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## **Social Enterprise Lawyering**

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# SOCIAL ENTERPRISE LAWYERING\*

Alina Ball\*\*

## INTRODUCTION

The dramatic rise of the social enterprise sector over the last decade<sup>1</sup> and, in particular, the recent enactment of for-profit, mission-driven entity forms<sup>2</sup> across the country has inspired a significant production of legal scholarship on corporate law innovations and governance considerations within the social enterprise context.<sup>3</sup> Legal scholars have examined and critiqued new hybrid entity forms as various states introduce and adopt them. A consistent theme in social enterprise legal scholarship is skepticism of, and search for, the real value-add of these hybrid entity forms.<sup>4</sup> Regardless of the ambivalence of hybrid entity forms among corporate law scholars, it seems clear that social entrepreneurship—business development that seeks to achieve an articulated social mission using market-based strategies—is here to stay. Although social entrepreneurship is a

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\* Social enterprises—businesses that achieve an articulated social mission using market-based strategies—have commanded rare attention in the last decade of corporate law scholarship. The recent enactment of for-profit, mission-driven entity legislation across the country has inspired a significant production of legal scholarship on corporate law innovations and governance considerations within the social enterprise sector. However, this influx of social enterprise legal scholarship has not, surprisingly, translated into a scholarly examination of the methods and strategies that corporate lawyers use when representing social enterprise clients. The proliferation and sustainability of social entrepreneurship will undoubtedly require the assistance of corporate and transactional lawyers who are equipped to address the nuances that social entrepreneurship presents. This Essay uniquely addresses this gap in social enterprise legal scholarship by advocating for “social enterprise lawyers”—corporate lawyers who also intuit how the social justice objectives of their social enterprise clients impact each legal matter. Moreover, social enterprise lawyers, as defined herein, are those corporate lawyers who conduct their lawyering in a manner that is consistent with the social change ethos of social entrepreneurship. As social entrepreneurship challenges fundamental assumptions of standard business practices and theories, social enterprise lawyering invites a reimagining of conventional corporate lawyering. This Essay hypothesizes that for the nascent social enterprise sector to reach its full potential, there must also be a rise of social enterprise lawyers.

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<sup>1</sup> Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility*, 34 SEATTLE U. L. REV. 1351, 1353 (2011) (describing the impact of the “social enterprise movement” with conventional business industries).

<sup>2</sup> Also referred to in the relevant literature as “hybrid entities,” these entity forms include the benefit corporation, social purpose corporation, public benefit limited liability company, and the low-profit limited liability company. The term “hybrid entity” is not universally used in the social enterprise sector to describe for-profit, mission-driven legal entities and can also be used to describe for-profit, nonprofit tandem entities within the same corporate family. *See e.g.*, Ryan Shaening Pokrasso, *For-Profit or Nonprofit or Hybrid?*, SPZ, <http://www.spzlegal.com/social-enterprise/for-profit-nonprofit-hybrid/> (last visited May 19, 2020).

<sup>3</sup> *See infra* Part I.A and accompanying notes.

<sup>4</sup> *See* Mohsen Manesh, *Introducing the Totally Unnecessary Benefit LLC*, 97 N.C. L. REV. 603, 606 (2019) (“However appealing this notion of corporate altruism might be, the legal justification for benefit corporations reflects a facile oversimplification of conventional corporate law. Conventional corporate law already enables purpose-driven businesses to pursue a social mission, even if doing so might curb a business’s ultimate profits.”).

relatively small percentage of the for-profit business sector,<sup>5</sup> it is, nonetheless, entrenched within the contemporary spectrum of business paradigms<sup>6</sup> and will likely continue to be a vocal contingency—if even a numerically small portion—of the global business sector moving forward. While the majority of social enterprises are small, privately held or nonprofit entities operating at a hyper-local level, the impact of social entrepreneurship is potentially far-reaching.<sup>7</sup> The proposed changes put forth by the Corporate Laws Committee of the ABA Business Law Section to the Model Business Corporations Act to include a new chapter on benefit corporations<sup>8</sup> evidences the legal community’s perceived permanence of social entrepreneurship. Additionally, the consistent flow of for-profit social enterprises gaining notoriety and strong customer followings because of their articulated commitment to pursuing a societal or environmental impact,<sup>9</sup> helps cement the social enterprise sector in the public consciousness, regardless of

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<sup>5</sup> See Brian Groom, *A Third of Start-ups Aim for Social Good*, FIN. TIMES (June 14, 2018), <https://www.ft.com/content/d8b6d9fa-4eb8-11e8-ac41-759eee1efb74>; see also Marshall Ganz, Tamara Kay & Jason Spicer, *Social Enterprise Is Not Social Change*, STANFORD SOCIAL INNOVATION REV. (2018), available at [https://keough.nd.edu/wp-content/uploads/2015/12/SSIR-Spring\\_2018\\_social\\_enterprise\\_is\\_not\\_social\\_change.pdf](https://keough.nd.edu/wp-content/uploads/2015/12/SSIR-Spring_2018_social_enterprise_is_not_social_change.pdf) (“[t]hese institutions have helped turn SEE into an industry, funded by \$1.6 billion in foundation grants since 2003.”).

<sup>6</sup> Emma Sheppard, *‘Social Enterprises Go Bust All the Time’ – How the Sector Is Tackling its Image Problem*, THE GUARDIAN (Mar. 12, 2018) <https://www.theguardian.com/small-business-network/2018/mar/12/social-enterprises-go-bust-all-the-time-how-the-sector-is-tackling-its-image-problem> (“Despite the challenges, one in four people who want to start a business want to create a social enterprise. According to the most recent figures from the government, the sector now accounts for 9% of the business population, employing 1.44 million people.”); Josh Bersin, *The Rise of the Social Enterprise: A New Paradigm for Business*, FORBES (Apr. 3, 2018), <https://www.forbes.com/sites/joshbersin/2018/04/03/the-rise-of-the-social-enterprise-a-new-paradigm-for-business/#77c9d31471f0> (“What we found, after detailed analysis of the data and many interviews with business leaders, is that businesses today are entering a whole new paradigm for management: one which considers a business less as a ‘company’ and more as an ‘institution,’ integrated into the social fabric of society.”); Paul Klein, *Corporate as Agents of Social Change: The Academic View*, THE GUARDIAN (Jan. 15, 2014), <https://www.theguardian.com/sustainable-business/corporates-agents-social-change-academic-view>.

<sup>7</sup> Filipe M. Santos, *A Positive Theory of Social Entrepreneurship* (Social Innovation Centre, Working Paper No. 23 (2009), <https://sites.insead.edu/facultyresearch/research/doc.cfm?did=41727> (“Although social entrepreneurs usually start with small, local efforts, they often target problems that have a local expression but global relevance, such as access to water, promoting small-business creation, or waste management.”).

<sup>8</sup> *Proposed Changes to the Model Business Corporation Act—New Chapter 17 on Benefit Corporations*, 74 BUS. LAW. 819 (2019).

<sup>9</sup> See e.g., Tom Huddleston Jr., *How Allbirds went from Silicon Valley fashion staple to a \$1.4 billion sneaker start-up*, CNBC (Dec. 18, 2018), <https://www.cnbc.com/2018/12/14/allbirds-went-from-silicon-valley-staple-to-billion-sneaker-startup.html>; Carmen Reinicke, *Beyond Meat extends its post-IPO surge to 734%, breaking a \$200-a-share threshold for the first time*, BUSINESS INSIDER (Jul. 23, 2019), <https://markets.businessinsider.com/news/stocks/beyond-meat-stock-price-breaks-200-per-share-2019-7-1028376980>; Amy Feldman, *Next Billion-Dollar Startups: Rothy’s Makes This Year’s ‘It’ Shoe*, FORBES (Aug. 31, 2019), <https://www.forbes.com/sites/amyfeldman/2019/07/16/rothys-shoes/#bff2b4779d54>; *Buy a Pair, Give a Pair*, WARBY PARKER, <https://www.warby.com/buy-a-pair-give-a-pair> (last visited Dec. 31, 2019); *Who We Are*, THE WING, <https://www.the-wing.com/who-we-are/> (last visited Dec. 31, 2019).

whether social entrepreneurship remains at the margins of conventional market-driven business.

Given the likely endurance of social entrepreneurship moving forward, it is critical that legal scholars devote attention to not only hybrid entity law, but also how social enterprise clients shape or influence corporate lawyering. Social entrepreneurship is a unique way of doing business.<sup>10</sup> Thus, social enterprise representation provides a powerful opportunity to challenge, reinvent, and refine conventional constructions of corporate lawyering. Surprisingly, the proliferation of social enterprise legal scholarship has not ushered in an examination of the methods and strategies that corporate lawyers should use when representing social enterprise clients. In general, too little time and attention is given to the strategies and techniques of corporate lawyers in corporate law scholarship. However, the development and sustainability of the social enterprise sector will undoubtedly require the assistance of corporate and transactional lawyers who are equipped to address the nuances that social entrepreneurship presents.<sup>11</sup> Thus, the sector needs legal scholarship on corporate lawyering, not merely corporate law, that acknowledges the differences between conventional business clients and social enterprise clients. Moreover, through their writing on social enterprise lawyering, legal scholars can inspire future cohorts of corporate lawyers to specialize in representing social enterprises.

This Essay uniquely identifies and describes the cadre of “social enterprise lawyers”—corporate lawyers who not only understand the conventional business law issues of social enterprise clients but can also intuit how their social justice objectives impact those issues. Additionally, social enterprise lawyers are those who conduct their corporate lawyering in a manner that is consistent with the social change ethos of social entrepreneurship.<sup>12</sup> In the same manner that social entrepreneurship calls into question fundamental assumptions about standard market-based practices, the concept of social enterprise lawyering invites a reexamining of conventional corporate lawyering. This Essay has the potential to be particularly impactful given limited corporate law scholarship addressing how corporate lawyers can impact social justice or advance social good. This vacuum in legal scholarship leaves social enterprise lawyers and their social enterprise clients in a precarious place. This Essay hypothesizes that if corporate lawyers who represent social enterprise clients cannot adapt and evolve into social enterprise lawyers, then the nascent social enterprise sector is unlikely to reach its full potential.

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<sup>10</sup> Joan MacLeod Heminway, *To Be or Not to Be (A Security)*, 25 REGENT UNIV. L. REV. 299, 320 (2013).

<sup>11</sup> Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 176 (2008) (“When it comes to corporations, lawyers are ship captains.”); JOHN FLOOD, WHAT DO LAWYERS DO?: AN ETHNOGRAPHY OF A CORPORATE LAW FIRM 169 (2013) (“Law firms as outside counsel to companies have long enjoyed positions of authority and power, almost unassailable.”).

<sup>12</sup> Alicia E. Plerhoples, *Risks, Goals, and Pictographs: Lawyering to the Social Entrepreneur*, 19 LEWIS & CLARK L. REV. 301, 312 (2015) (discussing the needs for lawyers to understand the values and goals of social entrepreneurs).

Part I of this Essay provides a brief overview of social enterprise legal scholarship to date, which collectively demonstrates that social entrepreneurship is a promising concept enveloped by weak legal structures and norms where a cadre of corporate lawyers specializing in social enterprise representation could be particularly impactful. Part II discusses the core competencies of social enterprise lawyers not previously addressed in social enterprise legal scholarship. These core competencies explain why social enterprise lawyers would benefit from more legal scholarship on lawyering within this distinct business sector. Part III examines community lawyering theory. The Essay begins to address the gap in social enterprise legal scholarship by highlighting a core feature of community lawyering theory—critical client-centered lawyering—and explains why social enterprise lawyers should intentionally bring a critical lens of client-centeredness into their corporate practice. Because social enterprise clients have social impact missions, key stakeholders, and a consciousness of their environmental footprint that add to their complexities, social enterprise lawyers should—as community lawyering theory suggests—not merely take directives from the client representatives, but also analyze legal strategies and consequences within the social change context specific to their social enterprise clients. The Essay concludes by discussing why social enterprise lawyering is ripe for exploration in future legal scholarship to continue building the identity of and consistency among social enterprise lawyers.

## I. SOCIAL ENTERPRISE LEGAL SCHOLARSHIP

Social enterprises—businesses that achieve an articulated social mission using market-based strategies—have commanded rare attention in the last decade of corporate law scholarship. The community of private entities deploying traditional business strategies to effect social change coalesced and self-consciously defined under the term “social entrepreneurship” in the late 2000s.<sup>13</sup> In 2007, the low-profit limited liability company (or “L3C”) was the first hybrid entity enacted.<sup>14</sup> Shortly thereafter, a significant increase of scholars began engaging the concept of social entrepreneurship and, in particular, corporate law scholars began discussing evolutions in social enterprise law.<sup>15</sup> Subsequently, there

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<sup>13</sup> See ALEX NICHOLLS, *SOCIAL ENTREPRENEURSHIP: NEW MODELS OF SUSTAINABLE SOCIAL CHANGE* (2008); J. Gregory Deese & Beth Battle Anderson, *Framing A Theory of Social Entrepreneurship: Building on Two Schools of Practice and Thought* (2006), available at [https://centers.fuqua.duke.edu/case/wp-content/uploads/sites/7/2015/02/BookChapter\\_Deese\\_FramingTheoryofSE\\_2006.pdf](https://centers.fuqua.duke.edu/case/wp-content/uploads/sites/7/2015/02/BookChapter_Deese_FramingTheoryofSE_2006.pdf); and Roger L. Martin & Sally Osberg, *Social Entrepreneurship: The Case for Definition*, *STAN. SOC. INNOVATION REV.*, Spring 2007, at 35, [http://ssir.org/images/articles/2007SP\\_feature\\_martinosberg.pdf](http://ssir.org/images/articles/2007SP_feature_martinosberg.pdf). But see Ashoka, *Celebrate Global Entrepreneurship Week with Quotes from The Man Who Coined The Term Social Entrepreneur*, *FORBES* (Nov. 15, 2012, 11:18 AM), <https://www.forbes.com/sites/ashoka/2012/11/15/celebrate-global-entrepreneurship-week-with-quotes-from-the-man-who-coined-the-term-social-entrepreneur/#657e88d221d3> (explaining Bill Drayton “founded Ashoka and coined the term ‘social entrepreneur’ in the 1980s”).

<sup>14</sup> See VT. STAT. ANN. tit. 11, § 3001 (2008).

<sup>15</sup> To collect a sampling of legal scholarship discussing social enterprise law and social

was a consistent increase in the number of law review articles discussing social entrepreneurship, with another dramatic increase in social enterprise legal scholarship between 2011 and 2013, and again in 2015.<sup>16</sup>

The corpus of social enterprise legal scholarship is diverse and addresses a variety of interconnected issues. At the risk of oversimplification, this Part I suggests three dominant categories that account for the majority of social enterprise legal scholarship to date: (1) analyzing and making recommendations to new for-profit, mission-driven entity statutes; (2) critiques of hybrid entities that rely on and advance progressive corporate law theory; and (3) examining other facets of the social enterprise ecosystem. This Part I proceeds by elaborating on the contributions of these primary camps of social enterprise legal scholarship. While each of these categories are impactful in understanding contemporary issues of law and social entrepreneurship, currently social enterprise legal scholarship provides only limited insight for corporate lawyers representing social enterprise clients.

#### A. For-Profit, Mission-Driven Entity Form Analysis

There has been a proliferation of new for-profit, mission-driven entity forms designed specifically for social enterprises. These new entity forms, also referred to as “hybrid entities” in the relevant literature, include the low-profit limited liability company (or “L3C”),<sup>17</sup> the benefit LLC,<sup>18</sup> the benefit

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entrepreneurship, the Essay relies on a Westlaw search yielding 978 law review articles published between 2000 and 2019 that contain the term social enterprise at least once. While I do not purport this database equates the corpus of social enterprise legal scholarship, as it is likely both over and under inclusive, this collection of law review articles is an informative sampling of legal scholarship discussing the social enterprise sector. See Figure 1 showing a 33% increase in 2009 from 2007 and 113% increase in 2012 from 2009 in the number of law review articles published that reference social enterprise. For a textual analysis of social enterprise legal scholarship from 2007 through 2017 see Deborah Burand & Anne Tucker, *Legal Literature Review of Social Entrepreneurship and Impact Investing (2007-2017): Doing Good by Doing Business*, 11 WM. & MARY BUS. L. REV. 1 (2019) (providing a literature review of 260 articles that focus explicitly on social entrepreneurship and impact investing); see also Jess Dagers & Alex Nicholls, *The Landscape of Social Impact Investment Research: Trends and Opportunities* (Mar. 2016), <https://thegiin.org/research/publication/oxford-reviews-global-data,-literature-on-impact-investment-research> (last visited May 19, 2020).

<sup>16</sup> See *infra* Figure 1 (showing a relative peak at 109 law review articles published in 2015 mentioning social enterprises); see also Burand & Tucker, *supra* note 15, at 17 (documenting a 164% increase in social enterprise legal articles between 2011 and 2013).

<sup>17</sup> The L3C retains the flexibility and protections of the standard LLC while requiring the company to include the Internal Revenue Code definitions of “charitable” and “educational” in the company’s purpose. See e.g., VT. STAT. ANN. tit. 11, § 3001 (2008). See also Elizabeth Schmidt, *Vermont’s Social Hybrid Pioneers: Early Observations and Questions to Ponder*, 35 VT. L. REV. 163, 165–172 (2010).

<sup>18</sup> The benefit LLC relies on the traditional LLC framework but requires the entity to pursue a general public benefit that is evaluated by a third-party standard similar to the benefit corporation. See e.g., MD. CODE ANN., CORPS. & ASS’NS §§ 4A-1101 to -1108 (LexisNexis 2013), amended by 2013 Md. Laws. ch. 527 (S.B. 697) (codifying benefit LLCs); and OR. REV. STAT. §§ 60.750-66.770 (2014). See also Manesh, *supra* note 4, at 640 (“Each state’s benefit LLC statute largely parrots the

corporation,<sup>19</sup> and the social purpose corporation.<sup>20</sup> The vast majority of states have at least one hybrid entity statute, and several states offer multiple hybrid options.<sup>21</sup> Of these, the benefit corporation is considered the flagship hybrid entity, with thirty-six states having already enacted benefit corporation statutes and five states considering passing legislation at publication of this Essay.<sup>22</sup> Hybrid entities and the statutory benefit corporation, in particular, have rightly been seen by legal scholars as a significant development in entity law worthy of the field's attention.<sup>23</sup>

A significant portion of social enterprise legal scholarship examines hybrid entity statutes<sup>24</sup> by comparing them to conventional entity forms,<sup>25</sup> often arguing for either statutory modifications or implementation considerations.<sup>26</sup> The literature also assesses how social enterprises select their entity form over another.<sup>27</sup> Additionally, there are critiques and concerns about the entity forms. For example, a common critique of hybrid forms is that they do not provide sufficient

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language of the [Model Benefit Corporation Legislation], including the statutorily required purpose of creating general public benefit and the optional purpose of creating a specific public benefit.”). Similarly, the Delaware public benefit LLC or PBLLC is a variation of the Delaware LLC that tracks the public benefit deviations of the Delaware public benefit corporation. *See* DEL. CODE ANN. tit. 6, §§ 18-1201–5 (Supp. 2018).

<sup>19</sup> The statutory benefit corporation requires the corporation to pursue an articulated general public benefit, defined as “a material positive impact on society and the environment, . . . assessed against a thirdparty standard . . . .” MODEL BENEFIT CORP. LEG. § 102 (B LAB Jan. 13, 2016). This Essay uses the term “benefit corporation” in reference to the statutory benefit corporation not the certification from the nonprofit B Lab, referred to as a Certified B Corporation. For more information on B Lab certification, *see* CERTIFIED B CORPORATION, <https://bcorporation.net> (last visited May 19, 2020).

<sup>20</sup> The social purpose corporation or SPC requires the corporation to pursue one or more explicitly adopted social or charitable purposes. *See e.g.*, CAL. CORP. CODE §§ 2500-3503. The Delaware public benefit corporation statute is a modification of the model benefit corporation legislation. Although the Delaware public benefit corporation or PBC statute differs from model benefit corporation legislation, for the purposes of this Essay, it is not carved out as a distinct entity form as it is substantially similar in function to the social purpose corporation. *See* 8 DEL. CODE ANN. tit. 8, §§ 361–368.

<sup>21</sup> *See Status Tool*, SOCIAL ENTERPRISE LAW TRACKER, [www.socentlawtracker.org/#/map](http://www.socentlawtracker.org/#/map) (last visited Jan. 2, 2020) (an up-to-date depiction of hybrid entities by state).

<sup>22</sup> *See State by State Status of Legislation*, BENEFIT CORPORATION, <https://benefitcorp.net/policymakers/state-by-state-status> (last visited Jan. 2, 2020).

<sup>23</sup> *See* John Montgomery, *Mastering the Benefit Corporation*, A.B.A. (July 20, 2016), [https://www.americanbar.org/groups/business\\_law/publications/blt/2016/07/02\\_montgomery/](https://www.americanbar.org/groups/business_law/publications/blt/2016/07/02_montgomery/). (“The benefit corporation may be the most significant development in corporate law since New York combined limited liability and free incorporation in 1811.”).

<sup>24</sup> *See* J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541 (2016); and Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TULANE L. REV. 337 (2009).

<sup>25</sup> *See* Dana Thompson, *L3Cs an Innovative Choice for Urban Entrepreneurs and Urban Revitalization*, 2 AM. U. BUS. L. REV. 115, 129–150 (2012).

<sup>26</sup> *See* Joseph Karl Grant, *When Making Money and Making a Sustainable and Societal Difference Collide: Will Benefit Corporations Succeed or Fail?*, 46 IND. L. REV. 581 (2013); Kyle Westaway & Dirk Sampsel, *The Benefit Corporations: An Economic Analysis and Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999 (2013).

<sup>27</sup> *See* Alicia E. Plerhoples, *Nonprofit Displacement and the Pursuit of Charity Through Public Benefit Corporation*, 21 LEWIS & CLARK L. REV. 525 (2017).

guidance on the balance between profit and mission pursuits.<sup>28</sup> Thus, scholars have recommended including more clarity on the prioritization of social mission to better align hybrid entities with social entrepreneurship theory.<sup>29</sup>

Perhaps the most significant shortcoming of hybrid entities are the limited accountability measures and lack of government enforcement, creating the opportunity for hybrid entities to engage in greenwashing or more deceptive practices.<sup>30</sup> Although benefit corporation statutes vary slightly jurisdiction to jurisdiction, generally benefit corporations are all required to (1) pursue a material positive impact on society and the environment as an element of its corporate purpose; (2) consider non-pecuniary interests, including its public benefit and key stakeholders, in its decision-making; and (3) provide shareholders and the public with annual reports on its social and environmental impact using a third-party standard (the “benefit report”).<sup>31</sup> The proponents of the benefit corporation identify the benefit reports against a third-party standard as the lynchpin of the statute providing credibility and reliability.<sup>32</sup> Yet consistently benefit corporations are not producing or, at least, not making their benefit reports publicly available.<sup>33</sup>

Legal scholarship examining hybrid entity statutes also serves as opportunities to discuss and propose nonconventional governance mechanisms. Hybrid entities are visible representatives of the social enterprise movement and have the potential to help standardize social enterprise governance.<sup>34</sup> In critiquing the statutes, corporate law scholars are also identifying potential weaknesses in the social enterprise governance models that hybrid entities represent. Thus, these articles provide concrete considerations for legislatures introducing hybrid entity

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<sup>28</sup> See Dana Brakman Reiser, *Theorizing Forms of Social Enterprise*, 62 EMORY L. J. 681, 705–06 (2013); but see John Tyler, *Negating the Legal Problems of Having “Two Mothers”*, 35 VT. L. REV. 117 (2010) (discussing the clear prioritization of charitable purpose over any profits pursuits in the L3Cs).

<sup>29</sup> See Raghda El Ebrashi, *Social Entrepreneurship Theory and Sustainable Social Impact*, 9 SOCIAL RESPONSIBILITY J. 188 (2013).

<sup>30</sup> Ellen Berrey, *Social Enterprise Law in Action: Organizational Characteristics of U.S. Benefit Corporations*, 20 TRANS. TENN. J. BUS. L. 21, 37 (2018) (“A major shortcoming of benefit corporation law, recognized by enthusiasts and critics alike, is the absence of sufficient mechanisms for transparency, accountability, and enforcement.”).

<sup>31</sup> For simplicity, this Essay refers to all hybrid entity reporting requirements uniformly as “benefit reports” although that term is not consistently used in the relevant statutes. However, a significant distinction is that reporting requirements for the SPC, PBC, and PBLLC, for example, do not require a third-party standard but instead “the standards the board of directors has adopted to measure the corporation’s progress in promoting [the] public benefits.” DEL. CODE ANN. tit. 8, § 366(b)(1)–(4). See also CALI. CORP. CODE §3501, DEL. CODE ANN. tit. 6, § 18-1205 (Supp. 2018). Moreover, PBC and PBLLC biennial reports are not required to be made publicly available. Notwithstanding these differences in requirements, in practice hybrid entity reporting is regarded similarly.

<sup>32</sup> WILLIAM H. CLARK, JR., ET. AL., THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS, AND, ULTIMATELY, THE PUBLIC 18 (Jan. 18, 2013), [https://benefitcorp.net/sites/default/files/Benefit\\_Corporation\\_White\\_Paper.pdf](https://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf) (“...in many ways the third-party standard is the heart of the benefit corporation legislation...”).

<sup>33</sup> See J. Haskell Murray, *An Early Report on Benefit Reports*, 118 W. VIR. L. REV. (2015) (showing approximately ten percent benefit report compliance).

<sup>34</sup> See Alina S. Ball, *Social Enterprise Governance*, 18 U. PENNSYLVANIA J. BUS. L. 919, 945 (2016).



statutes in their jurisdiction and social enterprise lawyers to discuss with their clients.

## B. Progressive Corporate Law Critique of Hybrid Entities

Despite the enthusiasm surrounding hybrid entities in state legislatures,<sup>35</sup> the legal justification of these new hybrid entities is far from clear. The general consensus among corporate law scholars is that hybrid entity forms are not legally necessary.<sup>36</sup> Repeatedly, scholars demonstrate that conventional corporate law is sufficient for directors and officers to consider social mission and other relevant stakeholders in their decision-making.<sup>37</sup> This segment of social enterprise legal scholarship draws on progressive corporate law theories and scholarship,<sup>38</sup> which is foundational for many social enterprise legal scholars.<sup>39</sup> Progressive corporate law scholarship challenges shareholder wealth maximization theory as the normative framework for corporate legal theory.<sup>40</sup> Progressive corporate law scholars rely on the historical context of corporate charters, the judicial presumption known as the “business judgement rule,” as well as fact-sensitive analysis of corporate law cases to argue a narrow application of seemingly broad legal opinions that undergird shareholder primacy.<sup>41</sup>

If there is weak legal justification for hybrid entities, then a related concern in the literature is that “[t]he creation of new hybrid entities also tacitly gives credence to the widely held but inaccurate view that standard, for-profit corporations can legally justify misconduct or unethical decision-making as the relentless pursuit of profits required by corporate law.”<sup>42</sup> This unintended consequence of conceding conventional corporate law to shareholder wealth maximization would be an unfortunate legacy for hybrid entity statutes that could also jeopardize public opinion of social entrepreneurship generally.

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<sup>35</sup> See Kyle Westaway, *Something Republicans and Democrats Can Agree on: Social Entrepreneurship* STAN. SOC. INNOVATION REV. (Apr. 17, 2012).

<sup>36</sup> See generally Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALA. L. REV. 767 (2015).

<sup>37</sup> See Joan MacLeod Heminway, *Let's Not Give up on Traditional For-profit Corporations for Sustainable Social Enterprise*, 86 UMKC L. REV. 779, 782 (2018).

<sup>38</sup> See Stephen M. Bainbridge, *Community and Satism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856 (1997) (book review) (describing progressive corporate theorists as more communitarian than progressive).

<sup>39</sup> Judd F. Sneirson, *Green is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987, 1017 (2009) (“The shareholder-wealth-maximization principle thus does not limit and should not discourage corporations from undertaking sustainability efforts, even when those efforts appear to detract in the short term from what would otherwise become shareholder profits.”).

<sup>40</sup> See, e.g., Matthew T. Bodie, *The New Iteration of Progressive Corporate Law*, 74 WASH. & LEE L. REV. 739, 739 (2017); Kevin V. Tu, *Socially-Conscious Corporations and Shareholder Profit*, 84 GEORGE WASH. L. REV. 121 (2016).

<sup>41</sup> See LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 25–31 (2012).

<sup>42</sup> Justin Blount & Patricia Nunley, *What is a “Social” Business and Why Does the Answer Matter?*, 8 BROOKLYN J. CORP., FIN. & COM. L. 278, 312 (2014).

### C. Facets of the Social Enterprise Ecosystem

The last significant category of social enterprise legal scholarship analyzes other facets and factors outside of entity form influencing social enterprises, such as pro bono representation,<sup>43</sup> analysis of security interests,<sup>44</sup> adoption of hybrid entities within specific industries,<sup>45</sup> tax treatment, and financing instruments. Appropriate tax treatment of for-profit, mission-driven entities and the consequences that would flow from offering any tax preferences analogous to those enjoyed by nonprofits has generated scholarly consideration even before the first hybrid entity was introduced.<sup>46</sup> The enactment of each new hybrid entity form provides another opportunity to reexamine those arguments.<sup>47</sup> The L3C, for example, was explicitly designed as a for-profit entity form that could attract program related investments (or “PRIs”).<sup>48</sup> Moreover, each hybrid entity statute requires the social enterprise to identify either a charitable or educational purpose<sup>49</sup> or specific public benefit<sup>50</sup> that provides social or environmental impact. These entity purpose statements are comparable to the charitable or educational purpose of the tax-exempt nonprofit.<sup>51</sup> Tax-exemption has been a powerful tool for facilitating the growth and financial stability of the nonprofit sector,<sup>52</sup> and would certainly induce more social enterprises to engage in tax planning to access similar preferences if the IRS extended any tax preference to hybrid entities.<sup>53</sup> Notwithstanding arguments in favor of tax preferences for hybrid entities, tax scholars caution against categorical tax preferences for hybrid entities, which is

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<sup>43</sup> See Alicia E. Plerhoples, *Representing Social Enterprise*, 20 CLINICAL L. REV. 215, 232–33 (2013).

<sup>44</sup> See Heminway, *supra* note 10, at 310–327; Dilpreet K. Minhas, *Enhancing the Legal and Regulatory Environment for Investment in Social Enterprise*, 3 MICH. BUS. & ENTREPRENEURIAL L. REV. 257, 282–86 (2014).

<sup>45</sup> See Yaniv Heled, Liza Vertinsky, & Cass Brewer, *Why Healthcare Companies Should Be (come) Benefit Corporations*, 60 B.C. L. REV. 73 (2019).

<sup>46</sup> See Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2064–67 (2007).

<sup>47</sup> Lloyd Hitoshi Mayer & Joseph R. Ganahl, *Taxing Social Enterprise*, 66 STAN. L. REV. 387, 391 (2014).

<sup>48</sup> *Id.* at 397. Notwithstanding, private foundations are still likely required to demonstrate they have satisfied all PRI requirements including, but not limited to, the foundation’s intent and purposes for the PRI and on-going due diligence as to the L3C’s use of the PRI.

<sup>49</sup> VT. STAT. ANN. tit. 11, §§ 3001(27)(A) (2013).

<sup>50</sup> See *e.g.*, CAL. CORP. CODE § 14601(e); and 8 DEL. CODE ANN. tit. 8, § 362(b) (“‘Public benefit’ means a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature.”).

<sup>51</sup> See I.R.C. § 170(c)(2)(B) (2012); and Treas. Reg. § 1.501(c)(3)(d) (2012).

<sup>52</sup> *Giving USA 2019: Americans Gave \$427.71 Billion to Charity in 2018 Amid Complex Year for Charitable Giving*, GIVING USA (June 18, 2019, 3:07 PM), <https://givingusa.org/giving-usa-2019-americans-gave-427-71-billion-to-charity-in-2018-amid-complex-year-for-charitable-giving/> (explaining \$427.71 billion were donated to U.S. charities in 2018 alone).

<sup>53</sup> See Manoj Viswanathan, *Lower-Income Tax Planning*, 2020 U. ILL. L. REV. 195, 198–203 (2020) (discussing tax planning and how it incentivizes entity form selection and structuring business activities).

consistent with the Internal Revenue Service refusal to issue rulings on PRIs to hybrid entities automatically.<sup>54</sup>

Included in this category are also articles discussing the role of financing documents to both protect the social mission of the social enterprise, and adequately compensate investors. Financing documents, scholars have argued, can effectively harmonize the mutual skepticism and minimize opportunism between social enterprise founders and investors.<sup>55</sup> The literature provides a “taxonomy of socially-motivated investments”<sup>56</sup> and discusses the materiality of environmental, social, and governance (“ESG”) factors in financial modeling and reporting.<sup>57</sup> There are also discussions of how the growing community of impact investors can best support social entrepreneurship.<sup>58</sup> In sum, these articles demonstrate that “contracting for impact”<sup>59</sup> requires thoughtful consideration as to how best modify standard contractual provisions or, where needed, create novel contractual provisions that provide sufficient assurances the business will create social impact.

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Understandably, the aforementioned three categories are too narrow to accurately describe the entire corpus of social enterprise legal scholarship. Additionally, this simplification does not seek to address the various other forms of social science research and scholarship on social entrepreneurship that informs social enterprise legal scholarship. Notwithstanding, even a cursory survey of social enterprise legal scholarship, as explained above, illustrates that the current corpus provides limited insight on lawyering within the social enterprise sector.<sup>60</sup> Of the nearly one thousand law review articles referencing “social enterprise” since 2000,<sup>61</sup> only a few discuss the role of the corporate lawyer representing social enterprises.<sup>62</sup> Collectively, social enterprise legal scholarship demonstrates that

<sup>54</sup> Mayer & Ganahl, *supra* note 47, at 398.

<sup>55</sup> See Dana Brakman Reiser & Steven A. Dean, *Hunting Stag with Fly Paper: A Hybrid Financial Instrument for Social Enterprise*, 54 B.C. L. REV. 1495 (2013).

<sup>56</sup> Paul Brest, Ronald J. Gilson & Mark A. Wolfson, *How Investors Can (and Can't) Create Social Value*, 44 J. CORP. L. 205, 211–213 (2018).

<sup>57</sup> See Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLO. L. REV. 731 (2019).

<sup>58</sup> See Deborah Burand, *Contracting for Impact: Embedding Social and Environmental Impact Goals into Loan Agreements*, 13 N.Y.U. J.L. & BUS. 775 (2017) (advocating for “standardization of the impact provisions being embedded in loan agreements is likely to generate efficiencies that can lower both the financial expense and time involved in consummating impact investment transactions”).

<sup>59</sup> *Id.*

<sup>60</sup> *But see* Allen R. Bromberger, *Social Enterprise: A Lawyer's Perspective*, PERLMAN & PERLMAN, LLP (2007), <https://community-wealth.org/sites/clone.community-wealth.org/files/downloads/paper-bromberger.pdf>. See also Joan MacLeod Heminway, *Lawyering for Social Enterprise*, 20 TRANSACTIONS: TENN J. BUS. L. 797 (2019) [hereinafter Heminway, *Lawyering for Social Enterprise*]; and Stephanie Dangel & Michael J. Madison, *Innovators, Esq.: Training the Next Generation of Lawyer-Entrepreneurs*, 83 UMKC L. REV. 967 (2015) (advocating for more lawyers to become social entrepreneurs).

<sup>61</sup> See *infra* Figure 1.

<sup>62</sup> See Plerhopes, *Risks, Goals, and Pictographs*, *supra* note 12; see also Heminway, *Lawyering for*

social entrepreneurship is a promising concept enveloped by weak legal structures and norms. These are the circumstances where a cadre of corporate lawyers specializing in social enterprise representation would be particularly useful, as corporate lawyers play an invaluable role in specific industry formation and economic development generally.<sup>63</sup> Thus, there is an unmet need in social enterprise legal scholarship to develop the concept and contours of social enterprise lawyering.<sup>64</sup> As Part II explores, a failure to identify and explore social enterprise lawyering is to the detriment of the nascent social enterprise sector.

## II. SOCIAL ENTERPRISE LAWYERING COMPETENCIES

Social enterprises need much of the same corporate lawyering as conventional business clients. After all, social enterprises are legal entities, operating business lines, seeking to attract investments and funding, as well as retain skilled and creative talent. Corporate lawyers need to advise social enterprises on how to form their business entities, minimize tax liability, raise capital, contract with vendors and partners, maintain corporate governance, and comply with regulatory regimes.<sup>65</sup> However, in each iteration of the representation, the social enterprise client presents nuances for the corporate lawyer. Thus, conventional corporate law expertise is necessary but not sufficient to effectively represent social enterprise clients. Social enterprises span entity forms, including, but not limited to, traditional for-profit corporations, nonprofits, limited liability companies, and limited partnerships. But the proliferation of social enterprise statutes that provide off-the-shelf, for-profit entity forms that incorporate a public benefit or social mission, adds another layer of complexity to the entity formation legal counsel.<sup>66</sup> In fact, several prominent law firms now promote their social enterprise law expertise and experience advising hybrid entities.<sup>67</sup>

Hybrid entity statutes also highlight the importance of entity formation to the social enterprise client by putting front-and-center how entity form can advance

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*Social Enterprise*, *supra* note 60.

<sup>63</sup> See Abraham J.B. Cable, *Startup Lawyers at the Outskirts*, 50 WILLAMETTE L. REV. 163, 176–177 (2014) (documenting the impact of startup lawyers on the development of the Silicon Valley ecosystem).

<sup>64</sup> This is consistent with corporate legal scholarship generally, which tends to undervalue the exploration of corporate lawyering theory. See Cathy Hwang, *Value Creation by Transactional Associates*, 88 FORDHAM L. REV. 1649, 1663 (2020) (“Existing legal scholarship fails to adequately explore the crucial question of what transactional associates do.”).

<sup>65</sup> See George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 BUS. LAW. 279 (2009) (discussing the various internal and external transactions business lawyers advise clients on).

<sup>66</sup> See Eric Franklin Amarante, *A Rational Approach to Business Entity Choice*, 64 U. KAN. L. REV. 573 (2016).

<sup>67</sup> See *Social Enterprise and Impact Investing*, COOLEY LLP, <https://www.cooley.com/services/practice/social-enterprise-and-impact-investing> (last visited Jan. 14, 2020); *Social Enterprise + Impact Investing*, MORRISON & FOERSTER LLP, <https://www.mofo.com/practices/business-finance/social-enterprise-impact-investing/> (last visited Jan. 14, 2020); *Sustainable Business and Impact Investing*, HANSON BRIDGETT LLP, <https://www.hansonbridgett.com/Practices-Industries/sustainable-business-and-impact-investing>

the company's adherence to its social mission. Even for social enterprise clients that ultimately decide not to form under these new social enterprise statutes,<sup>68</sup> the statutes provide a benchmark and model for how corporate lawyers can integrate social mission into the entity form.<sup>69</sup> This knowledge of how to accommodate social mission into the entity form and governance model is but one example of the specialized legal fluency social enterprise lawyers must possess. The investigation into what distinguishes social enterprise lawyering cannot conclude with a fluency of hybrid entity law. As this Part II illustrates, there are multiple skill-sets the social enterprise lawyer must possess, which makes social enterprise lawyering worthy of further examination in legal scholarship.<sup>70</sup> Taking as a baseline that social enterprise lawyers need to have a fluency in discussing new hybrid entity laws,<sup>71</sup> this section identifies and describes additional substantive knowledge and modifications to conventional corporate lawyering the social enterprise lawyer must master.

### A. Social Change Theory

Representing social enterprise clients requires the corporate lawyer to command more than the technical aspects of transactional law expertise. For social enterprises, their theory of social change is perhaps the most significant and harmonizing aspect of their business.<sup>72</sup> Thus, in addition to understanding how to marshal private ordering to advance the business objectives, the social enterprise lawyer must also understand the social mission and theory of change model of their social enterprise clients. Social enterprises challenge fundamental assumptions of standard business practices, and position impact on people and planet as the primary unit of concern rather than profits.<sup>73</sup> The relevant literature refers to social entrepreneurship's commitment to addressing sustainable development goals (or

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(last visited Jan. 14, 2020).

<sup>68</sup> Although there is not yet the empirical data to support, the conventional wisdom is that most social enterprises are formed as traditional business forms, particularly as nonprofit organizations.

<sup>69</sup> See generally Ball, *supra* note 34.

<sup>70</sup> Heminway, *Lawyering for Social Enterprise*, *supra* note 60, at 813 ("Said another way, the complex decision-making involved in lawyering for social enterprise presents obvious challenges for business ventures and their legal counsel that involve not only baseline professional responsibility matters of *competence* (comprising doctrinal knowledge and solid, rational legal analysis), *diligence* (by offering patient and perceptive insights in helping the client to choose from among available alternatives), and *communication* (with the goal of ensuring informed client decision-making), but also the exercise of appropriate discretion and professionalism that requires the savvy built from doctrinal, theoretical, and practical experience and leadership capabilities.") (emphasis added).

<sup>71</sup> *Id.* at 800 (explaining that social enterprises are complex and unique entity clients).

<sup>72</sup> *My Impact Framework – Theory of Change*, SPARK SOCIAL ENTERPRISE, <https://www.mysocialstartup.eu/the-theory-of-change/> (last visited Jan. 14, 2020) ("Your theory of change is a core part of your social enterprise.").

<sup>73</sup> Shann Turnbull, *Stakeholder Democracy: Redesigning the Governance of Firms and Bureaucracies*, 23 J. SOCIO-ECONOMICS 321, 321 (1994) (identifying the significance of Mondragón's social innovation as "[p]eople, rather than money, became the fundamental unit of concern").

“SDGs”).<sup>74</sup> Adopted in 2015 by all United Nations Member States, *Transforming Our World: The 2030 Agenda for Sustainable Development* outlines seventeen SDGs as “urgently needed to shift the world on to a sustainable and resilient path.”<sup>75</sup> Social enterprises often link their social mission to SDGs or articulate their mission within the context of SDGs, such as ending poverty, providing access to clean water and sanitation, creating economic opportunities, reducing inequities, and mitigating climate change. A social enterprise’s theory of change articulates not only the company’s goals for social change, but also their strategies for transforming that vision into a reality.<sup>76</sup>

Much like their clients, social enterprise lawyers should distinguish themselves in the legal market by their understanding of social marginalization,<sup>77</sup> structural inequity,<sup>78</sup> and theories of social change.<sup>79</sup> Without this understanding, social enterprise lawyers cannot comprehend the systems that create and sustain the social problems their social enterprise clients are seeking to address. Social enterprise lawyers are tasked with advising their clients on legal mechanisms for how to achieve their business objectives consistent with their values and social mission.<sup>80</sup> Of the various functions corporate lawyers fulfill, client counseling has been repeatedly identified in lawyering theory literature as the most critical.<sup>81</sup> The

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<sup>74</sup> Christian Seelos & Johanna Mair, *Social Entrepreneurship: Creating New Business Models to Serve the Poor*, 48 BUS. HORIZONS 241, 244 (May-June 2005) (identifying the need to assess and study social entrepreneurship through the lens of established social development goals). See also <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>.

<sup>75</sup> G.A. Res. 70/1, Preamble (Sept. 25, 2015), available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>.

<sup>76</sup> Rickke Mananzala & Dean Spade, *The Nonprofit Industrial Complex and Trans Resistance*, 5 SEXUALITY RESEARCH & SOC. POL’Y 53, 61 (March 2008).

<sup>77</sup> Sarah Hidey & Adam Brock, *Social Enterprise IS Social Change*, JOINING VISION AND ACTION (Mar. 28, 2018), <https://joiningvisionandaction.com/social-enterprise-social-change-response/> (discussing Joining Vision and Action’s thirty years of “working with changemakers across the country who are working at both the grassroots and policy levels to ensure our community and our world are places where all people have equality and opportunity in all sectors—health, education, women’s rights, disability rights, refugee/immigrant services, economic development and more. We partner with government agencies as well as nonprofits and social enterprises—helping them build their capacity to have a bigger impact”).

<sup>78</sup> See generally Angela Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923 (2000) (deconstructing the structures of racial subordination and dominance); Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 963-64 (2012) (discussing group subordination absent discriminatory laws).

<sup>79</sup> JILL KICKUL & THOMAS S. LYONS, UNDERSTANDING SOCIAL ENTREPRENEURSHIP: THE RELENTLESS PURSUIT OF MISSION IN AN EVER CHANGING WORLD 95 (2d ed. 2016) (“A theory of change offers a clear road map to achieving results by identifying the preconditions, pathways, and interventions necessary for an initiative’s success.”).

<sup>80</sup> MODEL CODE OF PROF’L CONDUCT R. 2.1 (AM. BAR ASS’N 2016) (discussing other considerations such as “moral, economic, social and political factors” that influence a lawyer’s legal advice to a client).

<sup>81</sup> DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 465 (2004).

social enterprise lawyer cannot fulfill the critical function of client counseling without a deep understanding of the client's business.<sup>82</sup>

Without a deep understanding of social inequities and their client's corresponding theory of change framework, the social enterprise lawyer cannot purport to understand their social enterprise client's business objectives. A significant critique of social entrepreneurship is that it does not achieve social change.<sup>83</sup> If corporate lawyers are not advising their social enterprise clients on how a particular action or provision inhibits the clients' social mission, then their clients are vulnerable to fulfilling this critique. The promise of social enterprises is addressing and improving systemic social and environmental problems. To do this, social enterprise clients need legal counselors who are knowledgeable thought partners in how the business achieves social change.<sup>84</sup> Business lawyers have to understand their client's business to provide appropriate legal advice.<sup>85</sup> Thus, social enterprise lawyers must develop strong competencies on social justice issues and applicable theories of change to contextualize their advice and counsel to social enterprise clients.<sup>86</sup>

This is not an insignificant task for social enterprise lawyers to accomplish. While traditional business school curriculum has adapted to acknowledge social entrepreneurship as an element of contemporary business,<sup>87</sup> law schools have not followed suit in substantially augmenting their business law

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<sup>82</sup> Stuart Goodman, *The Fundamental Role of the Corporate Lawyer — And How to Succeed in It*, in INSIDE THE MINDS: THE CORPORATE LAWYER INDUSTRY INSIDERS ON THE SUCCESSFUL PRACTICE OF BUSINESS LAW (2013), reprinted in SCHIFF HARDIN LLP 2, [http://www.schiffhardin.com/Templates/Media/files/archive/binary/goodman-corporate\\_lawyer.pdf](http://www.schiffhardin.com/Templates/Media/files/archive/binary/goodman-corporate_lawyer.pdf) (last visited Jan. 14, 2020) (“That’s another element of what makes a great corporate lawyer—the ability to think about things the way the client would without losing the legal perspective. That’s the way you can add value because you can not only understand the business perspective but also bring to bear your legal expertise to help the client solve a problem.”); Dent, *supra* note 65, at 310.

<sup>83</sup> See Marshall Ganz, Tamara Kay & Jason Spicer, *Social Enterprise Is Not Social Change*, STAN. SOC. INNOVATION REV. 59 (Spring 2018).

<sup>84</sup> Alison R. Weinberg & Jamie A. Heine, *Counseling the Startup: How Attorneys Can Add Value to Startup Clients’ Business*, 15 J. BUS. & SEC. L. 39, 52 (2014); Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 J. LEGAL EDUC. 223, 228 (2004) (“The better deal lawyers are able to look at a transaction from the client’s perspective and add value to the deal. Looking at a contract from the client’s perspective means understanding what the client wants to achieve and the risks it wants to avoid.”).

<sup>85</sup> Dent, *supra* note 65, at 297 (“One growing area of business practice is preventive law, that is ‘periodically evaluating a client’s business situation to identify potential legal problems ... and to develop and recommend appropriate action accordingly’”) (quoting Peter J. Gardner, *A Role for the Business Attorney in the Twenty-First Century: Adding Value to the Client’s Enterprise in the Knowledge Economy*, 7 MARQ. INTELL. PROP. L. REV. 17, 50 (2003)).

<sup>86</sup> MODEL CODE OF PROF’L CONDUCT Preamble ¶2 (AM. BAR ASS’N 2016) (discussing the need to be able to inform clients of the practical implications of their legal rights and obligations).

<sup>87</sup> For a sampling of business school programs with a specialization on social entrepreneurship, see *Social Enterprise*, HARV. BUS. SCH., <https://www.hbs.edu/socialenterprise/Pages/default.aspx> (last visited Jan. 14, 2020); *Social Entrepreneurship Program*, STAN. GRAD. SCH. OF BUS., <https://www.gsb.stanford.edu/experience/learning/social-innovation/experiential-learning/social-entrepreneurship-program> (last visited Jan. 14, 2020); *Social Impact Career Path*, UCLA ANDERSON SCH. OF MGMT., <https://www.anderson.ucla.edu/degrees/full-time-mba/career-impact/social-impact-career-path> (last visited Jan. 14, 2020).

curriculum. Few law schools have courses on social enterprise law or social entrepreneurship.<sup>88</sup> And even among those limited law schools, few offer more than a single course on social enterprise law.<sup>89</sup> Thus, aspiring social enterprise lawyers must cobble together various courses on conventional business law, on the one hand, and courses on law and society on the other hand, in order to gain exposure to the complexities representing social enterprise clients will present.

In addition to understanding the role of law in creating social inequities,<sup>90</sup> social enterprise lawyers also need to spend significant time engaging with the populations and injustices their social enterprise clients seek to impact. To gain the requisite understanding of social and environmental issues that allows social enterprise lawyers to intuit how legal issues connect to their clients' missions, social enterprise lawyers need to possess a level of fluency that stems from meaningful personal experiences and interactions, not merely academic study.<sup>91</sup>

## B. Governance Models and Reporting

Perhaps one of the most criticized aspects of hybrid entities—their lack of accountability and enforcement of annual or biennial benefit reporting requirements—also provides an opportunity for the social enterprise lawyer to add significant value to the social enterprise client. Hybrid entities serve as off-the-shelf models for social enterprise organizations with built-in mechanisms that promote both profits and adherence to a social mission. As the flagship hybrid entity form, benefit corporation statutes present a particularly impactful opportunity to serve as a new institutional framework around which the social enterprise sector can evolve and mature.<sup>92</sup> To seize this opportunity, social enterprises would need to use the statutorily required benefit report mechanism to

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<sup>88</sup> For a sampling of law school courses and centers on social entrepreneurship, see *Grunin Center for Law and Social Entrepreneurship*, N.Y.U. L., <https://www.law.nyu.edu/centers/grunin-social-entrepreneurship> (last visited May 19, 2020); *Social Enterprise and Nonprofit Clinic*, GEO. L., <https://www.law.georgetown.edu/experiential-learning/clinics/social-enterprise-and-nonprofit-clinic/> (last visited Jan. 14, 2020); *Introduction to Social Entrepreneurship*, HARV. L. SCH., <https://hls.harvard.edu/academics/curriculum/catalog/index.html?o=64904> (last visited Jan. 14, 2020).

<sup>89</sup> UC Hastings Law is one of the few law schools that provide two clinical courses (one corporate law, one business tax) examining social enterprises and the corresponding legal questions these entities present. See *Clinical Programs*, UC HASTINGS C. OF THE L., <https://www.uchastings.edu/academics/experiential-learning-opportunities/clinical-programs/> (last visited Jan. 14, 2020).

<sup>90</sup> See Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1217 (2002) (“The law produces, constructs, and constitutes race, not only in domains where race is explicitly articulated but also where race is unspoken and unacknowledged.”); and Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1596 (2011) (discussing the “productive capacity” of the law “to constitute social arrangements, social hierarchies, and social interests” and the general “failing to seriously engage the role of race as a phenomenon, not an epiphenomenon, in this process”).

<sup>91</sup> An ancillary consequence of legal scholarship examining social enterprise lawyering is that it would provide the basis for law school curriculum addressing not only social enterprise law but also the unique competencies of social enterprise lawyering.

<sup>92</sup> See Yockey, *supra* note 36.



create and disseminate their lessons learned.<sup>93</sup> While the statutory language of hybrid entities does little to disrupt traditional corporate governance practices, which prioritize profit generation, the benefit reporting requirement provides novel opportunities for the social enterprise lawyer to achieve this.

Statutes alone lack the “transformative promise to upend the prevailing model of shareholder supremacy.”<sup>94</sup> The promise of transformation rarely lies within the black and white spaces of the code. Human transformation comes through reflection, refinement, and accountability.<sup>95</sup> In other words, transformation relies on human interaction, exchange, and struggle.<sup>96</sup> Hybrid entity benefit reports provide an opportunity to harness the human capital that drives the social enterprise sector—founders, managers, owners, stakeholders, employees, and corporate lawyers—to refine conventional business practices through critical thought about the social enterprise’s management, spending, and trends that impact the company’s performance.<sup>97</sup> Benefit reports provide an opportunity for social enterprise clients to share not only their successes but also their failures and decisions to pivot. Analogous to the role of corporate lawyers in drafting the Management’s Discussion and Analysis of Financial Condition and Results of Operations (“MD&A”) section in SEC disclosure documents,<sup>98</sup> social enterprise lawyers can add value by conducting the necessary diligence, reviewing, and critiquing these benefit reports.<sup>99</sup> In reviewing benefit reports on an annual or biennial basis, social enterprise lawyers would also gain insight to better advise their social enterprise clients that would inform their advice and counsel in subsequent transactions. Moreover, governance structures need to reflect the social enterprise’s theory of change.<sup>100</sup> Reviewing benefit reports would provide the social enterprise lawyer with insight into the company’s theory of change that could influence the company’s governance structure.

In this way, social enterprise lawyers would also become institutional knowledge repositories to better support current and future social enterprise clients. Given that “model [benefit] legislation does not mandate an external audit . . . [and] provides no method for verifying the truthfulness of the [benefit] reports,”<sup>101</sup> social enterprise lawyers serving as gatekeepers and reputational

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<sup>93</sup> See Ball, *supra* note 34.

<sup>94</sup> Berrey, *supra* note 30, at 23.

<sup>95</sup> See Jack Mezirow, *Understanding Transformation Theory*, 44 ADULT EDU. QUARTERLY 222 (1994).

<sup>96</sup> See MIKHAIL M. BAKHTIN, DISCOURSE IN THE NOVEL 348 (1981) (“The importance of struggling with another’s discourse, its influence in the history of an individual’s coming to ideological consciousness, is enormous. . . . Our ideological development is just such an intense struggle within us for hegemony among various available verbal and ideological points of view, approaches, directions, and values.”).

<sup>97</sup> CALI CORP. CODE §§ 3500–3502.

<sup>98</sup> Larry Catá Backer, *The Duty to Monitor: Emerging Obligations of Outside Lawyers and Auditors to Detect and Report Corporate Wrongdoing Beyond the Federal Securities Law*, 77 ST. JOHN’S L. REV. 919, 945 (2002)

<sup>99</sup> Ball, *supra* note 34.

<sup>100</sup> Rickke Mananzala & Dean Spade, *supra* note 76, at 61.

<sup>101</sup> Berrey, *supra* note 30, at 38.

intermediaries<sup>102</sup> within the social enterprise sector would fill this current void. The social enterprise lawyer's or their law firm's "reputation as an honest, arm's length third party with no incentive to lie or mislead" could also "facilitate transactions and reduce information asymmetries."<sup>103</sup>

### C. Contract Drafting

Social enterprise clients also have unique needs when it comes to contract drafting and analysis. Social enterprise lawyers are more likely to have to draft unique provisions that accommodate their social enterprise clients and their social mission.<sup>104</sup> In her book, *Practicing Law in the Sharing Economy*, Janelle Orsi discusses how contracts in the sharing economy<sup>105</sup> are distinct from other conventional business-to-business contracts.<sup>106</sup> She identifies four distinctions between traditional contracts and the contracts that govern the sharing economy. She notes that contracts in the sharing economy (1) have individualized terms tailored to unique circumstances of that relationship and less reliance on standardization and inequity of bargaining power, (2) rarely memorialize one-time transactions with an emphasis on on-going relationships between the contracting parties, (3) are representative of a highly collaborative process where the counterparties are sharing decision-making and responsibilities, and (4) are co-governed by pre-existing relationships which needs to be reflected in the tone and approach to contractual terms to nourish the underlying relationships.<sup>107</sup> The

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<sup>102</sup> Karl S. Okamoto, *Reputation and the Value of Lawyers*, 74 OR. L. REV. 15, 18 (1995).

<sup>103</sup> Praveen Kosuri, *Beyond Gilson: The Art of Business Lawyering*, 19 LEWIS & CLARK L. REV. 463, 468–69 (2015) (acknowledging Okamoto's theory of reputational intermediaries focuses on the reputation of the law firm rather than an individual lawyer). See also Bruce A. Green, *Thoughts About Corporate Lawyers After Reading The Cigarette Papers: Has the "Wise Counselor" Given Way to the "Hired Gun"?*, 51 DEPAUL L. REV. 407, 412 (2001) (explaining the value of outside corporate counsel as "not economically dependent on any single client, and [whose] law firm traditionally enjoyed a long-term relationship with its corporate client, [such that a corporate lawyer] could risk giving advice that corporate officers did not want to hear."); and 148 Cong. Rec. S6524 (daily ed. July 10, 2002) (remarks by Senator Jon Corzine) ("We cannot overlook the role corporate lawyers ... play in addressing abuses and ensuring that our markets have integrity.").

<sup>104</sup> Alina Ball & Manoj Viswanathan, *From Business Tax Theory to Practice*, 24 CLINICAL L. REV. 27, 75 (2017) (discussing the need to revise boilerplate contract provisions that address employees with criminal records).

<sup>105</sup> In discussing her version of the "sharing economy," Orsi is not speaking generically and, thus, popular sharing economy companies such as Airbnb, Inc. or Uber Technologies, Inc. are not the best archetypes for her model. Instead consider a local credit union, cohousing community, or worker-owned cooperative. "Although it is hard to encapsulate the qualities of the new economy, it generally facilitates community ownership, localized production, sharing, cooperation, small-scale enterprise, and the regeneration of economic and natural abundance. . . . The sharing economy is not a top-down solution, meaning that it will not be imposed by a set of legislated policies. We don't need to wait for a large organization or company to offer the solution to us." JANELLE ORSI, *PRACTICING LAW IN THE SHARING ECONOMY: HELPING PEOPLE BUILD COOPERATIVE, SOCIAL ENTERPRISE, AND LOCAL SUSTAINABLE ECONOMIES* 2–3 (2012).

<sup>106</sup> *Id.* at 95–149.

<sup>107</sup> *Id.* at 98–99.

particularities of sharing economy contracts undoubtedly have a dramatic impact on the role of the corporate lawyers representing each party.

Similar analysis is necessary to identify the distinguishing factors of the contractual terms social enterprise clients require.<sup>108</sup> Social enterprises bring an innovative approach to business and a commitment to social impact that are not likely to be represented in the standardized terms of conventional business contracts.<sup>109</sup> Moreover, the focus on how terms will affect the social enterprise's mission population and other vulnerable individuals is likely to differentiate contracts in the social enterprise sector.<sup>110</sup> Conventional business-to-business contracts are standardized where the majority of the terms are not intended for lawyers to renegotiate them with each new transaction.<sup>111</sup> Additionally, incorporating input from various parties and stakeholders to reach final contractual language requires more of the social enterprise lawyer's time to draft and advise the social enterprise client.<sup>112</sup> With time, it is likely that standardized terms and provisions will emerge that serve as useful starting places for social enterprise clients in their transactions. Undoubtedly, social enterprise lawyers will be integral in the development and dissemination of that standardization across the sector.<sup>113</sup>

### III. THEORIZING SOCIAL ENTERPRISE LAWYERING

As social enterprise legal scholarship continues to evolve, it would be helpful for corporate law scholars to theorize corporate lawyering not merely corporate law in the social enterprise context. Social enterprises distinguish

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<sup>108</sup> Although beyond the scope of this Essay, it is also worth noting that an examination of the billing practices of social enterprise lawyers may also be helpful. The unique contracts that social enterprise clients require will likely also influence how social enterprise lawyers bill their time. Traditionally corporate lawyers bill their clients by the hour or on a project-specific basis when the project is standardized or relatively routine. The level of individuality that social enterprise clients are likely to require may inspire social enterprise lawyers to innovate billing practices that allow them to conduct the individualized contract drafting and analysis their social enterprise clients need while remaining affordable.

<sup>109</sup> Burand, *supra* note 58, at 819.

<sup>110</sup> Zarinah Hamid, Zhang Hengchao & Suhaimi Mhd-Sarif, *Economic Theories of Social Entrepreneurship*, 2 INT'L J. OF ACCT., FIN. & BUS. 110, 115 (2018) (explaining that "what differentiates social entrepreneurship from other forms of entrepreneurship is the superior position of the social value creation in its mission.").

<sup>111</sup> Francisco Reyes & Erik P.M. Vermeulen, *Company Law, Lawyers and "Legal" Innovation: Common Law Versus Civil Law*, 28 BANKING & FIN. L. REV. 433, 465 (2013) (discussing that corporate lawyers resist "legal change and innovation," as exemplified in the "boilerplate standardized agreements and arrangements rather than customized and more optimal contractual solutions.").

<sup>112</sup> Patience A. Crowder, *Impact Transaction: Lawyering for the Public Good Through Collective Impact Agreements*, 49 IND. L. REV. 621, 671 (2016) ("Drafting relational contracts is not for the weak of heart. Good lawyers whose practice includes rational contracts will have to become 'anthropologists, sociologists, economists, political theorists, and philosophers.'").

<sup>113</sup> See Elisabeth de Fontenay, *Law Firm Selection and the Value of Transactional Lawyering*, 41 J. CORP. L. 393, 396 (2015) (explaining that corporate lawyers serve as precedent databases and draw on their expertise in previous deals to inform future transactions).

themselves in the marketplace by remaining conscious about why they operate and *how* they conduct business. Thus, social enterprise clients should demand the same of their corporate counsel. This requires the social enterprise lawyer to not only possess the subject matter competencies explained above but also develop *lawyering strategies* to effectively counsel their clients in achieving their social mission. Many litigators understandably self-identify as co-creators of public law, as every case, every motion, and every argument has the potential to shape the law—and law shapes society.<sup>114</sup> In fact, the conventional role of lawyers in social movements is refining common law. Corporate lawyers, on the other hand, are neither categorically described, nor do they typically self-identify as social change agents.<sup>115</sup> Moreover, rarely does legal scholarship discuss or even acknowledge the methods and strategies corporate lawyers engage in to affect social change.

In the absence of a theorized social enterprise lawyering, social enterprise lawyers could benefit from the thirty years of social change lawyering theory in “community lawyering” scholarship. Community lawyering is the dominant legal theory for social justice lawyering. Although community lawyering scholarship generally contemplates representing groups in advocacy campaigns and individual clients in dispute resolution, there are tenets of community lawyering that social enterprise lawyers could apply to their corporate and transactional representations. Chief among these would be acknowledging each social enterprise client as an equal in the attorney-client relationship, and using the client’s knowledge and situational context to collaboratively problem-solve.<sup>116</sup> The relevant lawyering theory literature refers to this practice as *client-centered lawyering*.<sup>117</sup> The concept of client-centeredness is integral, but not unique, to social justice lawyering.<sup>118</sup> As explained herein, mainstream applications of client-centeredness are not sufficient for social enterprise lawyers. A theorized approach to social enterprise lawyering should incorporate a method akin to community lawyering’s critical perspective to client-centeredness.<sup>119</sup>

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<sup>114</sup> Symposium, James E. Moliterno, *The Lawyer as Catalyst of Social Change*, 77 FORDHAM L. REV. 1559, 1559 (2009) (“Common-law lawyers understand that their arguments make law, and in some cases, social change. . . . Common-law lawyers correctly perceive themselves as potential agents of social change.”).

<sup>115</sup> See Lynnise E. Phillips Pantin, *The Economic Justice Imperative for Transactional Law Clinics*, 62 VILL. L. REV. 175, 204 (2017).

<sup>116</sup> Ann Shalleck, *Constructions of the Client in Legal Education*, 45 STAN. L. REV. 1731, 1735-36 (1993) (arguing that in dominant legal discourse “[t]he unique motivations and desires, the visions and values, of the actual clients [are] . . . irrelevant to the nature of the arguments offered”).

<sup>117</sup> BINDER, BERGMAN & PRICE, *supra* note 81, at 465; Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 376-85 (2006) (summarizing the historical development of the Binder et al. theory of client-centeredness); Plerhoples, *Risks, Goals, and Pictographs*, *supra* note 12, at 310–12.

<sup>118</sup> See Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 418–19 (1985) (describing how an outside corporate lawyer can operate as “a cynical manipulator of the tools made available by the complex legal system. He takes advantage of the forms and the letter of the law, rather than the spirit or intent, to maximize his client’s narrowly defined and essentially asocial goals.”).

<sup>119</sup> See also Plerhoples, *Risks, Goals, and Pictographs*, *supra* note 12, at 312–13 (identifying the benefit of client-centeredness in social enterprise representation as centering the client’s risk

### A. Conventional Client-Centered Corporate Lawyering

Client-centeredness is a recurring theme in conventional narratives of corporate lawyering. As regularly described, the corporate lawyer is supposed to zealously represent the entity client by seeking to understand the client's goals. "Client goals are paramount, with only modest constraints imposed by the countervailing interests of others or the public generally. . . . Within only very loose constraints, [corporate] lawyers seek the private good of their clients and disregard the interests of the public."<sup>120</sup> Not only does the conventional corporate lawyer disregard the impact of the client's goals on the public, they may also have the client's goals substitute their own moral compass.<sup>121</sup>

When I ask my students to visualize an iconic corporate lawyer, invariably the fictional character Harvey Specter from the television show *Suits* is invoked as the contemporary personification of a corporate lawyer. Harvey Specter is characterized as the ultimate "closer." His corporate clients (often manifested as a single executive officer) employ Harvey's prestigious New York corporate law firm specifically to have Harvey tread the fine lines of ethical representation to ensure they obtain their business objectives. In his custom-made, three-piece charcoal suits, Harvey also embodies the perils of the conventional approach of client-centeredness. All adaptations of client-centeredness place client autonomy and decision-making as a primary goal.<sup>122</sup>

Client-centeredness focuses on ensuring that lawyers do what their clients truly want, that they fully understand clients' needs and priorities, explore with them the likely ramifications of different steps they might take on their behalf, and encourage them to make key decisions to guide the legal work on their cases.<sup>123</sup>

As Harvey's character personifies, client-centeredness does not intrinsically generate positive and equitable externalities.<sup>124</sup>

### B. Critical Client-Centered Social Enterprise Lawyering

In many ways the social enterprise lawyer represents clients that are more complicated than the fictional businesses that hire Harvey Specter, and, thus, his narrow application of client-centeredness as taking a directive from a client representative is not sufficient for the social enterprise lawyer. The social

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tolerance).

<sup>120</sup> Moliterno, *supra* note 114, at 1561.

<sup>121</sup> Duncan Kennedy, *Rebels from Principle: Changing the Corporate Law Firm from Within*, 33 HARV. L. BULL. 36 (1981).

<sup>122</sup> Ascanio Piomelli, *Rebellious Heroes*, 23 CLINICAL L. REV. 283, 297 (2016).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 301.

enterprise lawyer must constantly think about the multiple layers of their social enterprise clients. All entity clients have the complexity of multiple constituents (owners, founders, executives, and directors) who may have divergent interests but simultaneously compose the identity of the company. But social enterprises also have social impact missions, key stakeholders, and a consciousness of their environmental footprint that add to their complexities. Thus, it is insufficient for the social enterprise lawyer merely to take direction from a client representative without also determining how the actions will contribute to the social impact and affect the company's stakeholders. In other words, an essential element of social enterprise lawyering requires the lawyer to analyze not merely the individual client, but also the applicable social change movement within which the client operates.

While corporate law scholarship may not grapple with the added layer of complexity a robust company purpose presents for the corporate lawyer,<sup>125</sup> community lawyering scholarship provides a useful theoretical framework for how to incorporate social mission and theory of change into social enterprise lawyering. Community “lawyers view and treat clients as connected (or connectable) members of communities with shared experiences.”<sup>126</sup> “The rebellious vision strives to assist individual clients and, simultaneously, strengthen community and collective capacity to act in concert with others. The goal is horizontal connection with others to achieve shared aims.”<sup>127</sup> Community lawyering’s concept of critical client-centeredness can inform how social enterprise lawyers incorporate their clients’ social impact missions in their lawyering to achieve connectedness and shared political strength for a social movement. This also provides an example of how social enterprise lawyers are trailblazing conventional corporate lawyering. The social enterprise lawyer needs to understand the social enterprise client as an actor within not merely a business industry, but also a larger social movement—and contextualize her counseling accordingly.<sup>128</sup>

A theorized approach to social enterprise lawyering that builds on critical client-centeredness also serves as a strong rebuttal to one of the harshest critiques of social entrepreneurship. Social entrepreneurship is criticized for its out-sized emphasis on the individual entrepreneur or business.<sup>129</sup> Often, stories within social

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<sup>125</sup> Although beyond the scope of this Essay, I do acknowledge that nonprofit legal scholarship may provide helpful insight here. *But see* Edward B. Rock, *The General Counsel of a Nonprofit Enterprise: Some Questions*, 46 HOUSTON L. REV. 17, 30 (2009) (“[B]ecause the very mission of nonprofits is contested and can be captured by different stakeholders, individual nonprofits will have very different organizational cultures.”).

<sup>126</sup> Piomelli, *supra* note 122, at 300.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 302 (“Rebellious lawyers do more than place clients at the center of decision-making. . . . They treat clients as members of communities, rather than as atomized individuals. They seek out and partner with activists and allies in other disciplines or professions, as well as those who operate in no formally credentialed domain. They don’t focus exclusively on legal remedies and procedures, but are alert to other paths. They strive to avoid routinized practice and resignation to the intractability of subordination or the limited impact of their efforts. They aim to be connected partners rather than responsive champions.”).

<sup>129</sup> Ganz, *et al*, *supra* note 83, at 59 (criticizing the capitalism “approach to solving social problems”

enterprise literature present social entrepreneurs as mythologized superheroes.<sup>130</sup> Social enterprise lawyers who instead understand their clients as members of and connected to larger social movements would serve as a balancing effect to the individualistic nature of conventional entrepreneurship. It is the ethical obligation of the corporate lawyer representing a social enterprise client to consider the client's social mission in the lawyer's counseling. Instead of the problematic "third sector" language that seeks to usurp government<sup>131</sup> and its role in addressing social issues, the social enterprise lawyer should understand that private actors have both created and, therefore, have a role alongside government in addressing systems of inequity.<sup>132</sup> The social and environmental issues that social enterprises are attempting to address are pervasive social problems that were not created by government alone. Private interests also participate in creating social inequity and, thus, it is appropriate that social entrepreneurship envisions a function for private action to contribute to resolving these issues. Social entrepreneurship disconnected from social movements of the marginalized has the danger of being paternalistic and ineffective.<sup>133</sup> But social enterprises seeking to support the political process by filling gaps working in coordination and collaboration with government agencies and traditional nonprofits could be transformative. The social enterprise lawyer who understands their clients as needing to work in collaboration with and connected to governmental, grassroots, and other institutional players, is what the success of the social enterprise sector requires.

#### IV. CONCLUSION

The promise of the nascent social enterprise sector is inspiring, yet understandably unfulfilled. Scholars of social entrepreneurship critique the limited social change to date attributed to social enterprises and express skepticism about the transformative impact of the sector. Undoubtedly, corporate lawyers and contextualized legal advice are important elements of the ecosystem social entrepreneurship needs to thrive and reach its full potential.<sup>134</sup> Social entrepreneurship disrupts conventional assumptions, theories, and business

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and the emphasis on innovations of the individual social entrepreneur over impact).

<sup>130</sup> See Fredrik O. Anderson & Ruth McCambridge, *Social Entrepreneurship's All-American Mind Trap*, NONPROFIT QUARTERLY (Aug. 2, 2017) (explaining that "social entrepreneurs have taken center stage as a new type of superhero fighting injustice, poverty, and other social evils across the globe.").

<sup>131</sup> Ganz, *et al*, *supra* note 83.

<sup>132</sup> Bill Conerly, *Business Is One Reason For Economic Inequity – And Also For Equality*, FORBES (Sept. 23, 2018), <https://www.forbes.com/sites/billconerly/2018/09/23/business-is-one-reason-for-economic-inequality-and-also-for-equality/#1bbdba4c654f> (last visited May 19, 2020).

<sup>133</sup> Eric Franklin Amarante, *The Perils of Philanthrocapitalism*, 78 MD. L. REV. 1, 6 (2018) (critiquing "the recent trend of philanthropists using for-profit vehicles to conduct charity" because it "effectively bypasses the [regulatory] regime's [balance and] restrictions, leaving philanthropists free to indulge in their worst instincts").

<sup>134</sup> Alina Ball, *Primary Care Lawyers: A Holistic Approach to Pro Bono Business Lawyering*, 17 U.C. DAVIS BUS. L.J. 121, 123–24 (2017) (connecting corporate representation to business longevity).

practices. Lawyers counseling social enterprise clients have not only an opportunity, but also an imperative to reimagine and refine conventional assumptions, theories, and practices of corporate lawyering. Legal scholars are beginning to recognize the distinct characteristics of social enterprise lawyering. In addition to specialized expertise in hybrid entity forms, social enterprise lawyers also need a deep understanding of social and environmental justice issues to adequately counsel their social enterprise clients. Without social enterprise lawyers, who have both the legal expertise and critical lawyering strategies to represent social enterprise clients, it is unlikely the social enterprise sector will accomplish its ultimate objective of transformative economies and communities. This Essay demonstrates how community lawyering theory and critical client-centeredness, in particular, can inform in the development of social enterprise lawyering theory. More legal scholarship documenting social enterprise lawyering would facilitate the creation of a unified community of social enterprise lawyers.<sup>135</sup> This Essay seeks to inspire more articles that contribute to understanding the nuances and supporting the development of a theorized approach to social enterprise lawyering.

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<sup>135</sup> David Nahmias, Note, *The Changemaker Lawyer: Innovating the Legal Profession for Social Change*, 106 CAL. L. REV. 1335, 1337 (2018) (identifying social enterprise lawyers among entrepreneurial, potentially “changemaker” lawyers who have “enormous opportunity to innovate and advance positive social change”).



Figure 1

