



CORPORATIONS, PROPERTY, & PERSONHOOD:  
FROM *CORPO ECONOMICUS* TO *CORPO SAPIENS*

Lua Kamál Yuille  
Associate Professor of Law  
University of Kansas School of Law  
Lawrence, Kansas

University of Kansas School of Law Working Paper

April 30, 2015

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*Lua Kamál Yuille*<sup>\*</sup>

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<sup>†</sup>The subtitle of this article parallels the title of an essay by Richard Thaler, a University of Chicago behavioral economist known for his contributions to lay economics, predicting that economic behavior models would evolve to incorporate, as a matter of course, behaviors observed in real world situations. Richard H. Thaler, *From Homo Economicus to Homo Sapiens*, 14 J. ECON. PERSPECTIVES 133-141 (2000). That article itself reflects similarly themed observations during the same time period. *See, e.g., See, e.g.,* Chris Doucouliagos, *A Note on the Evolution of Homo Economicus*, 28 J. ECON. ISSUES 877-883 (1994) (recognizing the increasing nuance of the paradigm).

<sup>\*</sup>Associate Professor of Law, University of Kansas, School of Law. **Comments on this early draft are welcome at [lyuille@ku.edu](mailto:lyuille@ku.edu).**

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*“A thing which you have enjoyed and used as your own for a long time ... takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.”*

- Oliver Wendell Holmes<sup>1</sup>

INTRODUCTION

*Homo economicus*, the central figure of neoclassical economics,<sup>2,3</sup> is a psychopath. This assertion is neither revelatory nor hyperbolic.<sup>4</sup> Others have recognized and repeated that, in his hyper-rational pursuit of individual self-interest (defined as utility, or wealth, maximization or pecuniary egoism), “economic man”<sup>5</sup> exhibits the central characteristics of the psychiatric condition

<sup>1</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

<sup>2</sup> Although the term was originally coined and is often used pejoratively, Tony Lawson, *What is this ‘School’ Called Neoclassical Economics?*, CAMBRIDGE J. L & ECON. 2013, 1–2 (referencing for the origins of the term, Thorstein Veblen, *The Preconceptions of Economic Science* (1900)), the term “neoclassical” economics is used, here, as a convenient shorthand for the paradigm—the basic principles and rules—that presently dominates and are the basis of (even if only to depart therefrom) a major portion of theoretical and applied economics research.

<sup>3</sup> This idea is so ubiquitous that it needs no citation. Nevertheless: *See, e.g.*, James Konow & Joseph Earley, *The Hedonistic Paradox: Is Homo Economicus Happier?*, 92 J. PUB. ECON. 1, 2 (2008) (calling the concept the “centerpiece of economics”); John Gowdy, Charles Hall, Kent Klitgaard and Lisi Krall, *The End of Faith-Based Economics*, 37 CORPORATE EXAMINER 5, 8 (2010) (siting *homo economicus* at “the heart of standard economic theory”); Doris Schroeder, *Homo Economicus on Trial: Plato, Schopenhauer and the Virtual Jury*, 1 PHILOSOPHY OF MANAGEMENT 65 (2001).

<sup>4</sup> *See, e.g.*, John Mixon, *Neoclassical Economics and the Erosion of Middle-Class Values: An Explanation for Economic Collapse*, 24 NOTRE DAME J.L. ETHICS & PUB. POL’Y 327, 329 (2010)

<sup>5</sup> The original version of this concept, as imported into law, has been attributed to Oliver Wendell Holmes, whose bad man, “car[ing] only for the material consequences which such knowledge [of law] enables him to predict,” has become the principle subject of American law. Lynn Stout, *CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE* 26 (2010) (describing the bad man “nineteenth-century legal scholar’s depiction of *homo economicus*”); Robert W. Gordon,

*The Path of the Lawyer*, 110 HARV.L.REV. 1013, 1014 (1997) (the ‘bad man’ is just the rational man—*Homo law-and-economicus*—who treats all legal rules as prices on conduct.”). More recently, the term “Chicago Man” has been used to narrowly identify the version of *homo economicus* that predominates so-called Chicago School law and economics scholarship and with which this article is primarily concerned. Robert Prentice, *Enron: A Brief Behavioral Autopsy*, 40

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referred to clinically as anti-social personality disorder.<sup>6,7</sup> Concluding through “cold calculation”<sup>8</sup> that he will be better off, economics’ Vitruvian man<sup>9</sup> will unselfconsciously display the following characteristics:

1. failure to conform to social norms, unless motivated by endogenous factors;
2. willingness to engage in the “full set of ex ante and ex post efforts to lie, cheat, steal, mislead, disguise, obfuscate, feign, distort, and confuse”;<sup>10</sup>
3. being so “uncompromisingly thorough”<sup>11</sup> in pursuing his pecuniary self-interest that he recklessly disregards others and is consistently irresponsible (e.g. fails to honor financial obligations); and most important,
4. lack of remorse or conscience by being indifferent to and/or rationalizing inflicting harm on or mistreating others.<sup>12</sup>

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AM. BUS. L.J. 417, 423 (2003) (citing Daniel McFadden, *Rationality for Economists?*, 19 J. RISK & UNCERTAINTY 73, 76, 83 (1999)).

<sup>6</sup> There is no longer any disease formally referred to as either psychopathy or sociopathy by the American Psychiatric Association, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (Revised 4th ed.) (2000). *But see*, Robert Hare, *Psychopathy Checklist-Revised (PCL-R)* (2003).

<sup>7</sup> In contrast to the perspective of Lynn Stout, *id.* at 158-59, this paragraph purposely chooses the term psychopath over sociopath. While the heavily debated terms (often used interchangeably) are subject to disagreements irrelevant to the topic at hand, several reasons urged the selection of one over the other, here. Chief among those reasons is that, psychopathy is largely accepted as an innate condition, as opposed to the environmental cause associated with sociopathy. John Mixon, *Neoclassical Economics and the Erosion of Middle-Class Values: An Explanation for Economic Collapse*, 24 Notre Dame J.L. Ethics & Pub. Pol’y 327, 330 (2010) (citing Martha Stout, *The Sociopath Next Door: The Ruthless Versus the Rest of Us* (2005) and Paul Babiak & Robert D. Hare, *Snakes in Suits: When Psychopaths Go To Work* (2006)).

<sup>8</sup> Lynn A. Stout, *Taking Conscience Seriously* in PAUL J. ZAK, ED., *MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY*, 154, 159 (2008).

<sup>9</sup> The Vitruvian Man, Leonardo da Vinci’s famous illustration depicting a perfectly drawn circle on top of a square, with a naked man inside, represents the ideal human proportions described by the ancient Roman architect Vitruvius in Book III of his treatise *De Architectura* [1–3]. It is generally considered to be a supreme example of the synergy between art and science.

<sup>10</sup> Oliver E. Williamson, *The Economic Institutions of Capitalism* 51 n.8 (1985).

<sup>11</sup> Samuel Bowles & Herbert Gintis, *The Revenge of Homo Economicus: Contested Exchange and the Revival of Political Economy*, 7 J. Econ. Persp. 83, 84 (1993).

<sup>12</sup> Lynn A. Stout, *Taking Conscience Seriously* in PAUL J. ZAK, ED., *MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY*, 154, 159 (2008).

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Faced with this presentation, any adequately trained clinician, psychologist, or psychiatrist might well suspect or diagnose some degree of psychopathy.<sup>13</sup>

If *homo economicus* actually modeled typical human behavior, then mental health statistics estimating rates of psychopathy would be vastly low.<sup>14</sup> However, *homo economicus* is a myth. This concession is widely accepted.<sup>15</sup> Empirical data, qualitative observation, common sense, and the aforementioned mental health statistics bear witness to the proposition. The simplification of individuals into calculators singularly bent on obtaining their own greatest material advantage may be an extremely useful tool in the development and exposition of microeconomic

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<sup>13</sup> See American Psychiatric Association, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (Revised 4th ed.)(2000)(indicating that the presence of at least three of seven listed traits may be the basis for such a diagnosis); American Psychiatric Association, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (Revised 5th ed.)(2011)(explaining that “essential features” the disorder are impairments in personality functioning and the presence of pathological personality traits”); K.A. Kiehl, & M.B. Hoffman, *The Criminal Psychopath: History, Neuroscience and Economics*, *Jurimetrics: The Journal of Law, Science, and Technology* 355-397 (2011) (listing shallow affect; lack of empathy, guilt and remorse; irresponsibility; impulsivity; and poor planning and decision-making as typical psychopathic traits).

<sup>14</sup> Only a small fraction of the population exhibits any degree of antisocial personality disorder. Estimates suggest that between 1% and 4% of all adults not subject to institutionalization meet the criteria for the disorder. See R. D. Hare, *Psychopathy: A Clinical Construct Whose Time Has Come*, 23 *Criminal Justice and Behavior* 25-54 (1996) (suggesting less than 1%); Martha Stout, *THE SOCIOPATH NEXT DOOR: THE RUTHLESS VERSUS THE REST OF US* (2005) (estimating 4%).

<sup>15</sup> See, e.g., Steven D. Levitt, John A. List, *Homo Economicus Evolves*, 319 *Science* 909, 909 (2008) (“The discipline of economics is built on the shoulders of the mythical species *homo economicus*.”); Lynn A. Stout, *On the Proper Motives of the Corporate Directors (Or, Why You Don’t Want to Invite Homo Economicus to Join Your Board)*, 28 *DEL. J. CORP. L.* 1 (2003); Michael Shermer, *The Prospects for Homo Economicus*, 297 *SCIENTIFIC AMERICAN* 40 - 42 (2007) (using an fMRI study to debunk “myth” that people are rational-utility money maximizers); Rob Donovan, *Social Marketing’s Mythunderstandings*, 1 *J. Social Marketing* 8-16 (2011); Dale T. Miller, Rebecca K. Ratner, *The Power of the Myth of Self-Interest* in *CURRENT SOCIETAL CONCERNS ABOUT JUSTICE* (Leo Montada, Melvin J. Lerner, eds., 1996); Oliver R. Goodenough, *Values, Mechanism Design, and Fairness*, in *MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY* 228 (Paul J. Zak ed., 2008)(describing as “imaginary”); Robert Brenner, *The Origins of Capitalist Development: A Critique of Neo-Smithian Marxism*, *New Left Rev.*, July-Aug. 1977, at 58; John Gowdy, Charles Hall, Kent Klitgaard and Lisi Krall, *The End of Faith-Based Economics*, 37 *Corporate Examiner* 5, 8 (2010); Doris Schroeder, *Homo Economicus on Trial: Plato, Schopenhauer and the Virtual Jury*, 1 *Philosophy of Management* 65 (2001).

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concepts.<sup>16</sup> Indeed, economics’ “hardheaded grounding”<sup>17</sup> in this paradigm is seen to provide a consistent framework for modeling human behavior,<sup>18</sup> especially in markets, where what is ultimately relevant may not be the behavior or the motives of any specific individual but the average or aggregated behaviors of all people from which relevant descriptions and predictions can be gleaned.<sup>19</sup> Nevertheless, no contemporary scholar unreservedly endorses *homo economicus* by suggesting that he accounts for the full spectrum of economically relevant or meaningful human characteristics and motivations.<sup>20</sup>

More accurate than characterizing it as an outright myth, is the recognition that *homo economicus* occupies a theoretical world.<sup>21</sup> Since its conception by Adam Smith and David Ricardo, its full articulation by John Stuart Mill, and the coining of the term, possibly by Vilfredo Pareto,<sup>22</sup> economic man’s rationally self-interested actor has imperialized not just economics, but political science, sociology, philosophy, business and management, and law, among other disciplines. But, at least in contemporary scholarship, that theoretical hegemony

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<sup>16</sup> William Dixon, David Wilson, *A History of Homo Economicus: The Nature of the Moral in Economic Theory* (2012) (“*homo economicus* is not a type or form of human being but an abstraction from it”).

<sup>17</sup> Samuel Bowles & Herbert Gintis, *The Revenge of Homo Economicus: Contested Exchange and the Revival of Political Economy*, 7 *J. Econ. Persp.* 83, 84 (1993).

<sup>18</sup> Steven D. Levitt, John A. List, *Homo Economicus Evolves*, 319 *Science* 909, 909 (2008).

<sup>19</sup> DAVID D. FRIEDMAN, *HIDDEN ORDER: THE ECONOMICS OF EVERYDAY LIFE* (1st Pbk. Ed edition ed. 1997).

<sup>20</sup> How and whether economic methodologies should address or correct the unidimensionality of *homo economicus* remains the subject of debate within economics and across several complementary fields. Many economists continue to believe that *homo economicus* is not just an adequate but the most accurate—predictively—model of human behavior available. See Stigler & Becker, *De Gustibus Non Est Disputandum*, 67(2) *AM. ECON. REV.* 76-90 (1977) (“we assert that this traditional approach of the economist offers guidance in tackling these problems – and that no other approach of remotely comparable generality and power is available”). This debate is the *raison d’être* of the subfield of behavioral economics. See Christine Jolls, Cass R. Sunstein, Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471 (1998). Mostly unknown in the legal context, other “post-neoclassical” approaches like “evolutionary game theory,” “complexity economics,” and “neuroeconomics” engage in the same project. See Christian Arnsperger, *FULL-SPECTRUM ECONOMICS: TOWARD AND INCLUSIVE AND EMANCIPATORY SOCIAL SCIENCE I* (2010).

<sup>21</sup> Tanina Rostain, *Educating Homo Economicus: Cautionary Notes on the New Behavioral Law and Economics Movement*, 34 *LAW & SOC’Y REV.* 973, 978 (2000).

<sup>22</sup> Edward J. Boyle, *Requiem for Homo Economicus*, 10 *JOURNAL OF MARKETS AND MORALITY* 321, 322 (2007).

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has been tempered and is supplemented by more holistic and realistic descriptions of human nature, which take into account ethical and moral values, social norms, altruistic and philanthropic aims, misanthropic and malicious impulses, and other intuitively obvious motivating factors.<sup>23</sup>

Not surprisingly, *homo economicus* has been imported wholesale into the business context. This manifestation of economic man, which will be referred to here as *corpo economicus*,<sup>24</sup> underlies the proposition that the *universitas*, the *collegium*, the *societas*, the firm—that is, the type of business entity known today as the corporation<sup>25</sup>—exists to facilitate the pursuit of a reasonably simple objective: to maximize wealth (i.e. profits) through the correct means (i.e. efficient ones). This conception of the corporation, which animates the fields of corporate law and corporate governance both discursively and practically, has intuitive appeal. If individuals are rationally self-interested in pecuniary gain, then individuals united for a common purpose would likewise be pursuing pecuniary gain.

The corollary of the correspondence between *homo economicus* and *corpo economicus* is this: If *homo economicus* is a psychopath, then *corpo economicus* is also psychopath. This assertion is also neither revelatory nor hyperbolic. Joel Bakan’s book, *THE CORPORATION*, a diatribe against its subject in its modern incarnation, claims that the psychopathy exhibited by *corpo economicus* is an inescapable function of its legal design.<sup>26</sup> No less colorfully, the corporation has been vilified as a “golem,”<sup>27</sup> an “uncivilized power,”<sup>28</sup> the “gangs of America,”<sup>29</sup>

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<sup>23</sup> MICHAEL SHERMER, *THE MIND OF THE MARKET: COMPASSIONATE APES, COMPETITIVE HUMANS, AND OTHER TALES FROM EVOLUTIONARY ECONOMICS* 24 (2008).

<sup>24</sup> Equally imperfect alternatives include “*firma economicus*” and “*corpicus economicus*.”

<sup>25</sup> The etymology of the term corporation Throughout this article, the term corporation will be used primarily in its popular understanding as synonymous with business or firm. Where the legal term of art is intended as something distinct from the broader understanding of business association, the term “corporate form” will be employed.

<sup>26</sup> Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (2004).

<sup>27</sup> Lawrence E. Mitchell, *Corporate Irresponsibility: America’s Newest Export* 47 (2001).

<sup>28</sup> Andrew W. Fraser, *Reinventing Aristocracy: The Constitutional Reformation of Corporate Governance* (1998).

<sup>29</sup> Ted Nace, *Gangs of America: The Rise of Corporate Power and the Disabling of Democracy* (2005).

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“Frankenstein,”<sup>30</sup> a “Fool’s Parliament,”<sup>31</sup> among other epithets.<sup>32</sup>

But, if *corpo conomicus*’ psychopathy is generally recognized, likewise should follow the wide acceptance that *corpo economicus* is a myth. That is, just as *homo economicus* occupies a theoretical space, so too should *corpo economicus* occupy a theoretical realm. Curiously, the latter proposition does not share the wide acceptance of *homo economicus* as myth. *Corpo economicus* is not framed as a useful analytical trope that is confined to theoretical exposition. Instead, the standard is accepted as descriptive, epistemological, and ontological fact, and it is often promoted as a normative imperative or value. This is not to imply that there has not been a rich debate over the validity of economic man in the corporate context as an empirical fallacy, a predictive failure, and a normative goal.<sup>33</sup> Rather, it simply means that within those debates and, more important, in the evaluation, analysis, and regulation of the corporation, *corpo economicus* (and the rational choice model it embodies) is treated as a starting point, the basic unit of analysis.

The popular, intuitive, and legal conception of the corporation and the corporate form is that of a value-neutral profit maximizer. By and large, business and corporate law reifies and perpetuates that intuition by creating strictures that facilitate its perceived advantages and mitigate its perceived dangers. However, practice has shown that this foundational principle of corporate theory is not consistent with real world experience. Arguably indifferent to the efficiency or profit implications of their choices, corporations demonstrate malfeasance, altruism, and deontological motivations. The executives of WorldCom and Enron, engaged in behavior of considerable risk to themselves (and ultimately the business) to shore up or advance those corporations. The Body Shop skincare company sources all its products from fair wage suppliers; In-N-Out burger chain and Trader Joe’s grocery stores pay “living wages” and benefits to normally minimum wage workers; and out of an interest in the environment, Toyota, by investing in the development of the Prius hybrid car, created an eco-friendly car when there was no market for it. And, Hobby Lobby and Conestoga Woods became

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<sup>30</sup> Maurice Wormser, ‘Frankenstein, Incorporated’ (1931).

<sup>31</sup> John H. Farrar, *Frankenstein Incorporated or Fools’ Parliament? Revisiting the Concept of the Corporation in Corporate Governance*, 10 Bond L. Rev. 2 (1998).

<sup>32</sup> For an analysis of some of these positions, see Ian B. Lee, *Is There A Cure for Corporate “Psychopathy”?*, 42 Am. Bus. L.J. 65, 65 (2005).

<sup>33</sup> David S. Ruder, *Public Obligations of Private Corporations*, 114 U. PA. L. REV. 209 (1965)



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famous for upholding their religious values in their daily operations.

Legal scholars, economists, and management professionals often betray perplexed or frustrated reactions to these recurrent departures from the *corpo economicus* standard. The common response to not-profit (or, better, not-just-profit) maximizing corporations is to reinterpret the source of nonconformity as irrationality, rationality, market failure, inefficiency, or some other phenomenon that protects the integrity of *corpo economicus*. That is, observers tend to pathologize or apologize for a corporation's aberrancy. Pathologists defend *corpo economicus* as central to the very nature of the corporation and corporate law, so they offer post mortem analyses of "what went wrong" with these corporations or why the malfeasance, altruism, or deontology was actually perfectly consistent with the model. Apologists promote broad *corpo economicus* orientation in which corporate utility functions can incorporate non-pecuniary values.<sup>34</sup>

This article uses property theory to suggest an explanation for corporate malfeasance, altruism, and deontology that requires a more complex view of the corporation than underlying *corpo economicus*. Corporations serve a key role in the development of the types of intrinsically valuable property interests—referred to, here, as "identity property"—that transcend or belie traditional corporate law analyses, and its dominant methodology and ideology, imported from neoclassical economics.

In the *corpo economicus* paradigm, corporations are ultimately conceptually straightforward entities constituted for ascertainable purposes. Even though a corporation acts only through its agents, the endowment of the legal fiction of separateness apparently creates not a veil, as that concept is commonly understood,<sup>35</sup> between the owner or agent and the corporation but an "Iron Curtain," generally impenetrable and impermeable, except where a court exercises

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<sup>34</sup> This cross point reflects the debate that is the principal occupation of corporate social responsibility (CSR) scholarship and is a central concern of corporate governance, corporate law, securities regulation, and a host of business law fields: Whether and how it is possible to incentivize or require socially conscientious behavior by corporations. The property perspective offered here suggests the need to return to a prior question: Why are corporations persistently and pervasively (though not universally) defying the *corpo economicus* characterization?

<sup>35</sup> That a business operating as a corporation or other legally recognized business form extending limited liability (e.g. limited liability companies, limited liability partnerships, limited partnerships) is an entity distinct from its owners and agents is a "basic tenet" of corporate law used to shield investors from personal liability for the acts and obligations of the business. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003).

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its discretion to impose the narrow legal remedies to “pierce” that veil.<sup>36</sup> With this veil drawn, whatever the permissible purpose of the corporation—whether pure profit or some broader utility—can be quarantined from the characteristics that make *homo economicus* a myth. Property theory suggests corporations are more complex and resist both of these superhuman phenomenon. Instead, there is a dialogical and dialectical mutually constitutive relationship between the corporation and its constituents. Without undermining the importance of the profit motive, this property perspective suggests that the identity affirming capacity of the pursuit of property, perhaps especially the pursuit of property in groups, is very important and may be central to understanding corporate behavior.

Part I of this article briefly elaborates the central features of the *corpo economicus* paradigm as deployed in the relevant legal scholarship. Part II explores three examples of corporate behavior failing to conform to that model. The misleading management of financial records by Lehman Brothers at the apex of the burst of the housing bubble offers an example of corporate malfeasance, the most widely recognized category of this divergence. The supplier requirements of Whole Foods Market stores and the buy one, give one integrated charity model of TOMS shoe company provide clear pictures of corporate altruism. And, Hobby Lobby, Inc., whose objection to part of the contraceptive mandate of the Affordable Care Act created a controversy resolved by the Supreme Court, represents corporate deontology, a previously unexplored version of the *corpo economicus* divergence. Each example, sketches the behavior predicted by the *corpo economicus* model and explores the corporation’s actual conduct.

Part III develops the theoretical foundation of this article’s descriptive thesis. It suggests that an alternative property framework is rhetorically, formally, and functionally important to understanding, evaluating, and addressing corporate behavior. The article synthesizes several disparate threads of foundational and innovative property theory, including Charles Reich’s *The New Property*<sup>37</sup> and

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<sup>36</sup> Courts will disregard the corporate form if it is abused or, more recently, “it appears that something in the original ‘contract’ [creating the corporation] has gone amiss” 1 Fletcher Cyc. Corp. § 41 . The doctrine permitting this equitable remedy is known by various names, including “piercing the corporate veil,” “disregarding the corporate entity,” and the “alter ego” and “instrumentality” theories, and is the rare exception. *Dole Food*, 538 U.S. at 475.

<sup>37</sup> Charles Reich, *The New Property*, 73 Yale L.J. 733 (1964).

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Margaret Radin’s *Property and Personhood*,<sup>38</sup> and Cheryl Harris’s *Whiteness as Property*<sup>39</sup>. Interwoven, this scholarship suggests that corporations can create a broader spectrum of property for their constituents than generally recognized. This property is not limited to functional property—e.g. financial capital or monetary assets. Corporations also create and pursue those types of incommensurable property central to ontological, epistemological, and vocational humanity. Within this identity property framework, not all corporate malfeasance, altruism, and deontology is pathological. Rather, engagement with identity property is subject to different social norms and amenable to different regulatory strategies.

With the new property dimension of corporate behavior properly set forth, the article concludes by suggesting that the more robust understanding of the relationship among property, identity, and the nature of corporations it constructs indicates that laws that fail to address the potential role of corporations in the identity of their constituents will be of inherently limited value in preventing the kinds of market failures against which those law are meant to shield.

**I. *CORPO ECONOMICUS*, OR THE NATURE OF THE CORPORATION**

In its simplest form, this article asks “what do corporations do?” To answer that question, it would seem, it serves to know exactly what a corporation is.<sup>40</sup> The answer seems simple. In essence, the corporation is merely one way individuals unite to pursue capital, often (but not always<sup>41</sup>) taking the form of private property. The legal contours of the corporate form are easily identifiable by reference to the corporate law of an entity’s state of incorporation.<sup>42</sup> This characterization should

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<sup>38</sup> Though the discussion here relies primarily on *Property and Personhood*. Radin has refined, developed, and evolved that theory she developed their in a series of well-recognized articles and books. See Margaret Jane Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849 (1987); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667 (1988); Margaret Jane Radin, REINTERPRETING PROPERTY (1993); Margaret Jane Radin, CONTESTED COMMODITIES (1996); Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & Com. 509 (1996).

<sup>39</sup> Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1709 (1993).

<sup>40</sup> In fact, “[t]he answer to the question, “What is a corporation?” is much of (all of?) the law of corporations, including all the exceptions built into the concept itself.” Frederick Schauer, *Exceptions*, 58 U. Chi. L. Rev. 871, 877 (1991).

<sup>41</sup> For example, labor unions and non-profit organizations use the corporate form, but generally pursue primarily other forms capital of their constituents.

<sup>42</sup> Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconceived*, 42 Seton Hall L. Rev. 879, 885 (2012) (“Defining the corporation itself is of course fairly simple--it is a legal

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be uncontroversial,<sup>43</sup> but it is also not particularly instructive.<sup>44</sup> What the question “what is a corporation?” really seeks to understand is the fundamental nature of that choice. At a minimum, that nature contemplates the corporation as a legal person, separate from its constituents.<sup>45</sup> Otherwise, there is no universally accepted answer. Instead, the nature of the corporation is a conversation, debate, and polemic that “extends far back into history.”<sup>46</sup> Several broad perspectives on this question have enjoyed cyclical dominance,<sup>47</sup> each contributing to the landscape of corporate law and theory. These perspectives can be and have been denominated, framed, and grouped in a variety of ways and across different dimensions. However, the most common analytical strategy delineates three principle ways of thinking about corporations: as artificial entities, as natural entities, and as aggregate entities.

In *Trustees of Dartmouth College v. Woodward*, Chief Justice Marshall set forth the original iteration of the artificial entity theory, the image of the corporation predominant in the first half of the nineteenth century, when their modern iteration was first developed:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of

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entity possessing the characteristics defined by the corporate law of its state of incorporation, or if beyond the United States, by the law of the jurisdiction in which it is formed.”)

<sup>43</sup>Lewis D. Solomon Kathleen, *Humanistic Economics: A New Model for the Corporate Social Responsibility Debate*, 12 J. Corp. L. 331, 338 (1987); Brynnar Nelson Swenson, *The Corporate Form: Capital, Literature, Architecture 1* (2011) (defining the corporate form as a structure for collective action).

<sup>44</sup> In addition to legal personality (the capacity and authority to own property, sue and be sued, and bear criminal responsibility), standard across jurisdictions are limited liability for owners and managers; shared ownership by investors of capital; delegated management; and transferability of ownership interests. See, e.g., Henry Hansmann, Reinier Kraakman, *The End of History for Corporate Law*, 89 Geo. L.J. 439, 440 (2001).

<sup>45</sup> Exactly who the constituents of a corporation are is a distinct but related debate in corporate theory. Most perspectives on the nature of the corporation also expressly or implicitly ascribe to a view on this question. Nonetheless, that set of debates is of little consequence to the ideas being elaborated here. Merrick Dodd inaugurated this debate in his still debated piece, *For Whom are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145 (1932).

<sup>46</sup> Robert W. Hamilton, *The Corporate Entity*, 49 Tex. L. Rev. 979, 980 (1971) (citing Lord Coke’s definition of the corporation in *The Case of Suttons Hospital*, 77 Eng. Rep. 937, 973 (K.B. 1613)).

<sup>47</sup> Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 Del. J. Corp. L. 767, 771 (2005) (tracing the cyclical dominance of the aggregate theory, the artificial entity theory, and the real entity theory).

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law, it possesses only those properties which the charter of its creation confers upon it. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use.<sup>48</sup>

From this perspective, corporations exist to facilitate whatever ends the government (which grants the corporate charter) concludes benefit society, an idea eventually understood to mean commerce or economic development.<sup>49</sup>

In contrast, the real or natural entity perspective posits that, rather than the progeny of government fiat, corporations are the result of the natural tendency of individuals toward collective action.<sup>50</sup> Under this view, the corporation is “an organic social reality with an existence independent of, and constituting something more than, its changing shareholders.”<sup>51</sup> The natural entity version of the corporation possesses independent morality, will, and goals, which cannot be directly identified with those of its constituents. This corporation exists and emerges without regard of the state, which merely legitimizes a preextant entity.<sup>52</sup>

The aggregate theory, animating the Supreme Court’s description of the corporation as an “association of citizens,”<sup>53</sup> understands the corporation as “a

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<sup>48</sup> *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819).

<sup>49</sup> Susanna Kim Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 *Fordham J. Corp. & Fin. L.* 97, 106 (2009).

<sup>50</sup> Margaret Blair, *Corporate Personhood And The Corporate Persona*, 2013 *U. Ill. L. Rev.* 785, 805 (2013).

<sup>51</sup> *Id.* (citing Phillip I. Blumberg, *The Corporate Personality in American Law: A Summary Review*, 38 *AM.J.COMP.L., SUPP: U.S. LAW IN AN ERA OF DEMOCRATIZATION* 49 (1990)).

<sup>52</sup> Roger Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 *Ga. L. Rev.* 1245, 1305 (1979). George F. Deiser, *The Juristic Person*, 57 *U. Pa. L. Rev.* 300, 304 (1909). (“What really happens is that the state finding certain persons standing in a certain relation to each other and acting as a unit, upon a request from them, authorizes the group to embark upon a certain course of activity.”)

<sup>53</sup> *Citizens United*, 130 S. Ct. at 906-07.

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group of otherwise disaggregated natural persons joining together by agreement to mutually pursue a private endeavor.”<sup>54</sup> Thus, corporations “have no reality over and above their constituents, because they are created by and function only because of them.”<sup>55</sup> That same perspective—that the corporation is not a real entity but a convenient fiction—underlies the currently prevailing contractarian or “nexus of contracts” perspective of the nature of corporations,<sup>56</sup> which was presaged by Ronald Coase,<sup>57</sup> coined by Michael Jensen and William Meckling,<sup>58</sup> and championed<sup>59</sup> by Frank Easterbrook and Daniel Fischel<sup>60</sup>. Under this perspective, the corporation is “a shorthand for the complex arrangements of many sorts that

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<sup>54</sup> Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 Seattle U. L. Rev. 1135, 1142 (2012).

<sup>55</sup> Patricia H. Werhane, *Persons, Rights, and Corporations* 51 (1985).

<sup>56</sup> The same perspective was described as a “property conception” by William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264 (1992).

<sup>57</sup> Ronald Coase, *The Nature of the Firm*, 4 *Economica* 386 (1937). See also Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 *Am. Econ. Rev.* 777 (1972) (whose rejection of Coase’s construction advanced the paradigm). See, e.g., Stephen Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 *Iowa L. Rev.* 1, 9 (2002) (“This model’s origins fairly can be traced to Nobel Prize laureate Ronald Coase’s justly famous article, *The Nature of the Firm.*”); Gregory Sidak, *Mr. Justice Nemo’s Social Statics*, 79 *Tex. L. Rev.* 737, 745 (2001) (“Coase’s insight that the firm is the nexus of contracts between the owners of various factors of production also has gained widespread acceptance among legal scholars.”); David Millon, *Theories of the Corporation*, 1990 *Duke L.J.* 201, 229 (1990) (“can be traced to Ronald Coase’s 1937 article”). Marshall’s opinion in *Dartmouth* is an even earlier antecedent sited within legal canon. As noted by Margaret Blair, in that same decision, Marshall stated emphatically that the incorporation of Dartmouth College (i.e. its charter) was unequivocally a contract subject to the benefits of that legal institution. Margaret Blair, *Corporate Personhood And The Corporate Persona*, 2013 *U. Ill. L. Rev.* 785, 802 (2013).

<sup>58</sup> Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. Fin. Econ.* 305, 310 -11 (1976) (“nexus for contracting relationships”)

<sup>59</sup> *But see* Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 *Wash. L. Rev.* 1 (1990) (characterizing as weak the contractarianism promoted by Easterbrook and Fischel, normally characterized as “strong”).

<sup>60</sup> “The Corporate Contract,” 89 *Columbia Law Review* 1416 (1989) (with Daniel R. Fischel). ; *Contract and Fiduciary Duty*, 36 *Journal of Law and Economics* 425 (1993) (with Daniel R. Fischel); *The Economic Structure of Corporate Law* (Harvard University Press, 1991) (edited with Daniel R. Fischel); Easterbrook & Fischel, *Close Corporations and Agency Costs*, 38 *Stan. L. Rev.* 271 (1986); Easterbrook & Fischel, *Corporate Control Transactions*, 91 *Yale L. J.* 698 (1982); Easterbrook & Fischel, *Limited Liability and the Corporation*, 52 *U. Chi. L. Rev.* 89 (1985); Easterbrook & Fischel, *Voting in Corporate Law*, 26 *J.L. & Econ.* 395 (1983); Fischel, *The Appraisal Remedy in Corporate Law*, 1983 *Am. B. Found. Res. J.* 875; Fischel, *The Corporate Governance Movement*, 35 *Vand. L. Rev.* 1259 (1982).

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those who associate voluntarily in the corporation will work out among themselves.”<sup>61</sup> More simply, it is a set of “contractual relationships between the various parties involved with the firm: executives, directors, creditors, suppliers, customers, and employees. The corporation itself doesn’t really exist; it is merely the nexus (or connection or link) amongst these various corresponding relationships.”<sup>62</sup>

Ultimately, all of these perspectives—and those that revise, build on, or transform them—provide insight into the nature of corporations and the laws designed to constitute, recognize, and regulate them.<sup>63</sup> As John Dewey appreciated, the varying perceptions can be used to pursue identical, complementary, and competing or conflicting ends, based largely on independent normative considerations.<sup>64</sup> Indeed, present debates, conversations, and polemics surrounding the nature of the corporation are best characterized as concerned primarily not with defining or understanding corporations but with determining which understanding best meets society’s needs.<sup>65</sup> Most important, with respect to the advancement of the present discussion, the fundamental characteristics of *homo economicus* are

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<sup>61</sup> Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 *Colum. L. Rev.* 1416, 1426 (1989).

<sup>62</sup> Grant M. Hayden & Matthew T. Bodie, *The Uncorporation and the Unraveling of "Nexus of Contracts" Theory*, 109 *Mich. L. Rev.* 1127, 1129 (2011). It is important to note that the eponymous contracts are not contracts in any lay or legal sense of the term. Rather than any express agreement or legally enforceable promise, Jensen and Meckling actually referred reciprocal arrangements involving mutual expectations between parties. See Susanna Kim Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 *Fordham J. Corp. & Fin. L.* 97, 158 (2009) (citing Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 *Colum. L. Rev.* 1549, 1549 (1989).); Melvin A. Eisenberg, *The Conception That the Corporation Is A Nexus of Contracts, and the Dual Nature of the Firm*, 24 *J. Corp. L.* 819, 822 (1999); Robert C. Clark, *Agency Costs versus Fiduciary Duties*, in *Principals and Agents: The Structure of Business* 59-71 (John W. Pratt & Richard J. Zeckhauser eds., 1985).

<sup>63</sup> Jeffrey Nesteruk, *Corporate Theory and the Role of Narrative*, 2009 *Mich. St. L. Rev.* 933, 934 (2009) (“each corporate conception may well capture something essential about the corporate entity, thus providing insight into its complex and evolving reality”).

<sup>64</sup> John Dewey, *The Historic Background of Corporate Legal Personality*, 35 *Yale L.J.* 655, 669 (1926). Alternatively, they may be unable to approach lasting consensus because they reveal fundamental questions outside the purview of legal and economic analysis. See Brynnar Nelson Swenson, *The Corporate Form: Capital, Literature, Architecture* 7-8 (2008).

<sup>65</sup> That question, it should be clear, is wholly normative.

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embedded in each of these approaches to create a clear paradigm of *corpo economicus*.<sup>66</sup>

*Homo economicus* is the personification of the rational choice model of decision-making that is the basis of most microeconomic analysis. Rational choice is defined as the process of determining what options exist and, then, choosing the “best” one according to some consistent criterion. The rational actor model of human behavior assumes that individuals exhibit the following traits:

- (a) perfect self-interest, or consideration of only the costs and benefits that accrue to the actor;<sup>67</sup>
- (b) perfect information, or knowledge of all information and circumstances, including the probable outcomes, relevant to a decision; and
- (c) perfect rationality, or the capacity to logically order options according to their performance with respect to consistent criterion (utility) and the absolute tendency to select the utility maximizing option.<sup>68</sup>

Such an individual will, invariably, act to maximize his utility, taking into account existing opportunities and constraints, on the one hand, and probable outcomes, on the other.<sup>69</sup> While the idea of utility may take into account the full range of individual preferences, economic man is only a functional predictive tool if utility is taken to mean material welfare. The core features and, more important, the substantive implications of this paradigm have been incorporated into the understandings of the corporation outlined above implicitly, expressly, or both.

*Corpo economicus* is most apparent in aggregate theories of the nature of

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<sup>66</sup> See generally Richard A. Posner, *Economic Analysis of the Law* (6th ed. 2003) (elaborating a neoclassical theory of law and economics that takes as a given that corporations are rational actors that seek to maximize profits).

<sup>67</sup> Robert H. Frank, *Microeconomics and Behavior* 18 (3rd ed., 1997). See also Frank, Robert H., *If Homo Economicus Could Choose His Own Utility Function, Would He Want One with a Conscience?* 77(4) AM. ECON. REV. 593-604 (1987); Frank, Robert H., *Rethinking Rational Choice*. in *BEYOND THE MARKETPLACE: RETHINKING ECONOMY AND SOCIETY* 53-87 (Friedland, Roger, and Robertson, A. F., eds., 1990).

<sup>68</sup> Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEORGETOWN L. J. (2002).

<sup>69</sup> Gary Becker offers a typical account of those principles: “all human behavior can be viewed as involving participants who maximize their utility from a stable set of preferences and accumulate an optimal amount of information and other inputs in a variety of markets.” Gary S. Becker, *The Economic Approach to Human Behavior* 14 (1976).



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the corporation. These perspectives view the corporation as nothing more than the sum of the constituents of which it is comprised. Currently dominant contractarian framings of the aggregate theory view businesses as a collection of voluntary agreements entered into among stakeholders, from owners and management to employees, suppliers, and consumers.<sup>70</sup> The corporation is “an entity in rational patterns no different from those of human actors.”<sup>71</sup> From this perspective, fully informed, perfectly logical, selfish, profit-pursuers interact in the corporation, leading to corporate behavior that, in turn, reflects those aims. If each actor maximizes profit, profit will necessarily be maximized for the corporation. Profit maximization is, indeed, the *sine qua non* of the corporation under this perspective.

The corporation-as-a-natural-entity is also *corpo economicus*. Placed in its historical context, the perspective is a reaction to the difficulty of identifying a one-to-one correspondence between corporate behavior and either the behavior of any individual within the corporation or the combined behavior of many or all of the corporation’s constituents.<sup>72</sup> Thus, the corporation is imbued with an independent will determined solely by the interests of the corporation. Indeed, this separation of control (the will of the corporation) from its ownership, is a central feature if not the defining characteristic of the corporation. These differentiated goals and interests, support the idea of corporate personhood as investing corporations with the a parallel spectra of rights as other independent individuals. Chief of among these is the idea that as a real, independent entity, the corporation should be free from heavy state regulation and oversight. Embedded in that idea is that corporations are amenable to the same predictive analyses as other persons, namely *homo economicus*.<sup>73</sup>

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<sup>70</sup> Stephen M. Bainbridge, *Corporation Law and Economics* (2002).

<sup>71</sup> Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 *Law & Soc. Inquiry* 179, 210 (2005).

<sup>72</sup> David Millon, *Theories of the Corporation*, 1990 *Duke L.J.* 201, 212 (1990).

<sup>73</sup> For example, the foundational text in corporate governance, *The Modern Corporation and Private Property*, made a central observation: in the mega-corporation that dominates the American economy, the unity of ownership and control is destroyed. Since this unity is a key assumption of the institution of private property, authors Aodlf Berle and Gardiner Means proposed principles of corporate governance to mitigate the dangers such disunity presents. However, the dangers they identify exist only if it is presupposed that the corporation displays the characteristics of *corpo economicus*. Similarly, the prevailing contract conception of the

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The artificial, grant or concession theory of the corporation—as articulated by Chief Justice Marshall—holds that the corporation possesses only those characteristics allowed by the state. As a framework, this indicates that the only relevant behavior of the corporation is that prescribed in the charter. Reflected in the law, this implies that the corporation’s behavior can be highly circumscribed and singularly limited in the ways described by the rational choice model.<sup>74</sup> As the aims of the states in chartering corporations evolved and narrowed on economic contributions the correspondence between the artificial entity perspective of the corporation and the *corpo economicus* is complete. Corporations are chartered by the government in order to engage in economic activity (for the benefit of their owners). With these economic aims as the only aims permitted by the charter, the corporation will singularly focus on this profit-maximizing imperative.

Each of the primary answers to the question “what is a corporation?,” then, ultimately gives the same basic answer: The corporation is *corpo economicus*. Whether *corpo economicus* is constituted at the behest of and beholden to the state, an independent entity meriting the rights (and responsibilities) of natural persons, or a nexus of contracts reflecting the voluntary arrangements of private individuals are ways structure the conversation about whether and how to respond to the implications of *corpo economicus*.

For example, proponents of the nexus of contracts perspective, conclude that *corpo economicus* is largely self-regulating through market forces that dominate the various aspects of the corporate form: management, ownership, employment, etc. The acceptance of this normative position is arguably the basis of the significant judicial deference shown to corporate executives.<sup>75</sup> Alternatively, the separation of ownership and control in *corpo economicus*, emerging as a problem in the real entity view of the corporation, raises significant problems of agency costs, potentially supporting the imposition and enforcement of strong fiduciary duties.

These abstractions of *corpo economicus* provide the foundation on which business law—from incorporation to securities regulation to corporate governance

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corporations—generally accepted as undermining the normative proposals offered by Berle and Means—rely on core characteristics of economic man.

<sup>74</sup> This idea was key in the decline of this perspective.

<sup>75</sup> See, e.g., *Joy v. North*, 692 F2d 880 (1982)(business judgment rule).

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rules—is built. And, unlike *homo economicus*, who has been empirically elusive, examples of *corpo economicus* abound. Where engaged directly, the paradigm tends to be accepted. It is not presented merely as the best predictor of corporate behavior, permitting intelligent regulatory decision-making. Rather, *corpo economicus* is largely accepted as the empirical norm from which deviations are pathological. Even critiques of *corpo economicus* tend to accept the paradigm. Notably, progressive corporate legal scholarship and advocates of corporate social responsibility, engage in a largely normative discourse about what the corporation should be and how the law could incentivize rational profit-maximizers to take into account a broader range of interests and concerns.<sup>76</sup> Nonetheless, they start from the idea that *corpo economicus* is a standard position that must be addressed. Similarly, newer developments in corporate law, clearly start from *homo economicus*. The so-called “B-corporation” or benefit corporation, which incorporates with pursuit of some philanthropic purpose expressly included in its organizational documents, making failure to pursue that extra purpose actionable by shareholders, is intended to give flexibility to those individuals who reject profit as the only vector of utility. However, by creating a separate, special corporate form for such entities, states adopting the model reinforce the idea the standard or “normal”.

Behavioral and experimental law and economic approaches to corporations are making advances with respect to empirical testing of basic business functions, as relevant to corporate and securities law. The descriptive contribution of this work is largely limited to refining the concept of rationality applicable to *corpo economicus*. Even more circumscribed, the normative implications of this work only question the strength of the contractarian market hypothesis. *Corpo economicus* with bounded rationality, rather than perfect, should be agnostic toward regulation.

Notwithstanding the orthodoxy of *corpo economicus* as the paradigm of corporate behavior, corporations routinely diverge from this model in practice. There are many reasons this could take place. A corporation may veer from the paradigm because of “groupthink,” which occurs when desires for conformity lead to irrational behavior. Advancing the project of the behavioral law and economics

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<sup>76</sup> Taking a notably more nuanced approach and using behavioral economics to broaden the discussion of corporate law is the work of Lyn Stout over more than twenty years. Her approach, however, does not engage the identity roles for corporations suggested here.

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area of inquiry, real corporations may diverge from *corpo economicus* because the model may be too inflexible. As mentioned above, instead of perfect rationality, the model may need to contemplate bounded rationality—which essentially constitutes decision-making in the absence of information or the capacity of identify and pursue preferences. In both these examples, divergence is pathological. The section that follows sets out three archetypal divergences from *corpo economicus*, suggesting that in each such divergence was a normal manifestation of the corporate form.

**A. Lehman Brothers & Corporate Malfeasance**

The legendary glory and the story of the spectacular fall of the corporation by that time publicly traded as Lehman Brothers Holding, Inc.<sup>77</sup> is well known and has been the subject of extensive academic and popular analyses.<sup>78</sup> Founded in 1850, it was one of the oldest and most profitable investment banks on Wall Street—“a titan of America’s financial system”<sup>79</sup> that underwrote F. W. Woolworth, Macy’s, American Airlines, TWA, Pan American Airlines, Campbell Soup Company, B. F. Goodrich, RCA, RKO, Paramount, and 20th Century Fox.<sup>80</sup> While Lehman’s historical strength was in underwriting and trading fixed income

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<sup>77</sup> Lehman was comprised of many legal entities beyond this ultimate parent holding company; this legal structure was, in turn, unrelated either its operational structure or the lines of business in which it engaged. Stephen J. Lubben & Sarah Pei Woo, *Reconceptualizing Lehman*, 49 Tex. Int’l L.J. 297, 303 (2014). These complexities reflect regulatory arbitrage and perceived operating efficiency, rather than any substantive impact on analysis of the group as a single corporation.

<sup>78</sup> An article-length treatment would be required to provide a full bibliography of Lehman Brothers. For a sample of materials relating to the period leading up to its 2008 failure (upon which the proceeding description is built), see Christopoulos, A. & Mylonakis, J. & Diktapandis, P., *Could Lehman Brothers’ Collapse be anticipated? An examination using CAMELS Rating System*, 4 International Business Research (2011); Hope Greenfield, *The decline of the best: An insider’s lessons from Lehman Brothers*, 2010 (55) Leader to Leader 30-36 (2010); Jeffers, A., *How Lehman Brothers used Repo 105 to manipulate their financial statements*, 8 Journal of Leadership, Accountability and Ethics (2011); Levine, R., *An autopsy of the US financial system: accident, suicide, or negligent homicide*, 2(3) Journal of Financial Economic Policy (2010); Maux, J. & Morin, D., *Black and white and red roll over: Lehman Brothers’ inevitable bankruptcy splashed across its financial statements*, 2 International Journal of Business and Social Sciences, (2011); LAWRENCE McDONALD, *A COLOSSAL FAILURE OF COMMON SENSE* (2009); Andrew R. Sorkin, *The Race to Save Lehman Brothers*, The New York Times (2009); Andrew R. Sorkin, *Lehman’s Last Hours*, The New York Times (2010); VICKY WARD, *THE DEVIL’S CASINO: FRIENDSHIP, BETRAYAL, AND THE HIGH-STAKES GAMES PLAYED INSIDE LEHMAN BROTHERS* (2010).

<sup>79</sup> Edward J. Estrada, *The Immediate and Lasting Impacts of the 2008 Economic Collapse-Lehman Brothers, General Motors, and the Secured Credit Markets*, 45 U. Rich. L. Rev. 1111, 1113 (2011).

<sup>80</sup> LAWRENCE McDONALD, *A COLOSSAL FAILURE OF COMMON SENSE* (2009).

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securities, by the 1990s the firm had diversified its sources of revenue.<sup>81</sup> In mid-2000s, with the repeal of the Glass-Steagall Act,<sup>82</sup> Lehman began a higher growth strategy, moving from the low-risk brokerage model to a higher-risk banking model, which included activities like real estate mortgage lending.

That change transformed Lehman financial profile, as the company began “holding” assets on its own balance sheet, instead of merely “transferring” them to third-parties. The practical consequence of this change was that Lehman started internalizing the risks associated with its expanded ventures in riskier activities—such as subprime lending and packaging and trading in exotic and now maligned mortgage-backed securities, and other derivatives—in the already higher risk real estate investment market. Investment in high-margin products during the apex of the housing boom, led Lehman to post record results. In 2007, it recorded profits of \$4.2 billion, revenues of \$19.3 billion; the market price of Lehman’s stock reached a high of \$86.18 in February of that year, and its market capitalization was close to \$60 billion. However, it was highly leveraged and exposed to the eventual bursting of the housing bubble, the scope of which became fully apparent in mid-2007.

### **1. Rational Choice & Financial Distress**

Though widely criticized, in the aftermath, as foreseeably bad business judgment,<sup>83</sup> what came to be seen as the causes of the distress that led to Lehman’s ultimate collapse—reckless lending through subsidiaries across the country that were making convoluted subprime loans to questionable borrowers and excessive risk taking in opaque derivatives and structured finance products—are not generally counted as malfeasance.<sup>84</sup> Rather, it was the company’s response to that

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<sup>81</sup> By 2008, it was involved in virtually all aspects of the economy impacted by the financial services sector. *Id.* at 1114.

<sup>82</sup> The Glass-Steagall Act of 1933, Banking Act § 16, 48 Stat. at 184-85; § 20, 48 Stat. at 188-89 (repealed 1999); § 21, 48 Stat. at 189); § 32, 48 Stat. at 194 (repealed 1999), created a “wall” between investment banking and commercial banking, by prohibiting commercial banks from participating in the investment banking business, because “affiliations between these institutions were perceived as a main factor contributing to the stock market crash of 1929 and the Great Depression.” Joseph Jude Norton, *Up Against "The Wall": Glass-Steagall and the Dilemma of A Deregulated ("Reregulated") Banking Environment*, 42 Bus. Law. 327 (1987). The wall was eventually torn down by the Gramm-Leach-Bliley Act of 1999.

<sup>83</sup> Lawrence G. McDonald, *A Colossal Failure of Common Sense: The Inside Story of the Collapse of Lehman Brothers* (2010).

<sup>84</sup> *But see* Mark Denbeaux, et al., *Lehman Brothers: A License to Fail with Other People’s Money*

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impending and eventual financial distress. And, it is in this regard that Lehman clearly diverged from the *corpo economicus* model.

*Corpo economicus*'s rational choice model is built on three axioms: (a) perfect self-interest, (b) perfect information, and (c) perfect rationality. They combine to dictate that, when the housing market crashed, Lehman Brothers—neutrally pursuing its own best interest—would have selected an option (i.e. available and feasible course of action) likely to produce the best financial return given the circumstances in mid- to late 2007.

By all accounts, in late-2007, it was clear that the housing market was not going to rebound in a way that relieved the distress created by Lehman's leverage. It was also widely accepted that the company had a serious, near term liquidity problem. Thus, Lehman had at least two options: declare bankruptcy, or sell all or part of the company. Declaring bankruptcy (which may have been premature) would guarantee the unwinding of the company, and likely result in limited if any meaningful returns for Lehman's investors. On the other hand, the financial distress would have been significantly mitigated, if not eliminated, by the sale of Lehman's mortgage-related portfolio, even at a large loss.<sup>85</sup> To facilitate such a sale, Lehman would need to increase its liquidity, triage its exposure to the flailing mortgage market, and decrease its leverage.

Led by its Chief Executive Officer, Richard Fuld, Lehman ostensibly chose the latter option. Shortly after the collapse and federal government-backed fire sale of Bear Sterns in March 2008, Lehman executives sought a deal with Warren Buffett's Berkshire Hathaway for that company to obtain a stake in Lehman, which could have aided in the essential mortgage portfolio sale. Pursuant to the proposed transaction, Berkshire Hathaway would have provided a significant liquidity infusion in exchange for preferred shares paying a dividend of nine percent and convertible to common shares at the then-market price of \$40.<sup>86</sup> Lehman executives ultimately rejected the transaction as undervaluing the company. It made several more similar overtures during the summer of 2008, at least some of which were also rejected for the same reasons.

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<sup>85</sup> Assuming that portfolio would have, necessarily been sold at a loss, the company would rationally have sought to, subsequently, raise sufficient capital to cover any losses incurred in such a sale.

<sup>86</sup> <http://www.bloomberg.com/apps/news?sid=aZ1syPZH.RzY&pid=newsarchive>

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## **2. Malicious Choice & Financial Distress**

Ultimately, Lehman was unable to increase its liquidity, mitigate its mortgage exposure, or decrease its leverage in ways that the company found acceptable. The unacceptability of the rational alternatives is generally ascribed to management egos. It is said that “Fuld lived for and identified with his firm. It was his oxygen....” And, he perpetuated a culture of loyalty to Lehman that permeated the executive structure. Led by Fuld, the hardscrabble mavericks at Lehman, had averted the company’s collapse on their own terms several times before. Lehman, the Fuld team had proven, was bank for which premiums were paid. Thus, it was impossible—in early to mid-2008—to conclude a transaction that did not recognize this value.<sup>87</sup>

Instead, after recognizing the magnitude of the economic crisis, Lehman doubled-down on its risk, while also disguising the declining value of its assets. Even as the real estate investment market that had buoyed Lehman’s growth rapidly deteriorated, the company continued writing mortgage-backed securities and publicly claimed to have implemented the strategies necessary to the bank’s survival. To protect the company’s reputation as a “cat with nine lives” and maintain their place in it, Lehman’s management dramatically increased the amount the company was prepared to lose in the real estate market, decimated remaining shareholder value, jeopardized potential strategic partnerships, and risked criminal sanctions.

These acts were not inadvertent. Internally, executives at Lehman were using deliberate accounting misdirection, concealment, and communication of misleading information to preserve this image of financial strength when the company was actually financially distressed.<sup>88</sup> The financial statement massaging may not have occurred so aggressively before, but the practice of “polishing” financial statements at quarter’s end, using a secret cash cushion had been a well-established strategy to protect and project Lehman’s image by the time the company began its more extensive manipulation.<sup>89</sup>

During the credit crunch, Lehman’s primary strategy to improve its financial

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<sup>87</sup> For a complete account of this perspective, *see* Vicky Ward, *DEVIL'S CASINO: FRIENDSHIP, BETRAYAL, AND THE HIGH STAKES GAMES PLAYED INSIDE LEHMAN BROTHERS* (2011).

<sup>88</sup> 1 Report of Anton R. Valukas, Examiner, at 6-8, *In re Lehman Brothers Holdings Inc.*, No. 08-13555 (Bankr. S.D.N.Y. Mar. 11, 2010).

<sup>89</sup> *See* Ward, *supra* note 87.

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position was the utilization of “Repo 105,” an accounting device that helped create favorable net leverage and liquidity measures on the balance sheet.<sup>90</sup> In simple terms, Lehman raised cash by selling its toxic assets to Hudson Castle, which appeared to be an independent company but was actually controlled by Lehman. Assets sold to Hudson Castle were repurchased a few days after their sale, and because they were valued at 105 percent of the cash received, Generally Accepted Accounting Principles (GAAP)<sup>91</sup> allowed the transactions to be treated as sales, thus removing the assets from Lehman’s balance sheet altogether. Through this technique, Lehman transferred a combined total of \$100 billion off its balance sheet at the end of the first and second fiscal quarters of 2008. As a result, its leverage ratio fell from 13.9 to a far more favorable 12.1. Ultimately, the company’s global finance controller admitted that, “there was no substance to the transactions.”<sup>92</sup> Three times, in late 2007 and the first half of 2008, Lehman used “balance sheet manipulation,” according to the examiner’s report, to hide debt of \$38.6 billion, \$49.1 billion and \$50.4 billion.

Once, Lehman’s façade crumbled, the company rapidly unraveled.<sup>93</sup> On September 15, 2008, after months during which its chief executive executed plan after plan to save the company; after the United States Treasury made it clear that Lehman would not be bailed out by the federal government; and after a round the clock weekend during which officials from the Federal Reserve Bank of New York, senior representatives of major New York based financial institutions, Secretary of the Treasury Henry Paulson, and Securities and Exchange Commission Chairman Christopher Cox—all advised by the highest billing distressed finance and bankruptcy lawyers from most of the major American law

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<sup>90</sup> William H. Widen, *The Arbitrage of Truth: Combating Dissembling Disclosure, Derivatives, and the Ethic of Technical Compliance*, 66 U. Miami L. Rev. 393, 427 (2012).

<sup>91</sup> James M. Lukenda & Michael Scannella, *International Financial Reporting Standards: Hello Accounting Convergence, Goodbye GAAP?*, Am. Bankr. Inst. J., April 2009, at 22, 22

<sup>92</sup> The Role of the Accounting Profession in Preventing Another Financial Crisis: Hearing Before the Subcomm. on Sec., Ins., & Inv. of the S. Comm. on Banking, Hous., & Urban Affairs, 112th Cong. 55, 56 (2011) (statement of Anton R. Valukas, Chairman, Jenner & Block, LLP).

<sup>93</sup> Christian Plumb and Dan Wilchins, *Lehman CEO Fuld’s hubris contributed to meltdown*, REUTERS, September 14, 2008, <http://www.reuters.com/article/2008/09/14/us-lehman-backstory-idUSN1341059120080914> (last visited Apr 22, 2015) (“Lehman’s fall from grace was brutally fast.”).



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firms serving the banking sector—strategized to find any workable alternative,<sup>94</sup> Lehman filed for Chapter 11 bankruptcy protection in federal court at 1:45 a.m. Eastern time. With \$639 billion in assets and \$619 billion in debt, Lehman’s bankruptcy filing was the largest in history.<sup>95</sup> The failure definitively heralded a profound systemic crisis in financial markets, national economies, and the global economy,<sup>96</sup> and Lehman Brother’s garnered a legacy as a paradigmatic case of corporate malfeasance.

***B. Whole Foods Market, TOMS, & Corporate Altruism***

Also subject of considerable academic and popular attention are the stories of the rapid rise of TOMS Shoes, LLC with its buy one, give one business/marketing model, and Whole Foods Market, Inc., promoting what it eventually termed “conscious capitalism.” Whole Foods Market, a publicly traded corporation and the world’s largest natural foods retailer, operates nearly 400 stores and generated more than \$14 billion in revenue in 2014. Founded in 1980, the company grew from a single organic grocer to become the principle high-end national supermarket, pioneering a unique democratic organization model based on four pillars: “higher purpose, stakeholder integration, conscious leadership, and conscious culture and management,” tenets the company’s founder and co-chief executive officer, John Mackey, claims are “foundational... not tactics or strategies.”<sup>97</sup> TOMS Shoes is a privately owned corporation, whose story bears an affinity with that of Whole Foods in that it introduced an innovative business

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<sup>94</sup> Debtors’ Disclosure Statement for Joint Chapter 11 Plan of Lehman Brothers Holdings Inc. and Its Affiliated Debtors Pursuant to Section 1125 of the Bankruptcy Code at 28, *In re Lehman Bros. Holdings Inc.*, No. 08-13555 (Bankr. S.D.N.Y. Apr. 14, 2010).

<sup>95</sup> Report of Anton. R. Valukas, Examiner, at 3, *In re Lehman Bros. Holdings*, No. 08-13555 (Bankr. S.D.N.Y. Mar. 11, 2010 (08-13555 (JMP)).

<sup>96</sup> In the U.S. alone, in a period of a few months beginning in early September 2008, the government-sponsored enterprises known as Fannie Mae (Federal National Mortgage Association) and Freddie Mac (Federal Home Loan Mortgage Corporation) were placed in conservatorship; Lehman Brothers filed for bankruptcy; Bank of America acquired Merrill Lynch at a significant discount; the government intervened to help insurance giant American International Group (A.I.G.); The Washington Mutual Investment Fund was closed by the Federal Office of Thrift Supervision; Goldman Sachs and Morgan Stanley became bank holding companies; and Wells Fargo Bank eventually took over Wachovia Bank. These events, in addition to the earlier collapse of the IndyMac Bank and the takeover of the investment firm Bear Sterns by J. P. Morgan Chase have been referred to as the “Great Recession.”

<sup>97</sup> John Mackey, & Rajendra Sisodia, *CONSCIOUS CAPITALISM: LIBERATING THE HEROIC SPIRIT OF BUSINESS* (2013).

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model—which is now being replicated at a fast pace<sup>98</sup>—into the retail industry. Founded in 2006, the footwear company’s primary product line consists of a single-style of shoe based on the Argentine *alpargata* (a type of *espadrille*). TOMS was valued at \$625 million at the time Bain Capital, a prominent private equity firm, acquired a fifty per cent interest in the company. It enjoyed a rapid ascent, becoming a significant footwear brand through its “One for One” model—a pair of shoes is donated to a child in need for every pair bought by the consumer.

**1. Rational Choice & the Markets for Food & Shoes**

The predictions and prescriptions of *corpo economicus* in the retail sector—whether for groceries or fashion—are straightforward. For the supermarket, the core (long-term) strategic decisions consist of pricing and “store format,” or identifying targeted demographics, i.e. consumer segment.<sup>99</sup> Because the industry generates \$500 billion in annual revenue and competition is significant, these strategic decisions are key to obtaining, maintaining, and growing market share. Once made, they are relatively inelastic because strategic changes impose significant penalties on retailers.<sup>100</sup> Thus, on an ongoing basis, supermarket retailers maximize profit by, *inter alia*, obtaining merchandise consistent with long-term strategy—for Whole Foods, this is organic, natural food and groceries—at the lowest cost possible.<sup>101</sup>

The consumer fashion industry, divided into retail and brand segments, is as competitive as the supermarket industry. While TOMS maintains a limited direct retail operation, it primarily fits into the brand segment. Brands focus on designing, producing, and delivering products to the marketplace that engage their target

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<sup>98</sup> A Harvard Business School study counts sixteen such companies created since 2009. However, Warby Parker Retail, Inc., a private B corporation selling eyewear is the next largest and most successful adopter of the model. Its “buy a pair, give a pair” commitment is less prominently promoted, but within its first three years of operation it reported donating more than 500,000 pairs of glasses, a figure which more than doubled during fiscal year 2014.

<sup>99</sup> Gauri, Dinesh Kumar, Minakshi Trivedi, and Dhruv Grewal. “Understanding the determinants of retail strategy: an empirical analysis.” *Journal of Retailing* 84, no. 3 (2008): 256-267.

<sup>100</sup> For example, Sears famously switched from a “HiLo” promotional pricing model to an “Everyday Low Price” model, advertising that they eliminated sales because everyday offered low prices. Though the average price of retail items had not changed significantly, customers perceived the change as making the company’s merchandise less competitively priced, and the strategic change led to a buyout by Kmart. *Id.*

<sup>101</sup> *Id.*

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demographic. To do this, a brand (1) identifies its unique product, (2) performs a strategic analysis of competitor pricing to position itself in the market with respect to the market leader, (3) determines a wholesale price (based on that position), and (4) then develops its product by defining costs and materials at about half the wholesale price. This well-established strategic process represents a logical integration of available market information to permit a brand to maximize its profits for a given product line.<sup>102</sup>

Neither Whole Foods nor TOMS positions itself in the market as predicted by these standard accounts of the relevant industry.

## **2. Altruistic Choice & the Markets for Food & Shoes**

While Whole Foods invests considerable effort in its store format, catering to a high end, health conscious consumer segment with remarkably opulent store designs, layouts, and product mixes, it does not adopt a traditional pricing strategy and does not consistently source its product lines at the lowest costs.

Instead, Whole Foods' strategy begins with the company's "capitalism with a conscious," through which Whole Foods, the supermarket, is re-imagined as Whole Foods, "a community of people working to make a difference in the world, where the mission matters as much as the bottom line."<sup>103</sup> That mission is the reversal of the industrialization of the world's food supply to provide people with better things to eat.<sup>104</sup> Based on its mission, Whole Foods distinguishes itself not through competitive pricing, but through its commitment to organic produce and sustainable agriculture<sup>105</sup> and influencing how consumers think about their own

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<sup>102</sup> For a general discussion of these concepts *see*, Fairhurst, A., Moore, M., (2003) Marketing capabilities and firm performance in fashion retailing, *Journal of fashion marketing and management*, vol. 7, no 4. ss. 386-397; Sherwin Rosen (1974) Hedonic Prices and Implicit Markets: Product Differentiation in Pure Competition, *The Journal of Political Economy*, Vol. 82, No. 1. p. 34-55. This description of the development and pricing strategy for brand process is adapted from, Matthew Carroll, How Fashion Brands Set Prices, *available at* <http://www.forbes.com/sites/matthewcarroll/2012/02/22/how-fashion-brands-set-prices/>

<sup>103</sup> *Creating a Community of Purpose: Whole Foods Market*, Harvard Business Review.

<sup>104</sup> Whole Food, Company Profile, Harvard Business School.

<sup>105</sup> Which is credited with mainstreaming concerns about the way food was produced—including how animals were raised and slaughtered, how fish were harvested, how produce was farmed, and how other staples were brought to market.

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health and well being in relation to food quality.<sup>106</sup> For example, it pioneered disclosure giving customers information about the origin and environmental “friendliness” of products sold in its stores. The company self-consciously sees these distinctions as costlier. None of the traditional pricing strategies fit Whole Foods’ ideology, and it has instead earned the moniker “Whole Paycheck,” for its lack of competitive pricing.<sup>107</sup>

Similarly, the company’s supply chain management does not consistently seek minimize costs but to support its altruistic orientation. Whole Foods operates seafood-processing plants to ensure the integrity of the company’s sustainable salmon-sourcing policies.<sup>108</sup> Since 2006, it has offset all of the company’s electric energy consumption with renewable energy credits from wind farms.<sup>109</sup> Based partly on a study citing lobsters’ ability to feel pain and on concerns about the conditions in which lobsters were kept from the moment of capture to the moment of sale, Whole Foods stopped selling live lobsters in its stores.<sup>110</sup>

A notable example of this altruistic supply chain management, is Whole Foods’ revision of its standards for meat suppliers in 2003. At an annual shareholders meeting, vegan animal rights activists interrupted a presentation to protest the treatment of the ducks sold in Whole Foods supermarkets.<sup>111</sup> All evidence, importantly the considerable revenue growth enjoyed by the company during the

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<sup>106</sup> *Id.*

<sup>107</sup> In response to waning stock prices and revenue underperformance in 2014, Whole Foods experimented with short-term discounting but ultimately responded to the issues with strategies designed to reinforce its relationship to its target demographic (e.g. by introducing Apple Pay and other app based amenities to its shopping experience.) See Rafi Mohammed, *Whole Foods Market Needs More than Price-Tinkering*, Harvard Business Review (2014); Ashely Lutz, *Whole Foods Is Making 6 Changes To Improve Business* available at <http://www.businessinsider.com/whole-foods-turnaround-strategy-2014-9#ixzz3YusfOi8I>.

<sup>108</sup> *Creating a Community of Purpose: Whole Foods Market*, Harvard Business Review.

<sup>109</sup> *Id.*

<sup>110</sup> An exception was later made for the store in Portland, Maine, but only after it found a supplier that could transport and treat the crustaceans more humanely.

<sup>111</sup> The protest, which was the culmination of two years of pressure, formed part of a broader backlash against the continued growth of the company, including a critical examination of the company’s food sourcing policies, ultimately presented in the expose by Michael Pollan, *The Omnivore’s Dilemma* (2006).

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same period, suggests that the vegan protestors, as well as traditional health-food customers, no longer represent the core demographic-base of Whole Foods. Indeed, the company openly compares itself to Starbucks Coffee and luxury cars.<sup>112</sup> Nevertheless, committed to the tenet of stakeholder integration, Whole Foods executives eventually studied the issue, and came to agree with the protestors' claims about "organic factory farms." As a result, even though the existing standards were among the most rigorous, the company initiated a multi-stakeholder review, and then revision, of its standards for meat suppliers.<sup>113</sup>

The new requirements increased costs for certain meat products and forced Whole Foods to discontinue certain product offerings. The company also donated \$550,000 to launch an independent nonprofit organization, the Animal Compassion Foundation, dedicated to helping farmers "achieve a higher standard of animal welfare excellence while still maintaining economic vitality," and collaborated with farmers and organizations, like People for the Ethical Treatment of Animals (PETA) and the Humane Society of the United States to develop a system of "Animal Compassionate Standards" for its meat and poultry products.<sup>114</sup> Whole Foods' response was so aggressive, that it was subsequently sued by another customer of one of its suppliers, with which the supplier had ceased dealing to comply with Whole Foods revised requirements.<sup>115</sup>

Unlike Whole Foods' altruism, in which the company engaged notwithstanding impacts on revenues or profits, it is generally accepted that TOMS' great success is due, at least in part, to its "buy-one, give-one" model, which is the company's socially conscious play on the more traditional "buy one, get one" promotional concept.<sup>116</sup> For every pair of shoes that TOMS sells, it donates a pair of shoes to a needy child in a developing country. As the company introduces new product lines, it continues its "one for one" pledge in a relevant manner. So, when TOMS

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<sup>112</sup> *Creating a Community of Purpose: Whole Foods Market*, Harvard Business Review.

<sup>113</sup> John Mackey, & Rajendra Sisodia, *CONSCIOUS CAPITALISM: LIBERATING THE HEROIC SPIRIT OF BUSINESS* (2013).

<sup>114</sup> *Creating a Community of Purpose: Whole Foods Market*, Harvard Business Review.

<sup>115</sup> The customer was a producer of *foie gras*, which requires ducks be force fed, a practice Whole Foods deemed inhumane and, thus, unacceptable.

<sup>116</sup> In addition to its buy-one, give-one strategy TOMS organizes an online marketplace where customers can shop for products from other "like-minded" companies engages in the traditional range of corporate philanthropy, as well as sustainability initiatives.

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introduced an eyewear line, it also began donating prescription glasses, medical treatment and/or sight-saving surgery with each purchase; when the company launched a line of coffee, it pledged to give 140 liters of safe water (a one week supply) through its giving partners; and its latest venture (hand bags) distributes maternal health kits and trains birthing attendants.

As corporate philanthropy, these projects are unremarkable. Critics have further argued that TOMS' giving model, at best, has significant unintended negative impacts and, at worst, replicates the counterproductive and ineffectual aid models that were discredited decades ago.<sup>117</sup> Nevertheless, TOMS' altruism diverges significantly from *corpo economicus*' brand development model.

Accounts of the development of the business and its initial product line certainly indicate that founder and “chief shoe giver”, Blake Mycoskie, engaged in the basic strategic analyses associated with brand development. He identified the Argentine increasingly popular *alpargatas* as a potentially attractive shoe style for a particular American demographic, modifying the basic design to appeal more to the aesthetics of that demographic. In pricing and manufacturing, he performed strategic analyses to identify wholesale price as well as materials, manufacturing site (originally Argentina but it quickly became apparent the China was more cost-effective)<sup>118</sup> enabling the company to enjoy a strong debut, rapid brand identification, and early profitability. He also engaged in compelling branding and marketing of the purchase and consumption as social engagement. For his business acumen, Mycoskie has been criticized and congratulated as a “legendary storyteller[] and clever advertising guru[].”<sup>119</sup>

However, these accounts very clearly indicate that none of these neutral strategic plans to maximize exposure, sales, and resultant profits, where the initial impetus behind the development of TOMS. Rather, the founder was motivated to “start something that mattered”:

Mycoskie was traveling in Argentina ... when he met a woman who was collecting shoes for the poor. Startled that in the 21st century so

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<sup>117</sup> See, e.g., Christopher Marquis & Andrew Park, *Inside the Buy-One, Give-One Model*, 2014 Stan. Social Innovation Rev. 27 (2014).

<sup>118</sup> Jeff Chu, *Toms Sets Out To Sell A Lifestyle, Not Just Shoes* available at <http://www.fastcompany.com/3012568/blake-mycoskie-toms>

<sup>119</sup> Nathan Rothstein, *The Limits of Buy-One Give-One*, 2014 Stan. Social Innovation Rev. (2014).

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many kids still needed shoes, he decided to start a shoe company that would give a pair away for every one it sold.<sup>120</sup>

In fact, his first instinct was to start a shoe-giving charity, but concluded a for-profit model would best meet the need he had identified.<sup>121</sup> This is TOMS' altruistic divergence from the model. *Corpo economicus* identifies a business opportunity or innovative product and uses that idea as a tool for creating value. TOMS identified a social need and developed an entrepreneurial strategy to fill it.

Whole Foods and TOMS are merely two salient examples of corporations engaging in behaviors that demonstrate disinterested and selfless concern for the well-being of others. Indeed, an entire avenue of research has developed to theorize, understand, and debate the viability and desirability of such social enterprises.

***C. Hobby Lobby's Corporate Deontology***

Corporate malfeasance and corporate altruism are established phenomena, recognized as undermining the descriptive and normative bases of *corpo economicus*. Beginning in 2012, the story of Hobby Lobby, Inc., introduced a new vector of divergence: corporate deontology, or the moral obligation to act in accordance with a certain set of principles and rules regardless of outcome.

Founded in 1972 as small arts and crafts retailer, Hobby Lobby expanded to sell arts, crafts, hobbies, home decor, holiday, and seasonal products. With 23,000 employees working in more than 600 mega-stores, it has become one of the largest closely held corporations in the United States. The company's owners consist of founder and chief executive officer, David Green, and several generations of his immediate family, all evangelical Christians. The corporation is open about its theological foundations, explaining:

We believe that it is by God's grace and provision that Hobby Lobby has endured. God has been faithful in the past, and we trust Him for our future. We are committed to: Honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles. Offering our customers

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<sup>120</sup> Blake Mycoskie, *Start Something that Matters* (2012).

<sup>121</sup> *Id.*

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exceptional selection and value. Serving our employees and their families by establishing a work environment and company policies that build character, strengthen individuals, and nurture families. Providing a return on the family's investment, sharing the Lord's blessings with our employees, and investing in our community.<sup>122</sup>

Hobby Lobby is known to fulfill its commitment to its faith-based principles and beliefs in conventional and unconventional ways, all largely tangential to its business. Conventionally, all of its charitable giving, reportedly representing half of its pretax earnings, is directed toward evangelical Christian ministries. Less conventionally, it buys full-page Christmas and Easter newspaper advertising in every city in which the company has a store. Referring readers to resources to know Jesus "as Lord and Savior," these "advertisements" prominently feature Christian imagery and Biblical quotations, but the company's name appears only in fine print at the bottom.<sup>123</sup> The company also employs several chaplains in a "Chaplain Services" department and offers a free health clinic for employees at the corporate headquarters because "it's the right thing to do."<sup>124</sup>

Hobby Lobby rose to national prominence in September 2012. Soon after, it would become subject to the provisions of the Patient Protection and Affordable Care Act of 2010, part of the legislative package that significantly reorganized the U.S. healthcare system, mandating that businesses provide contraceptive coverage to employees as part of their insurance plan offerings. Businesses failing to offer an employee health plan covering the required drugs, are subject to fines of up to \$1.3 million daily.

### **1. Rational Choice & the Coverage of Contraception**

If Hobby Lobby were *corpo economicus* the decision whether to comply with the contraceptive mandate would rest on whether the cost of compliance (i.e. providing a health plan covering the required drugs) is less than the cost of noncompliance.

The available evidence is not conclusive, however it suggests that, even absent daily fines, compliance with the mandate is likely cost-neutral and possibly cost-

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<sup>122</sup> [http://www.hobbylobby.com/our\\_company/](http://www.hobbylobby.com/our_company/)

<sup>123</sup> See e.g., [http://www.hobbylobby.com/assets/images/holiday\\_messages/messages/2015e.jpg](http://www.hobbylobby.com/assets/images/holiday_messages/messages/2015e.jpg).

<sup>124</sup> Jennifer Palmer, Hobby Lobby's health clinic to aid employees, cut costs, March 2, 2010, available at [newsok.com/hobby-lobbys-health-clinic-to-aid-employees-cut-costs/article/3443213](http://newsok.com/hobby-lobbys-health-clinic-to-aid-employees-cut-costs/article/3443213).



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saving. This conclusion is based on the prediction that the contraceptive coverage mandated by the Affordable Care Act would not increase insurance premiums because the savings from preventing unwanted and ill-timed pregnancy outweighs the increased cost of providing the coverage.

For example, estimates of the cost of providing contraceptives for one-year range from \$100 to \$600. Costs of prenatal care, delivery, and newborn care range from \$18,000 to \$28,000. Accordingly, preventing one unplanned pregnancy among eighteen women covered would result in cost savings for an insurer.<sup>125</sup> While there is no guarantee that insurance providers would pass on any of those cost savings, especially as they would be realized only in the long run, the expansion of federally provided insurance coverage in this way did not result cost increases.<sup>126</sup>

Available evidence also suggests that insurance coverage of contraception increases productivity of female workers, who make up the majority of Hobby Lobby's workforce. In addition to avoidance of absences associated with abortion, pregnancy, and maternity leave for women faced with unwanted pregnancies, women report "that access to contraception had enabled them to take better care of themselves or their families, support themselves financially, complete their education, or get or keep a job,"<sup>127</sup> key determinants of female worker productivity.

Thus, there is a not insignificant business case for contraceptive insurance.

## **2. Deontological Choice & the Coverage of Contraception**

Hobby Lobby did not engage in the cost benefit analysis outlined above. Indifferent to the efficiency or profit implications (or lack thereof) of its anti-contraceptive policy position, Hobby Lobby engaged in the following deontological analysis. As a Christian company, Hobby Lobby believes that life begins at conception; therefore, it opposes abortion. Facilitating access to contraceptive drugs or devices that operate after the point of conception is the equivalent to facilitating abortion, so to do so would violate its religious beliefs.

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<sup>125</sup> The Alan Guttmacher Institute, *Good for Business: Covering Contraceptive Care Without Cost-Sharing is Cost-Neutral or Even Saves Money* available at <http://www.guttmacher.org/media/inthenews/2014/07/16/>

<sup>126</sup> Id.

<sup>127</sup> Frost JJ and Lindberg LD, Reasons for using contraception: perspectives of U.S. women seeking care at specialized family planning clinics, 2012, *Contraception*.

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Accordingly, Hobby Lobby claimed the right to refuse contraceptive insurance to its employees. It filed suit seeking exemption from the obligation to provide insurance coverage for drugs the company deemed were abortifacient: Plan B (“The Morning After Pill”), Ella (a similar type of “emergency contraception”), Copper Intra-Uterine Device, and IUD with progestin.

Hobby Lobby’s religious deontology rendered irrelevant profit considerations.<sup>128</sup> The company took the same position when it elected to keep its stores closed on Sundays, despite losing millions of dollars in revenue. And, on other occasions, Hobby Lobby refused to transfer a building lease to a liquor store because they object to supporting alcohol consumption, even though accepting the offer would have resulted in significant cost savings, and it refused to transport beer for a major distributor, losing significant profit.

Hobby Lobby’s ultimately winning lawsuit has been analyzed in academic, political, and popular discourse, primarily as a fascinating religious freedom case. This makes sense. At issue was whether the corporation could “exercise” religion. That religious freedom debate, as well as discrimination perspectives, corporate personality debates, and the potential implications of the Supreme Court’s decision are all interesting and exciting paths of inquiry revolving around the case. However, it also provides a clear model for the concept of corporate deontology.

**II. DEPATHOLOGIZING *CORPO SAPIENS***

*Corpo economicus* personifies the one-dimensional popular, intuitive, and academic conception of the corporate form—value neutral profit maximizer. However, the preceding vignettes recall that practice has shown the inconsistency of this foundational corporate law concept, painting a much more complex and nuanced picture of what corporations do. The complex picture of the corporation varies considerably based on the vector of divergence from the model, malfeasance, altruism, or deontology. Nevertheless, the preceding vignettes reveal several important characteristics of the corporation that remain underappreciated and under-theorized, within legal discourse. The socio-cultural, political, and economic functions of corporations as social actors and societal institutions, reinforce that the central function of a corporation is the promotion and creation of capital. But, connecting those vignettes to property theory reveals that corporations

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<sup>128</sup> Hobby Lobby’s forty-six page complaint dedicated one sentence to the potential financial impacts of the mandate.

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serve multiple capital creation functions, specifically corporations are connection to a distinct and particularly important category of property, referred to here as “identity property,”<sup>129</sup> that merits heightened protection or deference because it is closely connected to proper self-development.

**1. What Corporations Do**

As early as 1916, scholars began to intuit that traditional notions of capital<sup>130</sup> were too narrow to capture the ways in which power (read: resources) is accumulated and exploited in social life.<sup>131</sup> Pierre Bourdieu responded to that intuition by redefining capital as the sum of all the resources available to facilitate action,<sup>132</sup> which he elaborated into a quadripartite taxonomy: economic, cultural, social and symbolic.<sup>133</sup>

Broadly, economic capital is equated with material wealth.<sup>134</sup> Cultural capital is comprised of “knowledge, skills and other cultural acquisitions, as exemplified by educational or technical qualifications.”<sup>135</sup> Social capital describes those resources available to secure benefits or advance one’s interests due to social connections, membership in social groups, or access to social networks.<sup>136</sup> And,

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<sup>129</sup> This term is meant to refer to that property that implicates one’s being more fully human (e.g., Radin’s personal property), as well as those property interests that impact one’s identity as such (e.g., taking into account Harris and Davidson’s insights).

<sup>130</sup> One traditional definition of capital is those “assets that yield income and other useful outputs over long periods of time.” Gary S. Becker, *Human Capital*, in *THE CONCISE ENCYCLOPEDIA OF ECONOMICS* (David R. Henderson, ed., 2d ed., 2008).

<sup>131</sup> See, Lyda Judson Hanifan, *The rural school community center*, 67 *Annals of the American Academy of Political and Social Science* 130-138 (1916) (describing social capital as “those tangible substances [that] count for most in the daily lives of people”).

<sup>132</sup> Pierre Bourdieu, *The Forms of Capital*, in *HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION* (John G. Richardson, ed., 1986). For a brief intellectual history of the “plethora of capitals,” see Michael Woolcock, *Social Capital and Economic Development: Toward a Theoretical Synthesis and Policy Framework*, 27 *Theory and Society* 151, 155, 155 n. 19, 159-61 (1998).

<sup>133</sup> Bourdieu, *id.*

<sup>134</sup> Pierre Bourdieu, *LANGUAGE AND SYMBOLIC POWER* 14 (1991)

<sup>135</sup> *Id.* Cultural capital is further differentiated into subtypes: embodied, objectified (e.g., physical cultural goods, like books), and institutionalized (e.g., institutional recognition of such capital, like diplomas). For Bourdieu, the neo-classical economic concept of human capital most associated with Theodore Schultz and Gary Becker, would fall within this category.

<sup>136</sup> Bourdieu, *supra* note 132 at 51 (“the aggregate of the actual or potential resources which are linked to possession of a durable network of more or less institutionalized relationships of mutual acquaintance and recognition”).

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symbolic capital denotes the resources associated with one's value as perceived by others—"standing, good name, honour, fame, prestige, and reputation."<sup>137</sup> The particular volume and composition of capital for an actor motivates that actor's actions towards particular types of goals and interests and facilitates "social mobility."<sup>138</sup> Embedded in the malfeasance, altruism, and deontology profiled above was the role of the corporation as a source of significant cultural, social, and symbolic capital.

## 2. Identity Property & Personhood

Exploring the idea of property—that is, what does the concept mean, and what does it have to offer as an independent unit of analysis?<sup>139</sup>—is a primary task of theoretical property inquiries in law, politics, economics, and philosophy.<sup>140</sup> Property theorists have drawn a fault line drawn between ostensibly lay understandings of property-as-things<sup>141</sup> and legalistic "bundle of sticks"<sup>142</sup> formulations.<sup>143</sup> Others portray the same line as property, defined as the

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<sup>137</sup> Pierre Bourdieu, *THE FIELD OF CULTURAL PRODUCTION* (1993).

<sup>138</sup> Writing from a neo-Marxist perspective, Bourdieu saw the motivational power of capital as distinctly in line with traditional capitalist values.

<sup>139</sup> Among the most recognized work attacking the viability of property is Thomas C. Grey, *The Disintegration of Property*, in XXII *NOMOS, PROPERTY* 69 (J. Roland Pennock & John W. Chapman eds., 1980); see also Edward L. Rubin, *Due Process and the Administrative State*, 72 *Cal. L. Rev.* 1044, 1086 (1984) ("[P]roperty is simply a label for whatever 'bundle of sticks' the individual has been granted."); Joan Williams, *The Rhetoric of Property*, 83 *Iowa L. Rev.* 277, 297 (1998) ("Labeling something as property does not predetermine what rights an owner does or does not have in it."); but see Stephen R. Munzer, *A Theory of Property* 31-36 (1990) (rejecting the argument that property is "too fragmented" for a general theory).

<sup>140</sup> See Gregory S. Alexander and Eduardo M. Peñalver, *AN INTRODUCTION TO PROPERTY THEORY* xi (2012) (defining competing theories of property as "different understandings of what property is, why we have it, and what its property limitations are").

<sup>141</sup> Grey, *supra* note 139 at 69.

<sup>142</sup> The origins of the metaphor are not entirely clear, but it is popularly believed to have been inspired by Wesley Hohfeld's analysis of rights and A.M. Honore's description of the incidents of ownership. J. E. Penner, *The "Bundle of Rights" Picture of Property*, 43 *UCLA L. Rev.* 711, 712 (1996).

<sup>143</sup> Stephen R. Munzer, *A THEORY OF PROPERTY* 24 (1990) contrasting the "popular conception" of property as things with the "legal conception" of property as relations); Bruce A. Ackerman, *PRIVATE PROPERTY AND THE CONSTITUTION* 26-29, 97-100 (1977) (contrasting the definition of property held by the Scientific Policymaker with that of the Ordinary Observer); Carol M. Rose, *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP* 2 (1994). For the legal transition from "things" to the "bundle of rights", see Michael A. Heller, *Three Faces of Private Property*, 79 *Or. L. Rev.* 417, 429-31 (2000). See also Gregory S. Alexander,

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relationship of a person to an entity,<sup>144</sup> versus property, defined as the relationship among persons with respect to entities.<sup>145</sup> From either side of these intellectual divides, the corporate capital project related in the vignettes above can be logically understood as creating property.<sup>146</sup>

In addition to satisfying traditional property definitions, corporate cultural, social, and symbolic capital is consonant with a line of contemporary scholarship that develops the way property not only organizes and incentivizes—its instrumental role—but also its intrinsically valuable function as constitutive of self, personality, community, and freedom.<sup>147</sup> The surface form of property creates a descriptively compelling connection to corporate capital, but its deep structure provides a normative foundation for countenancing that connection.

Charles A. Reich charted the first steps on this course in *The New Property*.<sup>148</sup> He viewed property in traditional terms as “guard[ing] the troubled boundary between the individual and the state,”<sup>149</sup> concluding that it facilitated the individual’s ability to control his own life,<sup>150</sup> which ability directly and inextricably connects to the acquisition and control of wealth.<sup>151</sup> However, Reich observed a change<sup>152</sup> in nature of wealth from things to status derived from a relationship to

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*Commodity & Propriety: Competing Visions of Property, in AMERICAN LEGAL THOUGHT, 1776-1970*, at 37-41 (1997).

<sup>144</sup> Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 *Yale L.J.* 357, 358 (2001) (defining the *in rem* character as the “distinctive type of right to a thing, good against the world”).

<sup>145</sup> Restatement (First) of Property I, 1 IN NT (1936).

<sup>146</sup> The financial capital created by the corporations profiled, unequivocally constitutes legally recognized property. However, the additional property is not intended to suggest legal recognition.

<sup>147</sup> An alternative catalogue of these intrinsic functions might be that the “right of property is not simply an economic right... property rights are also about self-expression, self-governance, belonging, and civic participation.” Gregory S. Alexander, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 67 (2006).

<sup>148</sup> Charles Reich, *The New Property*, 73 *Yale L.J.* 733 (1964).

<sup>149</sup> *Id.* at 733. Reich’s definition of property aligns with the *in rem*/property-as-things definition. *Id.* at 739 (“A man who has property has certain legal rights with respect to an item of wealth.”).

<sup>150</sup> Reich later argued that his interest was to collapse the distinction among the constitutional categories of “life, liberty, and property,” which is at least implicitly a key insight of classical liberal thought.

<sup>151</sup> *Id.* at 733.

<sup>152</sup> It is probably be more accurate to describe Reich’s “change” as his recognition of facts that always were.

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the state.<sup>153</sup> By 1964, when he was writing, traditional land or physical asset-based wealth had been and was increasingly being replaced by new sources, key among them government-created sources, like largess.<sup>154</sup> These new sources of wealth performed the traditional functions of land-as-property—”maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner.”<sup>155</sup> As a result, Reich argued, new wealth should be accorded the same protections as (*i.e.* be treated like) property.<sup>156</sup> Reich’s novel descriptive and prescriptive moves operationalized the idea that property cannot be understood outside of its social context. Property is a deliberate social construct that can be wielded to promote societal interests.<sup>157</sup>

Notwithstanding her disavowal of Reich’s functional approach as undermining the value of property as a concept,<sup>158</sup> the work of Margaret Jane Radin, beginning with *Property and Personhood*,<sup>159</sup> provides a theoretical foundation for and refinement of new property. Reich saw wealth in the form of property as key to individuality.<sup>160</sup> Radin identifies which wealth is infused with this special individuation power and refines the connection between Reich’s individuality and property through her qualified adoption of Hegel’s philosophy. Her main goal was

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<sup>153</sup> Reich, *supra* note 37.

<sup>154</sup> In his original piece, Reich suggested, but did not explore, other new forms of wealth, including private business franchises, corporate equity, and private organization membership. The connection among these sources of “wealth” and Bourdieu’s capital taxonomy is clear.

<sup>155</sup> Reich *supra* note 37 at 771. This function was closely tied to Reich’s acceptance of the idea that power over the means of subsistence is functionally equivalent to power over his will.

<sup>156</sup> *Id.*

<sup>157</sup> Property as a social construct has clear classical antecedents. *See, e.g.,* David Schultz, PROPERTY, AND POWER, AND AMERICAN DEMOCRACY 43 (1992)(quoting Blackstone as saying “a conventional institution created by law, habit, or the passage of time....[The] rules prescribing its use and transfer were determined by society.”). *See also* Jennifer Nedelsky, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 248 (1991)(“property is, of all the basic rights, perhaps, most obviously the creation of the state”).

<sup>158</sup> Margaret Jane Radin, *Property and Personhood*, 34 Stan. L. Rev. 957, 989 note 111 (1982).

<sup>159</sup> Though the discussion here relies primarily on *Property and Personhood*. Radin has refined, developed, and evolved that theory she developed their in a series of well-recognized articles and books. *See* Margaret Jane Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849 (1987); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667 (1988); Margaret Jane Radin, REINTERPRETING PROPERTY (1993); Margaret Jane Radin, CONTESTED COMMODITIES (1996); Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & Com. 509 (1996).

<sup>160</sup> Reich *supra* note 37 at 771.

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to elaborate the intuitive notion that “[m]ost people possess certain objects that they feel are almost part of themselves.”<sup>161</sup> In so doing, Radin categorized property as either “fungible” or “personal.”<sup>162</sup> Fungible property is valuable for instrumental reasons, *i.e.* to enable the owner to do something else.<sup>163</sup> It can be replaced with property that equally meets the purposes of the owner. Personal property, by contrast, has value *per se* because it is “bound up” with the owner.<sup>164</sup> The loss of this property “causes pain that cannot be relieved by the object’s replacement.”<sup>165</sup> Grounded in the Hegelian justification for property rights (“property is justified as an expression of the self”<sup>166</sup>) Radin asserts, “to achieve proper self-development—to be a person—an individual needs some control over resources in the external environment.”<sup>167</sup> The purpose of property rights, then, is to secure such control.<sup>168</sup>

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<sup>161</sup> Radin, *supra* note 158 at 959.

<sup>162</sup> This is a somewhat unfortunate nomenclature in the property context as it is easy to confuse with the more popular term for personalty. Here, Radin’s personal property will be described as “property for personhood” or “personality property,” a term which Radin later adopted for the same concept. As discussed below, the term “identity property” will be used to connote the broader notion of property on which the article’s arguments rely, of which Radin’s personality property forms only one part. See *infra* note **Error! Bookmark not defined.**

<sup>163</sup> Radin, *supra* note 158 at 960.

<sup>164</sup> *Id.* A one-dollar bill is a clear example of the distinction. In most cases, a one-dollar bill is fungible property, replaceable with any other one-dollar bill or any property worth one dollar. But a particular one-dollar bill may be the personal property of a business proprietor if, say, it is the first dollar earned in her commercial enterprise. The proprietor’s sentimental attachment to the physical dollar bill transforms it from a replaceable utilitarian good into part of the proprietor’s sense of self. Examples of personal property used by Radin include the home (to a person living in it), *id.* at 959, a wedding ring (to the bride or groom), *id.* at 959, and body parts, *id.* at 966.

<sup>165</sup> Radin, *supra* note 158 at 959.

<sup>166</sup> G.W.F. Hegel, *PHILOSOPHY OF RIGHTS* 44 (T.M. Knox trans., Oxford University Press 1969) (1821). Hegel’s theory is generally understood to mean that one acquires property by imposing one’s will upon it. Note that Radin does depart from Hegel on several key points. In deed, she would later assert that her reliance on Hegel was not intended as theoretical foundation, but an illustration of the resonance between their positions, which she termed “a suggestive text.” See Margaret Jane Radin, *REINTERPRETING PROPERTY*, *supra* note 38 at 7. For a review of these departures, see Alexander and Peñalver, *supra* note 140.

<sup>167</sup> Radin, *supra* note 158 at 957.

<sup>168</sup> An alternative construction of that control focuses on the control of the social relations connected to an object—the relationship among individuals—rather than the particular connection a person has to the object itself. This tracks Radin’s insights from her distinctly *in rem* understanding of property to a relational understanding thereof. See Lisa M. Austin, *Person, Place, or Thing? Property and the Structuring of Social Relations*, 60 U. Toronto L. J. (2010). This interesting alignment of Radin’s theory does not change its underlying import.

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Thus, property for personhood, *i.e.* that property “important to the freedom, identity, and contextuality of people”<sup>169</sup> is a fundamental category that deserves greater legal protection:

Where we can ascertain that a given property right is personal, there is a *prima facie* case that that right should be protected to some extent against invasion by government and against cancellation by conflicting fungible property claims of other people. This case is strongest where without the claimed protection of property as personal, the claimants’ opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened, and probably also where the personal property rights are claimed by individuals who are maintaining and expressing their group identity.<sup>170</sup>

Radin’s personality theory has garnered extensive attention, and the jurisprudence it has inspired and influenced extends far beyond the scope of this article.<sup>171</sup> However, several lines of recent scholarship have (often only implicitly) extended the property-as-personhood premise to several important contexts and concepts that further the present discussion.<sup>172</sup> In that respect, while Radin’s work was distinctly oriented toward “personal individuation,”<sup>173</sup> this scholarship explores the connections among property and communities and groups.

In his study of the costs that attach to the benefits property ownership, Eduardo Peñalver helps explain how property rights are fundamental to the constitution of

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<sup>169</sup> Radin, *The Liberal Conception of Property*, *supra* note 38 at 1679.

<sup>170</sup> Radin, *supra* note 158 at 1015.

<sup>171</sup> For a review of the influential works and authors engaging Radin’s concept, see Jeffrey Douglas Jones, *Property and Personhood Revisited*, 1 Wake Forest J.L. & Pol’y 93, 94-94 (2011).

<sup>172</sup> Personality theory has other important implications unrelated to the present discussion.

<sup>173</sup> For use of the term, see Radin, *CONTESTED COMMODITIES*, *supra* note 38 at 56. Though Radin acknowledges the important and possible necessity of “group cohesion,” she highlights collective, group, and community interests as “a difficult case for the personhood perspective,” which she blames on law’s failure to advance a convincing theory of group rights. Radin, *supra* note 158 at 1011-12. Her brief discussion implies an aggregative conception of group interests (*i.e.* the interests of the group is the sum of the individual interests of its members) that breaks down when individual group members advance conflicting claims. *Id.* at 1011-13 (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)).



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communities.<sup>174</sup> It is well established that property is a necessary and useful concept only in a community context. “In the world of Robinson Crusoe property rights play no role.”<sup>175</sup> However, Peñalver’s insight advances a different proposition: “Property binds individuals together into normative communities.” To develop this point, he accepted the centrality of exit—defined as “the right to withdraw or refuse to engage; the ability to dissociate, to cut oneself out of a relationship with other persons”<sup>176</sup>—to the types of control or autonomy that animates utilitarian property perspectives, but he reversed the analysis to determine the role of property in facilitating *not exit from* the demands of a community *but access to* that community and the social and legal obligations concomitant therewith. Peñalver called the inductive aspect of the reciprocity between individuals and communities mediated by things “property as entrance.”<sup>177</sup>

The normative underpinnings of property as entrance are anchored in an Aristotelian community theory of property advanced by Peñalver and Gregory Alexander.<sup>178</sup> That theory conceives of people as social and political animals inherently dependent and interdependent on other people to develop the uniquely “human capacities” necessary for “human flourishing,”<sup>179</sup> a rich concept that “must include at least the capacity to make meaningful choices among alternative life horizons.”<sup>180</sup> That capacity justifies the value and effort invested in individual autonomy.<sup>181</sup> In the communitarian framework, property facilitates access to the

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<sup>174</sup> Eduardo Peñalver, *Property As Entrance*, 91 Va. L. Rev. 1889 (2005).

<sup>175</sup> Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347 (1967).

<sup>176</sup> Peñalver, *supra* note 174 at 1891 (quoting Hanoch Dagan and Michael Heller).

<sup>177</sup> *Id.* at passim.

<sup>178</sup> Alexander and Peñalver, *supra* note **Error! Bookmark not defined.** Alexander has elaborated this concept of community. See, generally, Gregory S. Alexander, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* (2006).

<sup>179</sup> Without providing an exhaustive analysis of the “well-lived life” implied by human flourishing, Peñalver and Alexander broadly include at least four capabilities necessary to the pursuit thereof: life, freedom, practical reason, and affiliation. Alexander and Peñalver, *supra* note **Error! Bookmark not defined.** at 137-38.

<sup>180</sup> *Id.* at 134-35. They further explain the contours of “meaningful” decision-making within a robust conception of freedom as including both the ability to discern the “salient differences” among choices and “deliberate deeply” about their relative value. *Id.* For an elaboration of this idea in the property context, see Colin Crawford, *The Social Function of Property and the Human Capacity to Flourish*, 80 Fordham L. Rev. 1090 (2011-12).

<sup>181</sup> Alexander and Peñalver, *supra* note **Error! Bookmark not defined.**

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human networks that allow an individual to become fully human.<sup>182</sup>

Such community access, however, is mediated by the socio-cultural meanings attached to property.<sup>183</sup> Among the denominative or expressive functions of property is its ability to signal the status of the property owner in the community. Nestor Davidson has explored the manifestation of this role on several levels.<sup>184</sup> In its thin form, the expressive function of property is to denote the relationship of a party to a valuable resource and/or the relationship of several parties to each other with respect to that resource.<sup>185</sup> Property's thick expressive role is to shape and reinforce the economic, social, and cultural hierarchies that define mutual obligations and set the borders of social relations.<sup>186</sup> The type, volume, and composition of an individual's ownership situate that individual horizontally and vertically in the social order.<sup>187</sup> Thus, property not only constitutes communities, it orders them.

Though they did not necessarily intend to contribute to Radin's personality theory, the ideas represented by the work of Peñalver, Alexander, and Davidson extend her insights about the ontological role of property beyond the individual to the body politic. Other scholars deliberately extend Radin's personality theory to collectivities, like insular minorities and indigenous peoples.<sup>188</sup>

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<sup>182</sup> Alexander and Peñalver's prescriptive conclusion asserts that their communitarian/ human flourishing analysis provides a valuable heuristic for resolving property questions. *Id.* at 138. León Duguit's view of property as a social function in service of community solidarity reaches a more rigid conclusion that property should only be protected where it fulfills this social function. See Sheila R. Foster and Daniel Bonilla, *The Social Function of Property: The Comparative Perspective*, 80 *Fordham L. Rev.* 1003, 1004-07 (2011-12).

<sup>183</sup> Jeffery Douglas Jones advances the importance of socio-cultural meaning to suggest that the relevant unit of analysis is the way property advances specific "sociocultural meanings grounded in specific object relationships" rather than property for personhood. Jeffery Douglas Jones, *Property and Personhood Revisited*, 1 *Wake Forest J. L. & Pol'y* 93, 127-31 (2011).

<sup>184</sup> Nestor M. Davidson, *Property and Relative Status*, 107 *Mich. L. Rev.* 757 (2009).

<sup>185</sup> These are the alternative basic definitions of property that are often the core of the property theory debate. See *supra* notes 139-147 and accompanying text.

<sup>186</sup> Davidson, *supra* note 184.

<sup>187</sup> This function clearly correlates to the Bourdieuan idea of capital facilitating social mobility. See *supra* notes 132 to **Error! Bookmark not defined.** and accompanying text. Davidson explores the connection between social mobility and property with respect to implications of stability and instability in the institution of property and how the law can or should be used to influence those implications. Davidson, *supra* note 184 at 807-10.

<sup>188</sup> See, e.g., Derek Fincham, *The Distinctiveness of Property and Heritage*, 115 *Penn St. L. Rev.* 641 (2011); Kristen A. Carpenter, *Real Property and Peoplehood*, 27 *Stan. Envtl. L.J.* 313 (2008);

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For example, Kristen Carpenter, Sonia Katyal, and Angela Riley draw an intellectual divide between standard market-amenable visions of property and a “more relational vision” that seeks to honor interests related to property (independent of ownership status) that promote various (and possibly nonmarket) values to advance a theory of property for “peoplehood.”<sup>189</sup> This theory directly extends Radin’s descriptive argument. Just as some property should be entitled to enhanced protection because it performs the personhood function, Carpenter, Katyal and Riley argue, “certain lands, resources, and expressions are entitled to legal protection as cultural property because they are integral to the group identity and cultural survival of indigenous peoples.”<sup>190</sup> Normatively, the move is slightly different. In line with the broader body of Radin’s work, which uses her personality theory to contest almost blanket (and certainly default) market valorization in favor of context-specific inalienability,<sup>191</sup> they reject the still-standard perspective that property values are universally “commodifiable” and “commensurable,” and, thus, alienable.<sup>192</sup> However, they also challenge the traditional ownership model as the nexus of property interests.<sup>193</sup> Instead, “property for *peoplehood*” contemplates “stewardship” as an alternative nexus.<sup>194</sup> That concept illustrates the potential functions, manifestations, and protections of property outside strict ownership, which is capable of promoting various rights and obligations with respect to property without necessarily requiring any legal title thereto.<sup>195</sup>

Radin began a discourse that demonstrates the connection between being a

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Madhavi Sunder, *Property in Personhood*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* (Martha M. Ertman & Joan C. Williams eds., 2005) (applying Radin’s theory to “subordinated groups” seeking protection for their intellectual property rights to songs, folklore, agricultural knowledge, and religious symbols); Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. Rev. 559 (1995) (defining cultural property as tangible objects and intangible expressions that capture a group’s identity); John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 Cornell L. Rev. 1179 (1989)(first suggesting the application of Radin’s theory to group ownership of cultural property).

<sup>189</sup> Kristen A. Carpenter, Sonia K. Katyal, and Angela R. Riley, *In Defense of Property*, 118 Yale L.J. 1022, 1027 (2009).

<sup>190</sup> *Id.* at 1028.

<sup>191</sup> *See, generally, supra* note 38.

<sup>192</sup> Carpenter, Katyal, and Riley, *supra* note 189 at 1047.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 1124.

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fully actualized person and property. The extension of her work into community and group contexts permits the distillation of an enriched version of her ontological thesis: There is a constitutive relationship among property, individuality, community, status, and group identity that is central to vocational humanity (*i.e.* that which is necessary to go about the business of being human).<sup>196</sup> These relationships can be advanced and supported through traditional and nontraditional property structures.

In her groundbreaking article, *Whiteness as Property*,<sup>197</sup> Cheryl Harris created a bridge across which to directly connect Reich's potentially expansive new property to personality theory. Drawing on Radin's theory and other prevailing conceptions of property, Harris charted the way whiteness (a racial construct that escapes definition in the "thing"-based terms generally applied to traditional tangible and intangible property) theoretically and functionally meets the criteria to be denominated property. Not only does whiteness satisfy traditional conceptions—like James Madison's "everything which a man may value" and Jeremy Bentham's "basis of expectation," but the historical evolution of property rights reinforce that denomination by according protection to the strongest sticks of the axiomatic property bundle—alienability, use, and exclusion.<sup>198</sup> In Harris's account, notwithstanding its lack of "thing-ness," because whiteness is accorded the legal attributes of property, it plays the same role as Radin's property for personhood in the development of individual and group identities and to the constitution and organization of communities.<sup>199</sup>

Harris' work introduces two elements to the robust framing of property being developed here. First, Harris showed that new property had already been

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<sup>196</sup> The term vocation is meant to evoke Paulo Friere's understanding that the ontological vocation of becoming more fully human ("humanization") is the central problem of humanity. Paulo Freire, *PEDAGOGY OF THE OPPRESSED*. Freire places education at the core of this vocation and freedom (which Freire defines in terms complementary to those advanced by Aristotle, as the capacity to autonomously and responsibly take control of one's own live through authentic, critical insights into the social construction of human society, Paulo Freire, *EDUCATION FOR CRITICAL CONSCIOUSNESS* 34, 41) as its metric. Freire, *PEDAGOGY OF THE OPPRESSED* 30. The work reviewed in the preceding discussion indicates that, at a minimum, property plays a central role in this vocation. The "mythical" connection between property and freedom in legal and political discourse, seems to indicate that freedom (however defined) remains an appropriate metric for property as a feature of vocational humanity.

<sup>197</sup> Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1709 (1993).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

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constituted in American law in the form of whiteness. In so doing, she concretized Reich's aspirational break from the entity-centered property framework by setting forth how a construct as ethereal as race had been imbued with the powerful (even if poorly defined) substance of property traits and protections.<sup>200</sup> The American reification of race through property law suggests, in the Reichian tradition, that some values can become so contextually important as to beg institutional recognition, which may or may not be formalized.

Second, whiteness as property extended Radin's personality theory. While Radin established an important link between vocational humanity and property, Harris drew the essential epistemological line, connecting property—writ in her broader terms—to how people<sup>201</sup> understand and know themselves and their relationships to others (and to the government). This epistemological role is linked to property's individuating authority because “[p]eople form their sense of self at least in part by comparison to others, with property serving as a particularly important and informational metric for that comparison.”<sup>202</sup> Davidson examined the implications of property's epistemological power to organize communities in ways that are important to an mutable identity. His focus on the fetishism of ownership illustrates this point: Property communicates where an individual stands in the social order at any given moment, and more property and better property suprapositions an individual in that order.<sup>203</sup> Implicit is the notion that every individual can potentially change the composition and character of her property, to

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<sup>200</sup> *Id.*

<sup>201</sup> Harris focused exclusively on whiteness as having been transformed into property. Because she considered formal (though only implicit) legal recognition—a proxy for value—as the lynchpin of whiteness as property, she expressly excludes from her construct unvalued subaltern identities. This position is reasonable since the reinterpretations of property that are advanced by Harris (as well as Radin and Reich) find inspiration from understandings of the idea of property as a system for assigning rights to valued resources. However, Harris's insights have inspired theoretical extensions of her idea to blackness and race, generally, as identity categories that exhibit value in contemporary law in distinct but analogous ways to whiteness. *E.g.* Jim Chen, *Embryonic Thoughts on Racial Identity As New Property*, 68 U. Colo. L. Rev. 1123, 1157-59 (1997); Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 Stan. J. Civ. Rts. & Civ. Liberties 51 (2005). On the strength of these expansions, this article takes the key contribution of Harris's work in this respect to be generally applicable to a diverse range of identity frames. Of course, the precise task of elaborating whether and how such identity frames do or could constitute property is beyond the scope of this article.

<sup>202</sup> Davidson details the important function of property in the development of individual identity. *See supra* note 184 at 782-788.

<sup>203</sup> *Id.*

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change her position in the social hierarchy. The implication of Harris's arguments in this respect is that property also communicates the degree of positionality change that is possible for an individual. Harris's whiteness is a limited, excludable, and extremely valuable resource. Ownership thereof automatically supersedes the owner, and members of nonwhite group members will indelibly occupy less favorable social positions than individuals that have an otherwise comparable mix of property.<sup>204</sup>

In *Property Outlaws*, Peñalver and Katyal, map how the centrality of property to both vocational and epistemological identity creates tension among politico-legal, individual, and community incentives.<sup>205</sup> Vocational humanity creates a property creation instinct, but the way property is organized may push individuals out of that system. That centrifugal motion incentivizes those "excluded from participation in the system of ownership to challenge existing property rules and established entitlements."<sup>206</sup> Those pushed outside the boundaries of ownership also have little political voice, so among the only avenues of relief from this marginalization is the violation of legally sanctioned property entitlements: "the simple act of taking or occupying."<sup>207</sup> The Peñalver and Katyal reframing of property transgressions, can be read to suggest that where property implicates vocational, epistemological, or ontological humanity individuals subscribe to distinct sets of norms and respond to different incentives. Thus, an individual might engage in unlawful behavior to create or protect identity property. Traditional incentive structures might be replaced by behavior designed to advance or reinforce the identity relationship.

Although the authors do not make any claim to engage one another in the ways suggested here, the scholarship explored above establishes four steps that clearly connect corporations to property in a way that is largely undertheorized, and wholly underappreciated in the regulatory context: (1) Reich painted an image

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<sup>204</sup> Again, this is the same position that Bourdieu advances in nonracialized terms with respect to capital. In his terms, access to identity-based networks impacts the availability of the full range of capital that provides the basis for social mobility. *See supra* notes 132 to **Error! Bookmark not defined.** and accompanying text.

<sup>205</sup> Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. Pa. L. Rev. 1095, 1132-33 (2007). *See* Dorothy A. Brown, *Shades of the American Dream*, 87 Wash. U.L. Rev. 329, 378 (2009) (noting the importance of wealth creation for communities of color).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

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of property as a social-legal construct that has the meaning provided to it, which opened the doors for expansive, teleological analyses of property. (2) Radin demonstrated how Reich's expansive notion of property is inextricably connected to any ontology and the pursuit of fulfillment according thereto.<sup>208</sup> (3) Harris linked ontological property to less fixed concepts, like identity. (4) Finally, Peñalver and Katyal suggest that transgression—whether of norms, expectations, or predictions—is a natural feature of identity property.

### **3. Identity Property & Corporations**

Following this constructed train of thought, the corporate capital projects of Lehman, Whole Foods, TOMS, and Hobby Lobby—irrespective of whether they involve malfeasance, altruism, or deontology—constitute engagement with identity property. That perspective could, in turn, provide a fresh lens through which to evaluate the divergence from the *corpo economicus* standard.

In the aftermath of Lehman's bankruptcy, the executives' decisions to manipulate the financial statements, likely delaying the bank's collapse by several months and deepening its ultimate debt, has been held out as an example of corporate greed, excess, and maliciousness. The *laissez faire* approach to corporations that is the normative suggestion of much mainstream corporate law scholarship was dismissed as ill-equipped to manage the agency costs inherent in the large corporation. In contrast, the identity property perspective is markedly more benign. Available accounts tend to agree that upper management of Lehman had a deep connection to the company. It was inextricably connected to their ontological, epistemological and vocational humanity. So, when the company faced distress the executives were unable to ameliorate, at risk was both the property—the company and its assets—and identity property. The latter was what the executives were protecting when they manipulated the financial statements.

The identity property perspective sheds the same light on the business approaches of Whole Foods Market and TOMS. Widely criticized as disingenuous in their commitment to altruism or irresponsible in their responsibilities to shareholders, the concept of a company genuinely engaging in disinterested behavior is either disbelieved or decried. That, instead, Mackey, Whole Foods' co-chief executive and Mycoskie, TOMS' founder, are engaged in projects of identity

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<sup>208</sup> See, for a similar recognition, Michael B. Kent, Jr. & Lance McMillian, *The World of Deadwood: Property Rights and the Search for Human Identity*, 20 S. Cal. Interdisc. L.J. 489, 518 (2011).

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property creation provides a more compelling narrative. The engagement with identity property only suggested in Lehman and hypothesized in Whole Foods and TOMS, is fairly certain in the Hobby Lobby context. The company's management self-consciously uses the company to pursue Christian identity. Indeed, the owners identify so closely with it that they felt personally burdened by the specter of that legal person engaging, even indirectly, in behavior that conflicts with their religious beliefs.

What ever their ultimate nature, corporations are entities organized for the purpose of the creation of wealth—for the pursuit of property. Nonetheless, they can serve much more nuanced and critical roles in the constitution of their constituents. That role, in turn, influences the behavior of the corporation.

**CONCLUSION**

In the same way *homo economicus* is a mere caricature of *homo sapiens*, *corpo economicus* is no more than a caricature of *corpo sapiens*. Flesh and blood human behavior is a product of ethical and moral values, social norms, altruistic and philanthropic aims, misanthropic and malicious impulses, and other intuitively obvious motivating factors. Likewise, corporate behavior—whether the corporation is an artificial, natural, or aggregate entity—is a product of ethical and moral values, social norms, altruistic and philanthropic aims, misanthropic and malicious impulses, and other factors motivating the corporation and its constituents.

One way to explore this complexity is through property. Corporations serve a key role in the development of identity property for its constituents, a category that is not amenable to the standard incentives and norms imposed on corporations. Recognizing patterns of identity property can shed light on the persistence of examples of corporations deviating from the standard understandings of corporate behavior.

The scope of the implications of this observation is unclear. Nevertheless, a robust understanding of the relationship among property, identity, and the nature of corporations suggests that laws that fail to address the role of corporations in the identity of their agents will be of limited value in preventing the kinds of market failures against which those law are meant to shield and in promoting the kinds of value creation seen uniquely suited to the corporate form.