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## **Anonymous Companies**

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## ANONYMOUS COMPANIES

WILLIAM J. MOON<sup>†</sup>

### ABSTRACT

*Hardly a day goes by without hearing about nefarious activities facilitated by anonymous “shell” companies. Often described as menaces to the financial system, the creation of business entities with no real operations in sun-drenched offshore jurisdictions offering “zero percent” tax rates remains in vogue among business titans, pop stars, multimillionaires, and royals. The trending headlines and academic accounts, however, have paid insufficient attention to the legal uses of anonymous companies that are both ubiquitous and almost infinite in their variations.*

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<sup>†</sup> Associate Professor, University of Maryland Carey School of Law. For helpful conversations and comments, I thank Michael Abramowicz, Julian Arato, Jordan Barry, Richard Boldt, Christopher Bradley, Eric Chaffee, Albert Choi, Kyung-Hoon Chun, Peter Danchin, Steven Dean, Aaron Dhir, Will Dinneen, Larry Donahue, Ben Edwards, Franklin Gevurtz, Michael Gilbert, Mark Graber, David Gray, Sue S. Guan, Paul M. B. Gutierrez, Alon Harel, Joan Heminway, Jay Jones, Christine Kim, Guha Krishnamurthi, Alex Lee, Paul Miller, Geeyoung Min, Elizabeth Pollman, Peter Salib, Max Stearns, Nina Varsava, Liza Vertinsky, Cheryl Wade, and Paige Wilson. I also thank participants of workshops at the Law and Political Economy Conference at Yale Law School, the Maryland Carey Law Virtual Constitutional Law & Economics Workshop, the Junior Faculty Workshop at the University of Maryland, the Faculty Workshop at the University of Georgia School of Law, the International Economic Law Colloquium at Brooklyn Law School, the Trans-Pacific Business Law Workshop, the 2021 American Association of Law Schools’ Entrepreneurship and the Entity Panel, and the 2022 American Association of Law Schools’ New Voices in Business Law workshop. I am particularly grateful to Eric Chaffee, Frank Gevurtz, David Gray, and Joan Heminway for serving as commentators on earlier drafts of this manuscript. For excellent research assistance, I thank Vanessa Agbar, Erika Birk, Jordan Danso, Leah Higgins, Daniel Juliao, Lydia Jines, Samantha Jonjo, Sammy Jo Kanekuni, Erick Marquina, and Valeriya Zavyalova. Jennalee Beazley, Chelsea Cooper, Tranae Felicien, Madeline Hundley, Emma Ritter, Karen Sheng, Lily Tran, Jenny Wheeler, Zijun Zhao, and other editors of the *Duke Law Journal* provided exceptional editorial work. Finally, I am most grateful for Dr. Chris Cho, who patiently read and criticized early drafts.

*This Article identifies privacy as a functional feature of modern business entities by documenting the hidden virtues of anonymous companies—business enterprises with owners who are practically untraceable to the general public. Anonymous companies were essential to launch the first abortion drug in the United States at a time when no pharmaceutical company was willing to touch it for fear of backlash by anti-abortion activists. Anonymous companies today serve as “race-neutral” public faces of Black entrepreneurs who conceal their race in order to more equitably compete in a marketplace infected with systemic racism. And anonymous companies are ubiquitous over the internet, enabling survivors of intimate partner violence to become financially self-sufficient entrepreneurs without fear of harassment or stalking.*

*This Article thus reveals privacy as a prevalent, yet under-theorized function served by modern business entities. In documenting their use in today’s commercial life, this Article makes two contributions to the literature. First, it disrupts prevailing accounts concerning the function of business entities, departing from scholarly accounts that predominantly conceptualize business entities as transactional cost-reducing devices that facilitate the pooling of capital for business ventures. This Article enriches these accounts by showing how protecting the identity of capital contributors from forced public disclosure—what it refers to as identity shielding—can advance important economic and humanistic interests. While the doctrine of limited liability encourages entrepreneurial risk-taking by limiting the amount of capital risk borne by the firm’s equity owners, identity shielding encourages the flow of capital to business enterprises by preserving the business owner’s ability to control knowledge about oneself to the world. Second, it develops a policy framework that enables a more nuanced discussion balancing the interest in ameliorating the harm inflicted by anonymity, as well as harnessing the promise of identity shielding in promoting entrepreneurial risk-taking and human collaboration.*

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## INTRODUCTION

In the sleepy, rural town of Cheyenne, Wyoming, lies an unassuming building that is the juridical home to over two thousand companies.<sup>1</sup> Littered with hundreds of mailboxes, the building serves as a “virtual office” to thousands of individuals who claim the building as their business headquarters.<sup>2</sup> Some of these companies are mom and pop businesses operating as limited liability companies (“LLCs”) to limit the potential personal liability that may accrue to the hardworking entrepreneurs.<sup>3</sup> Others are deployed by some of the world’s notorious kleptocrats and financial criminals,<sup>4</sup> who use business entities to anonymize a garden variety of modern financial transactions. The building in Wyoming is one of the dozens of hotspots

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1. See Kelly Carr & Brian Grow, *Special Report: A Little House of Secrets on the Great Plains*, REUTERS (June 28, 2011, 6:40 AM), <http://reut.rs/j6muzU> [<https://perma.cc/78ZR-TDFE>] (describing a “1,700-square-foot brick house with a manicured lawn” that is said to be the headquarters of Wyoming Corporate Services, a business-incorporation specialist firm that houses over two thousand companies).

2. *Id.*

3. *See id.*

4. *See id.*; CASEY MICHEL, HUDSON INST., THE UNITED STATES OF ANONYMITY 26 (2017), <https://s3.amazonaws.com/media.hudson.org/files/publications/UnitedStatesofAnonymity.pdf> [<https://perma.cc/K7AQ-DFSL>].

across the United States that mass produce companies on demand to cloak financial transactions for anyone willing to pay a modest fee.<sup>5</sup>

These mailboxes are the physical sites of how modern corporate law has engineered vehicles designed to anonymize the source of capital injected into business enterprises. In its simplest iteration, secrecy is accomplished by operating a business in the name of the corporate entity formed in a jurisdiction, like Wyoming, that does not require the actual owners of business entities to be disclosed.<sup>6</sup> Nefarious activities facilitated by these anonymous “shell” companies—including drug trafficking, money laundering, terrorism financing, and tax evasion—by now are familiar to avid readers of *The New York Times* and *The Washington Post*.<sup>7</sup>

But the use of anonymous companies is not limited to those who engage in illicit activities. They constitute an important lifeblood of modern commercial life—judging by their explosive popularity in the United States.<sup>8</sup> Anonymous companies today serve as “race-neutral” public faces of Black business owners who conceal their race to more equitably compete in a marketplace full of systemic racism.<sup>9</sup> They are ubiquitous over the internet, ranging from small e-commerce entrepreneurs selling on eBay and Amazon to incognito owners of

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5. See MICHAEL G. FINDLEY, DANIEL L. NIELSON & J.C. SHARMAN, *GLOBAL SHELL GAMES: EXPERIMENTS IN TRANSNATIONAL RELATIONS, CRIME, AND TERRORISM* 11 (2014).

6. See *id.* at 9.

7. See, e.g., Jeanne Whalen, *Tax Cheats Deprive Governments Worldwide of \$427 Billion a Year, Crippling Pandemic Response: Study*, WASH. POST (Nov. 19, 2020, 7:01 PM), <https://www.washingtonpost.com/us-policy/2020/11/19/global-tax-evasion-data> [<https://perma.cc/KB54-VPNA>]; Peter J. Henning, *Is This the End of Anonymous Shell Companies? Not Too Fast*, N.Y. TIMES: DEALBOOK (July 11, 2019), <https://www.nytimes.com/2019/07/11/business/dealbook/llc-shell-companies-money-laundering.html> [<https://perma.cc/Y89U-W9BV>].

8. One law firm partner specializing in producing anonymous companies maintains: “Our own firm has experienced year-over-year sales for Anonymous LLC’s, which are growing by triple digits.” Merilee Kern, *Anonymous L.L.C. Demand Accelerates as Business Owners Pursue Privacy Protection in the Information Age*, BLACK ENTER. (Aug. 26, 2020), <https://www.blackenterprise.com/anonymous-l-l-c-demand-accelerates-as-business-owners-pursue-privacy-protection-in-the-information-age> [<https://perma.cc/8VDH-UBS6>] (quoting Larry Donahue).

9. See *infra* Section II.B. I capitalize the word “Black” throughout this Article for the reasons articulated by Professor Kimberlé Crenshaw. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (“Blacks, like Asians, Latinos, and other ‘minorities,’ constitute a specific cultural group and, as such, require denotation as a proper noun.”).

some of the world's most highly trafficked pornographic websites.<sup>10</sup> As one law firm partner specializing in forming anonymous companies explains, “The types of owners are diverse and include everything from businesses you see when you drive down the street to . . . those who sell goods online through e-commerce platforms and do not want their names and home addresses published with their seller information.”<sup>11</sup>

Today, business entities are deployed not only to efficiently pool capital for business ventures but also to serve as powerful secrecy cloaks designed to conceal the ownership structure of business enterprises. For the past several decades, corporate law luminaries have principally focused on the former, making significant inroads augmenting our understanding of the “essential” role of business entities.<sup>12</sup> According to the standard account, the corporate form is a legal privilege invented in the name of efficiency to reduce the transactional costs associated with pooling capital for business enterprises.<sup>13</sup> It provides an efficient way—some would argue the only

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10. See, e.g., Patricia Nilsson, *MindGeek: The Secretive Owner of Pornhub and RedTube*, FIN. TIMES (Dec. 17, 2020), <https://www.ft.com/content/b50dc0a4-54a3-4ef6-88e0-3187511a67a2> [<https://perma.cc/5LW8-U7DH>].

11. Kern, *supra* note 8 (quoting Larry Donahue).

12. See *id.*; Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335, 1336–37 (2006) [hereinafter Hansmann, Kraakman & Squire, *Law and the Rise*]; Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 391 (2003) [hereinafter Blair, *Locking*]; Henry Hansmann & Reinier Kraakman, *Organizational Law as Asset Partitioning*, 44 EUR. ECON. REV. 807, 813–14 (2000); Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 390 (2000) [hereinafter Hansmann & Kraakman, *Essential Role*].

13. See Hansmann & Kraakman, *Essential Role*, *supra* note 12, at 398, 430. As Justice Leo Strine and Professor Jonathan Macey put it, “the treatment of corporations as separate legal entities is . . . what justifies the legal notion of ‘limited liability’ and other central characteristics of the corporate form, such as the ability to contract and to sue and be sued.” Jonathan Macey & Leo E. Strine, Jr., *Citizens United as Bad Corporate Law*, 2019 WIS. L. REV. 451, 455. In a strict sense, the term “corporate form” is commonly used to refer to corporations, as opposed to other types of business entities. I use the term loosely in this Article to refer to business entities that are chartered by a sovereign government, with recognition of separate legal personality and functional features on creditor rights and limited liability associated with traditional corporations. Thus, my terminology includes the limited liability company (“LLC”), the limited liability partnership (“LLP”), the limited liability limited partnership (“LLL”), and the statutory business trust. This usage is consistent with the following description from Professors Henry Hansmann, Reinier Kraakman, and Richard Squire:

The many legal forms for business organizations that first appeared during the last thirty years . . . all combine the pattern of creditors’ rights . . . that are traditional to the business corporation with the freedom of contract among investors and managers that

practical way—to achieve the so-called asset partitioning critical for modern business enterprises.<sup>14</sup> Asset partitioning, which relies on the idea that corporations are separate legal persons from natural persons who own and control those entities,<sup>15</sup> serves two related functions: entity shielding, which ensures that personal creditors of the owners cannot opportunistically withdraw capital from the firm, thereby enabling capital to be “locked in” for the enterprise,<sup>16</sup> and limited liability, which incentivizes entrepreneurial risk-taking by ensuring that owners do not risk more than their capital investment.<sup>17</sup> These business enterprises are in turn understood to be foundational to the modern economy.<sup>18</sup>

This Article builds on this literature, documenting an underexamined collateral feature of business entities. Namely, modern business entities are widely used today as powerful privacy devices that protect the identity of capital contributors from forced public disclosure.<sup>19</sup> It refers to this feature—the ability of individuals to invest

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is traditional to the partnership. . . . The new forms are thus better understood as part of the continuing development of the corporate form . . . .

Henry Hansmann, Reinier Kraakman & Richard Squire, *The New Business Entities in Evolutionary Perspective*, 2005 U. ILL. L. REV. 5, 6 [hereinafter Hansmann, Kraakman & Squire, *New Business*].

14. As Professors Hansmann and Kraakman explain in their groundbreaking piece, while contract law can create core characteristics that can functionally emulate the legal structure created by business entities, “the transaction costs necessary to accomplish this would be prohibitive.” Hansmann & Kraakman, *Essential Role*, *supra* note 12, at 406. The doctrine of limited liability, enjoyed as a birthright of modern corporations, “has been credited with making it easier to raise capital and, by extension, contributing to the tremendous economic growth that occurred during the twentieth century.” Joshua C. Macey, *What Corporate Veil?*, 117 MICH. L. REV. 1195, 1204–05 (2019).

15. See ERIC W. ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* 35 (2013). The legal personality attached to the corporate form—perhaps most clearly espoused through “corporations are people too” slogans—is the doctrinal metaphor that enables firms to exercise certain business capabilities, including the ability to contract, own property, sue, and be sued in the corporate name. See Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1638 [hereinafter Pollman, *Reconceiving*].

16. See Blair, *Locking*, *supra* note 12.

17. See Pollman, *Reconceiving*, *supra* note 15, at 1634.

18. See Giuseppe Dari-Mattiacci, Oscar Gelderblom, Joost Jonker & Enrico C. Perotti, *The Emergence of the Corporate Form*, 33 J.L. ECON. & ORG. 193, 225 (2017) (“The corporate form is now the foundation of the modern market economy. Its benefits are well appreciated: permanent capital grants an autonomous and indefinite life, and a capacity for long-term investment.”).

19. Privacy is a loaded and contested term. The focus of this Article concerns anonymity, or a condition in which business enterprises associated with a person are largely unidentified to the general public. See Jeffrey M. Skopek, *Reasonable Expectations of Anonymity*, 101 VA. L.

in and operate business enterprises without forced public disclosure—as *identity shielding*.

Despite being of central importance to vast swaths of modern entrepreneurs, the privacy of capital contributors has largely escaped the radar of legal scholars as a functional feature of the corporate form.<sup>20</sup> Instead, corporate law’s foundational concepts, manifesting in canonical doctrines like limited liability, are typically discussed in terms of disagreements about whether and to what extent the law ought to encourage entrepreneurial risk-taking by limiting the potential capital loss borne by investors.<sup>21</sup> These accounts are largely

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REV. 691, 725 (2015) (defining anonymity as “a condition in which something associated with a person . . . is known only through traits that are not, without further information or investigation, unique and connected in a way that provides a relevant form of access to that person in a given context”). While arguably distinct concepts, anonymity can advance various privacy interests. *See, e.g.,* Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 876 (1996) (“Anonymity refers to the power to control whether people know who you are; it is a tool of privacy.”).

20. Functional inquiries mean different things to different people. In developing a functional account, this Article attempts to organize discussion around the way in which the law has responded to the exigencies of commercial activity. *See* John Armour, Henry Hansmann, Reinier Kraakman & Mariana Pargendler, *What Is Corporate Law*, in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 1, 3–4 (Reinier Kraakman et al. eds., 3d ed. 2017). This line of inquiry benefits from a rich body of literature concerning the related but distinct questions of whether corporations are legal persons and whether those juridical entities ought to have the right to privacy as a matter of U.S. constitutional law. For influential scholarship in this line of work, see ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS, at xvi (2018); Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 27–30 (2014) [hereinafter Pollman, *Corporate*]; Eric W. Orts & Amy Sepinwall, *Privacy and Organizational Persons*, 99 MINN. L. REV. 2275, 2286–87 (2015); Vincent S.J. Buccola, *Corporate Rights and Organizational Neutrality*, 101 IOWA L. REV. 499, 502–05 (2016). These accounts principally concern whether certain categories of constitutional rights enjoyed by natural persons ought to be extended to corporations—a related but separate inquiry from whether identity shielding should be a functional feature offered by modern business entities. Chief among the differences is that a functional account can uncover a range of interests that are important policy considerations but outside the scope of a conventional constitutional analysis. This Article engages with this literature further in Section III.B.

21. *Compare* Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1880 (1991) [hereinafter Hansmann & Kraakman, *Toward Unlimited*] (“We argue, contrary to the prevailing view, that limited liability in tort cannot be rationalized for either closely-held or publicly-traded corporations on the strength of the conventional arguments offered on its behalf.”), and Hansmann & Kraakman, *Essential Role*, *supra* note 12 (“The truly essential aspect of asset partitioning is, in effect, the reverse of limited liability—namely, the shielding of the assets of the entity from claims of the creditors of the entity’s owners or managers.”), with STEPHEN M. BAINBRIDGE & M. TODD HENDERSON, LIMITED LIABILITY: A LEGAL AND ECONOMIC ANALYSIS 13 (2016) (“Although some leading scholars claim that entity shielding rather than limited liability . . . is the essential



agnostic to the privacy interests of capital contributors involved in business ventures and implicitly conceptualize liability in terms of the loss of capital accrued to entrepreneurs in the event of business failure.<sup>22</sup> In reality, privacy matters a great deal when it comes to the propensity of individuals to take on business risks. In this sense, identity shielding can be understood as providing limited *reputational* liability rather than limited *capital* liability to business owners.

Of course, identity shielding is far from a universally desired feature associated with business entities. One only needs to browse local restaurants and bars to know that business owners often broadcast their ownership status. Consider Louis' Lunch in New Haven, Connecticut. Its owner, Jeff Lassen, proudly identifies his business as family-owned and operated by the fourth generation, in part to capitalize on his great grandparent Louis Lassen's fame from being the first person in the United States to sell the hamburger sandwich in 1900.<sup>23</sup> The widely publicized disclosure of Oprah Winfrey's ownership stake in Weight Watchers, which more than doubled the company's share price, is another example of how public knowledge of a source of capital can enhance firm value.<sup>24</sup>

But for certain business enterprises, identity shielding is arguably more important than limited liability or entity shielding. Identity shielding is particularly vital to pool capital for morally contestable enterprises. For instance, anonymous companies were instrumental in bringing the first abortion drug to the United States, which no pharmaceutical company was willing to touch at the time for fear of backlash by anti-abortion activists.<sup>25</sup> To operate the now-infamous

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attribute of corporate law, the importance of limited liability to the development and success of the corporate form should not be minimized." (footnote omitted)).

22. See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89-90 (1985) ("The rule of limited liability means that the investors in the corporation are not liable for more than the amount they invest. . . . The managers and the other workers are not vicariously liable for the firm's deeds. No one risks more than he invests.").

23. *The History of Louis' Lunch*, LOUIS' LUNCH, <https://louislunch.com/history> [<https://perma.cc/429F-RRVD>].

24. Rupert Neate, *Oprah Winfrey's Stake in Weight Watchers Sends Share Price Soaring*, GUARDIAN (Oct. 19, 2015, 1:06 PM), <https://www.theguardian.com/business/2015/oct/19/oprah-winfrey-takes-stake-in-weight-watchers> [<https://perma.cc/E3QK-ZL6N>].

25. Sharon Bernstein, *Persistence Brought Abortion Pill to U.S.*, L.A. TIMES (Nov. 5, 2000, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2000-nov-05-mn-47330-story.html> [<https://perma.cc/X4MM-5SR3>] ("[N]ot a single pharmaceutical company stepped up to the plate to help research, make[,] or manufacture the drug.").

Danco Laboratories, investors in the 1990s formed corporate vehicles in the Cayman Islands so they could remain unidentified by the public.<sup>26</sup> As reported in *The Los Angeles Times*, “the decision to set up the investors’ group as an offshore enterprise came about because participants feared that they would be targeted by abortion opponents, some of whom ha[d] assaulted and even killed doctors who had performed abortions.”<sup>27</sup>

Anonymous companies thus present an opportunity to reimagine business entities not just as a transactional cost-reducing legal invention designed to accomplish asset partitioning but also as a modern privacy device. Like the twin features of entity shielding and limited liability, identity shielding can also serve socially beneficial functions by impacting the propensity of individuals to take on entrepreneurial risk. Today, the doctrine of limited liability is widely appreciated as a tool to help individuals overcome economic risk-aversion, thereby encouraging investment and economic growth.<sup>28</sup> Similarly, identity shielding can encourage investment and spur economic growth by preserving the privacy of capital contributors. In its strongest form, identity shielding is foundational to the very existence of many business enterprises that benefit society at large, including the supply of desirable products and services for consumers. Identity shielding particularly has a potential to unlock innovation because it may encourage the flow of capital and human collaboration for enterprises that may foster critical perspective about the status quo.<sup>29</sup> Anonymity in the financing of business enterprises is also intimately connected to personal autonomy, such as safeguarding

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26. Marcia Riordan, *Chemical Abortion in Australia*, 15 CHISHOLM HEALTH ETHICS BULL. 6, 7 (2009) (describing Danco as “a company chartered in the Grand Cayman Islands . . . created to market and distribute RU-486 in the United States” (quoting CHRISTOPHER M. GACEK, FAM. RSCH. COUNCIL, *POLITICIZED SCIENCE: THE MANIPULATED APPROVAL OF RU-486 AND ITS DANGERS TO WOMEN’S HEALTH* 6 (2007), <http://downloads.frc.org/EF/EF07A29.pdf> [<https://perma.cc/MBG6-DMEG>])).

27. Bernstein, *supra* note 25.

28. See Michael Simkovic, *Limited Liability and the Known Unknown*, 68 DUKE L.J. 275, 278, 285 (2018).

29. See *infra* Part II; see also Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1918 (2013) (“[I]nnovation requires the capacity for critical perspective on one’s environment . . . . Innovation also requires room to tinker, and therefore thrives most fully in an environment that values and preserves spaces for tinkering.”).

personal reputations and, in some cases, the physical safety of business owners.<sup>30</sup>

But like the doctrine of limited liability, identity shielding does not come without a charge. By now, legal scholars are acutely familiar with the cost of limited liability. While credited for incentivizing entrepreneurial risk-taking that can generate a range of social benefits,<sup>31</sup> limited liability can also create moral hazard problems by enabling firms to evade involuntary creditors like tort victims.<sup>32</sup> Similarly, the cost of identity shielding is far from negligible given firms' ability to stream capital to a variety of enterprises that are illicit or morally unpalatable to mainstream society.<sup>33</sup>

Thus far, the economic and humanistic interests served by the corporate form's privacy function have been underappreciated. Instead, policy has largely been driven by a zealous campaign to purge nefarious activities facilitated by anonymous shell companies—entities with no real operations or assets often deployed for illicit purposes.<sup>34</sup>

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30. See *infra* Part II.

31. David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1317 (2007) (“The real policy basis for limited liability . . . seems to be to promote investment by transferring risk from investors to creditors. Commercial activity can generate a range of social benefits, including financial returns to investors, jobs for employees, and desirable products and services for consumers.” (footnote omitted)).

32. As Professors Hansmann and Kraakman explain, “increasing exposure to tort liability has led to the widespread reorganization of business firms to exploit limited liability to evade damage claims.” Hansmann & Kraakman, *Toward Unlimited*, *supra* note 21, at 1881. Limited liability can “create incentives for excessive risk-taking by permitting corporations to avoid the full costs of their activities.” *Id.* at 1879.

33. In recent years, LLCs have been used as vehicles for anonymous political campaign contributions, raising issues about public debate and electoral integrity as well. See Anthony J. Gaughan, *Trump, Twitter, and the Russians: The Growing Obsolescence of Federal Campaign Finance Law*, 27 S. CAL. INTERDISC. L.J. 79, 109 (2017) (“Limited liability corporations have also become a vehicle for donors to avoid disclosure. . . . Only the name of the LLC is reported on disclosure forms, not the wealthy individuals behind the LLC.”).

34. See *infra* Section I.A. Not all shell companies are deployed for illicit purposes. Anonymous companies are frequently used by developers of large-scale projects to prevent the so-called “holdout” problem that arises when assembling private land from multiple owners. Amnon LeHAVI, *Property and Secrecy*, 50 REAL PROP. TR. & EST. L.J. 381, 425–26 (2016). Anonymous companies enable developers to conceal their true identity to prospective sellers, and in doing so, reduce the tendency of buyers to “inflate their asking prices and hold out strategically.” Daniel B. Kelly, *Acquiring Land Through Eminent Domain: Justifications, Limitations, and Alternatives*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 344, 357 (Kenneth Ayotte & Henry E. Smith eds., 2011). The Walt Disney Company was a pioneer in this practice. The California-based company famously used dozens of subsidiary entities structured as anonymous companies to purchase large parcels of land in Florida for what was to become Walt Disney World. See Daniel B. Kelly, *The Public Use Requirement in Eminent*

This is an unfortunate intellectual shortcoming. While the desire for privacy varies significantly across different societies, the explosive popularity of anonymous companies at the very least demands a serious academic inquiry into whether there might be socially desirable interests advanced by identity shielding. Without this basic analysis, reforms might throw out the proverbial baby with the bathwater.

This project takes on urgent practical importance in light of a tectonic wave of legislation being enacted across the world that mandates various levels of disclosure concerning the ownership structure of business entities. As of the end of 2020, eighty-one nations around the world now have laws on the books requiring some form of beneficial ownership information of business entities to be registered with government authorities—more than double the number from 2018.<sup>35</sup> The United States has joined this movement, with Congress enacting the Corporate Transparency Act (“CTA”) on January 1, 2021, which is set to fully take effect in 2023.<sup>36</sup> Many voices are urging the United States to go a step further in adopting an open access registry giving the public unfettered access to the ownership structure of private companies.<sup>37</sup> Yet, these reform efforts, however well-intentioned, largely overlook the important economic and humanistic interests advanced by identity shielding.

To be clear, this Article is not an attempt to denigrate the genuine and well-intentioned efforts undertaken by various “corporate transparency” initiatives aimed at curbing financial crimes. It is also

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*Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 22–23 (2006). Without anonymity, savvy owners would have held out “in hope that Disney would acquire a sufficiently large number of properties that it would desperately need the remaining property to facilitate the development.” MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 63–64 (2009).

35. Andres Knobel & Moran Harari, *The State of Play of Beneficial Ownership Registration in 2020*, TAX JUST. NETWORK (June 3, 2020), <https://www.taxjustice.net/2020/06/03/the-state-of-play-of-beneficial-ownership-registration-in-2020> [<https://perma.cc/E4RE-Q4S7>].

36. Corporate Transparency Act, Pub. L. No. 116-283, §§ 6401–6403, 134 Stat. 3388 (2021); Robert W. Downes, Scott E. Ludwig, Thomas E. Rutledge & Laurie A. Smiley, *The Corporate Transparency Act – Preparing for the Federal Database of Beneficial Ownership Information*, AM. BAR ASS’N: BUS. L. TODAY (Apr. 16, 2021), [https://www.americanbar.org/groups/business\\_law/publications/blt/2021/05/corporate-transparency-act](https://www.americanbar.org/groups/business_law/publications/blt/2021/05/corporate-transparency-act) [<https://perma.cc/BT7X-NFLU>] (“When fully implemented in 2023, it will create a database of beneficial ownership information within FinCEN.”).

37. See OPENOWNERSHIP & GLOB. WITNESS, LEARNING THE LESSONS FROM THE UK’S PUBLIC BENEFICIAL OWNERSHIP REGISTER 4 (2017), <https://www.openownership.org/uploads/learning-the-lessons.pdf> [<https://perma.cc/5QD9-8MJ8>].

not an academic fiat that identity shielding constitutes an essential feature of the corporate form.<sup>38</sup> Any interests served by identity shielding need not be syllogistically deduced from the premise of corporate legal personality.<sup>39</sup> The concept of juridical persons may have some metaphysical appeal in conceptualizing the firm as a creature of legal fiction but does not necessitate bundling privacy rights with the corporate form from a functional standpoint.

Rather, identity shielding is a policy choice. That policy choice depends on how any given society prioritizes the contested and complex relationship between individuals, markets, and governments. Some of these privacy interests reflect the fundamental values embedded in constitutional principles and longstanding social norms, and indeed ones that may be grounded in U.S. constitutional law.<sup>40</sup>

The remainder of this Article proceeds in three Parts. Part I synthesizes prevailing accounts of anonymity in business enterprises and articulates the concept of identity shielding within the broader literature concerning the function of modern business entities. Part II provides a typology of individuals that benefit from identity shielding, by documenting the contemporary uses of anonymous companies among a diverse array of legal (and arguably socially beneficial) business ventures. Part III reviews the rapidly developing global trend toward laws mandating open-access public registries and urges policymakers to adopt more nuanced approaches—including building databases only accessible to law enforcement agencies but not the general public—that may capture some of the benefits of identity

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38. Indeed, forming a business entity with formal sovereign recognition is currently not a prerequisite to run a business in the United States. General partnerships, for instance, do not require filing with a state and therefore allow owners of enterprises to keep their ownership information outside of state registries. Rodney D. Chrisman, *LLCs Are the New King of the Hill: An Empirical Study of the Number of New LLCs, Corporations and LPs Formed in the United States Between 2004-2007 and How LLCs Were Taxed for Tax Years 2002-2006*, 15 *FORDHAM J. CORP. & FIN. L.* 459, 461 (2010) (“The number of general partnerships formed each year cannot be tracked since no filing is required.”). But these forms of enterprises suffer from the lack of limited liability protection offered by entities like the LLC or the corporation. *Id.*

39. As observed by John Dewey nearly a hundred years ago, a juridical “‘person’ might legally mean whatever the law makes it mean.” John Dewey, *The Historic Background of Corporate Legal Personality*, 35 *YALE L.J.* 655, 656 (1926). This line of thought is still widely accepted by leading scholars and jurists. See Macey & Strine, *supra* note 13, at 456 (“[C]orporations have only those rights society gives them by statutory law, and any statutory law may take into account the unique nature of corporations in limiting their ability to act.”).

40. See *infra* Section III.B.

shielding while minimizing the harms inflicted by anonymous shell companies. A brief conclusion follows.

## I. THE EMERGENCE OF ANONYMOUS COMPANIES

It may not have been until the massive document leaks known as the Panama Papers that the general public came to understand the rampant use of offshore shell companies by the rich and the powerful.<sup>41</sup> Chronicled in a popular Netflix film, *The Laundromat*, starring Meryl Streep and David Schwimmer,<sup>42</sup> the leaks have inspired growing scholarly literature and media news stories critiquing how anonymous shell companies facilitate a swarm of illicit activities, ranging from drug trafficking to tax evasion.<sup>43</sup> The trending headlines and academic accounts, however, almost invariably preclude discussion of the legal uses of anonymous companies that are both pervasive and almost infinite in their variations today.<sup>44</sup> This Part begins to fill that gap.

Because anonymous companies and shell companies are terms that are widely used for different purposes, it is important to note the definitional contours of entities that are the subject of this Article before proceeding further. The phrase “anonymous companies” denotes closely held business entities whose owners are practically unknown to the general public.<sup>45</sup> Typically, anonymous companies are

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41. See William J. Moon, *Regulating Offshore Finance*, 72 VAND. L. REV. 1, 2 (2019).

42. See *THE LAUNDROMAT* (Netflix 2019).

43. See, e.g., Shima Baradaran, Michael Findley, Daniel Nielson & Jason Sharman, *Funding Terror*, 162 U. PA. L. REV. 477, 493–94 (2014); Shima Baradaran, Michael Findley, Daniel Nielson & J.C. Sharman, *Does International Law Matter?*, 97 MINN. L. REV. 743, 774 (2013).

44. This is in part because many existing accounts conceptualize anonymous companies as shell companies: companies devoid of assets or ongoing business activities. See Carl Pacini & Nate Wadlinger, *How Shell Entities and Lack of Ownership Transparency Facilitate Tax Evasion and Modern Policy Responses to These Problems*, 102 MARQ. L. REV. 111, 113 (2018).

45. Thus, for instance, I exclude publicly traded companies that are labeled “shell companies” under the Securities Exchange Act. See Robert B. Thompson & Donald C. Langevoort, *Redrawing the Public-Private Boundaries in Entrepreneurial Capital Raising*, 98 CORNELL L. REV. 1573, 1588–89 (2013). These “shells” typically underlie reverse mergers that have become an important alternative to traditional initial public offerings in recent years. See Ioannis V. Floros & Travis R. A. Sapp, *Shell Games: On the Value of Shell Companies*, 17 J. CORP. FIN. 850, 850 (2011). Anonymity is of central importance to closely held firms because investors with significant ownership stakes in today’s public companies (i.e., with meaningful control over such firms) are required to disclose a broad spectrum of information to the public through periodic Securities and Exchange Commission (“SEC”) disclosures. See James J. Park, *Rules, Principles, and the Competition To Enforce the Securities Law*, 100 CALIF. L. REV. 115, 133 (2012); Jonathan R. Macey & Jeffrey M. Netter, *Regulation 13D and the Regulatory Process*, 65 WASH. U. L.Q. 131, 131 (1987) (describing the SEC’s Schedule 13D, which “imposes certain disclosure

formed in jurisdictions that do not require the actual owners of companies to be disclosed to the public, such as Delaware or the Cayman Islands. Although most prominently appearing today in the form of LLCs,<sup>46</sup> anonymous companies include other business entities, including corporations, business trusts, limited liability partnerships (“LLPs”), and limited partnerships (“LPs”). This definition thus strives to move beyond investigating anonymous shell companies, which are “companies devoid of physical or human substance” frequently used for illicit activities.<sup>47</sup>

Section I.A sketches the legal architecture underlying the market for anonymous companies and reviews prevailing scholarly accounts that predominantly conceptualize anonymous companies as getaway cars for financial criminals. Section I.B reveals that this understanding is incomplete because it fails to capture the range of *legal* business enterprises whose capital contributors opt for anonymity. It is also theoretically incompatible with potential socially beneficial functions advanced by identity shielding. Section I.B thus presents an alternative theoretical framework aimed at uncovering the privacy function of modern business entities. Section I.C elaborates on the link between identity shielding and entrepreneurial risk-taking, showcasing how identity shielding can facilitate the flow of capital to business

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requirements on persons within ten days of the date that they acquire more than five percent of the beneficial ownership of a public company”). While disclosure is almost always the name of the game for publicly traded companies in the United States, disclosure requirements mandated by federal securities regulation are plainly inapplicable to closely held business entities, thereby preserving the ability of entrepreneurs to conceal the flow of capital from the public’s view. *See, e.g.,* Franklin A. Gevurtz, *Why Delaware LLCs?*, 91 OR. L. REV. 57, 68 (2012) (“LLCs rarely sell interests in the company in public offerings or list such interests for trading on a national securities exchange[,] [meaning that] LLCs are rarely subject to most federal securities regulation.”).

46. *See* Telephone Interview with Larry Donahue (Apr. 28, 2021) (notes on file with author). This is not particularly surprising. Shareholders of traditional corporations famously delegate control to directors and officers. *See* Eugene F. Fama & Michael C. Jensen, *Separation of Ownership from Control*, 26 J.L. & ECON. 301, 301 (1983). Therefore, the fact that shareholders remain anonymous is less important because the decisionmakers of those firms are the corporate managers and not shareholders. LLCs, on the other hand, enable capital contributors—called members—to retain the power to control business enterprises even while enjoying the benefits of limited liability. *See* Larry E. Ribstein, *The Deregulation of Limited Liability and the Death of Partnership*, 70 WASH. U. L.Q. 417, 425–26 (1992). For a background on the development of LLC statutes in the United States, see generally Joan MacLeod Heminway, *The Ties That Bind: LLC Operating Agreements as Binding Commitments*, 68 SMU L. REV. 811, 813–15 (2015).

47. Delphine Nougayrède, *After the Panama Papers: A Private Law Critique of Shell Companies*, 52 INT’L L. 327, 327 (2019); *see also* FINDLEY, NIELSON & SHARMAN, *supra* note 5, at 31 (“Shell corporations are thus companies with nothing more than their basic legal essence, and as such lack all of the marks of substance . . .”).

enterprises by limiting the potential reputational liability accrued to the firm's equity owners.

A. *The Standard Account: Shell Companies as "Getaway Cars"*

In part because of the sensational nature of small offshore jurisdictions and less populous states emerging as modern hubs of mass-produced business entities, there is no shortage of academic work and popular media news stories on the use of shell companies among celebrities, politicians, and kleptocrats.<sup>48</sup> Anonymous companies have been infamously described by *The Financial Times* as "getaway cars" for criminals,<sup>49</sup> and they routinely headline popular media outlets as menaces to the financial system.<sup>50</sup>

Scholars in law and social science alike have produced an impressive volume of literature critiquing this practice within the past decade or so.<sup>51</sup> Prominent political scientists, for instance, describe anonymous shell companies as vehicles used to undertake illicit activities. Some of the morally rotten transactions include "processing payments for banned Internet poker businesses; vending controlled pharmaceuticals illegally; routing money earned from unlawful subprime credit cards; and sheltering . . . real estate assets."<sup>52</sup> Legal scholars take a similar approach. Shell companies have been linked to

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48. See, e.g., Scott Shane, Spencer Woodman & Michael Forsythe, *How Business Titans, Pop Stars and Royals Hide Their Wealth*, N.Y. TIMES (Nov. 7, 2017), <https://www.nytimes.com/2017/11/07/world/offshore-tax-havens.html> [<https://perma.cc/VL83-BQ2T>].

49. Xiangmin Liu, *Anonymous Shell Companies Are a Menace to the Financial System*, FIN. TIMES (Nov. 12, 2019), <https://www.ft.com/content/eb76acdc-054b-11ea-a984-fbbacad9e7dd> [<https://perma.cc/F3CV-R6K5>].

50. See, e.g., Chuck Collins, *The Costs of a Secretive 'Wealth Defense Industry' of Shell Companies, Offshore Tax Havens, and Empty Luxury Condos*, BOS. GLOBE (Apr. 1, 2021, 11:50 AM), <https://www.bostonglobe.com/2021/04/01/magazine/costs-secretive-wealth-defense-industry-shell-companies-offshore-tax-havens-empty-luxury-condos> [<https://perma.cc/J4HX-JKG8>].

51. See, e.g., OLIVER BULLOUGH, MONEYLAND: WHY THIEVES AND CROOKS NOW RULE THE WORLD AND HOW TO TAKE IT BACK 21 (2019); JAKE BERNSTEIN, SECRECY WORLD: INSIDE THE PANAMA PAPERS INVESTIGATION OF ILLICIT MONEY NETWORKS AND THE GLOBAL ELITE 1–3 (2017); FINDLEY, NIELSON & SHARMAN, *supra* note 5, at 8–10; NICHOLAS SHAXSON, TREASURE ISLANDS 11–13 (2011); Lawrence J. Trautman, *Following the Money: Lessons from the Panama Papers, Part 1: Tip of the Iceberg*, 121 PENN ST. L. REV. 807, 807 (2017); J.C. Sharman, *Shopping for Anonymous Shell Companies: An Audit Study of Anonymity and Crime in the International Financial System*, 24 J. ECON. PERSPS. 127, 129–30 (2010).

52. Michael G. Findley, Daniel L. Nielson & J.C. Sharman, *Using Field Experiments in International Relations: A Randomized Study of Anonymous Incorporation*, 67 INT'L ORG. 657, 658 (2013).



illicit activities exposed by the Panama Papers,<sup>53</sup> and reportedly “facilitate tax evasion, impede investigations, and harm society.”<sup>54</sup>

This line of work typically isolates cash-strapped lawmakers in small jurisdictions like Delaware or Bermuda as facilitating illicit activities by offering lax rules to form corporate entities in their jurisdictions.<sup>55</sup> Chief among the concerns are the lax rules governing the disclosures of the owners of business entities formed in their jurisdictions.

There is a degree of truth to this understanding. In the United States, federalism has dictated that the formation of business entities and the associated rules governing the internal affairs of those entities are largely a matter of state law.<sup>56</sup> A time-honored choice of law rule enables business entities to shop for the corporate law of any state<sup>57</sup>—or, more recently, of any nation<sup>58</sup>—effectively rendering corporate law into a set of rules largely amenable to private choice rather than

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53. Reid K. Weisbord, *A Catharsis for U.S. Trust Law: American Reflections on the Panama Papers*, 116 COLUM. L. REV. ONLINE 93, 105 (2016).

54. Pacini & Wadlinger, *supra* note 44, at 111 (2018); *see also* Avnita Lakhani, *Imposing Company Ownership Transparency Requirements: Opportunities for Effective Governance of Equity Capital Markets or Constraints on Corporate Performance*, 16 CHI.-KENT INT’L & COMP. L. 122, 125 (2016); Dean Kalant, Comment, *Who’s in Charge Here? Requiring More Transparency in Corporate America: Advancements in Beneficial Ownership for Privately Held Companies*, 42 J. MARSHALL L. REV. 1049, 1053 (2009).

55. *See, e.g.*, Weisbord, *supra* note 53 (“It is, perhaps, due to these lax documentation and disclosure requirements that the United States is now considered one of the most favorable international trust havens and has attracted assets from offshore jurisdictions that recently tightened their trust-disclosure rules.”).

56. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) (“[S]tate regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law.”); Deborah A. DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 LAW & CONTEMP. PROBS. 161, 161 (1985) (“To many corporate lawyers, the ‘internal affairs’ doctrine . . . is irresistible if not logically inevitable.”).

57. *See* Vincent S.J. Buccola, *Opportunism and Internal Affairs*, 93 TUL. L. REV. 339, 346 (2018) (“[T]he internal affairs doctrine is a choice-of-law rule, pure and simple. It undergirds the entirety of modern corporate law, and its vitality generally goes unquestioned.”); Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 45–46 (2006); Jens Dammann & Matthias Schündeln, *The Incorporation Choices of Privately Held Corporations*, 27 J.L. ECON. & ORG. 79, 79 (2011) (“The internal affairs of U.S. corporations are governed by the law of the state of incorporation. Accordingly, corporations can choose the corporate law applicable to their internal affairs by incorporating in the state of their choice.”).

58. *See* William J. Moon, *Delaware’s New Competition*, 114 NW. U. L. REV. 1403, 1420–21 (2020) (synthesizing recent cases extending the internal affairs doctrine to U.S. firms incorporated in foreign nations).

territorially-demarcated rules imposed by sovereigns.<sup>59</sup> Jurisdictions chartering business entities thus compete not just by “selling” corporate governance rules,<sup>60</sup> but by bundling their corporate governance rules with a set of disclosure rules concerning the beneficial owners of business entities.<sup>61</sup> Lawmakers in these jurisdictions, in some respects, can be conceptualized as having successfully commercialized their sovereignty into staple revenue streams.<sup>62</sup>

Within this broader market for business entities, a handful of states—most notably, Delaware, Nevada, and Wyoming—are actively competing to attract anonymous companies in part to boost their state government revenues.<sup>63</sup> Delaware’s state government, for instance, has

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59. See William J. Moon, *Tax Havens as Producers of Corporate Law*, 116 MICH. L. REV. 1081, 1095–96 (2018) [hereinafter Moon, *Tax Havens*].

60. See Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 228 (1985).

61. This point is currently underappreciated in existing accounts of jurisdictional competition for business entities, which tend to focus on the quality of the jurisdiction’s corporate governance rules (and the quality of its judiciary) as the main driver of competition. See, e.g., LARRY E. RIBSTEIN, *THE RISE OF UNCORPORATION* 131 (2010) (“LLC statutes have evolved toward both efficiency and uniformity.”); Bruce H. Kobayashi & Larry E. Ribstein, *Delaware for Small Fry: Jurisdictional Competition for Limited Liability Companies*, 2011 U. ILL. L. REV. 91, 91 (attributing the popularity of Delaware as the state of incorporation to “the quality of Delaware’s legal system”). It is perhaps of no coincidence that the market leaders in offering anonymous companies tend to be less populous states that may have the incentive to attract this breed of business entities. Cf. CHRISTOPHER M. BRUNER, *RE-IMAGINING OFFSHORE FINANCE: MARKET-DOMINANT SMALL JURISDICTIONS IN A GLOBALIZING FINANCIAL WORLD* 41, 43 (2016) (assessing that “market dominant small jurisdictions” that become major players in cross-border financial services, including Delaware and Singapore, have a tendency to be “small and poorly endowed with natural resources”); Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REGUL. 209, 212 (2006) (“It is not fortuitous that the dominant incorporation state is a small state . . . . Because a corporate charter is a relational contract[,] . . . a state needs a mechanism . . . [to] commit to firms that it will maintain its code and otherwise not undo existing rules to firms’ disadvantage.”).

62. Ronen Palan, *Tax Havens and the Commercialization of State Sovereignty*, 56 INT’L ORGS. 151, 151–52 (2002).

63. See Jessie P.H. Poon, Gordon Kuo Siong Tan & Trina Hamilton, *Social Power, Offshore Financial Intermediaries and a Network Regulatory Imaginary*, 68 POL. GEOGRAPHY 55, 58 (2019) (“Nevada, Wyoming and Delaware . . . are hotspots for the registration of offshore shell companies.”). State governments benefit by deriving annual revenue generated from franchise taxes or business registration fees. A franchise tax is an annual tax that states charge firms for the privilege of incorporating in their borders. Michal Barzuza, *Does the Structure of the Franchise Tax Matter?*, 96 VA. L. REV. BRIEF 27, 27 (2010). As observed by Professor Michal Barzuza, “[u]nlike some other taxes, the franchise tax is not a portion of income or revenues.” *Id.* Interest groups—including lawyers and registered agents within the states—are important financial beneficiaries that drive incorporation work into these states. See Jonathan R. Macey & Geoffrey

lobbied against numerous iterations of federal legislation requiring stricter disclosure rules—recognizing the massive revenue stream provided by chartering anonymous companies.<sup>64</sup>

Therefore, the ubiquity of shell companies today is not a result of business enterprises physically relocating to jurisdictions like Wyoming or Delaware.<sup>65</sup> Instead, it is driven by jurisdictions chartering those business entities—essentially glorified paperwork<sup>66</sup>—offering lax rules requiring little to no beneficial ownership information be disclosed to the public or the chartering government.<sup>67</sup>

Lax disclosure rules are said to facilitate criminal behavior,<sup>68</sup> and numerous anecdotal accounts reinforce this depiction. For instance, former President Donald Trump’s presidential campaign manager, Paul Manafort, was prosecuted by the Department of Justice in 2018 for elaborate tax fraud and bank fraud, which were allegedly facilitated by LLCs and other business entities formed in Cyprus, Delaware, Florida, Saint Vincent and the Grenadines, New York, the United Kingdom, and Virginia.<sup>69</sup> According to the indictment, Manafort laundered more than \$18 million through dozens of corporate entities

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P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 471–72 (1987).

64. See Suzanne Barlyn, *Special Report: How Delaware Kept America Safe for Corporate Secrecy*, REUTERS (Aug. 24, 2016, 9:50 AM), <https://reut.rs/2bFOLuE> [<https://perma.cc/49DW-RL6R>]. The corporate transparency bill in 2016, for instance, was reportedly held back in Congress after strong opposition from the Delaware Congressional Delegation and the National Association of Secretaries of State. See Naomi Jagoda, *‘Panama Papers’ Could Boost Prospects for Corporate-Transparency Legislation*, HILL (Apr. 4, 2016, 6:25 PM), <https://thehill.com/policy/finance/275134-panama-papers-could-boost-prospects-for-corporate-transparency-legislation> [<https://perma.cc/5FP2-BAHX>].

65. For instance, to form a Delaware corporation, a business without previous interaction with Delaware need only file paperwork, pay a franchise tax, and hire a registered agent who has “a physical street address in Delaware.” *How To Form a New Business Entity*, DEL. DIV. CORPS., <https://corp.delaware.gov/howtoform.shtml> [<https://perma.cc/XYX7-8HDW>].

66. See Moon, *Tax Havens*, *supra* note 59, at 1095.

67. Christopher G. Bradley, *Artworks as Business Entities: Sculpting Property Rights by Private Agreement*, 94 TUL. L. REV. 247, 251 (2020) (assessing that Delaware “permits LLCs to be formed with no public disclosure of their purposes or the assets or parties involved,” and the “[e]ntities then can operate throughout the United States with little restriction”).

68. See, e.g., FIN. ACTION TASK FORCE, ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING MEASURES – UNITED STATES, MUTUAL EVALUATION REPORT 4 (2016) (citing “[l]ack of timely access to adequate, accurate[,] and current beneficial ownership (BO) information [as] one of the fundamental gaps in the U.S. context”).

69. Government’s Memorandum in Support of Conditions of Release, Complex Case Designation and Notice of Intent to Use Certain Bank Records at 10–12, *United States v. Manafort*, 314 F. Supp. 3d 258 (D.D.C. 2018) (No. 1:17-201), 2017 WL 9487210, at \*10–12.

with names such as Daisy Manafort, LLC and Davis Manafort, Inc.<sup>70</sup> The proceeds in turn were used to fund his extravagant lifestyle (including a \$15,000 ostrich leather bomber jacket), along with “his mortgage, children’s tuition, and interior decorating of his Virginia residence.”<sup>71</sup>

The exploitation of shell companies for money laundering and tax evasion bleeds into other nefarious activities. In 2016, Fair Share Education Fund published a report connecting anonymous shell companies to opioid trafficking.<sup>72</sup> Dictators, drug dealers, and corrupt politicians have also been linked to using shell companies to conceal their proceeds.<sup>73</sup>

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Even the most passionate critics of anonymous shell companies acknowledge that not all uses of anonymous companies are for illicit purposes.<sup>74</sup> Heather Lowe, legal counsel for the advocacy group Global Financial Integrity,<sup>75</sup> readily acknowledges that “shell companies can be used for legitimate business purposes.”<sup>76</sup> Yet, influential policy advocates and scholars almost unanimously praise the virtues of full transparency. The Tax Justice Network, for instance, advocates that “information on the beneficial owners of every type of legal vehicle should be available to the general public and accessible online, for free

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70. Indictment at 3–4, *United States v. Manafort*, 314 F. Supp. 3d 258 (D.D.C. 2018) (No. 1:17-cr-00201), 2017 WL 6033301.

71. *Id.* at 2–3; see also Samantha Schmidt, *Paul Manafort’s \$15,000 Ostrich Jacket Raises Tantalizing Questions*, WASH. POST (Aug. 1, 2018), <https://www.washingtonpost.com/news/morning-mix/wp/2018/08/01/paul-manafort-15000-ostrich-jacket-raises-tantalizing-questions> [<https://perma.cc/UN3Y-KMK4>].

72. See NATHAN PROCTOR & JULIA LADICS, FAIR SHARE EDUC. FUND, ANONYMITY OVERDOSE 10 (2016), [http://www.fairshareonline.org/sites/default/files/AnonymityOverdose\\_Aug1\\_2016.pdf](http://www.fairshareonline.org/sites/default/files/AnonymityOverdose_Aug1_2016.pdf) [<https://perma.cc/5J5S-Y32C>].

73. See Steve Kroft, *Anonymous, Inc.*, CBS NEWS (Jan. 31, 2016), <https://www.cbsnews.com/news/anonymous-inc-60-minutes-steve-kroft-investigation> [<https://perma.cc/A3SM-M4YZ>].

74. See, e.g., Pacini & Wadlinger, *supra* note 44, at 114 (“Shell entities are not always formed for illegal purposes, and they are even a valuable source of tax revenues in some countries.”).

75. Global Financial Integrity is a think tank based in Washington, D.C., “focused on illicit financial flows, corruption, illicit trade and money laundering.” *Mission Statement*, GLOB. FIN. INTEGRITY, <https://gfin integrity.org> [<https://perma.cc/5ZG5-798Y>].

76. James Rufus Koren, *How Disney Used Shell Companies To Start Its Magic Kingdom*, L.A. TIMES (Apr. 9, 2016, 10:00 AM), <https://www.latimes.com/business/la-fi-disney-shell-companies-20160408-story.html> [<https://perma.cc/5LER-2AGD>] (quoting Heather Lowe).

and in open data format.”<sup>77</sup> These efforts have ushered in a tidal wave of legislative reforms around the world in recent years aimed at bringing transparency to the ownership structure of private companies.<sup>78</sup>

While anonymous shell companies undoubtedly facilitate illicit activities, the prevailing accounts fail to appreciate the range of important interests advanced by protecting the identity of capital contributors to legitimate business ventures.<sup>79</sup> Without this basic analysis, we lack an effective framework to grapple with thorny policy questions of whether and to what extent we ought to harness or regulate enterprise anonymity. To understand the privacy interests served by anonymous companies better, we need a paradigm that does not depict anonymous companies as mere menaces to the financial system.<sup>80</sup> The next Section takes a crack.

### *B. Business Entities as Privacy Devices*

This Section explains how modern business entities serve as powerful secrecy cloaks that anonymize the source of capital injected into business enterprises. In some respects, this identity shielding function relates to but is distinct from the standard conceptualization of the function of the corporate form. This Section develops a theory of identity shielding and situates it within the broader literature concerning the function of modern business entities.<sup>81</sup>

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77. MORAN HARARI, ANDRES KNOBEL, MARKUS MEINZER & MIROSLAV PALANSKÝ, TAX JUST. NETWORK, OWNERSHIP REGISTRATION OF DIFFERENT TYPES OF LEGAL STRUCTURES FROM AN INTERNATIONAL COMPARATIVE PERSPECTIVE: STATE OF PLAY OF BENEFICIAL OWNERSHIP – UPDATE 2020, at 2 (2020).

78. See *infra* Section III.A.

79. See generally J.C. SHARMAN, THE DESPOT’S GUIDE TO WEALTH MANAGEMENT (2017) (“[T]here is strong reason to think that the United States, given its central place in the global financial system and the number of companies involved, is the worst in the world when it comes to regulating shell companies.”).

80. For an example of a piece characterizing anonymous companies as “a menace to the financial system,” see Liu, *supra* note 49.

81. This Article benefits from the emerging strand of legal scholarship observing the link between markets and privacy. Professor Ryan Calo has argued that “[p]rivacy supports the basic market mechanism by hiding enough distracting, value-laden information from market participants.” Ryan Calo, *Privacy and Markets: A Love Story*, 91 NOTRE DAME L. REV. 649, 650 (2015). The concept of identity shielding adds support to this line of scholarship in challenging one of the central assumptions in modern law and economics literature, which tends to treat privacy pejoratively insofar as it reduces information available to market participants. For influential accounts, see generally Symposium, *The Law and Economics of Privacy*, 9 J. LEGAL

It bears noting that the pursuit of financial secrecy enjoys a long pedigree in history across different societies,<sup>82</sup> and the desire for anonymity in economic life is not an entirely new phenomenon.<sup>83</sup> An inordinate number of people have entered the commercial marketplace concealing or downplaying their personal information—including their criminal record, race, education, and sexual orientation.<sup>84</sup>

Anonymous companies are cut from the same legal cloth as shell companies. That is, anonymous companies tend to be formed in jurisdictions that enable individuals to pool capital for business ventures without forced public disclosure.<sup>85</sup> While relying on a shared legal blueprint as shell companies, anonymous companies are not just “companies devoid of physical or human substance.”<sup>86</sup> Today, owners of scores of legitimate business enterprises are virtually unknown to the general public because they opt for anonymity.<sup>87</sup>

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STUD. 621 (1980) (discussing a broad range of issues on privacy, including the concealment of information both by firms and individuals). In recent years, the traditional law and economics framework has been subject to a number of forceful critiques built around the law and political economy movement. *See, e.g.*, Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1790 (2020); Martha T. McCluskey, Frank Pasquale & Jennifer Taub, *Law and Economics: Contemporary Approaches*, 35 YALE L. & POL'Y REV. 297, 301 (2016) (“In a prevailing law and economics framework that defines economic rationality as essentially unconcerned with fairness and inequality, proposals to advance economic justice can appear presumptively irrational and unrealistic, closing off the possibilities for beneficial reform.”).

82. *See* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1154 (2004); Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 396–97, 407 (1978).

83. *See* Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1642 (1995) (“There are numerous situations in which anonymity seems entirely appropriate and even desirable. Psychologists and sociologists point out that people benefit from being able to assume different personae.”).

84. As Judge Richard Posner observed, “[o]ften people want privacy in order to manipulate other people by concealing from them aspects of their character, prospects, or past that would if known reduce their opportunities to engage in advantageous market or nonmarket transactions.” Richard A. Posner, *Privacy, Secrecy, and Reputation*, 28 BUFF. L. REV. 1, 9 (1979).

85. *See, e.g., infra* Section II.B (describing anonymous Black-owned businesses formed in Delaware).

86. Nougayrède, *supra* note 47.

87. *See* FINDLEY, NIELSON & SHARMAN, *supra* note 5, at 33 (“[M]ost shell companies are used for legitimate business purposes.”).

Although almost impossible to pinpoint their exact origin,<sup>88</sup> several historical developments have contributed to the explosive popularity of anonymous companies in recent years. First, technological innovation has enabled commerce over internet platforms on a significant scale.<sup>89</sup> A century ago, a small business owner often had a physical footprint that would have enabled consumers or business partners to identify the owners of enterprises with relative ease. Today, entrepreneurs selling products through eBay, Etsy, Shopify, Amazon, and the like can largely operate businesses from their homes without revealing their true identities.

The demand for identity shielding has also surged because of the dramatic ease with which personal information can now be obtained—and instantly publicized—through social media platforms like Twitter and Facebook.<sup>90</sup> Today, a simple Google search could expose personal information facilitating the identification and harassment of

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88. In the most immediate sense, anonymous companies can trace their lineage to business trusts. Trusts were widely used for business enterprises, particularly in the early twentieth century in the United States, because they could be formed without public disclosures. As Professor John Morley explains: “Unlike a corporation, a trust could be formed privately, without any public filings. A trust thus did not always show up in state records of business organizations. . . . [A]necdotal evidence . . . shows that the trust remained a major force in American business up through at least the end of the 1920s.” John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2166 (2016) (footnotes omitted); see also Eric C. Chaffee, *A Theory of the Business Trust*, 88 U. CIN. L. REV. 797, 810–11 (2020) (“Trusts remained a cornerstone of American business for much of the nineteenth century. . . . For a myriad of different types of businesses, trusts retained their popularity throughout the 1920s, until corporate law could mature in the United States.”). More broadly, juridical entities that mediate the relationship between individuals, markets, and sovereign governments are also not entirely new. Privacy has a long historical pedigree in trusts, which were a fixture of late-medieval England used to avoid feudal incidents. See J. M. W. BEAN, *THE DECLINE OF ENGLISH FEUDALISM, 1215–1540*, at 126 (1968) (documenting the spread of trusts in late medieval England). Legal scholars have also documented that business entities can serve as important instruments to evade existing legal restrictions. See Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023, 2045–46 (2006) (documenting how corporations were deployed during the Jim Crow era to evade racially restrictive covenants); Bradley, *supra* note 67, at 251–52 (“By using an LLC, an artist can evade doctrinal restrictions and accomplish the goals of the Artist’s Contract.”).

89. According to a recent study, home-based businesses, defined as businesses that “undertake most or all of their activity in the residential home,” now account for the majority of businesses in the United States. Darja Reuschke & Colin Mason, *The Engagement of Home-Based Businesses in the Digital Economy*, FUTURES, Mar. 2020, at 1.

90. Kern, *supra* note 8.

individuals for their association with a particular business enterprise.<sup>91</sup> This is particularly true if a business entity is formed in a jurisdiction that makes the business owners' names, home addresses, and phone numbers searchable on a central database for anyone at any time.

The desire for privacy has become so great that boutique law firms and registered agents now specialize in forming anonymous companies enabling entrepreneurs to pursue their business activities without fear of harassment, cyberstalking, or doxing online.<sup>92</sup> These businesses often tout anonymity as one of the main advantages of forming business entities in their home states.<sup>93</sup> Consider Harvard Business Services, an incorporation service firm based in Delaware that claims to have formed over two hundred thousand companies.<sup>94</sup> The firm openly promotes the advantages of privacy offered for business entities incorporated in Delaware by emphasizing that “the state of Delaware’s public record will . . . contain no information about . . . LLC’s members and/or managers.”<sup>95</sup> These firms openly compete with one another by

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91. Cf. Michael D. Gilbert, *Campaign Finance Disclosure and the Information Tradeoff*, 98 IOWA L. REV. 1847, 1852 (2013) (“The Internet rapidly disseminates disclosure information, and that facilitates identification—and harassment—of individuals for their speech.”).

92. See, e.g., *Maintain Your Privacy with an Anonymous LLC*, LAW 4 SMALL BUS. P.C., <https://www.l4sb.com/services/business-formation/anonymous-llc> [<https://perma.cc/7DCU-HV7S>]; *Why Form an LLC in Wyoming?*, WYO. TR. & LLC ATT’Y, <https://wyomingllcattorney.com/Form-a-Wyoming-LLC> [<https://perma.cc/23JY-WG5K>]. Doxing is “[t]he public release of an individual’s private, sensitive, personal information,” often facilitating harassment. Julia M. MacAllister, *The Doxing Dilemma: Seeking a Remedy for the Malicious Publication of Personal Information*, 85 FORDHAM L. REV. 2451, 2456 (2017).

93. These businesses can be conceptualized as local “interest groups” that facilitate the formation of anonymous companies. See Macey & Miller, *supra* note 63, at 472.

94. *About Harvard Business Services, Inc.*, HARV. BUS. SERVS. INC., <https://www.delawareinc.com/aboutus> [<https://perma.cc/B83S-AJYN>].

95. *Delaware LLC: What’s on Public Record?*, HARV. BUS. SERVS. INC., <https://www.delawareinc.com/blog/what-is-on-public-records-delaware> [<https://perma.cc/KLY8-3Y5A>]. In Professor Frank Gevurtz’s illuminating study based on interviews with business attorneys whose clients have formed LLCs, out of sixteen surveyed attorneys who invoked “ease of establishment as a reason for forming LLCs in Delaware,” seven specifically pointed to “the fact that Delaware did not require disclosure of the names of the LLC’s members, thereby providing more privacy for LLC members” as the reason for forming LLCs in Delaware. Gevurtz, *supra* note 45, at 110–11. Delaware undoubtedly also enjoys a competitive advantage derived from the state’s status as a branded product in the market for corporate charters. See Omari Scott Simmons, *Branding the Small Wonder: Delaware’s Dominance and the Market for Corporate Law*, 42 U. RICH. L. REV. 1129, 1138–39 (2008) (conceptualizing Delaware’s legal regime as a brand in the market for corporate charters).



leveraging differentiated features of state law and procedure.<sup>96</sup> A popular Nevada-based incorporator insists that it offers the best privacy results through a simple transactional cocoon: “Our privacy service doesn’t provide a nominee unlike many other incorporators. . . . We create privacy by registering another entity controlled by you to be the Manager for the Nevada LLC, thereby not giving up control of the entity, yet not breaking any laws.”<sup>97</sup>

Of course, the desire to conceal the identity of the owners or investors of business enterprises is not universal. In professional service businesses, for instance, firms often go out of their way to publicize the names of their owners. Typically, major law firms in the United States use the last names of their founding partners. For instance, legendary New York law firm Wachtell, Lipton, Rosen & Katz is named after the firm’s prominent partners, who met as students at New York University School of Law.<sup>98</sup> Oprah Winfrey’s widely publicized ownership stake in Weight Watchers—in which the disclosure of her 10 percent stake in the company in 2015 was followed by a skyrocketing of the company’s stock price—is another example of how public knowledge of the source of capital and ownership may enhance firm value.<sup>99</sup> In these cases, enterprises wanted to publicly showcase their owners or investors because of the added value of their identities.

But the reverse can be equally true. By concealing the true identity of those involved in a business enterprise, anonymity may in fact enhance business prospects. The economic fate of enterprises may be affected by anonymity for a number of reasons, including the widely documented phenomenon of market participants making business

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96. One Wyoming-based company advertises to its clients: “Nevada now requires the names, addresses, date of birth and social security numbers of all the shareholders of their corporations or LLCs. . . . Wyoming has never asked for the social security numbers of the owners of any limited liability companies or corporations.” *Wyoming vs Nevada Corporations and LLCs*, WYO. REGISTERED AGENT, <https://wyomingregisteredagent.com/wyoming-vs-nevada-incorporation> [https://perma.cc/P4NP-L28F].

97. *Special: Expedited 1-2 Days Nevada LLC Formation with Las Vegas Address and Privacy for \$1049*, NEV. LLC SERVS., <https://www.nevadallcservices.com/special-same-day-nevada-llc-formation-with-privacy.php> [https://perma.cc/PXX2-S3YL].

98. *Supporter Spotlight: Wachtell, Lipton, Rosen & Katz*, N.Y. UNIV. SCH. OF L., <https://www.law.nyu.edu/giving/campaign/supporters/wachtell-lipton-rosen-katz> [https://perma.cc/NSV8-GK8Q].

99. See Neate, *supra* note 24 (documenting that the share price of Weight Watchers more than doubled after Oprah Winfrey announced her purchase of a ten percent share in the company).

decisions based on immutable traits of entrepreneurs—be it race, gender, or sexual orientation.<sup>100</sup> Forced public exposure of the owner can therefore negatively impact the viability of a business by “outing” these immutable traits.<sup>101</sup> In such contexts, identity shielding allows entrepreneurs to evade biases and more equitably compete in a systemically flawed marketplace.

The sirens of conformity can powerfully deter individuals from funding otherwise legal and socially desirable enterprises. This is because the business enterprise is often presumed to mirror—whether rightfully or not—the owner’s identity or political beliefs. Thus, for instance, a straight man in a small conservative-leaning town who might personally support LGBTQ rights may still be skittish about becoming owner or investor in part of a highly lucrative lesbian bar or an LGBTQ-oriented media company for fear of his community’s judgment, absent some assurance of privacy. Conformity has an addictive quality, and many individuals would rather not invest in enterprises if it means potentially exposing some of their intimate desires, unusual hobbies, or hidden political viewpoints. Anonymity, in this regard, ensures that capital flows to enterprises unconstrained by the fear of public exposure.

In other cases, privacy is sought out by those who want to invest in promising and innovative business ventures but seek protection from potential threats of violence or backlash. Privacy interests are particularly strong among commercial enterprises that operate in morally contestable industries, including reproductive health care, firearm sales, gene-editing technology, cannabis, and pornography.<sup>102</sup> Abortion-care providers in the United States are prime examples.<sup>103</sup> In

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100. See Benjamin P. Edwards & Ann C. McGinley, *Venture Bearding*, 52 U.C. DAVIS L. REV. 1873, 1873 (2019) (“For all founders, the size, shape, and frequency of the obstacles they face shifts with perceptions about their identities. Identity alters the economic landscape because venture capitalists, developers, and others may consciously and unconsciously modulate their behavior depending on the perceived identity of the founder.”); see also DERALD WING SUE, *MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER, AND SEXUAL ORIENTATION* 5–10 (2010) (discussing biases against socially marginalized groups in general).

101. Cf. Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159, 161 (2015) (examining the constitutionality of the forced outing of “individuals’ sexuality, gender identity, HIV status, and political beliefs by the government”).

102. See *infra* Section II.A.

103. Benjamin P. Edwards, *When Fear Rules in Law’s Place: Pseudonymous Litigation as a Response to Systematic Intimidation*, 20 VA. J. SOC. POL’Y & L. 437, 464 (2013) (“[I]t bears noting that death threats are frequently used to induce fear and to intimidate, rather than to convey an

2019 alone, abortion providers reported over three thousand “targeted incidents of hate mail and harassing phone calls” along with ninety-two instances of “death threats and threats of harm.”<sup>104</sup> Consider providers in Louisiana, a state where anti-abortion regulations have driven out all but a handful of abortion-care providers.<sup>105</sup> Recently, providers have been “targeted at private offices, hospitals, and disturbingly, their children’s daycare centers.”<sup>106</sup> One provider, referred to as “Dr. John Doe 1” in court documents, tried to hide his identity, but “that didn’t stop protesters from accosting him . . . or sending nasty mailers about him to his neighbors.”<sup>107</sup> It is no wonder why potential investors take utmost care to protect their identity from public disclosure, given that “[e]ven a tenuous association with abortion care in Louisiana has presaged harassment and violence.”<sup>108</sup>

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actual intent to kill. However, . . . [i]n other contexts such as with abortion doctors, zealots have followed through on their threats to kill people.”)

104. NAT’L ABORTION FED’N, 2019 VIOLENCE AND DISRUPTION STATISTICS 4 (2020), <https://5aa1b2xfmfh2e2mk03kk8rsx-wpengine.netdna-ssl.com/wp-content/uploads/NAF-2019-Violence-and-Disruption-Stats-Final.pdf> [<https://perma.cc/LE9E-3Q88>].

105. Kathaleen Pittman, *I Run a Louisiana Abortion Clinic. Despite Supreme Court Win, I’m Nervous For Our Future*, USA TODAY (July 1, 2020, 1:41 PM), <https://www.usatoday.com/story/opinion/voices/2020/06/30/supreme-court-june-medical-services-abortion-rights-access-column/3283212001> [<https://perma.cc/297T-89HG>].

106. Brief of Feminist Majority Foundation, National Organization for Women Foundation, Southern Poverty Law Center, and Women’s Law Project as *Amici Curiae* in Support of June Medical Services L.L.C., et al. at 12, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (No. 18-1323, 18-1460), 2019 WL 6698206, at \*12 [hereinafter Brief of Feminist].

107. Jessica Mendoza, *The View from One of the Last Abortion Clinics in Louisiana*, CHRISTIAN SCI. MONITOR (June 13, 2019), <https://www.csmonitor.com/USA/Politics/2019/0613/The-view-from-one-of-the-last-abortion-clinics-in-Louisiana> [<https://perma.cc/EJ7V-FHEX>].

108. Brief of Feminist, *supra* note 106, at 13. In Germantown, Maryland, for example, even the landlord of an abortion clinic has been targeted by anti-abortion activists. *See* Petula Dvorak, *A Clinic’s Landlord Turns the Tables on Anti-Abortion Protesters*, WASH. POST (Mar. 29, 2012), [https://www.washingtonpost.com/local/a-clinics-landlord-turns-the-tables-on-anti-abortion-protesters/2012/03/29/gIQAThgwiS\\_story.html](https://www.washingtonpost.com/local/a-clinics-landlord-turns-the-tables-on-anti-abortion-protesters/2012/03/29/gIQAThgwiS_story.html) [<https://perma.cc/PZ8L-LK3K>] (“[Anti-abortion activists] showed up at [the landlord’s] daughter’s middle school on the first day of classes and again at back-to-school night. They had signs displaying his name and contact information as well as those gory images of the fetuses. . . . Soon after that, the harassing calls started coming to his home.”). This is critical, given that abortion clinics often fail to secure sufficient funding to open their doors. As reported in *Bloomberg*, abortion-care business owners often get denied funding from traditional lending outlets once they reveal their line of business. Cynthia Koons & Rebecca Greenfield, *Abortion Clinics Are Getting Nickel-and-Dimed Out of Business*, BLOOMBERG BUSINESSWEEK (Feb. 27, 2020, 10:29 AM), <https://www.bloomberg.com/news/features/2020-02-27/abortion-clinics-are-the-most-challenging-small-business-in-america> [<https://perma.cc/E732-2AMC>]. As one abortion clinic owner in Kansas who was denied funding from Bank of America

Constraints on the flow of capital to certain business enterprises are not just limited to ventures that may incite threats of physical violence or harassment toward owners or investors. The social cost inflicted by the publicity in the event of business failure can also serve as a deterrent to entrepreneurship.<sup>109</sup> The social cost of business failure is well known in the management literature.<sup>110</sup> In addition to the loss of important social network, business failure generates a sense of stigma for entrepreneurs that “can also lead to negative discrimination with respect to employment opportunities and access to future resources.”<sup>111</sup> Because anonymous companies enable entrepreneurs to avoid public disclosure in the event of business failure, it can serve as an important catalyst for entrepreneurial risk-taking that may benefit society at large.<sup>112</sup>

Anonymous companies have thus become a staple feature of modern economic life by providing the means to achieve identity shielding—a powerful force that impacts the propensity of individuals to take on entrepreneurial risk. This feature, which has earned the imprimatur of the natural selection process in the market for business entities, ought to be taken seriously because it disrupts conventional accounts concerning the function of the corporate form.

### C. Identity Shielding and Entrepreneurial Risk-Taking

The concept of identity shielding enriches the prevailing scholarly accounts concerning the function of the corporate form. According to

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to Wells Fargo to smaller regional institutions recalls: “After I announced that we would be providing abortion care, that’s where the conversation stopped.” *Id.*

109. I am grateful to Professor Eric Chaffee and Dr. Chris Cho for raising this point.

110. See, e.g., Jason Cope, *Entrepreneurial Learning From Failure: An Interpretative Phenomenological Analysis*, 26 J. BUS. VENTURING 604, 605 (2011) (“[T]he emotional impact of failure is inextricably linked to its social cost, particularly the ability of failure to detach entrepreneurs from their naturalistic community of collaborators.”); Smita Singh, Patricia Corner & Kathryn Pavlovich, *Coping With Entrepreneurial Failure*, 13 J. MGMT. & ORG. 331, 336–37 (2007) (“Entrepreneurs reported substantive social impact from venture loss in that three of their five marriages broke up within a few months of the business failure. Also, two of the entrepreneurs reported a social distance from friends and from family members due to feelings of embarrassment or guilt . . .”).

111. Deniz Ucbasaran, Dean A. Shepherd, Andy Lockett & S. John Lyon, *Life After Business Failure: The Process and Consequences of Business Failure for Entrepreneurs*, 39 J. MGMT. 163, 177 (2013).

112. *Id.* at 164 (“If the costs of failure (i.e., financial, social, and psychological) are too high compared to the benefits of learning from failure, entrepreneurs may choose to exit their entrepreneurial careers. In such a situation, both the entrepreneur and society may lose out.”).

the standard account, the legal personality assigned to the corporate form serves to partition assets in the eyes of the law.<sup>113</sup> Stripped of its metaphysical narrative, asset partitioning is the idea that firms are separate legal persons from natural persons who own and control those entities,<sup>114</sup> thereby enabling two critical functions of the corporate form: entity shielding and limited liability.<sup>115</sup>

Entity shielding partitions firm assets from those of the owners, thereby reserving those assets for the firm's creditors.<sup>116</sup> Entity shielding is considered to be an essential feature of modern firms by today's leading legal scholars,<sup>117</sup> for it "reduces the cost of credit for legal entities by reducing monitoring costs, protecting against premature liquidation of assets, and permitting efficient allocation of risk."<sup>118</sup> To illustrate, imagine that I operate a food truck specializing in selling jumbo lump crab cakes.<sup>119</sup> If I operated the food truck without forming a business entity, my credit card lenders like American Express and Chase could at any time tow away the truck that belongs to my business if I default on my personal loans. The same is not true if I operate the food truck through an LLC or a corporation. Entity shielding ensures that only my business creditors (say, my Chesapeake

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113. As Professors Hansmann and Kraakman explain, "designation of a separate pool of assets that are associated with the firm, and that are distinct from the personal assets of the firm's owners and managers . . . is done by recognizing juridical persons . . . that are distinct from individual human beings and that can own assets in their own name." Hansmann & Kraakman, *Essential Role*, *supra* note 12, at 393. Although asset partitioning is principally associated with the function of corporations, the concept has been extended to other business entities. Hansmann, Kraakman & Squire, *New Business*, *supra* note 13.

114. See Pollman, *Reconceiving*, *supra* note 15.

115. Blair, *Locking*, *supra* note 12.

116. Hansmann, Kraakman & Squire, *Law and the Rise*, *supra* note 12, at 1335.

117. Hansmann & Kraakman, *Essential Role*, *supra* note 12, at 398. It is now fairly well-accepted that "the law is essential in providing the corporation with distinct property rights and, in particular, a dedicated pool of assets shielded from the shareholders' personal creditors." Dari-Mattiacci, *supra* note 18, at 194.

118. Hansmann & Kraakman, *Essential Role*, *supra* note 12, at 398. In a later work, Professors Hansmann and Kraakman, joined by Professor Squire, write that entity shielding brings about "a lower cost of credit for firm owners, reduced bankruptcy administration costs, enhanced stability, and the possibility of a market in shares." Hansmann, Kraakman & Squire, *Law and the Rise*, *supra* note 12, at 1335.

119. I am indebted to Professor Morley's illustration of entity shielding for this example. See Morley, *supra* note 88, at 2167-68.

Bay blue crab suppliers) can go after business assets, ensuring that capital is locked into the food truck to perform its intended return.<sup>120</sup>

Relatedly, asset partitioning insulates firm owners from business debts. For instance, if a consumer develops a serious illness from eating my crab cakes and successfully brings a million-dollar tort suit against my food truck business, my personal assets will generally be unreachable to that tort creditor. This is the concept of limited liability that every teacher of Business Associations tries to drill into their law students as a foundational feature of modern corporate law.<sup>121</sup> Limited liability's importance as a tool for encouraging socially productive risk-taking is widely appreciated.<sup>122</sup> For example, not many people will start a local clinic offering essential medical services or a Spanish tapas wine bar offering first-class seafood paella without some degree of assurance that their home or wedding rings are not up for grabs by business creditors—say, if a global pandemic or an unfortunate listeria outbreak bankrupts the business.<sup>123</sup> These commercial ventures generate a range of benefits for society, including “financial returns to investors, jobs for employees, and desirable products and services for consumers.”<sup>124</sup>

While a healthy scholarly debate persists as to whether limited liability is truly essential to the corporate form,<sup>125</sup> limited liability's

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120. Hansmann & Kraakman, *Essential Role*, *supra* note 12. As Professor Morley explains, “[e]ntity shielding stops the owners and creditors of a business from taking the assets of the business away before the assets have had a chance to perform their intended purpose and produce an investment return.” Morley, *supra* note 88, at 2167.

121. See BAINBRIDGE & HENDERSON, *supra* note 21, at 2–3.

122. See *id.* at 47; Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80, 99–107 (1991); Susan E. Woodward, *Limited Liability in the Theory of the Firm*, 141 J. INST. & THEORETICAL ECON. 601, 601–02 (1985).

123. As Professor Herbert Hovenkamp assesses, “[l]imited liability clearly encouraged the flow of capital into new enterprise.” HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW: 1836–1937*, at 54 (1991). As an added bonus, limited liability relieves creditors from having to monitor the potential personal liability of the owners in extending the credit. See Hansmann & Kraakman, *Essential Role*, *supra* note 12, at 404.

124. Millon, *supra* note 31.

125. Compare BAINBRIDGE & HENDERSON, *supra* note 21, at 19 (“Limited liability is arguably the most important characteristic of the modern corporation.”), with Hansmann, Kraakman & Squire, *Law and the Rise*, *supra* note 12, at 1336 (“While limited liability has evident and important functional complementarities to entity shielding, it is neither necessary nor sufficient for the creation of business firms as separate and distinct economic actors. Firms can prosper without limited liability, but significant enterprises lacking entity shielding are largely unknown in modern times.”).

impact on the broader history of modern economic life is undeniable.<sup>126</sup> As Professors Stephen Bainbridge and Todd Henderson assess, “[i]t is not an exaggeration to say that our capitalist society probably could not exist, as we know it, without the principle of limited liability.”<sup>127</sup>

Largely unexplored in this body of literature is the privacy function served by modern business entities.<sup>128</sup> This feature is critical to analyze because the set of interests advanced by identity shielding

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126. See Nicolas M. Butler, President of Columbia Univ., Address at the 143d Annual Banquet of the Chamber of Commerce of the State of New York (Nov. 16, 1911), in WILLIAM MEADE FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 21 (1917) (“[I]n my judgment the limited liability corporation is the greatest single discovery of modern times. . . .”). Scholars have, for instance, theorized that limited liability has allowed for widened participation in the marketplace and equalized opportunities to gain wealth, since entrepreneurs need not fear losing more capital than they invested. See Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW. U. L. REV. 148, 155–56 (1992).

127. BAINBRIDGE & HENDERSON, *supra* note 21, at 19; see also Blair, *Locking*, *supra* note 12, at 390 (“[C]hartering of a corporation legally transformed the business enterprise in ways that would have been impossible or extremely difficult to achieve through individual proprietorship, partnership, or other forms of contract law . . .”). Modern business entities are thus credited with lowering the transactional costs of individuals pooling capital for business ventures, limiting the liability to the owners of the businesses, and protecting such enterprises from untimely dissolutions. See Andrew Verstein, *Enterprise Without Entities*, 116 MICH. L. REV. 247, 248–49 (2017).

128. Instead, when discussing the intersection of corporations and privacy, the prevailing literature has primarily focused on examining (1) the data privacy of various stakeholders impacted by corporations, and (2) the right to privacy for corporations as a matter of U.S. constitutional law. For influential accounts on the former, see H. JEFF SMITH, *MANAGING PRIVACY: INFORMATION TECHNOLOGY AND CORPORATE AMERICA* 93 (1994) (“[M]ost executives wait until an external threat forces them to consider their privacy policies.”); Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy on the Books and on the Ground*, 63 STAN. L. REV. 247, 251 (2011) (“Between 1995 and 2010, corporate privacy management in the United States has undergone a profound transformation. Thousands of companies have created ‘chief privacy officer’ positions, a development often accompanied by prominent publicity campaigns.”); Victoria L. Schwartz, *Corporate Privacy Failures Start at the Top*, 58 B.C. L. REV. 1693, 1693 (2016) (“[E]ven corporations not directly in the privacy business must also make important decisions potentially impacting the privacy of their employees, consumers, and shareholders.”). For important scholarship concerning whether corporations ought to be afforded privacy rights as a matter of U.S. constitutional law, see Pollman, *Corporate*, *supra* note 20, at 32 (“This Article argues that most corporations in most circumstances should not have a constitutional right to privacy.”); Orts & Sepinwall, *supra* note 20, at 2278 (“[W]e do not think the conclusion that ‘most corporations in most circumstances should not have a constitutional right to privacy’ is justified by the normative and legal arguments presented.”); Buccola, *supra* note 20, at 499 (“Constitutional rights are ascribed to corporations such that entrepreneurs are neither rewarded nor punished for choosing the corporate form over other modes of coordination . . . .”); see also Anita L. Allen, *Rethinking the Rule Against Corporate Privacy Rights: Some Conceptual Quandaries for the Common Law*, 20 J. MARSHALL L. REV. 607, 607–09 (1987) (assessing whether corporations should have privacy rights at common law).

are not entirely disjointed from the functional goals of modern business entities identified in existing scholarly accounts.

Similar to how the rule of limited liability incentivizes entrepreneurial risk-taking,<sup>129</sup> identity shielding encourages the flow of capital to certain business ventures that would otherwise be underfunded or not be funded at all. The risks protected by identity shielding, however, are distinct from risks protected by the doctrine of limited liability. Canonical understanding of limited liability frames risk in terms of the loss of capital. That is, limited liability helps overcome risk aversion of individuals and facilitates capital formation by preventing “investors from losing more than the capital they invest in a business.”<sup>130</sup> Identity shielding, on the other hand, encourages the flow of capital to business enterprises by preserving the individual’s ability to control knowledge about oneself to the world.<sup>131</sup>

In this regard, identity shielding might be conceptualized as providing limited *reputational* liability, as opposed to limited *capital* liability.<sup>132</sup> Like the doctrine of limited liability, assuring anonymity does not only promote enterprise that results in desirable products and services for consumers, but also may generate tax revenues and technological innovation to benefit society.<sup>133</sup> The link between identity shielding and innovation should not be particularly surprising. As Professor Julie Cohen observes, “[c]onditions of diminished privacy also impair the capacity to innovate . . . because innovation requires the capacity for critical perspective on one’s environment and because

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129. BAINBRIDGE & HENDERSON, *supra* note 21, at 47 (“By reducing a project’s riskiness to the entrepreneur, limited liability thus may encourage business risk taking and, as a result, economic growth.”).

130. Simkovic, *supra* note 28, at 277.

131. See Charles Fried, *Privacy*, 77 YALE L.J. 475, 483 (1968) (defining privacy as “control over knowledge about oneself”).

132. I am grateful to the invaluable input of Professor Christopher Bradley on this point.

133. Professor David Millon emphasizes the importance of limited liability as a tool for risk reallocation:

The real policy basis for limited liability . . . seems to be to promote investment by transferring risk from investors to creditors. Commercial activity can generate a range of social benefits, including financial returns to investors, jobs for employees, and desirable products and services for consumers. The general public also benefits from tax revenues and, less directly but no less importantly from the advantages of ongoing technological progress. . . .

Millon, *supra* note 31 (footnote omitted).



innovation . . . requires room to tinker, and therefore thrives most fully in an environment that values and preserves spaces for tinkering.”<sup>134</sup>

In some cases, identity shielding impacts the propensity of individuals to take on business risk because any given individual’s involvement in business ventures may reveal not only their financial position, but a trove of sensitive information about people’s personal lives.<sup>135</sup> In this sense, identity shielding involves preserving privacy interests that are intricately linked to personal autonomy. Professor Laurence Tribe explains that privacy allows individuals “to shape the ‘self’ that one presents to the world, and on the basis of which the world in turn shapes one’s existence.”<sup>136</sup> This reality is already recognized in other areas of the law.<sup>137</sup> For instance, trusts used to transfer wealth enable individuals to control their identities and reputations even beyond death.<sup>138</sup> Trust law denies the general public access to trust instruments, for they may reveal intimate details about an individual, including their sexual orientation.<sup>139</sup> Similarly, business ventures are not always mere passive investment vehicles. Rather, they are social activities that can reveal intimate details about an entrepreneur’s (or an investor’s) closeted sexuality, religious affiliations, unusual hobbies, and political beliefs.

In other cases, preserving identifying information from public exposure can help safeguard the entrepreneur’s physical safety. That is, absent anonymity, a business creditor or a dissatisfied customer can

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134. Cohen, *supra* note 29; see also Frank Pasquale, *Redescribing Health Privacy: The Importance of Information Policy*, 14 HOUS. J. HEALTH L. & POL’Y 95, 125 (2014) (“In a growing variety of contexts, rights to privacy are critical to motivate the *creation* of knowledge. . . . We increasingly find ourselves needing to consider knowledge *systems*, ecologies built over time and space, rather than the efficiency or fairness of single transactions in the knowledge economy.”).

135. See *infra* Section II.A.

136. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1304, 1389–90 (2d ed. 1988).

137. Privacy rights, although notoriously difficult to conceptualize, are enshrined in a patchwork of laws in the United States. See DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* 1 (2008); Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. (forthcoming 2022) (manuscript at 3), [https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2790&context=faculty\\_publications](https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2790&context=faculty_publications) [<https://perma.cc/6CNR-Y8VL>].

138. Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 566, 569–70 (2008) (“Trust law has placed such a premium on privacy that it has denied trust beneficiaries as well as the general public access to the trust instrument.”).

139. *Id.* at 559–60; see also Matthew R. Dubois, Note, *Legal Planning for Gay, Lesbian, and Non-Traditional Elders*, 63 ALB. L. REV. 263, 322 & n.308 (1999) (assessing that planning through wills, which are part of the public record “may subject the private lives of your gay, lesbian, or non-traditional elder to unwanted scrutiny”).

always knock on the doors of the actual owners of the business and perhaps shake down the owners informally, even if there might not be a *legal* recourse under the doctrine of limited liability. Indeed, there are far too many reports of violence and harassment toward owners of business enterprises that discourage investment in socially productive enterprises.<sup>140</sup> For vast swaths of e-commerce businesses, the potential for doxing and cyber-harassment, moreover, can serve as a powerful constraint for individuals to take on entrepreneurial risk. Colorado-based lawyer Paul Miller, who specializes in forming LLCs for small businesses, advises his clients to form anonymous companies “as a matter of course” because of the pervasive risk of doxing or harassment in today’s market environment.<sup>141</sup>

To be clear, the assessment that privacy advances some of the functional features traditionally associated with the corporate form does not mean that identity shielding must be pursued at all costs.<sup>142</sup> Rather, the exposition serves to understand fully what is at stake regarding anonymity and business enterprises. Take, for example, the rule of limited liability. Although credited with encouraging socially productive risk-taking, limited liability has social costs in the form of allowing enterprises “to externalize a certain amount of costs and risks onto third parties.”<sup>143</sup> Yet, that is a feature of modern business entities that many legal scholars have come to accept as “the most important

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140. Consider a recent incidence of a disturbing threat targeting at least ten Black business owners in Philadelphia. As reported in the *Philadelphia Inquirer*, the emails, littered with racial slurs, “threatened to burn down businesses and rape women, and questioned the intelligence of Blacks.” Mensah M. Dean, *Racist Emails Hit Black-Owned Small Businesses in Philly*, PHILA. INQUIRER (Sept. 3, 2020), <https://www.inquirer.com/news/racism-emails-small-business-owners-philadelphia-police-20200903.html> [<https://perma.cc/RUN2-LFFH>].

141. Telephone Interview with Paul Miller (Sept. 9, 2021) (notes on file with author).

142. Indeed, even the doctrine of limited liability does not offer absolute protection for owners of firms. Corporate law recognizes a doctrine called “veil piercing” designed to provide an exception to limited liability. See Peter B. Oh, *Veil-Piercing Unbound*, 93 B.U. L. REV. 89, 90 (2013). The notoriously murky jurisprudence on veil piercing injects uncertainty regarding limited liability protection to investors of business entities. See *id.* at 89 (“Veil-piercing is an equitable remedy. This simple insight has been lost over time. What started as a means for corporate creditors to reach into the personal assets of a shareholder has devolved into a doctrinal black hole.”); Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 481 (2001) (“The standards by which veil piercing is effected [sic] are vague, leaving judges great discretion. The result has been uncertainty and lack of predictability, increasing transaction costs for small businesses.”). Similarly, it is entirely plausible that societies can preserve identity shielding as the default rule and carve out exceptions overcoming that default in appropriate circumstances.

143. BAINBRIDGE & HENDERSON, *supra* note 21, at 3.

advance in the organization of business enterprises.”<sup>144</sup> Albeit noteworthy dissents published in prominent law reviews,<sup>145</sup> limited liability is sanctified in virtually every state’s corporate code governing the laws of business entities.<sup>146</sup> By examining the broader functional dimensions of privacy served by anonymous companies, this Article hopes to stimulate a less myopic and more productive discussion regarding the extent to which any given society ought to harness or regulate these interests.

## II. THE HIDDEN VIRTUES OF IDENTITY SHIELDING

This Part elaborates on the set of interests advanced by identity shielding by sketching the real-life workings of anonymous companies. It shows how identity shielding facilitates the unadulterated flow of capital—that may otherwise be deterred by personal, social, and moral constraints—into business enterprises. My analysis is not proffered as a comprehensive taxonomy of identity shielding. Rather, it is aimed at crystalizing the idea that privacy can unlock a range of humanistic and economic interests. It is my hope that these contemporary examples can serve as a proof of concept that can inspire future research to further shed light on the topic.

Section II.A demonstrates anonymous companies as incubators of morally contestable enterprises by documenting how identity shielding

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144. Naomi R. Lamoreaux & Jean-Laurent Rosenthal, *Entity Shielding and the Development of Business Forms: A Comparative Perspective*, 119 HARV. L. REV. F. 238, 238 (2005) (“Scholars have generally assumed that the most important advance in the organization of business enterprises has been the development of forms that grant all members of a firm limited liability, thus enabling them to protect their personal assets from claims against the enterprise.”).

145. See Hansmann & Kraakman, *Toward Unlimited*, *supra* note 21 (“[L]imited liability in tort cannot be rationalized for either closely-held or publicly-traded corporations on the strength of the conventional arguments offered on its behalf. In fact, there may be *no* persuasive reasons to prefer limited liability over a regime of unlimited pro rata shareholder liability for corporate torts.”); Hansmann & Kraakman, *Essential Role*, *supra* note 12 (arguing that limited liability is “of distinctly secondary importance”); Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 VAND. L. REV. 1, 2 (1994) (“The liability that is avoided does not disappear into a black hole; it falls onto another person. If the liability is shifted to a tort victim, the use of the corporate form seems particularly troublesome, permitting the enterprise to externalize part of the cost of doing business.”); David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1568–69 (1991) (arguing for the abrogation of limited liability for certain corporate subsidiaries).

146. See Armour et al., *supra* note 20, at 8–9 (assessing that the rule of limited liability “has over time become nearly universal”); see also MODEL BUS. CORP. ACT § 6.22(b) (Am. Bar Ass’n 2002) (providing for shareholder limited liability unless liability might be warranted by virtue of the shareholder’s own conduct).

enabled those who believe in female reproductive autonomy to launch the first abortion drug in the United States. Section II.B describes anonymous companies as “race-neutral” platforms for small business entrepreneurs by documenting how Black entrepreneurs use anonymous companies to more equitably compete in a marketplace infected with systemic racism. Section II.C discusses anonymous companies as entrepreneurial “safe houses” by documenting how survivors of intimate partner violence use anonymous companies to pursue business ventures without threats of stalking, violence, and harassment.

#### A. *Incubating Morally Contestable Enterprises*

Today, more than half of U.S. women seeking abortion care during the first ten weeks of gestation rely on medical (or medication) abortion.<sup>147</sup> As a safe and effective option in early pregnancy,<sup>148</sup> medical abortion is often preferred to surgical abortion because it “is noninvasive and can be completed in a patient’s chosen setting, such as at home.”<sup>149</sup> Notwithstanding the contentious legal battle in a recent Supreme Court case of *Food and Drug Administration v. American College of Obstetricians and Gynecologists*<sup>150</sup> over whether an in-person doctor’s visit is required to access the abortion drug during the COVID-19 pandemic,<sup>151</sup> medical abortion remains a mainstream way for U.S. women to access abortion.

It was not always like this. Although the drug compound used in medical abortion, mifepristone, was first approved and distributed in France in 1988, and then a few years later in the United Kingdom and

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147. *Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578, 579 (2021) (Sotomayor, J., dissenting).

148. Jillian T. Henderson, Ann C. Hwang, Cynthia C. Harper & Felicia H. Stewart, *Safety of Mifepristone Abortions in Clinical Use*, 72 *CONTRACEPTION* 175, 175 (2005) (“In approving mifepristone, the FDA considered data from clinical trials showing mifepristone to be safe and effective for early pregnancy termination. Subsequent studies have helped refine regimens used for medication abortion.” (citation omitted)).

149. *See Medication Abortion*, GUTTMACHER INST. (Feb. 2021), <https://www.guttmacher.org/evidence-you-can-use/medication-abortion> [<https://perma.cc/E8HU-Z27T>].

150. *Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. at 578.

151. As Justice Sonia Sotomayor describes in her scathing dissent, “[o]f the over 20,000 FDA-approved drugs, mifepristone is the only one that the FDA requires to be picked up in person for patients to take at home.” *Id.* at 579 (Sotomayor, J., dissenting).

Sweden,<sup>152</sup> women in the United States did not have access to the drug until 2000. The fears surrounding those providing reproductive health services served as a significant barrier to manufacturing and distributing the drug despite the high consumer demand.<sup>153</sup> In the 1980s, anti-abortion activists had been linked to the deaths of doctors who provided abortion services, and pharmaceutical companies had been effectively shamed into refusing the production of the drug for the U.S. market.<sup>154</sup> As reported in *The Los Angeles Times*, in the United States, “not a single pharmaceutical company stepped up to the plate to help research, make[,] or manufacture the drug.”<sup>155</sup>

It was for this reason in part that in 1994, the French patent holder Roussel Uclaf S.A. voluntarily transferred its U.S. patent rights to mifepristone without compensation to the Population Council, a nonprofit organization based in New York.<sup>156</sup> Even so, the capital investments necessary to conduct clinical trials for regulatory approval required the raising of at least \$50 million in capital.<sup>157</sup>

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152. Kristina Gemzell-Danielsson & Sujata Lalitkumar, *Second Trimester Medical Abortion with Mifepristone–Misoprostol and Misoprostol Alone: A Review of Methods and Management*, 16 REPROD. HEALTH MATTERS 162, 163 (2008).

153. R. Alta Charo, *A Political History of RU-486*, in BIOMEDICAL POLITICS 43, 60 (Kathi E. Hanna ed., 1991) (“A Louis Harris survey, released on October 12, 1988, found that 82 percent of Americans supported government spending on research and development of new contraceptives and 59 percent thought that RU-486 should be made available in the United States.”).

154. See *id.* at 54 (“Publicly, pharmaceutical companies claimed they were not concerned by the boycott threat. Privately, however, according to the *New York Times*, the message was different. ‘The reasons are obvious,’ said one unnamed company executive, ‘and we don’t want to get into it.’”); Carole Joffe & Tracy A. Weitz, *Normalizing the Exceptional: Incorporating the “Abortion Pill” into Mainstream Medicine*, 56 SOC. SCI. & MED. 2353, 2354–55 (2003) (“The pill immediately became entangled in international antiabortion politics—including visits to France by both abortion proponents and opponents from the United States, with the latter threatening boycotts of the manufacturer’s other products if the pill were to become available in the US.”).

155. Bernstein, *supra* note 25.

156. The *Washington Post* noted:

The French firm that makes RU-486 . . . will give away its U.S. patent rights to help bring the drug to market here. . . . Roussel is giving up potential American profits from sale of the drug because of its stated reluctance to market RU-486 in the highly charged U.S. political climate surrounding the issue of abortion.

John Schwartz, *Abortion Pill on Way to U.S. Market After Rights Deal*, WASH. POST (May 17, 1994), <https://www.washingtonpost.com/archive/politics/1994/05/17/abortion-pill-on-way-to-us-market-after-rights-deal/8a2d196b-feb6-4a67-a513-73ae606abc1d> [<https://perma.cc/4MLN-82JA>].

157. Bernstein, *supra* note 25 (“The pill’s 11-year journey to the United States included a cloak-and-dagger scheme to hide the identities of participants from anti-abortion activists . . . and a price tag of at least \$50 million.”).

Danco Laboratories—the company associated with the Population Council and now known to have been behind the clinical trials necessary to win Food and Drug Administration (“FDA”) approval in the United States—was cloaked in secrecy.<sup>158</sup> Everything from the company’s telephone number to its exact headquarter address remained anonymous.<sup>159</sup> In fact, company officials only disclosed that Danco was housed in an ordinary suite of offices “somewhere in ‘midtown Manhattan.’”<sup>160</sup> For security reasons, it was particularly critical that the identity of investors was kept secret from the public.<sup>161</sup> These privacy goals were accomplished by the deployment of anonymous companies formed in the Cayman Islands. The complex corporate structure of Danco Laboratories, strategically developed with the help of lawyer–activist Joseph Pike, is now well-documented:

Pike had set up shop as a nonprofit, calling his organization Advances in Health Technologies. But the company also had two for-profit subsidiaries—Danco Laboratories Ltd. and Neogen Holdings. Another entity, listed in California state documents as Danco Investors Group LP, was registered in the Cayman Islands, where the identities of officers and partners are not required to be disclosed. The general partner for Danco Investors Group, N.D. Management Inc., also is based in the Cayman Islands.<sup>162</sup>

The decision to use anonymous companies to pool capital for clinical trials was deliberate, “because participants feared that they would be targeted by abortion opponents, some of whom had assaulted and even killed doctors who had performed abortions.”<sup>163</sup> Even the FDA safeguarded the privacy of those involved in its approval process. In an unprecedented move, when the FDA finally announced the

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158. Margaret Talbot, *The Little White Bombshell*, N.Y. TIMES (July 11, 1999), <https://www.nytimes.com/1999/07/11/magazine/the-little-white-bombshell.html> [<https://perma.cc/VN5V-ELDD>].

159. Joffe & Weitz, *supra* note 154, at 2355 (“The security issues surrounding this enterprise are so great that Danco operates out of an office with an unlisted phone, and with the name of another company on its door.”).

160. *Id.*; Melody Petersen, *Abortion Pill Distributor Energized by New Mission*, N.Y. TIMES (Sept. 30, 2000), <https://www.nytimes.com/2000/09/30/us/abortion-pill-distributor-energized-by-new-mission.html> [<https://perma.cc/HT44-UFGT>].

161. Petersen, *supra* note 160 (“There are still many things that Danco will not disclose, including the names of its investors. Ms. O’Neill said the group included wealthy individuals and foundations that supported abortion rights.”).

162. Bernstein, *supra* note 25.

163. Petersen, *supra* note 160.

approval of the sale of the drug in 2000, it “refus[ed] to disclose the name or location of the manufacturer.”<sup>164</sup> The potential risk of being associated with the commercialization of the pill required that almost everyone involved be kept under seal.

As the saga of bringing mifepristone to the United States demonstrates, anonymity can enable the pooling of capital by protecting investors from the backlash of unpopular enterprises that arguably serve socially beneficial functions. The broader societal implications of identity shielding as an incubator for morally contestable business ventures remain vast and transcend political viewpoints.<sup>165</sup>

### B. *Evading “Racialized” Market Biases*

By now, most Americans have at least some understanding about systemic racism that contributes to the subordination of Black people in the United States. This ranges from police brutality,<sup>166</sup> electronic surveillance,<sup>167</sup> home-ownership discrimination,<sup>168</sup> employment discrimination,<sup>169</sup> health care disparity,<sup>170</sup> to banking discrimination and predatory lending.<sup>171</sup>

The commercial marketplace is not immune from racial biases. In an illuminating empirical work, Professors Ian Ayres, Mahzarin

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164. Joffe & Weitz, *supra* note 154, at 2355.

165. Indeed, according to a law firm partner specializing in forming anonymous LLCs, the entrepreneurs seeking anonymity are diverse, including gun shop, abortion clinic, and collection agency owners. See Telephone Interview with Larry Donahue, *supra* note 46. This point is important, given “that one person’s ethical consumption can be another’s discrimination.” See Calo, *supra* note 81, at 649 n.3.

166. See Maneka Sinha, *Radically Reimagining Forensic Science*, 73 ALA. L. REV. (forthcoming 2022) (manuscript at 67–68), <https://ssrn.com/abstract=3891788> [<https://perma.cc/XX85-UKV8>]; Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 419 (2018).

167. See Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641, 655 (2019).

168. See RICHARD R. W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS* 140–67 (2013).

169. See Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1721 (2000). The phenomenon of colorism, or discrimination based on skin tone, exacerbates the discrimination against darker-skinned Black people. See *id.* at 1709–10 (“Even today, [B]lacks with light brown skin tones, although clearly identified as [B]lack, may have some economic advantage over [B]lacks with darker skin tones, especially in workplace settings.”).

170. See Mاتيанgai Sirleaf, *Racial Valuation of Diseases*, 67 UCLA L. REV. 1820, 1820 (2021).

171. See JANIS SARRA & CHERYL WADE, *PREDATORY LENDING AND THE DESTRUCTION OF THE AFRICAN AMERICAN DREAM 3* (2020).

Banaji, and Christine Jolls demonstrated that baseball cards held by a dark skinned/African American hand on eBay sold for approximately 20 percent less than those held by a light skinned/Caucasian hand.<sup>172</sup> The study provided striking evidence of the disproportionately negative outcomes for Black sellers in ordinary market transactions “even when there is no opportunity to observe demeanor, socioeconomic status, or other nonrace but potentially race correlated features of potential transaction partners.”<sup>173</sup> In another famous field experiment study selling iPods through local online classified advertisements throughout the United States, economists Jennifer Doleac and Luke Stein similarly found that “Black sellers receive fewer and lower offers than white sellers.”<sup>174</sup>

Unsurprisingly, many Black entrepreneurs conceal information of their business ownership. The common reasons Black entrepreneurs cite for choosing anonymity include the misperception that their products or services are only for Black consumers—or racism by potential investors, consumers, and business partners.<sup>175</sup> Pepper Miller, a Black consumer marketing expert, explains the Black entrepreneurs’ decisions to downplay Black ownership: “It’s not about anybody selling out. People are trying to survive. There’s a perception that [B]lack people can only do [B]lack stuff.”<sup>176</sup>

Consider Duane Draughon, a Black owner of a patio installation company in Illinois interviewed by *The Chicago Tribune*.<sup>177</sup> In growing his business, Draughon intentionally concealed his ownership of the company, going to the lengths of having “no photos of him or his family on his website; giving potential customers the impression the business was part of a franchise and that he was a project manager, not the owner; and recruiting a white insurance company representative to

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172. Ian Ayres, Mahzarin Banaji & Christine Jolls, *Race Effects on eBay*, 46 RAND J. ECON. 891, 891 (2015).

173. *Id.* at 910.

174. Jennifer L. Doleac & Luke C.D. Stein, *The Visible Hand: Race and Online Market Outcomes*, 123 ECON. J. 469, 469 (2013).

175. See, e.g., Jonathan S. Leonard, David I. Levine & Laura Giuliano, *Customer Discrimination*, 92 REV. ECON. & STAT. 670, 670 (2010).

176. Brian, *Would You Hide That Your Business Is Black-Owned To Achieve More Success?*, BLACK BUS. BOOST, <https://www.blackbusinessboost.com/would-you-hide-that-your-business-is-black-owned-to-achieve-more-success> [https://perma.cc/3MZN-VR7Y].

177. Cheryl V. Jackson, *When Building Your Business Means Hiding That It’s Black-Owned*, CHI. TRIB. (Apr. 14, 2016, 5:25 AM), <https://www.chicagotribune.com/business/blue-sky/ct-black-entrepreneurs-downplay-ownership-bsi-20160414-story.html> [https://perma.cc/75LW-3LP7].



conduct job interviews in assembling his white sales team.”<sup>178</sup> Draughton’s story is hardly unusual.<sup>179</sup>

In iHeartRadio’s popular Black Entrepreneur Blueprint, a podcast “created specifically to educate and inspire Black entrepreneurs to Launch[,] Build, and Grow successful businesses,”<sup>180</sup> host Jay Jones explains why he—as a self-described “Black dude with [a] bald head”—operates his e-commerce business selling high-end hair products through an anonymous company: to compete on an equal footing based on the quality of his products, rather than his race or appearance.<sup>181</sup> Providing a guide for his listeners in keeping ownership information anonymous, Jones notes:

[I]ncorporate in a state like Delaware where members of any LLC can stay anonymous. . . . [A]ny company you create you can be anonymous. So you can create an LLC, ABC LLC, who are the members of that LLC? They’re anonymous. So if anybody was trying to dig and do some research, they won’t be able to find out who are the owners or the members of that LLC. So you can incorporate in Delaware, and that’s why a lot of companies do that.<sup>182</sup>

In a Zoom interview conducted for this study, Jones emphasized that the use of anonymous companies is “very common in the Black community.”<sup>183</sup> According to Jones, for many Black owners, “anonymity can serve as credibility.”<sup>184</sup> For instance, Jones cited a friend, Darryl, who operated a cleaning service business of residential homes through an anonymous LLC structure.<sup>185</sup> Cognizant of racial biases among his own clients, Darryl concealed his ownership: “Darryl

178. *Id.*

179. In Wisconsin, for instance, Black business owners have reportedly hired white employees to engage in negotiations after “not [being] able to obtain or rent a property site” due to their race. See Michael Bonds, *Looking Beyond the Numbers: The Struggles of Black Businesses To Survive: A Qualitative Approach*, 37 J. BLACK STUD. 581, 588 (2007).

180. Black Entrepreneur Blueprint, *To Be or Not To Be a Black Owned Business; That Is the Question*, iHEART RADIO, at 0:05–:35 (July 30, 2018), <https://www.iheart.com/podcast/263-black-entrepreneur-bluepr-27628674/episode/black-entrepreneur-blueprint-211-jay-29645392> [<https://perma.cc/7V8G-CVXW>].

181. *Id.* at 21:15–22:15, 27:02–:30.

182. *Id.* at 25:39–26:14.

183. Zoom Interview by William J. Moon and Leah Higgins with Jay Jones, at 9:01–9:04 (Sept. 9, 2021).

184. *Id.* at 35:35–:39 (Jones assessing that “the credibility factor is going to come from anonymity”).

185. *Id.* at 11:39–12:50, 14:40–:50.

had to not be the owner of his business, in order to get business from other ethnicities—he was the worker, not the owner . . . .”<sup>186</sup>

The use of anonymous companies by Black entrepreneurs, of course, is not an observation concerning its normative desirability. One might rightfully argue that it should not be this way: that race, gender, or sexual orientation ought not to matter in the market for goods and services.<sup>187</sup> My observation here is rather descriptive: entrepreneurs in certain industries are constrained by their immutable traits from fully and fairly participating in today’s commercial life, and many of them choose anonymity to combat this reality.<sup>188</sup> Identity shielding thus provides Black entrepreneurs the option to compete in a marketplace infected with racial biases more equitably.<sup>189</sup>

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186. *Id.* at 12:33–:45.

187. One might also argue that identity shielding may have the potential to entrench discriminatory norms. In a fascinating piece, Professors Ben Edwards and Ann McGinley document how female entrepreneurs in the venture capital world “strategically conceal facets of their female identities in favor of presenting masculinized identities to conduct business and raise capital.” Edwards & McGinley, *supra* note 100. Professors Edwards and McGinley further caution that “yielding to pressures to perform their entities in particular ways, women leave discriminatory norms unchallenged.” *Id.* at 1910–11. Yet, a simple ban on identity shielding not only unfairly penalizes individuals with immutable traits currently dealt with vastly unequal hands, but it also undermines the ability for individuals in marginalized groups to access opportunities to gain wealth that too can challenge market biases. Edwards and McGinley explain that “[t]he costs of resisting social pressures and unjust gender expectations may be too great to force onto the shoulders of individuals seeking access to economic and social resources.” *Id.* The normative desirability of identity shielding’s value, at least in part, depends on one’s assessment of the optimal ways to combat market inequities, as well as judgment calls about whose perspective ought to count in rendering those assessments.

188. To be clear, anonymous companies do not constitute the only vehicles chosen by Black entrepreneurs. According to noted branding expert Sheila P. Coates, the preference to identify one’s business as Black-owned depends on the person: “There are some Black owners who wouldn’t dare take their faces off their products. It’s who they are[,] and they would prefer to succeed doing it their way than hide who they are. It may take longer but it’s who they are as a brand. Bold. Strong, [sic] and outgoing.” Ann Brown, *Hide & Seek: Why Some Companies Hide Being Black or Woman Owned*, MADAME NOIRE (July 28, 2016), <https://madamenoire.com/708037/black-owned> [<https://perma.cc/BH6F-FXK2>] (quoting Sheila P. Coates).

189. In recent years, the Black Lives Matter movement inspired supporters to identify and support Black-owned businesses. See, e.g., Dylan Haas, *How To Find and Support Black-Owned Businesses—And Why It’s Important*, MASHABLE (June 18, 2020), <https://mashable.com/article/how-to-find-and-support-black-owned-businesses> [<https://perma.cc/M3K3-XR43>]. While these movements should be lauded in helping combat market inequities, it remains to be seen whether they can fully remedy deep structural inequalities. In some respects, identity shielding preserves the option for entrepreneurs themselves, who might be at the best informational advantage to determine optimal strategy to effectively compete in the marketplace. Jay Jones, for instance, readily admits that he deploys anonymous companies for some but not all of his businesses because he is cognizant that he does not face discrimination in all contexts. Zoom

In addition to the individual entrepreneurs from socially marginalized groups who may benefit from anonymous companies, there may be other socially desirable dimensions to harnessing identity shielding in this context. This is because it is arguably a quasi-market failure when consumers or business partners make business decisions based not on the quality of the enterprise's product,<sup>190</sup> but rather based on the immutable traits of the owners, whether race, gender, or sexual orientation. By stripping away these variables, anonymity forces the quality of product or service to function as the principal component for competition, thereby arguably more broadly benefiting the market.<sup>191</sup>

### C. Reducing the Risk of Harassment, Violence, and Stalking

In the United States, one in four women and nearly half of transgender people experience intimate partner violence.<sup>192</sup> Financial abuse occurs almost invariably in these intimate partner violence cases.<sup>193</sup> Unfortunately, survivors encounter many barriers in leaving their abusers, including financial insecurity, homelessness,

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Interview with Jay Jones, *supra* note 184, at 4:55–8:48 (acknowledging that he is “unapologetically Black” in running his podcast and hot sauce company yet deploys anonymous structures for his beauty business). It is also worth noting that identity shielding can coexist in a world full of social movements aimed at supporting minority-owned businesses, given that it does not require a legal regime that mandates anonymity.

190. Cf. David Lowery, *Consumer Sovereignty and Quasi-Market Failure*, 7 J. PUB. ADMIN. RSCH. & THEORY 137, 137 (1998) (articulating the concept of consumer preference error as a quasi-market failure). Rica Elysee, who created the illusion that her beauty product business was not Black-owned, explains: “We have [C]aucasian clients that work with us but have no idea we are a [B]lack-owned business. The quality of our products is about the quality of the products, it’s not about race so I don’t want to use race to build my success.” Lisa Jean Francois, *Do Black-Owned Businesses Fare Better When They Conceal Their Blackness?*, BGLH MARKETPLACE (May 13, 2016), <https://bglh-marketplace.com/2016/05/do-black-owned-business-fare-better-when-they-conceal-their-blackness> [<https://perma.cc/Z5N3-RT9X>].

191. As Professor Calo teaches us, “[p]rivacy supports the basic market mechanism by hiding enough distracting, value-laden information from market participants. A certain *absence* of knowledge focuses us on market-relevant considerations such as quality and price over salient but distorting information such as personal or political commitments.” Calo, *supra* note 81.

192. AMY DURRENCE, KIRKLEY DOYLE & SONYA PASSI, ASSET FUNDERS NETWORK, MAKING SAFETY AFFORDABLE: INTIMATE PARTNER VIOLENCE IS AN ASSET-BUILDING ISSUE 3 (2020), [https://assetfunders.org/wp-content/uploads/AFN\\_2020\\_MakingSafetyAffordable\\_SINGLE\\_9\\_22\\_2020.pdf](https://assetfunders.org/wp-content/uploads/AFN_2020_MakingSafetyAffordable_SINGLE_9_22_2020.pdf) [<https://perma.cc/S4L6-BXGC>]; see Wesley M. King, Arjee Restar & Don Operario, *Exploring Multiple Forms of Intimate Partner Violence in a Gender and Racially/Ethnically Diverse Sample of Transgender Adults*, 1 J. INTERPERS. VIOLENCE NP10477, NP10478 (2019).

193. See Adrienne E. Adams, Cris M. Sullivan, Deborah Bybee & Megan R. Greeson, *Development of the Scale of Economic Abuse*, 14 VIOLENCE AGAINST WOMEN 563, 563 (2008).

unsupportive police, and privacy vulnerabilities that may cause stalking or death.<sup>194</sup> The abuse does not stop with separation from the batterer. According to Professor Leigh Goodmark, “batterers continue to stalk their victims—and in many cases, increase their violence—after separation.”<sup>195</sup>

Financial freedom is thus critical for victims to gain independence from intimate partner violence, but it is difficult to achieve. Survivors of intimate partner violence generally refrain from actively engaging in social media, posting job pursuits, or advertising identifiable information that may enable their abusers to find them.<sup>196</sup> Because many workplaces require going to and remaining in the same place every day for hours, survivors face an additional barrier to gaining employment.<sup>197</sup>

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194. See Michael A. Anderson, Paulette Marie Gillig, Marilyn Sitaker, Kathy McCloskey, Kathleen Malloy & Nancy Grigsby, “*Why Doesn’t She Just Leave?*”: *A Descriptive Study of Victim Reported Impediments to Her Safety*, 18 J. FAM. VIOLENCE 151, 152–53 (2003) (discussing reasons to remain or return as reported by victims); KATRINA BAUM, SHANNAN CATALANO, MICHAEL RAND & KRISTINA ROSE, BUREAU OF JUST. STAT. SPECIAL REP., STALKING VICTIMIZATION IN THE UNITED STATES 3 (2009), <https://www.justice.gov/sites/default/files/ovw/legacy/2012/08/15/bjs-stalking-rpt.pdf> [<https://perma.cc/ETC7-M837>] (citing that the risk of stalking victimization was highest for adults who were separated or divorced—thirty-four per one thousand individuals); Jacquelyn C. Campbell, Daniel Webster, Jane Koziol-McLain, Carolyn Block, Doris Campbell, Mary Ann Curry, Faye Gary, Nancy Glass, Judith McFarlane, Carolyn Sachs, Phyllis Sharps, Yvonne Ulrich, Susan A. Wilt, Jennifer Manganello, Xiao Xu, Janet Schollenberger, Victoria Frye & Kathryn Laughon, *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1090 (2003) (finding that having been separated from an abusive partner after living together, and having ever left or having asked the partner to leave were associated with a higher risk of femicide).

195. Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 8 (2004); see also Dana Harrington Conner, *Financial Freedom: Women, Money, and Domestic Abuse*, 20 WM. & MARY J. WOMEN & L. 339, 340 (2014) (“[F]inancial instability is one of the greatest reasons why, after gaining freedom, a woman who experiences battering has limited choices and may ultimately acquiesce to her partner’s attempts to reconcile.”).

196. Cf. *Domestic Violence and Privacy*, ELEC. PRIV. INFO. CTR., <https://epic.org/privacy/dv> [<https://perma.cc/2UMU-625X>] (“[D]omestic violence victims are . . . singled out by a particular aggressor. This aggressor is able to take advantage of the general lack of protection for personal information in our society.”).

197. See, e.g., Devna Bose, “*Don’t Let Them Take Your Voice Away*”: *Domestic Violence Survivors Face Voting Challenges*, CHARLOTTE OBSERVER (Oct. 9, 2020), <https://www.charlotteobserver.com/news/politics-government/election/article246265510.html> [<https://perma.cc/D2W4-C74X>] (finding that similar privacy concerns arise in voting, where survivors of domestic violence are hesitant to register to vote because voting records are public information). Compounding this problem is the reality that traditional employment can be inaccessible to survivors. As Amy Durrence and her colleagues assess, “[s]urvivors have any number of issues that require attention

Anonymous companies have emerged as a critical tool for survivors of intimate partner violence to regain their financial independence through entrepreneurship. Although the secretive nature of these enterprises renders these entrepreneurs difficult to document, several telephone interviews conducted for this study help shed light on this practice.

In a telephone interview, Larry Donahue, a law firm partner specializing in forming anonymous LLCs,<sup>198</sup> discussed the colorful spectrum of survivors that have entered commercial life by forming anonymous companies:

There's the traditional, former wife who was abused and battered and finally left and moved to another area of the United States and started over with her business. But then I have other abuse victims [like] a daughter who was horribly abused by her father and started her own company without her father being able to look her up and see where she's at. . . . The more common stuff isn't outright abuse like that. There's a lot of stalking victims who are trying to do business . . . without opening themselves up to further stalking or problems like that.<sup>199</sup>

These survivor-entrepreneurs engage in a wide array of commercial activities, including selling home-produced goods on Amazon and Etsy to providing services like educational training. Consider the story of an intimate partner violence survivor in her thirties, referred to by the pseudonym Ann, who fled her abuser after being terrorized by years of constant stalking.<sup>200</sup> After moving to a different state, Ann set up a consulting business that she operated through her home. In a telephone interview, Ann revealed that she deliberately set up an LLC that listed a P.O. Box address instead of her home address to ensure that her abuser could not track her.<sup>201</sup>

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during normal business hours (e.g., court appearances) or issues that are so urgent that they require a survivor to miss work (e.g., going to the hospital to treat injuries and wounds), thus making their schedules unpredictable and inconsistent." DURRENCE ET AL., *supra* note 192, at 8.

198. See Telephone Interview with Larry Donahue, *supra* note 46.

199. *Id.*

200. See Telephone Interview with an Anonymous Intimate Partner Violence Survivor (June 29, 2021) (notes on file with author).

201. See *id.* Interestingly, Ann did disclose her actual name when forming her LLC, only choosing not to reveal her home address by providing a P.O. Box. *Id.* Ann's LLC constitutes a breed of quasi-anonymous LLCs that do not fully anonymize an entrepreneur's association with the enterprise. She attributed this structure to her lack of knowledge that it would have been

According to Ann, abuse victims “cannot afford to locate themselves publicly and getting a job is super tricky because you may not be able to stay put and you might have to flee again.”<sup>202</sup> Her story conforms to what advocacy organizations have identified as nontraditional work including “selling beauty products online via Etsy or Shopify” as viable paths for survivors to create pathways to financial security.<sup>203</sup>

While not necessarily immutable traits, survivors of intimate partner violence represent a group of individuals who are constrained by their personal circumstances—whether religious, social, or family-based constraints—from effectively engaging in business enterprises without some assurance of anonymity. To many of these individuals, identity shielding offered by the corporate form is often a more important feature than limited liability or entity shielding in their ability to engage in entrepreneurial risk-taking.

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To recap, the concept of identity shielding complicates the dominant account in modern corporate law scholarship conceptualizing business entities as transactional cost-reducing devices.<sup>204</sup> This literature, which tends to conceptualize business risks in terms of the loss of capital, is animated in large parts by disagreements about the extent to which the cost of business failure ought to be borne by capital contributors.<sup>205</sup> In reality, however, business ventures require more than just money. The ability of capital contributors to maintain privacy when investing in business ventures also powerfully impacts the propensity of individuals to take on entrepreneurial risk. For some capital contributors, identity shielding

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possible to even form a fully anonymous structure and indicated that she would have opted for full anonymity if she was more fully informed.

202. *See id.*

203. DURRENCE ET AL., *supra* note 192, at 8.

204. *See, e.g.,* Hansmann & Kraakman, *Essential Role*, *supra* note 12, at 406 (“In the absence of organizational law, it would be effectively impossible to create the affirmative asset partitioning that is the core characteristic of a legal entity. While . . . affirmative asset partitioning might still be established through contracting, the transaction costs . . . would be prohibitive.”).

205. *See, e.g.,* Richard A. Booth, *Limited Liability and the Efficient Allocation of Resources*, 89 NW. U. L. REV. 140, 143 (1994); Leebron, *supra* note 145, at 1570–71. Commonly cited in this impressive body of literature is Judge Easterbrook and Professor Fischel’s six traditional justifications for limited liability, which focus on the economic benefits of limited liability. *See* Easterbrook & Fischel, *supra* note 22, at 89.

may be a more important feature of the corporate form even than limited liability or entity shielding due to their individual circumstances or the type of business in which they are engaged. Separate from funding morally contentious enterprises, there are vast swaths of enterprises that would otherwise not exist without some assurance of anonymity for capital contributors.<sup>206</sup> Practically, explicitly theorizing identity shielding as a function of modern business entities enables more nuanced policy discussions about regulating anonymous companies. The next Part engages with the thorny policy questions in this important debate.

### III. TOWARD SENSIBLE ENTERPRISE PRIVACY LAWS

This Article has thus far identified the privacy functions served by anonymous companies—functions that encourage entrepreneurial risk-taking and human collaboration. Appreciating identity shielding as a function of the corporate form not only enriches existing academic accounts concerning the function of business entities but also enables a fresh outlook on balancing the legitimate societal interests in preserving anonymity and the need to curb illicit activities facilitated by anonymous shell companies. This Part unpacks how we may balance those interests. Section III.A synthesizes the rapidly shifting landscape of business ownership disclosure laws currently underway worldwide, including the CTA in the United States enacted by Congress in 2021. These reform efforts, while well-intentioned, often fail to give weight to the privacy interests of individuals involved in legitimate commercial enterprises. Section III.B elaborates on the value tradeoffs involving mandatory disclosure laws and discusses the possibility of “semi-

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206. Anonymity also protects investment in ventures from targeted exploitation by competitors or other investors. This principle, of course, is already recognized in the laws governing investments in U.S. public companies. That is, there is no duty for the average retail investor to disclose her ownership of stocks. See Lucian A. Bebchuk & Robert J. Jackson, Jr., *The Law and Economics of Blockholder Disclosure*, 2 HARV. BUS. L. REV. 39, 44 (2012) (“[T]he general principle [is] that outside investors may remain anonymous.”). Moreover, because most public company shareholders hold their shares in a street name, anonymity is preserved in this context. Constantine G. Papavizas, *Public Company Jones Act Citizenship*, 39 TUL. MAR. L.J. 383, 384 (2015) (“Most publicly traded securities are held in ‘street name’ where the securities issuer does not have access to the identity of the ultimate owners. . . .” (footnote omitted)). Anonymity in these circumstances may be beneficial. As explained by Professors Lucian Bebchuk and Robert Jackson, a mandatory disclosure requirement might “enable other investors to free-ride on . . . investments in information acquisition about under-valued companies and thus could have an adverse effect on such investments.” Bebchuk & Jackson, *supra*, at 45.

disclosure” regimes that may balance competing interests for and against anonymity.

A. *The Corporate Transparency Act and the Global Trend Toward Open Registries*

The public outcry following the Panama Papers document leaks galvanized a powerful global movement for legislative reform. Largely driving the legislative agenda is a well-intentioned fetishization of transparency among global reformers. To these activists, the promise of transparency comes at a relatively cheap price tag of maintaining public registries of company information.<sup>207</sup> Fresh on these reformers’ minds are the sensational stories of transnational criminals that deploy shell companies to commit financial crimes.<sup>208</sup>

Legislative reform efforts around the world vary, but they share an outlook in observing the seemingly pernicious nature of actors choosing to form business entities in jurisdictions with lax disclosure rules. More specifically, those who are alarmed by anonymous shell companies thus far have focused on advocating for legislation to create government registries that collect and disseminate beneficial ownership information of companies to the general public. At the heart of these reform efforts is the premise that public registries will enable “greater scrutiny by investigative journalists and civil society

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207. These accounts are often presented as a simple cost-benefit analysis. According to Global Witness, for instance, “the likely economic benefits of collecting beneficial ownership information and then making it public outweigh the costs.” Rosie Sharpe, *Eight Reasons Why Everybody Needs To Be Able To See Company Ownership Information (Not Just the Police)*, GLOB. WITNESS (June 30, 2016), <https://www.globalwitness.org/en/blog/eight-reasons-why-we-all-need-be-able-see-beneficial-ownership-information-rather-just-police> [<https://perma.cc/7MX3-V6V2>]. Global Witness also notes that,

[I]ncluding beneficial ownership information in a register that is searchable and updated as ownership changes would cost the UK government £11m a year (with an initial outlay of £0.5m to set up)[.] and for the UK private sector, the costs would be £4m a year (with an initial outlay of £24m). The 2002 study estimated the savings in police time alone from having a public registry of beneficial ownership to be £30m a year.

*Requiring Beneficial Ownership Information To Be Put in the Public Domain Is Cheap*, GLOB. WITNESS (May 9, 2013), <https://www.globalwitness.org/en/archive/howell> [<https://perma.cc/XQ5R-C9N2>].

208. See J.C. Sharman, *Privacy as Roguery: Personal Financial Information in an Age of Transparency*, 87 PUB. ADMIN. 717, 717 (2009) (quoting a policy maker in the area of financial transparency who said that “[w]here secrecy lies, roguery is not far behind”).



organisations [that] will help to prevent the abuse of anonymous companies by the criminal and the corrupt.”<sup>209</sup>

Europe has been at the forefront of enacting beneficial ownership statutes. As part of its Anti-Money Laundering Directive (“AMLD”),<sup>210</sup> the European Union (“EU”) requires its member states to keep central registers on beneficial owners that can be accessed by authorities and the general public.<sup>211</sup> The minimum amount of information that must be available to the general public includes the beneficial owner’s name, month and year of birth, country of residence, nationality, and the nature and extent of the beneficial interest held.<sup>212</sup> With implementation in progress, Bulgaria, Denmark, Latvia, Luxembourg, and Slovenia have already set up free, unrestricted public registers of the beneficial owners of companies, while Belgium, Croatia, Portugal, and Sweden have set up public registers that limit their access to citizens and residents of European nations.<sup>213</sup> The EU’s efforts follow legal reforms undertaken by the United Kingdom, which in 2016 became one of the first nations in the world to enact a public registry of business entities.<sup>214</sup>

Europe has had success influencing other nations to enact similar reform.<sup>215</sup> In order to address concerns raised by the EU Code of

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209. *Patchy Progress in Setting Up Beneficial Ownership Registers in the EU*, GLOB. WITNESS (Mar. 20, 2020) [hereinafter GLOB. WITNESS, *Patchy Progress*], <https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/anonymous-company-owners/5aml-d-patchy-progress> [<https://perma.cc/A7TM-BS8S>].

210. Council Directive 2018/843, 2018 O.J. (L 156) (EU).

211. *See id.* The fifth AMLD expands access to information in the beneficial ownership registers to include “any member of the general public” in addition to competent authorities and obliged entities. *See id.* § 30(5). Failure to comply with the AMLD may result in public reprimand, cease and desist orders, suspension of authorization, a temporary ban from managerial function, a maximum sanction in the amount of double the benefit derived from the breach, or a fine of at least one million euros. Council Directive 2015/849, ch. VI, § 4, art. 59, 156/43, 2015 O.J. (L 141), 57–58 (EU).

212. Council Directive 2015/849, ch. III, art. 30, 156/43, 2015 O.J. (L 141) (EU); Council Directive 2018/843, 156/43, 2018 O.J. (L 156) (EU).

213. GLOB. WITNESS, *Patchy Progress*, *supra* note 209.

214. In the United Kingdom, ownership of business entities on the register “is made freely available by the UK’s Companies House both as a searchable web interface as well as structured data in machine-readable format.” OPENOWNERSHIP & GLOB. WITNESS, *supra* note 37, at 3.

215. This is, of course, not the first time Europe has set the global standard for regulation. *See Anu Bradford, The Brussels Effect*, 107 NW. U. L. REV. 1, 1 (2012) (assessing that “the EU has a strong and growing ability to promulgate regulations that become entrenched in the legal frameworks of developed and developing markets alike, leading to a notable ‘Europeanization’ of many important aspects of global commerce”).

Conduct Group, a number of offshore jurisdictions have introduced “substance” rules for companies that carry on certain activities in their jurisdictions.<sup>216</sup> With new laws adopted in 2019, corporations formed in Guernsey, the Cayman Islands, the British Virgin Islands, Bermuda, the Isle of Man, and Jersey will be forced to demonstrate territorial nexus to the incorporating jurisdiction.<sup>217</sup> While permutations are endless, these laws also require the disclosure of business owners to relevant government agencies.<sup>218</sup>

Europe’s approach has also been influential in shaping the legislative agenda in the United States.<sup>219</sup> On January 1, 2021, Congress passed the CTA and set it to take effect in 2023.<sup>220</sup> The Act requires reporting companies to submit a report to the Department of Treasury identifying each beneficial owner of corporations, LLCs, and other similar entities that are formed or registered to do business in the United States.<sup>221</sup> Beneficial owners, which the CTA defines broadly,<sup>222</sup> must file a report providing their full legal name, date of birth, and address.<sup>223</sup>

The CTA does not mandate public disclosure. But reform activists insist that a European-style open registry must be enacted into law in

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216. Simon Goldring, *The Economic Substance Requirement*, NAT’L REV. (July 9, 2021), <https://www.natlawreview.com/article/economic-substance-requirements> [https://perma.cc/6FTU-XBEQ].

217. *Id.*

218. *See, e.g.*, MOURANT, BVI BENEFICIAL OWNERSHIP LEGISLATION 1–2 (2019), [https://www.mourant.com/file-library/media--2019/2019--guides/bvi-beneficial-ownership-legislation-\(dec-19-update\).pdf](https://www.mourant.com/file-library/media--2019/2019--guides/bvi-beneficial-ownership-legislation-(dec-19-update).pdf) [https://perma.cc/D2Z7-4MR8].

219. *See* Harold Adrion, *The New Corporate Transparency Act Will Require Reporting of Beneficial Ownership of Many U.S. Companies, LLCs and Foreign Companies Registered To Do Business in the U.S.*, EISNERAMPER LLP (Feb. 8, 2021) (“The U.S. has been under significant pressure to create and conform a corporate registry to what exists in the European Union (‘EU’). All 28 countries in the EU are now required to have corporate registries that include beneficial ownership information.”).

220. Corporate Transparency Act, Pub. L. No. 116-283, §§ 6401–6403, 134 Stat. 3388 (2021).

221. *See* 31 U.S.C. § 5336(a)(11)(A), (b)(2).

222. The Act defines “beneficial owner” broadly to include:

[A] natural person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise (i) exercises substantial control over a corporation or limited liability company; (ii) owns 25 percent or more of the equity interests of a corporation or limited liability company; or (iii) receives substantial economic benefits from the assets of a corporation or limited liability company.

*Id.* § 5333(a)(1)(A).

223. *Id.* § 5336(b)(2)(A).

the United States.<sup>224</sup> Consider the stance taken by the Organized Crime and Corruption Reporting Project, a prominent investigative reporting platform. While the organization describes the CTA as “a major legislative milestone in the American fight against kleptocracy,” the organization considers the work “only half done” and laments “how much better things could be if the U.S. copied the British model.”<sup>225</sup>

These efforts have already made progress more locally. In 2018, Washington, D.C., enacted a law requiring the public disclosure of all business entities formed in or that do business within the district.<sup>226</sup> As of January 1, 2020, the law mandates the disclosure of the names and addresses of each person who directly or indirectly has an ownership stake exceeding 10 percent of the firm.<sup>227</sup> Lawmakers in New York have recently introduced a similar bill that would require the public disclosure of beneficial owners of LLCs.<sup>228</sup>

Intellectually, the proclivity toward ownership transparency owes its scholarly debt to academics writing in the law and economics tradition who have long been skeptical of privacy.<sup>229</sup> This proclivity is

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224. Advocacy organizations typically tout the U.K.’s public registrar as “[a] model of best practice,” assessing that “the UK has set standards for what a good register of beneficial ownership look like that should be replicated.” OPENOWNERSHIP & GLOB. WITNESS, *supra* note 37, at 4.

225. Ann Marlowe, *Time for a Free Public Registry of Corporate Beneficial Ownership in the U.S.*, OCCRP (Jan. 2021), <https://www.occrp.org/en/37-ccb/ccb/13722-opinion-time-for-a-free-public-registry-of-corporate-beneficial-ownership-in-the-u-s> [<https://perma.cc/V6PN-MKLO>]. The logic here is drawn straight from advocacy organizations that romanticize transparency. For instance, the Hudson Institute assesses that transparency would force “sleazeballs and rip-off artists’ flocking to the United States . . . [to] uproot and look elsewhere rather than allow their networks of American-based shell companies to see the light of day.” HUDSON INST., UNITED STATES OF ANONYMITY 32 (2017).

226. See D.C. CODE §§ 29-102.01, 29-102.11 (2021).

227. Hunter M. Haines, *Understanding Entity Disclosure Requirements Under DCRA’s Amended Entity Filing Law*, SHULMAN ROGERS (Mar. 13, 2020), <https://www.shulman-rogers.com/news-events/understanding-entity-disclosure-requirements-under-dcras-amended-entity-filing-law> [<https://perma.cc/J79H-B8UQ>].

228. S. 2255, 2019 Leg., 242d Sess. (N.Y. 2019) (“The department of state shall establish and maintain a database identifying beneficial owners by name and current residential or business street address. . . . Such database shall be made available to the public. . .”).

229. As Professor Calo observes, “[M]any economists see privacy as harming markets by removing information.” Ryan Calo, *Privacy Law’s Indeterminacy*, 20 THEORETICAL INQUIRIES L. 33, 44 (2019); see also Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381, 2382 (1996) (“[T]he consensus of the law and economics literature is this: more information is better, and restrictions on the flow of information in the name of privacy are generally not social wealth maximizing, because they inhibit decisionmaking, increase transaction costs, and encourage fraud.”).

hardly surprising given that many economists and legal scholars have long romanticized markets with perfect information.<sup>230</sup> Judge Richard Posner, for instance, conceptualizes privacy as a means for market actors to take advantage of others through selectively hiding germane information.<sup>231</sup> Within this academic paradigm, unfettered public access of information ought to result in better market transactions for all. Reformers take a page from this academic tradition. Shining light on these transactions will supposedly serve as the antidote, helping detect and deter illicit activities. Indeed, reformers often tout that “[t]he free market works best when all parties have full access to information.”<sup>232</sup>

While undoubtedly well-intentioned, reform efforts advocating unfettered public access of private ownership information have not yet been subject to serious intellectual pressure. The next Section aims to address this shortcoming by identifying the true costs of instituting mandatory public disclosure regimes.

#### *B. Toward A More Nuanced Policy Framework for Enterprise Transparency*

Open registries mandating full-throttled ownership disclosures do not necessarily result in bad policy or assault fundamental values that may be embedded in longstanding constitutional law doctrines. In some societies, the needs of government enforcement agencies or the simple desire by society to probe and monitor private businesses may outweigh the interests advanced by identity shielding. More broadly, normative assessments in this area are value tradeoffs that speak to broader questions about the kind of society one desires to live in—questions that are not easily reducible to a singular policy prescription. At the very least, however, the costs associated with open registries ought to be recognized beyond just the administrative costs associated with building and maintaining disclosure registries. Unfortunately, the subtle yet real costs of transparency are not fully appreciated as tradeoffs in today’s policy debate. Moreover, the purported benefits of

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230. See, e.g., Kenneth C. Laudon, *Markets and Privacy*, 39 COMM’NS ACM 92, 97 (1996).

231. See Posner, *supra* note 84 (“Often people want privacy in order to manipulate other people by concealing from them aspects of their character, prospects, or past that would if known reduce their opportunities to engage in advantageous market or nonmarket transactions.”).

232. Sharpe, *supra* note 207. Advocates of open registry also tout that a public registry can “enhance accuracy by allowing users of the data—be they private sector, civil society, or public sector—to review and report errors in the data.” OPEN OWNERSHIP & GLOB. WITNESS, *supra* note 37, at 3.

mandatory disclosure regimes cannot be taken for granted, given that they often operate under tenuous assumptions that those engaged in illicit activities would voluntarily report their ownership information.

This Section highlights the range of policy considerations that ought to be weighed by any given society before instituting disclosure laws that effectively ban identity shielding. Specifically, this Section elaborates on the true costs of mandatory public disclosure regimes for policymakers in order to develop a richer understanding of their necessary tradeoffs, and it explores the potential for semi-disclosure regimes that may enable us to capture some of the benefits of identity shielding while simultaneously minimizing the harms inflicted by anonymous shell companies. While some of these issues implicate constitutional dimensions that also weigh against open access regimes,<sup>233</sup> this Section focuses on policy tradeoffs, recognizing that the demands of constitutional minimums vary widely by jurisdiction,<sup>234</sup> and

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233. For instance, in the United States, preserving the ability of individuals to pool resources to fund and operate businesses that promote certain political beliefs or associational interests is laden with constitutional principles. In the seminal case of *NAACP v. Alabama*, the Supreme Court held unconstitutional Alabama's mandatory disclosure regime making the group's membership list accessible, given that such disclosure entails "the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." Pollman, *Corporate*, *supra* note 20, at 81 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)). U.S. constitutional law also recognizes the right to informational privacy—a limited right to avoid the public disclosure of personal information. As Professors David Gray and Danielle Keats Citron recounted:

In *Whalen v. Roe*, a 1977 case involving New York's mandatory collection of prescription drug records, the Supreme Court strongly suggested that the Constitution contains a right to information privacy based on substantive due process. Although it held that New York's prescription drug database did not violate the constitutional right to privacy because the gathered information was adequately secured, the Court recognized an 'individual interest in avoiding disclosure of personal matters.

David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 74 (2013) (quoting *Whalen v. Roe*, 429 U.S. 589, 589–600 (1977)). Jurisprudence in this area, however, is murky at best. As Professor Skinner-Thompson assesses, "the Supreme Court has failed to definitively recognize a constitutional right to informational privacy in favor of reluctantly assuming (without deciding) that such a right exists on three occasions, most recently in 2011." Skinner-Thompson, *supra* note 101, at 163.

234. See MICHAEL HENRY, INTERNATIONAL PRIVACY, PUBLICITY AND PERSONALITY LAWS 1 (Michael Henry ed., 2001); Mark Tushnet, *Comparative Constitutional Law*, in OXFORD HANDBOOK ON COMPARATIVE LAW 1193, 1193 (Mathias Reimann & Reinhard Zimmermann eds., 2019).

that legislation is principally driven by complex policy considerations that may not be entirely captured in constitutional analyses.<sup>235</sup>

1. *The Promise and Pitfalls of Public Ownership Registries.* The global movement toward beneficial ownership disclosure laws has largely been premised on the observation that anonymous shell companies “are the single greatest obstacle to fighting money laundering and other financial crimes.”<sup>236</sup> Demands for action deluge lawmakers particularly in the aftermaths of massive document leaks that capture the public’s attention. Disclosure laws appear to come to the rescue, addressing real and important problems of deterring illicit activities and grand-scale financial fraud. Currently, policy is driven principally by the desire to curb shell companies that facilitate illicit activities, even though “most shell companies are used for legitimate business purposes.”<sup>237</sup>

This does not mean that public disclosure laws lack any value. Registries with accurate information available—public or not—to relevant government enforcement agencies can better equip law enforcement to detect and tackle complex financial crimes. According to an FBI deputy assistant director, “[t]he burden of uncovering true beneficial owners can often handicap or delay investigations, frequently requiring duplicative, slow-moving legal process in several jurisdictions to gain the necessary information.”<sup>238</sup> The ability to easily identify the true owners of shell companies, therefore, “would allow the FBI and other law enforcement agencies to quickly and efficiently

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235. Business entities do not implicate constitutional concerns because corporations are persons in the sense that they closely resemble natural humans. Instead, as Professor Pollman eloquently puts it,

[C]orporations do not receive rights because the characteristics of the entity so closely resemble a natural human so as to merit granting the right; rather corporations receive rights because, as forms of organizing human enterprise, they have natural persons involved in them, and sometimes it is necessary to accord protection to the corporation to protect their interests.

Pollman, *Corporate*, *supra* note 20, at 52.

236. J.C. SHARMAN, *THE MONEY LAUNDRY: REGULATING CRIMINAL FINANCE IN THE GLOBAL ECONOMY* 74 (2011).

237. FINDLEY, NIELSON & SHARMAN, *supra* note 5, at 33.

238. *Combatting Illicit Financing by Anonymous Shell Companies: Hearing Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 116th Cong. 33 (2019) (statement of Acting Deputy Assistant Director Steven M. D’Antuono, Criminal Investigative Division, Federal Bureau of Investigation).

mitigate the threats posed by the illicit movement of the succeeding funds.”<sup>239</sup>

At least in theory, registries accessible by the general public come with the added benefit of enabling private citizens to detect and enforce violations of law. Government agencies often suffer from limited resources to detect and enforce laws.<sup>240</sup> In some cases, private citizens might also have the informational advantage to detect fraudulent activities.<sup>241</sup> For instance, publicly available civil court proceedings initiated by a bank against a Kazakh ex-banker revealed “hundreds of offshore companies, extended corporate services supply chains, multiple nominee directors, and successive ostensible ‘ultimate beneficial owners.’”<sup>242</sup> Private litigation in the United States routinely reveals more information about shell companies as well.<sup>243</sup>

Aside from combatting outright illicit activities, the disclosure mantra—that more information is better than less<sup>244</sup>—may in some cases enable people to make better decisions while shaming socially undesirable business practices. Identity shielding has a flip side, although not necessarily symmetrical in its function. Forced public disclosure may enable consumers to better exercise their purse power by punishing local business crooks who pollute the environment or enterprises that engage in unsavory labor practices. The threat of bad publicity, at least in theory, can thus shame certain actors from

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239. *Id.*

240. See William J. Moon, *Contracting Out of Public Law*, 55 HARV. J. ON LEGIS. 323, 361 (2018) (“[P]ublic enforcement is often inadequate because of resource constraints endemic in administrative agencies.”); Robert Pitofsky, *Arbitration and Antitrust Enforcement*, 44 N.Y.U. L. REV. 1072, 1073 (1969) (“[I]t is expected that private treble damages litigation in the antitrust field . . . will insure some minimal deterrent against local and not too flagrant violations of law which the public enforcement agencies, because of limited resources, would almost certainly ignore . . .”).

241. See J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1154 (2012); see also Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 95–96 (2005) (arguing that private litigants in the United States play an important role in “detering, detecting, and correcting socially harmful violations of the law”).

242. Delphine Nougayrède, *The Use of Offshore Companies in Emerging Market Economies: A Case Study*, 23 COLUM. J. EUR. L. 401, 401 (2017).

243. See, e.g., *Bootay v. KBR, Inc.*, No. 2:09-CV-1241, 2010 WL 3632720, at \*3 (W.D. Pa. Sept. 9, 2010) (“Plaintiff alleges the over-use of corporate formalities, by emphasizing repeatedly that Overseas and SEII were ‘shell companies’ with no business or assets of their own, which were set up in the Cayman Islands to avoid United States taxes.” (emphasis omitted)).

244. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 651 (2011).

operating what many might view as morally reprehensible enterprises. Consider, for instance, landlord-tenant relationships. Advocates of transparency in real estate ownership in the United States argue that public records “facilitate[] the enforcement of tenant rights . . . [while preventing] abuse and landlord negligence.”<sup>245</sup> From businesses operated by white supremacists to businesses that engage in anticompetitive activities, morally reprehensible businesses may be endless.<sup>246</sup> Finally, similar to how limited liability can be a source of moral hazard,<sup>247</sup> identity shielding can do the same, at least theoretically, by reducing the reputational costs involved in risky business ventures.

But policy ought not to be dictated by the intuitive yet relatively untested premise that mandatory disclosure laws effectively serve as the proper antidote to curbing illicit or nefarious activities. The baseline question that ought to be investigated further is whether and to what extent disclosure laws meaningfully accomplish their intended goals. This is particularly true because mandated disclosure in other contexts have largely failed to achieve their intended goals. According to Professors Omri Ben-Shahar and Carl Schneider’s wide-ranging study of mandatory disclosure laws in contexts ranging from financial transactions to healthcare and insurance, mandated disclosure “not only fails to achieve its stated goal but also leads to unintended consequences that often harm the very people it intends to serve.”<sup>248</sup> Even in the world where the regulations achieve some of their objectives, their efficacy ought to be weighed against their tradeoffs:

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245. D. Victoria Baranetsky, *Op-Ed: You Should Have the Right To Know Your Landlord’s Name*, L.A. TIMES (Feb. 24, 2021, 3:10 AM), <https://www.latimes.com/opinion/story/2021-02-24/rental-housing-shell-companies-landlords> [<https://perma.cc/4CDZ-V629>]. Identity shielding can also make it more difficult for plaintiffs to pursue veil piercing litigation. To the extent that veil piercing—as the general exception to the doctrine of limited liability—is deemed to be desirable (a contested point), this factor can weigh against preserving identity shielding.

246. Anonymity, for example, may undermine the ability of consumers to boycott businesses like Publix Supermarkets, whose heiress allegedly partly provided funding “used to incite the deadly Capitol attack.” Lauren Sue, *‘Enough’: Publix Heiress Funds Trump Rally and Worker Denied Right To Wear Mask Dies of COVID-19*, DAILY KOS (Feb. 15, 2021, 12:42 PM), <https://www.dailykos.com/stories/2021/2/15/2016211/>—Not-going-to-call-this-normal-Publix-heiress-gives-300K-for-Trump-rally-ending-in-Capitol-riot [<https://perma.cc/QFT2-SYL5>].

247. Marie-Laure Djelic & Joel Bothello, *Limited Liability and Its Moral Hazard Implications: The Systemic Inscription of Instability in Contemporary Capitalism*, 42 THEORY & SOC. 589, 589 (2013). Moral hazard refers to “the opportunity for organizational and individual actors to reap rewards of risky behavior without bearing associated costs.” *Id.*

248. Ben-Shahar & Schneider, *supra* note 244, at 647.



the costs of building and maintaining registries, compliance costs, along with the lost benefits of identity shielding.

A glaring issue underlying any mandatory disclosure regime is that it requires those engaged in fraudulent, nefarious, and illicit activities—money launderers, tax evaders, and drug traffickers—to self-report information on beneficial ownership registries. Those who engage in unsavory or illicit behavior are precisely those more inclined to dodge compliance.<sup>249</sup> According to one commentator, transparency bills aimed at curbing fraud often fail because “those targets would also be the most likely to frustrate the purposes of the [law] by committing fraud in their reporting of beneficial ownership information.”<sup>250</sup>

This is, of course, not to say that laws cannot be designed to compel or incentivize compliance. The effectiveness of disclosure laws necessarily depends on a host of variables, including the specific design of the law’s penalties, exceptions, and enforcement. Rather, it is an observation that an unintended consequence of mandatory disclosure may be that the costs are borne disproportionately by law-abiding, small-business owners who are forced to give up anonymity and incur compliance costs.

Even operating under the optimistic assumption that owners and investors of enterprises will faithfully attempt to comply with disclosure mandates, these disclosure regimes still face other issues that potentially hinder them from achieving their intended goals. First, loopholes abound in any disclosure regime that must define the scope and targets of disclosure, incentivizing sophisticated actors to deploy resources to evade regulation—even in a world where disclosers faithfully comply with laws on the books.<sup>251</sup> Consider, for instance, the

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249. As Professor Richard Gordon explains:

I find it difficult to believe that plain vanilla money launders won’t be able to persuade—through fraud, threat, or compensation—people who appear honest to approach service providers to set up and “own” companies, whether shell or otherwise, on behalf of the bad guys. While investigators would find it useful for corporation service providers to record the identity of the physical person who set up a company . . . I think efforts are better made at the level of the financial institution.

See Richard Gordon, *A Tale Of Two Studies: The Real Story Of Terrorism Finance*, 162 U. PA. L. REV. ONLINE 269, 280 (2014).

250. See J.W. Verret, *Terrorism Finance, Business Associations, and the “Incorporation Transparency Act”*, 70 LA. L. REV. 857, 861 (2010).

251. See, e.g., Lill Marie Martinez Cruz, *After the Panama Papers. . . A More Transparent Corporate Business Model?*, 33 ASIAN J. LATIN AM. STUD. 135, 141 (2020) (“Instead of facilitating the detection of illegalities by raising red flag alerts, AMLR [anti-money laundering regulation] has simply encouraged an ‘increase in the complexity of ML [money laundering]

United Kingdom’s ownership disclosure law that requires the disclosure of owners of entities who directly or indirectly hold a 25 percent share of the company. As bluntly put by one commentator, “[T]he 25% threshold set for disclosure is meaningless, as criminals can easily arrange to hold less than that to evade reporting.”<sup>252</sup> This is far from a theoretical problem. Former Kazakh minister Mukhtar Ablyazov allegedly laundered \$6 billion from BTA Bank using multiple entities that each held just under 10 percent shares in the bank because “10 per cent was the disclosure threshold in Kazakhstan at the time.”<sup>253</sup> Then, there are the practical difficulties of building effective verification mechanisms. The UK’s registry, for example, “merely accept[s] information from companies and add[s] details to the register; [but it] is not required to . . . check whether information provided is accurate.”<sup>254</sup>

In some respects, evasion of local disclosure laws is predictable in a world with approximately two hundred sovereign nations—and even more quasi-sovereign lawmakers with internationally-recognized lawmaking authority to charter business entities<sup>255</sup>—as private actors can shop for business entities in jurisdictions with lax disclosure rules.<sup>256</sup> Like a game of whack-a-mole, laws requiring all companies *formed* in their jurisdiction to disclose their beneficial owners would simply incentivize those who seek anonymity to form or reincorporate their business entities in jurisdictions with lax disclosure rules. This is because enterprises in many jurisdictions—including the United States—need not maintain any territorial nexus to their place of incorporation.<sup>257</sup> Even where laws mandate disclosure based on the location of the enterprise, the nonterritorial nature of modern financial transactions enable those engaged in sophisticated financial crimes to

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schemes.” (quoting Mohammed Ahmad Naheem, *The Agency Dilemma in Anti-Money Laundering Regulation*, 23 J. MONEY LAUNDERING CONTROL 26, 32 (2020)).

252. *Id.* at 151.

253. Paul Michael Gilmour, *Lifting the Veil on Beneficial Ownership: Challenges of Implementing the UK’s Registers of Beneficial Owners*, 23 J. MONEY LAUNDERING CONTROL 717, 726 (2020).

254. *Id.* at 727.

255. *See Moon, supra* note 58, at 1405 n.6.

256. *See id.* at 1444.

257. *See William J. Moon, Delaware’s Global Competitiveness*, 106 IOWA L. REV. 1683, 1699 (2021) (“Today, a number of major jurisdictions around the world allow firms to shop for corporate law, including Brazil, Canada, China, India, Israel, Japan, the United Kingdom, and the United States.” (footnotes omitted)).

easily shift the locus of their operations to evade regulation.<sup>258</sup> Again, small business owners cannot shift their locus of operations easily (for example, local coffee shops or restaurants that are almost by definition geographically bound); it is the sophisticated financial criminals who are more likely able to evade disclosure regulations. At worst, these kinds of design flaws may deter and discourage productive entrepreneurship of small business owners, but they do not necessarily deter sophisticated transnational criminals.

Policymakers ought to factor in opportunity costs as well. Thus far, the costs associated with mandatory disclosure have principally been framed as a government expenditure needed to build disclosure registries. But costs are also borne by private businesses that may need to hire lawyers to navigate the maze of vague regulations for compliance.<sup>259</sup> Any given resources deployed to build and maintain disclosure registries—along with the intangible costs of undermining identity shielding—can be deployed to combat illicit activities more directly.<sup>260</sup> After all, as indicated by the number of successful indictments brought by the Department of Justice *prior* to disclosure laws,<sup>261</sup> shell companies do not offer blanket immunity for financial

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258. See Moon, *supra* note 41, at 13 (“Unlike industries that rely on productive activities tied to an identifiable parcel of territory (think, for instance, automobile manufacturing in Detroit), financial transactions are *legally constituted*. Because finance is built and constituted by systems of rules, the industry need not be territorial at all.” (footnotes omitted)).

259. See Kevin L. Shepherd & Edward M. Manigault, *Beneficial Ownership Disclosure and the Corporate Transparency Act: Overdue or Overwrought?*, 35 PROB. & PROP. 49, 49 (2021) (“The CTA raises many basic questions, such as how it will affect small business and entities commonly used for business and estate planning, whether law firms will be reporting companies, and how lawyers will be involved with filing the beneficial ownership reports.”); *House Panel Approves Beneficial Ownership Legislation*, A.B.A. (June 19, 2019), [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/publications/washingtonletter/June\\_2019\\_Washington\\_Letter/gatekeeper\\_article](https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/June_2019_Washington_Letter/gatekeeper_article) [<https://perma.cc/AG2X-PWE8>] (describing an earlier version of the CTA as a bill “that would impose burdensome and intrusive regulations on millions of small businesses and their lawyers”).

260. As Professor Richard Gordon explains:

[G]iven that the resources to prevent bad guys from doing bad things are necessarily finite, shifting resources to initiatives intended to stop terrorists from setting up or using shell companies necessarily means shifting them from somewhere else. But if that somewhere else is actually stopping bad guys, and if the assertion that terrorists use shell companies is false, the result could actually harm antiterrorism efforts.

See Gordon, *supra* note 249, at 271.

261. See, e.g., Press Release, U.S. Department of Justice, *Charlotte Man Charged With Tax Evasion For Using Shell Companies To Hide Income* (June 11, 2015), <https://www.justice.gov/usao-wdnc/pr/charlotte-man-charged-tax-evasion-using-shell-companies-hide-income> [<https://perma.cc/3XT5-SFMM>]; Press Release, U.S. Department of Justice, *Shell Company Operator Pleads Guilty*

criminals. Finally, any system of disclosure that mandates public disclosure denies us the benefits of identity shielding.

2. *Possibility of Semi-Disclosure Regimes.* It is important to note that identity shielding, as conceptualized in this Article, does not necessarily require a world where no one knows about the identity of capital contributors.<sup>262</sup> Owners and investors in anonymous companies, for instance, must still pay applicable federal and state taxes<sup>263</sup>—all which necessitate ownership information flowing to government agencies but not to the general public.<sup>264</sup> While information retained by governments undoubtedly is vulnerable to leaks and abuse,<sup>265</sup> that system still preserves identity shielding as the default economic setting.

Therefore, even when a society accepts the value proposition offered by mandatory disclosure, implementing a publicly accessible registry is not necessarily the optimal course of action. Policymakers concerned about identity shielding could adopt more nuanced approaches—including databases only accessible to law enforcement agencies but not the general public—that may capture some of the benefits of identity shielding while simultaneously attempting to

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in Multi-Million Dollar Health Care Fraud and Money Laundering Scheme (Oct. 2, 2014), <https://www.justice.gov/opa/pr/shell-company-operator-pleads-guilty-multi-million-dollar-health-care-fraud-and-money> [https://perma.cc/5A8B-Z8RM].

262. Indeed, as Professor Jeffrey Skopek puts it, “anonymity is never perfect: everything that we consider to be anonymous will contain some information that eliminates the majority of individuals in the world from the group of potential sources.” Jeffrey M. Skopek, *Anonymity, the Production of Goods, and Institutional Design*, 82 *FORDHAM L. REV.* 1751, 1758 (2014).

263. See Scott D. Michel, Zhanna A. Ziering & Young Ran Kim, *U.S. Offshore Account Enforcement Issues*, 16 *J. TAX PRAC. PROC.* 49, 65–66 (2014).

264. See Steven A. Dean, *The Incomplete Global Market for Tax Information*, 49 *B.C. L. REV.* 605, 619 (2008) (“U.S. tax authorities require a wide range of individuals and entities to report an array of payments, transactions, and events. In the first instance, individuals, corporations, estates, and others are obligated to file tax returns describing their own status and activities each year.” (footnote omitted)); Larry Donahue, *Regular LLC Versus Anonymous LLC*, *LAW 4 SMALL BUS. P.C.* (Oct. 16, 2016), <https://www.l4sb.com/blog/regular-llc-versus-anonymous-llc> [https://perma.cc/CE4U-GPP9] (“Anonymous LLCs are taxed the same as any other LLCs.”). Anonymity, of course, is not absolute even in a world where no ownership information is gathered through a dedicated government registry. For instance, an LLC or a corporation could be subpoenaed, which could expose personal information during litigation. See Meera Unnithan Sossamon, *Subpoenas and Social Networks: Fixing the Stored Communications Act in a Civil Litigation Context*, 57 *LOY. L. REV.* 619, 623 (2011).

265. See Natalie Ram, *Genetic Privacy After Carpenter*, 105 *VA. L. REV.* 1357, 1377–78 (2019); Margaret B. Kwoka, *Leaking and Legitimacy*, 48 *U.C. DAVIS L. REV.* 1387, 1410–11 (2015); Daniel L. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 *S. CAL. L. REV.* 1083, 1084–85 (2002).

minimize the harms inflicted by anonymous shell companies. This approach can be conceptualized as a “semi-disclosure” regime,<sup>266</sup> enabling societies to harness the upsides of identity shielding without necessarily giving up government registries that can aid investigative efforts curtailing tax evasion and other financial crimes.

To a certain extent, this is the approach currently embraced by the U.S. federal government under the CTA. The CTA requires the U.S. Treasury’s Financial Crimes Enforcement Network to “maintain the reported beneficial ownership information in a confidential, secure, and non-public database” only to be disclosed for “specific purposes to several categories of recipients, such as federal law enforcement.”<sup>267</sup> Of course, semi-disclosure regimes still suffer from the baseline question of whether mandates would induce financial criminals to self-report in the first place. While open questions remain as to the efficacy of this type of disclosure regime as well, semi-disclosure regimes are more favorable than public registries, at least if identity shielding is worth preserving.

In this regard, it is critical for policymakers to recognize that identity shielding is particularly valuable to individuals who are vulnerable to threats, harassment, and discrimination due to their personal circumstances—as is the case for survivors of intimate partner violence. To these individuals, anonymity serves as an entrepreneurial safehouse to secure financial freedom in a world where traditional employment is difficult if not deadly to achieve. For others, including Black entrepreneurs who conceal their race through anonymous companies,<sup>268</sup> a simple ban on identity shielding compromises their

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266. This Article borrows the term “semi-disclosure” from legal scholars who have proposed limited disclosures in the context of campaign finance law. See Bruce Cain, *Shade from the Glare: The Case for Semi-Disclosure*, CATO UNBOUND (Nov. 8, 2010, 11:08 AM), <http://www.cato-unbound.org/2010/11/08/bruce-cain/shade-from-the-glare-the-case-for-semi-disclosure> [https://perma.cc/8UGJ-PBBN]; see also Gilbert, *supra* note 91, at 1878 (“Under semi-disclosure, much or all of the information mentioned above would be reported to the government. That would help ensure compliance with contribution limits and police corruption. Only some of that information, however, would be publicly disclosed, and it may be disclosed in a different form.”).

267. Press Release, Financial Crimes Enforcement Network, FinCEN Launches Regulatory Process for New Beneficial Ownership Reporting Requirement (Apr. 1, 2021), <https://www.fincen.gov/news/news-releases/fincen-launches-regulatory-process-new-beneficial-ownership-reporting> [https://perma.cc/LXJ8-F4DG].

268. See *supra* Section II.B. Similarly, many transgender business owners “don’t openly identify as trans because they are afraid to do so.” Jane K. Callahan, *How Entrepreneurship Is Helping the Transgender Community*, HIGH TOUCH (Aug. 12, 2020), <https://hightouch.co/how-entrepreneurship-is-helping-the-transgender-community> [https://perma.cc/K77H-WWRM].

ability to compete more equitably in a biased and prejudiced marketplace.<sup>269</sup> Legal scholars have praised limited liability's promise in widening participation in the marketplace and equalizing opportunities to gain wealth, since entrepreneurs need not fear losing more than the capital they invested.<sup>270</sup> Perhaps more directly, identity shielding can unlock opportunities to gain wealth for individuals who are socially marginalized by society and unfairly discriminated against by the marketplace.<sup>271</sup>

Disclosure laws also do not merely impact those directly subject to disclosure mandates. Indeed, there are subtle but powerful consequences of coerced disclosures even from the public's standpoint. Recall that anonymous companies encourage entrepreneurial risk-taking and human collaboration by protecting the identity of capital contributors. Assurance of anonymity, importantly, helps incubate businesses that are not purely driven by profit motives, as was the case for launching mifepristone in the United States.<sup>272</sup> In many cases, it is the line of business perceived to promote particular political agendas—

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269. For this reason, a simple ban on identity shielding would create costs borne disproportionately by women and other socially marginalized groups. For a myriad of reasons, women are especially vulnerable on the internet, suffering abusive language, sexual harassment, and cyber-stalking, and they are also vulnerable to real-life stalking and violence. See Anita Allen, *Gender and Privacy in Cyberspace*, 52 STAN. L. REV. 1175, 1178 (2000) (explaining that women are viewed as inferior and safe targets for harassment and abuse online). As Professor Danielle Citron explains in her celebrated work, online harassment of women “impedes women’s full participation in online life, often driving them offline, and undermines their autonomy, identity, dignity, and well-being.” Danielle K. Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 373 (2009). Concerns about internet privacy and safety often cause reluctance in female business owners who wish to engage in e-business or social networking to boost their business engagement or product sales. See Alexandra Michota, *Digital Security Concerns and Threats Facing Female Entrepreneurs*, 2 J. INNOVATION & ENTREPRENEURSHIP 1, 2 (2013); see also Ann M. Lipton, *Capital Discrimination*, HOUS. L. REV. (forthcoming 2022) (manuscript at 105) (on file with author) (critiquing how business law doctrines fail to recognize “how discrimination can undermine women’s ability to participate in business as principals”).

270. See Presser, *supra* note 126, at 148.

271. Indeed, legal scholars have highlighted the promise of business entities in disrupting inequalities. Metaphorically importing the laws of business associations to the regulation of intimate relationships, Professor Martha Ertman observes that “[b]usiness models are relatively free of the antiquated notions of status, morality, and biological relation” that plague other areas of the law. Martha M. Ertman, *The Business of Intimacy: Bridging the Private-Private Distinction*, in FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY 467, 468 (Martha Albertson Fineman & Terence Dougherty eds., 2005).

272. See Robert O’Harrow, Jr., *Drug’s U.S. Marketer Remains Elusive*, WASH. POST, Oct. 12, 2000, at A18 (explaining how efforts to launch the first abortion drug in the United States was “not driven by the profit motive” but rather driven by a “chance to offer to American women a real new option, something that has been denied to them for political reasons for 15 years”).

like reproductive healthcare or firearm sales—that subjects those involved in the enterprise to threats, bullying, and harassment. In this sense, a system of coerced public disclosure chills the ability of individuals to establish and maintain business enterprises that advance certain political views.<sup>273</sup> Without anonymity, the range of enterprises funded is severely diminished, and the types of enterprises funded are less of a byproduct of our own agency but mandates of societal orthodoxy.

This has important implications from a democratic governance perspective.<sup>274</sup> In the United States, for instance, it is settled law that the right to privacy affords constitutional protection for women’s decision whether to end a pregnancy.<sup>275</sup> But such rights can be exercised effectively only to the extent that the commercial marketplace supplies the necessary products and services to effectuate those rights.<sup>276</sup> In this sense, incubating morally contestable enterprises can serve broader goals of safeguarding fundamental constitutional rights, not just as a theoretical matter, but as a practical one.

Separate from funding morally contentious enterprises, there are vast swaths of enterprises that would otherwise not exist without some

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273. *Cf.* NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 466 (1958) (holding that “immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others . . . as to come within the protection of the Fourteenth Amendment”).

274. As outlined by Scott Skinner-Thompson,

Democratic theory and Supreme Court jurisprudence have long recognized that privacy and anonymity serve as critical first-order rights that help make the freedom to associate, organize, and speak meaningful. . . . [J]ust as privacy can, as discussed above, serve a critical role in the creation of individual identity, it can also help develop collective or group identities.

SCOTT SKINNER-THOMPSON, PRIVACY AT THE MARGINS 51–53 (2021); *see also* Cohen, *supra* note 29, at 1905 (“[F]reedom from surveillance, whether public or private, is foundational to the practice of informed and reflective citizenship. Privacy therefore is an indispensable structural feature of liberal democratic political systems.”).

275. *See* Roe v. Wade, 410 U.S. 113, 155 (1973); *see also* Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 991 (“[E]ven if *Roe* is reversed, constitutional principles of equal protection constrain government regulation of abortion.”).

276. *Cf.* Calo, *supra* note 81, at 651 (“Privacy is best understood as an instrument of human flourishing. To flourish, people need the separation from others that privacy affords. But they also need access to the material and cultural resources that only other people in society can provide.” (footnote omitted)).

assurance of anonymity for capital contributors.<sup>277</sup> The magnitude of identity shielding's importance in encouraging business enterprises is an empirical question that should be further examined in future scholarship.

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In many respects, the tradeoffs that exist in the laws of business entities parallel tensions that animate other areas of the law. In election law, mandatory disclosures of campaign finance contributions expose the sources of speech that can help some voters “assess candidates and issues and vote more competently.”<sup>278</sup> But as Professor Michael Gilbert explains, disclosure also imposes “costs on speech, and that . . . means fewer speech acts will take place, fewer ideas will circulate, and voters will receive less information.”<sup>279</sup> In trust law, it is evident that trusts enabling the transmission of wealth without public disclosure invite exploitation, corruption, and injustice.<sup>280</sup> But as Professor Frances Foster explains, “[t]rust law has placed such a premium on privacy that it has denied trust beneficiaries as well as the general public access to the trust instrument.”<sup>281</sup> In tax law, scholars have argued that public disclosures of corporate tax returns “would increase detection of illegal tax evasion, result in shaming of unethical corporate behavior, catalyze beneficial policy changes, and generally increase the public’s

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277. Anonymity also ensures that one’s investment in promising ventures is not exploited by competitors or other investors. This principle, of course, is already recognized in the laws governing investments in American public companies. That is, there is no duty for the average retail investor to disclose her ownership of stocks. *See* Bebchuk & Jackson, Jr., *supra* note 206 (“[T]he general rule [is] that investors in public companies may remain anonymous.”). As explained by Professors Lucian Bebchuk and Robert Jackson, Jr., a mandatory disclosure requirement “might enable other investors to free-ride on . . . investments in information acquisition about under-valued companies and thus could have an adverse effect on such investments.” *Id.* at 43.

278. Gilbert, *supra* note 91, at 1862; *see also* Press Release, White House, Statement by the President on the DISCLOSE Act (Apr. 29, 2010), <https://obamawhitehouse.archives.gov/the-press-office/statement-president-disclose-act> [<https://perma.cc/585Q-G5EC>] (proponents of disclosure assess that disclosure enable the public to “follow the money and see clearly which special interests are funding political campaign activity and trying to buy representation”).

279. Gilbert, *supra* note 91, at 1862. It is for this reason that Professors Ian Ayres and Jeremy Bulow argue that “mandating anonymous donations can make it more difficult for candidates to sell access or influence.” Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity To Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837, 837 (1998).

280. Foster, *supra* note 138, at 558.

281. *Id.* at 566.



understanding of tax law.”<sup>282</sup> Yet the Internal Revenue Service is prohibited from releasing tax returns publicly as a matter of statutory law,<sup>283</sup> in part driven by the recognition that such disclosure measures would “lead to information overload rather than enlightenment, and expose proprietary information, which could diminish corporations’ willingness to cooperate with the IRS.”<sup>284</sup> The list goes on. The point is not that privacy needs to be pursued at all costs, but rather to recognize the true cost of enterprise transparency.

With the looming policy debate over the specific design of ownership disclosure laws, it is worth remembering that there are important societal benefits of identity shielding—even if they may be hard to detect or measure. Those who consider unfettered transparency as the panacea may risk much more than what they had initially envisioned.

### CONCLUSION

Anonymous companies have become a staple feature of modern economic life by enabling individuals to operate business enterprises without coerced public disclosure. While not without costs, identity shielding advances a broad spectrum of economic and humanistic interests. These interests include the desire to incubate enterprises that are not purely driven by profit motives but also to advance political or moral viewpoints. In other cases, identity shielding ensures the physical safety of those involved in business ventures. And yet for others, anonymity enables entrepreneurs to compete on more equal footing in the commercial marketplace, countering the prejudice and discrimination experienced by socially marginalized groups.

Modern business entities today thus function not only to facilitate business enterprises under familiar academic banners of limited

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282. Daniel Schaffa, *The Economic Efficiency Case Against Business Tax Privacy*, 50 SETON HALL L. REV. 27, 29–30 (2020) (footnotes omitted). Moreover, because firms today have an incentive to “exaggerate their income reported to shareholders and to understate their income for tax purposes,” Professors Lawrence Summers and Natasha Sarin argue that “tax transparency will lead to accountability and ultimately wiser policy.” Lawrence Summers & Natasha Sarin, Opinion, *Many Companies Pay Nothing in Taxes. The Public Has a Right to Know How They Pull It Off*, WASH. POST (Oct. 22, 2020), <https://www.washingtonpost.com/opinions/2020/10/22/many-companies-pay-nothing-taxes-public-has-right-know-how-they-pull-it-off> [https://perma.cc/2EU6-UF6J].

283. 26 U.S.C. § 6103(a), (b)(2), (c).

284. Joshua D. Blank, *Reconsidering Corporate Tax Privacy*, 11 N.Y.U. J.L. & BUS. 31, 36 (2014).

liability and entity shielding, but also to serve as powerful instruments of privacy. Understanding the privacy function of modern business entities provides a fresh outlook on balancing the interests advanced by anonymity with the societal need to curb illicit activities propagated by anonymous shell companies. This analysis comes at an opportune time, as new statutes are being enacted across the world requiring business ownership disclosures. These reform efforts almost invariably derive from the understandable impulse to romanticize transparency. And it almost seems like the natural order of things that more information ought to produce better markets and societies.

But a sober examination reveals the important and unexamined virtues of enterprise anonymity that already constitute an important lifeblood of the modern economy. By developing a theoretical account of identity shielding, this Article hopes to encourage policymakers to engage in a more nuanced discussion of regulating and harnessing anonymity. It also hopes the discussion helps pave a path to reimagine business entities not just as transaction-cost-reducing economic devices, but also as instruments of privacy that can advance important societal interests.