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***321 DESIGN JURISPRUDENCE AND THE NONPROFIT STYLE**

Jeff Trexler [FN1]

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September 11, 2001. The disintegration of the Twin Towers has left “something empty in the sky,” [FN1] and almost immediately charities rise to fill the void. The Red Cross, the Twin Towers Fund, the countless other businesses and civic groups supporting the relief effort--each strives to reunite a shattered country with a healing message for these troubled times:

As a nation, we can minimize the effect of network externalities, reduce transaction costs, and provide an optimal equilibrium solution to this particular coordination game by aggregating capital in nonprofit firms, while utilizing signals that enable for-profit providers to maximize shareholder value through strategic pseudo-altruism.

Of course, no one actually said this. There is a reason why real-life charity does not sound like a law review article or a business plan: ***322** style matters. A group's name, the way it asks for money, its office space, the timing and look of its programs--perhaps the most difficult challenge of nonprofit design is to acquire needed resources while giving the appearance of a form beyond finance. [FN2]

The specter of capitalism haunts nonprofit rhetoric. For many lay-people and nonprofit advocates, talk of nonprofit “business” and the nonprofit “firm” seems to be an oxymoron--a nonprofit is supposed to embody a higher form of spiritual truth, moral virtue, public-mindedness, or other values outside the state or economy. [FN3] Yet academics, nonprofit managers, and business competitors tend to view nonprofits just like any other market actor: a nonprofit is an inter-section of agreements and rules “about property rights, governance structures, rules of exchange, and conceptions of control,” [FN4] and tax privileges are coherent only to the extent they reflect the essential utility of nonprofit enterprise. [FN5]

Nonprofits embody the dueling cultures that sociologist Ferdinand Tönnies described as *gemeinschaft* (“community”) and *gesellschaft* (“society”). [FN6] From one angle, nonprofits represent the emotional, spiritual, and even familial values of a communal realm outside state and market: the Metropolitan Opera is art, but *Les Misérables* is commercial pop; a museum Lichtenstein is superior to a Batman comic; [FN7] church transcends group therapy; NPR offers “intelligent ***323** talk” while Rush Limbaugh is a pitchman. And yet in direct contrast, the nonprofit as *gesellschaft* embodies the impersonal world of contract and commodity. Vague talk of transcendent values must give way to a crisp, quantifiable metric, [FN8] and the role of the nonprofit expert is to educate the public in what the term “nonprofit” truly means.

The 9/11 controversy highlights the tensions resulting from this split within our nonprofit consciousness. Charity managers initially defended their use of donated funds for overhead, future emergencies, arts groups, and legal aid to immigrants as in keeping with economic efficiency and the black-letter rules of nonprofit law;

such rules give charities wide discretion over how they use their assets within the (typically indefinite) purposes specified in their articles of incorporation. Yet this did not keep Congress, state regulators, reporters, and angry donors from expressing outrage and betrayal when practice diverged from rhetoric. The name of the Red Cross's "Liberty Fund," repeated pleas for "victims' families" in telethons and other fundraising drives, and the implicit association of the relief effort with the collapse of the Twin Towers--all helped foster the sense of a patriotic, emotional, and even familial bond that tran-scends economic efficiency and the letter of the law. The more the charities tried to rationalize their actions, the more they came across as corporate and cold. [FN9] As one World Trade Center widow said bit-terly, "If something like this ever happens again, no one is going to send them money." [FN10]

The storm over 9/11 charity replays an all too common scene from the last century of nonprofit law. At a time when for-profits strateg-ically adopt the stylized selflessness of nonprofit design, nonprofit profit-seeking stands out in ever sharper relief. What may seem related and charitable within the closed environment of legal analysis appears crass and self-serving without. Acts consistent with the in-stitutional realities of "nonprofit enterprise" contradict our intuition *324 that nonprofits stand outside financial concerns, and pressure increases for yet another wave of ineffective reform.

The key to resolving the tension in nonprofit identity ultimately lies on neither side of the conceptual divide. From an institutional perspective, the essential reality behind nonprofit enterprise is argu-ably the same as that behind any other organizational form; buying, selling, contracts, altruism, selfishness, coercion, democracy, liberty, and lumber are all of a piece, parts arranged throughout a range of organizations to perform different functions. Yet the experience of nonprofit design--from buildings and bake sales to the word "non-profit" itself--offers perceptual cues that unite each separate element in a form beyond finance. For nonprofit law to maintain its integrity, we need to develop a more nuanced understanding of how those seemingly disparate realities relate.

Overview: The Elements of Nonprofit Style

This article explores nonprofit form as a fictio in the classical sense of a "shape," no more false or illusory than the image you see when you open your eyes. [FN11] "Seeing," in the words of visual theorist James Elkins, "is metamorphosis, not mechanism" [FN12]--"two-dimensional images projected onto the retina only achieve full dimensionality as a result of our perception: we infer the third dimension of depth." [FN13] The composition of points and two-dimensional relations into a scene in multidimensional perspective provides the fundamental template for our experience of nonprofit form. A logo, a door, a house, and a church all provide cues that induce us not only to view them as distinct shapes beyond the flattened points and planes on our retinal screen, but also to take certain actions. Similarly, non-profits embody connective relations--economic, political, visual, architectural, and even aural--that interact to produce a distinct identity and direction.

In law as much as any other area of information design--VCR programming, a web site, or a computer screen--the loss of a sense of design logic leads to increasingly complex and ultimately ineffective design. Like Microsoft Windows, ineffective patch follows ineffective patch as the code grows ever more unwieldy and likely to *325 crash. [FN14] Design illiteracy in nonprofit law creates an environment analogous to the butterfly-ballot effect, in which the arrows on a Palm Beach ballot channeled voters' attention to a different box from the one they wanted to pick--a small design flaw that resulted in a constitutional crisis. [FN15] Within the nonprofit realm, the directional problem typically relates to finance: although nonprofits are indispu-tably market actors, identifying them as such can erode their distinct identity.

The core design flaw within modern nonprofit legal theory is its constricted perspective: the assumption that

we must cut to an essence behind the fictional mask. It is a methodology that excels at further breaking down nonprofit form into its separate parts, but it has lost sight of how these individual elements compose a greater whole. This narrowness of scope is exacerbated by the prevailing Whig history of nonprofit law, according to which the only people who have ever truly understood nonprofit law are those now writing it. [FN16] The evolution of nonprofit law is said to have been a mere “his-torical accident,” [FN17] a concatenation of “ad hoc” [FN18] policies lacking any cohesive rationale until nonprofit theory arrived at its intellectual maturity in the early 1980s. [FN19]

Accordingly, the most persistent theme of nonprofit scholarship over the past twenty years is that the word “nonprofit” does not mean what it says. Modern nonprofit theory offers a definition of “nonprofit enterprise” in terms of its efficiency as a producer of goods and services, dismissing the sense that the term bore any other relation to profit-making as a popular misunderstanding. Instead, on this view, the sole defining trait of nonprofit character is the nondis-tribution constraint, the strict prohibition on distributing net profits to those in control of the organization. The nondistribution con-³²⁶straint makes nonprofits more trustworthy than for-profits in areas marked by “contract failure,” or the inability of consumers “to police producers by ordinary contractual devices.” [FN20] The lack of sharehold-ers might be an invisible trait, but it assures supporters that capital will not go toward personal gain.

In keeping with this premise, the ignorance of the people has become a standard trope in the nonprofit literature. The leading reporter of nonprofit law, Bruce Hopkins, even argues that the stat-utory term “not-for-profit” is a complete misnomer, inasmuch as it gives the mistaken impression that the law restricts the ability of nonprofits to earn net gain over loss. The tendency to look through to an essence not seen by hoi polloi has led at least one commentator to suggest that tax privileges based on organizational form might be obsolete. Evelyn Brody observes that the “‘growing mismatch be-tween the actual operations of the voluntary sector and popular con-ceptions of what this sector is supposed to be like’ open up the sector to ‘cheap shots and exposés’ and polit-ical attack.” [FN21] To remedy this problem of “cognitive dissonance,” Brody concludes that leaders of nonprofits need to educate the public as to the narrower definition of “nonprofit” nondistribution. [FN22] If that does not work, she suggests that legislators should perhaps simply eliminate tax privileges based on organiza-tional form and target specific purposes instead.

Like so many other analyses, this approach rests on a fundamental misunderstanding of the problem. Cognitive dissonance in nonprofit law derives not so much from ignorant masses as from a deeper dis-connect of ex-perts from experience. The irony of modern nonprofit theory is that it has produced a caste system within a uni-versally accessible form. Our academic methodology mirrors what Harold Bloom has described as a deep gnostic impulse within American thought. [FN23] The visible face of nonprofit environments--a cathedral, a ³²⁷soup kitchen, a museum exhibit--becomes the deceptive specter of Baudrillard's simulacrum: an unreal city that casts its shadowing veil over a reality known only to experts. [FN24]

My argument here is not that the past generation of nonprofit theory is irrelevant--far from it. The genius of nonprofit identity is that it provides a medium for uniting an infinite array of seemingly contradictory values. Accordingly, the future of nonprofit theory lies not in distilling the one controlling model of nonprofit enter-prise. Rather, we need a better sense of how so many conflicting view-points can converge to create a distinct nonprofit character. The role of nonprofit law is to help compose the “inner and outer environ-ments” [FN25] of nonprofit form into a unifying effect, one that simultan-eously embodies and transcends legal relations of prop-erty, contract, control, and exchange.

To that end, this article will explore the integrity of nonprofit form from three different but related angles. Part I examines in greater depth how nonprofit style relates to information design, the science of creating forms

to convey meaning and to guide action. [FN26] The focus of this section is nonprofit style as nomos, a normative pattern that creates distinct continuity across the flux and flow of experience. [FN27] The Red Cross logo, a religious symbol in a hospital room, a Shake-speare play on public TV--objects, like individuals, have points of view, features that direct and shape attention in particular ways. The direction and analogous relations of these perceptual cues transform how we understand nonprofit environments; accordingly, a prominent recurring theme in Part I is the relation between style as externalized memory and the “cognitive style” [FN28] of our intuitive sense.

***328** But the significance of nonprofit style goes beyond simply man-aging attention; it is a “philosophical project of the highest order.” [FN29] That people persist in investing nonprofit forms with deeper significance--emotional, ethical, and spiritual meaning that can at times defy rational explanation--points to a deeper relational dynamic within nonprofit form itself. Part II explores the compositional force of nonprofit law as a style of perception. From the first law school through Blackstone's corporate university, nonprofit form has shaped a programmatic sense of social identity as unity in perspective: “a nontotalizing structure that nonetheless acts as a whole.” [FN30] Blackstone, however, marked the apex of a legal tradition that integrated an understanding of perceptual dynamics with organizational form. The roots of the fragmentary mindset of modern nonprofit thought lie in the privileging of abstract thought evident in the corporate theories of Hobbes, Locke, and Kant.

Part III calls for a new humanism in nonprofit law and legal theory, in which we look beyond the fragmenting force of empiricist analysis. The growing convergence between nonprofits and other organizational forms, as illustrated by avant-garde design strategies that appropriate nonprofit style to refashion commercial corporate identity, [FN31] highlights the legal problems fostered by a methodology that treats the culture of form as a fictitious distraction. At a time when for-profits appropriate the rhetorical power of nonprofit style, the apparent commercialism of nonprofits increasingly dominates the frame. Years of looking past the nonprofit interface must now give way to a new approach to nonprofit law, [FN32] in which form takes shape through an intuitive sense of unity by design.

I. Style as Law

Marshall McLuhan once observed that we can sense the impact of a new technology by going “where that particular form has not been ***329** felt.” [FN33] The same is true with respect to the forms of social organization. For specialists in nonprofit law, it is natural to assume that the nondistribution constraint defines nonprofit enterprise; after all, state nonprofit corporation laws consistently include a prohibition on distributing profits to members. Outside the realm of specialists, however, more impressionistic views prevail.

One could, of course, dismiss the association of “nonprofit” with non-profit-making as a “common misconception” [FN34] of a naïve and un-reflective populace. After all, everyone knows that nonprofits engage in commerce on a daily basis, from the Metropolitan Museum gift shop to the Girl Scout who sells cookies door-to-door. Nonprofit legal theorists have noted that we can classify nonprofits as donative, commercial, or mixed. In the consensus view, however, these descriptors have little practical significance; the only relevant characteristic is what a nonprofit does with the profits it earns.

What this approach does not address is how people come to hold two seemingly contradictory notions of nonprofit meaning at once. Though nonprofit commerce pervades American society, people nonetheless intuitively link “nonprofit” with meanings beyond profit-making or finance in any number of ways:

- use of the word “noncommercial” interchangeably with “non-profit”; [FN35]

- puns that link nonprofit to operating at a loss (including the ever-popular “Amazon.org”); [FN36]
- contradictory juxtapositions of “nonprofit” with “profit”; [FN37]
- *330 • the association of “nonprofit” with “free”; [FN38]
- reference to “nonprofit” as a value distinct from “corporate” identity, despite the fact that nonprofits are often corporations; [FN39]
- use of nonprofit status in fundraising drives to indicate the need for donated resources, on the grounds that money is for the most part not derived from profit-making sales; [FN40]
- criticism of nonprofit commerce, profit-making, and capital accumulation;
- statutory limits on nonprofit purposes; [FN41]
- legal recognition of consumer cooperatives as nonprofits on the basis of their purpose, despite violation of the nonprofit constraint; [FN42]
- legal restrictions on commercial activity by certain mutual benefit nonprofits; [FN43]
- the loosely conceived “commerciality test” in U.S. tax law, which denies tax exemption under Section 501(c)(3) to organizations that engage in a vaguely defined substantial amount of commercial activity. [FN44]

*331 Far from showing a lack of understanding, such reactions reflect the abundance of data people process with regard to the nature of nonprofit identity. The rules and intuitions associated with the nonprofit concept do not typically derive from reasoned explanation, just as no one ever studies an instruction manual before using a word processing program, the Internet, a Target store or a chair. Except for specialists in nonprofit law and management, [FN45] most people develop their sense of nonprofit identity primarily through the style of nonprofit design.

A. Sense and Sensibility [FN46]

We can think of style on two levels. The first is the physical environment associated with nonprofit identity and how the elements within it relate to one another. Recognizable continuities within time and space--indeed, all means of producing a sensory impression--produce a distinct perceptual field. The name of an organizational category or a specific group is but one configuring element. [FN47] A soup kitchen, a clerical collar, weekly worship, and a Girl Scout cookie box all exert a subtle yet pervasive impact on how people view nonprofits and nonprofit laws. The law as written and the *332 nomos of nonprofit environments both express elements of nonprofit style; the nonprofit class in state corporate law, Section 501(c)(3), and a local mosque are all examples of nonprofit form.

The second level of style is the deeper effect that the evident patterns within the external environment have on our intuition, a perceptual orientation that defines how we relate the various elements within our environment to shape and to identify nonprofit form. This intuition can evolve in any number of ways depending on the particular configurations we encounter, both within the nonprofit category and outside it. It is a matter not so much of essential difference among organizational categories, but of the ways people compose the flux and chaos of lived experience through patterns of connecting, analogy, metaphor, inference, reason, and sense. From this angle, nonprofit law is a stylized interplay of our material culture--the various ways we focus attention to pro-

duce a nonprofit effect--with the "cognitive style" [FN48] that shapes how we respond to the com-positional force of our external environment.

Consider an action that many people performed in the early days following September 11: giving blood. If you went to a Red Cross office, you immediately felt that you were in a different place from a store or a commercial plasma collection center. A ubiquitous blood-red plus sign served as a symbol of inclusion and life; no one gave you any money in exchange for your blood, nor did you have to pay for the cookies and juice afterward--these and other aspects of the immediate environment blended together to form a larger percep-tual whole. Similarly, if you gave blood at an emergency Red Cross donation center set up at a mall or your apart-ment complex, many of the same images and objects combined to transform the space into a noncommercial zone, framing an experience as distinct from a doc-tor's office as a Banana Republic or McDonald's.

The Red Cross environment offers a variety of sensations and sight lines that compose separate parts into a perceptible whole beyond them. To borrow an image from mathematician and legal philo-sopher G.W. Leibniz, nonprofit style is a "power of arranging cases" akin to that of a city skyline, in which individual surfaces play off each other in relation to one's line of sight. [FN49] In the language of the Leibnizian sensibility that pervades contemporary design theory, objects have viewpoints: they are not brute facts on which people arbitrarily impose meaning, but rather are forms with an array of *333 features that can connect, contrast, and combine with others to pro-duce new yet bounded transformational fields of meaning. [FN50]

The total effect of nonprofit form, whether a tangible building or abstract legal concept, emerges through the interplay of perceived objects and perceptual orientation. [FN51] This feedback loop between percept and per-ceiver underlies the general assumption of nonprofit experts that the contours of the category can change over time. Nonetheless this is not a radically untethered process. Form beyond finance is one dominant trope. For ex-ample, one donor's experience of the Red Cross might reinforce the sense that nonprofits follow a formalistic rule against exchange. Another may feel that the Red Cross exists to address a special circumstance in which the potential object of exchange--human blood--is a noncommodifiable value. [FN52] A third might pick up on cues that relate nonprofits to a sense of a nurturing family, [FN53] inextricably intertwined with relations of ex-change yet physically, philosophically, and even emotionally viewed as a unity beyond financial concerns.

From the standpoint of nonprofit legal theory, however, the scene at the Red Cross might best be described not in terms of its composi-tional effect, but as the aggregate of divisible parts. The archetypical style is that of a written legal text. Nonprofit law reads a nonprofit environment after the fashion of a contract, deed, statute, or judicial opinion, raw material for lawyers to break down to point-to-point connections and separable terms. Thus, we are supposed to break through the overall effect to identify the segmented links of owner-ship, ex-change, and payoff: organization to property, employee to organization, money to (or not to) managers, service provided to chartered purpose, chartered purpose to § 501(c)(3). Nonprofit as text is a stylistic matrix akin to the Cartesian cognitive grid; the Red Cross environment "can be mapped out from the axis . . . in recti-linear fash-ion, and can be divided into discrete units," [FN54] with the Red Cross a fictitious label for the intersection of diagonal line segments.

*334 B. Memory and Attention

Nonprofit style in its physical forms is a tangible expression of social memory. [FN55] Similar to law as written, it embodies a "[m]eaning-ful structure" that "can organize apparent chaos and arbitrariness" into rules, constraints, and cues people can integrate "with previous-ly acquired material." [FN56] In fact, inasmuch as in-dividuals can tangibly interact with a building, campus, or website across time, nonprofit form as externalized

memory is arguably a more powerful force in shaping a sense of continuous shared identity than inscription in a written charter. [FN57]

But this is not to say that externalized memory is a force inherently separate from written legal texts; form as experienced and form as written can exhibit mutually reflecting aspects of style. Both equally shape the nonprofit whole. The admittedly vague purposes in nonprofit statutes serve as associative features, not formalistic rules, that ground the nonprofit statute in experience and cue lawyers and nonprofit founders to the parameters of nonprofit meaning. The un-certainty in the precise boundaries of the terms themselves can also subtly discourage the entry of destabilizing nonprofit endeavors (for example, Hansmann's example of an auto manufacturer reorganizing as a nonprofit) or provide an additional textual referent for an enforcement action. In this regard, the insistence on listing purposes in some contemporary state statutes [FN58] reflects the prominence of an associationist perceptual style akin to that of the nonprofit and charitable association statutes in the nineteenth century, in which lists of purposes set up chains of analogy without which the nonprofit form would seem incoherent.

The image of nonprofit form fostered by written and embodied cues also permeates tax law, albeit in an altogether unself-conscious way. Perhaps the most noteworthy instance of this is the Tax Court's opinion in *Plumstead Theatre Society, Inc. v. Commissioner*, which corrected the IRS's prior denial of 501(c)(3) status for nonprofit organizations that had entered into joint venture agreements. [FN59] According to the Tax Court, what differentiates commercial and *335 nonprofit theaters is their attitude toward generating profits. Commercial theaters seek an excess of revenue over costs. In contrast, "[t]ax-exempt organizations are not operated to make a profit." "[E]xcept in rare cases, box office receipts will never cover the costs of producing plays for nonprofit performing arts organizations," [FN60] and so their productions do not take on a "commercial hue." [FN61] From the perspective of a theater, museum, or trustee, this distinction might seem not strictly in accordance with the essential facts, yet it reflects an image of nonprofit form without which the tax privileges enjoyed by U.S. charities might very well not exist.

Nonprofit design cues can also shape law outside the realm of non-profit organizations. [FN62] One prominent example of nonprofit design as an agent of legal reform is the interaction between the Pasadena courthouse of the Ninth Circuit U.S. Court of Appeals and the adjacent Western Justice Center, a leading force in alternative dispute resolution. The compositional styling of the Center and courthouse push to the margins the neoclassical hierarchies of authoritative judging. Instead, the focus is on community interaction and mediation, as court and Center form an integrated whole. The Center stands immediately next to the court, an implicit part of the court complex. The courthouse itself is an inviting Spanish-style building that opens into meeting rooms and a library accessible to the general public. Not coincidentally, the number of appellate cases resolved through mediation has been consistently high. Design directs attention to law beyond force, subtly reshaping the contours of adjudication without coercive command from the court. [FN63]

*336 Conflicts in perceptual style can have a direct bearing on the course of nonprofit law. Take, for instance, the relation between background and foreground in determining whether a particular use of donations is "related" to a group's charitable purposes. Nonprofit law focuses on the point-to-point relation of the expenditure to contractual language--articles of incorporation, the charter of a special fund, or a donor's restrictions on the gift. Thus, when a group such as the Red Cross uses money donated to its 9/11 Liberty Fund for "general outreach" and a "telecommunications upgrade," it is arguably justified in viewing its actions as wholly within the letter of the law unless it uses funds earmarked for other purposes. As the Red Cross has noted, at no point did it state that the fund would serve solely to redistribute money to the relatives of those who died at the World Trade Center or the Pentagon. The same view was articulated by the leaders of the 9/11 Fund, who, when criti-

cized for making grants to arts groups, noted that using donations in this manner was within the scope of the Fund's chartered purpose: “The phrase ‘all of those af-fected’ was a very broad statement, and it was made on the very first day.” [FN64]

For those who develop their sense of nonprofit identity primarily through nonprofit design, the analysis is not so clear cut. “We learn from what we see, but not necessarily from what we do not see”; [FN65] prominent features within the design environment can induce people to ignore documents, statements, and rules that are in the fore-ground of lawyers' attention. Within the study of information design, this is known as “selective attention” [FN66] or “inattentive blindness.” [FN67] Certain background traits can be functionally invisible, even as other “seemingly inconsequential” cues shape our field of meaning in subtle yet significant ways. [FN68]

Efforts to increase state scrutiny of hospital sales illustrate the power of this phenomenon. Whether or not a health-care organiza-tion is adhering strictly to the nondistribution constraint, working within the broad language of its charter, and maximizing the efficient use of its resources may have little impact on the public assessment *337 of its decision to sell its hospital assets and operate instead as a regional grantmaking organization. The hospital building, years of fundraising drives, a named relation to a church or a dead child--for decades, these background elements physically integrated the com-munity with the nonprofit form to a degree far greater than the un-seen general purpose clause within the corporate articles. Selling the hospital or amending the articles to include a general purpose in the midst of contemplating a sale are acts that can “pop out” [FN69] from the conditioning cues in the background and prompt association with fraud, abuse, and commercial self-interest, increasing pressure for legal action. [FN70]

Likewise, the timing of a donation request can trigger a chain of associations that crowd out an awareness of a group's general chari-table purposes. A recent article in the Washington Post cited all-too-typical complaints by people in California who donated to the Red Cross following a wildfire outside San Diego. [FN71] Donors assumed bas-ed on the Red Cross's appeals for help in its relief efforts that their gift would actually go toward the wildfire relief effort. Instead, much to their dismay they discovered that the Red Cross actually used the money for general purposes. Telling these donors about the legal language in Red Cross charters has done little to dissuade the community that the Red Cross had deceived them. The charters and caveats have about as much semantic force as the Surgeon General's warning on a cigarette box or ad, which, as Yale design theorist Edward Tufte notes, is designed to disappear in the surrounding visual effects. [FN72]

The dynamics of selective attention are central to understanding the public outcry over grants and expenditures by September 11 charities. The interplay of focus and environment has fueled con-cerns over the corporate character of the Red Cross and other char-ities. The problem is not merely one of institutional isomorphism with commercial exchange and corporate bureaucracy; structural mimesis is inevitable and can even set in relief more salient nonprofit *338 traits. What occasioned the controversy was the attention called to these otherwise invisible corporate qualities.

The rhetorical mapping of “victims' families” onto charitable iden-tity was a natural fit, one that reconnected individuals through the metaphorical recasting of the nation as a nurturing family. [FN73] The names and time of creation of dedicated funds, coupled with the flur-ry of donation drives, benefit concerts, and other relief efforts linked to the Twin Towers and “victims' families” fostered deep intuitive connections that have made the charities' exercise of their broad legal rights seem disingenuous, if not fraudulent. Dead people trap-ped in the towers, burning buildings, Ground Zero, a disrupted New York City economy--these images dominate the frame, whether or not there is any legitimate relationship between the charity's char-tered purposes and the provision of aid for infrastructure, reserves, or affected local arts groups. In this environment the carefully craft-ed language in a charitable solicitation can be functionally invisible, unless designed in such a way as to focus attention on

the legal terms as opposed to the victims or the attack.

The power of context to blind people to pertinent data is especially evident in the overwhelming flood of donations itself. Fundraising drives across the country called people's attention to the victims of the tragedy, but outside the separate funds for firefighters and police there was for the most part little focus on the actual financial needs of the families themselves. Again the attack dominates the frame; the fact that any number of the victims were bond traders, executives, and other businesspeople with ample savings and insurance policies is lost information even when mentioned in passing. Imagine, however, that if instead of the pleas to help "victims' families" or "all of those affected," fundraising drives called attention to the plight of the spouse who has to cover hefty boat payments on top of a ten-thousand-dollar-a-month mortgage for a Greenwich town-house, so as to free up a million-dollar insurance payment to keep from having to work. The facts have not changed, only the focus; whether truckers, waitresses, and schoolchildren would so readily empty their savings in that case is seriously open to question. [FN74]

The long-term implications of the September 11 controversy for nonprofit law have yet to be seen. One possible consequence noted in congressional hearings on 9/11 charity is the federal extension of § 339 cy pres, the trust law standards governing change in charitable purposes. [FN75] The debate comes in the wake of a movement in recent years toward enhanced federal and state scrutiny of health care charities. It also echoes congressional investigations that in 1969 produced the federal framework governing so-called "private foundations," following allegations that grant-making charities were misdirecting their charitable assets to serve the interests of the wealthy families and corporations that created them.

Whether the charities in question in each of these instances engaged in financial self-dealing is largely beside the point; the underlying dynamic of the debate bears on more than the technicalities of the relatedness standard in administering charitable gifts. What is at stake is whether the nonprofit form is sufficiently distinct from the rhetoric of corporate design. From the standpoint of contemporary visual rhetoric in the U.S., a nonprofit is not simply an "unowned" organization; it is also an organization where the apparent "control" lies not in the directors or managers, but in the perceived nonprofit mission. Managers of a charity who call attention to their direct and independent control of charitable resources create an image akin to that of a commercial enterprise—even if the charity operates efficiently within the language of its charter or the law.

C. Free Space

The integrity of nonprofit law derives less from the essence of non-profit structure than the force of nonprofit design, a distinction lost in current nonprofit legal theory. From a phenomenological perspective, nonprofit or charitable purposes, as well as the actual goods and services nonprofits provide, do not necessarily reflect essential differences from purposes associated with for-profits or governmental organizations. Commercial campaigning is more cut-throat for the non-profit Oscars than, say, the Blockbuster Awards, and nonprofit advocates will likely never find the smoking hypodermic that proves doctors in for-profits skimp on patient care. The critical factor in perceiving nonprofit form is, to borrow the words of Edward Tufte, "the smallest effective difference"—the particular way in which we construct otherwise generic material to perceive a distinct nonprofit effect. [FN76]

In the contemporary United States, one of the primary effects that gives a distinct shape to nonprofit form is free space: a relative depth of field in contrast to the segmented relations of property, contract, and exchange. It is this experience of a form beyond self and object that links our experience of nonprofit health care with the stylized information space of a museum or university. This sense of a non-profit free zone can also extend to en-

vironments outside separate buildings, as evidenced by the public outcry against a Wall Street Starbucks that insisted rescuers buy bottled water to give out in the midst of the Towers' collapse.

Words and pictures sell everyday. We live in a realm where every possible surface, from the skin of a banana to the shirt on your back, bears the mark of commercial branding. In this environment, explains avant-garde architect and Harvard design professor Rem Koolhaas, nonprofits offer the ultimate “luxury” in focusing our attention on “non-commercial” space. When “focus and clarity” are at a premium, Koolhaas observes, “[m]useums are popular, not for the content, but their lack of content: you go, you look, you leave. No decisions, no pressure.” [FN77]

The contrasting environments of the museum and the department store exemplify the conditions that shape our sense of a distinct nonprofit style. In the mid-nineteenth century, the department store was a design revolution: shopping reconceived as a “cathedral of commerce,” replete with churchlike architecture and an aesthetic of product display echoing that of a museum. Yet even this appropriation of nonprofit styles was not easily confused with its nonprofit exemplars. Walk into a department store like Macy's and the sales-clerks swiftly seize your attention in ways designed to induce a purchase. Almost everything on display has a price tag, either literally or in the manager's computer.

By way of contrast, even a museum that charges admission admits you to a perceptible free zone. The nonprofit is not literally outside commerce or control--there are still relations of exchange and bids for your attention. But while there are offices and budgets and guards, these objects relate in such a way as to create a space beyond the separate and real elements of taxes, work, sales, self, or the state.

***341** Background shapes foreground; [FN78] we associate certain purposes and forms with nonprofit identity in large part due to the ways they direct our attention. In the typical museum, as in a university, you pay up front if you pay anything at all. Upon entering you may even see signs that label the admission charge a “suggested donation.” A church has a similar structure, though it masks finance even further by incorporating a voluntary collection into the middle (and some-times the end) of the service, with congregants themselves passing the plate as they sing a hymn or as religious music plays in the back-ground. [FN79] In either case, the contrast with a for-profit store is evident. A customer may not pay to enter Urban Outfitters, but the price for gratis entry is often a subtle yet pervasive mindgrab. Meanwhile, paintings and sculptures at the Metropolitan Museum of Art have no price tags, and the Monterey Bay Aquarium will not let you buy one of its playful sea otters no matter how hard you try.

Even the design of a museum store can reinforce the sense of nonprofit identity as a zone beyond or outside finance. Typically, a museum store occupies a segregated space within or just outside the museum, such that it sets in relief the noncommercial space that surrounds it. The Monterey Bay Aquarium is a prime example of this architectural strategy. The Aquarium has two shopping areas. The larger of the two is set off to the right of the main entrance, thereby associating the store with ticket and café space in the foyer and not the main display. The other is a small shop, which is set off from the enclosed larger displays on the Aquarium's upper floor. This shop is enclosed and overloaded with books and tchotchkes, a sensory experience rather distant from the environment surrounding it.

Visual contrasts are hardly limited to fixed architectural forms. Take, for instance, the tensions in the nonprofit identity of ICANN, the Internet Corporation for Assigned Names and Numbers. ICANN is legally a California nonprofit and a section 501(c)(3) tax-exempt charity set up by the Commerce Department to manage the Internet domain name system: .com, .org, .biz, .info, and, of course, the new .museum. Most of the attendees at the quarterly ICANN ***342** conferences are representatives of commercial domain name Regis-trars and other

companies with a stake in Internet commerce. There is also a small but vocal “noncommercial constituency” dedicated to representing nonprofit interests. This emphasis on noncommerciality as opposed to mere nondistribution reflects a design logic akin to that of the free space in a museum. For example, among the many aspects of ICANN's behavior found to be objectionable by the non-commercial constituency was the display of Microsoft, Network Solutions, and other commercial sponsorship logos at the front of the general meeting area. [FN80]

Tax exemption resonates with the sense of nonprofit form as an externalizing force reinforced by the overall effect of the nonprofit environment. Modes of disguising or qualifying profit-generation direct us to view profits as not-profits, conceptually distinct from the raw accumulation and distribution of capital that is the proper subject of corporate tax. [FN81] In this regard, one of the leading explanations of nonprofit tax privileges before Hansmann-- Boris Bittker's in-come measurement theory--reflects a more intuitive grasp of non-profit identity than its critics allow. The standard critique of Boris Bittker's argument may be technically on point--contra Bittker, accounting can easily account for nonprofit profits--but his sense of nonprofits as a form outside commercial finance is intuitively closer to the rhetorical effect of exempting nonprofits from corporate tax. [FN82]

D. Transformation

Establishing a form beyond finance is a prominent feature of non-profit style, one reinforced by the way in which the category's name suggests an open-ended negation of profit. However, maintaining an absolute distance from finance is for most nonprofits not a viable design strategy, let alone a physical possibility. Without an infinite source of capital, even the most visibly noncommercial charity--say, a monastery--will have to raise money by various means, such as seeking donations, selling wine, or performing services under contract for other nonprofit organizations.

The need to relegate financial concerns to the background of our zone of attention presents a substantial design challenge for a non-³⁴³profit organization. However much financial considerations may enter into a decision, the nonprofit must in some way distract us from these underlying impulses, lest it risk losing support or legal privileges. Some foci lend themselves to this more easily than others. For example, the Manhattan museum for children can show a conspicuous array of commercial icons (Curious George, Peanuts, Radio Flyer sleds) with little risk of damage to its nonprofit image, yet a public radio station shifting from bluegrass to Talk of the Nation can spark protests of “selling out.” [FN83] Similarly, the transformative effect of the physical space of a university or hospital underlies the exclusion of student stores and cafeterias from the Unrelated Business Income Tax (“UBIT”). Compositional force, more than the rationalized “convenience” standard, [FN84] underlies the perceived integrity of this carve-out.

The shaping of perception by visual electronic media makes it increasingly risky for nonprofits to rely on contrast alone to produce a distinguishing effect. Public television is perhaps the most visible case in point. For years, it designed its programs so that they had a noncommercial space that was either bookended by the naming of sponsors or, on occasion, interrupted by fundraising drives. The overall effect was similar to that of museum, not because naming sponsors or flashing logos are “passive” gestures and not truly advertising, but because such practices mirrored figure/ground relations familiar from universities, museums, hospitals and other nonprofit environments. However, the recent shift toward beginning and ending shows with sponsorship notices indistinguishable from commercials is reversing the equation; the zone of noncommercial contrast is receding to the background, while the associative link with commercial networks is coming to the fore.

Historically, nonprofits have overcome the tension between financial constraint and maintaining distinction

by transforming the image of financial features into nonfinancial perceptual fields. When judges or regulators focus on such noncommercial contrasts to make general claims about nonprofit form as non-profit-making or not acting “in a commercial manner,” they reflect how organizational design can transform an entire space through selective focus. [FN85] The conditioning cues of the noncommercial space in a museum foster a sense of noncommerciality beyond the money-conscious board or the employees out to make a living. Similarly, the design of a religious hospital can transform our image of a doctor who occupies the dual roles of a profit-seeking private practitioner and a physician in the service of Lutheran General.

The metamorphosis effects of nonprofit style reflect a phenomenon that Tufte refers to as “disinformation design.” Through “strategies of disguise and attention control . . . to regulate the optical information available to the spectator,” profit-making gestures can appear to be noncommercial, just as David Copperfield can make the Statue of Liberty seem to disappear without literally reducing it to dust. As Tufte notes, such methods of display reflect what “researchers in visual perception” describe as “‘visual masking,’ ‘the reduction of the visibility of one stimulus, called the target, by a spatiotemporally overlapping or contiguous second stimulus, called the mask.’” [FN86]

Terms such as “nonprofit” and “charity” in themselves exert a powerful transformative force. Tax theorists have recently debated whether the latent self-interest in charitable activity vitiates the logic behind deductible contributions, [FN87] but such arguments--whatever their essential accuracy--are ultimately beside the point. We accept the special treatment of charity not because it is consistently and essentially different, but because it composes self-serving, greedy, and spiteful brute facts into an image of other-directed empathy. The trustee who seeks status in the community but also wants to avoid personal liability, a volunteer who distributes food at Ground Zero because her brother died fighting a fire, a movie star who donates two million dollars so her publicist can shill it to the cover of People --the Red Cross logo does more than connect them; it gives them all new meaning. This principle applies throughout the range of non-profit activities: nonprofit health care, education, sports, computing, and promotion of the film industry. Whether or not any of these are truly distinct from their for-profit counterparts is less important than *345 how they resonate with the sense of a form breaking through the Cartesian flatness of “one-dimensional man.” [FN88]

Names, of course, are powerful means of directing attention, but they also need to correspond with organizational design. For people unfamiliar with black-letter nonprofit law, the most compelling transformative features are not always legal standards such as nondistribution and “causal relationship,” [FN89] which tend to focus on the invisible means of production rather than diverting attention. Nonprofits deflect attention from their financial interests through an array of pattern-shifting strategies, [FN90] such as:

- Separation: a medical journal focuses attention on its academic nature by placing ads in the back, while the Girl Scouts in uniform sell cookies within a limited time, outside of stores; [FN91]

- Enclosure: a bookstore in the back of a church; a self-enclosed hospital gift shop; [FN92]

- *346 • (Mis)direction: a university with a multibillion-dollar endowment deflects criticism of its tax privileges through academic programs and a town improvement program, while a September 11 charity televises a benefit concert as opposed to three hours of hired fundraisers pleading for cash; [FN93]

- Continuity: a dolphin in a display tank, a scientific book on dolphins, a dolphin t-shirt, a dolphin puppet, and dolphin pajamas;

- Repetition: signs placed in front of cash registers and on display tables throughout the Harvard Collections

gift shop declare that the items reflect and support Harvard mu-seums, thereby focusing attention on charitable elements beyond the act of buying jewelry and other tchotchkes; and

- Association and analogy: toy tigers and rhinos--endan-gered, of course-- sold at Walgreens, made by Fisher Price, but co-branded by the Smithsonian, transform the act of buying a plastic animal into an educational, environmental, and donative gesture.

Perhaps the master of seduction in the nonprofit realm is the Sal-vation Army thrift shop. The Salvation Army, along with Good Will and any number of local churches and women's shelters, sets up a range of counter-vailing visual cues to counteract what the Internal Revenue Service colorfully calls the "commercial hue" of what is essentially a chain store. Donation boxes branded with the Salvation Army logo, coupled with a donation center in the back of the store, differentiate a thrift shop from Target or Saks, an impression rein-forced by a display floor full of used and remaindered items. Season-al donation drives and highly visible charitable projects, organized around disaster scenes like the Twin Towers, further help foster a sense that shopping in a Salvation Army store is noncommercial or, better yet, beyond commercial in nature.

This transformative effect can encompass even luxury items. For example, in New York's American Museum of Natural History there was in the fall of 2001 an exhibit dedicated to pearls. Upon exiting the exhibit visitors can enter a special museum shop reflecting the themes of the exhibit. Items include an exhibit catalog, a t-shirt *347 featuring the landmark image of 1920s silent film star Louise Brooks holding a string of pearls (without any mention of the exhibit), and an assortment of pearl jewelry, most of which is not a replica of any item found on display in the Pearls exhibit.

Nonetheless, this small shop does not transform the Pearls exhibit into Harry Winston's. The compositional force of the museum design reshapes the significance of shopping; the store's location by the Pearls exhibit and within the museum itself sets up chains of infer-ence and analogy you do not experience on Rodeo Drive. The de-signers of the shop attempt to make you feel that buying a pearl necklace at the Pearls exhibit is not equivalent to buying the same pearl necklace at a freestanding commercial store. The pearls motif in the store continues the theme of the Pearls exhibit; prices are rela-tively inexpensive, explanatory signs connect the pearls in the shop to the educational material in the exhibit, and there are visible reminders that purchases "support" (not "fund" or "capitalize") the museum itself.

The power of metamorphic design can even transform perception of for-profit enterprise. After September 11, a host of ads appeared noting that a percentage of profits would go to 9/11 charities, such as a Saks mailing to its credit card holders stamped with the logo of the Red Cross. As game theorists note, such a juxtaposition of images signals trustworthiness, but it does much more than that--it com-poses business and charity into a new perceptual unit. If a customer makes the desired connections, attention shifts from Saks to the Red Cross; buying Blahniks for yourself becomes an act of charity.

This transformative force can grow stronger as more elements re-late the purchase to a field of meaning beyond exchange. A few years ago, the Los Angeles Police Department drew fire for its deci-sion to market officially branded goods. After September 11, how-ever, buying an NYPD hat is a patriotic act, and the official Fire De-partment store by Rockefeller Center is veritably a site of holy pil-grimage. Likewise, the Here is New York exhibit in lower Man-hattan, which sells videos and copies of photographs related to the September 11 attack, donates net profits to charity. Despite the fact that every picture on display within the shop is on sale, it nonetheless takes on the air of a museum. The pictures' subject, the shop's loca-tion near Ground Zero, and the use of the profits makes this a dis-tinctly noncommercial commercial zone among Soho stores. In fact, in the weeks immediately following the attack, the Here is New York organizers encountered so many confused visitors that

they eventually posted signs throughout the store notifying people that if they *348 were looking for the 9/11 museum exhibit on Grand Street, this was not it. [FN94]

Of course, most people do not try to rationalize their various impressions of nonprofit style, and multiple interpretive schemas coexist in a related and functional whole. Nonprofit style as a perceptual *nomos* “is an infinity of converging series, capable of being extended into each other around unique points.” [FN95] Folds, links, map-ping, hollows, shadows, and focus continually shape our attention as much as generative rules. Various cues give regularity and predictability to the range of nonprofit precepts, from space free from commerce and nondistribution to selfless generosity and spiritual transcendence. In this regard, a layperson with an intuitive sense of reconciling particulars within patterns reflects a more sophisticated grasp of nonprofit identity than the lawyer with a fragmenting cognitive grid.

II. Law as Style

The unity of nonprofit form reflects a design technique known as composition, the configuration of elements to produce a distinct whole. A nonprofit is a *fictio* in the classical Latin sense of a shape or a thing made, more akin to a sculpture or a crafted piece of pottery than a false or fictitious imaginary construct. [FN96] Nonprofit form reflects how we see—points and lines interact to produce a perceptible multidimensional space. Corporate form is “fictitious” to the degree that every image we see when we open our eyes is false. After all, we do not see the lightwaves, molecules and atoms as they truly are in themselves, and “we infer the third dimension of depth” from visual cues contained in “two-dimensional images projected onto the retina.” [FN97] In this regard nonprofits exhibit a recognizable continuity with iconic imagery extending back to classical Greek notions of form as an interplay among the viewer, crafted design, and the material object. [FN98] This link between creativity and matter is inherent to nonprofit *349 identity in all its various manifestations, from the meeting space of a club for computer hackers to an international NGO giving seed grants to commercial businesses in emerging economies. [FN99]

No figure in Anglo-American jurisprudence has come closer to identifying the compositional dynamic of nonprofit form than William Blackstone. Yet his description of corporate law is far less understood than we might like to think. [FN100] Since the late Enlightenment we have had a tendency to read Blackstone's words without grasping his images, a weakness that also pervades our analysis not only of current corporate law but of the political and legal philosophy that first gave shape to the modern corporate frame. For Blackstone, as was also the case with Locke, Leibniz, and a long tradition of synthetic scholarship going back to Roger Bacon and Robert Grosseteste, rhetoric, law, and other academic disciplines were inextricably bound with questions of aesthetics or perception. [FN101] Even if the particulars of black-letter corporate law in Blackstone's day are long obsolete, his visual sense of compositional unity serves as an archetype for contemporary nonprofit design, which, unlike that of the for-profit corporation, continues to project the image of form beyond segmented relations of exchange, ownership, and control.

*350 A. Composing the Community

As noted in a recent article on visual culture in the law, visual imagery pervades Blackstone's Commentaries:

Blackstone repeatedly made “observations,” analyzed legal powers from various “views” or “points of view,” and reported that truths “appear.” He notably regarded himself as offering the prospective law student “a general map” of the law, which he later described in visual terms as a magnificent, if somewhat

antiquated, “Gothic castle.” [FN102] While Hibbitts's general point is correct--Blackstone, like other scholars in his day, incorporates strong visual imagery in his work--Hibbitts's view of what this implies for Blackstone's jurisprudence rests on a critical indictment of visual thinking, one that cutting-edge research in design theory has soundly discredited. For Blackstone, vision is not inherently a deceptive or abstracting force; that is an Enlightenment legacy that postmodern thought has with a surprising lack of irony blithely adopted as its own. [FN103] Instead, Blackstone's im-age of corporate form marks the zenith of a centuries-long tradition of dynamic composition, one far closer to Leibniz's view of human consciousness as a “combinatorial art” than the divide-and-abstract mindset of Lockean empiricism. [FN104]

Blackstone saw the corporate university as the prototypical expres-sion of corporate identity, and, though this may no longer hold true for corporations in general, the university nonetheless provides a telling archetype of what would later become known as nonprofit form. An organizational theorist would err in assuming that Black-stone's “corporation” is equivalent to its modern counterpart. [FN105] Blackstone wrote at a time when the primary expressions of corpor-ate identity in law were what we now classify as nonprofit organiza-tions, such as hospitals, churches, colleges, monasteries, and, as cor-^{*351}porations sole, priests and parsons. [FN106] The corporate town and king served as their political analogs, and even the businesses allowed to incorporate had to manifest the sense of other-directedness that we now associate more narrowly with a distinctly nonprofit style.

As Blackstone notes, the academic university brings into the mod-ern era the core idea of the Roman law *universitas*. Legal historians have long noted this Roman law concept was not, in the words of Fritz Schulz, “what we call today a corporation.” Indeed, “[t]he term *corporatio* was entirely unknown, nor was *universitas* a technical term to designate a corporation.” [FN107] The primary focus of the univer-sitas, and with it, Black-stone's university, was the sense of “forming one whole out of many individuals”--a compositional unity greater than, yet emerging from, its various parts. [FN108]

Blackstone's decision to use the English universities as the model of corporate form resonates on any number of levels, not least of which is his repeated theme of law in relation to viewpoints. Echoing Leibniz's comparison of human identity to perspectival views of the city, Blackstone likens a whole *universitas* --colleges, administra-tion, professoriate, and all the rules and objects to which they relate--to a view of Oxford or Cambridge: you can see the students and walled college buildings as parts of the town or as a distinct pattern that stands out from it. [FN109] Today the many and varied surfaces within a university--the logo, departments, students, sports teams, book-stores, dorm pizza, and the Bursar--interact with the observer to foster a sense of the whole formed of, yet distinct from, its various elements, with each individual part more or less exemplary of the whole. [FN110] Even a highly paid basketball coach can reflect a set of ^{*352}meanings beyond lesser-paid professional counterparts; Mike Kry-zewski of Duke is a multimillionaire, but his public image is equally that of an educator and mentor. The act of naming universities and physical space after a wealthy donor follows the general pattern, as over time the university environment transforms the donor's name into an element within the university itself; the names Yale and Har-vard are famous, but the individuals behind them are either outside the zone of most people's at-tention or take on new meaning in rela-tion to the school.

The compositional dynamic at the heart of the modern university manifests the design logic of the nonprofit legal form itself, whose origins, as Blackstone intimates, lie in a twelfth-century law student rebellion that cre-ated the first law school. [FN111] Soon after the rediscov-ery of the emperor Justinian's *Corpus Iuris Civilis*, people through-out Europe flocked to the city of Bologna to get a first-rate legal education, but at first they had to do so at considerable personal risk. Because there was no corporate university structure, each student formed partnerships with individual teachers, and the unequal power relationship in these arrangements left students in

an extremely vulnerable position. Moreover, under the law in force at the time, students from outside Bologna could be liable for the debts of other people in the city from the students' original home jurisdiction, such as traders welching on a bill.

The law students at Bologna created a novel escape from their legal entanglements: they used law and rhetoric to make social meaning a combinatorial art. Geography, buildings, mutual assistance, and legal terms and documents became cues highlighting a distinct new identity. In particular, the students related the full scope of their educational environment to a pattern beyond the partnership and the exchange of cash for instruction. In place of individual contracts, the universitas offered a means to compose the separate elements of the law student experience into a distinct, legally recognizable form. Though the classical Roman universitas was originally a narrow subordinate subpart of the imperial city, the students transformed it into a means of independence from professors, home towns, and the city of Bologna. Student groups, housing, health care, and classroom instruction—all took on new meaning as expressions of a unifying whole.

Foreshadowing the cascading dynamic of legal exemptions from liability to tax, in transforming the universitas into a distinct public identity, the law students at Bologna did not create a form incommensurate with their perceptual context. Their innovation lay in viewing their entire educational environment as elements for composition, the rhetorical composition into a unified whole. In the rhetorical theory that, with Justinian, formed the bedrock of their legal training, composition and style (elocutio) expressed the fusion of word and image. In speech, compositio referred to the blending of words and phrases into a single unit of persuasion, such as the periodic sentence or, in later years, an organizational charter. [FN112] Within the mind, it shaped what the rhetorical manuals called “artificial memory,” three-dimensional visual fields that related words, matter, and images as a perceptible unity within projected mental space. [FN113] Though the illusion of depth was outside the norms of medieval painting, rhetorical treatises used at Bologna and later academic universities instructed students to use verbal and visual foci to give mental pictures of buildings, people, and other objects the three-dimensional “space, depth [and] lighting” then lacking in the visual arts. [FN114]

The student universitas applied the techniques of artificial memory to external memory, and in doing so created a cognitive Trojan horse: corporate form as a mirror city, [FN115] capable of infinite redesign and replication. The universitas would reshape Western thought precisely because it seemed to be a mere intellectual trifle; it was, after all, just a simple and relatively undeveloped black-letter knack, not a subject of serious philosophical inquiry. [FN116] What art historian Erwin Panofsky describes as a cultural fusion of rhetoric, law, and visual design [FN117] expressed itself primarily in a pervasive network of nonprofit organizations. Monasteries, charities, academic universities, and 354 local churches re-organized on the universitas model and thereby created a highly visible array of compositional counterpoints to city-states, the Holy Roman Empire, and the papal see. The network effects on cultural perception of identity and authority are similar to those fostered by the spread of the Internet among children and young adults since the early 1990s, as chronicled in Sherry Turkle's celebrated study, *Life on the Screen*. [FN118]

“What exactly happened in the twelfth century?” is the question posed by the landmark theorist of social space Henri LeFebvre, [FN119] and the answer lies in a legal commonplace that quickly went viral throughout Western society. The nonprofit universitas altered European perceptual orientation, as corporate composition helped create an environment more conducive to accepting such ideas as open systems, white space, and an infinity not centered in God. [FN120] The sudden explosion of interest in folktales and literature exploring themes of transformation [FN121] was but one outgrowth of the new sense of the generative potential of corporate composition. The origins of Western timekeeping in monastic devotional “hours” [FN122] further reflects how a compositional identity in a corporate universitas made all aspects of life open to new unifying styles of

contrast and relation. Likewise, that it was a monk who made the pathbreaking introduction of the number “zero” to the West reflects the degree to which corporate form had worn away resistance to viewing absence and negation as positive values. [FN123]

When Blackstone calls attention to the various centers that draw together the parts of the corporate university, he echoes a continuing fascination with the interplay between legal rhetoric as a *ratio civilis* and the *ratio sensus* of aesthetic composition. The corporate name is the “knot of its combination” for “legal acts” and “functions;” [FN124] the “individuals who compose the community” unite in a corporate seal. [FN125] Students compose a college, colleges compose a university, and universities are distinct from the corporate towns--and not just in the present. Their constituents include not just contemporaries, but “all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist . . . in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.” [FN126]

This reference to Heraclitus's metaphor of the ever-changing river points to the deeper implications of Blackstone's visual sense: the functionality of form as externalized legal memory derives from its ability to present an image distinct from the separate parts within it. The physicality of Heraclitus's (and Blackstone's) image of the river has visible counterparts within the university environment. The university seal was one enduring element; the corporate name and logo serve as similar compositional centers today. Likewise the college and university buildings themselves: every year brings a different *356 combination of students and different class identities, yet the university's physical environment helps foster a sense of a cohesive unity.

Blackstone's image of corporate form as a recognizable means of transcending time had a dual resonance within the visual culture of his day. One was architectural, highlighted by Blackstone's switch from college to church to explain how corporate form under law embodies temporal continuity. Using the church pastor as archetype, Blackstone notes that “the present incumbent, and his predecessor who lived seven centuries ago, are in law one and the same person; and what was given to the one was given to the other also.” [FN127] This image might seem rather abstract, but Blackstone's reference elsewhere to the “Gothic castle” provides a clue: he is describing the visual environment of the English church, and especially its most recently completed cathedral, St. Paul's. [FN128] As designed by Christopher Wren, St. Paul's Cathedral in London was a tangible expression of the “classical ideal of an indivisible unity, with every part dependent on every other part,” [FN129] a concept captured in image as well as architecture. A glance up into the dome enables the viewer to look through time, as statues and scenes of saints and preaching compose in infinite recursive space encompassing the observer below. The sense of looking through time is reinforced throughout the varied monuments and stained glass images throughout the building. [FN130]

If Blackstone's image of people coming together across time through law sounds familiar, that may be because it also refers to a visual technology known as the camera obscura, or “magic mirror,” a device that reflects light into a mirrored space to produce projective images. [FN131] Oliver Wendell Holmes's description of law as “a magic *357 mirror in which we see reflected, not only our own lives, but the lives of all men that have been” follows Blackstone in referring to the popular entertainment in which mirror boxes or rooms created a “perpetual gallery” of repeating images. Holmes, like Blackstone, visualizes the light reflecting not a scene of nature--as was common through the late nineteenth century--but mirrors angled to project time out of time.

Blackstone's image of a dynamic form-space through time breaks through the fixed bounds of classical unity to embrace action and change as defining aspects of a shared identity; individuals can come and go but the integrity of the “corporate” composition is not in question. [FN132] This unifying image also has a distinct ethical and legal effect, as the union of individuals within shaping space gives a fiduciary character to the corporate form. What is given to the church in the past is given to the present and the future, and the reverse is true as

well. Those who make decisions are not truly autonomous but express a collective “sense” reflecting values other than their own. In this regard, Blackstone's *universitas* foreshadows the temporal philosophy of Henri Bergson, the “modern Heraclitus,” [FN133] who likewise used the image of a flowing river to explain the simultaneous one-ness and multiplicity inherent in the flux of time. The memory embodied in corporate design “frees us from the rhythm of necessity” by evoking analogous perceptions from past and future, and the contemporaneous space emerging from the interactions of the parts creates a distinct whole beyond them. [FN134]

B. Beyond Flatland

The unifying space formed through interacting parts relates to a broader theme in Blackstone's corporate theory: perspective. Latin for “looking through,” perspective in visual design is, in Tufte's felicitous phrase, our “Escape from Flatland.” [FN135] It is an image or “point of view” that breaks through the flat surface of a two-dimensional ***358** plane by proportionally relating surfaces through planes and sight lines that appear to converge at points in infinity. [FN136] An organizational analog to the way we sense shapes out of the datasmog of daily existence, [FN137] nonprofit form goes beyond property, contract, control, and capital to the way in which these very elements relate to form a larger whole. The tension created by focusing on parts rather than the pattern is one succinctly captured by Elkins, who notes in his explanation of how we see three dimensions that confining one's view to the mechanics artificially freezes the image, despite the accuracy of the breakdown into flat points, lines, and planes. “I have thought about perspective for over a decade,” he writes, “and I no longer want to see the lines.” [FN138]

Perspective is not merely a metaphorical paradigm for nonprofit style; rather, nonprofit forms embodied principles of compositional unity later expressed in perspective in art. By the early fifteenth century, perspective in legal rhetoric, architecture, and urban design shaped the environment that produced the rediscovery of perspective in painting. The connection between law and rhetoric was made explicit in the work of a Renaissance lawyer, architect, and social planner named Leon Battista Alberti, who identified rhetorical composition as the operating principle for creating a unified visual scene through the interaction of surfaces. As Alberti explained in his groundbreaking study *de Pictura*, [FN139] because of the way these elements interact in relation to one or more vanishing points, a well-composed example of linear perspective smashes through the static flatness of the two-dimensional canvas, pulling you into the motion, bidding you to hear a whispered conversation or drink the pictured wine. The various surfaces within the scene play off each other to produce active fields, yet no one part within the image stands out of proportion to break the three-dimensional effect--in sharp contrast with medieval painting, in which artists convey information by flat-***359** tening images without creating any sense of an integrated visual effect. [FN140]

Art historians have focused on how Alberti's theory points to the wide-ranging implications of the new perspective in painting, which implicitly displaced theocentric hierarchy from the center of Western thought. Alberti himself, a humanist critic disenfranchised by birth from the Roman ruling class, saw painting as the expression of a radical dynamic within corporate form. Alberti makes the connection explicit in his subversive description of the “centric ray” between viewer and the vanishing point as emblematic of *unica congressio*, a civic assembly. [FN141]

Through the interrelation of individual surfaces, people can assume the authority and creative power not just of the ruling prince, but of God. “Like a god among mortals,” [FN142] Alberti observes in a study of law and painting that would have sent a Protestant Reformer to the stake, the “human becomes the style (*modus*) and measure (*mensura*) of all things,” [FN143] and those who grasp the full significance of unity in perspective could “feel themselves to be almost like the Creator.” [FN144] And, like God, painting has the power to resur-

rect the dead; its form of visual memory “possesses a truly divine power” through which “the faces of the dead go on living for a very long time.” [FN145] In this respect, painting mirrors the immortality of corporate form in law. This is a set of associations that Leibniz, himself a law-yer, would later make the ground of his view of human understand-ing as a “combinatorial art” akin to a perspectival view of a city, with different images appearing based on the interplay of the viewer and the analogous relations among individual surfaces. [FN146]

*360 Blackstone links corporate law and pictorial composition when he describes corporate form in terms of anamorphic perspective, an effect in painting whereby images that appear separate or formless from one line of sight take on the appearance of a three-dimensional shape when viewed from another. Anamorphosis may sound exotic, but at a time when optics and visual projection were a pop phen-omenon akin to the Internet it was an effect as familiar as the “web” and “net” are to today's law students. [FN147] Probably the most familiar example of this technique is Hans Holbein's *The Ambassadors*. [FN148] Viewing the portrait straight on, your eyes cannot help but focus on an unusual shadow and ivory figure in the center foreground, somewhat resembling the cracked bones of a dead animal. Looked at from below and sideways, the parts compose a human skull. It seems out of place until you realize that “Holbein” can be interpreted as “hollow bone” in Dutch; the skull is in essence a pictorial signature, an emblem of the artist's name.

To explain the significance of corporate identity, Blackstone invites us to look at the eighteenth-century college--the corporate body of students--from two different angles: a voluntary assembly and a corporation. Empirically the students are the same from either standpoint. They are individuals who gather for prayer, classes and meetings; they make rules and they own property. When viewed as a “mere voluntary assembly,” however, the students cannot issue any *361 binding rules or, without great difficulty, accommodate the addition or departure of any students from the group. It is only when viewed as a corporate college that the students appear as a “consolidated and united” whole. [FN149]

The problem is one of dimension. Unincorporated, the college students and their property are akin to fixed endpoints connected by a line segment. Add a new point--a new piece of property, a new member of the group--and you have to draw a new contractual line to formalize the conveyance. Remove a person and the line disappears. A persistent form takes shape, though, when individuals and objects compose a common corporate name, through which the stu-dents “and their successors are considered as one person in law.” [FN150] In this respect the name is neither a word nor a thing. It plays a role akin to that of the vanishing point--the dimensionless, invisible focal point at which sight lines converge to produce a three-dimensional image on a two-dimensional plane. Likewise, speaking of the legal person as if it were a thinking and acting human personality does not imply that Blackstone viewed it as a discrete essence any more than talk of a chariot rushing and people shouting in a cathedral window bespeaks a communal spirit within the stained glass.

On one level, Blackstone's optical imagery sheds light on his ver-tiginous sense of the corporation as “invisible, and existing only in intendment and consideration of law.” [FN151] This is perspective in a nut-shell: it is an effect that appears only in relation to one's line of sight, and the effect itself is a space that draws together diverse yet propor-tionally related elements. Law as lines between persons and property has discrete physical endpoints that can be taken away or punished; as a unity in perspective, the interacting parts form shapes that emerge from but are not identifiable with any individual element within the frame. The effect is one that smashes through the legal limits of property and contract; the sense of space creates the scene, and without it the separate parts do not have the same significance. Though a viewer can fully sense the action and objects within it, she cannot literally grab, eat, or touch them without returning to the Flatland of dabs of paint on canvas.

More specifically, the cognitive style of Blackstone's corporation mirrors the corporate identity of churches, universities, monasteries, and other nonprofit forms. Without denying the physical or visual traits of any of its

constituent elements, unity in perspective enables viewer and objects to transcend the literal constraints of occupying a *362 fixed point in time. One could see the relations among individual elements within the nonprofit as point-to-point exchanges or connections—for example, the high salaries of a university president or football coach, bureaucracy, careerism, social signaling, and product-development grants from pharmaceutical companies. Similarly, the dizzying plays on perspective in a cathedral emerge from what is essentially a massive colossus of stone, glass, wealth, and ambition. Yet an effectively composed nonprofit unity in perspective directs attention in ways that transform the separate parts into a much different whole: the cathedral inspires faith and humility, and the university is a haven from commercial concerns.

Blackstone's perspectival imagery anticipates Ludwig Wittgenstein's analysis of the “visual room” and pictorial landscape. Wittgenstein makes explicit the elements of perceptual style that link Blackstone's corporation most closely with modern nonprofit form. Wittgenstein observes that the defining trait of the “visual room” or painted house is that it “has no owner,” for “it has no master, outside or in.” [FN152] You can place yourself optically within this multidimensional room but you cannot enter it; likewise,

[t]hink of a picture of a landscape, an imaginary landscape with a house in it. Someone asks, “Whose house is that?”—The answer, by the way, might be “It belongs to the farmer who is sitting on the bench in front of it.” But then he is not to be found in it, and there is no outside. . . . The “visual room” seemed like a discovery, but what its discoverer found was a new way of speaking, a new comparison; it might even be called a new sensation. [FN153]

Today, though the nonprofit form is no longer the archetype for corporate law in general, it remains the most visible expression of this sense of a free space unifying individual parts within a distinct whole. This perceptual orientation is what links the modern non-profit to the sense of the “corporation” before the nineteenth century, when the for-profit business supplanted nonprofits as the prototypical exemplar of corporate form. Tax privileges, regulatory exemptions, charitable immunity, separately recognized legal status, as well as the continuing stream of private donations, are all ongoing actions that resonate with deep nonprofit patterns shaped by our ongoing interaction with organizational environments. In its purest *363 expression, nonprofit form would arguably exist outside the parameters of written or governmental law altogether; legal carve-outs, anchors, focal points, and bounding effects should be viewed not as the essence of nonprofit form, but as means to reflect, to stabilize, and even to stop it.

The modern analog to Blackstone's contrast between the voluntary assembly and the unowned corporation is the apparent divergence of for-profit and nonprofit legal forms. Virtually all organizations now reflect a certain degree of unity in perspective. This contributes to the public acceptance of limited liability, a self-protecting risk-management scheme that for centuries did not seem so intuitive as it does now. Likewise, the sense of perspective in organizational law supports the modern view of the partnership as an entity as opposed to an aggregate of individuals. Nonetheless, from the standpoint of information design the shift to a for-profit archetype has transfigured the compositional logic of the corporate form akin to what Tufte calls a “false escape from Flatland,” a shading of the data that does not achieve a fully coherent multidimensional shape. [FN154]

Organizations converging toward the for-profit end of the spectrum break down projective space, particularly when viewed in relation to corporate law. [FN155] Each element within the corporate experience becomes a dimensionless point, obtaining its primary value in relation to the monetized segments of contract, control, exchange, or property that tend to dominate the frame over time. Individual interests intersect in measurable ways, with measurement and separability prominent features of the operating environment. More than simply conveying an image of shareholder enrichment, the numerical columns of stock prices in the daily paper are a constant reminder of the coded grids that frame corporate fields of meaning. Likewise, the focus is essen-

tially presentist, fixed on discrete point-to-point links such as those between capital and shareholders, principals and agents, and customers and company. [FN156]

*364 Corporate theory reflects the material culture of corporate planning and legal work in its relentless drive to fragment, measure, fix, and control. The paradigmatic manifestation of this sensory orientation is the definition of for-profit enterprise in terms of maximizing shareholder value. This is, however, only the most prominent aspect of segmentation discussed in corporate legal policymaking. In most corporate actions the shareholders are functionally invisible, yet the sense of segmented relations assumes other, more visible forms. For example, the Gap won widespread praise for its post-9/11 series of ads with a “Give your Gift” theme, [FN157] but when you got to the store you still had to pay for your khakis. On the level of theory, the culture of the contract--separable segments, terms, obligations, and payoffs--has framed corporate consciousness at least since the sectioning of corporate identity in the late Enlightenment, most notably as expressed in John Marshall's reduction of form to a literal contract in his Dartmouth College opinion. More recently, Jensen & Meckling's image of the firm as a “nexus of contracts” continues to underscore the force of the contractual metaphor. [FN158]

In picturing corporate categories as divergent sensory ratios, I am not arguing for a postmodern rejection of linear thought. Asset partitioning, the delineation of property rights, formal and informal contracts, maximizing shareholder value--all are legitimate and necessary elements of organizational law, and not just for commercial business. To contend that nonprofits literally do not share the essential relations that make up for-profit form would be not only inefficient, but incorrect. What makes nonprofit form distinct is the way it frames the scene: the nonprofit focuses attention in ways that transform these segmented and two-dimensional connections into a discrete form beyond them.

Style shapes content. So long as the environment composes a perceptible total nonprofit or charitable effect, a society will recognize and accept differing treatment in law for the production of goods and services in forms otherwise essentially and functionally the same. Opera, a Pearls exhibit, a women's health clinic, Barney on PBS, or “intelligent talk” on NPR do not need a metric to determine whether *365 they are truly different from their for-profit counterparts. The tax exemption of vaguely defined or functionally inefficient nonprofit purposes is not a sign of bad statute writing; it reflects a sophisticated sense of what is a largely self-sustaining compositional impulse. In this regard nonprofit law is analogous to a funeral, a poem, or romance--not just a game of signaling, but a broader cultural phenomenon that anthropologist Ellen Dissanayake calls “making special”--a means of enhancing the environment in ways that make “sense of human experience.” [FN159] As Dissanayake observes, the impulse toward creative embellishment appears to be endemic to human nature. It is valuable as an evolutionary advantage precisely because it develops a capacity for expression beyond naked utility. [FN160]

C. From Blackstone to the Matrix

In recent years, a growing number of legal academics have called for a renewed awareness of material culture, visual communication, and the full range of human senses. [FN161] That such things are important seems indisputable; after all, the distinctive architecture of the court-room attests to an intuitive sense of a role for aesthetics in the administration of justice. The larger question remains, however, as to how these perceptual fields are organic within law itself. Remaking law in the image of art all too often seems to be an exercise in inapposite grafting. The metaphor seems external to the law's own combinatorial force in much the same way that recasting law in terms of chaos or quantum theory can make scientists wince. Likewise, claims that the world around us has shifted to an “oral” or “visual” culture call for something of a legal leap of faith, especially now that we have witnessed the “new new economy” of the digital age span the life of the Roman Empire in a flick-

ering instant.

The significance of Blackstone's corporate imagery is not that non-profit lawyers need to become armchair experts in Picasso. Rather, Blackstone was one of the last corporate theorists to grasp the intuitive resonance of organizational law with the full scope of our corporate experience. Alberti called this accord between law and sense *concinntas*, a harmony of design that aims “to compose parts that are quite separate from each other by their nature . . . so that they correspond to one another in appearance.” [FN162] However, today's non-profit form takes us beyond the jurisprudential aesthetics of Alberti and Leibniz by shedding their underlying Platonism. Essentialist approaches to natural law and idealized form now give way to the stylized interplay of viewer and object. In so doing, the contemporary consciousness of nonprofit design returns to the pre-Socratic roots of form as *eidōs*: the “shape” or “pattern” of “that which is seen.” [FN163]

A well-composed nonprofit form involves more than a sense of effective information design and attention management; it reflects a comprehensive sense of space and form aptly described by Martin Heidegger as “The Age of the World Picture.” In Heidegger's famous formulation, the *weltbild* does not refer to a literal “picture of the world” as such, but “the world conceived and grasped as picture. What is, in its entirety, is now taken in such a way that it first is in being and only is in being to the extent that is set up by man, who represents and sets forth.” [FN164] The nonprofit image world, however, differs from Heidegger's *weltbild* in at least one fundamental respect: nonprofit form is not an expression of radical and unbridgeable “ontological difference.” [FN165] The active space of unity in perspective derives from the stylized arrangement or patterning of one's actual environment. The relation-space of nonprofit identity is not a zone of absolute negation and difference, but a projective sweep through the bits of existence. It is a creative gesture whose multi-dimensional richness flows from the combinations and contrasts we sense among individual parts.

Once again, an image from Alberti illustrates the effect. As Alberti notes, a well-composed unity in perspective is akin to a “*historia*” or scene. Actors and objects relate in ways that take viewers beyond the budget, the technical aspects of lighting and makeup, and the financial self-interest of each individual. This is not the ossified monocular vision of Lacan's *objet petit a*, a stunted cyclopean malformation that is more akin to the soul-crushing structure of the corporate colossus. [FN166] Alberti's vision of a dynamic whole beyond the parts is more akin to the fluid plays on multiple perspective by Russian avant-garde designer El Lissitzky [FN167] or the frame-filling explosion of image and action in an Eisenstein film. [FN168] Princeton design theorist Christine Boyer captures this sense of an emergent whole in her study of the Manhattan skyline. From the whole scene to the individual buildings and spaces within it, the elements of the cityscape display “a surprising compositional effect that pulls these diverse scenes together, yet sets one off against the other.” [FN169]

What has contributed to the growing loss of distinction between nonprofit and for-profit forms has been a confusion of perspectives. The two-dimensional frame of contract, property, exchange, and control has come to be viewed as the very essence of nonprofit “enterprise,” a term that is itself emblematic of the rhetorical turn. The reform agenda for at least the past two decades has been to re-fashion nonprofit law and experience in the image of the brute facts of its distilled phenomenological base. It is as if Peter Jackson had abandoned compositional design in *Lord of the Rings*. Without background music, computerized design, or the use of “forced perspective” to alter the natural dimensions of actors and their surrounding environment, any given scene in his adaptation of the Tolkien trilogy would be a radically different--and ultimately less satisfying--experience.

The Cartesian split between nonprofit law as “subjective and objective knowledge” [FN170] has fostered a growing insensitivity to compositional effect. The controversy over September 11 donations to the Red Cross and United Way is symptomatic of a more pervasive weakness in how those who plot the course of nonprofit activity view the nature of their work. This systemic flaw cuts across the field of nonprofit experience, es-

pecially since the legal framework governing nonprofits is viewed as defining the legitimate scope of nonprofit action. Nonprofit law has come to be a closed perceptual system, where the fragmentary and design-illiterate language of the Internal Revenue Code or a state attorney general's office provides the patterns for the nonprofit interface. Unfortunately, what may seem related and charitable within this closed environment can come across as crass and self-serving outside it.

At a time when for-profits increasingly grasp the sensory dynamics of nonprofit style, this self-enclosed perceptual field is the real simulacrum. Piercing through an ignorant and irrelevant nonprofit culture to find the hidden codes within can be an important enterprise from both an academic and planning perspective, but remarking the nonprofit environment exclusively on the basis of these insights can produce an image of nonprofit character that does not appear quite right. The effects of nonprofit reform increasingly resemble the programmed illusory dreamspace of *The Matrix*: a green hue colors the world created by a hidden code. In the movie this offputting glow reflects the hue of a digital screen; for nonprofits, it is the color of money.

The intellectual source of this quintessentially postmodern impulse lies primarily in a fragmenting and anti-sensory analytical frame that crystallized in Enlightenment philosophy and jurisprudence. The roots of this perceptual orientation sink back to a growing suspicion of perspectival imagery not just in painting, but in the camera obscura and special effects on the stage. [FN171] Before artificial perspective became the representational norm in painting and especially film, such effects seemed disorienting, even suspicious--a *trompe l'oeil* that could either highlight a combinatorial unity or induce a deceptive illusion.

Descartes and later Locke would crystallize the belief that “general knowledge could be obtained only through an analytical process of separation or abstraction.” [FN172] Since Descartes, Ernst Gellner observed, Western philosophy has been a “comparative diabolics,” seeking “to outwit the devil of the imagination as well as the demon of the senses. Logic was to pierce the tricks of the mind, language was to tear the veil of imagery, and theory was to unmask the idolatry of the laboratory's satanic setups.” [FN173] This attitude seeped into jurisprudence as well, with the empiricist methodologies of modern corporate law being perhaps its purest (if not its most self-aware) expression.

Thomas Hobbes's study of the corporation crisply captures the growing distrust of images and display that would develop into the gnostic bias of Enlightenment empiricism. Hobbes offers a telling counterpoint to Blackstone in describing corporate persona --Latin for “mask”--as a “disguise” akin to the “counterfeited” appearance of an actor on the stage. [FN174] Hobbes himself was an accomplished optical scientist who integrated perspectival imagery and visual display elsewhere in *Leviathan*. Even so, his image of the corporate form as deceptive stagecraft foreshadowed the eventual rejection of form as an illusionary intellectual trifle by twentieth-century corporate legal theorists. Though Hobbes's Latin translation is literal, his disdain for the deceptions in performance is a distinct reflection of his times. The effect of this point of view is one that Locke captures when he explains the limits of human understanding in terms of the contrast between the watch face and its inner workings. The watch face serves as an occlusive mask for the internal mechanics that truly make it work. [FN175]

The persistence of a similar split within nonprofit scholarship mirrors a deeper epistemological fissure reinforced by one of this country's most prominent nonprofit forms: the modern university. The basic intellectual framework reflects a model first set forth by Immanuel Kant in *The Conflict of the Faculties*, a work that served as the “blueprint” for the organization of contemporary higher education in the West. [FN176] Whereas Blackstone's university took the form of an aesthetic unity in perspective, Kant's educational framework reflects a fundamental split within the matrix of the mind.

Kant divides the university into “higher” and “lower” faculties according to a deeper conceptual division

between practical and pure research. For Kant, law is a discipline within the higher faculties, and its core methodology reflects the core values of what social theorist Mark C. Taylor describes as “the mechanical logic of industrial-³⁷⁰ism” [FN177]: quantification, utility, economics, and operational structure. The alternate approach of the “lower faculties” embodies the “pure” research of the arts and sciences; [FN178] empirical calculation and rigorous textual hermeneutics give way to the standards of “truth” [FN179] and cul-tural values “not intended to be useful or profitable.” [FN180]

That contemporary American legal scholarship fails to see the visual dynamics in legal theories underscores its grand inheritance from Enlightenment epistemology. The great divorce between law and aesthetics in the late eighteenth century established a new envi-ronment for legal training, especially among practitioners in the area of corporate law. The contractual connections of finance and gover-nance came to be the dominant focus of attention, with division, definition, and payoff defining the scope of corporate legal inquiry and interaction. In its drive to isolate facts and abstract principles from proof-texts, the modern corporate mindset is a secular analog of Protestant fundamentalism: both are legacies of Enlightenment empiricism. [FN181]

The time has come for a new jurisprudence of nonprofit design, one capable of bridging the Kantian divide within our current under-standing of the nonprofit form.

III. A New Design Jurisprudence

The sense of the whole in nonprofit form is not merely an abstraction or inapposite metaphor. Rather, nonprofit identity in law emerges from the surfaces and sightlines in nonprofit environments that direct our attention in particular ways; to paraphrase Leibniz, each nonprofit environment has its own viewpoints. Identifying nonprofit style too closely with the mechanics of nonprofit finance is to risk the future of the form, even if no insiders benefit and no diver-sion of funds occurs. Nonprofits seen through the lens of commercial contract or corporate monolith have no apparent reason to exist.

This sense of unity in perspective also helps explain the persistence of the idea that nonprofits are somehow essentially distinct, regard-less of any metrics showing for-profits and nonprofits to be function-³⁷¹ally equivalent. The ethical, political, and public values associated with nonprofit identity reflect an underlying sense of a multidimen-sional form beyond segmented relations of ownership and control. Conversely, as in the recent controversy over 9/11 donations, direc-tors or managers who visibly identify their personal will with that of the nonprofit risk alienating supporters and regulators alike, even if they do not engage in any financial or legal impropriety. The image of a sovereign self dominating nonprofit action can seem as much a form of self-dealing as personal self-enrichment.

One of the ironies of the growth of nonprofit law as a specialized discipline has been a corresponding plunge in design literacy. The problem is not that nonprofit law ignores other senses, but rather that it has a tenuous grasp on the dynamics of perception. One con-spicious result of this is that government efforts to curb nonprofit commerce--for example, efforts by the IRS to scrutinize a maga-zine's price and distribution patterns of a magazine for “commercial hue”--can take on the cast of an ad hoc and legally unsupported doctrine.

We know ourselves so closely that we have forgotten who we are. The apparent disintegration of nonprofit form poses a substantial challenge to the perceived integrity of nonprofit law, one that policy-makers in the nonprofit realm are at present not well prepared to face. Simply recommending that Congress replace the current legal framework with a new set of rules consistent with information design would not strike at the core problem facing nonprofit law today: a fragmentary mindset whose analytical sophistication is the very source of its inher-

ent weakness.

A. When Styles Converge

The nonprofit style is a manner, a gesture, a visual scene--and is thus susceptible to imitation by both for-profits and nonprofits alike. The increasingly apparent similarities between for-profit and non-profit forms point to what is perhaps the greatest challenge facing nonprofits in the United States: since the mid-nineteenth century, commercial businesses have enhanced their popular reputation by appropriating the nonprofit style of a form beyond finance.

To address the problem of convergence, we must go beyond the standard concerns of recent nonprofit scholarship, such as whether nonprofits pay sufficient tax on unrelated business activity, whether for-profits are in some respects as efficient as nonprofits, or whether nonprofits are simply too commercial or otherwise "isomorphic" with for-profit structures. For example, institutionalized isomorphism can actually set in relief features that further distinguish non-profit identity. An organizational bureaucracy can make a charity ³⁷² more efficient in gathering information and engaging in visible charitable activities, thereby enhancing the perceived integrity of the group's charitable status. Likewise, UBIT has become a functionally invisible metric, except for occasional surveys in the nonprofit trade press. Enforcing UBIT more strictly will have a minimal effect on the larger perceptual tension.

Environmental convergence poses a more pervasive challenge to nonprofit identity, transforming the entire compositional dynamic of nonprofit design. Since the transportation and communications revolutions of the mid-nineteenth century, for-profit enterprise has systematically colonized and redefined the zones of "public" and "noncommercial" meaning. Each phase of the evolving sense of commercial enterprise as a form beyond finance has increased pressure on nonprofits to distinguish themselves. The cumulative effect of the past century of corporate design has been to distract attention from commerce by remaking the commercial interface in the image of the nonprofit style, thereby setting in relief how nonprofits appear to pack "smaller and smaller temporal and physical crevices . . . with the message of the market." [FN182]

The key to the current convergence in design environments lies in a twist on the question posed by LeFebvre: what exactly happened in the nineteenth century? Corporate scholars have done solid work in explaining the financial efficiencies that contributed to the rise of for-profit corporations and the end of a corporate status limited to "public" enterprise. However, legal theory has yet to address the broader shifts in cognitive style, the perceptual orientation shaping these developments, and the patterns that helped such changes make sense. Non-profit scholarship has been particularly lacking in this respect, missing the deeper significance of the early-nineteenth century shift in America from a charitable culture pervaded by trusts to one marked by a network of nonprofit organizations. The shift reflects less a disgruntlement with things British [FN183] than a systemic convergence in American culture among nonprofit organizations, models of political governance as a self-regulating system, and the spread of new networks of communication and transportation. As points of composition increased, American perception shifted from property and control to the production of zones of infinite relation.

The changing nature of networked connection produced a sea-change in the image of the corporation in law. The association of for-profit enterprise with thick communication and transportation net-³⁷³ works shattered the notion that business corporations were inherently monopolistic. The image of the totalizing corporation as cultural threat--a central theme of Kent's Commentaries echoed in the sharp restrictions of corporate law--gave way to the corporate business as a form of organic growth, expansion, and interrelation. [FN184]

The significance of the new networked environment was not merely, per the tropes in corporate scholarship, the need for large capital investment or the image of a public service enterprise; [FN185] early corporate law embodied a trenchant populist resistance to capital accumulation that could just as easily have grown more rigorous. The key difference in the new networks was the extent to which they permeated consumer environments with diffuse compositional force. Whereas previously, a for-profit trading company might show itself primarily through the point-to-point sale of consumables, suddenly the most visible for-profits were redefining zones of interaction for every individual. Religious and literary speech incorporated railway and telephone metaphors, implicitly sanctifying the forms. These commercial interactive networks even resonated with the “web” of nerves and blood circulation. [FN186]

Such for-profit effects offered a striking counterweight to the image of financial interest and the segmenting contract. The image of the nonprofit sector as a uniquely innovative force for the public good is increasingly distant from the flood of technological innovations associated with the for-profit sector. A commercial environment that exponentially amplifies webs of creativity also mirrors the free space of a nonprofit church or museum. Windows bundled in with the cost of a computer; free services on commercial web sites, the rise of free tours at corporate production facilities designed to mimic the museum experience [FN187]—these set in relief even the “rela-^{*374}ted” commercial activities of a nonprofit organization, which some-times seem to be framing interactions in terms of exchange on a scale far greater than for-profits, and with less generative potential over time. The sense of creative enhancement in for-profit innovation also contrasts with the marketing of nonprofits as business-savvy players in such contexts as the popular “venture philanthropy” movement, with its emphasis on operational efficiencies and return on social investment.

Of course, each new technology recedes from foreground to deep background over time, and the commercial market is still to a conspicuous degree not noncommercial: ads, mass marketing, the stock market, the availability (and commercial appeal) of information on corporate profits and wealthy individuals, recurring economic down-turns, and hierarchies of control and wealth all repeatedly remind people of segmented and monolithic forces within for-profit corporate form. The emergence of the term “nonprofit” in the late nine-teenth century as a semantic center for cooperatives, charities, and other groups marks the degree to which conspicuous profit-centered behavior continued to stand out as a defining trait. It is a semantic phenomenon that continues to have force today, as witnessed by the ongoing transition in nonprofit circles from a rhetoric of “venture philanthropy” to “social entrepreneurship” as a way to promote charity. The venture philanthropy movement openly espoused re-making nonprofits in the image of business; social entrepreneurial-ism applies many of the same lessons—indeed, involves many of the same people—but focuses attention on nonprofit style as the trans-forming culture.

As business historian Roland Marchand has chronicled, such en-vironmental conditions helped shape a strategy that also significantly contributed to the acceptance of the large business corporation over the course of the late nineteenth and twentieth centuries: the rise of advertising aimed at fostering the image of a “corporate soul.” [FN188] The trend began with lifestyle advertising, which sought to direct people's attention away from the ad's attempt to market a product by focus-ing instead on the product's personal and social benefits. The use of discounts as a marketing strategy further reinforced the sense that profit-seeking was not the corporation's primary concern. Over time, ^{*375} a full-scale strategy emerged of marketing the corporation itself as a form beyond finance. The 1920s in particular witnessed a sustained campaign by for-profits to portray stockholding as a democratic value, business as a source of economic security for the average worker, and market exchange as a social benefit project dedicated to the well-being of the nation, children, and the home.

Decades later, the marketing of corporate soul has spread through-out all available media, including the commercial workplace itself. ADM feeds the world. Apple wants you to think different. Law firms tout their pro

bono work. Journalists for multinational media conglomerates follow a relentlessly promoted code of ethics. Starbucks supports free trade. Cause-related marketing has become a standard means of promoting corporate social consciousness. From one angle, the material culture of commercial responsibility creates implicit “contracts” as recognizable as those involving stockholders or service providers. The relation of federal securities regulation in the 1930s to corporate rhetoric during the 1920s boom, and the broader link between corporate design and corporate responsibility, are two of the more conspicuous lacunae in contemporary legal scholarship.

The rounded edges of the commercial marketing environment make nonprofits' own attempts to market products and services pop out, especially if the nonprofit is acting in an area of the economy where for-profits are highly visible. The effect extends not just to commerce, but to the broad scope of financially-conscious behavior, from aggressive fundraising to considering market response in non-profit planning. In an environment with pervasive non-profit-making rhetoric, finance-related behavior by supposedly “nonprofit” organizations attracts attention in ways it might not have before. As Rem Koolhaas observes, the retail strategies adopted by nonprofits stand out in higher relief, and “the result is a deadening loss of variety.” Nonprofit forms, once distinct, “no longer retain the uniqueness that gave them their richness.” [FN189]

The growing conspicuousness of market relations within nonprofit environments is a force that commercial designers are now leveraging to refashion the experience of shopping itself by inducing a gestalt shift in how we perceive commercial space. In a study of his redesign of the Prada chain, Rem Koolhaas explains how the visibility of nonprofit finance makes the appropriation of “non-commercial typologies” a powerful tool for branding a luxury store. [FN190] Besides creating more white space in the presentation of goods, Koolhaas's *376 Prada stores incorporate a broad range of mannerisms designed to mimic nonprofit style:

- “Library”: “reading tables, book and magazine shelves, and areas for viewing archival material and documentaries; a zone [f]or the absorption and accumulation of ideas . . . and the generation of knowledge”; [FN191]

- “Museum”: display areas showing new technologies or “illustrating the creative process by displaying studies from past lines”--“the history of Prada”; [FN192]

- “Laboratory”: a visible “research studio” for “experimentation, innovation, and adventure,” as well as special “host city encounters”; [FN193] and

- “Hospital”: an “area liberated from all commercial pressures and iconography for private communication between client and goods,” a “place of hygienic rejuvenation.” [FN194]

Koolhaas's strategy is emblematic of a contextual shift that has been evolving for over a century. Postmodern assessments of the commercial environment as an illusionary simulacrum or a culture of the “spectacle” have their merits as cultural critiques, but for non-profit law the more immediate concern is the effect such environments have on how people perceive nonprofit experience. Remaking commercial space in the image of nonprofit style changes how people perceive the relative dimensions of nonprofit identity. Consequently, pressure is growing for nonprofits to distinguish themselves even further from their commercial counterparts.

B. Scale and Metastasis

As for-profit environments strive to mirror nonprofit style, nonprofits have become more conspicuously commercial in ways supported by nonprofit theory and organizational law. As noted earlier, the consensus definition of nonprofit enterprise is that it is subject to the nondistribution constraint, the prohibition on distrib-

uting net profits to insiders. As Henry Hansmann has observed, in principle General Motors or General Electric should be able to organize as a nonprofit if shareholders were stripped of voting rights.

Although it may seem strange to think that a business corporation might be organized as a nonprofit firm, there is nothing illogical or contradictory in the concept. The defining feature of *377 a nonprofit organization is not that it is barred from making a profit, but rather that it is barred from distributing that profit to controlling persons. And if the shareholders of the firm have no votes, they are not controlling persons. [FN195]

In the years since Hansmann first proposed this model, it has come to be the consensus approach to defining nonprofit form in legal theory and statutory reform. Similarly, federal tax law governing tax-exempt organizations provides ample latitude for nonprofits, and especially charities, to engage in commerce related to their chartered purposes. The tests that classify charities as either public or private even reward charities that engage in copious amounts of related commerce or active fundraising, relegating to the more highly regulated status of private foundation those charities that subsist on large endowments. [FN196]

One of the most problematic effects of these aspects of nonprofit policy has been a disregard for scale. Scale is the process through which objects derive meaning through relative proportion, and it is a central feature of nonprofit design. For example, nonprofit composition has repeatedly been associated literally or metaphorically with such values as “small,” “out,” “distant,” and “less” in relation to the for-profit environment. A nonprofit can enjoy considerable financial success with a product associated with small-scale value--think Barney or Teletubbies--without drawing attention to profits, commerce, or a colonizing corporate character. Likewise, community foundations have escaped the same degree of public scrutiny given to other large grant-making charities, partly due to their expression in a multitude of publicly acknowledged individual funds--a scalar dynamic akin to the use of multiple rival brands to mask a large corporation.

Relative scale and selective attention also play a role in the classification of clubs and consumer cooperatives as nonprofit organizations. As Hansmann correctly observes, the distribution program of such groups, especially upon dissolution, violates the strict application of the nondistribution constraint. Hansmann recommends that organizational statutes end the confusion by removing such organizations from the nonprofit category, [FN197] but from a design standpoint *378 such a reform could create more confusion than it dispels. In Russia, for example, social clubs--like cooperatives in the late-nineteenth-century United States--were arguably the form most visibly identified with *nekommercheskii* or nonprofit organizations. To have excluded them from the nonprofit legal category would have actively linked them to commercial forms, with potentially disastrous effects to the perceived integrity of nonprofit form overall. Unless abuse of the co-op form perceptibly breaks its sensory logic, other nonprofit characteristics--an anti-corporate environment, an orientation toward members as opposed to stockholders, or a hobbyist culture--may all be factors that can render the literal violation of the nondistribution constraint irrelevant to maintaining a nonprofit identity.

Similarities in scale also foster a related perceptual link between charities and small business. Based on the core principles built into both state law and federal tax exemption, a charity should not be able to give grants or below-market-rate loans to for-profit businesses without considerable risk to its own legal status, yet 501(c)(3) organizations do both on a regular basis in the United States and abroad. Aid to small business in a disadvantaged area reorients how people perceive the technical violation of prohibitions against “commercial hue,” private benefit, and private inurement to shareholders and other insiders. [FN198] The perceptual effects of relative scale also extend to small business itself, which enjoys quasi-charitable exemptions from certain levels of corporate tax. Relative size shifts relative attention, with cascading effects throughout the different categories of corporate form.

In addition, nonprofit design also assesses objects in relation to temporal scale. The opera and symphony display many features associated with wealth, privilege, and popular entertainment, but they also represent a time beyond the present. This sense of the external resonates with the rhetorical force of other nonprofit media, including the very form of tax-exemption as a zone beyond finance and immediate payoff. Likewise, temporal scale shades the perception of commerciality in public television. The Lawrence Welk and Ed Sullivan shows now broadcast on local PBS affiliates were once commercial hits; now they convey an image of cultural memory as much as a concert of medieval chants.

But scale works both ways. Shifts in the perception of relative values can produce a pattern shift in how a society perceives non-profit form as a whole. This principle applies even in cases where the nonprofit is engaged in “related” activities, be they education, educational, or medical in nature. What had once seemed a dynamic unity in perspective can transform into what Alberti describes as a monolithic statue or “colossus.” [FN199] Within the world of business corporations the colossus effect of commerce and profit-making is particularly evident, potentially offsetting the most determined efforts to put forth a human face. The autobiography of former GE CEO Jack Welch exemplifies the effect of the legal colossus in corporate management, as shareholder value relentlessly subsumes all other values. In their landmark study of scale in architecture, S,M,L,XL, Koolhaas and Bruce Mau describe this effect as “the problem of Large.” At “a certain critical mass,” a feature can take on “the properties of Bigness” [FN200]--a complete break “with scale, with architectural composition, with tradition, with transparency [and] with ethics.” [FN201]

However much the visual rhetoric of Bigness might enhance the creative potential of a skyscraper, it can be a rather dangerous message for a nonprofit to send. The rhetorical effect can be similar to the transformation of MP3 downloads from a noncommercial to a recognizably commercial form of activity. As the court explained in *A&M Records v. Napster*, “[a]lthough downloading and uploading MP3 music files is not paradigmatic commercial activity” and the music companies failed to show that “the majority of Napster users download music to sell--that is, for profit,” the “vast scale” [FN202] of the downloading and uploading activity gave it a “commercial character.” [FN203]

The following excerpt from a recent *Wall Street Journal* museum review illustrates how scalar metastasis can alter our perception of nonprofit form. The subject of the reviewer's “indignation” is an exhibit even more lavish than Pearls currently on display at the *380 Metropolitan Museum of Art: Treasury of the World: Jeweled Arts of India in the Age of the Mughals.

You don't have to be an al Qaeda cadre to wince at all this wealth. . . . But that's not the worst of it. Coming out of the cave of Midas that is the exhibition proper, you enter the gift shop. . . . There are giant ruby rings in the Met shop for \$6000, cascades of emeralds for many times that, and even a necklace, based on one made famous by Marella Agnelli, that will set you back around a quarter million. [FN204]

What is important to note here is that the reviewer does not identify commercial activity per se as the problem, nor does it matter that the items on sale are arguably related to the exhibit. The total effect is a break from the combinatorial force of charity, artistry, and heritage that might otherwise shape one's impression of a museum environment. “Normally,” the reviewer notes, museum shops are “defensible as sources of income to museums and all their good works in the cause of real art,” but the Treasury shop goes too far. Fortunately, the reviewer concludes, a concurrent Met exhibit offers “a brilliant and equally Islamic counterweight to this celebration of crown jewels and their knockoffs.” Unlike Treasury's “brash emporium,” The Glass of the Sultans features “pathbreaking scholarship,” “preindustrial” artifacts, and a gift shop in which “[n]othing . . . costs more than \$70.” [FN205]

The sale of hospitals to for-profit organizations and the use of proceeds to fund large community charities

raises similar concerns. The force of such transactions, often conducted with little sense of their overall rhetorical effect, can pull charity from Blackstone's sense of a community beyond current members and property to the present limits of directors' self-will and finance. Reduction to corporate cap-ital dominates the frame, even without any demonstrable negative effects on community health or misappropriation of charitable assets. The resurgence in applying charitable trust law to charitable corporations expresses a noteworthy shift in perceptual orientation, from a perspectival projection beyond people and property to organization as capital--a sensory re-alignment that has needlessly complicated any number of transactions that would ultimately benefit the public.

The problem of scale was also a factor in the recent public outcry aimed at the major 9/11 charities. Together, five charities (led by the Red Cross) swiftly colonized our 9/11 attention through their high visibility across all communications media, including logo placement, *381 banner ads, TV commercials, and blood donation centers. They also garnered most of the billion dollars in contributions made in response to the tragedy. The result was the fusion of these charities into a conceptual colossus; the compositional force directing us to see them as active charities fell away to an image of monolithic bureaucracy, corporate control, and the blind accumulation of cash. It is an image that could have been offset not just by gifts to families but by a visible ethic of restraint, such as curtailment of fundraising efforts or, as the United Way did to some success, distributing funds to smaller charities within the affected areas. [FN206] Though there is no evidence of a single donor dollar going to waste, the early 9/11 meta-stasis called attention to charity as a corporate monolith, providing a predictable impetus for legal action.

Changes in environment and perceived scale have produced periodic cycles of reform through the twentieth century. [FN207] The proto-typical shift is the one that led to the enactment of the UBIT in 1950. Prior to UBIT, federal law governing the charitable tax exemption looked to the destination of income as opposed to its source; a charity's unrelated business escaped taxation if the profits went to fulfilling its charitable purposes, and even a for-profit corporation could be tax-exempt if the revenue stream went to a charity. The design logic of this arrangement should by now be evident: in a cultural context where charities conducted a relatively small amount of commercial activity, the dominant focus on the overall charitable effect overshadowed the relatively small amount of business that made these benefits possible.

Large-scale commerce spurred support for the enactment of UBIT rules. In the twenty-year period prior to 1950, a growing number of charities and their feeder corporations seemed to pay no attention to the image projected by their increasingly unfettered commercial activity. The most conspicuous player in this regard was New York University. The NYU School of Law was the sole shareholder of what was then the leading pasta maker in the U.S., C.F. Mueller Co., prompting Representative John Dingell to launch his famous protest against the university "macaroni monopoly." NYU also owned prominent producers of china, piston rings, and leather goods. *382 Regardless of whether the money was going to legitimate charitable purposes, over time the commercial interface threatened to obscure the charitable. Charity tipped to Bigness, and with its moral force receding from public attention, its tax privileges were no longer impervious to attack.

C. Fragmentation Rules

From the mid-twentieth century onward nonprofit law has attempted to address the problem of convergence through repeated waves of reform. [FN208] The first culminated in 1950 with a phase shift in nonprofit taxation: the enactment of UBIT and the earliest statutory moves toward distinguishing between public charities and private foundations. An unusual convergence among regional interests--the D.C. meritocracy, Southerners threatened by the civil rights movement, Northeastern urban immigrants, and the emerging New South and Southwest--led to the equally dramatic extension of federal private foundation rules in the Tax Reform Act of

1969. In addition to further strengthening UBIT, the Act aimed to curtail the wealth and influence of New England and Rust Belt industrialist elites. [FN209]

The subsequent rise of nonprofit law as a specialized discipline has tempered the scope of change since 1969. In place of a signal moment of comprehensive reform there have been a number of incremental changes involving cy pres and hospital sales, commercial activity and property tax, self-dealing and insider compensation, the sale of donated goods, for-profit subsidiaries, and strengthening UBIT.

If there is a single dominant trope that has emerged over the recent decades of mainstream and academic nonprofit analysis, it is that the legal framework is failing to maintain the image of nonprofits as a form beyond finance. The September 11 controversy, hospital sales, and the wealth of major universities and health care organizations are a few of the more conspicuous examples. Even 60 Minutes in December of 2001 did an expose of the five billion dollar endowment and “prep school” atmosphere at the Hershey School for ***383** disadvantaged children. [FN210] The Wall Street Journal has similarly called attention to the business environment at nonprofits, as commercial grants to researchers in the sciences give nonprofit medical institutes the cast of a tax-exempt R&D center for profit-making business. [FN211] And in the nonprofit world itself, attention on unrelated business is once again on the rise; as a recent article in the Chronicle of Philanthropy notes, the federal tax on unrelated business income does little to curb profit-seeking behavior by otherwise tax-exempt nonprofits, largely because most companies either choose not to pay it or exploit accounting rules to minimize its effect. [FN212]

Concern that the image of nonprofit finance may produce yet another wave of reform aimed at curbing nonprofit business and autonomy has led both nonprofit scholars and managers to seek remedies to the perceived problems. Paradoxically, as nonprofits grow more knowledgeable with regard to their legal rights and limits, their offending behavior seems to increase. The ultimate source of this conundrum lies not in the widespread ignorance of laypeople as to what truly constitutes nonprofit character, but in the growing design illiteracy within nonprofit law itself.

What keeps the legal system from effectively addressing such concerns is its inability to see the whole for the parts. The spirit of current nonprofit legal analysis is embodied in a principle from UBIT called the “fragmentation rule.” [FN213] Under this rule, the transformative effects of compositional design are irrelevant; the IRS has the power to divide actions into separate parts and determine whether each individual act bears a “causal relation” to the organization's charitable purposes. [FN214] As the legal system ignores compositional effect to curtail actions that few nonspecialists view as commercial activity, the visible breakdown of unity in perspective continues unabated under color of law.

One prominent example of this fragmentation is the tax treatment of nonprofit professional journals. Selling ads in such a journal is a distinct experience from selling ads in a commercial magazine; the scale and scope of sponsorship are far more limited. The difference is ***384** reflected in the incidental commerciality of the journal's design, which is shaped primarily by the narrow organizational culture and by a readership pool a bit south of Vogue. The appearance and feel of the issue reinforce the academic image: type dominates and there are few attention-grabbing cues or pictures. The effect of a nonprofit journal's advertising may appear, depending on the design, qualitatively different from that of a commercial magazine, in which the ads' spacing, quantity, and relative force distract from and even overwhelm the body of the magazine itself.

Federal tax law, however, looks past this on the basis of a determination by “Congress and the Treasury . . . that advertising published by tax-exempt professional journals can never be substantially related to the purposes of those journals and is, therefore, always a taxable business.” [FN215] The principle expressly rejects attempts

by ex-exempt organizations to argue relatedness by design; section 513(c) of the Code, enacted in 1969, provides that “[a]dvertising . . . does not lose identity as a trade or business merely because it is carried on . . . within a larger complex of other endeavors which may, or may not, be related to the exempt purposes of the organization.” [FN216] Essence cut from context shapes the rule.

The slicing up of museum space illustrates the complexity of the law's fragmenting force. In applying UBIT, the established rule is that a museum must establish the “causal relation to art or to artistic endeavor” of every individual item sold on the premises, regardless of the location or timing of the sale. [FN217] This broad principle, embodying a principle of causality based on the vague notion of “contributes importantly,” was further refined in a 1997 Technical Advice Memorandum, which specified rules to be applied when determining whether a museum needed to pay UBIT on certain pieces of children's merchandise. [FN218]

On a certain level, the rules are design-sensitive, considering the “impression” made by the object based on the “nature, scope and motivation” of the particular sales activity. [FN219] Yet the very act of fragmentation divorces it from its context. The museum needs to ask if the item is “utilitarian, ornamental, a souvenir in nature, or only generally educational,” [FN220] with the relatedness standard extending point-to-point back to “the degree of connection between the item and the *385 museum's collection and the extent to which the item relates to the form and design of the original item.” [FN221] The problem with this assessment process is that Treasury takes the design of the object out of the design of the store and museum. Intervening chains of inference formed by the museum environment fall to the cutting room floor.

In instances such as the above, the federal government pierces through the compositional effect to tax “unrelated” activity that scarcely calls attention to itself as such, even as the UBIT rules fail to curb far more conspicuously commercial activities. For example, the Guggenheim Museum has sparked sharp criticism for its exhibits and store. An Armani retrospective and an exhibit of popular motor-cycles are two of the more notorious exhibitions in fulfillment of its charitable purpose. Its main museum store, a large gift shop located immediately to the left of the entrance, has a cut-away ceiling that opens the store into the middle of an inside display floor, drawing you into the store's action and attention-grabs as you view the exhibit. Whatever tax the museum pays on specific items of un-related merchandise is functionally invisible, doing little to offset the immediate visual effects. As the New Republic opined, it “is no longer a museum of art so much as it is a market-driven experiment.” [FN222]

Miscues in design fragmentation extend to the question of so-called “passive” visual stimuli, such as the inscription of a corporate logo on a nonprofit visual field--or vice versa. The IRS in 1991 tried to tax the placement of commercial corporate logos and other “well-positioned visual images” at a college bowl game on the grounds that this constituted a taxable trade or business. [FN223] Congress resolved the controversy that ensued by declaring in Section 513(i) that such placements were not taxable unless they included “advertising” of the products and services, such as “an inducement to purchase, sell, or use such products or services.” [FN224]

Newly promulgated Treasury regulations further reinforce the principle that displaying a logo does not provide a “substantial return benefit” to a company [FN225] and accordingly does not qualify as “advertising.” As with the statute, verbal narrative and argument define the field; the paradigmatic ad is a “message” that “promotes or *386 markets” through its “qualitative or comparative language” or other explicit “inducement to purchase.” [FN226]

However, a trademarked logo is itself an inducement to purchase. The age of Hüsker Dü ads flashing “Buy It!” are long gone; the logo by its very presence inscribes the perceptual surface “with the logic of the market.” [FN227] Under current theories of marketing psychology--the evidence of which you can see on any number of

car bumpers or logo placements in movies--the language of the statute should make any use of the Coke logo a taxable event.

A more coherent approach would have been for Congress and the IRS to consider the total effect of the various surfaces that compose into the overall charitable identity. The sale of ads is indeed a trade or business regularly carried on; the placement of trademarked logos is not passive, and it does indeed mirror the sale of logo space in commercial sporting events. However, logo space has in most (though not all) contexts become a generic background element, just like university administration, salaried professors, a Coke machine, or twenty bucks admission to the game. The bounded meaning of the ad is derived to a significant degree from its relation to the organizational environment; sporting events, professorships, and similar areas have conditioned us to overlook a degree of co-branding in exchange for support. The essential nature of the ad is less important than such factors as continuity, scale, and even aural dissonance. Uniforms branded like those of NASCAR drivers or jarring associations like the Chick-Fil-A Peach Bowl are more likely to reshape impressions of nonprofit distinctness than whether the words below a logo qualify as "an inducement to purchase" under the law.

Visual dynamics also condition our sense of nonprofit logos. Within the nonprofit network, I have encountered any number of people who, while adamant about the noncommerciality of the non-profit sector, nonchalantly pay for lunch with a credit card branded by their home university or other favorite charity. The perceptual logic here is not, as current law would clarify, that obtaining royalties from such a card is a "passive" form of commercial activity. [FN228] Rather, the active nonprofit image transforms the card and the purchase into charitable gestures. Understanding this principle would have clarified the broader question of whether the acts surrounding the creation and marketing of the card were by their very nature an unrelated business.

***387** Here as elsewhere, the categories of nonprofit law would benefit from focusing less on the invisible means of production and more on how they direct our attention. Any number of examples outside UBIT reinforce the need to move in this direction, but perhaps the most prominent is the set of rules for determining whether a charity is a so-called "public charity" or "private foundation." [FN229] The details are agonizingly complex, but at base they reflect the same design logic that would eventually take shape in campaign finance reform: the assumption is that fundraising campaigns strengthen public trust, when quite the reverse is true. An alternative test that puts a cap on investment income but rewards related business activity shows a similar reversal of the rhetoric of the act; invisible moneyraising is penalized, while business activity is a preferred sign of a charitable character. A far more preferable system would be one that replaced these rather arcane rules with a single standard focusing primarily on the class of larger charities, thereby eliminating the substantial compliance costs incurred by smaller organizations that are far less likely to be viewed as metastasizing beyond an appropriate scale.

However, the commercial image of nonprofit enterprise will continue to grow unchecked so long as nonprofit law keeps its focus on unseen detail. For example, the nondistribution constraint is indeed critical to understanding nonprofit law, but even when most effectively applied it is an aspect of nonprofit enterprise that most people do not see. Perfect enforcement of invisible law is no enforcement at all when more prominent features grab hold of our attention. Likewise, attempts to refine the contract failure model by focusing on invisible or inapposite criteria--the motives of donors, disclosures to the IRS, the mechanics of governance--all make the law's primary concern objects that are, for most donors and taxpayers, in a zone of inattentive blindness.

The trend toward increasing restrictions on commercial behavior and capital accumulation--as well as the revival in some states of trust principles for charitable corporations--points to the breakdown of nonprofit form as projective space. A dinnertime phone call requesting a donation, a televangelist shilling a prayer cloth, and a PBS pledge break all grab our attention in particular ways, creating immediate impressions that inevitably shape

our sense of whether a nonprofit is acting true to form.

As nonprofits revert to segmented relations of property, exchange, contract, and control in the eyes of society, the image of nonprofits as a distinct free zone gradually loses its shape. This development is a ***388** backwards step, in which fragmentary analysis deprives itself of the insight gained by an intuitive sense of the whole. [\[FN230\]](#)

The larger lesson to take away from UBIT as an exemplar of the nonprofit legal mindset is not that nonprofit law needs to incorporate an awareness of architecture, graphic design, or art. The UBIT rules, emblematic of nonprofit law as a whole, apply a relentless fragmenting logic to every aspect of nonprofit design, from the character of logos on a building to the relation between an “ornamental” toy and a picture on a wall. The current legal regime is all too aware of material culture; the problem lies in a systemic failure to understand it.

D. Unity by Design

The future of nonprofit legal reform lies not in a change of laws but in a change of mind. The conceptual divide between actual function and illusory form is a false contrast. [\[FN231\]](#) The elements that define the utility of a nonprofit organization are intrinsic to creating a unity in perspective beyond them. What makes nonprofit form distinct is its unbounded capacity to transform and create. This core compositional force has enabled what we know now as “nonprofit” to flourish in differing ways in a host of different contexts--feudal, mercantile, monarchical, and communist as well as capitalist and democratic societies, not always with the same name, but with recognizable affinities in design.

Design jurisprudence recognizes the legal sense inherent in the full spectrum of nonprofit forms. Objects have viewpoints, and style is law. The term “nonprofit,” the layout of museums, the attention flows of an aquarium, the rhetoric of fundraising, and even the competing theories of nonprofit enterprise--these and other aspects of nonprofit culture are not mere distractions from behind-the-scenes finance and hidden legal language. The normative patterns of our nonprofit environments are as crucial for understanding nonprofit law as the letter of a statute. Like Blackstone's cathedral, each expression of nonprofit style offers gateways of perspective that relate generic elements within a space where all is one. Rigorous and isolated analyses of legal rules, organizational documents, risk management, ***389** and corporate finance are all part of producing this effect, but we lose sight of their significance if we look past the total image they create.

Nonprofit form will continue to be distinct to the degree that it performs social alchemy. Even without a measurable difference from its for-profit counterparts, an environment recognized as nonprofit can present a clearer image beyond ownership, contract, control, and exchange; for many the decision to use open-source software is as much a matter of faith as efficiency, while heavily-endowed hospitals and universities that are functionally equivalent to a large commercial enterprise still manage to transform their commercial attributes into a distinct nonprofit identity. On the opposite end of the spectrum, the ever-expanding occupation of mindshare by commercial enterprise will maintain pressure for public recognition of a form beyond finance. The new breed of commercial shops appropriating nonprofit style still keep commerce visibly in the foreground, and the image of the profit-maximizing capitalist has yet to fade from view.

But if nonprofit style is to maintain its distinctiveness, upcoming generations of nonprofit lawyers, managers, and government regulators need to develop an intuitive sense of unity in perspective. The myth of nonprofit law before specialization as a vague and unformed ad hoc morass overlooks the complex interplay of rules and examples within the evolving nonprofit network. The apparent vagueness of thin definitions of nonprofit

form reflects the degree to which nonprofit identity in law has traditionally been a realm of cues and patterns--a zone seemingly beyond law that most effectively main-tains its integrity without requiring the visible intervention of legal authorities. Today's nonprofit leaders must learn how to read the ap-parent disjunctions between nonprofit law and nonprofit experience as evidence of a deeper unifying force: the fundamental human im-pulse to transform the needs of existence into expressions of creative power. [FN232]

The challenge facing nonprofit legal thought is to resist the con-stricting force of its own inward gaze. The past generation of non-profit reform has sought to re-educate people to forget what they see everyday, offering instead an unfocused dataflood of reports and dis-closures that only experts know how to find and to read. As a discip-line, nonprofit law reflects the extent to which professional schools in law and management have “abdicated responsibility for training in *390 the core professional skill” of distinctive organizational design. [FN233] The more effective nonprofits become in raising funds, partnering with for-profits, and working with the state, the more we need to strive to focus attention on other aspects of their work. The primary way in which nonprofit law can advance toward this end is to reinforce design cues that point to a form with depth beyond points and segments. Nonprofit law will arrive at its maturity not through ever more intrusive legislative enactments, but when these corrective rules wither away as irrelevant artifacts of an artless time.

For the nonprofit lawyer, exploiting what is permissible within the parameters of written law can dissolve the sense of composition within nonprofit form. As charities learned in the 9/11 controversy, even actions that are legal in the strictest sense can cause significant damage to our sense of nonprofit as a form beyond finance. Allocating disaster relief to a general fund; suffusing a museum with multiple high-end gift shops; identifying the university with an on-campus Coca-Cola monopoly--such actions may not be inherently improper or illegal, yet the practice of nonprofit law is inexorably bound with the rhetoric of nonprofit design, and nonprofits must consider their own public identity in relation to the whole. Other-wise, the lawyer contributes to a background environment that places the perceived integrity of the form--and the client--unneces-sarily at risk. [FN234] The more we encourage the rules of segmentation to dominate the scene, the faster the distinctiveness of nonprofit style will degrade. Advising nonprofits is a task that requires an intuitive grasp of history, culture, and the rhet-oric of form--in short, a comprehensive view of nonprofit law as a humanistic discipline. [FN235]

IV. Conclusion

In *The Irony of American History*, Reinhold Niebuhr observed that “[t]he possible destruction of a technical civilization, of which the ‘skyscraper’ is a neat symbol, may become a modern analogue to the Tower of Babel.” [FN236] We have now seen Niebuhr's vision realiz-ed--not the disintegration of American society, but the “ironic fail-*391 ure” of the religious absolutists who sought to destroy it. [FN237] Contrary to plan, the 9/11 at-tack on the towering symbols of American capital-ism only served to reawaken our sense of a deeper unity bey-ond the narrow limits of self-interest, contract, and exchange.

However, the ideal of unity cannot hold if we continue to view our unifying forms as but a false, distracting fiction. The nonprofit net-work can make its most vital contribution to the future of civil soci-ety by freeing it-self from the splintering force of the modern legal mind. That we treat nonprofit law as a private language out-side the comprehension of an uninformed populace is not a sign of theoretic-al sophistication; it is our tragic flaw.

Because the unifying shape of nonprofit form is so little under-stood, I have in this article focused on non-profit design as a style of perception. How nonprofits communicate through design is itself a form of legal rhet-oric, [FN238] the latest expression of what Aristotle called “the ability in everything to see the means of persua-

sion that people would listen to.” [FN239] Yet this does not mean that nonprofit style is purely instrumental. The root metaphor of a form “beyond” or “out-side” the self has the potential to foster a sense of empathic other-directedness in all forms of social organization, [FN240] and design jurisprudence in its fullest expression brings together both the rhetorical and ethical dimensions of nonprofit style.

Nonetheless, creating a social identity beyond self and capital is an impulse that can lead as much to a radical antinomianism as it can to a spirit of altruism. After all, we can view al Qaeda itself as a non-profit network supported by a wide array of charities. The counter-point to dynamic composition--an annihilation of the individual within a totalizing monolith--is a force that should inspire a stronger countervailing commitment to pull in the other direction. In advising or writing about nonprofit identity, we have an opportunity--and, I believe, a responsibility--to help create structures that reinforce the ethic of empathy and personal integrity commonly associated with nonprofit form.

***392** Finally, the dynamics of nonprofit design should reshape the very style of our nonprofit research. Unity in perspective plays off of the similarities and differences in the objects it combines; it does not subsume or erase them. In contrast, the pattern we typically see in academia is typically one of paradigm trumping--in a word, we make our reputations through Oedipal scholarship. This practice fits within the reputation-building culture of the modern corporate university, but it is not the best path to understanding the infinite creative potential embodied in nonprofit form. Nonprofit legal theory is an intellectual crossroads, where, to borrow an image from Blackstone, the scholar from seven hundred years ago and the scholar of today are one, and the value of each can only increase as we understand how they relate.

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[FN1]. Don DeLillo, *In the Ruins of the Future*, Harper's, Dec. 2001, at s 33, 39. See also Peter Marks, *A Skyline is Conspicuous by an Absence*, N.Y. Times, Oct. 24, 2001 (quoting Broadway designer David Gallo's statement that “[t]he World Trade Center, though not aesthetically pleasing, was our anchor.... It was there at the base of Manhattan giving us all a point of reference. Having lost that anchor, we are confused as a nation visually.”).

[FN2]. See Friedrich Nietzsche, *The Gay Science* 239 (Walter Kaufmann trans., 1974) (“What one should learn from artists. --How can we make things beautiful, attractive and desirable for us when they are not?”).

[FN3]. See, e.g., Robert Wuthnow, *The Voluntary Sector: Legacy of the Past, Hope for the Future?*, in *Between*

States and Markets 1, 7 (Robert Wuthnow ed., 1991) (“Nonprofit organizations and other, more informal voluntary associations often enjoy a special legal stat-us, are prohibited from coercing their members to provide donations of time or energy against their will, and do not attempt to sell goods or services in the marketplace.” After writing this very paragraph I was introduced to a person who had left her prior job to work for an international charity involved in scientific research. Before I had a chance to mention my own work, she explained hers as follows: “Our business... well, if you can call it that, because we’re a nonprofit”).

[FN4]. Neil Fligstein, *The Architecture of Markets: An Economic Sociology of Twenty-First-Century Capitalist Societies* 36 (2001). As Jon Van Til notes, citing the historian Rudolph Bauer: “[I]n a capitalistic society all organizations are capitalistic.” Jon Van Til, *Growing Civil Society: From Nonprofit Sector to Third Space* 192 (2000).

[FN5]. See Henry Hansmann, *The Ownership of Enterprise* 245 (1996); Van Til, *supra* note 4, at 191-93. For an extended discussion of the essential identity of nonprofit and for-profit forms, see also Evelyn Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 *N.Y.L. Sch. L. Rev.* 457 (1996).

[FN6]. See Ferdinand Tönnies, *Community and Civil Society (Gemeinschaft und Gesellschaft)* (Jose Harris ed. & Jose Harris & Margaret Hollis trans., 2001) (1887). Tönnies’s categories have had widespread influence in Western sociology, both direct and in-direct, from Durkheim through contemporary notions of civil society within nonprofit scholarship.

[FN7]. At a November 2001 talk at Yale University, comic art pioneer Will Eisner described Art Spiegelman’s dismay over an exhibit at the New York Museum of Modern Art, which contrasted “high” art with such “low” forms of visual expression as comic books. Spiegelman won a Pulitzer Prize for his graphic novel *Maus*.

[FN8]. For broader discussions of this theme and its application to contemporary analytical norms, see David Gelernter, *Machine Beauty: Elegance and the Heart of Technology* (1998) [hereinafter Gelernter, *Machine Beauty*]; David Gelernter, *Mirror Worlds* (1991) [hereinafter Gelernter, *Mirror Worlds*]; Robin Hogarth, *Educating Intuition* (2001); Herbert A. Simon, *The Sciences of the Artificial* 111-13 (3d ed. 1996); and Mark C. Taylor, *The Moment of Complexity: Emerging Network Culture* (2001).

[FN9]. The following anecdote has already gained a fair degree of notoriety: The Red Cross President “allegedly explained the firings of the disaster workers by personally telling the departed employees’ co-workers at the operations center, ‘Welcome to corporate America.’” Grant Williams, *Turmoil at the Red Cross*, *Chron. Philanthropy*, Nov. 1, 2001, at 71.

[FN10]. David France & David Noonan, *Blood and Money*, *Newsweek*, Dec. 17, 2001, at 52.

[FN11]. *Fictio* is derived from the Latin verb *ingere*, meaning to shape or to mold, as when forming a statue out of clay or, by metaphorical extension, forming a mental image out of words or ideas. The earlier Greek concept of *eidōs* approaches form from a different perspective: seeing a shape or pattern.

[FN12]. James Elkins, *The Object Stares Back: On the Nature of Seeing* 12 (1997).

[FN13]. Jessica Helfand, *Screen: Essays on Graphic Design, New Media, and Visual Culture* 7 (2001).

[FN14]. See Gelernter, *Machine Beauty*, *supra* note 8, at 27-35, for an elegant discussion of this problem in design.

[FN15]. Countless commentators--not to mention stand-up comics and bumper stickers--derided the ignorance of Floridians who could not follow directions, but usability experts and cognitive theorists correctly noted that, in this instance, the fault lay with visual cues in the ballot that made it about as clear as the programming mode for a 1980s VCR. One of the most telling pieces of evidence that came out of the media consortium review of the election was the exponential rise in voter error on both sides of the political fence in areas with unclear ballot design. For a frequently cited (and highly prophetic) article on ballot interface design, see Susan King Roth, *Disenfranchised by Design: Voting Systems and the Election Process*, 9 *Info. Design J.* 1, 1-8 (electronic off-print 2000) (1998), at <http://www.informationdesign.org/pubs/pdf/roth1998.pdf>.

[FN16]. See Herbert Butterfield, *The Whig Interpretation of History* (1931).

[FN17]. Henry Hansmann, *The Evolving Law of Nonprofit Organizations: Do Current Trends Make Good Policy?*, 39 *Case W. Res. L. Rev.* 807, 810 (1989).

[FN18]. *Id.* at 808.

[FN19]. *Id.* at 810.

[FN20]. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 *Yale L.J.* 835, 845 (1980); see also Rob Atkinson, *Theories of the Special Tax Treatment of Nonprofit Organizations*, in *Federal and State Tax Exemption of Exempt Organizations 15-1, 15-12 to 15-14* (Frances R. Hill & Barbara L. Kirschten eds., 1994); Richard Steinberg & Bradford H. Gray, 'The Role of Nonprofit Enterprise' in 1993: Hansmann Revisited, 22 *Nonprofit & Voluntary Sector Q.* 297, 299-301 (1993).

[FN21]. Evelyn Brody, *Institutional Dissonance in the Nonprofit Sector*, 41 *Vill. L. Rev.* 433, 467-68 (1996) (quoting Lester Salamon in Karen W. Arenson, *Woeful '95 Leads U.S. Charities to Introspection*, *N.Y. Times*, Dec. 10, 1995, § 1, at 38).

[FN22]. *Id.* at 502-03.

[FN23]. See Harold Bloom, *The American Religion: The Emergence of the Post-Christian Nation* (1992). For an informative look at the gnostic impulse in American popular culture, see Erik Davis, *Techgnosis: Myth, Magic and Mysticism in the Age of Information* (1998). The theme of gnostic abstraction is also prominent in the works of Barbara Maria Stafford cited throughout this article. Two additional sources have been influential in the development of the gnostic theme in this article: *The Nag Hammadi Library in English* (James M. Robinson ed., 1990) and the later works of Philip K. Dick.

[FN24]. See Jean Baudrillard, *Simulacra and Simulation* (Sheila Faria Glaser trans., 1994) (1981).

[FN25]. Simon, *supra* note 8, at 113.

[FN26]. See, e.g., Donald A. Norman, *The Design of Everyday Things* (Doubleday 1990) (1988); Brenda Dervin, *Chaos, Order, and Sense-Making: A Proposed Theory for Information Design*, in *Information Design 35* (Robert Jacobson ed., 1999); Jef Raskin, *The Humane Interface* (2000); and Richard Saul Wurman, *Information Anxiety 2* (2000).

[FN27]. For style as a form of nomos, see Ellen Dissanayake, *Homo Aestheticus: Where Art Comes from and Why* (1992); E.H. Gombrich, *Art and Illusion* 9-30, 388-89 (2000); Nietzsche, *supra* note 2, at 232-33; and Meyer Schapiro, *Selected Papers No. 4, Theory and Philosophy of Art: Style, Artist, and Society* (1998). See also

Bruce Mau, *Life Style* 35 (2001); Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 *Stan. L. Rev.* 509, 518 n.53 (1992).

[FN28]. Michael Baxandall, *Painting and Experience in Fifteenth-Century Italy* (Oxford Univ. Press 1988) (1972). See also Hogarth, *supra* note 8.

[FN29]. Sanford Kwitner, Introduction to Mau, *supra* note 27.

[FN30]. Taylor, *supra* note 8, at 11-12.

[FN31]. See Mau, *supra* note 27; Rem Koolhaas, *Projects for Prada Part I* (2001). This book is unpaginated.

[FN32]. Lon Fuller's work on implicit law and institutional design provides useful reference points for a jurisprudence of nonprofit design. See the essays in *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Willem J. Witteveen & Wibren van der Burg eds., 1999), a work from which I have benefited immensely. However, rather than re-arguing the debates in which Fuller engaged a half-century ago, or persisting within his neo-Kantian and linguistic orientation, this section takes an approach that looks beyond Fuller's most direct intellectual influences and is responsive to the insights of more recent scholarship on form and perception. In other words, I believe that we can be more in keeping with the spirit of Fuller's "economics" if we move past the letter.

[FN33]. Marshall McLuhan, *Understanding Media: The Extensions of Man* 19 (MIT Press 1994) (1964).

[FN34]. Hansmann, *supra* note 20, at 838.

[FN35]. See, for example, Mickey Warner, *Noncommercial, Institutional, and Contract Foodservice Management* (1994), as well as the following comment on patent policy from a nonprofit manager, posted to <http://lists.w3.org/Archives/Public/www-patentpolicy-comment/2001Sep/0648.html>:

I have been involved in noncommercial Internet work for many years now. I am the President of the Nonprofit Technology Enterprise Network. I publish Nonprofit Online News. I have worked with hundreds of nonprofit organizations and scores of foundations on the future of nonprofit communication technology.

I cannot state my concerns strongly enough: To adopt the RAND model will be to undermine the very foundations of the noncommercial Internet....

[FN36]. See, e.g., Diane Seo, *Amazon Agonistes, Salon*, at <http://www.salon.com/business/feature/2000/06/29/amazon>. A recent "headlines" segment on *The Tonight Show* with Jay Leno (NBC television broadcast, Mar. 21, 2002) offers another illustration. Jay displayed the headline, "Nonprofit Theaters Show a Loss," and joked, "Why am I not shocked by this?"

[FN37]. See, e.g., Robert Franklin, *Giving; New Era Charity Fraud Case Settled; Those Nonprofit Groups That Benefited in the Double-Your-Money Scheme Must Pay Back Their Profits*, *Star Trib.* (Minneapolis, Minn.), Sept. 10, 1996, at 3B; Walter Goodman, *The Perils of Nonprofit Profits: Et Tu, Tinky Winky?*, *N.Y. Times*, Apr. 23, 1998, at E2; David S. Hilzenrath, *AARP's Nonprofit Status Comes Under Scrutiny*, *Wash. Post*, May 22, 1995, at A1 (quoting Senator Alan Simpson as saying, "[T]hey're not a nonprofit at all. They're a big profit."); Monica Langley, *Trauma Center: A Nonprofit Hospital Finds Its Executives Were Making the Profit*, *Wall St. J.*, Nov. 20, 1996, at A1; Kent E. Walker, *Nonprofit Group Profits from Another's Computer Upgrade*, *Knoxville News-Sentinel*, Apr. 1, 1998, at A2; Philip Winters et al., *When a Nonprofit Turns a Profit*, *N.Y. Times*, Feb. 16, 1998, at A14 (Letters to the Editor).

[FN38]. See, e.g., Infoteam Internet Solutions, Nonprofit Organization Web Site Hosting, at <http://www.infoteam.com/nonprofit/> (providing free website hosting services to nonprofits). See also 2001 Visitor Map for the Monterey Bay Aquarium (“The aquarium is a non-profit organization. Your admission today, along with member support and contributions, makes possible our free programs for visiting schoolchildren”).

[FN39]. A particular subculture in this regard is the growing literature on the corporatization of universities. See, e.g., Stanley Aronowitz, *The Knowledge Factory: Dismantling the Corporate University and Creating True Higher Learning* (2000); *Beyond the Corporate University* (Henry A. Giroux & Kostas Myrsiades eds., 2001).

[FN40]. This sort of fundraising becomes the basis for a theory of charitable form in Mark A. Hall & John D. Colombo, *The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption*, 66 *Wash. L. Rev.* 307, 312-13 (1991).

[FN41]. Criticized as vague and unnecessary in Hansmann, *supra* note 20, at 838.

[FN42]. See Henry Hansmann, *Reforming Nonprofit Corporations Law*, 129 *U. Pa. L. Rev.* 497, 580-99 (1981).

[FN43]. See, for example, 26 U.S.C. § 506 (1994) and the associated regulations concerning business leagues, which place limits on business activity even if conducted on a cooperative basis or with minimal profit.

[FN44]. In brief, *Treasury Regulations 1.501(c)(3)-1(c)-(e)* provide that substantial unrelated business activity will disqualify an organization from tax exemption; more generally, the commerciality doctrine embodies the notion that a charity's “primary objective is not the production of profit.” *Goldsboro Arts League v. Comm'r*, 75 *T.C.* 337, 343 (1980).

[FN45]. The textual bias of modern scholarship and analysis has been a growing theme in academia generally, and legal scholarship in particular. See McLuhan, *supra* note 33; Barbara Maria Stafford, *Good Looking* (1996). Collins & Skover, *supra* note 27; Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 *Cardozo L. Rev.* 241 (1994).

[FN46]. This section represents my own synthesis and extension of a wide range of interdisciplinary works on issues related to style, from classical rhetoric to modern information theory and cognitive linguistics. Particularly useful have been Philip E. Agre, *Computation and Human Experience* (1997) (especially pp. 61-66, an instructive study of interactionist methodology in artificial intelligence); Gilles Deleuze, *Bergsonism* (Hugh Tomlinson & Barbara Habberjam trans., Zone Books 1988) (1966) [hereinafter Deleuze, *Bergsonism*]; Gilles Deleuze, *The Fold: Leibniz and the Baroque* (Tom Conley trans., Univ. of Minn. Press 1993) (1988) [hereinafter Deleuze, *Fold*]; Dissanayake, *supra* note 27; Gombrich, *supra* note 27; Steven Johnson, *Interface Culture* (1997); George A. Kennedy, *Classical Rhetoric & Its Christian and Secular Tradition from Ancient to Modern Times* (1999) (a crisp survey of style in rhetoric); Rem Koolhaas, *Delirious New York: A Retroactive Manifesto for Manhattan* (1994); Rem Koolhaas & Bruce Mau, *Small, Medium, Large, Extra-Large* (1995); Mau, *supra* note 27 (especially the landmark introductory manifesto by Sanford Kwitner); McLuhan, *supra* note 33; Gareth Morgan, *Images of Organization* (1997) (a concise and thought-provoking survey of corporate metaphors); Nietzsche, *supra* note 2; Norman, *supra* note 26; Walter J. Ong, *The Presence of the Word: Some Prolegomena for Cultural and Religious History* (1967); Erwin Panofsky, *Perspective as Symbolic Form* (Christopher S. Wood trans., Zone Books 1997) (1927); Paul Rand, *Paul Rand: A Designer's Art* (Yale Univ. Press 2001) (1985); Shapiro, *supra* note 27; Barbara Maria Stafford, *Visual Analogy: Consciousness as the Art of Connecting* (1999); Harry S. Stout, *The New England Soul* (1986).

[FN47]. “Titles are, so to say, social matters” John Dewey, *Art as Experience* 113 (Perigee 1980) (1934).

[FN48]. Baxandall, *supra* note 28, at 36-40.

[FN49]. Deleuze, *Fold*, *supra* note 46, at 21 (discussing Leibniz's philosophy as a form of jurisprudence).

[FN50]. See Deleuze, *Fold*, *supra* note 46. See also Steven D. Hales & Rex Welshon, *Nietzsche's Perspectivism* (2000), for a study of Nietzsche's combinatorial perspectivism, another anchor of modern design thought; Deleuze, *Fold*, *supra* note 46; Mau, *supra* note 27; Stafford, *Visual Analogy*, *supra* note 46. See also Steven D. Hales & Rex Welshon, *Nietzsche's Perspectivism* (2000), for a study of Nietzsche's combinatorial perspective, another anchor of modern design thought.

[FN51]. The resonance of pictorial composition and emergent identity is far from a unique phenomenon in human perception. For an accessible introduction to the concept of emergence within complex systems, see Steven Johnson, *Emergence* (2001).

[FN52]. See Margaret Jane Radin, *Contested Commodities* (1996).

[FN53]. George Lakoff & Mark Johnson, *Philosophy in the Flesh: The Embodied Mind and Its Challenge to Western Thought* 323-24 (1999).

[FN54]. Deleuze, *Fold*, *supra* note 46, at xvii.

[FN55]. For more general studies of social memory, see, for example, Paul Connerton, *How Societies Remember* (1989); James Fentress & Chris Wickham, *Social Memory* (1992).

[FN56]. Norman, *supra* note 26, at 69.

[FN57]. Compare the textualist focus of Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (2001).

[FN58]. See, e.g., Illinois General Not for Profit Corporations Act of 1986, 805 Ill. Comp. Stat. 105/103.05 (1993) (listing over thirty permissible nonprofit purposes), available at <http://www.legis.state.il.us/ilcs/ch805/ch805act105articles/ch805act105Sub3.htm>.

[FN59]. 74 T.C. 1324, 1332 (1980), *aff'd*, 675 F.2d 244 (9th Cir. 1982).

[FN60]. *Id.* at 1333.

[FN61]. *Id.* at 1330.

[FN62]. For example, the intuitive link between the nonprofit corporate *universitas*, perspectival composition, self-regulating dynamic systems, and democratic political structures warrants a book of its own. Part II offers a brief overview of their interconnection.

[FN63]. Ninth Circuit Judge D.W. Nelson, a pioneer in ADR who has played a prominent role in the growth of the court and Center projects, provides an overview of the Circuit's extensive appellate settlement program in D.W. Nelson, *ADR in the Federal Courts--One Judge's Perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators and the Public*, 17 *Ohio St. J. on Disp. Resol.* 1, 7-9 (2001). For information on the Western Justice Center, see its website, <http://www.westernjustice.org>, especially the sections on history, facilities, and the Capital Campaign. See also Western Justice Center, *Coalition Proposes Nonprofit Campus in Pasadena's Western Gateway*, at <http://www.westernjustice.org/pr12.htm>.

The nonprofit influence on this setting goes even further than the overt integration of Center and court. The architectural openness of the complex mirrors the egalitarian, interconnecting culture of the Bahá'í Faith, in which Judge Nelson is a member of the National Spiritual Assembly. As she notes in describing the Faith's influence on her interest in ADR, the Bahá'í Faith is “a world religion that practices the art of consultation, a high form of mediation in over 200 countries and territories of the world.” Nelson, [supra at 2](#). This spirit is evident within Bahá'í architecture as well, as evidenced by the themes of unity and convergence that shape a Bahá'í House of Worship. See, for example, Bahá'í Houses of Worship, at <http://www.bahai.org/article-1-6-0-7.html>, or visit the House of Worship in the United States, centrally located in Wilmette, Illinois, for a particularly striking example.

[FN64]. Robert Ingrassia, Arts Getting WTC Victim Aid: Orchestra, Dancers Among Sept. 11th Fund Recipients, *Newsday*, Nov. 21, 2001, at 7.

[FN65]. Hogarth, *supra* note 8, at 90.

[FN66]. Norman, *supra* note 26, at 164-65.

[FN67]. Arien Mack & Irwin Rock, *Inattentional Blindness* (1998).

[FN68]. A. Tversky & D. Kahneman, Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment, 90 *Psychol. Rev.* 290, 313 (1983), quoted in Hogarth, *supra* note 8, at 101.

[FN69]. “Pop out” is a term of art referring to an object that is seen regardless of the number of distractors. Mack & Rock, *supra* note 67, at 4.

[FN70]. The literature on cy pres actions, increased attorney general oversight, property tax retrenchment, and IRS scrutiny of universities and hospitals is vast, albeit oriented toward standard policy debates rather than the dynamics of perception.

[FN71]. Mary Pat Flaherty & Gilbert M. Gaul, Red Cross Has Pattern of Diverting Donations, *Wash. Post*, Nov. 19, 2001, at A1.

[FN72]. Edward R. Tufte, *Envisioning Information* 62 (1990). Tufte's discussion centers on the interplay of the border and underlining within the warning box--stripes that effectively erase or swallow the words. Other design elements further push the words and warning into a zone outside attention, such as the location of the box on the side of the packet or the dominant images on a billboard or magazine ad.

[FN73]. Lakoff & Johnson, *supra* note 53, at 310-13.

[FN74]. I initially wrote this paragraph in the early weeks after September 11, and subsequent events have borne it out as vocal demands for more money by victims' families sparked a sharp public backlash. See, e.g., Sept. 11 Families Accused of Greed, *Wash. Post*, Jan. 28, 2002, at A1.

[FN75]. During the testimony of Howard Beales, Chair of the FTC Consumer Protection Bureau, Representative Bass inquired about the possibility of federalizing cy pres by enabling the FTC to sue a nonprofit if it uses donations for a different purpose than a donor's implicit intent. House Energy & Commerce Subcommittee on Oversight & Investigation, Nov. 6, 2001 (audio archive available at <http://energy-commerce.house.gov/107/hearings/11062001Hearing414/hearing.htm>). For discussions of the evolution of cy pres doctrine, see Frances Howell Rudko, [The Cy Pres Doctrine in the United States: From Extreme Reluctance](#)

to [Affirmative Action](#), 46 *Clev. St. L. Rev.* 471 (1998); Rob Atkinson, *Reforming Cy Pres Reform*, 44 *Hastings L.J.* 1112 (1993).

[FN76]. See Edward R. Tufte, *Visual Explanations* 73 (1997) for a useful discussion of effective difference.

[FN77]. Koolhaas, *supra* note 31; see also Mau, *supra* note 27, at 39-45.

[FN78]. This is, of course, a central theme in the later work of Marshall McLuhan. See the discussions of McLuhan and figure/ground relations in W. Terrence Gordon, *Marshall McLuhan: Escape into Understanding* (1997) and *On McLuhan: Forward Through the Rearview Mirror* (Paul Benedetti & Nancy DeHart eds., 1996).

[FN79]. As Mario Carpo notes, “the indulgences of Tetzels that were the direct cause of Luther’s indignation were printed.” Mario Carpo, *Architecture and the Age of Printing* 88 (Sarah Benson trans., 2001) (1998). Printing the indulgences, I would argue, intensified the association of church with exchange, inasmuch as it stripped away the conditioning environmental cues of intra-church transactions (for example, paying for a priest to perform a mass for a dead relative). This analysis is also informed by the discussion of ritual purity and impurity in Mary Douglas, *Purity and Danger* (1970).

[FN80]. This observation is based on my experience at the March 1998 ICANN meeting in Cairo and discussions with a number of leaders of the noncommercial constituency.

[FN81]. See the long line of cases and IRS rulings, beginning most notably with [Better Business Bureau v. United States](#), 326 U.S. 279 (1945), in which commerciality and profit-making color the nonprofit or charitable character of the activity.

[FN82]. Compare Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 *Yale L.J.* 299 (1976) with Hansmann, *supra* note 20.

[FN83]. See Samuel G. Freedman, *Public Radio’s Private Guru*, *N.Y. Times*, Nov. 11, 2001, § 2, at 1.

[FN84]. [Section 513\(a\)\(2\) of the Internal Revenue Code](#) excludes from UBIT trade or business carried on “primarily for the convenience of its members, students, patients, officers, or employees.” [I.R.C. § 513\(a\)\(2\)](#) (2002).

[FN85]. The tax treatment of publishing activity is an area in which IRS rules strive to capture an intuitive sense that design shapes the perception of form and categories. See, e.g., [Rev. Rul. 67-4, 1967-1 C.B. 121](#) (for an attempt at circumscribing research disseminated in a commercial manner).

[FN86]. Tufte, *supra* note 76, at 64 (quoting Brono G. Breitmeyer, *Visual Making: An Integrative Approach* 2 (1984)).

[FN87]. See, e.g., Evelyn Brody, [Charities in Tax Reform: Threats to Subsidies Overt and Covert](#), 66 *Tenn. L. Rev.* 687 (1999); see also the critique of philanthropy generally in David Wagner, *What’s Love Got to Do with It? A Critical Look at American Charity* (2000). Critics of Wagner who disagree with his assessment of the reality behind the image should nonetheless pay attention to his critique, which captures a number of ways nonprofits are becoming insensitive to the way design illiteracy is undermining the perceived integrity of nonprofit form.

[FN88]. Herbert Marcuse, *One-Dimensional Man: Studies in the Ideology of Advanced Industrial Society* (2d

ed. 1991). Marcuse's observation regarding modern soci-ety, that “[t]he world tends to become the stuff of total administration, which absorbs even the administrators,” reflects the interaction between physical and cognitive organizational styles that is the bedrock of this article. Marcuse, *supra*, at 169.

[FN89]. See Treas. Reg. § 1.513(d) (as amended in 1983).

[FN90]. The following examples of nonprofit gestalt derive from a range of works on information science and serve as but a brief introduction to a rich field of study. For a concise overview, see, for example, Donis A. Dondis, *A Primer of Visual Literacy* (1973); Colin Ware, *Information Visualization: Perception for Design* 201-14 (2000); Wucius Wong, *Principles of Form and Design* (1993). For good introductions to the experience of values in patterns of physical space, see Francis D.K. Ching, *Architecture: Form, Space and Order* (1996) and Francis D.K. Ching & Steven P. Juroszek, *Design Drawing* (1998). Christopher Alexander et al., *A Pattern Language: Towns, Buildings, Construction* (1977) is a classic study of the relation between modular design and compositional effect. Collins & Skover, *supra* note 28, make a general argument from a gestalt approach to law in an imagistic culture. Rudolf Arnheim, of course, is the scholar of visual perception most notably associated with a gestalt to design. See Rudolf Arnheim, *Art and Visual Perception: A Psychology of the Creative Eye--The New Version* (rev. & expanded ed. 1974) (1954) [hereinafter Arnheim, *Art and Visual Perception*]; Rudolf Arnheim, *The Dynamics of Architectural Form* (1977) [hereinafter Arnheim, *Dynamics*].

[FN91]. As discussed *infra* in Section III.C, the fragmentation rule within the Unrelated Business Income Tax ignores the design effect. The Girl Scouts example illustrates the extent to which the rhetoric of the act-- children, uniforms, bracketed periodic time--effectively performs its distraction task in what is arguably a multimillion-dollar, regularly conducted business that cuts into the market share of commercial cookie products. Technically, though, the Girl Scout cookie sales are not “regularly carried on” and thus not taxed. The “regularly carried on” requirement serves to exempt a wide range of activities whose design transforms commerciality into a nonprofit image. See, e.g., Treas. Reg. § 1.513-1(c)(2) (as amended in 1983).

[FN92]. The logic of the enclosed design can blind patrons to the commercial character of the shop, or at least push it into the background to the extent that it does not seem incompatible with tax exemption or nonprofit status. The rise of hospital and university malls, however, is pushing this effect to the breaking point.

[FN93]. Yale University is a prominent example of misdirection, as support for the commercial redevelopment of New Haven is helping to offset public criticism and pressure from the city government. The Yale Manuscripts and Archives Department has a solid collection of material on this subject (not all of which is yet publicly accessible), including reports on Yale-New Haven relations. In my own research on Yale history, I particularly recall a late nineteenth-century speech by the younger Timothy Dwight, in which Dwight warned that a physical space creating a fortress effect would undermine Yale's image in New Haven. His warning proved prophetic.

[FN94]. For information on this exhibit, see <http://www.hereisnewyork.org>.

[FN95]. Stafford, *Visual Analogy*, *supra* note 46, at 126.

[FN96]. Within the nonprofit context, the answer to the realist/nominalist debate in the theory of corporate personality is “neither.” Both fundamentally misconstrue the nature of corporate form. The philosophical idealism of the former needlessly complicates matters with its essentialist form; the so-called nominalist models are but pale imitations of Ockhamist nominalism, which had a strong visual sense rooted in late medieval optical science and the experience of university identity.

[FN97]. Helfand, *supra* note 13, at 7; see also Elkins, *supra* note 12, at 12 (“[S]eeing is meta-morphosis, not

mechanism.”).

[FN98]. Adrian Forty, *Words and Buildings: A Vocabulary of Modern Architecture* 172-95 (2000) provides a helpful overview of the philosophical dimensions of terms commonly used in architecture and design, especially “form,” “formal,” and “function.” See also Dewey, *supra* note 47, at 109 (“This is what it means to have form. It marks a way of en-visaging, of feeling, and of presenting experienced matter so that it most readily and effectively becomes material for the construction of adequate experience on the part of those less gifted than the original creator. Hence there can be no distinction drawn, save in reflection, between form and substance.”).

[FN99]. As much as I believe Lon L. Fuller was on the right track with his defense of legal fictions as a means of simplifying and organizing noise into sensible form, his core impulse is to ground fiction in words and concepts, not the viewpoints in both the viewer and perceived objects. He describes the fiction = “falsification” view as grounded in “the picture theory of truth,” thereby dismissing the very cognitive processes at the root of our sense of fiction and form. See Lon L. Fuller, *Legal Fictions* 104 (1967). With regard to computer culture, Susan Scafidi, *Intellectual Property and Cultural Products*, 81 *B.U. L. Rev.* 793, 831-35 (2001), provides a valuable discussion of the noncommercial values of the open source movement and its relation to cultural commodification.

[FN100]. Though the study of optics and aesthetics in relation to political philosophy through the Enlightenment is an exploding field in the humanities as well as the history of science, it is--in keeping with the usual lag time in such matters--relatively undeveloped in legal scholarship, and a veritable black hole in corporate theory. Daniel Boorstin, *The Mysterious Science of Law* 85-105 (1941) provides a brief overview of Blackstone's aesthetics in relation to the later Romantic categories of the beautiful and the sublime, but much work remains to be done. Wilfrid Prest's forthcoming full-length study of Blackstone promises to provide an important analysis of this theme. See Wilfrid Prest, *Blackstone as Architect: Constructing the Commentaries* (forthcoming 2003) (manuscript on file with author).

[FN101]. See generally David C. Lindberg, *Theories of Vision from al-Kindi to Kepler* (1976) (surveying optics theories through the sixteenth century). For studies of optics in later periods and its relation to broader intellectual trends, see, for example, Jonathan Crary, *Suspensions of Perception* (1999); Jonathan Crary, *Techniques of the Observer* (1990); and Barbara Maria Stafford, *Body Criticism: Imaging the Unseen in Enlightenment Art and Medicine* (1991).

[FN102]. Berhard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurality and the Reconfiguration of American Legal Discourse*, 16 *Cardozo L. Rev.* 229, 259 (1994).

[FN103]. The works of Barbara Maria Stafford, cited throughout this article, discuss this theme at length. See also Mark Taylor & Esa Saarinen, *Imagologies* 4 (1994) (“[T]he fragmentary has become a psycho-socio-cultural condition.”).

[FN104]. G.W. Leibniz, *Dissertatio de Arte Combinatoria* (1666), reprinted in 4 *Die Philosophischen Schriften von Gottfried Wilhelm Leibniz* 27 (C.J. Gerhardt ed., 1960). For a summary discussion of Leibniz's view of unity, complexity, situs, and compositio, see *Id.* at 30-31 and 35-39; see also Stafford, *supra* note 46, at 120-31.

[FN105]. “In less than three hundred years the social institution connoted by the words ‘company’ and ‘corporation’ has undergone mutations in form and application....” C.A. Cooke, *Corporation, Trust, Company: An Essay in Legal History* 7 (1951).

[FN106]. See Alfred F. Conard, *Cook and the Corporate Shareholder: A Belated Review of William W. Cook's*

[Publications on Corporations, 93 Mich. L. Rev. 1724, 1726 \(1995\)](#); see also Cooke, *supra* note 105, at 51 (“The grant of the privileges of incorporation was not a grant for private gain; it was, in theory at least, a grant for public benefit.”). This view continued through Blackstone's day. It also characterized the American corporation through the early nineteenth century. See Ronald E. Seavoy, *The Origins of the American Business Corporation, 1784-1855*, at 9-52 (1982).

[FN107]. Fritz Schulz, *Classical Roman Law* 86 (1951).

[FN108]. 1 William Blackstone, *Commentaries on the Laws of England* 457 (Stanley N. Katz ed., Univ. of Chicago Press 1979) (1765). See also Conard, *supra* note 106, at 1726 (“the law was concerned with the relation between the corporation, viewed as a unit, and the state or outsiders with whom the corporation might deal. Angell and Ames paid scarcely any attention to the conflicting interests of a corporation's internal constituents--its members and its managers.”).

[FN109]. Cf. Interview with Christopher Hitchens, *Washington Journal* (C-SPAN television broadcast, Nov. 10, 2001) (Remarking that “there is no such place as Oxford University,” only walled colleges in town.)

[FN110]. See the description of Terry Eagleton's study of Nietzsche's perspectival aesthetics in Terry Eagleton, *The Ideology of the Aesthetic* 234-61 (1990), as well as Stafford, *Visual Analogy*, *supra* note 46, at 120-31. Neither discusses the university as a transformative interplay of surfaces, but the careful reader will see the connection.

[FN111]. The following account is adapted from Manlio Bellomo, *The Common Legal Past of Europe, 1000-1800*, at 112-25 (Lydia G. Cochrane trans., 1995); Harold J. Ber-man, *Law and Revolution: The Formation of the Western Legal Tradition* 123-31 (1983); Peter Stein, *Roman Law in European History* 52-54 (1999). The theoretical interpretation of the basic elements is, of course, my own.

[FN112]. See the discussions of composition in Michael Baxandall, *Giotto and the Orators: Humanist Observers of Painting in Italy and the Discovery of Pictorial Composition, 1350-1450*, at 129-39 (1971); Kennedy, *supra* note 46, *passim*.

[FN113]. For a leading model of artificial memory studied in the twelfth century, see *Rhetorica Ad Herennium* 207-25 (Harry Caplan trans., Harvard Univ. Press 1954).

[FN114]. Frances A. Yates, *The Art of Memory* 93 (1966).

[FN115]. Echoing Gelernter, *Mirror Worlds*, *supra* note 8, I use the term “mirror city” here to reflect the context from which this sense of corporate identity emerged: as a visual counterpoint within city-states and empire.

[FN116]. For the classic description of rhetoric--legal and otherwise--as a “knack” (*tribê*), not an “art” (*technê*), see Plato, *Gorgias* 463b.

[FN117]. Erwin Panofsky, *Renaissance and Renascences in Western Art* 15-31 (1960) (relating the revival of rhetoric and Roman law to the identification of “Disegno” as the father of the fine arts).

[FN118]. Sherry Turkle, *Life on the Screen: Identity in the Age of the Internet* (1995).

[FN119]. Henri LeFebvre, *The Production of Space* 255 (Donald Nicholson-Smith trans., Blackwell 1991) (1974).

[FN120]. For useful discussions of the evolving Western understanding of negation, dynamic systems, and infinity, albeit without an attempt to relate them to the organizational forms--church and university--with which the architects of intellectual change were most familiar, see generally J.V. Field, *The Invention of Infinity: Mathematics and Art in the Renaissance* (1997); Robert Kaplan, *The Nothing That is: A Natural History of Zero* (1999); Alexandre Koyre, *From the Closed World to the Infinite Universe* (1957); Arthur O. Lovejoy, *The Great Chain of Being* (reprint 1998); Eli Maor, *To Infinity and Beyond: A Cultural History of the Infinite* (1987); Otto Mayr, *Authority, Liberty & Automatic Machinery in Early Modern Europe* (1986); and Charles Seife, *Zero: The Biography of a Dangerous Idea* (2000). Ingrid Rowland, *The Culture of the High Renaissance: Ancients and Moderns in Sixteenth-Century Rome* (1998) is a useful study of organizations, intellect, and culture in the Renaissance. Alfred W. Crosby, *The Measure of Reality: Quantification and Western Society, 1250-1600* (1997) is also quite helpful. Joel Kaye, *Economy and Nature in the Fourteenth Century: Money, Market Exchange, and the Emergence of Scientific Thought* (Cambridge Stud. in Medieval Life & Thought, 4th Ser. No. 35, 1998) is an excellent study of university finance and the early evolution of dynamic systems theory. It is the sort of broad-based intellectual and institutional theory that nonprofit theorists should be doing. See also Bernhard Grossfeld, *Lawyers and Accountants: A Semiotic Competition*, 36 *Wake Forest L. Rev.* 167 (2001) (relating corporate form to the rise of modern accounting); Brian Tierney, *The Foundations of Conciliar Theory* 97-101, 240-47 (1995) (highlighting the role of decentralized networks in the rise of corporate theory).

[FN121]. Caroline Walker Bynum, *Metamorphosis and Identity* (2001) is an excellent discussion of this phenomenon, though the relation of metamorphosis as a trope in literature, folklore, and scholarship to the sense of corporate identity as a visibly "blank form of legal thought" is one she does not explore. For "blank form" and the plasticity of corporate identity, see Frederick Pollock & Frederick William Maitland, *The History of English Law Before the Time of Edward I* 469 (Cambridge Univ. Press 1968) (1898). Laura Otis, *Networking: Communicating with Bodies and Machines in the Nineteenth Century* (2001) is helpful for placing this discussion--as well as the idea of law as a "seamless web"--in the context of nineteenth-century intellectual history.

[FN122]. Sanford Kwitner, *Architectures of Time: Toward a Theory of the Event in Modernist Culture* 15-17 (2001).

[FN123]. In this regard legal historian Brian Tierney's scrupulous study of medieval legal texts understates the direct links between late medieval corporatism and the countercultural impact of the emerging nation-state and the Protestant Reformation. See Tierney, *supra* note 121, at 240-47. The smoking gun lies not so much in textual references as in the perceptible continuity of compositional force among cathedral space, the networked monastery, multi-point perspective, and the idea of a corporate identity beyond state control and the allocation of profits among individuals. The Reformation provides an ideal study in the dynamics of information design. For example, the widespread sale of indulgences turned relations of exchange into the focus of religious identity, changing Church identity from a multidimensional form beyond individuals, property, and contract to a straightforward commercial point-to-point relation.

[FN124]. 1 Blackstone, *supra* note 108, at 462.

[FN125]. *Id.* at 463.

[FN126]. *Id.* at 458.

[FN127]. 1 Blackstone, *supra* note 108, at 458.

[FN128]. St. Paul's was Christopher Wren's masterwork, deemed finished in 1711 upon Wren's final payment

from Parliament. Judith Dupre, *Churches* 68 (2001).

[FN129]. *Id.* at 68.

[FN130]. Blackstone's related image of monarchs united in time also mirrors the visual space within an English cathedral--most notably, Westminster Abbey, where the congregant can view lifelike images of royalty and church leaders who have been entombed within the church. *Id.* at 50-51.

[FN131]. Barbara Maria Stafford & Francis Terpak, *Devices of Wonder: From the World in a Box to Images on a Screen* 80-81, 303-13 (2001) offers a well-illustrated introduction to the camera obscura. *Id.* at 256-66 provides a brief history of *miroirs de sorceire* and the infinitely repeating "perpetual gallery" optical box. For a general discussion of the camera obscura and "magic mirror" through the nineteenth century--with pictures of magic mirrors in England and at the time Oliver Wendell Holmes made his famous analogy of law as a "magic mirror," see Jack Wilgus & Beverly Wilgus, *The Magic Mirror of Life: An Appreciation of the Camera Obscura*, at [http:// brightbytes.com/cosite/what.html](http://brightbytes.com/cosite/what.html) (last modified Dec. 2001). The resonance of the camera obscura is not conceptually separate from projective unity in architectural space; for the relation of perspective theaters and perspectival design in religious architecture, see the discussion of Brunelleschi's Dome in Stafford & Terpak, *supra*. See also Hubert Damisch, *The Origin of Perspective* (John Goodman trans., MIT Press 1994) (1987); Field, *supra* note 120; Martin Kemp, *The Science of Art: Optical Themes in Western Art from Brunelleschi to Seurat* (1990); and other standard works on the origins of perspective. Finally, see the discussion of Holmes, form, and photographic imagery in Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Anal-ogy*, 10 *Yale J.L. & Human.* 1 (1998).

[FN132]. The image of "corporate" order in art criticism is not uncommon. See, for example, the discussion of Giotto in Thomas Puttfarcken, *The Discovery of Pictorial Composition: Theories of Visual Order in Painting 1400-1800*, at 10 (2000).

[FN133]. G.J. Whitrow, *Time in History: Views of Time from Prehistory to the Present* 172 (1988).

[FN134]. Henri Bergson, *Matter and Memory* 226-33 (N.M. Paul & W.S. Palmer trans., Zone Books 1988) (1908); Deleuze, *Fold*, *supra* note 46, at 80-82, 105.

[FN135]. Tufte, *supra* note 72, at 12-13.

[FN136]. There is a vast literature on perspective. For an accessible explanation of its more technical aspects, see Arnheim, *Art and Visual Perception*, *supra* note 90, at 282-98; Kemp, *supra* note 131; John Montague, *Basic Perspective Drawing: A Visual Approach* (1998); and Ian Stewart, *Flatterland* 109-11 (2001). Panofsky, *supra* note 46, is a classic study of the resonance of perspective outside artistic technique. James Elkins, *The Poetics of Perspective* (1994) is a good counterweight to interpretive trends in scholarship post-Panofsky.

[FN137]. See Elkins, *supra* note 12; James Elkins, *How to Use Your Eyes* 92-99 (2000).

[FN138]. Elkins, *supra* note 137, at 99.

[FN139]. Leon Battista Alberti, *De Pictura*, in *On Painting and On Sculpture: The Latin Texts of De Pictura and De Statua* (Cecil Grayson ed. & trans., 1972).

[FN140]. I am aware that this description of perspective as a multipoint active field differs from the one commonly proffered by legal theorists, but art historians have amply demonstrated that the popular conception of

perspective is oversimplified and incorrect. For an example of current understanding in legal theory, see Robert E. Rodes, Jr., [Non-Representational Juris-prudence: A Centennial Reading of "The Path of the Law,"](#) 42 *Am. J. Juris.* 263, 275 (“Classical jurisprudence, like perspective painting, insisted on a single, unified point of view. Whether you study law from Blackstone's Commentaries or Langdell's casebooks, it is a system of rules: do this, don't do that, and your position is that of a detached observer scrutinizing the rules in some orderly fashion.”). But see Lew Andrews, *Story and Space in Renaissance Art: The Rebirth of Continuous Narrative* (1998); Elkins, *supra* note 136; and Kemp, *supra* note 131, for studies of perspective that explore its dynamic complexity.

[FN141]. Alberti, *supra* note 139, at 44-45.

[FN142]. Leon Battista Alberti, *On Painting* 61 (Martin Kemp ed. & Cecil Grayson trans., 1991).

[FN143]. Alberti, *supra* note 139, at 54 (my translation).

[FN144]. Alberti, *supra* note 142, at 60.

[FN145]. *Id.*

[FN146]. G.W. Leibniz, *Philosophical Texts* 275 (R.S. Woolhouse & Richard Francks trans., 1998).

[FN147]. For a good overview of anamorphosis in western art and optics, see Stafford & Terpak, *supra* note 121, at 14, 28-29, 235-47, 375-78. The tension between reality and perspectival projection was a common theme in philosophy and literature through the late eighteenth century, with evident connections to broader themes of social unity and isolation. One of the more noteworthy parallels to Blackstone's corporate college is Shakespeare's use of anamorphic contrast in *Richard II* as a metaphor of political unity and dissolution. In perhaps the most famous scene from the play (and one with disturbing resonance today), Bushy, a royal advisor, dismisses the Queen's unsettling sense that the things she sees in the kingdom are coalescing into some imminent “unborn sorrow.” Bushy chides her with a reference to the anamorphic style:

For sorrow's eye, glazed with blinding tears,
Divides one thing entire to many objects,
Like perspectives which, rightly gaz'd upon,
Show nothing but confusion-ey'd awry,
Distinguish form.

William Shakespeare, *Richard II* act II, sc. 2. He argues that the image of form created in perspective is just an illusion, “shapes of grief” composed of “mere shadows”; to be concerned over such a *trompe l'oeil* is to see the world “with false sorrow's eye, / Which for things true weeps things imaginary.” This ambiguity toward perspectival effects was not uncommon. In Shakespeare and elsewhere, descriptions of perspectival effect portray it as unnatural, disturbing, and dizzying, yet as the play unfolds, we see that this unifying image more accurately represents the royal threat, with the royal advisor himself among the casualties.

[FN148]. See <http://www.nationalgallery.org.uk/webmedia/images/13/NG1314.jpg>. See also *Art of Anamorphosis*, at <http://www.anamorphosis.com>, which contains an image and analysis of Holbein's famous painting.

[FN149]. 1 Blackstone, *supra* note 108, at 456.

[FN150]. *Id.*

[FN151]. *Id.* at 464.

[FN152]. Ludwig Wittgenstein, *Philosophical Investigations* 121 (G.E.M. Anscombe trans., Macmillan 1958) (1953). For a discussion of Wittgenstein's view of perspectival painting relative to Renaissance models, see Damisch, *supra* note 131, at 33-35, 45-46, 268-69.

[FN153]. Wittgenstein, *supra* note 152, at 121.

[FN154]. Tufte, *supra* note 72, at 35.

[FN155]. The effect is similar to that of the image of a secularizing commercial culture in Piero della Francesca's *Flagellation of Christ*, where the perspectival effect on the left side of the painting sends Christ into the deep background, while the disproportional placement of a merchant and aristocrat on the right break the perspectival unity to capture attention and the frame. In this I would disagree with Puttfarcken, *supra* note 132, at 40, that "[w]e know these people cannot be more important than Christ." The picture is conceptually complex; Christ defies state and legal structure even as the merchants and aristocrats dominate the whole. The motif of a secularizing urban culture is not out of keeping with the general tenor of Renaissance urban culture in Italy.

[FN156]. The presentism of commercial business is a feature that Rod Serling captured well in his prize-winning drama, *Patterns*. In it, a junior executive derides the CEO for his attempts to push out a failing senior manager. In response to the junior executive's protestation that "It was his business, too!", the CEO replies, "It is no one's business! It belongs only to the best! To those who can control it. Keep it growing, producing--keep it alive! It belongs to us right now! In the future, to whoever can give it more." *Kraft Television Theater: Patterns* (NBC television broadcast, Jan. 12, 1955). For Blackstone, the eternal flux of the present unites in perspectival form; for Serling's CEO, a manager connects to the corporation for but a flicker-ing instant, then is gone.

[FN157]. See, e.g., Louis Lazare, *New Gap Ads Ring True*, *Chi. Sun-Times*, Nov. 16, 2001, at 69.

[FN158]. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. Fin. Econ.* 305, 310-11 (1976).

[FN159]. Dissanayake, *supra* note 27, at 139.

[FN160]. *Id.* For a concise overview of Dissanayake's theory, see Caleb Crain, *The Artistic Animal*, *Lingua Franca*, Oct. 2001, <http://www.linguafranca.com/print/0110/cover.html>.

[FN161]. See, for example, the aesthetic argument of Paul Costonis, *Icons and Aliens: Law, Aesthetics, and Environmental Change* (1989) and the thesis that we are moving from a visual to an oral culture in Hibbitts, *supra* note 45. Most recently, a new essay by Pierre Schlag extends this tradition in legal scholarship even further by arguing that legal argument can be classified in terms of aesthetic categories, and an article by Neal Katyal has examined the practical use of architecture as a tool in fighting crime. See Pierre Schlag, *The Aesthetics of American Law*, 115 *Harv. L. Rev.* 1047 (2002); Neal Kumar Katyal, *Architecture as Crime Control*, 111 *Yale L.J.* 1039 (2002).

[FN162]. Leon Battista Alberti, *On the Art of Building in Ten Books* 302 (Joseph Rykwert et al. trans., 1988) (1486).

[FN163]. Liddell & Scott, *A Greek-English Lexicon* 482 (1968).

[FN164]. Martin Heidegger, *The Age of the World Picture*, in *The Question Concerning Technology and Other Essays* 128-30 (William Lovitt trans., 1977).

[FN165]. Heidegger, quoted in Stafford, *Visual Analogy*, supra note 46, at 68.

[FN166]. Elkins, supra note 136, contains an excellent and nuanced critique of Lacan's objet petit a, which has wielded far more influence as an analysis of linear perspective than it might warrant, given the technical limits of Lacan's explanation of the phenomenon. See Jacques Lacan, *Of the Gaze as Petit Objet a*, in *The Four Fundamental Concepts of Psycho-analysis* 67 (Alan Sheridan trans., 1998).

[FN167]. See El Lissitzky, A. and *Pangeometry*, reprinted in Sophie Lissitsky-Koppers, *El Lissitzky: Life, Letters, Texts* 348-54 (Helene Aldwinckle trans., 1968) (1967). For a more accessible study of El Lissitzky, see the comprehensive Getty web exhibit *Monuments of the Future: Designs by El Lissitzky*, at <http://www.getty.edu/research/tools/digital/lissitzky/index2.html> (last visited May 8, 2002).

[FN168]. Fortunately, the essential Eisenstein has recently been collected in Sergei Eisenstein, *Eisenstein Reader* (Richard Taylor ed., Richard Taylor & William Powell trans., 1998). Eisenstein is perhaps most famous in the English-speaking world for his theory of filmic montage. For decades Eisenstein was an idiosyncratic visionary; now we see his philosophy of film every day on MTV.

[FN169]. M. Christine Boyer, *The City of Collective Memory: Its Historical Imagery and Architectural Entertainments* (1994). The postmodern themes of law as text and narrative have their place within this model of non-profit form as composing a scene, but only as part, not the whole.

[FN170]. Stafford, *Visual Analogy*, supra note 46, at 125.

[FN171]. Stafford & Terpak, supra note 121, at 257.

[FN172]. Stafford, supra note 101, at 35.

[FN173]. Barbara Maria Stafford, *Artful Science: Enlightenment, Entertainment, and the Eclipse of Visual Education* 229 (1994) is the source of this crisp summary of Gellner's argument.

[FN174]. Thomas Hobbes, *Leviathan* (Richard Tuck ed., rev. student ed. 1996) (1660); see also Stafford, supra note 101, at 378-79.

[FN175]. See John Locke, *An Essay Concerning Human Understanding* 493 (Roger Woolhouse ed., 1993). Mayr, supra note 120, contains a concise and perceptive analysis of Locke's clock as an epistemological model, as well as the dynamic systems counterpoint implicit in Blackstone's visual sense of political interaction.

[FN176]. Immanuel Kant, *The Conflict of the Faculties* (Mary J. Gregor trans., Abaris Books 1979) (1798). See Taylor, supra note 8, at 239-51, for an instructive discussion of Kant's model and its impact on the culture of modern scholarship.

[FN177]. Taylor, supra note 8, at 240.

[FN178]. Id. at 241.

[FN179]. Id. at 242.

[FN180]. Id. at 243. The cultural divide between "high" and "low" culture is the reverse mirror image of Kant's university, yet one that reflects the bedrock assumptions of his aesthetic judgment. See Guyora Binder & Robert Weisberg, *Literary Criticisms of Law* (2000) for a concise summary of the Kantian aesthetic, which con-

tinues to shape nonprofit interpretation in subtle yet important ways.

[FN181]. The Enlightenment heritage of Protestant fundamentalism is analyzed in George M. Marsden, *Fundamentalism and American Culture* (1980).

[FN182]. Mau, *supra* note 27, at 45.

[FN183]. Compare Howard S. Miller, *The Legal Foundations of American Philanthropy* (1961), in which the American rejection of things British is a recurring theme.

[FN184]. For the interconnection of technological network imagery with religious, ethical, and literary values, see Otis, *supra* note 121, and Taylor, *supra* note 8. The virtually simultaneous publication of these two works indicates the emergence of an analytical trend.

[FN185]. For a good summary of the state of current corporate scholarship, see Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 *Geo. L.J.* 439 (2001).

[FN186]. Otis, *supra* note 121, at 49.

[FN187]. In the course of writing this article I took the occasion to visit a number of these tours, including (but not limited to) the model Hershey factory, the Jelly Belly factory, and perhaps the most skillfully designed of all, the new Jack Daniels museum in Tennessee. The Jack Daniels experience epitomizes the noncommercial strategy in modern corporate design. Prominently advertised is the fact that the factory has received certification as a federal historic site. The theme of the tour and display centers on family spirit and a slow, non-rushed and noncompetitive attitude toward production and time. The main visitor center is a museum with ample free space and historical information. The gift shop is small, minimal and located in a separate room well off from the museum display. Items offered for sale are limited to a few inexpensive black-and-white postcards and mail-order liquor; to buy t-shirts, books, and other branded items, a visitor has to leave the wooded campus to go into the local town of Lynchburg, where commercial shops sell souvenir merchandise. To get a flavor of the experience, see the Jack Daniel's Distillery Tour, at <http://www.jackdaniels.com/oldno7/distill.asp> (last visited May 8, 2002).

[FN188]. See Roland Marchand, *Creating the Corporate Soul* 1 (1997) (discussing the relationship between the rise of corporate public relations and perceived corporate legitimacy in law); see also Ronald K.L. Collins & David M. Skover, *Commerce and Communication*, 71 *Tex. L. Rev.* 697 (1993).

[FN189]. Koolhaas, *supra* note 31.

[FN190]. *Id.*

[FN191]. *Id.*

[FN192]. *Id.*

[FN193]. *Id.*

[FN194]. *Id.*

[FN195]. Hansmann, *supra* note 5, at 61.

[FN196]. I am referring here to the public support tests of [section 509\(a\)\(1\) and \(2\) of the Internal Revenue Code](#). Explaining these frustratingly abstruse rules would be beyond the scope of this article, if not beyond the patience of most readers. Those interested should consult Bruce Hopkins & Jody Blazek, *Private Foundations: Tax Law and Compliance* (1997). For a more concise distillation of the experience of working through the tests, see the first line of Alan Ginsberg's *Howl*: "I saw the best minds of my generation destroyed by madness...."

[FN197]. See Hansmann, *supra* note 42, at 580-99.

[FN198]. Perhaps the most prominent example of charitable support to business that is now taking place is in New York City, where charities are giving substantial assistance to Battery Park businesses devastated by the 9/11 attack. See also [Rev. Rul. 74-587, 1974-2 C.B. 162](#) (recognizing tax exemption of community development organizations); *Tres. Reg. 53.4944-3* (1972) (providing examples of program-related investments that do not jeopardize exempt purposes of a private foundation, such as grants to a "small business enterprise" in a rural or "deteriorated urban area" that is "owned by members of an economically disadvantaged minority group").

[FN199]. See Alberti, *supra* note 142.

[FN200]. Koolhaas & Mau, *supra* note 46, at 495.

[FN201]. *Id.* at 502.

[FN202]. [A&M Records, Inc. v. Napster, 114 F. Supp. 2d 896, 912 \(N.D. Cal. 2000\)](#).

[FN203]. *Id.* at 913. Yale Law School Professor John Simon offers an interesting illustration of this point. He recounted to the author a phone poll conducted by the Yale Program on Nonprofit Organizations in which New Haven residents were asked whether Yale University is a nonprofit or for-profit. The response was overwhelmingly "for-profit," and the reason--"[B]ecause it is so big." Discussion with John G. Simon, Augustus E. Lines Professor of Law, Yale Law School, in New Haven, Conn. (Dec. 19, 2001).

[FN204]. *Petro-Baubles*, *Wall St. J.*, Oct. 18, 2001, at A24.

[FN205]. *Id.*

[FN206]. The Red Cross is conspicuously learning this lesson: it advertised its reversal of earlier controversial decisions regarding the expenditure of funds and on December 27, 2001 announced that former Senator George Mitchell would oversee its distributions to victims' families.

[FN207]. For the evolution of U.S. nonprofit organizations law, see, for example, Robert H. Bremner, *American Philanthropy* (1988); Bruce Hopkins, *The Law of Tax Exempt Organizations* (1998); James J. Fishman, *The Development of Nonprofit Corporation Law*, 34 *Emory L.J.* 619 (1985); and Hansmann, *supra* note 17.

[FN208]. See, e.g., John A. Edie, *Congress and Private Foundations: An Historical Analysis* (1987).

[FN209]. The regional dimension of the origin of the private foundation rules is a theme deserving of its own book. Historians of philanthropy and nonprofit law have yet to examine in sufficient depth the Tax Reform Act for what it is, a crossroads of the cultural forces that would shape business, charity, and electoral politics through the beginning of the next century, most notably the development of campaign finance reform and the oft-discussed Red/Blue split that shaped the 2000 elections. This article is not the place for me to document this thesis in detail, but substantial support for it can be found in Bernard D. Reams, *Tax Reform--1969: A Legislat-*

ive History of the Tax Reform Act of 1969 (Public Law 91-172) with Re-lated Amendments (1991). See especially 2 *id.*

[FN210]. 60 Minutes: The Candy Man (CBS television broadcast, Dec. 9, 2001).

[FN211]. Chris Adams, Laboratory Hybrids, *Wall St. J.*, Jan. 30, 2001, at A1.

[FN212]. Harvey Lipman & Elizabeth Schwinn, The Business of Charity, *Chron. Philanthropy*, Oct. 18, 2001, at 25.

[FN213]. "Activities of producing or distributing goods or performing services from which a particular amount of gross income is derived do not lose identity as trade or business merely because they are carried on within a larger aggregate of similar activities or within a larger complex of other endeavors which may ... be related to the exempt purposes of the organization." *Treas. Reg. § 1.513-1(b)* (as amended in 1983).

[FN214]. *Treas. Reg. § 1.513-1(d)* (as amended in 1983).

[FN215]. *United States v. Am. Coll. of Physicians*, 475 U.S. 834, 841 (1986).

[FN216]. 26 U.S.C. § 513(c) (1994).

[FN217]. *Rev. Rul. 73-105*, 1973-1 C.B. 264.

[FN218]. *Tech. Adv. Mem. 97-20-002* (Dec. 26, 1996).

[FN219]. *Id.*

[FN220]. *Id.*

[FN221]. Susan Ruth & Charles Barrett, UBIT: Current Developments, in *IRS Continuing Professional Education Text for FY 1999* (1998), <http://www.irs.gov/pub/irs-utl/topicn.pdf>.

[FN222]. Jed Perl, Paint It Black, *New Republic Online*, Nov. 20, 2001, at <http://www.newrepublic.com/artnotes/perl112001.html>.

[FN223]. *Tech. Adv. Mem. 91-47-007*.

[FN224]. 26 U.S.C. 513(i)(2)(A) (Supp. V 1999).

[FN225]. *Treas. Reg. § 1.513-4(c)(2)(iv)* (as amended in 2002).

[FN226]. *Treas. Reg. § 1.513-4(c)(2)(v)* (as amended in 2002).

[FN227]. *Mau*, *supra* note 27, at 45.

[FN228]. See the discussion of UBIT exclusions of passive income in *Sierra Club, Inc. v. Comm'r*, 86 F.3d 1526 (9th Cir. 1996).

[FN229]. See 26 U.S.C. § 509 (1994).

[FN230]. The relation between intuition and analysis is a prominent theme in Hogarth, *supra* note 8; Gelernter,

Mirror Worlds, *supra* note 8; and Simon, *supra* note 8.

[FN231]. See the discussion of the constructivist movement in Philip B. Meggs, *A History of Graphic Design* 262-64, 274-77 (3d. 1998) and its paradigmatic extension in Paul Rand, *Design, Form and Chaos* (1993); Rand, *supra* note 46; and Paul Rand, *From Lascaux to Brooklyn* (1996). Taylor, *supra* note 8, at 233-70, offers an insightful application of this theme to educational design, while Gelernter, *Machine Beauty*, *supra* note 8, provides an excellent discussion of beauty and function in technology.

[FN232]. See, for example, Dissanayake, *supra* note 27; Virginia Postrel, *The Future and Its Enemies: The Growing Conflict over Creativity, Enterprise and Pro-gress* (1999); E.O. Wilson, *Consilience: The Unity of Knowledge* (1999) for insightful discussions of creativity, dynamic complexity, and emergent unity in human evolution.

[FN233]. Simon, *supra* note 8, at 113; see also Gelernter, *Mirror Worlds*, *supra* note 8; Hogarth, *supra* note 8, for extensive discussions of intuition training.

[FN234]. The March 21, 2002, issue of the *Chronicle of Philanthropy* illustrates the shattering of the nonprofit image that is resulting from the atrophy of intuitive nonprofit design among nonprofit leaders. The cover is a lengthy donor letter filled with legal boilerplate conditioning the gift-- generosity broken down to the form of contract.

[FN235]. David Gelernter's discussion of "deep beauty" in academic discourse and computer design was helpful in framing this paragraph. See Gelernter, *Machine Beauty*, *supra* note 8, at 1-29; see also Dissanayake, *supra* note 27.

[FN236]. Reinhold Niebuhr, *The Irony of American History* 159 (1952).

[FN237]. *Id.* at 161. As Niebuhr summarized his thesis, "[D]reams of bringing the whole of human history under the control of the human will are ironically refuted by the fact that no group of idealists can easily move the pattern of history toward the desired goal of peace and justice. The recalcitrant forces in the historical drama have a power and persistence beyond our reckoning." *Id.* at 2-3.

[FN238]. See Leibniz, *supra* note 104, at 58-60 (providing a rhetorical analysis of jurisprudence as a combinatorial art that we see expressed in the complex social forms of civic identity).

[FN239]. Aristotle, *Rhetoric* 1355b (my translation).

[FN240]. See the discussion of empathic projection in Lakoff & Johnson, *supra* note 53, at 551-68.

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