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Sustainable Business

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INTRODUCTION

In recent years lawyers have become increasingly active in the field of social enterprise and social entrepreneurship, wherein organizations and people seek novel, revenue-generating solutions to social problems.[1] This is nowhere more evident than in the development of new legal structures for for-profit social enterprises.[2]

In this emerging field, "sustainability" is perhaps the most prized quality, as well as the most versatile construct. The archetypal social entrepreneur is one who builds a dual-mission business—one with both profit and a nonpecuniary purpose—that embodies sustainability. A social enterprise[3] can be sustainable in at least two senses. First, it can be *financially* or operationally sustainable: it engages in commercial activity that generates enough income to support a substantial amount of mission-related activity, and ideally does so in a manner that directly advances or is tied to its mission. Second, it can be *mission* sustainable: its legal structures are designed to ensure that it will vigorously advance its nonpecuniary purpose for as long as necessary and without unduly subordinating this purpose to the pursuit of profit. A successful social enterprise will be sustainable in both senses and, as explained below, one kind of sustainability can reinforce the other.

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1 *See, e.g.*, Wolfgang Bielefeld, *Social Entrepreneurship and Social Enterprise*, *in* 1 21ST CENTURY MANAGEMENT: A REFERENCE HANDBOOK 22 (Charles Wankel ed., 2008) (discussing growing interest in topics of social entrepreneurship and social enterprise).

2 *See, e.g.*, MARC J. LANE, SOCIAL ENTERPRISE: EMPOWERING MISSION-DRIVEN ENTREPRENEURS (2011) (describing special legal considerations lawyers need to know when advising for-profit and nonprofit entities that engage in socially conscious or progressive activities); Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337 (2009); Robert A. Wexler & David A. Levitt, *Using New Hybrid Legal Forms: Three Case Studies, Four Important Questions, and a Bunch of Analysis*, 69 EXEMPT ORG. TAX REV. 63 (2012); Allen R. Bromberger, Social Enterprise: A Lawyer's Perspective (2008) (unpublished manuscript), *available at* http://www.perlmanandperlman.com/publications/articles/2008/socialenterprise.pdf.

3 Although the term *social enterprise* can include both nonprofit and for-profit entities, we use it exclusively to refer to for-profit entities. *See* Robert A. Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 59 (2010).

A social enterprise can also be sustainable in the sense that sustainability *is* its mission—it embraces the pursuit of environmental sustainability as a defining nonpecuniary purpose. Such entities—often called "sustainable businesses"—espouse the triple goals of "[p]eople and planet and profit."[4] More ambitiously, sustainable businesses embrace the larger sustainable development agenda, which seeks environmental sustainability and global social justice, and asserts an inherent connection between the two. A sustainable business's commitment to these goals is reflected in its performance criteria: the celebrated triple bottom line and its three dimensions of economic, social, and environmental value creation.[5]

This Essay contributes to debates over new legal structures for social enterprises and sustainable businesses by analyzing the multiple meanings of sustainability in these contexts and identifying unexplored conflicts. It differentiates sustainable business by virtue of the specificity and breadth of its nonpecuniary purposes: social equity and environmental sustainability. It also identifies affinities between various new organizational forms and the archetypal social enterprise and sustainable business. We conclude that these organizations, although commonly lumped together, are designed to address problems of vastly different magnitudes.

Part I examines financial, or operational, sustainability in social enterprises. Whereas the generation of financial and social value is ideally indivisible, in practice social value is likely to rely upon cross-subsidization. Part II examines mission sustainability and assesses claims that new legal structures can help social enterprises maintain their missions in the face of threats to favor profit maximization. Part III examines the triple bottom line in the context of sustainable development and corporate sustainability, and evaluates the suitability of the new organizational forms for triple-bottom-line businesses. The conclusion reasserts the important distinctions and inherent tensions between social enterprise as a double-bottom-line business and sustainable business as a triple-bottom-line business.

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4 PETER FISK, PEOPLE, PLANET, PROFIT: HOW TO EMBRACE SUSTAINABILITY FOR INNOVATION AND BUSINESS GROWTH 8 (2010).

5 *See, e.g.*, JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS (1997); ANDREW W. SAVITZ WITH KARL WEBER, THE TRIPLE BOTTOM LINE: HOW TODAY'S BEST-RUN COMPANIES ARE ACHIEVING ECONOMIC, SOCIAL, AND ENVIRONMENTAL SUCCESS—AND HOW YOU CAN TOO (2006).

I. FINANCIAL/OPERATIONAL SUSTAINABILITY

According to the Skoll Foundation, "Sustainability for a social entrepreneurial organization is the ability to achieve and sustain impact for as long as the intervention is needed."[6] The Skoll Foundation's approach actually entails two distinct kinds of sustainability as is made clear in the criteria for a Skoll Award, where the "sustainability" criterion requires that organizations have a "clear, compelling plan for expanding impact and achieving long-term financial and operational sustainability."[7] Financial or operational sustainability is achieved when the hybrid organization has financial inputs that exceed financial outputs.[8] Clearly organizations must have financial inputs that equal or exceed their outputs in order to survive. This first-order financial imperative is often the most fateful for the budding social enterprise or social entrepreneur.[9] The second kind of sustainability embedded in the Skoll Foundation's approach, mission sustainability, is whether, assuming the hybrid organization is surviving, the mission itself is being adequately pursued (and

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6 *Skoll Awards: Glossary*, SKOLL FOUND., http://www.skollfoundation.org/about/skoll-awards/skoll-award-for-social-entrepreneurship-glossary/ (last visited May 11, 2013). Interestingly, the Skoll Foundation's mission is to "drive[] large scale change by investing in, connecting and celebrating social entrepreneurs and the innovators who help them solve the world's most pressing problems." *Mission*, SKOLL FOUND., http://www.skollfoundation.org/about/mission/ (last visited May 11, 2013). Its vision, however, "is to live in a sustainable world of peace and prosperity." *Id.*

7 *Skoll Awards Overview*, SKOLL FOUND., http://www.skollfoundation.org/about/skoll-awards/ (last visited May 11, 2013).

8 *See, e.g.*, William Foster, *Money to Grow On*, STAN. SOC. INNOVATION REV., Fall 2008, at 50, 54 ("The organization has a sustainable funding model. Conventional wisdom says that nonprofits do not have sustainable funding models—that is, they cannot develop predictable, ongoing financial support that covers core operating expenses." (emphasis omitted)); Jim Fruchterman, *For Love or Lucre*, STAN. SOC. INNOVATION REV., Spring 2011, at 42, 42–48 ("Even successful social ventures that reach financial sustainability (break even on an ongoing basis) may never recoup the initial investment."); Peter Kim et al., *Finding Your Funding Model*, STAN. SOC. INNOVATION REV., Fall 2011, at 37, 37–41 (discussing nonprofits seeking financial sustainability); Daniel Stid & Willa Seldon, *Five Ways to Navigate the Fiscal Crisis*, STAN. SOC. INNOVATION REV., Winter 2012, at 37, 37–38 (citing effectiveness as a necessary precondition to financial sustainability); Jim Schorr, *The Holy Grail for Nonprofits*, STAN. SOC. INNOVATION REV., Summer 2011, at 14, 14 (reviewing JEANNE BELL ET AL., NONPROFIT SUSTAINABILITY: MAKING STRATEGIC DECISIONS FOR FINANCIAL VIABILITY (2010)) ("The notion of financial sustainability is something of a holy grail in the nonprofit sector these days. Virtually all nonprofit board members and executives today face financial situations that at best constrain their ability to grow or at worst threaten their very survival. On each of the six nonprofit boards on which I've served in recent years, the topic of financial sustainability has been an ongoing discussion, albeit one that too often finds itself on the back burner.").

9 *See, e.g.*, Christian Seelos & Johanna Mair, *Social Entrepreneurship: The Contribution of Individual Entrepreneurs to Sustainable Development* 1 (Anselmo Rubiralta Ctr. for Globalization & Strategy Ctr. for Bus. in Soc'y, Working Paper No. 553, 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=701181 (noting that "[p]erhaps the greatest challenge" for social entrepreneurs is "to secure external financing, merely to keep their organizations running").

preferably expanded). We examine financial or operational sustainability in this Part, followed by mission sustainability in the next Part.[10]

To clarify our discussion, and why we have separated these two questions, we first distinguish between how lawyers and social entrepreneurs use the term *hybrid*. For lawyers, *hybrid* frequently refers to an entity's organizational form: it denotes a for-profit organization that is intended to pursue one or more social or environmental missions in a distinctively robust way.[11]

A hybrid organization, also known as a "blended enterprise,"[12] has two key features. First, it is a for-profit entity, i.e., it is organized and operated to distribute earnings to equity-owning shareholders. This distinguishes the "hybrid" from nonprofit organizations, which have no equity owners and must use all residual funds to advance their missions. Second, a hybrid organization, while organized as a for-profit entity, has certain features designed to make it advance a social or environmental mission more forcefully than a typical or conventional for-profit business. In this sense, the legal hybrid advances a social or environmental mission in operation more like a charitable nonprofit organization. Yet the hybrid can and may continue to (in fact is intended to) operate like a for-profit entity by distributing profits to owners and investors.

The three new state-supplied forms designed for social enterprises fit this model. The L3C, benefit corporation, and flexible purpose corporation are for-profit, with additional features that give a privileged place to a nonpecuniary

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[10] Both of these concerns are distinct from the question of whether the organization's activities are sustainable in that they will yield a net social or environmental benefit in the long run. That sense includes externalities on both inputs and output measures. An organization could generate net earnings but still be unsustainable in the broader sense as, for example, is thought to be true for resource extraction companies. *But see* Thomas M. Fitzpatrick & Karen Spohn, *A 25th Anniversary Redux of the Simon and Ehrlich Global Sustainability Wager*, 1 J. INT'L BUS. & CULTURAL STUD. 1, 6 (2009) (replicating Ehrlich and Simon's wager for 1990–2005 "demonstrates once again that human ingenuity and market forces respond to scarcity and higher prices through innovation and substitution"); John Tierney, *Betting on the Planet*, N.Y. TIMES, Dec. 2, 1990, § 6 (Magazine), at 52. The reverse is no doubt also true for some organizations, perhaps primarily nonprofits. Many organizations that shut down would claim that although their activities were no longer financially sustainable, in the broader sense they were sustainable because of the net social benefits they generated, albeit in the form of positive externalities they could not capture.

[11] *See, e.g.*, Michael D. Gottesman, Comment, *From Cobblestones to Pavement: The Legal Road Forward for the Creation of Hybrid Social Organizations*, 26 YALE L. & POL'Y REV. 345, 346 (2007); *see also* Dana Brakman Reiser, *Governing and Financing Blended Enterprise*, 85 CHI.-KENT L. REV. 619, 619 (2010).

[12] *See* Brakman Reiser, *supra* note 11, at 619.

purpose. In this vein, the L3C has been described as "a hybrid of a nonprofit and for-profit organization,"[13] and "the for-profit with a nonprofit soul."[14]

For social entrepreneurs, however, the term *hybrid* typically refers to the way in which an organization combines commercial activity and social or environmental engagement, rather than its status as a for-profit, nonprofit, or something in between. The typical hybrid pursues a social (or environmental) mission and relies heavily on commercial revenue to sustain its operations.[15] Nonprofit organizations that fit this description are sometimes called "commercial nonprofits."[16] When applied to commercial nonprofits, the term *hybrid organization* is synonymous with *social enterprise*, which has been described as "simply a relatively new term for what some charities have been doing for years, namely promoting their social purposes through a sustainable business model."[17]

If a social entrepreneur is especially creative and motivated, she may seek innovative ways to integrate or create synergies between the entity's social and commercial activities. A group of researchers recently reported:

> When we talk to entrepreneurs and students about hybrid organizations, a common theme that emerges is what we call the "hybrid ideal." This hypothetical organization is fully integrated—everything it does produces both social value and commercial revenue. This vision has at least two powerful features. In the hybrid ideal, managers do not face a choice between mission and profit, because these aims are integrated in the same strategy. More important, the integration of social and commercial value creation enables a virtuous cycle of profit and reinvestment in the social mission that builds large-scale solutions to social problems.[18]

The value that the hypothetical ideal hybrid generates is "[b]lended" (a concept developed by Jed Emerson); it includes but is not reducible to

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13 Emily Chan, *L3C—Low-Profit Limited Liability Company*, NONPROFIT L. BLOG (July 22, 2008), http://www.nonprofitlawblog.com/home/2008/07/l3c.html.

14 CMTY. WEALTH VENTURES, INC., THE L3C: LOW-PROFIT LIMITED LIABILITY COMPANY RESEARCH BRIEF 1 (2008), *available at* http://www.cof.org/files/Documents/Conferences/LegislativeandRegulatory01.pdf.

15 Julie Battilana et al., *In Search of the Hybrid Ideal*, STAN. SOC. INNOVATION REV., Summer 2012, at 51.

16 Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 840–41 (1980) (internal quotation marks omitted).

17 STEPHEN LLOYD & ALICE FAURE WALKER, CHARITIES, TRADING AND THE LAW 2 (2d ed. 2009).

18 Battilana et al., *supra* note 15, at 52 (footnote omitted).

economic value or social or environmental value.[19] The hybrid's business operation itself contributes to the social or environmental mission, rather than simply generating net profits to be reallocated internally.[20] Put differently, the hybrid is expected to "make" its social value rather than "buy" it through cross-subsidization. The ideal is reflected in the social entrepreneur's mantra that the more goods or services the hybrid produces, the more good it does. In this vision, an entity's financial or operational sustainability and mission sustainability are indivisible;[21] the business model ensures both, and neither can be achieved without the other.

The conventional for-profit corporation achieves financial or operational sustainability as a result of profitable business operations.[22] For those pursuing a single bottom line, this is the only criterion that matters. Traditionally most charities depended on donations to fund their operations, but the recent trend is for them to seek out more earned-income opportunities.[23] Proponents of for-profit social enterprise[24] hope this approach will lead to greater earned income and subsidies alike.[25] To be sure, subsidies here must be understood in a broad sense: employees working for below-market wages because they share the organization's mission and receive a warm glow from its advance; customers paying above-market prices for the same reason; investors accepting a below-market return, and so on. After all, an organization that receives no subsidies of any kind would be difficult to distinguish from a conventional business.

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19 *See* BLENDED VALUE, www.blendedvalue.org (last visited May 11, 2013).

20 *See, e.g.*, Battilana et al., *supra* note 15, at 53 (noting that "[w]hen consumption yields both revenue and social value, customers and beneficiaries may become indistinguishable" and if they are indistinguishable "growth of sales and fulfillment of mission are inseparable").

21 Christine Hurt captured this idea in a blog post. Christine Hurt, *CSR v. Social Entrepreneurship*, CONGLOMERATE (Apr. 16, 2012), http://www.theconglomerate.org/2012/04/csr-v-social-entrepreneurship.html ("CSR focuses on companies that make widgets, but who do so in an enlightened way; [s]ocial entrepreneurship envisions companies that make a completely different kind of widget." (emphasis omitted)).

22 *See* Terena Bell, *Being the Only B*, STAN. SOC. INNOVATION REV., Summer 2011, at 27, 28 ("After all, for a for-profit business to be sustainable, it has to make money.").

23 *See* Katz & Page, *supra* note 3, at 60–61 (discussing the evolution of social enterprise); *see also* Battilana et al., *supra* note 15, at 51 (stating that the increase in the number of hybrids results in part "from an increased interest in creating sustainable financial models in the wake of the 2007–08 financial crisis").

24 These organizations are also referred to as "'hybrid social ventures,' 'for-profit social businesses,' 'social purpose business ventures,' blended value organizations, companies with a conscience, Fourth Sector organizations, a 'for profit with a nonprofit soul,' and for-benefit organizations." Katz & Page, *supra* note 3, at 61–62 (footnotes omitted).

25 Ashley Holmes, *L3C: A More Flexible Corporate Model for Social Change*, GREENBLUE (Feb. 15, 2012), http://www.greenblue.org/2012/02/l3c-a-more-flexible-corporate-model-for-social-change/ (claiming that the L3C may "help advance more businesses toward [financial] sustainability in the coming years").

Some new hybrid forms recognize the need for this. L3Cs, for example, may depend on "tranching," which is essentially allowing different investors to face different risk and return profiles.[26] Foundations, it is hoped, will effectively subsidize the L3C by providing high-risk, low-return investment capital.[27] This would allow other investors to receive something closer to the appropriate market rate of return, and it allows foundations to potentially leverage their investment.[28] The more sympathy the investor holds for the enterprise, the lower return or greater risk she may be willing to accept on her investment.[29]

Other methods are less direct. Some have argued, for example, that constraints on the compensation of nonprofits' employees impair nonprofits' effectiveness.[30] Hybrids do not share these legal constraints on compensation.[31] Hybrids may facilitate more efficient operations, thereby increasing the likelihood of profitability. "Commercial business concepts applied to nonprofits are key to successful development work."[32]

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[26] *See, e.g.*, *id.* ("Because foundations can invest in L3Cs and are willing to take on more financial risk in exchange for social returns (especially during the early stages of these ventures), the risk/return profile becomes much more attractive for traditional market-driven investors."); Lauren Thomas, *L3C: A Finance Model for Sustainable Development*, SUSTAINABILITY SERIES (Jan. 24, 2010, 6:05 PM), http://www.vitanuova.net/journal/2010/01/l3c-a-finance-model-for-sustainable-development.html ("The L3C model facilitates 'tranching' which distributes risks and rewards unevenly over a number of investors, leveraging PRIs to increase returns for other investors.").

[27] *See* Thomas, *supra* note 26.

[28] Single hybrid organizational forms are not necessary for this kind of financial leverage. Consider Sanergy, which is two organizations—one nonprofit and the other for-profit. The two organizations are symbiotic, with grant funders underwriting the nonprofit and investors the for-profit. *See* Battilana et al., *supra* note 15, at 53.

[29] *See* David Wood, *The Case for Mission Investing*, PHILANTHROPY J. (June 1, 2011), http://www.philanthropyjournal.org/resources/fundraisinggiving/case-mission-investing (discussing below-market-rate mission investments in areas such as small business development).

[30] DAN PALLOTTA, UNCHARITABLE: HOW RESTRAINTS ON NONPROFITS UNDERMINE THEIR POTENTIAL 47–77 (2008).

[31] Nonprofits organized under § 501(c)(3) of the federal tax code face constraints regarding the compensation of executives that are not faced by other organizational forms, such as LLCs and corporations. *See, e.g.*, Anup Malani & Eric A. Posner, Essay, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017, 2019 (2007) (discussing what a nonprofit cannot do).

[32] Maria Luna, *The Paradigm Project—Sustainable Development and L3C Social Enterprise*, ICOSA (Sept. 22, 2011), http://www.theicosamagazine.com/the-paradigm-project%E2%80%95-sustainable-development-and-l3c-social-enterprise (internal quotation marks omitted); *see also* Battilana et al., *supra* note 15, at 51 (exploring solutions "for those seeking to combine the value-creating potential of for-profits and nonprofits").

People champion the survival of "good" organizations. This is not necessarily wise.[33] For social enterprise, success should not be defined at the organizational level but at least in part at the societal–global level. What matters for a social enterprise should not be who performs it (*who* adds the social or environmental value) but rather that the mission itself is being performed (or more precisely that the social or environmental value is being added).

A social enterprise's mission may be accomplished effectively by some other party. Seventh Generation established a market for green cleaning supplies, but Greenworks, a line of green cleaning supplies developed and promoted by conventional (profit-seeking) multinational Clorox Company, was far more successful in the marketplace.[34] It was Clorox that was able to demonstrate the widespread popular appeal of natural cleaners following the initial success of Seventh Generation. If the environmental good is the substitution of less toxic for more toxic cleaning chemicals, Seventh Generation should be pleased at the emulation,[35] even if it were to threaten the company's own growth or perhaps even survival.

Even the takeover of a social enterprise or socially responsible company by a traditional corporation may be desirable.[36] As an independent business, Ben & Jerry's Homemade, Inc. produced some social benefits that were reduced or extinguished when it was acquired by Unilever.[37] However, because Ben & Jerry's could grow much faster under Unilever (for example through increased international growth and an improved distribution system) they were able to produce more social benefits, such as the increased use of hormone-free milk.[38] Recently Ben & Jerry's became the first wholly owned subsidiary of a publicly

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[33] We leave out the point that an organization may be "good" but this does not mean it is optimal. Other organizations might be better, and perhaps are being crowded out by the incumbent. This point has frequently been made in other contexts, as in Betamax being better than VHS, or the Dvorak keyboard being preferable to the qwerty keyboard.

[34] *See* Katz & Page, *supra* note 3, at 99–101.

[35] *See id.* at 99–100 ("If one of Seventh Generation and Simple Green's goals was to move 'green cleaning' into the mainstream, they succeeded.").

[36] James E. Austin & Herman B. "Dutch" Leonard, *Can the Virtuous Mouse and the Wealthy Elephant Live Happily Ever After?*, CAL. MGMT. REV., Fall 2008, at 77, 79.

[37] *See* Antony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon*, 35 VT. L. REV. 211, 211–12 (2010).

[38] *Id.* at 245–46.

traded company to join the B Lab movement and become a Certified B Corp.[39] Some have concluded that the concerns about the company losing its social mission were misplaced.[40] Moreover the socially oriented company acquired by the traditional company may end up changing the acquirer's culture in positive ways.[41]

Likewise for the accomplishment of a nonprofit's mission, what matters for society is not who eradicates malaria, but that malaria is eradicated. Presumably a nonprofit should put the furtherance of its mission ahead of which organization does it.

For-profit corporations also do not require sustainability for their own sake. If a corporation's purpose is to maximize profits, there may well be situations when closing is the fiscally wise course of action. This is easiest to see in the context of mergers and acquisitions. Instagram, for example, a company with no revenue, sold itself to Facebook Inc. for $1 billion, and will no longer exist as an independently owned organization.[42] It is very unlikely that Instagram would have ever made more money as an independent organization—particularly because at the time of the purchase it had "yet to develop a model for generating revenue."[43] Spin-offs and break-ups are another instance of this. Perhaps more common are companies that should arguably have sold off their parts, but did not and ended up in bankruptcy, such as Kodak.[44]

Some commentators believe that corporations will behave in a more pro-social manner if they focus on the long-term good of shareholders or stakeholders. Yet promoting corporate social responsibility because it is good business is not really a legal project. Everyone agrees that this is fully permissible, and in fact should be encouraged. If this low-hanging fruit is there, it should be harvested. The issue, however, is whether there is low-hanging fruit, i.e., a positive financial return on social and environmental

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39 Joe Van Brussell, *Ben & Jerry's Becomes B-Corp Certified, Adds Credibility to Impact Investing Movement*, HUFFINGTON POST (Oct. 23, 2012, 6:51 PM), http://www.huffingtonpost.com/2012/10/23/ben-and-jerrys-b-corp-impact-investing_n_2005315.html.

40 *Id.*

41 *See* Austin & Leonard, *supra* note 36, at 79.

42 *See, e.g.*, Shayndi Raice & Spencer E. Ante, *Insta-Rich: $1 Billion for Instagram*, WALL ST. J., Apr. 10, 2012, at B1.

43 *See id.*

44 *See, e.g.*, Michael J. de la Merced, *Eastman Kodak Files for Bankruptcy*, N.Y. TIMES DEALBOOK (Jan. 19, 2012, 1:12 AM), http://dealbook.nytimes.com/2012/01/19/eastman-kodak-files-for-bankruptcy/.

returns, not what should be done with it.[45] (Put somewhat differently, if pursuit of the social or environmental mission is wealth expanding rather than zero-sum and thus supported by all, there is no legal conflict.) Such an organization really can have it all.[46] It is, however, an unresolved empirical question how common this is. If profit-making businesses are actually frequently leaving profitable opportunities on the table then this is something that business schools should address, far more than lawmakers.

How can a hybrid organization achieve financial or operational sustainability? An organization that can capture benefits that would ordinarily be externalized, or devotes resources to a social mission, likely must take those resources from somewhere else. There are several potential sources, and all of them are donors in a sense. Consumers may be willing to pay more, employees or investors may be willing to accept less, but someone is contributing.[47] There appear to be very few social enterprises that do not depend at least in some form or another on this kind of cross-subsidy.

Alternatively, and there are few clearly successful models out there, financial and operational sustainability is achieved through a business model that by its very nature also advances the social or environmental mission. For these organizations that do not depend on cross-subsidization, there is little for new law to do.

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[45] Academic studies are mixed. *See, e.g.*, ECONOMIST INTELLIGENCE UNIT, CORPORATE CITIZENSHIP: PROFITING FROM A SUSTAINABLE BUSINESS 22 (2008), *available at* http://graphics.eiu.com/upload/Corporate_Citizens.pdf (reporting a survey showing that 74% of respondents believed that corporate citizenship, broadly equivalent to corporate social responsibility, "can help to improve . . . [profits] at their company"); Marc Orlitzky et al., *Corporate Social and Financial Performance: A Meta-Analysis*, 24 ORG. STUD. 403 (2003) (suggesting that corporations practicing social and environmental responsibility will likely generate a financial return); David P. Baron et al., *The Economics and Politics of Corporate Social Performance* (Rock Ctr. for Corporate Governance, Working Paper No. 45, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1202390 (finding a positive link between corporate financial and social performance for consumer industries and a negative link for industrial industries).

[46] *See* Van Brussel, *supra* note 39 ("The addition of Ben & Jerry's to the list also confirms the notion that not only can profit and growth exist side-by-side with social good, but that a positive social agenda can *help create* profit and growth.").

[47] In the government context, California Governor Jerry Brown captures this notion with his claim that some employees should receive less financial remuneration because they are receiving "psychic income." *See, e.g.*, Jennifer Medina, *In California, Son Gets Chance to Restore Luster to a Legacy*, N.Y. TIMES, Jan. 29, 2013, at A1.

II. SUSTAINABILITY OF THE MISSION

Several legal scholars have expressed concern about mission sustainability in social enterprises, that is, the likelihood that such an entity (assuming it is financially and operationally viable) will pursue its mission over time without being unduly sidetracked by the pursuit of profit.[48] New organizational forms for such entities—also known as hybrid enterprises—are one response to this concern, according to their proponents.[49]

There are several potential threats to the maintenance of a social enterprise's mission. To simplify somewhat, consider three stakeholders in the corporate context: controllers (the directors), shareholders (who elect the directors, hold a financial stake, and can vote in the event of a merger), and outsiders. In a close corporation, the directors and shareholders may be the same parties. No issues arise when the directors and shareholders agree on whether, how, and how vigorously to pursue the nonpecuniary purpose (or if such pursuit is simultaneously profit maximizing, as in the hybrid organization ideal). The issues arise when key stakeholders disagree on these matters. The question then becomes how to enforce the mission when the directors and the shareholders disagree, or when both groups are ready to abandon the mission despite public outcry or the opposition of nonshareholding stakeholders. The sale of Ben & Jerry's Homemade, Inc. is commonly seen as an example of the first situation, but is more accurately seen as an example of the second, in that the controlling shareholders of the company acquiesced in the sale both as shareholders and as directors.[50] Finally, if all parties agree, there should be no impediment to dropping the mission.[51] It is also complicated in that an organization may lose its commitment to the mission either with its existing controllers, or through the transfer of the organization to new controllers.

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48 *See, e.g.*, Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 593 (2011) (arguing that benefit corporation form lacks robust mechanisms to enforce a firm's dual mission of profits and social good).

49 For a description of new organizational forms, see Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 SEATTLE U. L. REV. 1351, 1362–72 (2011).

50 *See* Page & Katz, *supra* note 37, *passim.*

51 If reasonable parties agree that a mission should be abandoned, ideally there should be no issue in abandoning it. Mission sustainability becomes a problem to solve and not a goal to achieve if there is insufficient flexibility to modify or change the mission. Clearly, in some cases as a normative matter organizations should no longer pursue a particular mission. If polio has been eradicated, future efforts to address it are wasted. *Cf.* Jackson v. Phillips, 96 Mass. (14 Allen) 539, 540–41, 597 (1867) (holding that funds bequeathed to "create a public sentiment that will put an end to negro slavery in this country" could be used to benefit "persons of African descent in the city of Boston and its vicinity" after the passage of the Thirteenth Amendment). The *cy pres* doctrine in trust law attempts to permit this flexibility, but it is by no means perfect.

Proponents of new organizational forms fear that when an aspiring social enterprise is organized as a conventional business, it will inexorably tend toward maximizing profits—and perhaps (over)enriching owners or controllers—and away from accomplishing its declared nonpecuniary purpose.[52] Some go further, claiming corporate law in fact requires corporations to be run solely in order to maximize profits, thus precluding a corporation from pursuing a significant nonpecuniary purpose in the first place.[53] The converse concern, that new forms might emphasize mission to the undue detriment of shareholders, gets little attention.[54] This Part analyzes how new forms purport to make social enterprises' missions more sustainable and why the proffered mechanisms do not significantly improve on existing forms.

The various new hybrid forms that have been created to date attempt to preserve the mission in different ways. The benefit corporation and L3C both make it expressly clear that the purpose of the organization goes beyond making profit.[55] (In the case of the L3C, making a profit cannot even be a significant purpose of the business.)[56] Regardless of the legal necessity for new forms to include these provisions,[57] such statements of purpose might

52 *See, e.g.*, Battilana et al., *supra* note 15, at 52 (noting competitive markets and corporate fiduciary duties may result in a shift toward a profit orientation).

53 Comedian Al Franken, Senator from Minnesota, famously made this claim in a July 25, 2010 speech. Senator Al Franken, Speech at Netroots Nation (July 25, 2010) ("It is literally malfeasance for a corporation not to do everything it legally can to maximize its profits."). He is not the only one. *See, e.g.*, KENT GREENFIELD, THE FAILURE OF CORPORATE LAW (2006); Robert Hinkley, *How Corporate Law Inhibits Social Responsibility*, COMMON DREAMS, http://www.commondreams.org/views02/0119-04.htm (last visited May 11, 2013).

54 Presumably investors who are most concerned with their return on investment are not particularly interested in social enterprises. Moreover, most people on the right and left alike would agree that an investor in a social enterprise invests knowing that the social mission is very important. (Investors in an L3C should know that the entity cannot have profit as a "significant purpose." *See infra* text accompanying note 70.) The real issue, however, is if there is a shift in emphasis that would violate the investor's reasonable expectations. *See* Page & Katz, *supra* note 49, at 1381–82. Perhaps there is no reasonable expectation that a social enterprise will not shift heavily toward the nonpecuniary mission side, but this assumption should be tested.

55 California's flexible purpose corporation legislation and Washington's social purpose corporation legislation, both recently enacted, likewise allow for the creation of entities that expressly have purposes beyond simply making profits. These two forms can be thought of as "benefit corporations lite," in that they relax some of the requirements of benefit corporations and thus more closely resemble conventional corporations. *See* Antony Page, *New Corporate Forms and Green Business*, 37 WM. & MARY ENVTL. L. & POL'Y REV. 347, 356–72 (2013) (comparing new corporate forms).

56 VT. STAT. ANN. tit. 11, § 3001(27)(B) (West Supp. 2012).

57 For-profit corporations have included such socially oriented statements in their organizational documents. The *Washington Post*, for example, states that its purpose is "[t]o publish . . . an independent newspaper dedicated to the welfare of the community and the nation, in keeping with the principles of a free press." THE WASH. POST CO., RESTATED CERTIFICATE OF INCORPORATION 1 (2003), *available at* http://media.corporate-ir.net/media_files/irol/62/62487/reports/AsamendedTWPCCertofincNovember.pdf.

conceivably reduce the possibility of litigation over a business's pursuit of a nonpecuniary mission.[58] Hopefully, such statements of purpose may better align the interests of shareholders (who know what they are buying in advance) and directors (who should manage with a view to achieving the business's goals).[59] Additionally, requiring the directors to consider other stakeholders in decision making[60] (in a way that some contend existing corporate law does not permit), will not predetermine the outcome, but does protect almost every substantive outcome from challenge.[61]

Most corporations, however, simply include the statutory minimum, which is general language regarding their purpose being any lawful act or activity. *See, e.g.*, DEL. CODE ANN. tit. 8, § 102(a)(3) (2006) ("It shall be sufficient to state, either alone or with other businesses or purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporate Law of Delaware . . . ."); APPLE INC., RESTATED ARTICLES OF INCORPORATION 1 (2009) ("The purpose of this corporation is to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of California other than the banking business, the trust company business or the practice of a profession permitted to be incorporated by the California Corporations Code.").

[58] Traditional corporations can do this too. *See* Bromberger, *supra* note 2 (stating that "there is no reason a business corporation could not include a social mission or values in its corporate charter").

[59] Other for-profit companies have included statements of purpose in their securities filings that suggest the importance of a social mission. *See, e.g.*, Facebook, Inc., Registration Statement (Form S-1) 68 (Feb. 1, 2012) ("Simply put: we don't build services to make money; we make money to build better services.").

[60] The Model Benefit Corporation Legislation requires the following:

> In discharging the duties of their respective positions and in considering the best interests of the benefit corporation, the board of directors, committees of the board and individual directors of a benefit corporation:
> (1) shall consider the effects of any action or inaction upon:
> (i) the shareholders of the benefit corporation;
> (ii) the employees and work force of the benefit corporation, its subsidiaries and its suppliers;
> (iii) the interests of customers as beneficiaries of the general public benefit or specific public benefit purposes of the benefit corporation;
> (iv) community and societal factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries or its suppliers are located;
> (v) the local and global environment;
> (vi) the short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation; and
> (vii) the ability of the benefit corporation to accomplish its general public benefit purpose and any specific public benefit purpose.

Model Benefit Corporation Legislation, BENEFIT CORP. INFO. CENTER 12 (Dec. 21, 2012), http://benefitcorp.net/storage/documents/Model_Benefit_Corporation_Legislation.pdf.

[61] Other constituency statutes are very similar, but are generally not viewed as very effective. *See* GREENFIELD, *supra* note 53. As the *Economist* has noted, "How does one measure [different interests]? What counts for more: a clean lake or a happy neighbour?" *See B Corps: Firms with Benefits*, ECONOMIST, Jan. 7, 2012, at 57, 58.

These two approaches are primarily about preserving a mission that controllers favor but at least some shareholders do not. So, for example, in the famous case of *Dodge v. Ford Motor Co.*, the controller Henry Ford apparently wanted to pursue eleemosynary goals that were resisted by the Dodge brothers, who wanted a larger dividend.[62] More recently, in *eBay Domestic Holdings, Inc. v. Newmark*, minority shareholder eBay objected to the defensive actions taken by the directors that were intended, according to the court, to preserve "purely philanthropic ends."[63] In both cases, the controllers lost, and it is these situations—essentially the only two such cases in nearly a century—that new forms are intended to avert.

Other approaches seem more intended to reduce the risk that directors, or their successors, will shortchange the mission against shareholders' wishes.[64] The benefit corporation typically includes several additional mechanisms to reduce the likelihood of this, depending on the jurisdiction. All states that have introduced the form require an annual benefit report, in which benefit corporations report on their social and environmental performance with varying level of details.[65] Transparency, proponents hope, is one mechanism to preserve the mission.[66]

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[62] 170 N.W. 668, 673, 684 (Mich. 1919).

[63] 16 A.3d 1, 34 (Del. Ch. 2010). The *eBay* decision itself is intriguing. The court left a carve out for likeminded investors, suggesting that the corporate form might be an appropriate vehicle for purely philanthropic ends if other shareholders did not object. *Id.* One can easily imagine the formation of corporations with shareholder agreements in which shareholders waive any rights to object to the pursuit of purely philanthropic ends. Or one could imagine this if there were adequate investors, because the resulting entity would look a lot like a nonprofit corporation.

[64] Some have argued that an explicit social mission will also help preserve it when a new controller comes in. *See B Corps: Firms with Benefits*, *supra* note 61, at 58 (quoting the founder of Patagonia arguing "that making a firm's social mission explicit in its legal structure makes it harder for a new boss or owner to abandon it").

[65] *See, e.g.*, CAL. CORP. CODE § 14630(a)(3) (West 2013) (requiring the disclosure of shareholders owning 5% or more of the company's shares); N.J. STAT. ANN. § 14A:18-11(a)(1)(4) (West Supp. 2012) (requiring disclosure of directors' compensation); VT. STAT. ANN. tit. 11A, § 21.14(a) (West Supp. 2012) (requiring disclosure of specific actions that could be taken by the benefit corporation to improve its performance). For a helpful table comparing benefit corporation legislation in different states, see *State by State Analysis*, BENEFIT CORP. INFO. CENTER, http://www.benefitcorp.net/storage/State_by_State_Analysis.pdf (last visited May 11, 2013).

[66] Disclosure is commonly seen as a means to achieve better corporate behavior, as is evidenced in fields such as securities regulation. *See, e.g.*, Antony Page, *Taking Stock of the First Amendment's Application to Securities Regulation*, 58 S.C. L. REV. 789, 819–20 (2007). The dispute over the disclosure of conflict minerals is another example. *See* Eric Savitz, *SEC Approves Detailed Disclosure on 'Conflict Minerals*,*'* FORBES (Aug. 22, 2012, 1:05 PM), http://www.forbes.com/sites/ericsavitz/2012/08/22/sec-approves-detailed-disclosure-on-conflict-minerals/.

Along with transparency comes monitoring and perhaps enforcement. Some states include benefit directors.[67] A benefit director is intended to monitor the benefit corporation's pursuit and achievement of its nonpecuniary purpose. States also authorize a "benefit enforcement proceeding"—comparable to a shareholder derivative suit—to enable certain parties to legally compel a benefit corporation's directors to perform their fiduciary duties, including their duty to advance the firm's nonpecuniary purpose. Shareholders and directors have standing to initiate a benefit enforcement proceeding, as do other persons specified in the corporation's organizational documents.[68]

Finally, perhaps most relevantly where controllers are content to neglect the social mission, there is third-party certification. An independent standard-setting organization applying independently created standards is intended to ensure that the benefit corporation is adequately pursuing its mission.[69] The annual benefit reports typically must report how well the corporation met these standards.[70] A concern here is that a benefit corporation may in fact be no different than an ordinary corporation, but is attempting to benefit from the halo of social enterprise. A for-profit social enterprise might pay only lip service to the social mission—thereby deriving the potential branding and signaling benefits of being perceived as a social enterprise without actually contributing a significant social benefit. We thus have the situation of a wolf (the conventional business) in sheep's clothing (the social enterprise form).[71]

At the risk of being unduly pessimistic, we think that none of these measures are particularly likely to prove successful. As a commentator has concluded, the hybrid forms "lack[] robust mechanisms to enforce dual mission."[72] Perhaps most glaringly, there is little to stop hybrid enterprises from changing forms to a completely for-profit model. For example, a benefit corporation that wishes to no longer be bound by the enacting statute may convert into a regular corporation, typically with only a two-thirds majority

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67 *See, e.g.*, N.J. STAT. ANN. § 14A:18-7.

68 *See, e.g.*, *id.* § 14A:18-10.

69 *See, e.g.*, *id.* § 14A:18-11(a)(2) (requiring an "assessment of the social and environmental performance of the benefit corporation, prepared in accordance with a third-party standard"); *see also id.* § 14A:18-1 (defining "[t]hird-party standard").

70 *See, e.g.*, CAL. CORP. CODE § 14630.

71 *See* Holmes, *supra* note 25 (noting that among the unanswered questions about hybrid business is "how they will be monitored to ensure they are making a social impact"); *see also Sustainability and the L3C*, CHI. CLEAN ENERGY ALLIANCE (June 23, 2011, 12:21 PM), http://www.theccea.org/2011/06/23/sustainable-l3cs/ (noting the risk of greenwashing).

72 Brakman Reiser, *supra* note 48, at 593; *see also* Dana Brakman Reiser, *Blended Enterprise and the Dual Mission Dilemma*, 35 VT. L. REV. 105 (2010) [hereinafter Brakman Reiser, *Blended Enterprise*].

vote.[73] This has been referred to as the "legacy problem," when controllers become unwilling or unable to continue supporting the mission.[74] In this scenario, the for-profit social enterprise has no statutory mission-maintenance mechanism remotely as powerful as the nonprofits' asset lock, also known as the "nondistribution constraint."[75]

Other forms intended for social enterprise use different or additional approaches. To prevent either situation where controllers are not adequately pursuing a social mission, the community interest company (CIC) in the United Kingdom uses a public enforcement approach.[76] The CIC Regulator is empowered to ensure that the organization is in fact pursuing a "community interest" and may even appoint or remove directors, sue in the CIC's name, prohibit the CIC's transaction, or petition to terminate the CIC.[77] (Likewise nonprofits in the United States are in theory compelled to pursue their mission through public enforcement by state attorneys general, although in practice enforcement is weak.)[78] Whether this is an effective measure or not will depend in large part on the vigilance and resources of the regulator. In addition, the CIC effectively has an asset lock.[79] Investors' returns are capped at a specific rate of return and as a percentage of profits.[80] So-called investors in CICs actually resemble lenders, just as a U.S. nonprofit may have a lender.

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73 *See, e.g.*, CAL. CORP. CODE §§ 14601(d)(1)(B), 14610(d); N.J. STAT. ANN. § 14A:18-5(d). As a practical matter, there appears to be no evidence that two-thirds supermajority provisions have any significant impact on widely held, publicly traded companies.

74 *See* Katz & Page, *supra* note 3, at 95–97.

75 *Id.* at 67.

76 *See, e.g.*, Companies (Audit, Investigations and Community Enterprise) Act, 2004, c. 27, §§ 42–51 (U.K.).

77 REGULATOR OF CMTY. INTEREST COS., STATUS, ROLE, FUNCTION AND LOCATION 8–9 (2010), *available at* http://www.bis.gov.uk/assets/cicregulator/docs/leaflets/10-1390-community-interest-companies-regulators-status-role-function-and-location-guide.pdf.

78 *See, e.g.*, Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcemen*t, 79 IND. L.J. 937, 939 (2004) ("[A]s a practical matter, few state attorneys general have the funding and inclination to engage in aggressive charity enforcement."); Thomas Lee Hazen & Lisa Love Hazen, *Punctilios and Nonprofit Corporate Governance—A Comprehensive Look at Nonprofit Directors' Fiduciary Duties*, 14 U. PA. J. BUS. L. 347, 408 (2012) ("Although on occasion the state attorneys general initiate action against nonprofits to address abuses, attorneys general simply do not have the resources to focus on nonprofits as an effective monitor of directors' duties." (footnotes omitted)).

79 REGULATOR OF CMTY. INTEREST COS., FREQUENTLY ASKED QUESTIONS FOR FUNDING ORGANISATIONS 4, 7–11 (2009), *available at* http://www.bis.gov.uk/assets/cicregulator/docs/leaflets/09-1647-community-interest-companies-frequently-asked-questions-for-funders-leaflet.pdf.

80 *Id.* at 9. A CIC is limited to paying out 35% of its profit and carrying forward any unused dividend capacity to five years. *Id.*

As compared to other organizational forms, the L3C gives interested parties the most discretion to design a firm's mechanism for sustaining its mission. Although the L3C's organizational documents must assert both that it would not have been formed but for the accomplishment of its nonpecuniary purpose and that no significant purpose of the L3C is "the production of income or the appreciation of property,"[81] enforcement is left undefined.[82] Parties basically set their own terms in the operating agreement, which is typically interpreted and enforced like a contract.[83] Sophisticated foundations may know enough in advance that they will retain adequate control rights by contract. One method might be to grant the foundation the right to be reimbursed for its investment at any time (i.e., effectively a put option), the idea being that the threat of a foundation withdrawing from the L3C should be enough to keep the operations of the L3C in line.

In order to help determine whether these provisions are really helpful for mission sustainability, it is useful to compare them to existing organizational forms. To take the simplest first, L3Cs introduce nothing new. Anything that can be done with an L3C can also be done with an LLC. Founders and investors in an LLC that would like to pursue something other than profit maximization can specify that, and any desired control arrangements (say veto power for certain actions, or specific percentages for the allocation of resources), in their operating agreement. Similarly, LLCs (and other organizational forms) can all be eligible recipients of program-related investment.

The CIC form, at least as compared to the U.S. context, also does not do much for mission sustainability when compared to the nonprofit. Both have potential enforcers, respectively the Community Interest Company Regulator[84] and state attorneys general. Both have an asset lock. Both permit the payout of resources, but where the CIC has a percentage cap on how much can be

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81 VT. STAT. ANN. tit. 11, § 3001(27) (West Supp. 2012).

82 *Cf.* John Tyler, *Negating the Legal Problem of Having "Two Masters": A Framework for L3C Fiduciary Duties and Accountability*, 35 VT. L. REV. 117, 144–46 (2010) (noting that although the LLC is "deeply rooted in strong freedom of contract principles, the ability to waive breaches of fiduciary duty is not absolute").

83 *See, e.g.*, Elf Atochem N. Am., Inc. v. Jaffari, 727 A.2d 286, 290 n.20 (Del. 1999) (giving maximum effect to the principle of freedom of contract); CARTER G. BISHOP & DANIEL S. KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW ¶ 14.02 (2012) ("[A]n LLC is at least as much a creature of contract as of statute.").

84 *See The Regulator*, COMMUNITY INT. COMPANIES, http://www.bis.gov.uk/cicregulator/about-us/regulator (last visited May 11, 2013).

returned to "investors," nonprofits are capped at paying their lenders a reasonable interest rate.[85] In some situations perhaps it is an advantage to have a specific percentage and thus an automatic bright-line safe harbor. In others, however, such as if the percentage rate is set too low, the cap will serve to deter lenders.[86]

Finally, examining corporations, existing corporate law is already good at preventing shareholders from interfering with directors' good-faith decisions, so if directors want to pursue social aims, there is little legally shareholders can do.[87] Under the business judgment rule, directors have enormous latitude in their decision making and their judgment is rarely overturned.[88] *Dodge v. Ford Motor Co.* and *eBay Domestic Holdings, Inc. v. Newmark* are two cases where arguably the pursuit of a social mission resulted in the directors' decisions being overturned, but there are few, if any, other examples, and in any case the implications of *Dodge* for modern corporate law are particularly contested.[89] The *eBay* case may even permit a company's directors to pursue a philanthropic purpose, as long as it is not the company's exclusive purpose.[90] (Moreover, states by statute expressly permit corporations to pursue a social mission by way of donations to a separate nonprofit organization.)[91] Many states even have statutes that allow the consideration of other stakeholders,[92]

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85 The riskier the nonprofit is as borrower, the more reasonable higher interest rates are.

86 In 2010, the U.K. Community Interest Corporation Regulator increased the interest rate cap on loan interest. The Regulator had found that CICs thought the cap was too low, thereby discouraging investment. *See* Sarah Townsend, *New Rules to Aid Social Enterprise Investment*, REGENERATION + RENEWAL (Jan. 11, 2010), http://www.regen.net/Community_Renewal/article/976326/New-rules-aid-social-enterprise-investment/.

87 *See, e.g.*, Antony Page, *Has Corporate Law Failed? Addressing Proposals for Reform*, 107 MICH. L. REV. 979, 988–89 (2009) (reviewing GREENFIELD, *supra* note 53). Conflict-of-interest situations, such as when directors enrich themselves, are managed the same way in both benefit corporations and traditional corporations. There are strong legal safeguards against self-enrichment and self-dealing, but there are few, if any, effective safeguards against the shifting of profits (seen as subject to shareholders' primary claim) to deserving third parties.

88 *See, e.g.*, Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 954 (Del. 1985) (noting that a "hallmark of the business judgment rule is that a court will not substitute its judgment for that of the board if the latter's decision can be attributed to any rational business purpose" (internal quotation marks omitted)).

89 *See* Page, *supra* note 87, at 987–88; M. Todd Henderson, *Everything Old Is New Again: Lessons from* Dodge v. Ford Motor Company 25 (Univ. of Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 373, 2007) (arguing that the decision did not turn on the purpose of the corporation).

90 eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010).

91 *See, e.g.*, DEL. CODE ANN. tit. 8, § 122(9) (West 2006) (providing that corporations may "[m]ake donations for the public welfare or for charitable, scientific or educational purposes, and in time of war or other national emergency in aid thereof").

92 *See, e.g.*, IND. CODE ANN. § 23-1-35-1 (West Supp. 2012). The Indiana statute specifically provides:

> In taking or declining to take any action, or in making or declining to make any recommendation to the shareholders of the corporation with respect to any matter, a board of directors may, in its

leaving directors protected just as they would be in a benefit corporation.[93] When shareholders are unhappy with directors' choices, their primary remedy is to elect different directors,[94] which is the same remedy that shareholders have in a benefit corporation.

If founders want to preserve control, either as directors or as shareholders, under existing corporate law there are several mechanisms by which this can be done. Put differently, it is straightforward for parties to preserve control rights that are independent of their economic interests. This would permit social entrepreneurs to retain control of their businesses, just as entrepreneurs can retain control of their businesses even after they accept other equity investors. Facebook is a recent example, but Google and the *New York Times* are two other prominent examples. All three use dual-class voting stock.[95] Founders or their designees can retain a disproportionate amount of stock with additional votes.[96] Another approach is to issue preferred stock with veto rights to selected parties, as Ben & Jerry's Homemade, Inc. did with the Ben & Jerry's Foundation.[97] Alternatively, different classes of stock can be given different rights to elect directors.

All of the above measures depend upon at least one group, either the directors or the controlling shareholders, staying committed to the mission. Foundations can be formed that have such a legal obligation. It is much harder

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> discretion, consider both the short term and long term best interests of the corporation, taking into account, and weighing as the directors deem appropriate, the effects thereof on the corporation's shareholders and the other corporate constituent groups and interests listed or described in subsection (d), as well as any other factors deemed pertinent by the directors under subsection (d). If a determination is made with respect to the foregoing with the approval of a majority of the disinterested directors of the board of directors, that determination shall conclusively be presumed to be valid unless it can be demonstrated that the determination was not made in good faith after reasonable investigation.

Id. § 23-1-35-1(g). The factors included in subsection (d) are "shareholders, employees, suppliers, and customers of the corporation, and communities in which offices or other facilities of the corporation are located, and any other factors the director considers pertinent." *Id.* § 23-1-35-1(d).

93 Until 2010, Connecticut had another constituency statute that required directors to consider other stakeholders in the takeover context, but this was amended to make it permissive. CONN. GEN. STAT. ANN. § 33-756 (West Supp. 2012).

94 *See, e.g.*, Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988) ("Generally, shareholders have only two protections against perceived inadequate business performance. They may sell their stock . . . or they may vote to replace incumbent board members.").

95 Facebook, Inc., Registration Statement (Form S-1) (Feb. 1, 2012); Google Inc., Registration Statement (Form S-1) (Apr. 29, 2004).

96 *See, e.g.*, Facebook, Inc., Registration Statement (Form S-1) 20–21, 127 (Feb. 1, 2012); N.Y. Times Co., Proxy Statement (Schedule 14A) 7–9 (Mar. 9, 2012).

97 *See* Page & Katz, *supra* note 37, at 238.

to do this with natural persons, given that preferences change and people move on and pass away. *eBay v. Newmark* is illustrative, as it was essentially about mission maintenance over time. The defendants controlled the company, Craigslist, Inc., and wanted to preserve its communitarian culture and prevent it from being overwhelmed by eBay's culture at some point in the future.[98] The rights plan was designed to make it much harder for eBay to increase its stake in Craigslist, and possibly gain control, in the event that the two defendants, or their estates, later wanted to sell.[99] There was no possible threat from eBay to Craigslist for as long as the two defendants chose to retain their controlling shares. The judge had it exactly right when he said the defendants were attempting to "shape the future of the space–time continuum" by preventing changes.[100]

The above, however, is the same challenge faced by benefit corporations. If both the directors and controlling shareholders lose interest in the mission, the mission is unlikely to be sustained, thus there too the benefit corporation offers little advantage. Note also that the *eBay* case did nothing to change Craigslist's day-to-day operations. The directors were able to continue operating the company with full regard for its communitarian, noncommercial (and almost certainly not exclusively profit maximizing) culture.[101]

We are left with soft arguments rather than hard arguments, or norms not laws. Perhaps providing a standard form helps make a particular provision the default. Or perhaps it serves to signal that the provision is presumptively reasonable. At the very least, a standard form is likely to reduce transaction costs.

It is also possible that any of these forms may promote mission sustainability not through legal provisions, but by changing organizational culture and thereby changing people's views and preferences. Organizational culture may, in addition to legal mechanisms, be a key way to increase the likelihood of mission sustainability.

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[98] eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 7 (Del. Ch. 2010) (noting that eBay and Craigslist "are a study in contrasts, with different business strategies, different cultures, and different perspectives on what it means to run a successful business").

[99] *Id.* at 32.

[100] *Id.*

[101] Craig Newmark and James Buckmaster, the two defendants in the *eBay* case, retained control of Craigslist. The only actions eBay challenged were the defensive measures: the rights plan, a staggered board, and right of first refusal over eBay's shares in Craigslist. *Id.* at 6–7.

Consider the *New York Times*. It is a publicly traded company committed to producing a newspaper of record, even at a cost in profits. The company has a dual-class stock that puts control in a family trust.[102] The company's SEC filings disclose that the trust's "primary objective . . . is to maintain the editorial independence and the integrity of The New York Times and to continue it as an independent newspaper, entirely fearless, free of ulterior influence and unselfishly devoted to the public welfare."[103] Even as the stock has dropped 80% over the last eight years and investors have protested, the *Times* has refused to give up its social mission. One commentator observed that "the tension between the *Times*'[s] public trust and the *Times*'[s] business is sharper than it's ever been," and opined that it seems unlikely that the *Times* can still "be both virtuous and rich."[104]

Even as the family's fifth generation takes over the trust, the commitment to the public remains. Family members start attending meetings at the age of ten, go on private retreats, have orientation sessions, and meet with top editors.[105] Apparently "by [fifteen] they understand their roles as caretakers of the *New York Times*."[106]

Compare this to the *Wall Street Journal*, which had a similar corporate structure, in that it was controlled by dual classes of stock owned through trusts,[107] and a similar journalistic mission. Even so, members of the controlling family, the Bancrofts, ceased to be seriously involved with the paper by the 1930s.[108] When they received a generous offer in 2007, they voted to sell to Rupert Murdoch's News Corporation, even though it was controversial.[109]

All of the above helps illustrate the limitations of law. There already is a legal form, the nonprofit organization, that entails an obligation to organize

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102 N.Y. Times Co., Proxy Statement (Schedule 14A) 7 (Mar. 9, 2012) (noting that the trust, which holds 83.7% of the New York Times Class B stock, has "the right to elect approximately 70% of the Board of Directors")

103 *Id.*

104 Joe Hagan, *Bleeding 'Times' Blood*, N.Y. MAG. (Oct. 5, 2008), www.nymag.com/news/media/51015/.

105 *Id.*

106 *Id.* ("From an early age, Sulzberger children are taught to value their role as stewards of the paper and servants to the public good.").

107 Dow Jones & Co., Inc., Proxy Statement (Schedule 14A) (Nov. 7, 2007).

108 *See* Richard Pérez-Peña, *Shareholders Back Dow Jones Sale*, N.Y. TIMES. (Dec. 13, 2007), http://www.nytimes.com/2007/12/13/business/media/13cnd-dow.html?_r=2&ref=media&oref=slogin&.

109 *See generally* SARAH ELLISON, WAR AT THE *WALL STREET JOURNAL*: INSIDE THE STRUGGLE TO CONTROL AN AMERICAN BUSINESS EMPIRE, at xvi, xxi (2010).

and operate exclusively for a larger purpose—something other than enriching insiders—and a prohibition against diverting assets away from that purpose.[110] Moreover, a nonprofit's mission tends to be very difficult to legally change. As the mission becomes more flexible and as assets can begin to be diverted to other objectives, the importance of the decision makers becomes more critical. After all, more discretion means more opportunity to make more unreviewable decisions. If the business is housed in *any* for-profit organizational form, controllers will have the ability to shortchange or sell out the social mission. The new forms—benefit corporations, CICs in the United Kingdom, L3Cs, and Certified B Corps—do not fundamentally change this. The only way to be sure a social enterprise's mission is protected and vigorously pursued is to have committed people in place, and a plan to ensure that when they leave, more committed people come in. If an organization has an adequate structure, corporate or otherwise, it will be the decision makers who make the difference.[111]

Notwithstanding the foregoing, benefit corporations may in fact promote sustainability, albeit not for the reason most promoters advocate. It is not that these organizational forms necessarily make missions significantly more sustainable—they do not—but they do provide a better model of what a sustainable corporation might look like. Even without effective enforcement, statutes mandate the directors of benefit corporations in their decision making to consider such matters as "community and societal factors" and "the local, regional and global environment."[112] Moreover, regardless of whether corporate law permits corporations to pursue social missions—it does—it surely does not encourage it.[113] The mere provision of an alternate model may be sufficient to encourage creation of an alternative economy of people committed to sustainable development. The creation of benefit corporations may offer a glimpse of one account of a sustainable corporation, as one that operates and reports using a triple bottom line.

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[110] I.R.C. § 501(c)(3) (2006).

[111] *See* Antony Page & Robert A. Katz, *The Truth About Ben & Jerry's*, STAN. SOC. INNOVATION REV., Fall 2012, at 39, 43 ("The surest way to maintain a business'[s] social mission is to put committed people in charge.").

[112] MASS. GEN. LAWS ANN. ch. 156E, § 10(a) (West Supp. 2012).

[113] *See, e.g.*, Todd Henderson, *Al Franken, Shareholder Wealth Maximization, and the Business Judgment Rule*, PROFESSORBAINBRIDGE.COM (July 27, 2010, 4:07 PM), http://www.professorbainbridge.com/professorbainbridgecom/2010/07/shareholder-wealth-maximization-and-the-business-judgment-rule.html (stating that "corporate law does not intend to promote corporate social responsibility, but rather merely allows it to exist").

III. SUSTAINABILITY *IS* THE MISSION

A social enterprise pursues profits and one or more nonpecuniary purposes and assesses its performance using a "double bottom line," a term that "describe[s] a social enterprise's balance of financial viability and social impact."[114] The universe of nonpecuniary purposes that social enterprises may pursue is vast. For example, an enterprise organized as an L3C may be deemed "social," it would seem, insofar as its business purpose "significantly furthers the accomplishment of one or more charitable or educational purposes" as defined by the charitable contribution provisions of the Internal Revenue Code.[115] (California's flexible purpose corporation also relies on the federal tax code's charitable tax provisions to define the nonpecuniary purposes suitable for the form.)[116] The tax code's definition includes many purposes not generally associated with "social enterprise," including religious purposes, literary purposes, and "foster[ing] national or international amateur sports competition."[117] Indeed, the tax code's definition of charitable purposes is so broad that, as the U.S. Congress's Joint Committee on Taxation has observed, it "encompass[es] several ideas that would not generally be considered as charitable in the ordinary sense" of relieving the poor and distressed.[118] A 2005 survey of tax-exempt organizations showed, in the Committee's words, that "there is no overriding principle explaining tax exempt status."[119]

The sustainable business concept is far more determinate than social enterprise. A sustainable business expounds its purposes using the tripartite (3-P) model of "People, Profit, Planet,"[120] which corresponds to (1) "[e]nsuring a fair society"; (2) "[l]iving within environmental limits"; and (3) "[c]reating a sustainable business."[121] It assesses its performance using a triple bottom line

114 Anthony Bisconti, Note, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land?*, 42 LOY. L.A. L. REV. 765, 767 n.6 (2009) (citing Jerr Boschee, Editorial, *Doing Good While Doing Well*, PITTSBURGH POST-GAZETTE, Oct. 19, 2008, at G1).

115 VT. STAT. ANN. tit. 11, § 3001(27)(A)(i) (West Supp. 2012). The provision identifies "charitable or educational purposes within the meaning of Section 170(c)(2)(B) of the Internal Revenue Code of 1986, 26 U.S.C. § 170(c)(2)(B)." *Id.* This set of purposes significantly overlaps with those set forth in I.R.C. § 501(c)(3), which defines the purposes of nonprofit organizations exempt from paying federal taxes on corporate income.

116 *See* CAL. CORP. CODE § 2602(b)(2) (West 2013).

117 I.R.C. § 501(c)(3) (2006).

118 STAFF OF THE JOINT COMM. ON TAXATION, JCX-29-05, HISTORICAL DEVELOPMENT AND PRESENT LAW OF THE FEDERAL TAX EXEMPTION FOR CHARITIES AND OTHER TAX-EXEMPT ORGANIZATIONS 8 (2005).

119 *Id.* at 159.

120 *See, e.g.*, Brakman Reiser, *supra* note 48, at 624.

121 FISK, *supra* note 4, at 8 fig.0.3.

of economic, social, and environmental outcomes. These ideas, wrote Dana Brakman Reiser, "clearly resonate with the fundamental ideas of a social enterprise, melding pursuit of profits with social good, *often* including environmental goals."[122] In a sustainable business, however, environmental goals are not optional; rather, they are at its core. The most ambitious sustainable businesses embrace the larger sustainable development agenda, which seeks environmental sustainability and global social justice and asserts an inherent connection between the two. This connection is problematic, however, giving rise to an inherent tension between a sustainable business's pursuit of environmental goals and its concurrent pursuit of social ones.

A. Sustainability and Sustainable Development

The triple bottom line can trace its lineage to the concepts of sustainability and sustainable development. Modern usage of sustainability is credited to Hans Carl von Carlowitz (1645–1714), a German mining administrator.[123] Carlowitz advocated the "*nachhaltende Nutzung* (sustainable use)" of forest resources that supported the silver mining industry.[124] Carlowitz's approach implied maintaining a balance between harvesting old trees and ensuring that there were enough young trees to replace them.[125] (Left unsaid is whether and what Carlowitz thought about the sustainability of an industry based on mining a nonrenewable resource.) Other forestry experts from Carlowitz's era "condemned excessive wood consumption as a practice that would bring negative consequences for future generations."[126] From this background was "*nachhaltigkeit*"—German for "sustainability"[127]—derived.

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[122] Brakman Reiser, *supra* note 48, at 624 (emphasis added).

[123] *See* Ian Scoones, *Sustainability*, 17 DEV. PRAC. 589, 590 (2007) ("But like all buzzwords, the term *sustainability* has a history. It has not always had such significant connotations. The term was first coined several hundred years ago by a German forester, Hans Carl von Carlowitz, in his 1712 text *Sylvicultura Oeconomica*, to prescribe how forests should be managed on a long-term basis."). *See generally* Ulrich Grober, *The Inventor of Sustainability*, ZEIT ONLINE (Sept. 11, 2009, 4:35 PM), http://www.zeit.de/1999/48/Der_Erfinder_der_Nachhaltigkeit.

[124] Jacobus A. Du Pisani, *Sustainable Development—Historical Roots of the Concept*, 3 ENVTL. SCI. 83, 85–86 (2006).

[125] *Id.*

[126] *Id.* at 86; *see also, e.g.*, Ulrich Grober, Deep Roots—A Conceptual History of 'Sustainable Development' (Nachhaltigkeit) 21 (Feb. 2007) (unpublished manuscript), *available at* http://www.umweltethik.at/download.php?id=373 ("Georg Ludwig Hartig [(1764–1837)], head of the Prussian forest department, called for a mode of harvesting timber that should yield as much as possible in a way that posterity would have at least as much benefit from it as the presently living generation.").

[127] Grober, *supra* note 126; *see* COLLINS GERMAN/ENGLISH ENGLISH/GERMAN DICTIONARY 576 (Peter Terrell et al. eds., 4th ed. 1999).

Contemporary usage of *sustainable* in connection with environmental concerns first appeared in publications such as *The Limits to Growth*, an influential 1972 report published by the Club of Rome, a group of prominent economists and scientists.[128] That report's authors warned that ''[i]f the present growth trends in world population, industrialization, pollution, food production, and resource depletion continue unchanged, the limits to growth on this planet will be reached sometime within the next one hundred years."[129] The consequences of exceeding these limits would likely be catastrophic, i.e., "a rather sudden and uncontrollable decline in both population and industrial capacity."[130] As a prelude to averting this fate, the authors sought to model "a world system that is: 1. *sustainable* without sudden and uncontrolled collapse; and 2. capable of satisfying the basic material requirements of all of its people."[131] Environmental sustainability required less economic development—slower growth, if not zero growth.

The compound term *sustainable development* entered global discourse following publication of the 1987 report, *Our Common Future*, written by the World Commission on Environment and Development (WCED), an entity commissioned by the United Nations. *Our Common Future* famously defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[132] Sustainability expert Pim Martens put the matter more starkly: "The essence of sustainable development is simply this: to provide for the fundamental needs of humankind without doing violence to the natural system of life on earth."[133]

The WCED was chaired by Gro Harlem Brundtland, then-Prime Minister of Norway and formerly its Minister for Environmental Affairs.[134] In her

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128 *See* Grober, *supra* note 126, at 6; *see also* Du Pisani, *supra* note 124, at 90 (describing the Club of Rome as "a group of eminent economists and scientists").

129 DONELLA H. MEADOWS ET AL., THE LIMITS TO GROWTH: A REPORT OF THE CLUB OF ROME'S PROJECT ON THE PREDICAMENT OF MANKIND 23 (1972).

130 *Id.*

131 *Id.* at 158 (emphasis added).

132 WORLD COMM'N ON ENV'T & DEV., OUR COMMON FUTURE (1987); *see also* Subhabrata Bobby Banerjee, *Who Sustains Whose Development? Sustainable Development and the Reinvention of Nature*, 24 ORG. STUD. 143, 151–52 (2003).

133 Pim Martens, *Sustainability: Science or Fiction?*, SUSTAINABILITY: SCI. PRAC. & POL'Y 36 (2006), http://sspp.proquest.com/static_content/vol2iss1/communityessay.martens.pdf.

134 Erik A. Wold, *New Labor Government Installed in Norway*, ASSOCIATED PRESS, May 9, 1986, *available at* http://www.apnewsarchive.com/1986/New-Labor-Government-Installed-in-Norway/id-765f1b9b3f767d921d8fc524a73f37a1. Ulrich Grober traces the "sustainable development" formulation to a 1980 report

foreword to *Our Common Future*, Brundtland recounted that when the Commission's mandate was being discussed, "there were those who wanted its considerations to be limited to 'environmental issues' only."[135] There was also resistance to the inclusion of "development" concerns, which sometimes refer to poor nations' efforts to improve their condition, as outside the Commission's purview. The WCED took *development* to refer more broadly to self-betterment through economic activity. It insisted that these be studied in tandem: "[T]he 'environment' is where we all live," wrote Brundtland, "and 'development' is what we all do in attempting to improve our lot within that abode."[136]

B. Corporate Sustainability and the Triple Bottom Line

Following publication of *Our Common Future*, interest in the concept of sustainability surged among management scholars, as reflected by the number of articles in leading management journals on the topics of corporate sustainability, ecological sustainability,[137] and corporate sustainable development.[138] The concept of corporate sustainability resulted from efforts by management scholars to operationalize *Our Common Future*'s conception of interconnectedness at the firm level.[139] In this vein, some management scholars view corporate sustainability "as a tridimensional construct that includes environmental, economic, and social dimensions" of corporate

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entitled *World Conservation Strategy: Living Resource Conservation for Sustainable Development*. Grober, *supra* note 126, at 5 ("In 1980, the 'International Union for the Conservation of Nature,' an association of nation states, environmental agencies and NGOs together with UNEP, the environmental programme of the United Nations, and the World Wildlife Fund, a non-governmental organization, published their 'World Conservation Strategy.' Under the patronage of the UN-General Secretary, this declaration was simultaneously presented in 34 capital cities around the world."). He also claims that the term *sustainable development* "entered the global stage during the 1992 'Earth Summit' in Rio de Janeiro. The United Nations presented it as their strategic concept for shaping—and indeed saving—the future of the 'blue planet.' It promised to become the key-word for describing a new balance between the use and the preservation of nature's potentials and resources." *Id.*

135 WORLD COMM'N ON ENV'T & DEV., *supra* note 132.

136 *Id.*

137 Ivan Montiel, *Corporate Social Responsibility and Corporate Sustainability: Separate Pasts, Common Futures*, 21 ORG. & ENV'T 245, 256 tbl.4 (2008).

138 *Id.*

139 *See, e.g.*, Thomas Dyllick & Kai Hockerts, *Beyond the Business Case for Corporate Sustainability*, 11 BUS. STRATEGY & ENV'T 130, 131 (2002) ("When transposing this idea [of sustainable development] to the business level, corporate sustainability can accordingly be defined as meeting the needs of a firm's direct and indirect stakeholders (such as shareholders, employees, clients, pressure groups, communities etc.), without compromising its ability to meet the needs of future stakeholders as well.").

activity.[140] On this view, a sustainable firm must effectively balance the creation of economic value with concern for social and environmental issues.[141]

The concept of corporate sustainability was introduced to a wider audience by prominent author and consultant John Elkington in his 1997 book *Cannibals with Forks: The Triple Bottom Line of 21st Century Business*.[142] Elkington familiarly identified the key dimensions of corporate sustainability as economic, social, and environmental.[143] In Elkington's view, these "three pillars" (as he calls them) correspond to three core aspirations of a sustainable capitalist system—"economic prosperity, environmental quality, and social justice."[144] Each at its level adumbrates the same idea: "people, planet, profit."[145] The triple bottom line, wrote Elkington, "captures an expanded spectrum of values and criteria for measuring organizational (and societal) success."[146] The triple-bottom-line framework has been embraced by a wide audience. In explaining its popularity, Carol Adams, Geoff Frost, and Wendy Webber observed that it "provided a language that made sense of the sustainability concept to a population focused on the economic bottom line."[147]

Our Common Future identified poverty as a source of environmental degradation, asserting that "poverty itself pollutes the environment, creating environmental stress in a different way. Those who are poor and hungry will often destroy their immediate environment in order to survive . . . ."[148] This view, argued Professor of Politics Andrew Dobson, "le[d] the Commission to recommend considerable global and national redistributions of wealth, in the belief that such redistributions [are] functional for environmental

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140 Montiel, *supra* note 137, at 254; *see also id.* at 259 ("[Corporate sustainability] scholars tend to argue that the economic, social, and environmental pillars are interconnected."). A smaller number of corporate sustainability scholars focus mainly on how a firm interacts with the natural environment. *Id.*; Sanjay Sharma, *Research in Corporate Sustainability: What Really Matters?*, *in* RESEARCH IN CORPORATE SUSTAINABILITY: THE EVOLVING THEORY AND PRACTICE OF ORGANIZATIONS IN THE NATURAL ENVIRONMENT 1, 1 (Sanjay Sharma & Mark Starik eds., 2002) (discussing the research agenda of the "organizations and the natural environment" (ONE) section of the management academy).

141 E-mail from Ivan Montiel to author (Aug 28, 2012, 22:12) (on file with authors).

142 ELKINGTON, *supra* note 5. For another popularization of corporate sustainability, see SAVITZ, *supra* note 5.

143 ELKINGTON, *supra* note 5, at 72–73.

144 *Id.* at vii, 70.

145 *See* JOHN ELKINGTON, THE ZERONAUTS: BREAKING THE SUSTAINABILITY BARRIER 250 (2012).

146 *Id.*

147 Carol Adams et al., *Triple Bottom Line: A Review of the Literature*, *in* THE TRIPLE BOTTOM LINE: DOES IT ALL ADD UP? 17, 18 (Adrian Henriques & Julie Richardson eds., 2004).

148 WORLD COMM'N ON ENV'T & DEV., *supra* note 132.

sustainability."[149] That is, "they encourage sustainable behaviour."[150] The argument is "that greater equality will lead to a more securely sustainable environment."[151] It is distinct from the claim that justice requires fewer wealth disparities between rich and poor countries, or more fairness between the present and future generations. One can readily understand how a person's views on social or economic justice might bias her assessment of the causal relationship between equality and environmental sustainability. "It is, indeed," wrote Dobson, "something of an *article of faith* in the sustainable development movement that a precondition for global sustainability is a global redistribution of wealth . . . ."[152]

If this is true, then empirical uncertainty can drive a wedge between the principles of sustainability and global social justice or cosmopolitan morality. Cosmopolitanism is the normative ideal that all human beings have an equal moral worth that gives rise to moral duties owed to all human beings.[153] Moral cosmopolitans and sustainability advocates are each deeply committed to reducing poverty-related suffering in the underdeveloped world. Andrew Kuper, a leading cosmopolitan thinker, wrote that "[n]othing is more politically important to think about, and act upon, than global poverty relief."[154] There is a critical difference, however, in how they justify their concern. If you ask a sustainability advocate why she wants to reduce poverty overseas, she must give a provisional answer that depends on whether feeding people now really reduces environmental degradation. This suggests a gap between the science and morals of sustainability, or that proponents of sustainable development are not fully cognizant or candid about the foundations of their call for greater global equity.

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149 ANDREW DOBSON, JUSTICE AND THE ENVIRONMENT: CONCEPTIONS OF ENVIRONMENTAL SUSTAINABILITY AND DIMENSIONS OF SOCIAL JUSTICE 14 (1998).

150 Andrew Dobson, *Introduction*, *in* FAIRNESS AND FUTURITY: ESSAYS ON ENVIRONMENTAL SUSTAINABILITY AND SOCIAL JUSTICE 1, 3 (Andrew Dobson ed., 1999).

151 DOBSON, *supra* note 149, at 14.

152 Dobson, *supra* note 150, at 3 (emphasis added).

153 Roland Pierik & Wouter Werner, *Cosmopolitanism in Context: An Introduction*, *in* COSMOPOLITANISM IN CONTEXT: PERSPECTIVES FROM INTERNATIONAL LAW AND POLITICAL THEORY 1, 3 (Roland Pierik & Wouter Werner eds., 2010).

154 Andrew Kuper, *More than Charity: Cosmopolitan Alternatives to the 'Singer Solution*,*'* 16 ETHICS & INT'L AFF. 107, 107 (2002).

C. Sustainable Business and the New Legal Structures

Of the new forms enacted, the privately supplied Certified B Corp and the state-enacted benefit corporation come closest to providing a legal prototype and framework for sustainable or triple-bottom-line business. The Certified B Corp is the creation of B Lab, a Pennsylvania-based 501(c)(3) nonprofit founded in 2007. B Lab seeks to aid social entrepreneurs by developing and promoting a more robust legal infrastructure for their activities, including new legal arrangements for sustainable businesses.[155] To this end, B Lab will confer the trademarked designation of "Certified B Corporation" on entities that meet its "standards of social and environmental performance, accountability, and transparency."[156]

B Lab is also a partner in the American Sustainable Business Council, which expressly supports sustainable development.[157] B Lab's activities are in alignment with a global sustainability agenda, as reflected in their public statements. If their project succeeds, their web page asserts, "individuals and communities will enjoy greater economic opportunity, society will address its most challenging environmental problems, and more people will find fulfillment by bringing their whole selves to work."[158] It encourages "all companies to compete not just to be the best in the world, but to be the best for the world."[159] Certified B Corps must endorse a "Declaration of Interdependence," which states, among other "self-evident" truths, that businesses "should aspire to do no harm and benefit all" and "act with the understanding that we are each dependent upon another and thus responsible for each other and future generations."[160]

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155 *See The Non-Profit Behind B Corps*, CERTIFIED B CORP., http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps (last visited May 11, 2013) ("B Corp certification is to sustainable business what LEED certification is to green building or Fair Trade certification is to coffee.").

156 *Id.*

157 *B Lab*, AM. SUSTAINABLE BUS. COUNCIL, http://asbcouncil.org/partner/b-lab (last visited May 11, 2013). For an over-the-top, critical screed on B Lab's links to sustainable development, see Stephen Poole, *Benefit Corporations: Expansion of the Public–Private Fascist State, Part 2*, FREEDOM ADVOCATES (Aug. 15, 2011, 3:31 PM), http://www.freedomadvocates.org/articles/illegitimate_government/benefit_corporations%3a_expansion_of_the_public-private_fascist_state%2c_part_2__20110815447/.

158 *Why B Corps Matter*, CERTIFIED B CORP., http://www.bcorporation.net/what-are-b-corps/why-b-corps-matter (last visited May 11, 2013).

159 *Id.* (emphasis omitted).

160 *The B Corp Declaration*, CERTIFIED B CORP., http://www.bcorporation.net/what-are-b-corps/the-b-corp-declaration (last visited May 11, 2013).

B Lab also prods state legislatures to enact benefit corporation legislation.[161] The various benefit corporation statutes enacted by state legislatures typically mandate a "purpose of creating general public benefit"[162] where a general public benefit is defined along the lines of "[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation."[163] Note that the impact is phrased in the conjunctive: a positive impact on society *and* the environment. Subject, of course, to the actual impact of the third-party standard, this would appear to legislate that a benefit corporation *must* be a triple-bottom-line organization.[164] Moreover, a benefit corporation's directors must, in performing their duties, consider both a variety of social concerns and the local and global environment,[165] even if most legal efforts to enforce these duties are unlikely to succeed.

This approach represents a clear advance over even the most progressive approaches of yesteryear. There is no better example of the unsustainable mindset than the one articulated in the founding text of modern corporate social responsibility and a precursor to the double bottom line, Howard Bowen's 1953 book *Social Responsibilities of the Businessman*. Bowen posited that "businessmen" (by which he meant the controllers of large public corporations) have a responsibility to conduct business "with concern for the effects of business operations upon the attainment of valued social goals."[166] The first valued social goal Bowen identified is to pursue a "'high standard of living'" for Americans, as reflected in "an abundance of goods and services available for consumption by the masses of the people."[167] The second goal is

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161 *See Legislation*, CERTIFIED B CORP., http://www.bcorporation.net/what-are-b-corps/legislation (last visited May 11, 2013).

162 *Model Benefit Corporation Legislation*, *supra* note 60, at 11.

163 *Id.* at 3; *see also* CAL. CORP. CODE § 14601(c) (West 2013) (similar).

164 Several states, perhaps intending to give more form to the foundational "material positive impact on society and the environment," require that it result from the "operations of a benefit corporation through activities that promote some combination of specific public benefits." *See, e.g.*, N.J. STAT. ANN. § 14A:18-1 (West Supp. 2012); *see also* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(c) (West Supp. 2012) (requiring that the material positive impact be created "through activities that promote a combination of specific public benefits"); VT. STAT. ANN. tit. 11A, § 21.03(a)(4) (West Supp. 2012) (similar). If a New Jersey benefit corporation were to choose specific public benefits *without* any positive environmental impact, it becomes difficult to see how it would achieve a material positive impact on the environment.

165 *See* MASS. GEN. LAWS ANN. ch. 156E, § 10(a) (West Supp. 2012).

166 HOWARD R. BOWEN, SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN 8 (1953).

167 *Id.*

"[e]conomic [p]rogress," by which he means "the steady advancement of that standard" of living—ever-increasing production and consumption.[168]

Contrast this worldview with the account set forth in a report drafted for the UN in advance of the 2012 Rio+20 Conference.[169] In a sustainable world economy, wrote the authors, "ever-increasing consumption is no longer considered an integral component of human needs."[170] Rather, "[p]eople pay attention to their other needs and desires, such as joy, beauty, affection, participation, creativity, freedom, and understanding."[171] This worldview recalls *The Limits to Growth* and its call for a world system that is both sustainable and satisfying.

CONCLUSION: POTENTIAL LOSSES FROM ADDING A THIRD BOTTOM LINE

There are critical differences between the concept of a social enterprise (with dual missions and double-bottom-line metrics) and the concept of a sustainable business (with tripartite missions and triple-bottom-line metrics). For-profit businesses can aspire to be environmentally sustainable and even define themselves in part by their commitment to environmental sustainability. The deeper that commitment, the less accurate it is to describe entities so committed as simply social enterprises with an environmental bent.

Both the double- and triple-bottom-line frameworks spotlight a firm's nonpecuniary goals and performance. Yet by singling out the environment for separate and additional consideration, the triple bottom line implies that a firm's environmental performance is essential to assessing the firm's success.[172] This implication may obscure the potential conflict among a firm's nonpecuniary commitments.

Consider a social entrepreneur who wants to improve the lives of people residing in Whiterock, a low-income inner-city neighborhood. She starts the Bakery, a for-profit company that sells jumbo-sized cupcakes, in order to

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168 *Id.* at 9 (emphasis omitted).

169 ROBERT COSTANZA ET AL., BUILDING A SUSTAINABLE AND DESIRABLE ECONOMY-IN-SOCIETY-IN-NATURE (2012).

170 *Id.* at 19.

171 *Id.*

172 *See, e.g.*, Daniela Ebner & Rupert J. Baumgartner, The Relationship Between Sustainable Development and Corporate Social Responsibility 5 (Sept. 2006) (unpublished manuscript), *available at* http://www.crrconference.org/downloads/2006ebnerbaumgartner.pdf (noting that WCED's account of sustainable development and triple bottom line "believes in an *equal consideration* of ecological, social and economic aspects to meet present and future needs" (emphasis added)).

create jobs for undertrained and otherwise hard-to-employ residents. She organizes the company as an L3C in Vermont (or as a flexible purpose corporation in California), and identifies "the relief of poor and distressed Americans" as its nonpecuniary purpose. The Bakery is so profitable that it can offer above-market wages and job training while generating solid financial returns for owners and investors.[173] In order to achieve these results, however, the Bakery must keep other production costs low. To this end, it imports kitchen equipment made from child labor, buys milk from dairies that keep their cows in cramped, dirty stalls, and uses materials from nonsustainable sources.[174] Its products also tend to make its consumers fatter. (Whiterock's mayor is agitating the Bakery to make smaller cupcakes.)

The Bakery is a robust social enterprise. It is financially sustainable: the more cupcakes it sells, the more jobs and training it can offer to Whiterock residents. The company's legal structure may make its nonpecuniary mission more sustainable at the margin, if only indirectly. At the same time, the Bakery does not aspire to become a 3-P/triple-bottom-line-style sustainable business. In setting its nonpecuniary priorities, the Bakery's controllers have chosen to benefit downtrodden people in the United States over those overseas, humans over other animals, and the present generation over the future. This plan has been well received by the Bakery's most immediate nonshareholding stakeholders—its employees, the community in which it operates (with the possible exception of the mayor), and cupcake lovers everywhere.

The triple-bottom-line approach, by singling out environmental goals from the broader portfolio of nonpecuniary goals, has other consequences. Anecdotal evidence suggests that some proponents of a triple bottom line are relatively diffident about the social dimension. In their review of management literature on sustainable development, Ebner and Baumgartner reported that "[t]he social dimension of [sustainable development] is still the weakest pillar and has been neglected in discussions over the years in comparison to the other two aspects" among articles that define social development in terms of the *Our Common Future* report and the triple bottom line.[175] In *Cannibals with Forks*,

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173 This example is loosely modeled on Greyston Bakery. *See* GREYSTON BAKERY, http://www.greystonbakery.com/ (last visited May 11, 2013). There are some key differences. Greyston Bakery is in fact a Certified B Corp that is attempting to increase its reliance on solar energy. *See Hello, Sunshine!*, GREYSTON BAKERY, http://www.greystonbakery.com/the-bakery/hello-sunshine/ (last visited May 11, 2013).

174 *Cf.* William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 842 (2012).

175 Ebner & Baumgartner, *supra* note 172, at 6.

Elkington offered a single half-hearted and light-hearted illustration of the social bottom line in action: he suggested that if French actress Brigitte Bardot were a corporation, she would fail, "[d]espite her economic and environmental contributions" to France, because of her xenophobic "views on immigration" and her "support for the extreme right-wing National Front party."[176] The deficient "social justice dimension" of her performance would "prevent[] her [from] achieving a win-win-win outcome."[177]

The Bardot, Inc. hypothetical underscores the sometimes controversial nature of assessing good or poor social performance. Consider Chick-Fil-A, the fast food chain whose president expressed support for "the biblical definition of the family unit" and opposition to homosexual unions.[178] Some people praised the chain's president for looking beyond its financial bottom line in order to promote the owning family's understanding of the social good.[179] Those who would distinguish the company from its president (Chick-Fil-A affirms that it treats "every person with honor, dignity and respect—regardless of their belief, race, creed, sexual orientation or gender")[180] must still address the company's policies. The chain is well-known for closing on Sundays, unlike almost every other fast food chain.[181] Who would deny that the promotion of Christian values is a social contribution? Such controversies arise whenever a for-profit business moves beyond the single bottom line.

Social enterprise and sustainable business each attempt to solve a different problem, and these problems differ vastly in scale. Social enterprise and the new organizational forms address a relatively discrete and concrete problem: how can mission-driven organizations expand access to capital without endangering their missions, enabling them to combine the most advantageous

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176 ELKINGTON, *supra* note 5, at XI.

177 *Id.*

178 Jack Nicas, *First Amendment Trumps Critics of Chick-fil-A's Views*, WALL ST. J., July 28, 2012, at A2 (internal quotation marks omitted).

179 Stephen Bainbridge quoted with approval a blogger's post:

> Doesn't the demand that corporations act responsibly in the interests of society, in ways other than profit-seeking, directly imply that corporate leaders who find same-sex marriage socially irresponsible should do something or other to discourage it?
>
> Matters of moral truth aside, what's the difference between buying a little social justice with your coffee and buying a little Christian traditionalism with your chicken? There is no difference.

Stephen Bainbridge, *CSR Bleeding Hearts Hoist by Own Petard by Chick-Fil-A*, PROFESSORBAINBRIDGE.COM (Aug. 17, 2012, 11:51 AM), http://www.professorbainbridge.com/professorbainbridgecom/2012/08/csr-bleeding-hearst-hoist-by-own-petard-by-chick-fil-a.html.

180 Nicas, *supra* note 178.

181 *Id.*

features of the for-profit and nonprofit forms. The ability of the new forms to achieve these aims has been extensively discussed, but relatively little has been said about the substantive goals these forms pursue, other than that these be legally charitable, confer public benefit, and so on.

In contrast, the sustainable business movement is attempting to enlist private enterprise in a global struggle to avert humanitarian disaster and ecological catastrophe. Although it has been little remarked upon, the benefit corporation approach provides a model for how such private enterprises may be organized. In a sense, such forms may serve as a Trojan horse, incorporating the triple bottom line into all social enterprise and erasing the distinction between social enterprise and sustainable business. No longer may a social entrepreneur simply follow her bliss if that bliss is deemed environmentally unsustainable. It may be true, as some claim, that addressing some social needs today will reduce environmental degradation tomorrow, but undoubtedly this is not necessarily or not always the case. The problems produced by imposing a second nonpecuniary bottom line on dual-mission enterprises remain unsolved.