryId=3316&contentId=70669h23> (last visited Aug. 28, 2012).

404. See Trefis Team, *Don’t Laugh at BP’s ‘Green’ Side*, FORBES (May 2, 2011, 1:27 PM), <http://www.forbes.com/sites/greatspeculations/2011/05/02/dont-laugh-at-bps-green-side/>.

405. See REICH, *supra* note 2, at 192–93 (discussing oil spill in Alaska due to poor maintenance in 2005; explosion in Texas for same reason in 2005).

406. See *Deepwater Horizon Accident*, BP, <http://www.bp.com/sectiongenericarticle800.do?categoryId=9036575&contentId=7067541> (last visited Dec. 11, 2012); BUREAU OF OCEAN ENERGY MGMT., REG., & ENFORCEMENT, U.S. DEP’T OF INTERIOR, REPORT REGARDING THE CAUSES OF THE APRIL 20, 2010 MACONDO WELL BLOWOUT (2011) [hereinafter MACONDO REPORT].

more than \$3.9 billion responding to the spill and on the cleanup.”<sup>407</sup> Gulf Coast residents disagree emphatically; these pesky humans actually wanted and still want payment, not just a process.<sup>408</sup> BP responded to the criticism of its claim process by warning that it might not be able to pay claims unless the government stopped holding up BP’s off-shore oil drilling permits.<sup>409</sup> A bill speeding up government response to permit requests passed the House in May 2011.<sup>410</sup> The same month brought hearings about the possibility of ending federal subsidies to big oil in light of the firms’ high profitability (and public displeasure over both gas prices and oil spills), but the bill to do so did not even make it to the Senate floor for a vote.<sup>411</sup> Furthermore, while Gulf Coast workers and small businesses have been wiped out by the spill, “[i]nvestors who bought BP’s stock and bonds [during the spill] made a killing in a classic example of turning panic into profit.”<sup>412</sup> Thus, BP portrayed itself as

- 
407. *Deepwater Horizon Accident*, *supra* note 406. BP also took out several full page advertisements. *See, e.g.*, N. Y. TIMES, Aug. 13, 2010, at A24; WALL STREET J. at A7 Aug 13, 2010; at A26 Aug. 10, 2010. BP’s final report on its internal investigation diffused blame by stating that “multiple companies, work teams and circumstances were involved over time.” BP, DEEPWATER HORIZON ACCIDENT INVESTIGATION REPORT 5 (2010), available at [http://www.bp.com/liveassets/bp\\_internet/globalbp/globalbp\\_uk\\_english/gom\\_response/STAGING/local\\_assets/downloads\\_pdfs/Deepwater\\_Horizon\\_Accident\\_Investigation\\_Report\\_Executive\\_summary.pdf](http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/gom_response/STAGING/local_assets/downloads_pdfs/Deepwater_Horizon_Accident_Investigation_Report_Executive_summary.pdf).
408. *See, e.g.*, Debbie Elliot, *On Gulf Coast, Frustration at BP Claims Process*, NPR.ORG (Feb. 24, 2011), <http://www.npr.org/2011/02/24/134009002/on-gulf-coast-frustration-at-bp-claims-process>.
409. *See* Clifford Krauss & John M. Broder, *BP Says Efforts to Bar Drilling Cloud Payouts: Sees Need for Permits to Satisfy Claims*, N.Y. TIMES, Sept. 3, 2010, at A1.
410. The putting the Gulf of Mexico Back to Work Act was passed by the House on May 11, 2011 and forwarded to the Senate. Putting the Gulf of Mexico Back to Work Act, H.R. 1229, 112th Cong. (2011) (forcing rapid government action on requests for drilling permission).
411. *See, e.g.*, 112 CONG. REC. S3064–65 (daily ed. May 18, 2011) (statement of Sen. Coons); 112 CONG. REC. S3003–04 (daily ed. May 17, 2011) (statement of Sen. Reid); 112 CONG. REC. H3155–56 (daily ed. May 16, 2011) (statement of Sen. Merkley); 112 CONG. REC. H3155–56 (daily ed. May 10, 2011) (statement of Del. Schweikert) (arguing that discussing oil subsidies was merely a political tactic to prevent consideration of more important issue of ending entitlement programs responsible for the government deficit); *see generally* *Oil and Gas Tax Incentives and Rising Energy Prices, Hearings Before the S. Comm. On Fin.* (May 12, 2011), available at <http://finance.senate.gov/hearings/hearing/?id=974701fa-5056-a032-5227-d055ec6b20d1>. (S. 940, the Close Big Oil Tax Loophole Act, was withdrawn without consideration by the Senate on May 17, 2011 due to the inability to obtain 60 votes to proceed.)
412. Edward Krudy, *Why Smart Investors Made Money on the BP Oil Spill*, REUTERS (Apr. 17, 2011 2:08 PM), <http://www.reuters.com/article/2011/04/17/us-oil-spill-bp-investors-idUSTRE73G1Q820110417>.

a group of hard-working people caught in a catastrophe not of their own making, as opposed to a money-seeking organization whose consistent bad conduct had caused an escalating series of harms to others.<sup>413</sup> The final official report found BP culpable.<sup>414</sup> Nevertheless, BP's self-portrayal seems to have been accepted by many politicians as sufficient cover to allow them to support BP's agenda; despite the lingering public displeasure, BP has not been cutoff from government largesse.<sup>415</sup>

Comcast was voted the 2010 Worst Company in America.<sup>416</sup> In response to this and other cues of public distrust, Comcast rebranded many of its products and services such as Xfinity.<sup>417</sup> Comcast also began a major publicity campaign about its deep commitment to customer service through new procedures backed by a customer guarantee.<sup>418</sup> Comcast was personalized through a host of friendly, hard-working, quality-conscious employees.<sup>419</sup> In my estimation, this campaign gets high-marks only for the use of misdirection.

The campaign is deafeningly silent on two major criticisms—Comcast's high prices and Comcast's monopoly status in most of its

---

413. See REICH, *supra* note 2, at 192–93 (discussing oil spill in Alaska due to poor maintenance in 2005; explosion in Texas for same reason in 2005); *Safety*, *supra* note 403.

414. MACONDO REPORT, *supra* note 406, at 1–2 (concluding that the loss of life and pollution were “the result of poor risk management, last-minute changes to plans, failure to observe and respond to critical indicators, inadequate well control response, and insufficient emergency bridge response training” for which BP was “ultimately responsible” though other firms were partially responsible); see also, e.g., John M. Broder, *Report Links Gulf Oil Spill to Shortcuts*, N.Y. TIMES, Sept. 14, 2011, at A25 (relying partially on report to predict forthcoming criminal charges against BP and others).

415. Cf. John Mervin, *Counting the Cost of the BP Disaster One Year On*, BBC NEWS (Apr. 19, 2011, 8:05 PM), [www.bbc.co.uk/news/business=13120605](http://www.bbc.co.uk/news/business=13120605) (reporting that BP's most profitable oil-operations remain in the Gulf of Mexico; forecasting that it will continue to operate there because the federal government does not want to give up either BP's tax payments nor the jobs BP generates).

416. Chris Morran, *Congratulations Comcast; You're the Worst Company in America!*, THE CONSUMERIST (April 26, 2010, 10:31 AM), <http://consumerist.com/2010/04/congratulations-comcase-youre-the-worst-company-in-america.html>.

417. See Sean Gregory, *Comcast's New Name: Rated X?*, TIME (Feb. 7, 2010), <http://www.time.com/time/business/article/0,8599,1960553,00.html>.

418. See Rick Germano, *Customer Care Improvements*, COMCAST, <http://www.comcast.com/Corporate/Customers/CG-In-Action.html?SCRedirect=true> (last visited Dec. 11, 2012).

419. See, e.g., *Customer Guarantee In Action: Our Dedicated Employees*, COMCAST, <http://www.comcast.com/Corporate/Customers/CG-In-Action.html> (last visited Dec. 11, 2012) (providing stories about specific employees and linking to more).

service areas.<sup>420</sup> The Customer Satisfaction Survey is questionable. After one of my many telephone calls to Comcast, I agreed to take the customer satisfaction survey. It refused to allow me to state what I disliked about Comcast. Instead, I was asked if the person who had just spoken to me had been sufficiently friendly and had fixed the problem; I was expressly instructed that the question was only about this specific telephone call. Well, the person on the line had been polite; she also had claimed that her intervention would fix the problem. The survey did not allow me to point out that several other polite Comcast employees had earlier said the same thing—while the problem remained. Worse, the survey did not allow me to point out that reaching Comcast to report a problem was usually impossible. Telephone calls produced (i) busy signals; (ii) automated messages telling me that Comcast knew of the problem and was fixing it; (iii) automated call-routing systems which wasted my time and finally cut me off; (iv) recorded messages telling me to use the online customer service system; or (v) (very occasionally) mailboxes promising return calls, which never materialized. Since I was generally calling about my internet service being off, I did not find the online customer service system very helpful.

The Consumer Guarantee is irrelevant to my service problems. In my personal experience, Comcast's cable, television, and internet service (while too expensive) are fine when they work, but service interruptions are frequent and, for internet service, are often lengthy. The Consumer Guarantee promises "a 30-day, money back guarantee on all our services," in other words, a new customer who cancels the service within a month of its installation does not have to pay the installation charges.<sup>421</sup> However, Comcast is the only supplier of high-speed internet access in my area. Since I need good internet service to make a living, I have no choice but to use Comcast. The Guarantee also promises that I can contact Comcast 24 hours a day, seven days a week by various internet mechanisms.<sup>422</sup> This is not helpful for someone whose problem is loss of internet service.

---

420. *See, e.g.,* Morran, *supra* note 416 (containing comments on announcement of Comcast's winning the contest); *see also* Behrend v. Comcast Corp., 655 F.3d 182, 187 (3rd Cir. 2011) (Plaintiffs allege Comcast "harmed the [plaintiffs] by eliminating competition, raising entry barriers to potential competition, maintaining increased prices for cable services at supra-competitive levels, and depriving subscribers of the lower prices that would result from effective competition"), *cert. granted*, 80 U.S.L.W. 3442 (U.S. Jun. 25, 2012) (No. 11-864) (*cert granted to determine legitimacy of class certification*).

421. *The Comcast Customer Guarantee*, COMCAST, <http://www.comcast.com/Corporate/Customers/CustomerGuarantee.html?SCRedirect=true> (last visited Dec. 11, 2012).

422. *See id.*

Furthermore, in my personal experience, almost all responses on Comcast's various internet service portals are polite statements unsupported by actual help with the problem.<sup>423</sup> But none of this violates any of the specific promises of Comcast's Consumer Guarantee; therefore, Comcast is not liable for false advertising.<sup>424</sup>

## V. THE IMPACT OF TRADE IDENTITY LAW

Protection of indicia of origin has exploded in the past few decades.<sup>425</sup> Two of the major expansions—dilution and merchandising—are primarily justifiable only on the ground that a brand's personification should be solely within the control of the brand's owner.<sup>426</sup> The core policy of contemporary trademark law

---

423. For example, my internet service was off for two weeks starting May 3, 2010 supposedly due to a flood hundreds of miles away. I say "supposedly" because all the other people I knew in Paducah who had Comcast internet got their service back within two days. My strenuous telephoning efforts never produced any conversation with anyone, with one exception. I finally telephoned the number for placing a paid advertisement with Comcast. That telephone was answered promptly, by someone who said he was in another building (allegedly across the street from operations) and was "unable" to (i) take a message, (ii) call the people who could help me; (iii) email the people who could help me; or (iv) walk across the street and talk to the people who could help me. I even sent on-line messages from other customer's computers, but none of these ever produced an answer. Getting credit for the lack of service also required a marathon. Every individual I reached online was polite, but none actually issued a credit. The on-line chat service finally admitted that it could not actually issue a credit, merely check to see if one had been issued by the local office which I had to telephone (but could never reach) (documentation on file with author).

424. See CALLMANN, *supra* note 254, § 5:3 (discussing state regulation of false advertising and the necessary elements thereof).

425. See generally *id.* §§ 22:4–22:18.

426. See, e.g., Rosemary Coombe & Andrew Herman, *Trademarks, Property, and Propriety: The Moral Economy of Consumer Politics and Corporate Accountability on the World Wide Web*, 50 DEPAUL L. REV. 597, 597–98 (2000) (linking overprotection of marks with corporate personas); Robert C. Denicola, *Institutional Publicity Rights: An Analysis of the Merchandising of Famous Trade Symbols*, 62 N.C. L. REV. 603, 620–21 (1984) (recognizing merchandising right as attempt to protect brands as if they were natural persons with autonomy rights); Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory of Fait Accompli?*, 54 EMORY L.J. 461, 465 (2005) (arguing that mark-holder does not have a valid claim to all value related to use of "its" mark). "When a trademark is sold, not as a source indicator, but as a desirable feature of a product, competition suffers--and consumers pay—if other sellers are shut out of the market for that feature. Accordingly, there is no reason for Congress to step in and codify a merchandising right." *Id.*

has shifted from consumer protection to brand protection.<sup>427</sup> Courts' analyses of the likelihood of confusion or dilution do not correlate with the possibility of actual harm to actual human consumers.<sup>428</sup>

In theory, protection could be narrowed<sup>429</sup> by many means: changing the analyses of both likelihood of confusion and likelihood of dilution; canceling the merchandising right; delegitimizing protection from post-sale and initial-interest confusion; increasing nominative fair use; liberalizing classic fair use; refusing to allow merely descriptive marks more than the narrowest of protections; etc., etc., etc.<sup>430</sup> To me, however, none of these changes seems likely in the foreseeable future.

Furthermore, lowering trade identity protection would only allow some counter speech—probably unlikely to gain the attention garnered by ubiquitous paid advertisements.<sup>431</sup> Lowering trade identity protection would not prevent businesses from engaging in personalization, misleading puffery, or image-centered naming practices.<sup>432</sup> Limiting these would require either banning certain types of commercial speech or requiring commercial speech to contain mandated disclosures.<sup>433</sup> The current Supreme Court's approach to free speech is unlikely to allow robust use of either of these cures.<sup>434</sup> Therefore, I will forebear from making specific suggestions.

## VI. CONCLUSION

Corporations are not humans.<sup>435</sup> Corporations are, therefore, not entitled to political representation.<sup>436</sup> Nevertheless, corporations have obtained a growing amount of control over humans' governments; this control is exercised for the sole benefit of the corporations.<sup>437</sup>

---

427. See, e.g., Deven R. Desai & Spencer Waller, *Brands, Competition, and the Law*, 2010 BYU L. REV. 1425, 1456–60 (arguing that current expansion of mark doctrine protects brand value, not consumers).

428. See *id.* at 1458; Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137, 140 (2010) (arguing against expansion of trade identity law).

429. See, e.g., William McGeeveran, *The Trademark Fair Use Reform Act*, 90 B.U. L. REV. 2267, 2278–79 (2010) (proposing statutory reform).

430. See Desai & Waller, *supra* note 427, at 1457–59.

431. See McGeeveran, *supra* note 429, at 2274–76.

432. See Desai & Waller, *supra* note 427, at 1458, 1460.

433. See McGeeveran, *supra* note 429, at 2271.

434. See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (using “heightened scrutiny” to void a regulation on commercial speech).

435. See *supra* Part III.A.2.

436. See *supra* text accompanying note 16.

437. See *supra* text accompanying notes 114–21.

Corporations camouflage their human-destructive power by masking themselves in fake human personalities.<sup>438</sup> Humans can revolt; the first step, however, is difficult—rejecting the smiling corporate masks.<sup>439</sup> The law is unlikely to help humans with this project.<sup>440</sup> Humans, therefore, must help themselves.

---

438. *See supra* Part IV.A.

439. *See supra* Part IV.A.

440. *See supra* note 434 and accompanying text.



