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Representing Social Enterprise

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REPRESENTING SOCIAL ENTERPRISE

ALICIA E. PLERHOPLES*

This article explores the representation of social enterprises—i.e., nonprofit and for-profit organizations whose managers strategically and purposefully work to create social, environmental, and economic value or achieve a social good through business techniques—in the Social Enterprise & Nonprofit Law Clinic at Georgetown University Law Center. The choice to represent social enterprise clients facilitates a curriculum that explicitly focuses on the business models, governance tools, and legal mechanisms that these organizations use to accomplish sustainability and charitable objectives. By serving social enterprise clients, clinic students learn to solve novel and unstructured problems and engage in information sharing and knowledge creation essential to legal advocacy. Legal issues unique to social enterprises compel clinic students to question corporate law and its underlying normative values and employ transactional lawyering for public interest purposes.

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INTRODUCTION

Contemporary corporate law scholarship espouses that the primary purpose of the corporation is to maximize share value for shareholders. Shareholder wealth maximization has been used to describe both the positive foundation and normative goals of corporate law.¹ Many criticize this version of corporate law as prioritizing the interests of shareholders and discounting the interests of nonshareholder constituents of corporations including employees, creditors, suppliers, and customers. At its worst, such critics claim, the shareholder wealth maximization norm promotes short-term thinking on the part of corporate boards and managers at great cost to communities where corporations operate, as well as to corporations themselves.²

¹ See generally ABA Committee on Corporate Laws, *Other Constituency Statutes: Potential for Confusion*, 45 BUS. LAW. 2253, 2265 (1990) (“[T]he ‘best interests of the corporation’ are equated with ‘corporate profit and shareholder gain.’”); Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423 (1993) (arguing that corporate law doctrine does and should prioritize shareholder wealth maximization to the exclusion of other interests); A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) (arguing that management should exercise its authority only for the benefit of shareholders); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 33. *Contra* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1153-54 (1932) (responding to Professor Berle’s article and arguing that corporations have an additional social purpose); Ronald M. Green, *Shareholders as Stakeholders, Changing Metaphors of Corporate Governance*, 50 WASH. & LEE L. REV. 1409 (1993); Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 171 (2008) (arguing that, except for *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, the Delaware courts have “never actually sanction[ed] directors for failing to maximize shareholder wealth”).

² A business strategy that focuses on short-term profit can be antithetical to sustainability goals. While sustainability requires long-term thinking for the benefit of future generations and the future planet, corporations focused on short-term gains or benefits are apt to create more negative externalities. According to Greenfield, “this is because . . . in

The academic debate about corporate purpose is informed by *actual* corporate performance and behavior. While some corporations focus on shareholders and short-term profits, a growing group of corporations emphasize long-term performance, social and environmental sustainability, and the interests of nonshareholder stakeholders; often through corporate governance mechanisms that are imbedded in a distinct sustainability culture.³ “Sustainability”—the capacity to endure—is a concept that has historically been the purview of environmentalists who use the term to refer to the long-term endurance of the natural world. Increasingly, corporate managers, investors, and other corporate stakeholders are applying the term “sustainability” to business, and in a manner that encompasses more than environmental goals. “Sustainable business” refers to operating a business in a manner that has a positive impact or lessens corporate harms on the indi-

the long run the interests of corporations conflate with those of society as a whole Short-termism is also costly economically, since the economy as a whole benefits when companies have a long-term strategy. The economy is the summation of the fortunes of the millions of companies and individuals that make it up; if most companies make decisions that prioritize the short-term at the expense of the long-term, we all suffer.” The counterpoint, however, is that in an efficient market, management decisions based on short-term strategies that hurt long-term company interests will be reflected in the share price because in a perfectly efficient market, share price is the sum of all expected future dividends and payouts discounted by present value. Nonetheless, the reality is that markets are not perfectly efficient, and it is difficult for investors to determine which strategies are based on short-termism and which are based on long-term thinking. Managers can hide their business strategies from the market. See LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* (2012); Kent Greenfield, *The Problem of Short-termism*, 46 WAKE FOREST L. REV. 627, 627 (2011); see also AMERICAN LAW INSTITUTE, *PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS*, § 2.01, Comment (f) (acknowledging that “long-run profitability and shareholder gain are at the core of the economic objective” of the corporation, and that the corporation creates “interdependencies” between various stakeholders that must be fairly managed); LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY: AMERICA’S NEWEST EXPORT* 4-5 (2001) (arguing that short-term management is irresponsible, leading to “layoffs, plant closings, alienated workers, unsafe products, and a polluted environment, all in the name of today’s profit”); Justin Fox & Jay W. Losch, *What Good are Shareholders?*, HARV. BUS. REV., July-Aug. 2012, at 57 (critiquing reliance on the concept of shareholders as owners of the corporation, arguing that the increase in short-term shareholders has detrimental effects on the corporation, and advocating for the involvement of other stakeholders and long-term shareholder involvement in corporate governance).

³ Robert G. Eccles et al., *The Impact of a Corporate Culture of Sustainability on Corporate Behavior and Performance* 2, 5 (Harv. Bus. Sch., Working Paper No. 12-035, 2012) (describing “sustainability culture” as a voluntary and explicit integration of social and environmental values, beliefs, policies, and practices into the underlying culture of the business, and finding that “high sustainability” companies have distinct characteristics such as “a governance structure that accounts for the environmental and social impact of the company in addition to financial performance, a long-term approach towards maximizing intertemporal profits, an active stakeholder management process, and more developed measurement and reporting systems.”).

viduals, communities, and the environment with which the business interacts. Businesses—as large-scale economic actors that assemble capital, produce and distribute goods and services, and make investments—have been called to task for contributing to environmental, financial, and social problems such as climate change, increased global demand for natural resources, and economic disparity and inequality that creates civil unrest and political pressure. As businesses face these challenges, they have several options. Will they respond in ways that mitigate or exacerbate these challenges? Will corporate actors attempt to balance often disparate but sometimes synergistic environmental, social, and financial interests? What systems, standards, policies, and practices encourage and reflect sustainability in the corporate sector?⁴

These are some of the questions that confront law students in the Social Enterprise and Nonprofit Law Clinic at Georgetown University Law Center (SENL Clinic).⁵ In the SENL Clinic, Georgetown law students serve the business and transactional legal needs of social entrepreneurs and nonprofit organizations in the District of Columbia and internationally. The Clinic's educational goals are to: (i) teach law students the materials, expectations, and methods of transactional lawyering and (ii) introduce law students to transactional lawyering in the public interest.⁶

⁴ See also John Elkington, *Governance for Sustainability*, 14 CORP. GOVERNANCE: INT'L REV. 522, 524 (2006) (asking similar questions and noting that the sustainability agenda "is the responsibility of the corporate board The better the system of corporate governance, the greater the chance that we can build towards genuinely sustainable capitalism.").

⁵ The Social Entrepreneurship and the Law Practicum was first offered during the Spring 2013 semester and is a precursor to the Social Enterprise and Nonprofit Law Clinic, which launched with the Fall 2013 semester. I have been engaged in the selection and representation of social enterprises as clients for a transactional law clinic since 2008, when I was a Clinical Teaching Fellow with the Organizations & Transactions Clinic at Stanford Law School, and subsequently a visiting assistant professor at University of California, Hastings College of the Law from 2010 to 2013. The Social Enterprise and Nonprofit Law Clinic is the second transactional law clinic at Georgetown Law. The Harrison Institute for Housing and Community Development is the first transactional law clinic at Georgetown University Law Center and one of the longest-operating clinics at a U.S. law school.

⁶ Numerous articles have been written about the missions and pedagogical objectives of law clinics in general, and more recently about transactional law clinics that practice in the field of community economic development. See, e.g., Alicia Alvarez, *Community Development Clinics: What Does Poverty Have to Do With Them?*, 34 FORDHAM URB. L.J. 1269 (2007); Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67 (2000); Laurie Hauber, *Promoting Economic Justice Through Transactional Community-Centered Lawyering*, 27 ST. LOUIS U. PUB. L. REV. 3 (2007); Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J.L. & POL'Y 249 (2004); Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLIN. L. REV. 195 (1997). Fewer articles describe the work

SENL Clinic students study corporate governance, i.e., the systems that govern the relationships of a firm's management, board, shareholders, and other stakeholders as well as the "structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring [the company's] performance."⁷ Students engage in corporate governance legal work that corporate counsel typically perform: review and revise organizational documents and governance policies that affect their clients' internal and external operations; advise clients on optimal business forms; identify, analyze, and recommend operational and strategic improvements for management's use; and draft contracts and manage transactions on behalf of their clients.

However, the SENL Clinic explicitly emphasizes legal and non-legal sustainable strategies and practices used in the social enterprise and corporate sectors.⁸ Corporate leaders are increasingly focusing on sustainability issues and targeting governance practices as a method of achieving sustainability goals.⁹ Some also argue that sustainability in the corporate sector is unavoidable; driving both organizational and

of transactional law clinics that represent businesses or nonprofit organizations outside of community economic development agendas. *See, e.g.*, Kosuri, "Impact" in 3*D*, *infra* note 8; Jay A. Mitchell, *Getting into the Field*, 7 *J. FOOD L. & POL'Y* 69 (2011) (describing the experience of students in the transactional law clinic at Stanford Law School in representing nonprofit clients in the food system sector); Amanda Spratley, *Connecting Law and Creativity: The Role of Lawyers in Supporting Creative and Innovative Economic Development*, 8 *HASTINGS BUS. L.J.* 221 (2012) (describing how transactional lawyers and the transactional clinic at George Washington University Law School contribute to the development of the creative economy).

⁷ The Organisation for Economic Co-operation and Development, *Principles of Corporate Governance* 11 (2004).

⁸ Few scholars have addressed transactional clinics' service to social enterprise clients explicitly. *See, e.g.*, Susan R. Jones, *Current Issues in the Changing Roles and Practices of Community Economic Development Lawyers*, 2002 *WIS. L. REV.* 437, 443-47 (2002) (discussing the effect that social venture philanthropy and social entrepreneurship principles will have on community economic development work); Praveen Kosuri, "Impact" in 3*D*—*Maximizing Impact Through Transactional Clinics*, 18 *CLIN. L. REV.* 1 (2011) [herein Kosuri, "Impact" in 3*D*] (discussing the social impact that a clinic can make by serving social ventures, among other organizational clients). Admittedly, transactional law clinics have engaged social enterprise clients since such clinics began in the 1970s. However, social enterprise has only been defined as such in recent years, as it has been widely adopted and supported by academics, entrepreneurs, investors, foundations, and politicians. One can aptly call this new phase of mission-driven business a "movement," distinct from previous iterations.

⁹ *See* Eccles, *supra* note 3, at 5 (noting the various corporate governance practices that characterize "high sustainability" companies, such as assigning responsibility for sustainable outcomes to the board of directors, forming a board committee on sustainability, considering environmental, social, and "external perception" when making executive compensation decisions, training managers in stakeholder engagement, creating an official stakeholder engagement process with feedback reported directly to board of directors, etc.); *see infra* Part IIA.

technological innovation.¹⁰ Understanding sustainable business is an essential skill for law graduates who want to practice business law. And law schools, which have been criticized for failing to maintain pace with changes in the legal profession,¹¹ should prepare law students for this emerging sector of corporate law practice.

Given the Clinic's pedagogical objectives, representing social enterprises is a natural fit. Because a "live-client" clinic's principal teaching method is legal representation of clients, client selection is critical in setting and meeting pedagogical objectives.¹² There are synergies between learning sustainable strategies and practices, and representing social enterprise clients. There is no single definition of social enterprise or the various other terms used to describe for-profit and nonprofit ventures that strategically pursue and create social, environmental, and financial value to achieve greater sustainability or address a social or environmental problem.¹³ Many social enterprises attempt

¹⁰ See Ram Nidumolu et al., *Why Sustainability Is Now the Key Driver of Innovation*, HARV. BUS. REV. MAG. (Sept. 2009), <http://hbr.org/2009/09/why-sustainability-is-now-the-key-driver-of-innovation/es> (arguing that competitors that do not make operations sustainable will be at a competitive disadvantage to those that do). Sustainability is also unavoidable in the sense that we will all eventually sink or swim (forgive the pun) given the oncoming disruption that climate change will cause. See also Matteo Tonello, *Charting a Path to Sustainability Leadership*, THE HARV. L. SCH. FORUM ON CORP. GOVERNANCE AND FIN. REG. (Dec. 13, 2012, 9:02 AM), <http://blogs.law.harvard.edu/corpgov/2012/12/13/charting-a-path-to-sustainability-leadership/> ("Not surprisingly, given the intense global competition for resources, talent, and market share, corporate sustainability has emerged as a new leadership benchmark. Especially among the largest and most influential corporations—those that control a large portion of the world's physical resources as well as its human and economic capital—sustainability is an increasingly important factor in both competitiveness and risk management. Corporate practices are scrutinized more closely than ever, and markets, supply chain partners, employees, regulators, and communities are all demanding proof of sustainable performance from these companies.").

¹¹ See, e.g., BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012); Peter Latman, *NYU Law Plans Overhaul of Students' Third Year*, N.Y. TIMES (Oct. 17, 2012), <http://dealbook.nytimes.com/2012/10/16/n-y-u-law-plans-overhaul-of-students-third-year/> (noting NYU Law School's change to its curriculum in response to this criticism). Law schools have been criticized for not teaching transactional lawyering, in particular. See, e.g., George W. Dent Jr., *Business Lawyers as Enterprise Architects*, 64 BUS. LAW. 279 (2009) (discussing the implications of his study of the value added by transactional lawyers on law school curriculums).

¹² CLINICAL ANTHOLOGY: READINGS FOR LIVE-CLIENT CLINICS 59 (Frank S. Bloch et al. eds., 2d ed. 2011) ("The cases are the primary 'teaching materials' in a clinical course; in effect, they set the course's educational objectives. Case selection is, therefore, among a clinical teacher's most important responsibilities. The types of cases students handle in a clinic determine not only which areas of law they will have to learn, but also which skills they will have to master and with which actors and institutions they will have to interact.").

¹³ Alicia E. Plerhoples, *Can an Old Dog Learn New Tricks?: Applying Traditional Corporate Law Principles to New Social Enterprise Legislation*, 13 TRANSACTIONS: TENN. J. BUS. L. 221 (2012); see also JOHN ELKINGTON, *CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS* (1997) (describing social enterprise as the pursuit of "people, profit and planet"); Robert A. Wexler, *Effective Social Enterprise – A Menu of*

to solve social or environmental problems while also pursuing financial returns for themselves and their investors; others do so in non-profit organizational forms so as to reinvest financial returns in the nonprofit organization. Many social enterprises employ innovative business models and governance structures.

The choice to represent social enterprise clients facilitates a dynamic curriculum in a transactional law clinic. First, serving social enterprise clients helps introduce students to law practice in a corporate sector that increasingly emphasizes sustainability. Students learn about sustainability strategies and initiatives in the social enterprise and corporate sector¹⁴ and gain an understanding of an emerging practice area.¹⁵ Second, serving social enterprise clients provides students with the opportunity to critically examine corporate laws and norms that perpetuate corporate harms to the communities and the environment in which they operate, just as clinic students working in low-income communities examine laws and norms that perpetuate poverty and inequality. Students also begin to evaluate modern corporate legal theories that are the basis of state corporate governance law, with an eye towards rethinking corporate governance strategies and practices to meet social enterprise goals. Additionally, representing social enterprises presents novel and unstructured issues, provid-

Legal Structures, 6 THE EXEMPT ORG. TAX REV. 565 (2009) (“Those of us who work with social enterprises recognize by now that there is no legal definition of social enterprise, and there is not even a uniformly recognized nonlegal definition, although there have been many valiant attempts.”); Elizabeth Bibb et al., *The Blended Value Glossary*, BLENDED VALUE, 13 (2004), <http://www.blendedvalue.org/wp-content/uploads/2004/02/pdf-blendedvalue-glossary.pdf> (“The definition of Social Entrepreneurship is hotly debated. The definitions in use are often as broad as simultaneously pursuing both financial and social returns (e.g. double bottom line) or as narrow as non-profits which used earned income strategies to pursue social objectives. One particular area of debate is whether or not the definition of social entrepreneurship must include revenue generation or if it just applies to the application of innovative/entrepreneurial skills to social problems. Finally, some claim that Social Entrepreneurs are found solely in the non-profit sector but this narrow definition seems to be waning.”).

¹⁴ When describing the type of legal work his students engage in on behalf of double bottom-line businesses, Praveen Kosuri notes that “the work students perform in these matters resembles the work they will likely do in practice if they work for private law firms.” Praveen Kosuri, “*Impact*” in *3D—Maximizing Impact Through Transactional Clinics*, 18 CLIN. L. REV. 1, 40 (2011) [herein Kosuri, “*Impact*” in *3D*]; see also Praveen Kosuri, *Losing My Religion: The Place of Social Justice in Clinical Legal Education*, 32 B.C. J. L. & SOC. JUST. 331, 341 [hereinafter Kosuri, *Losing My Religion*] (“Most clinicians rightly acknowledge that only a few clinical students will go into public interest careers. As such, most of them are in clinics to learn transferrable competencies.”).

¹⁵ A few major law firms have started practice areas to serve the social enterprise sector and to serve the “impact” investors that finance social enterprise. See Zachary D. Kaufman, *Making Social and Environmental Impact Through Legal Careers: The Top 10 Roles for Attorneys in Social Entrepreneurship* (Aug. 2013) (manuscript at 8), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2320728.

ing students with the opportunity to learn the methods and tools lawyers use to approach, analyze, and solve a legal problem. Moreover, the social enterprise sector is developing and growing. Law students contribute to the sector through direct representation of social enterprise clients on sophisticated business matters, as well as through information sharing and knowledge creation of best practices.¹⁶

Part I identifies the business models that social enterprises employ in an effort to provide a robust description of social enterprise, and an understanding of what students learn through their client representation and the SENL Clinic's curriculum. This description also illustrates the many ways in which social enterprise has embraced sustainability goals, and how these goals are also visible in the larger corporate sector. Part II argues that the corporate sector is increasingly focused on sustainability issues, creating a client-driven need to teach law students about sustainability strategies and practices. Part III explores how the SENL Clinic engages students in a critical examination of corporate legal theory as a pedagogical tool to teach law students corporate law. Students explore whether (and how) corporate law should be employed to achieve sustainability objectives. Part IV discusses the skills and practice methods law students enrolled in the SENL Clinic learn through representing social enterprise clients, such as information facilitation, knowledge creation, and solving novel and unstructured legal issues.¹⁷ Part V discusses the limitations of selecting social enterprises as clients in the experiential setting, and offers some conclusions.

¹⁶ "To most public-interest minded law students and lawyers, practicing transactional law isn't an obvious path to saving the world." And yet, transactional lawyers have the skills and capacity to shape and support sustainability in the corporate sector. JANELLE ORSI, PRACTICING LAW IN THE SHARING ECONOMY: HELPING PEOPLE BUILD COOPERATIVES, SOCIAL ENTERPRISE, AND LOCAL SUSTAINABLE ECONOMIES 1 (2012); *see also* Kent Greenfield, *Proposition: Saving the World with Corporate Law*, 57 EMORY L. J. 948 (2008). In his inaugural lecture for the Delaney Family Professorship entitled "Why Would Anyone Want to be a Public Interest Lawyer?," Philip Schrag named "corporate reform" in his list of what constitutes public interest law work. Such work is a large part of the pedagogical value of representing social enterprises in a transactional law clinic, as is discussed in this Article. Philip G. Schrag, *Why Would Anyone Want to be a Public Interest Lawyer?* Inaugural Lecture of the Delaney Family Professorship, Georgetown Public Law and Legal Theory Research Paper No. 10-52 (Sept. 2010).

¹⁷ Part IV does not reiterate all of the skills and practice methods used in representing organizational clients. *See infra* note 142. Rather the focus is on skills learned unique to the representation of social enterprise clients and the Clinic's focus on sustainability in the corporate sector.

I. MODELS OF SOCIAL ENTERPRISE

A. *What is Social Enterprise?*

In the Clinic seminar, students learn about the various business models employed by the growing social enterprise sector.¹⁸ Students discover that advocates and actors in the social enterprise sector have not agreed upon a single definition of “social enterprise” and that many terms are used to describe the various organizational models on the value creation spectrum, including social enterprise, triple-bottom line business¹⁹, and social entrepreneurship.²⁰ In seminar sessions that emphasize business understanding, terminology, and methods, students consider the range of possible organizational models and strategies that organizations use to solve environmental and social problems and/or meet sustainability goals.

Theoretically, organizations that strategically engage in double- or triple-bottom line value creation, lie on a spectrum between two extremes.²¹ On one end of the spectrum are organizations whose missions and activities are wholly philanthropic. On the other end of the spectrum are organizations that are profit-maximizing businesses

¹⁸ For illustration of the growth of the sector, consider recent legislation promoting new corporate forms to facilitate the growth of social enterprise that has been passed in several states with overwhelming bipartisan support. However, it should be noted that social enterprise principles can be accomplished in any corporate form whether nonprofit, C-corp, S-corp or one of the new corporate forms. Social enterprise is not synonymous with social enterprise legislation. The new corporate forms include the benefit corporation, flexible purpose corporation, and social purpose corporation along with alternative forms like the low-profit limited liability and the benefit limited liability company. Nine states have passed low-profit limited liability company statutes: Illinois, Louisiana, Maine, Michigan, North Carolina, Rhode Island, Utah, Vermont, and Wyoming. Twelve states have passed benefit corporation statutes: California, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, South Carolina, Vermont, and Virginia. Finally, some states have adopted other social enterprise legislation like the flexible purpose corporation in California, the benefit limited liability company in Maryland, and the social purpose corporation in Washington. Carter G. Bishop, *Fifty State Series: L3C & B Corp Legislation Table*, Suffolk University Law School Legal Studies Research Paper Series, Research Paper 10-11 (July 10, 2012); *State by State Legislative Status*, BENEFITCORP.NET, <http://www.benefitcorp.net/state-by-state-legislative-status> (last visited Jan. 25, 2013).

¹⁹ In business accounting, “bottom line” refers to a financial indicator: revenue minus expenses (which will either equal a loss or profit). “Triple bottom line” accounting refers to three dimensions of business performance: social, environmental and financial. In the vernacular, triple bottom line is often called “people, planets, and profit” to denote that financial performance is not the only meaningful indicator of a business’s success (or failure).

²⁰ See Bibb et al., *supra* note 13, at 33.

²¹ J. GREGORY DEES, JED EMERSON & PETER ECONOMY, *ENTERPRISING NONPROFITS: A TOOLKIT FOR SOCIAL ENTREPRENEURS* 14-15 (2001) (describing the organizational structure of the social enterprise spectrum as the range between purely philanthropic organizations and purely commercial organizations); see also Plerhoples, *supra* note 13, at 228-32. Often, mainstream media labels all businesses between these two axes as social enterprises, not acknowledging that there are crucial distinctions between business models at different points along this spectrum.

whose pursuits are solely commercial.²² Closer to the profit-maximizing side of the social enterprise spectrum, one might find corporate philanthropy²³ or corporate social responsibility²⁴ initiatives. On the nonprofit side of the spectrum, one might find nonprofit organizations using an earned income strategy to sustain a set of social services, as opposed to a nonprofit that relies exclusively on donations.²⁵ Although the work accomplished by social entrepreneurs is not new (Susan B. Anthony and John Muir are considered early social entrepreneurs), the language of social enterprise—the terms used to classify it—and the current momentum behind the movement has only recently emerged.

Scholars classify social enterprise business models according to their activities, operations, and motives.

There are likely hundreds of thousands of organizations that can and should self-identify as social enterprises in the U.S., on the basis of “what” they do (i.e. producing a good or service to solve a social problem), “how” they do it (i.e. employing from, locating in, or buying from underserved communities as a primary purpose), or “why” they do it (i.e. making profits principally to reinvest in a social activity).²⁶

This classification of social enterprise is inclusive. Notably, this definition does not depend on an entity’s organizational form.²⁷ A social

²² The Blended Value Glossary also has an illustration of a “blended value” spectrum that labels goals in a hierarchy. At one end are traditional nonprofit organizations that have a primary mission of achieving some social or environmental impact, and at the other end are traditional for-profit organizations that have a primary goal of achieving profits for shareholders. Bibb et al., *supra* note 13, at 4.

²³ One definition of “corporate philanthropy” is “support through gifts, equipment, supplies, or other contributions by business firms to charitable institutions, sometimes through organized programs that may include corporate foundations.” Bibb et al., *supra* note 13, at 24.

²⁴ “Corporate social responsibility” or CSR can be defined as “the voluntary role of business in contributing to a better society and a cleaner environment beyond its financial and capital commitments.” CSR often refers to the strategic social and environmental value creation initiatives of large, publicly-traded, or widely-held corporations. Bibb et al., *supra* note 13, at 13-14.

²⁵ “Earned income” is “money received by an organization in return for the sale of a product or rendered service. This does not include corporation or foundation grants, government grants or subsidies, contributions from individuals, or in-kind donation of products or services. Both non-profit and for-profit organizations can have earned income. However, non-profit earned income strategies are typically designed to cover a social program’s cost rather than to be distributed as a profit.” Bibb et al., *supra* note 13, at 15.

²⁶ Ben Thornley, *The Facts of Social Enterprise*, HUFFINGTON POST (Nov. 8, 2012, 9:54 AM), http://www.huffingtonpost.com/ben-thornley/social-enterprise_b_2090144.html.

²⁷ See also MARC LANE, SOCIAL ENTERPRISE: EMPOWERING MISSION-DRIVEN ENTREPRENEURS 7 (2011) (“[S]ocial enterprise’ will refer to any business model that, to a significant degree, has a mission-driven motive. This mission-driven motive may be exclusive of a profit motive or blended with one. The mission-driven motive may be primary and the profit motive may be secondary, or vice versa.”).

enterprise can be a nonprofit or for-profit entity.²⁸ Some define social enterprise more narrowly. According to Social Enterprise Alliance, Inc., a non-profit organization that promotes the goals of social enterprise, a social enterprise must “*directly* address an intractable social need and serve[] the common good, either through its products and services or through the number of disadvantaged people it employs.”²⁹ For others, social enterprise means “blended enterprise” or double or triple bottom line businesses—i.e., “entit[ies] that intend[] to pursue profits and social good both in tandem and by making considered choices to pursue one over the other.”³⁰

B. *How They Do It: The Stakeholder Governance Model*

For purpose of this article, social enterprise includes enterprises that are defined as such because of “how” they operate: they employ internal governance structures and practices to create social and environmental value. Two business models fit this framework, the stakeholder governance model (or stakeholder relationship management model)³¹ and the pluralist ownership model. Both of these models embrace a collaborative notion that the corporation’s constituents deserve a fair return on their investments, whether those are investments of capital, labor, natural resources, or land. Advocates of stakeholder governance reject the notion that “if a company is *financially* successful then all stakeholders will (automatically and inevitably) benefit.”³² They advocate taking into account returns to other stakeholders through measurements of both financial and non-financial success, while acknowledging that the interests of various corporate stakeholders are often divergent and not easily reconciled.³³ Some large corporations, such as Costco and Whole Foods, have implemented stakeholder governance models to define business performance

²⁸ Thornley, *supra* note 26 (“35 percent of U.S. social enterprises are non-profit organizations; 31 percent are regular ‘C’ corporations or LLCs.”).

²⁹ *What is Social Enterprise?*, SOCIAL ENTER. ALLIANCE, <https://www.se-alliance.org/what-is-social-enterprise> (last visited Jan. 16, 2013).

³⁰ Dana Brakman Reiser, *Blended Enterprise and the Dual Mission Dilemma*, 35 VT. L. REV. 105, 105 (2010).

³¹ RAJ SISODIA, JAG SHETH & DAVID WOLFE, *FIRMS OF ENDEARMENT: HOW WORLD-CLASS COMPANIES PROFIT FROM PASSION AND PURPOSE* (2007) (coining the term “stakeholder relationship management” business model or SRM and arguing that companies that take on a stakeholder relationship management business model have a competitive advantage and higher returns to their shareholders).

³² Rory Ridley-Duff, *Communitarian Perspectives on Social Enterprise*, 15 CORP. GOVERNANCE: INT’L REV. 382, 385 (2007) (parenthetical added).

³³ See BEVERLY SCHWARTZ, *RIPPLING: HOW SOCIAL ENTREPRENEURS SPREAD INNOVATION THROUGHOUT THE WORLD* 77 (2012) (describing social entrepreneurship as “align[ing] all stakeholder interests by creating mutually beneficially relationships aimed at serving the community”).

through financial, social, and environmental impact.³⁴

Recent state legislation creating new corporate forms such as the benefit corporation and flexible purpose corporation have embraced the stakeholder governance model by rejecting maximization of shareholder wealth as the sole driver of corporate managers' business decisions.³⁵ In July 2013, Delaware revised its corporate code to adopt the public benefit corporation, a new for-profit corporate form "intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner."³⁶ Public benefit corporations are required to be managed in a manner that balances shareholders' fi-

³⁴ See SISODIA, SHETH & WOLFE, *supra* note 31 (profiling Whole Foods, Costco, Honda, Harley-Davidson, Trader Joe's, The Container Store, Patagonia, Southwest Airlines, Wegmans Food Markets, and New Balance (among other companies) as those who are employing a stakeholder governance business model); see also John Mackey, *The Kind of Capitalist You Want to Be*, HARV. BUS. REV., Jan.-Feb. 2013, at 34 (Mackey is the co-founder of Whole Foods, author of *Conscious Capitalism*, and writes that "business leadership could not be only about maximizing profits for shareholders; it had to deliberately pursue the many other positive impacts good businesses have on their stakeholders."). *Contra* Kim Fellner, WRESTLING WITH STARBUCKS: CONSCIOUS, CAPITAL, AND CAPPUCINO (2008) (criticizing Starbucks and other "conscious capitalism" companies like Whole Foods for engaging in "benevolent paternalism" by deciding what is best for their employees).

³⁵ Opposition to the shareholder wealth maximization norm is named in the legislative histories of social enterprise legislation as the reasoning motivating such legislation. See, e.g., W. Derrick Britt et al., *Proposed Amendments to the California Corporations Code for a New Corporate Form: The Flexible Purpose Corporation and Senate Bill 201 — Frequently Asked Questions*, BUSINESS FOR GOOD (2011), <http://businessforgood.blogspot.com/2011/03/frequently-asked-questions-proposed.html>; see also, Plerhoples, *supra* note 13 (explaining the legislative history of The Corporate Flexibility Act of 2011 arising from opposition to the shareholder wealth maximization norm).

³⁶ 8 Del. C. §§ 362(a). See also *Model Benefit Corporation Legislation with Explanatory Comments*, BENEFIT CORP 10-11 (2012), http://benefitcorp.net/storage/documents/Model_Benefit_Corporation_Legislation.pdf. The Model Benefit Corporation Legislation reads:

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

nancial interests, the best interests of stakeholders materially affected by the corporation's conduct, and a public benefit. Notably, corporate lawyers and businesses that seek access to venture capital, private equity, and public markets look to Delaware as a corporate law leader and preferred place of incorporation. California and New York, two other prominent corporate law jurisdictions, have also adopted stakeholder governance corporate forms. Both states have adopted the benefit corporation, and California has also adopted the flexible purpose corporation. The flexible purpose corporate statute in California requires adoption of "at least one 'Special Purpose' that directors and managers may consider in addition to traditional shareholder economic interests."³⁷ Additionally, a flexible purpose corporation may operate for charitable purposes similar to a nonprofit corporation, or operate for:

[t]he purpose of promoting positive short-term or long-term effects of, or minimizing adverse short-term or long-term effects of, the flexible purpose corporation's activities upon any of the following:

- (i) The flexible purpose corporation's employees, suppliers, customers, and creditors.
- (ii) The community and society.
- (iii) The environment.³⁸

The Special Purpose and other purposes must be written into the flexible purpose corporation's charter and cannot be amended without two-thirds vote of each class of voting shares.³⁹

Greyston Bakery, the iconic social enterprise that became the first New York benefit corporation, provides an example of the stakeholder governance business model. Greyston Bakery dedicates itself to inner-city community renewal by providing sustainable employment—including living wages, job training, and benefits—to hard-to-employ individuals. Net profits from the bakery are distributed to Greyston Foundation, the bakery's sole shareholder. The foundation, in turn, provides job training, affordable housing, youth services, childcare, and health care to the mixed-income community where it operates. Greyston Bakery's motto is, "We don't hire people to bake brownies. We bake brownies to hire people."⁴⁰ Greyston Bakery is a

³⁷ Britt et al., *supra* note 35.

³⁸ CAL. CORP. CODE § 2602(b)(2)(A)-(B) (West 2012).

³⁹ CAL. CORP. CODE § 3000(a)(7)(B) (West 2012).

⁴⁰ *The Greyston Bakery's Guiding Principles*, <http://www.greystonbakery.com/wp-content/uploads/pdf/greyston-bakery-guiding-principles.pdf>. Another example of social enterprise that is defined based on employee low-income or hard-to-employ people is Sseko Designs, a company that employs university-bound Ugandan women during the nine-month gap between secondary school and college. Sseko Designs pays the women fair wages during this gap period and has a mission to end the cycle of poverty of Ugandan women. During the nine-month employment period, women who work for Sseko Designs

double-bottom line business that aims to treat its labor and capital in a sustainable manner. This treatment is at the core of the stakeholder governance model.⁴¹

C. How They Do It: Pluralist Ownership Business Model

A second model of social enterprise that turns on employing internal governance structures and practices to create a positive social or environmental impact is the pluralist business model. Advocates argue that “sustainable social organization evolves out of *equitable* relationships” where distinctions between capital and labor are not “inevitable” and the pluralist ownership model replaces the employer-employee relationship.⁴²

[T]hese models challenge the prevailing views on who controls the enterprise and how surplus value should be distributed amongst stakeholders. They also challenge the reliance [in corporate law] on ‘independent’ directors to make ‘rational’ judgments to protect shareholder interests and favor *internalization* of conflicts and socio-economic thinking guided by corporate debate.⁴³

In the United States, the business models that align most closely with the pluralist ownership business model are “democratic workplaces,” the most common of which are employee stock ownership plans (ESOP) and worker cooperatives. Consider Publix Super Markets, an employee-owned⁴⁴ supermarket chain in the southern United States. Publix Super Markets has more than 1000 stores and had net earnings of approximately \$1.4 billion in 2011. The company’s stock does not trade on any securities market. Publix common stock is only available to its current employees (and their beneficiaries) through an ESOP and the company’s 401(k) Plan.⁴⁵ Publix stock is owned entirely by its employees and its non-employee directors. ESOPs operate in compa-

earn enough to fund a year and a half of university tuition and Sseko matches 100% of the funds the women put aside for tuition. *FAQs*, SSEKO DESIGNS, <http://ssekodesigns.com/faqs/#charity> (last visited Jan. 10, 2013).

⁴¹ Notably, Greyston Bakery does not claim to be a triple-bottom line business, which denotes that environmental sustainability is not among the Bakery’s motives.

⁴² Ridley-Duff, *supra* note 32, at 383-84, 386 (citing studies that support the idea that “sustainable companies (and economies) are built slowly by groups of people who collaborate over many years and not through deliberate agency of visionary leaders or charismatic entrepreneurs.”).

⁴³ *Id.* (using some United Kingdom companies as examples of companies that have embraced pluralist business models).

⁴⁴ Under ESOPs, employees own the stock of the company. Whether those employee-stockholders can truly be considered “owners” of the company is up for debate. Generally, stockholders are not considered “owners” of a widely-held corporation. As stockholders, they only have a residual interest in the firm’s assets. They do not have decision-making rights over the firm’s day-to-day activities, nor can they unilaterally dissolve the firm.

⁴⁵ Publix Super Markets, Inc., Annual Report (Form 10-K) (2012).

nies for a variety of reasons: as a source of retirement funds for employees; to provide employees with a means of participation in company decisions; to maintain company culture or mission; and to align employee and management interests.

Although it is unclear whether this pluralist ownership model is the cause or an effect of Publix's exceptional corporate social responsibility (CSR) initiatives,⁴⁶ it is evident that Publix is a mission-driven company. Publix publishes a Social and Environmental Stewardship Report each year, highlighting its socially- and environmentally friendly business operations including those pertaining to recycling and waste management, resource and water conservation, greenhouse gas emissions management, sustainably sourced products, salvage food program, and LEED-certified stores.⁴⁷ In 2011, Publix ranked first on the Corporate Social Responsibility Index produced by the Boston College Center for Corporate Citizenship and the Reputation Institute.⁴⁸ The CSR Index bases its rankings on the public's perception of a company in three areas: "citizenship" (i.e., socially and environmentally responsible impact on surrounding community), "governance" (i.e., fair, transparent, and ethical business practices), and "workplace" (i.e., fair employee treatment and investment in employee careers).⁴⁹

Worker cooperatives fully embrace the pluralist ownership model, perhaps to an even greater extent than companies with ESOPs. The distinguishing characteristics of worker cooperatives are twofold: "(1) workers invest in and own the business, and (2) decision-making is democratic, generally adhering to the principle of one worker, one vote."⁵⁰ Governance rights do not depend on equity participation in the corporation—each worker has one vote. Worker cooperatives are situated within a larger community economic

⁴⁶ There are numerous research reports that have found that ESOPs enhance corporate and worker performance, and others that find no such effect. See generally, *Research on Employee Ownership, Corporate Performance, and Employee Compensation*, NATIONAL CENTER FOR EMPLOYEE OWNERSHIP, <http://www.nceo.org/articles/research-employee-ownership-corporate-performance> (last visited Jan. 10, 2013).

⁴⁷ PUBLIX SUPER MARKETS, INC., SOCIAL AND ENVIRONMENTAL STEWARDSHIP REPORT (2011).

⁴⁸ *Id.*; *The 2011 Corporate Social Responsibility Index*, BOSTON COLL. CTR. FOR CORPORATE CITIZENSHIP (2011), available at <http://www.bccccc.net/pdf/CSRIReport2011.pdf>.

⁴⁹ BOSTON COLL. CTR. FOR CORPORATE CITIZENSHIP, *supra* note 48. Publix has been on Fortune's list of the "100 Best Companies to Work For" since 1998. See PUBLIX SUPER MARKETS, INC., *supra* note 47.

⁵⁰ *About Worker Cooperatives*, U.S. FED'N OF WORKER COOPS., <http://usworker.coop/aboutworkercoops> (last visited Jan. 10, 2013); see also *Puget Sound Plywood v. Commissioner*, 44 T.C. 305 (1965) (defining cooperatives in a similar manner for tax purposes). For a thorough legal description of cooperatives, see ORSI, *supra* note 16, at 181-203.

development and poverty reduction agenda.⁵¹

Equal Exchange, a worker cooperative builds long-term trade partnerships with sustainable farmers' cooperatives and distributes fair trade products such as coffee and tea.⁵² Equal Exchange has a "one-worker, one-vote" governance structure with a board elected by co-op employees, a president who has the same single share as the other co-op members, and a maximum executive-to-worker compensation of 4-to-1.⁵³ Daniel Fireside, the Capital Coordinator at Equal Exchange explains the connection between social enterprise and pluralist ownership business models: "for social enterprises to claim the mantel of being socially responsible, you've got to do more than make a great product or treat your workers with respect. To make profound changes to the economy, you've also got to change the way you think of ownership, investment, and power."⁵⁴

D. Why They Do It: Corporate Philanthropy Business Model

There are some organizations and businesses that bear the social enterprises moniker because of "why" they operate as they do. These for-profit social enterprises operate to produce profits that are donated or reinvested in a socially- or environmentally-beneficial activity. Many label this "corporate philanthropy" because the primary focus is on making profits to fund social or environmental activity. Greyston Bakery, in part, employs this corporate philanthropy model in that its sole shareholder is a private foundation. Another prominent corporate philanthropy model is the "buy-one-give-one" or B1G1 business model. Under the B1G1 model, a for-profit company sells products or services in a developed nation and donates similar products or services in a developing nation. The social entrepreneurs employing the B1G1 model seem to be less concerned with transforming internal corporate governance structures (as the stakeholder governance model does) and are more focused on the impact that their businesses have on ameliorating an immediate social, health, or environmental problem. The most prominent example of the B1G1 model is TOMS Shoes, Inc., a Los Angeles shoe company. For every pair of TOMS shoes sold at a luxury retail store in developed coun-

⁵¹ See, e.g., Gowri J. Krishna, *Worker Cooperative Creation as Progressive Lawyering? Moving Beyond the One-Person, One-Vote Floor*, 33 BERKELEY J. OF EMP. & LAB. L. 101 (2013).

⁵² Equal Exch., Annual Report (2011).

⁵³ Daniel Fireside, *Equal Exchange's Radical Approach to Corporate Social Responsibility*, in PRACTICING LAW IN THE SHARING ECONOMY: HELPING PEOPLE BUILD COOPERATIVES, SOCIAL ENTERPRISE, AND LOCAL SUSTAINABLE ECONOMIES, *supra* note 16, at 190-92.

⁵⁴ *Id.* at 192.

tries, the company works with humanitarian organizations to identify and give a free pair of shoes to a child in a developing countries.⁵⁵ Other social enterprises that have followed TOMS' lead include Warby Parker that donates eyeglasses⁵⁶ and Baby Teresa which donates baby clothes.⁵⁷ Consumers in the developed world can now purchase a wide range of clothes and household goods using the B1G1 model.

E. What They Do: Beneficial Product or Services Business Model

Finally, an inclusive definition of social enterprise also captures those organizations and businesses whose primary operations are creating products and services to ameliorate a social or environmental problem, using a for-profit or nonprofit earned income strategy. Examples of this type of social enterprise include Socket, an organization that has created a soccer ball that generates and stores electricity when kicked. The soccer ball is intended to replace kerosene lamps in developing countries; kerosene lamps cause numerous health and safety problems, while playing soccer contributes to health by increasing physical activity and teamwork.⁵⁸ Sanergy, and EcoTact, both social enterprises, are developing toilets and sanitation systems in urban slums in Nairobi, and PeePeople, has developed a single-use hygienic bag that sanitizes wastes and converts it to fertilizer.⁵⁹ Likewise, the Center for Inspired Teaching aims to make an impact by providing "transformative teacher training" to teachers developed through evidence-based research on how students learn.⁶⁰ The Center for Inspired Teaching recently opened a public charter school in Washington, D.C. that demonstrates its pedagogical method and trains teachers.

⁵⁵ *One for One*, TOMS SHOES, <http://www.toms.com/our-movement/movement-one-for-one> (last visited Jan. 16, 2013); see also BLAKE MYCOSKIE, *START SOMETHING THAT MATTERS* (2011).

⁵⁶ *Buy a Pair, Give a Pair*, WARBY PARKER, <http://www.warbyparker.com/do-good/#buy-a-pair-give-a-pair> (last visited Jan. 16, 2013).

⁵⁷ *About Baby Teresa*, Baby Teresa, <http://www.baby-teresa.com/pages/about-us> (last visited Jan. 16, 2013).

⁵⁸ Jim Whitkin, *Using Soccer to Supplant Kerosene Use?*, N.Y. TIMES (Jan. 26, 2010, 8:32 AM), <http://green.blogs.nytimes.com/2010/01/26/using-soccer-to-supplant-kerosene-use/>.

⁵⁹ Jonathan Kalan, *The Silicon Valley of Shit: Nairobi Is Ground Zero for Sanitation Innovation*, GOOD (Nov. 17, 2011, 2:30 AM), <http://www.good.is/posts/the-silicon-valley-of-shit-nairobi-is-ground-zero-for-sanitation-innovation/>.

⁶⁰ *What We Believe About Teaching and Learning*, THE CTR. FOR INSPIRED TEACHING, <http://www.inspiredteaching.org/about/our-model/what-we-believe-about-teaching-and-learning> (last visited Jan. 10, 2013) (The Center operates a Certificate Program and Institute to train teachers and has partnered with the District of Columbia and Baltimore public school districts to improve literacy and mathematics teaching, respectively).

In sum, the social enterprise sector is vast and dynamic, encompassing both the for-profit and nonprofit sectors and a wide range of industries. Social enterprises use both customary and innovative business models to achieve a social and environmental impact and/or meet sustainability goals. This is the social enterprise sector that law students study in the SENL Clinic's seminar. Students examine these business models to gain an understanding of business terminology, financing methods, and sustainable corporate governance practices. With some constraints, this is also the sector that law students serve through their live-client representation.

F. Client Selection

While students in the SENL Clinic study the entire social enterprise sector, the Clinic limits its client representation to a subset of social enterprise clients that meet certain parameters. First, Clinic students represent nonprofit organizations (even those that can afford moderate legal fees) because the primary benefit of the provision of legal services runs to a charitable class or society as a whole. By representing a social enterprise that is a nonprofit organization, Clinic students are furthering the charitable mission of the nonprofit organization. Some of the Clinic's nonprofit clients are social enterprises; some are traditional public charities that rely primarily on donations for funding and provide social services to charitable classes. Whether a social enterprise or not, many of the Clinic's nonprofit clients have substantial corporate governance disclosure and reporting obligations and complex operations similar to public companies, although on a much smaller scale. Nonprofit organizations have boards of directors with fiduciary duties to the corporation; boards (and board committees) that have audit, conflict of interest, and whistleblower responsibilities; operations that require multiple funding sources; and contractual relationships with employees, suppliers, vendors, funders, volunteers, and other constituents. In short, this governance framework and institutional structure introduces students to a skill set and substantive knowledge of organizational complexity comparable to what they will employ in corporate or nonprofit law fields when they graduate.

Second, the SENL Clinic represents for-profit social enterprises. The Clinic tries not to compete with the local practicing bar. Because the Clinic's legal services are provided *pro bono* and because students pay tuition to participate in the SENL Clinic, it would be unethical to devote student resources to the representation of a for-profit business whose benefit runs primarily to private individuals (as opposed to low-income individuals, protected class groups, or society as a whole)

if that business can afford to pay for legal services. Nonetheless, the SENL Clinic represents for-profit social enterprises that are engaged in an activity whose *primary* mission is to have a beneficial social and/or environmental impact on disadvantaged individuals or communities, similar to a nonprofit organization. Some such for-profit clients cannot afford to pay legal fees; a few can afford to pay moderate legal fees but the Clinic represents them *pro bono* as well. Representing select for-profit clients that can afford moderate legal fees carries with it a similar justification as representing nonprofit organizations that can afford to pay legal fees: representing social enterprises whose primary mission is charitable helps further that mission.

The SENL Clinic also represents for-profit social enterprises that cannot afford to pay legal fees⁶¹ even where the primary mission is not a charitable mission. An example is an educational cooperative that operates under a for-profit pluralist ownership model—moderate-income teachers jointly own the cooperative and provide English as a second language training. The cooperative does not have a primary mission to benefit disadvantaged individuals or communities and benefits run primarily to the teacher-owners. Nonetheless, the cooperative has a social enterprise characteristic—the pluralist ownership model—that Clinic students can learn about through the client representation. Furthermore, the representation aids in community economic development by facilitating the financial independence for the group of teacher-owners.⁶² Given the high price of legal services, and the fact that law firms often have blanket policies prohibiting *pro bono* legal services to any for-profit entity, it is probable that the cooperative would not be able to find affordable representation for its legal needs. In selecting this social enterprise client, Clinic students are able to both learn about the pluralist ownership business model as well as assist a small business that would otherwise attempt to handle its legal needs by itself or through non-lawyers.

The foregoing description of social enterprise and the Clinic's selection criteria is only part of the story.⁶³ The more important ques-

⁶¹ For-profit social enterprises that cannot afford to pay legal fees are typically "microenterprises." The U.S. Department of Housing and Urban Development defines microenterprises as a commercial enterprise that has five or fewer employees, one or more whom owns the enterprise. Housing and Community Development Act of 1992, Pub. L. 102-550, 106 Stat. 3672, tit. 7, § 807 (c)(2) (1992).

⁶² For additional arguments in favor of providing *pro bono* legal services to for-profit business, see James L. Baillie, *Fulfilling the Promise of Business Law Pro Bono*, 28 WM. MITCHELL L. REV. 1543 (2002).

⁶³ An additional important issue concerns the teaching of transactional lawyering in law school. Traditionally, law schools have relied on the Langdellian method of teaching, where students learn legal analysis and law by reading cases. Law students learn contract law or business associations by reading cases where a contract is in dispute, an agent ex-

tions are: why represent primarily social enterprise clients and why build a curriculum around the social enterprise sector? According to a 2010-2011 study by the Center for the Study of Applied Legal Education, approximately 52 law schools in the United States have transactional law clinics that practice community economic development law, intellectual property law, housing law, consumer law, and nonprofit law.⁶⁴ Many transactional law clinics use client selection criteria similar to that of the SENL Clinic, and many represent social enterprises.⁶⁵ A key feature of the SENL Clinic is the development of a curriculum that explicitly focuses on the social enterprise sector and its relation to sustainable corporate strategies and practices to prepare students for transactional practice where future corporate and nonprofit clients will demand such knowledge and skills.

II. PREPARING FOR CORPORATE PRACTICE

Representing social enterprise clients helps prepare students for a corporate practice where business clients are facing greater demands to be “sustainable” in their business operations. In 1983, the United

ceeds its authority, or a board violates its duties to the corporation. Although the Langdellian method succeeds in teaching law and legal reasoning and analysis, it does so through the lens of appellate cases. The typical first year curriculum of most law schools is entirely based on a litigation framework, with many upper-level law courses using a similar lens. Law school does not introduce or teach law students about corporate documents, contractual documents, or transactional practice methods unless through their own initiative or by enrolling in specialized courses. Due in part to this reason, law schools have received substantial criticism from practicing corporate attorneys and law firms for failing to produce law graduates ready to practice in transactional law areas such as corporate governance, corporate finance, project finance, real estate law, intellectual property, and tax. Representing organizational clients on corporate and transactional matters is a partial attempt to fill this transactional void. See Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 J. OF THE ASS'N OF LEGAL WRITING DIRECTORS 118, 119 (2008); Celeste M. Hammond, *Borrowing from the B Schools: The Legal Case Study as Course Materials for Transaction Oriented Elective Courses: A Response to the Challenges of the MacCrate Report and the Carnegie Foundation for Advancement of Teaching Report on Legal Education*, 11 TRANSACTIONS: TENN. J. BUS. L. 9, 10 (2009); Seth Freeman, *Bridging the Gaps: How Cross-Disciplinary Training with MBAs Can Improve Transactional Education, Prepare Students for Private Practice, and Enhance University Life*, 13 FORDHAM J. CORP. & FIN. L. 89, 93 (2008); Eric J. Gouvin, *Teaching Business Lawyering in Law school: A Candid Assessment of the Challenges and Some Suggestions for Moving Ahead*, 78 UMKC L. REV. 429, 429-30, 441-42 (2009).

⁶⁴ Survey from The Center for the Study of Applied Legal Education, 2010-2011 Survey Subset on Transactional Law Clinics (May 11, 2012) (on file with author).

⁶⁵ For example, I regularly collaborate with the directors of the International Transactions Clinic at the University of Michigan Law School and the Small Business & Community Economic Development Clinic at The George Washington University Law School, both of which represent social enterprises. See Deborah Burand, Susan R. Jones, & Alicia E. Plerhoples, *Clinic Collaborations: Going Global to Advance Social Entrepreneurship* (manuscript on file with author).

Nations tasked the World Commission on Environment and Development (also known as the “Brundtland Commission” after its chairman, Gro Harlem Brundtland) with recommending long-term strategies for sustainable global development.⁶⁶ In its report, the Brundtland Commission defined sustainable development as the ability of an organization, community, or other group to “meet the needs of the present generation without compromising the ability of future generations to meet their own needs.”⁶⁷ Sustainability is an interdisciplinary, multi-faceted, complex goal.⁶⁸ Benchmarks for sustainability are not easily defined⁶⁹ or measured.⁷⁰ And questions loom around how to attract and satisfy equity investors in a firm that does not prioritize shareholder returns over other stakeholders or charitable objectives.⁷¹

⁶⁶ *Our Common Future*, World Comm. on the Env't and Dev. Rep., U.N. Doc. A/42/427 (1987) [hereinafter *Our Common Future*].

⁶⁷ *Id.* at 8; see also Judd F. Sneirson, *Green is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987 (2009) (defining sustainability in the context of corporate governance and advocating for businesses to voluntarily commit to sustainable business practices).

⁶⁸ See, e.g., Matthias Ruth, *A Quest for the Economics of Sustainability and the Sustainability of Economics*, 56 ECOLOGICAL ECON. 332, 335 (2006) (“Environmental issues are complex and to understand them requires interdisciplinary approaches.”).

⁶⁹ Economists Stefan Baumgartner and Martin Quaas describe sustainability as having its roots in normative views of justice vis-à-vis three relationships: (i) *intergenerational* justice between present and future generations; (ii) *intragenerational* justice between different groups of the same generation; and (iii) justice between humans and the planet. Stefan Baumgartner & Martin Quaas, *What is Sustainability Economics?*, 69 ECOLOGICAL ECON. 445, 445 (2010) (describing sustainability as “a normative notion about the way humans should act towards nature, and how they are responsible towards one another and future generations” and acknowledging the difficulty of defining and measuring sustainability as it pertains to justice). Some corporate managers and third party analysts engaged in sustainability efforts in the corporate sector define sustainability as the strategic pursuit of blended or shared value—i.e., positive social, environmental, and financial value creation. The term “blended value” was coined by Jed Emerson. See ANTONY BUGG-LEVINE & JED EMERSON, *IMPACT INVESTING: TRANSFORMING HOW WE MAKE MONEY WHILE MAKING A DIFFERENCE* 10-11 (2011).

⁷⁰ All firms have the capacity to create and destroy social, environmental, and financial value to varying degrees and the three value sets are necessarily intertwined and often indivisible. See ANTONY BUGG-LEVINE & JED EMERSON, *supra* note 69 (“All organizations, for-profit and nonprofit alike, create value that consists of economic, social, and environmental components. All investors, whether market rate, charitable, or some mix of the two, generate all three forms of value. But somehow this fundamental trust has been lost to a world that sees value as being only economic (created by for-profit companies) or social (created by nonprofit organizations or government). And most business managers, as well as investors, miss out on the opportunity to capture their total value potential by not managing for blended value on an intentional strategic basis.”). See also Elkington, *supra* note 4, at 523-24 (Elkington, the originator of the term “triple bottom line,” states that “[t]he TBL concept basically expresses the fact that companies and other organizations create value in multiple dimensions. In this case, we are talking about economic, social, and environmental value added – or destroyed.”).

⁷¹ See, e.g., Antony Bugg-Levine, Bruce Kogut, and Nalin Kulatilaka, *A New Approach*

The Sustainability Accounting Standards Board (SASB), a non-profit organization recently formed to create industry-specific sustainability accounting standards as a parallel to the Financial Accounting Standards Board (FASB), defines “sustainability performance” with respect to the corporate sector:

[S]ustainability performance encompasses environmental, social, and governance factors that have the potential to affect long term value creation and/or the public interest. We believe that companies need to be cognizant of the environmental and social impacts of their activities, the systems that govern and guide policies and actions, and the underlying environmental and social capital upon which value creation can be sustained. We also believe that investors and the public deserve to be informed of these impacts. A sustainable company is accountable for the social and environmental impacts of its commercial endeavors and continually adapts to manage business risks and seize opportunities while creating long term value by meeting society’s needs.⁷²

Third party standards firms like SASB, Global Reporting Initiative, B Lab, and GIIRS Ratings & Analytics for Impact Investing⁷³ have developed or are in the process of developing metrics to measure sustainability on a company-by-company or sector-by-sector basis with little convergence yet.⁷⁴ Sustainability accounting and reporting is still

to Funding Social Enterprises, HARV. BUS. REV., Jan.-Feb. 2012, at 4 (“[M]any, if not most, social enterprises cannot fund themselves entirely through sales or investment. They are not profitable enough to access traditional financial markets, resulting in a *financial-social return gap*. The social value of providing poor people with affordable health care, basic foodstuffs, or safe cleaning products is enormous, but the cost of private funding often outweighs the monetary return. Many social enterprises survive only through the largesse of government subsidies, charitable foundations, and a handful of high-net-worth individuals who will make donations or accept lower financial returns on their investments in social projects.”)

⁷² *What is “Sustainability”?*, SUSTAINABILITY ACCOUNTING STANDARDS BOARD, <http://www.sasb.org/approach/sustainability/> (last visited Jan. 16, 2013). Similarly, the International Federation of Accountants defines “sustainable success” as the combination of economic, environmental, and social performance of an organization that determines overall stakeholder value and allows the organization to succeed and prosper in the long term . . . [S]hareholders and other stakeholders should take more interest in the longer-term perspectives of the organization, including holding the board and leadership accountable for overall sustainable performance, not just short-term financial results.” International Federation of Accountants, *Integrating Governance for Sustainable Success*, at 6 (2012), available at <http://www.ifac.org/publications-resources/integrating-governance-sustainable-success> (hereinafter IFAC).

⁷³ *About GRI*, GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/information/about-gri/Pages/default.aspx> (last visited Sept. 9, 2013); *The Nonprofit Behind B Corps*, B LAB, <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps> (last visited Sept. 9, 2013); *How GIIRS Works*, GIIRS RATINGS & ANALYTICS FOR IMPACT INVESTING, <http://giirs.org/about-giirs/how-giirs-works> (last visited Sept. 9, 2013).

⁷⁴ Matteo Tonello, *Reporting on Corporate Sustainability Performance*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (Dec. 6, 2012, 8:58 AM), <http://blogs.law>

voluntary for most businesses but may emerge soon as a “best practice” for companies. Funding for third party standards firms often comes from companies themselves as corporate boards and managers are motivated by the need to make their operations more sustainable or, at least, to exert influence on the process of defining sustainability metrics.

The UN Global Compact–Accenture CEO Study in 2010 conducted more than 100 interviews with CEOs, chairpersons, and presidents, and surveyed 766 CEOs of companies that are members of the UN Global Compact, a corporate citizenship and sustainability initiative. This study—the largest study of CEOs ever conducted with respect to the issue of sustainability—reports that:

CEOs around the world are starting to see the shape of a new era of sustainability coming into view. In the face of rising global competition, technological change and the most serious economic downturn in nearly a century, corporate commitment to the principles of sustainability remains strong throughout the world: 93 percent of CEOs see sustainability as important to their company’s future success.⁷⁵

The study notes that this is “a fundamental shift since the last Global Compact survey in 2007. At the time of the earlier study, sustainability was just emerging on the periphery of business issues Three years later, sustainability is truly top-of-mind for CEOs around the world.”⁷⁶ Corporate managers also view sustainability in a holistic fashion—it is not a discrete issue that they can handle through a one-off initiative or lone team member. The CEOs surveyed acknowledged that sustainability must be “something fully integrated into the

harvard.edu/corpgov/2012/12/06/reporting-on-corporate-sustainability-performance/ (presenting an analysis of sustainability indicators: “Clearly, there is incredible diversity in the indicators disclosed. A number of factors may have contributed to this diversity, including differing interpretations of sustainability, a relative lack of mandatory standards for reporting, the fact that different sectors have different reporting priorities, and the need to accommodate local circumstances. Sustainability reporting is still relatively new to many corporations, which may further contribute to the uncertainty about what to disclose.”); see also John Elkington & Pamela Hartigan, *THE POWER OF UNREASONABLE PEOPLE: HOW SOCIAL ENTREPRENEURS CREATE MARKETS THAT CHANGE THE WORLD*, 183-84 (2008) (“[T]o promote scalability for social and environmental ventures and their partnerships with mainstream businesses, we need a number of ingredients [O]ne of the most critical missing links is a universally-accepted accounting language that would assess the extent to which all enterprises—whatever their scale—were heading toward sustainability.”).

⁷⁵ U.N. & Global Impact, *A New Era of Sustainability: UN Global Compact – Accenture CEO Study 10* (2010) [hereinafter *Accenture CEO Study*]. Members of the UN Global Compact include leading global public companies like Bristol-Myers Squib, Owens Corning, Merck & Co., General Electric Company, PepsiCo Inc., General Mills, Ford Motor Company, The Dow Chemical Company, DuPont, Cisco Systems, and Nike, Inc.

⁷⁶ *Id.*

strategy and operations of a company.”⁷⁷ “[S]ustainable business practices and products are opening up new markets and sources of demand; driving new business models and sources of innovation; changing industry cost structures; and beginning to permeate business from corporate strategy to all elements of operation.”⁷⁸

What motivating factors are driving corporate managers concern with sustainability? The corporate sector is responding to a rapidly changing world that is undergoing “radical disruption—of markets, societies and ecosystems” caused by climate change, growing inequality, and increased global competition for natural resources.⁷⁹ A full exploration of these challenges is beyond the scope of this article. However, these challenges affect the financial viability of corporations. For example, severe weather caused by climate change will increase insurance and production costs, and may physically disrupt supply chains; economic inequality reduces the pool of consumers able to purchase a corporation’s goods and services, and can create civil and political unrest that targets corporations; and increased global competition for natural resources impacts the availability, and increases the prices, of important factors of production. Moreover, consumers increasingly care about the social and environmental effects of companies and are using their purchasing power to demand more socially- and environmentally-responsible corporate behavior. Finally, market activity has increasingly become concentrated in fewer corporations, “which has led to a larger social and environmental impact from the activities of a few corporations that can be more easily located and held accountable by an increasingly activist civil society.”⁸⁰

This is the new corporate sector for which law students must be

⁷⁷ *Id.* at 11.

⁷⁸ *Id.* at 10.

⁷⁹ Elkington, *supra* note 4, at 525 (noting that the 2006 World Economic Forum focused on many of these issues in its study *Global Risks 2006*); see also Elkington & Hartigan, *supra* note 74 (noting that the “CIA has predicated that environmental pressures will exacerbate global tensions and increase the risk of conflict in the coming decade.”); WWF & SustainAbility, *One Planet Business: Creating Value Within Planetary Limits* (2007) (reporting that, since the 1980s human consumption has exceeded natural resource supply by over 20%); TRACEY S. KEYS & THOMAS W. MALNIGHT, *THE GLOBAL TRENDS REPORT 2013: TOWARDS A DISTRIBUTED FUTURE*, 128 (2013) (reporting that in the near future corporations must contend with strained resources caused by population growth, inequality, climate change, and environmental challenges, and that organizations must collaborate and “shift mindsets to support sustainable resource goals”); Joseph Stiglitz, *Inequality is Holding Back the Recovery*, N.Y. TIMES, Jan. 19, 2013, at SR1 (noting that inequality is holding back economic growth and is contributing to political inequality).

⁸⁰ George Serafeim, *The Role of the Corporation in Society: An Alternative View and Opportunities for Future Research 2* (May 27, 2013) (unpublished manuscript), available at SSRN: <http://ssrn.com/abstract=2270579> or <http://dx.doi.org/10.2139/ssrn.2270579>.

prepared. Law students who want to practice business law must be prepared for a shifting business and consumer culture where sustainability plays a central role, whether for financial or altruistic reasons. Despite much agreement that sustainability is a top priority, there is still a great deal of work to be done with respect to execution, implementation, and measurement. Educational institutions can be particularly helpful in introducing students to both corporate sustainability efforts and social enterprise and giving them the skills and support they need to be the next generation of corporate lawyers with tools to facilitate clients' sustainability needs.⁸¹ Lawyers have an important role to play in facilitating sustainability governance practices, programs, policies, and regulation.⁸² The SENL Clinic introduces law students to corporate sustainability through representation of small-scale sustainability and charitable objectives that social enterprises pursue. In this way, Clinic students become “changemakers”—i.e., “those who work with social entrepreneurs and help them spread their innovations and impact to other places, people, and sectors.”⁸³

For example, students may represent a start-up social enterprise that produces goods to raise awareness of a social problem and uses profits from the goods sold to address the problem. The client seeks help from the Clinic to ensure that its manufacturer and supplier do not harm or dilute the business's brand or social mission by, for example, using child labor, engaging in harmful labor practices, or infringing on the brand's trademarks. For any company, these are important legal and business risks to be mitigated. For a start-up social enterprise that is building its customer base from conscious consumers and offers brand value based on “doing good,” these risks are paramount. For this client, SENL Clinic students research possible steps that the client can take to maintain transparency in its supply chain and pro-

⁸¹ Elkington & Hartigan, *supra* note 74, at 206 (“Educational institutions are vital for the long-term success of communities, countries, and the global economy . . . [they] can teach the skills that propel world-class entrepreneurs. They therefore need to cultivate entrepreneurial thinking, promote interdisciplinary programs, provide internships and other opportunities to expose young people to the world of entrepreneurship, stimulate the formation of national and global networks, contribute research to the field, and support young entrepreneurs with awards.”).

⁸² *Id.* at 11-12. Although many business leaders agree that sustainability is a top priority and have begun to address sustainability issues, execution and integration of sustainability practices into their strategy and operations remains a major challenge to implementing a new sustainability paradigm. Companies face three major external challenges in implementing and executing sustainability strategies and operations: investors, consumers, and the regulatory environment. Investors are not yet seen as supportive of sustainability efforts; it is as yet unclear that consumers make purchasing decisions based on sustainability issues, and future regulation around key components of sustainability initiatives is uncertain.

⁸³ SCHWARTZ, *supra* note 33, at 7.

tect the business's intellectual property. The students then draft appropriate contracts and corporate policies with specific provisions pertaining to the client's social mission and that will meet the client's goals. The students also identify options—such as third party certification or assessment of social objectives—that the client might consider adopting voluntarily to meet its goals.

III. EXAMINING (SUSTAINABLE) CORPORATE GOVERNANCE

Representing social enterprises is the catalyst for in-depth seminar discussion of corporate law and its underlying theories. Clinical legal education has a distinctive pedagogy that includes teaching students to learn from practice and from their own experiences.⁸⁴ Clinical pedagogy “comprises theorizing and reflection about lawyering including issues such as socio-economic influences on available solutions to problems, ethical and moral dilemmas, and service delivery.”⁸⁵ An important feature of this pedagogy is to show students, through supervised practice and seminar discussion, that the law is not viewpoint-neutral or value-free but created and advanced by normative values and arguments.⁸⁶ Thus, one of the mechanisms to meet the goal of preparing students for corporate sustainability practice is to engage students in an examination of various corporate laws as well as the legal theories upon which current state corporate law rests, as they relate to sustainability.⁸⁷ Representing social enterprises complements this theoretical study, as students are able to bring their practical experiences with clients into the classroom.

Through reading for the Clinic seminar, students examine two

⁸⁴ WILLIAM M. SULLIVAN, ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 121 (2007) (“Assuming responsibilities for outcomes that affect clients with whom the student has established a relationship enables the learner to go beyond concepts, to actually become a professional in practice.”); see also Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 279 (1981) (“[C]linical legal education is primarily concerned with the process of learning from actual experience, learning through taking action (or observing someone else taking action) and then analyzing the effects of the action.”).

⁸⁵ Kosuri, “Impact” in 3*D*, supra note 8, at 18-19.

⁸⁶ Critical legal studies, in part, share the same task as clinical legal education. Critical legal theory challenges assumptions that the law is value free and instead makes inquiries into the norms that legitimize injustice and maintain inequality. See, e.g., Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717, 722 (1992) (describing the relationship of clinical legal education to critical legal studies as “both work(ing) to make conscious the tacit theories that the legal system embodies and expresses.”).

⁸⁷ See WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 8 (3d ed. 2009) (“In business law, the lawyer who fails to understand the economics of a problem usually fails to find a satisfactory solution to the problem.”).

prominent competing theories of corporate law: contractarian and communitarian theories, and their relation to various business models and organizational activities that contribute to or detract from sustainability.⁸⁸ The readings and seminar discussion make explicit these theories' underlying norms and values in order for the student to learn that corporate law is not objective and immutable, but subjective and challengeable. And that corporate law, like all law, can be deconstructed "to illuminate the assumptions, biases, values, and norms embedded in law's workings in order to heighten awareness of the political and moral choices made by lawyers and the legal system."⁸⁹ Far from being abstract, these corporate law theories are central to the story of the purpose of the corporation: is the corporation's most efficient and effective use to create shareholder wealth, or to contribute to social well being at large? These theories—contractarian and communitarian—and their deductions about corporate purpose, influence the mindset and behavior of corporate actors and the laws promulgated by legislators and corporate regulators. For example, a corporate actor who believes that the law requires the corporation to maximize shareholder wealth may behave differently than a corporate actor who knows that the shareholder wealth maximization norm is much more nuanced.

Class discussion of the shareholder wealth maximization norm, and contractarian and communitarian legal theories enhances students' learning experience through the intersection of legal theory and legal practice. The examination of corporate legal theory in the seminar complements a student's client work by placing discrete client issues within a larger theoretical framework about corporate sustainability.⁹⁰ I describe each of these theories below *very* briefly. The purpose here is to not to fully explore or reiterate the various points and counterpoints of each theory but to illustrate how these theories help students' understanding of corporate governance and its relation to sustainability practices.

⁸⁸ Notably there are other corporate law theories that relate to corporate sustainability (such as concession theory and sovereign coercion theory) that students explore in the Clinic seminar. However, there are numerous constraints on students' time (including actual representation of clients) that often do not allow for full exploration of all competing corporate law theories relating to corporate sustainability. Commitments to practice must be balanced along with theoretical engagement in the Clinic.

⁸⁹ Goldfarb, *supra* note 86.

⁹⁰ *See id.* at 721 ("Clinical legal education, with one foot in academia and the other in the practice of law, represents an ideal vantage point from which to scrutinize conventional lawyers' practices and bring the theories that prefigure them into conscious awareness In the hands of clinical educators, experience can generate theory which can circle back to inform experience, which in turn can alter, refine, and improve the theory.").

A. *The Corporation as a “Nexus of Contracts”*

Dominant modern corporate law theory describes a corporation as a “nexus of contracts”.⁹¹ Under this widely-accepted theory, the corporation is a nexus of a set of contracts among the firm’s constituents which include its shareholders, as providers of capital, but also its employees, creditors, suppliers, and board of directors.⁹² Efficiency is the basis for this corporate law theory, and rational individuals acting in their own self-interest promotes such efficiency.⁹³ Each constituent implicitly or explicitly enters into a voluntary contract with the corporation—employees enter into employment agreements while the firm’s contract with its shareholders is set forth in the firm’s organizational documents and the corporate laws (common law and statute) of the firm’s state of incorporation.⁹⁴ State corporate governance laws, then, act as a default set of rules (i.e., rules that the parties to the contract would have entered into absent government regulation) that reduce agency costs and facilitate private ordering⁹⁵ between the firm and the firm’s shareholders. State corporate laws thus reflect the rules that shareholders would contract for—corporate directors are bound by fiduciary duty to serve the best interests of the corporation and its shareholders. The “best interest of the corporation” is taken, by many, to mean shareholder wealth maximization.⁹⁶ Corporate laws and “shareholder friendly” governance structures and business practices are created and counseled as “best practices” to align manager/agent

⁹¹ Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976).

⁹² *Id.*; see also Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769, 777 (2006).

⁹³ WILLIAM T. ALLEN ET AL., *supra* note 87, at 7 (“We have argued that judges and lawyers, as well as academic commentators, ought to use efficiency in the production of wealth as the principle standard for evaluating current law.”).

⁹⁴ David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1378 (1993).

⁹⁵ Bainbridge, *supra* note 1, at 1428; see also Brett W. King, *The Use of Supermajority Voting Rules in Corporate America: Majority Rule, Corporate Legitimacy, and Minority Shareholder Protection*, 21 DEL. J. CORP. L. 895, 916-17 (1996) (describing corporate law as “enabling legislation . . . subject to bargaining and revision by the contracting parties themselves”); WILLIAM T. ALLEN ET AL., *supra* note 87, at 12-13 (“[The corporate] form succeeds because it reduces the transactions costs of complex economic contracting. But the corporate form does so at the risk of creating agency problems that must be constrained if it is to succeed. Thus, a principal aim of corporation law is the reduction of agency costs of all sorts.”).

⁹⁶ See discussion of shareholder wealth maximization norm in Plerhoples, *supra* note 13; see also ABA Committee on Corporate Laws, *supra* note 1, at 2265 (“[T]he ‘best interests of the corporation’ are equated with ‘corporate profit and shareholder gain’”); Bainbridge, *supra* note 1, at 1423 (justifying the shareholder wealth maximization norm and espousing it as a central tenet under Delaware law).

decision-making with shareholder/principal goals.⁹⁷

In this way, corporate governance law is the subject of private law, insulated from public law as well as the collective public interest.⁹⁸

In the view of contractarians, if social activists want to reform the activities of corporations, they must seek redress through the political process, and their options are limited to public law options, not rules of corporate governance.⁹⁹

B. The Corporation as an “Externalizing Machine”¹⁰⁰

Communitarians view contractarian theory as taking too narrow a view of the corporation. Communitarians emphasize the harm done to nonshareholder constituents as corporations pursue shareholder value. Kent Greenfield observes that “one of the intractable problems is the nature of the corporation to produce externalities.”¹⁰¹ Greenfield notes that this is not a statement about the morality or ethics of corporations but an economic reality.¹⁰²

The nature of the firm is to create financial wealth by producing goods and services for profit; without regulator or contractual limits, the firm has every incentive to externalize costs onto those whose interests are not included in the firm’s current financial calculus.¹⁰³

Communitarians provide routine business operations as examples of the externalities corporations create—e.g., payment of non-livable wages that require employees to seek government or charitable assistance,¹⁰⁴ or the social and economic costs of a plant closing on a local

⁹⁷ The Jensen and Meckling academic article provided a foundation for the shareholder wealth maximization norm and framed the principal-agent problem as the central challenge of corporate governance. That is, who will constrain the agent/corporate manager’s behavior? Choosing the shareholder as the primary principal has been the historically dominant choice. Jensen & Meckling, *supra* note 91; *see also* STOUT, *supra* note 2, at 33, 47, 52 (stating that although shareholder wealth maximization is not required by corporate law, many legal scholars espouse it as a normative goal, corporate law allows companies to adopt the goal of shareholder wealth maximization, and public companies have embraced shareholder wealth maximization to a great extent more than they used to).

⁹⁸ KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* 17 (2006) (challenging enablingism in corporate law).

⁹⁹ *Id.* at 31; *see also* Millon, *supra* note 94, at 1378. *Contra* Ronald Daniels, *Stakeholders and Takeovers: Can Contractarianism Be Compassionate?*, 43 U. TORONTO L.J. 315 (1993) (arguing that contractarian theory has room for nonshareholder protection arguments).

¹⁰⁰ MITCHELL, *supra* note 2, at 53 (“The function perfected by limited liability is that of permitting corporations to externalize the costs of stock price maximization, that is, to push those costs onto others. The corporation is the perfect ‘externalizing machine.’”).

¹⁰¹ Greenfield, *supra* note 2, at 627.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *See, e.g.*, George W. Dent, Jr., *Stakeholder Governance: A Bad Idea Getting Worse*,

community. Environmental examples abound as well. For example, Apple, Google, Facebook, Amazon, and other online companies waste a staggering level of energy in the operation of their computer servers. According to an investigation by the New York Times, the data centers of online companies “can waste 90 percent or more of the electricity they pull off the grid.” This energy waste is significant, given that “worldwide, the digital warehouses use about 30 billion watts of electricity, roughly equivalent to the output of 30 nuclear power plants.”¹⁰⁵ Communitarians are skeptical of the ability of contract-based, private law approach to reduce such externalities. A contract-based approach assumes that nonshareholder constituents have the bargaining power to protect themselves, or can predict the future harm to be inflicted to protect themselves *ex ante*.¹⁰⁶ Communitarians often promote government regulation and laws to protect non-shareholder stakeholders’ interests in ways that a contract-based approach cannot.

C. Exposing Normative Values

Contractarian and communitarian theories carry with them distinct normative views of the world.¹⁰⁷ Here, there is the risk of oversimplifying each group’s views; I do not mean to suggest a lack of diverging values within any one group. Nonetheless, these normative values are stated in their most general and accepted terms to illustrate how students are challenged to think critically about corporate governance theories and their impact on corporate law and their social enterprise clients. Just as a student in a community economic development clinic might examine the normative values and arguments that perpetuate poverty and inequality in a low-income neighborhood, or a

58 CASE W. RES. L. REV. 1107, 1112, n. 24 (2008) (“If there are net social benefits to cushioning employees from such harm (i.e., firing employees or reducing wages) the cost of such cushioning should be borne socially—i.e., by the government—rather than by shareholders.”).

¹⁰⁵ James Glanz, *Power, Pollution, and the Internet*, N.Y. TIMES (Sept. 22, 2012), <http://www.nytimes.com/2012/09/23/technology/data-centers-waste-vast-amounts-of-energy-belying-industry-image.html> (“A yearlong examination by The New York Times has revealed that this foundation of the information industry is sharply at odds with its image of sleek efficiency and environmental friendliness. Most data centers, by design, consume vast amounts of energy in an incongruously wasteful manner, interviews and documents show. Online companies typically run their facilities at maximum capacity around the clock, whatever the demand. As a result, data centers can waste 90 percent or more of the electricity they pull off the grid, The Times found.”).

¹⁰⁶ Millon, *supra* note 94, at 1379 (“Particular kinds of harmful conduct may be difficult for nonshareholders to foresee and specify adequately, because of management’s informational advantages and also because of the endless change and innovation in corporate activity that a market economy demands.”).

¹⁰⁷ Millon, *supra* note 94, at 1382.

student in an immigration clinic might examine the normative bases for the DREAM Act or immigration laws, a student in the SENL Clinic unpacks corporate law.

1. *Unpacking Contractarian Theory*

Efficiency arguments are at the heart of contractarian theory.¹⁰⁸ One such efficiency argument contractarian theorists rely on is that “rational individuals do not strike bargains with one another unless each perceives it to be in his or her own interest to do so.”¹⁰⁹ This exercise of liberty by rational individuals promotes efficiency. Choosing efficiency as the “dominant, if not the sole, criterion for academic evaluation of corporate law doctrines”¹¹⁰ is a value-based choice. Corporate law casebooks often obviate this choice, suggesting to students that efficiency as the sole foundation of corporate law is unquestionable. Consider, for example, the following excerpt from the first chapter of a leading corporate law casebook:

As citizens, of course, we are concerned about far more than the creation of total wealth or even our share of it But by and large, corporation law has been shaped within the classical liberal political paradigm as a field limited to only a slice of the human experience. Thus, legitimate political questions about, for example, the social distribution of wealth fall outside the competence of corporate law. The laws of taxation, education, environmental and labor policy, product safety, and other issues of health, safety, and welfare address the distribution of risks and rewards in society. Corporate law addresses the creation of economic wealth through the facilitation of voluntary, ongoing collective action.¹¹¹

The authors of this text have framed corporate law in a manner that obstructs law students’ exploration of alternative theories based on different normative values. The authors of this text go on to state that “corporate law in particular deals with the creation and governance of the private legal entities that are the principle economic actors in the modern world. Thus, it deals with the control over vast aggregations

¹⁰⁸ WILLIAM T. ALLEN ET AL., *supra* note 87, at 2 (“Efficiency is the dominant, if not the sole, criterion for academic evaluation of corporate law doctrines.”). Both Pareto standards and Kaldor-Hicks efficiency are used to advance contractarian theory. See Jules Coleman, *Efficiency, Utility, and Wealth Maximization*, in *MARKETS, MORALS AND THE LAW* 95 (1988) (describing Kaldor-Hicks efficiency and Pareto-optimal distributions with respect to their normative basis in utilitarianism, libertarianism, and contractarianism).

¹⁰⁹ JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* 101 (1988); see Ige Omotayo Bolodeoku, *Contractarianism and Corporate Law: Alternative Explanations to the Law’s Mandatory and Enabling/Default Contents*, 13 *CARDOZO J. INT’L & COMP. L.* 433, 452 (2005).

¹¹⁰ WILLIAM T. ALLEN ET AL., *supra* note 87, at 2.

¹¹¹ *Id.* at 2-3.

of wealth and power.”¹¹² A laissez-faire approach to “vast aggregations of wealth and power” is an approach to which many object. If a law student is exposed to just this text in her course on corporate law, she will have gained no exposure to other potentially legitimate corporate law theories. As one communitarian author notes, “contractarians . . . push a political vision. They simply do not bother to speak about it in those terms. If they do, they will encounter many of the same kinds of challenges now confronting communitarians.”¹¹³

There are also many challenges to the notion that a corporation’s purpose is to maximize shareholder value. Lynn Stout criticizes “shareholder value thinking” by noting that there is no reliable empirical evidence as to whether the approach actually improves corporate performance.¹¹⁴ Others criticize shareholder wealth maximization as contributing to corporate short-termism on the part of corporate managers, leading to financial crises such as the 2008 financial crisis after financial industries were deregulated in pursuit of shareholder wealth.¹¹⁵

A major critique of contractarian theory arises from its basis in property rights: “[W]hen corporate law scholars argue for legal rules that say that stakeholders must protect themselves through their contractual rights, that is simply another way of saying that they get only those rights they can buy.”¹¹⁶ This is not to say that contractarians are not concerned with economic inequality and other societal and environmental problems. Contractarians acknowledge that efficiency “has little to say about the legitimacy of initial distributions of wealth.”¹¹⁷ Nonetheless, contractarians (1) believe that such social and environmental ills are caused by actors and factors other than corporations and pursuit of shareholder value,¹¹⁸ or (2) believe that even despite these shortcomings, corporate laws and policies based on efficiency arguments create corporations that effect more benefits (i.e., wealth creation) than detriments (e.g., inequitable wealth creation and

¹¹² *Id.* at 3.

¹¹³ Millon, *supra* note 94, at 1387.

¹¹⁴ STOUT, *supra* note 2, at 48-50.

¹¹⁵ *Id.* at 53-54.

¹¹⁶ GREENFIELD, *supra* note 98, at 19; *see also* Millon, *supra* note 94, at 1383 (“To communitarians, life chances should not depend entirely on accidents of birth and bargaining power: people are entitled to more out of life than what they can pay for.”).

¹¹⁷ WILLIAM T. ALLEN ET AL., *supra* note 87, at 5.

¹¹⁸ Dent, *supra* note 104, at 1108 (“In the last twenty-five years, too much of our economic gains have gone to the wealthiest Americans; income for most Americans has stagnated. The resultant deepening of economic inequality is disturbing. Most of this trend stems from changes in technology, the globalization of economic activity, unchecked immigration, American tax policies, and changing social mores (like the divergence of class attitudes toward marriage) having nothing to do with corporate governance.”).

externalities).¹¹⁹

Once students recognize the underlying norms and values presented in contractarian legal theory, they can begin to unpack them and address their implications for positive corporate laws and policy. In the Clinic seminar, students are asked: What definitions of efficiency are used? Is efficiency the only standard by which law and policymakers can or should evaluate and create corporate laws? What, if any, other standards are possible and desirable? Desirable from whose standpoint? Does equity or sustainability have a role to play in corporate law? Is there room for sustainability arguments in contractarian theory? How and when should equity and sustainability give way to efficiency arguments? What is the purpose of the corporation? Is there a single purpose such as shareholder value maximization or can there be multiple purposes? Do efficiency arguments necessarily mean that the corporate form should have the default characteristics it currently has?¹²⁰ These questions are not purely theoretical or posed without context or practicality. Rather, students confront these issues and questions as they engage in client work that raises these issues.

2. *Unpacking Communitarian Theory*

Communitarians, on the other hand, start from the premise that “the market alone cannot adequately fulfill basic human needs for everyone because many people lack the resources to participate effectively in the market.”¹²¹ Communitarians acknowledge that financial markets facilitate enormous economic growth but openly question the ability of un-regulated markets to promote economic equality or other desirable social and environmental outcomes. Some communitarians point to the tremendous global economic growth between 1970 and 2007 (before the 2008 economic downturn), but the lack of compara-

¹¹⁹ See Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 48-50 (2004).

¹²⁰ See COLEMAN, *supra* note 108, at 95-132 (posing similar questions as “a fully adequate inquiry into the foundations of the economic approach to law”). Bruce Ackerman poses similar questions while defending the third year of law school in response to President Obama’s call for shortening law school to two years. Ackerman argues that law students should not be left to learn only the blackletter law but also taught “a broader understanding of the fundamental values of the American legal tradition” through social sciences, statistics, and economics. Students “must confront fundamental issues: When do free markets fail the test of economic efficiency? When should efficiency be trumped by justice? When do impressive-looking statistics amount to fancy ways of lying?” Bruce Ackerman, “Why legal education should last for three years,” WASH. POST (Sept. 6, 2013) (http://www.washingtonpost.com/opinions/why-legal-education-should-last-for-three-years/2013/09/06/55d80c06-1025-11e3-8cdd-bcdc09410972_story.html).

¹²¹ Millon, *supra* note 94, at 1383.

ble social and environmental returns.¹²² Communitarians attack efficiency arguments on the grounds that laws and policies grounded in efficiency and free-market principles perpetuate inequality:

[M]aximizing returns to money means maximizing financial returns to people who already have money; i.e. making the rich richer. All too often, what conventional economic growth indicators actually measure is the rate at which the rich are expropriating the resources on which the majority of the world's people depend for their modest livelihoods, and converting them to products destined for a garbage dump after a brief useful life, to generate financial assets for people who already have more money than they need.¹²³

The normative values underlying communitarian theory are more obvious, perhaps because it is an alternative to the dominant contractarian theory. The simple act of distinguishing an alternate leads one to highlight contractarian theory based on normative differences. Communitarians' normative worldview is that of a "shared community" in which "individuals owe obligations to each other that exist independently of contract."¹²⁴ The social, environmental, and economic health of this shared community depends on everyone's behavior, collectively and individually. Communitarians couch their positive law solutions and policy prescriptions in these terms. For example, Greenfield argues that: "Instead of using corporate law—which produces the fabric of governance for our most important and powerful nongovernmental institutions—to accentuate the antagonisms in society, perhaps we would want to craft a method of corporate govern-

¹²² David Korten, *More Than Corporations: A New Economy for a New Era*, in *SUMMIT ON THE FUTURE OF THE CORPORATION* 33 (Corp. 20/20, Paper No. 3, 2007). ("In contrast to the indicators of financial capital, indicators of health of the planet tell a very different story. The Living Planet Index, an indicator of the health of the world's freshwater, ocean, and land-based ecosystems, declined by 30 percent since 1970 . . . Indicators of human capital—the skills, knowledge, psychological health, capacity for critical thought, and moral responsibility characteristic of a fully functioning person—and of social capital—the enduring relationships of mutual trust and caring that are the foundation of healthy families, communities and societies—point to equally unfavorable trends. By the measure of financial capital, we humans are on a path to limitless prosperity. By the measure of living capital, the aggregate of human, social, and natural capital, we are on a suicidal path to increasing deprivation and ultimate self-extinction.").

¹²³ *Id.* at 33 ("According to a recent UN study, the richest 1 percent of the world's adults now own 40 percent of all global assets. The poorest 50 percent own only 1 percent. This distribution of ownership is a proxy measure for the global distribution of power . . . The greater the inequality, the greater the power of the privileged minority to change the rules to accelerate their expropriation of the declining pool of real wealth, and the greater the hardship and desperation of those excluded.").

¹²⁴ Millon, *supra* note 94; see also Ridley-Duff, *supra* note 32, at 383 ("[C]ommunitarians focus less on the development of individual rights and the pursuit of self-interest and more on utilitarian arguments that 'shared values' can be developed to achieve a 'common good.'").

ance that promotes harmony and partnership.”¹²⁵ These values also lead communitarians to espouse a redesign of corporate law from private law to public law. “Corporate law should not be seen as a narrow, private-law field for the acolytes of law and economics. Rather, it should be debated as if it were a part of larger social and macroeconomic policy.”¹²⁶

Many scholars critique communitarian theory on the grounds that empirical research validating communitarian theory is lacking—it has either not been done or is in its infancy.¹²⁷ That is, there is no evidence that society is bettered (or total financial wealth and societal health is increased) when economic actors take a “shared values” approach to doing business. Moreover, while communitarians have been consistent about attacking the shareholder wealth maximization norm and contractarian theory, they have been less capable in providing a concrete agenda of legal reforms that would achieve communitarian goals. Some advocate government regulation and intervention while others promote “collaboration rather than authority” whether the authority source is shareholder authority or government authority.¹²⁸ Indeed, it remains to be seen whether sustainability goals are wholly incompatible with the shareholder wealth maximization norm or with contractarian theory. As I have noted in other work, so-called impact investors can “contract” with a firm and use their investment dollars to ensure that the firm produces socially- and environmentally-responsible outcomes.¹²⁹

¹²⁵ GREENFIELD, *supra* note 98, at 27.

¹²⁶ *Id.*; see also Charles Handy, *The Unintended Consequences of Good Ideas*, HARV. BUS. REV. MAG. (Oct. 2012), <http://hbr.org/2012/10/the-unintended-consequences-of-good-ideas/ar/1> (arguing that the corporation itself has become a power center similar to a monarchy outside of democratic control and that it should be redesigned to take into account long-term interests rather than short-term shareholder or management self-interest); Elkington, *supra* note 4, at 6 (noting that the corporate governance agenda has rightfully converged with societal concerns through corporate responsibility, social entrepreneurship, and sustainable development agendas).

¹²⁷ Dent, *supra* note 104, at 1110 (arguing that there is little empirical data to show that short-termism exists, or if it does exist, that it causes the types of problems that communitarians claim); GREENFIELD, *supra* note 98, at 3; see also SISODIA, SHETH & WOLFE, *supra* note 31 (providing anecdotal, but not empirical, research on firms that have adopted a stakeholder relationship management approach that aligns with communitarian theory).

¹²⁸ Ridley-Duff, *supra* note 32, at 385. An example of a collaborative ownership approach is the worker cooperative discussed *supra* Part I.

¹²⁹ Plerhoples, *supra* note 13, at 251-56. Some researchers have also noted a middle ground where shareholder value maximization is not synonymous with short-termism. Rather, they lay blame on short-term shareholders and recommend giving a “favored role to long-term shareholders” as well as “finding roles for other actors in the corporate drama—boards, customers, employees, lenders, regulators, nonprofit groups—that enable those actors to take on some of the burden of providing money, information, and especially discipline” to the modern corporation. Fox & Losch, *supra* note 2, at 57 (espousing stakeholder capitalism “as a recognition that today’s shareholders aren’t quite up to making

Finally, a major fault of legal reforms arising from communitarian theory relates to capital markets—can investment be attracted *on a large scale* to firms that reject shareholder primacy and give equal priority to all stakeholders? For some, the answer is an unequivocal “no.”¹³⁰ As an example, benefit corporation legislation has been enacted in twelve states since 2010; it offers stakeholder governance in an off-the-shelf legal form. And yet very few firms have opted into the benefit corporation form, and investment in those that have reflects an infinitesimal scale.¹³¹

Once students recognize the underlying norms and critiques of communitarian legal theory, they can begin to address their implications for positive laws. In the seminar, students are asked: What definitions of “community” are used? Are we referring to the local community, national community, or global community? How are “desirable” social and environmental outputs and outcomes defined? Are social and environmental outputs and outcomes measurable? What is gained by measuring blended value instead of financial value? What is lost? What is the purpose of the corporation? Can corporate actors synthesize multiple purposes? How? Again, this inquiry into the role of the corporation and corporate governance law is based in theory but is not merely an academic exercise. Representing social enterprise clients raises these otherwise theoretical issues and provides students with a practical experience through which to discuss them; students also realize how otherwise abstract concepts practically affect their clients.

As an example, consider the social enterprise models described in Part I. When students encounter these business models through their client representation, students must critically examine these business models in order to provide their clients with sound legal advice. A client in its initial stages of operation may ask for advice on which business model to adopt, or ask for advice on implementing a certain business model. A for-profit social enterprise might ask for advice on how to structure the client’s relationship with the charities it funds, or how to convey to its consumers that its operations are environmentally-friendly and sustainable, or what policies and strategies the client should adopt to prioritize its social mission over the long-term.

To illustrate further, a start-up social enterprise client of the

shareholder capitalism work”).

¹³⁰ See generally Bainbridge, *supra* note 1.

¹³¹ Maryland was the first state to enact the benefit corporation legislation in 2010. As of May 28, 2013, only 60 Maryland benefit corporations and LLCs have been formed. Conference Report, The State of Social Enterprise: Maryland (Jan. 24, 2013), <http://www.slideshare.net/changematters/maryland-benefitcorporations-analysis-full-report>.

SENL Clinic recently asked students to provide advice on adopting the B1G1 business model. Students will conduct their research, which involves determining the client's business and social objectives, understanding the tax and other legal implications of the B1G1 business model, comparing the B1G1 models to other possible philanthropic structures the client might use, and writing an advice memorandum to the client with the relevant considerations specific to the client's goals. The students' legal assessment will necessarily entails an acknowledgment on the students' part that the B1G1 business model has many critics who argue that the model is not sustainable.¹³² Critics argue that the model relies heavily on the charitable heartstrings of individuals in developed countries who are willing to pay marked-up prices to fund the creation of similar products and services in developing countries. This willingness by consumers in developed countries to pay above-market prices, in order to create beneficiaries in developing countries, is a subsidy that may be only temporary, depending on trends or fads in the consumers' countries.¹³³ Critics also argue that the B1G1 model also floods developing markets with free products thereby diminishing the need and capacity of a developing country to manufacture and produce its own products for its own markets.¹³⁴

¹³² Cheryl Davenport, *The Broken Buy-One-Give-One Model: 3 Ways to Fix TOMS Shoes*, Co.EXIST, www.fastcoexist.com/1679628/the-broken-buy-one-give-one-model-three-ways-to-save-toms-shoes (last visited Jan. 16, 2013) ("First, the TOMS buy-one-give-one model does not actually solve a social problem. Rather, the charitable act of donating a free pair of shoes serves as little more than a short-term fix in a system in need of long-term, multi-faceted economic development, health, sanitation, and education solutions.").

¹³³ It should be noted that other social enterprise business models create subsidies in other ways, including by courting social investors who expect lower rates of return on their investments in social enterprises. However, to some, the B1G1 business model is not "true" social enterprise because the money used to manufacture the in-kind donation product comes from profits and is not a part of the company's core business operations, and the internal corporate governance structure of the company remains unchanged. S. Bansal, *Shopping for a Better World*, N.Y. TIMES (May 9, 2012, 7:00 AM), <http://opinionator.blogs.nytimes.com/2012/05/09/shopping-for-a-better-world/> (critiquing B1G1 model and quoting Gregory Dees, Professor at Duke Fuqua School of Business: "In fact, most development experts refrain from painting B1G1 companies as social enterprises, as some outlets have, and instead consider them philanthropic ventures. 'To me, it's only a social enterprise if the social impact comes from core operations,' Dees said. 'How you use the money afterward is your choice.'"). Other B1G1 models exist that do attempt to make their operations environmentally-friendly, even though relying on charitable purchases. For example, Better World Books donates books and funds to literacy programs in developing countries with every developed country purchase. However, it also diverts books from landfills and offsets pollution caused by shipping through carbon credits. *Triple Bottom Line: Social Enterprise*, BETTER WORLD BOOKS, <http://www.betterworldbooks.com/info.aspx?f=bottomlines> (last visited Jan. 16, 2013).

¹³⁴ Kiera Butler, *Does TOMS Shoes Really Help People?*, MOTHER JONES (May 13, 2012, 11:01 PM), www.motherjones.com/environment/2012/05/toms-shoes-buy-one-give-one (noting that in-kind donations hurt local shoemakers where TOMS Shoes are donated

Likewise, with a theoretical grounding, SENL Clinic students also provide their clients with advice on whether to incorporate as a benefit corporation or some other organizational form such as a cooperative, depending on the client objectives. Students must critically examine organizational forms, their critiques, and how each might fit a client's objectives. Students consider the major critiques of the benefit corporation that include: (i) the statute's rejection of shareholder wealth maximization but maintenance of shareholder primacy such that non-shareholder stakeholders do not have a private right of action to enforce the benefit corporation's social or environmental mission,¹³⁵ and (ii) the likelihood that a traditional corporation can accomplish the same public benefits promised by a benefit corporation.

Students also evaluate social enterprise business models while conducting client intake during the semester. Clinic students often encounter a for-profit business that labels itself as a social enterprise but lacks any of the characteristics of a social enterprise. The entrepreneur seeking legal assistance makes unsupported claims that the social enterprise benefits others or has a motive beyond profitmaking for investors. Upon investigation, the students responsible for the client intake process typically find that the entrepreneur has good intentions but either does not understand the concept of social enterprise or does not know how to incorporate social enterprise strategies into his or her business. The students responsible for the client intake then lead a discussion during seminar to determine whether the particular for-profit business meets the client selection perimeters of the SENL Clinic. The discussion centers on social enterprise business models and whether the entrepreneur's business model, as presented, is capable of

because market competition is decreased).

¹³⁵ Although directors of a benefit corporation must consider the interest of non-shareholder stakeholders in making decisions, non-shareholder stakeholders have no private right of action against the corporation or its board of directors, and directors owe no fiduciary duties to non-shareholder stakeholders. Non-shareholder stakeholders must trust that the board of directors is acting in their interests or protect themselves through contracting with the firm outside the scope of corporate governance laws. Given the inability to hold directors accountable for ordinary business decisions through shareholder derivatives suits, shareholders must also trust that the board is acting in their interests, but are on notice that their financial interests may not necessarily trump other stakeholders' interests. On the other hand, the benefit corporation may be palatable to some non-shareholder stakeholders (and legislators considering adoption of these corporate forms) given the assumption that the social enterprises' directors and shareholders are altruistic, possibly willing to accept below-market returns, and believe in the social enterprise's social or environmental mission. For a full discussion of the flexible purpose corporation statute and its embrace of shareholder primacy, see Plerhoples, *supra* note 13, at 250 (arguing that the flexible purpose corporation does not take a redistributive approach and rejects shareholder wealth maximization but embraces shareholder primacy).

achieving sustainability or charitable objectives. Students also consider whether they can assist the entrepreneur by educating him or her about social enterprise strategies to achieve social and/or environmental missions.

IV. REPRESENTING SOCIAL ENTERPRISES

In the SENL Clinic, students assume the important role the corporate lawyer plays in facilitating their clients' sustainability goals. Students gain skills crucial to practicing law while expanding their knowledge and critical-thinking about the growing social enterprise sector.

A. Solving Novel and Unstructured Problems

The rule of law, as well as mechanisms, to achieve sustainability in the corporate sector are under-developed. Sustainability economics and sustainability accounting are relatively new fields.¹³⁶ Environmental and social scientists, economists, ethicists, and legal scholars are laying the framework for determining what efficiency and justice means with respect to sustainability. Environmental and social scientists, lawyers, and policymakers must translate those theories into policy and positive law; corporate and nonprofit managers, boards of directors, and accountants must develop and apply accountability and measurement mechanisms; boards, managers, shareholders, and stakeholders must determine the mechanisms' utility and practicality.¹³⁷ Business lawyers have an important role to play in facilitating sustainability in the corporate sector.¹³⁸ The SENL Clinic engages law students in this multi-layered endeavor through their representation of social enterprise clients.

Business lawyers facilitate economic activity. They structure transactions and navigate laws and regulations for the benefit of their organizational clients. A business lawyer must understand the client's business as well as the context and regulatory framework in which the client operates.¹³⁹ The emerging sustainability field thus requires that

¹³⁶ For example, while the Financial Accounting Standards Board was created in 1973, the Sustainability Accounting Standards Board just launched on October 4, 2012. *Welcome to the SASB's Public Launch*, SUSTAINABILITY ACCT. STANDARDS BOARD, <http://www.sasb.org/sasb/launch/> (last visited Jan. 16, 2013).

¹³⁷ See, e.g., Ruth, *supra* note 68, at 335 (stating that economists must work with other disciplines to create relevant policy).

¹³⁸ See Elkington & Hartigan, *supra* note 74, at 211 (noting that "favorable legal and tax regimes" are needed to facilitate social enterprise).

¹³⁹ Jones, *Promoting Social and Economic Justice*, *supra* note 6, at 263-64 ("In order to accomplish the client's goals, students must learn about the business from the client and other sources, including experts in other disciplines Students have to learn not only

business lawyers be able to articulate, advocate for, and take into account the client's sustainability goals when structuring a transaction or otherwise facilitating the client's business strategy or operations. In many cases, because sustainability is a concept that is still being created and shaped into a viable business model, business lawyers must help their business clients by spotting routine and novel legal issues, navigating legal gray areas, fitting sustainability initiatives into the existing legal and regulatory framework, and assisting in creating a new framework that can accommodate sustainability goals.

The existing legal and regulatory organizational framework is largely predicated on the division of economic and social activity into three sectors—*for-profit*, *nonprofit*, and *governmental*—and factors of production into three segments—*capital*, *labor*, and *land*. The emergence of business models that attempt to combine principles from one sector with those of another sector or blur distinctions between capital and labor disrupt this division. For example, existing securities and labor laws do not take into account the pluralist business model described in Part I. Existing securities laws are aimed at protecting the investor and labor laws are aimed at protecting the employee. These laws must be re-evaluated when businesses employ models that do not so easily distinguish between owner and employee.¹⁴⁰ Lawyers are particularly adept at providing an analytical framework to help business clients think through the legal issues that will arise as they create and implement sustainability initiatives and structures. The business lawyer thus takes on the role of “problem-solver” in partnership with her social enterprise client.¹⁴¹ There are many skills required to represent organizational clients, including making complex law accessible to clients, crafting and defining legal relationships between multiple parties, transaction planning and nego-

the facts of the case, but must learn about the business from their clients.”); *see also*, WILLIAM T. ALLEN ET AL., *supra* note 87, at 8 (“In business law, the lawyer who fails to understand the economics of a problem usually fails to find a satisfactory solution to the problem.”).

¹⁴⁰ *See* ORSI, *supra* note 16 (rethinking existing employment laws to better serve different business models like cooperatives).

¹⁴¹ *See* Susan R. Jones, *Supporting Urban Entrepreneurs: Law, Policy, and the Role of Lawyers in Small Business Development*, 30 W. NEW ENG. L. REV. 1, 82 (2007) (“Increasingly, clients want lawyers who are problem solvers.”); Carrie Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905, 915 (2000) (“A good problem solver must take the problem, transaction, or matter presented by the client, analyze what the problem or situation requires, and then use creative abilities to solve, resolve, arrange, structure, or transform the situation so it is made better for the client, not worse.”); *see also* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 244 n.9 (1984) (“[Business lawyers engage in] joint problem solving, in which, through cooperation, the size of the pie, and hence the size of the piece received by each party, can be increased.”).

tiating, contract drafting (in addition to skills required in representing both organizational and individual clients—e.g., interviewing, effective communication, and client counseling).¹⁴² However, representing a social enterprise client, in particular, can require an additional skill worth highlighting—solving novel and unstructured legal problems.

“Helping students acquire an understanding of legal problem-solving and begin developing their expertise as problem-solvers is the most important task of legal education.”¹⁴³ Lawyers encounter unstructured legal problems throughout their careers; the competent or expert lawyer is able to apply their knowledge, skills, practice judgment, and method of practice to resolve their clients’ unstructured problems. Clinical legal education is particularly adept at teaching students problem-solving skills because (i) students take on the role of lawyer and are able to practice such skills; and (ii) clinical law professors guide students through this role while requiring the student to continually reflect on, theorize, and re-apply their improved knowledge and skills.¹⁴⁴ This reflective process teaches students how to learn from their own experience, a skill that facilitates the transition throughout one’s legal career from novice, to competent attorney, and finally, to expert. Student practice in the clinical setting is therefore different than student practice through employment or an internship because students are taught self-reflection and self-assessment tools that they can use throughout their careers to continually enhance their problem-solving skills.¹⁴⁵

Representing social enterprises facilitates student development of

¹⁴² These are the same skills that are required of advising the typical transactional law clinic clients—small businesses, start-ups, and nonprofit organizations. Such skills have been detailed in numerous other books and articles and therefore they will not be repeated here. See, e.g., ROGER S. HAYDOCK & PETER B. KNAPP, *LAWYERING: PRACTICE AND PLANNING* (2003); Susan D. Bennett, *Embracing the Ill-Structured Problem in a Community Economic Development Clinic*, 9 *CLIN. L. REV.* 45 (2002); Karl S. Okamoto, *Teaching Transactional Lawyering*, 1 *DREXEL L. REV.* 69 (2009); Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 *J. ASS’N LEGAL WRITING DIRS.* 118 (2008).

¹⁴³ Roy Stuckey, *Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses*, 13 *CLIN. L. REV.* 807, 811, 816 (2006) (arguing that “one of the strengths of experiential education is that it gives students opportunities to practice solving problems and to receive feedback on the quality of their efforts . . . Problem-solving skills can be developed only by actually working through the process of resolving problems.”).

¹⁴⁴ *Id.* at 816-17; see also Steven Hartwell, *Six Easy Pieces: Teaching Experientially*, 41 *SAN DIEGO L. REV.* 1011, 1013 (2004) (describing the four stage process of learning from experience: “Experience is the immersing of one’s self in a task or similar event—the doing. Reflection involves stepping back and reflecting on both the cognitive and affective aspects of what happened or was done. Theory entails interpreting the task or event, making generalizations, or seeing the experience in a larger context. Application enables one to plan for or make predictions about encountering the event or task a second time.”).

¹⁴⁵ Stuckey, *supra* note 143 (quoting SULLIVAN, ET AL., *supra* note 84, at 178).

problem-solving skills precisely because legal issues pertaining to social enterprise are often novel or unstructured. Social enterprises may present issues that the clinical law professor, law student, nor potentially any practicing lawyer has faced. There is no such thing as “social enterprise law,” and sustainability has been called a “craft rather than a science.”¹⁴⁶ Molly Scott Cato, Professor of Strategy and Sustainability at the University of Roehampton, advises that because sustainability is an area of “limited knowledge and uncertainty,” educators who teach sustainability should “adopt an approach of shared learning.”¹⁴⁷ Shared, or collaborative learning is a pedagogical tool often used in clinical legal education, and applies quite well to representing clients which themselves are working at the cross section of multiple sectors and legal “gray” areas.

The laws governing social enterprises arise from corporate law and nonprofit law, as well as the host of other regulatory regimes affecting nonprofit and business operations, such as securities law, employment law, environmental law, consumer law, and trade law. Law students representing social enterprises must learn these various legal regimes and develop an understanding of how they affect and can be applied to social enterprises. This analysis and learning process requires higher-order thinking and problem-solving because it requires adaptation of the law and legal theories and not just application or replication.¹⁴⁸ Admittedly, some of the legal issues that social enterprises face are the same issues that any organizational client might face. However, some legal issues will be novel. Consider, for example, thinking through how to classify money paid by customers to an organization like Panera Cares—a community café, organized as a nonprofit organization and funded by for-profit Panera Bread company. Panera Cares operates with a mission to address food insecurity.¹⁴⁹ Customers may (but are not required to) pay for food from a Panera Cares café at a suggested donation price; those who cannot afford to

¹⁴⁶ Moll Scott Cato, *What the Willow Teaches: Sustainability Learning as Craft 3* (Jan. 11, 2013) (unpublished manuscript) (on file with author) (“Given what we know about the prevalence of uncertainty and ignorance in the field of sustainability, the exposure of our young people to sustainability experimentation in the field is likely to generate precisely the sorts of creative and experimental solutions that are so lacking in a policy arena framed by techniques of measurement and projection.”).

¹⁴⁷ *Id.* at 1, 5 (“It might enable educators to escape the ‘deadly habit’ no. 3: ‘Teachers lead, students follow’ and help us all arrive at a learning situation where ‘pedagogical processes bring student and teacher together in their shared ignorance and mutual desire to make sense of their world’”) (quoting E.L. McWilliam, *Unlearning Pedagogy*, *JOURNAL OF LEARNING DESIGN*, 1/1: 1-11 (2005)).

¹⁴⁸ See Kosuri, *Impact in 3D*, *supra* note 8, at 23 (Kosuri contends that “the best lawyers employ sophisticated skills that are grounded in the lawyer’s role as problem-solver.”).

¹⁴⁹ *Our Mission*, PANERA CARES, <http://paneracares.org/our-mission/> (last visited Jan. 30, 2012).

pay are not required to. A tax lawyer easily spots the legal issues with this revenue-producing structure—is the money received by the organization a tax-free donation or taxable income? Does it matter if the money received is from a low-income person or a person capable of paying market-price? Does it matter if the organization receives enough revenue to covers its costs and therefore runs a surplus, or if low-income people are rarely served?¹⁵⁰

Consider, also, choice of entity issues. For social entrepreneurs that attempt to blend social, environmental, and financial value, and work within a “gray” legal arena, this issue is a crucial one. The distinguishing characteristic of a nonprofit organization is the prohibition against private inurement. Nonprofits do not have shareholders and “insiders” cannot receive excess benefits from the nonprofit. On the other hand, managers of for-profit corporations have a fiduciary duty to pursue the best interests of the corporation and its shareholders, which is often (even if incorrectly) taken to mean maximizing shareholder value. Many social entrepreneurs are using for-profit business models and strategies to work to address social and environmental issues or create a public benefit. They do not pursue shareholder value maximization and yet their business models or strategies do not work if they cannot attract investors (and distribute at least some profits to investors). The risk to a social enterprise in starting out in the wrong organizational form is acute. Consider, for example, Couchsurfing, which started as a New Hampshire nonprofit organization but converted to for-profit corporation with B Corp certification status after being denied tax-exempt status from the IRS and realizing that it could generate a considerable revenue stream (and investment) by converting to a for-profit organization.¹⁵¹ However, because the assets of nonprofit organizations are held in trust form and must be used for a charitable mission, to convert to a for-profit corporation, the assets of the non-profit organization had to be brought out by investors—this was a considerable and potentially unnecessary cost had Couchsurfing started as a for-profit organization. Moreover, Couchsurfing’s loyal fan base was critical of the conversion, likely costing Couchsurf-

¹⁵⁰ Professor Cassady Brewer raised this scenario concerning Panera Cares at the AALS 2013 Annual Meeting, Section on Nonprofit and Philanthropy Law panel on Social Enterprise (Jan. 6, 2013). Customer payments for food at Panera Cares are likely to be considered “exempt function income” made to further the organization’s exempt purpose. Only the amounts paid that exceed the fair market value of the food are deductible as charitable contributions.

¹⁵¹ Nicole Perlroth, *Non-Profit CouchSurfing Raises Millions In Funding*, FORBES ONLINE (Aug. 24, 2011, 9:51 PM), <http://www.forbes.com/sites/nicoleperlroth/2011/08/24/non-profit-couchsurfing-raises-millions-in-funding/>.

ing considerable time, money, and effort to restore its public image.¹⁵²

Additionally, as noted in Part I, new corporate forms that allow for-profit businesses to take into account non-shareholder stakeholders have been passed into law in at least twelve U.S. states, but the use of those forms has been moderate at best.¹⁵³ Because these forms are recent developments in corporate law (e.g., the benefit corporation statute was enacted in February 2013 in the District of Columbia), there is a lack of judicial precedent adjudicating claims against such corporations, making it unclear how their non-shareholder pursuits will be interpreted should a derivative claim or benefit enforcement proceeding be made. Law students will have to gather information about their client, identify the legal “gray” areas involved, and provide the best advice to a social enterprise clients regarding choice of entity with respect to these novel corporate forms. Dealing with such novel and unstructured problems that social enterprises present gives students the opportunity to develop their problem-solving skills, as well as develop self-reflection tools for career-long learning.

B. *Information Sharing and Knowledge Creation*

In addition to learning problem-solving skills, representing social enterprises presents students with the opportunity to step into the role of legal advocate for the social enterprise sector by engaging in knowledge creation and information facilitation. Transactional legal work that navigates and implements substantive corporate law is not often viewed—by law students or by law professors—as a means of accomplishing advocacy or public interest work.¹⁵⁴ Praveen Kosuri’s recent article describing the societal impact that transactional law clinics can have through synergies of service, pedagogy, and skills substantially advanced the dialogue about transactional law clinics and their potential to achieve an impact comparable to that of community economic development (CED) work.¹⁵⁵ Kosuri describes the history of transac-

¹⁵² Bobbie Johnson, *After Going For-Profit, Couchsurfing Faces User Revolt*, GIGAOM (Sept. 1, 2011, 11:00 AM), <http://gigaom.com/2011/09/01/after-going-for-profit-couchsurfing-faces-user-revolt/>.

¹⁵³ See *supra* note 131.

¹⁵⁴ Note, however, that there is growing interest in employing business law in the public interest. “Business Law in the Public Interest” was the recent title of a symposium held at University of California, Irvine School of Law, with presented articles subsequently published in the UC Irvine Law Review.

¹⁵⁵ Kosuri, “*Impact*” in 3*D*, *supra* note 8, at 4 (“It is more difficult for lawyers and law students to see how transactional law can affect change in the same manner as litigation. Law schools certainly do not teach it. If there are any courses dealing with transactional lawyering they are almost always ‘deals’ oriented or skills-based classes, but rarely do they promote transactional law as an impact strategy to affect change. Moreover, outside the CED world, transactional lawyers rarely come from social justice backgrounds. This com-

tional law clinics, the typical legal work in which they engage, and encourages transactional law clinicians to adopt impact strategies because “impact work unlocks the potential for enhanced skills development and deeper learning.”¹⁵⁶

To that end, the SENL Clinic is taking steps to adopt a “combined advocacy” model that is more typical of a litigation-based clinic or CED clinic. In the combined advocacy model, Clinic students work on small-scale client representation and larger-scale projects simultaneously and learn valuable advocacy and collaboration skills. Jayashri Srikantiah and Jennifer Lee Koh describe the combined advocacy clinic model in the context of an immigration clinic:

By conducting multi-modal advocacy, students work to achieve broader-scale social change beyond what can typically be achieved in individual client work. Working on both individual, small-scale cases and institutional, larger-scale projects also gives rise to synergies in learning, as students reflect on each undertaking in the context of the other. By exposing students to multiple lawyering roles, diverse tools for effecting social justice, and the complexity of issues facing the populations served by the clinic, a combined advocacy clinic deepens students’ ability to engage in problem solving, expands their exercise of judgment, and most fully develops their professional identity.¹⁵⁷

In addition to representing individual social enterprise clients, SENL Clinic students are given the opportunity to act as advocates of the social enterprise sector by facilitating information and creating knowledge important to the growth of the sector. Information sharing and knowledge creation are key roles of the business lawyer.¹⁵⁸ Business lawyers aggregate information across their organizational clients and distinguish patterns, norms, and customary practices within various industries, thereby creating knowledge about the industry that may not

bination of conditions creates a climate where few lawyers look to employ transactional law practice as a vehicle for change.”).

¹⁵⁶ *Id.* at 18.

¹⁵⁷ Jayashri Srikantiah & Jennifer Lee Koh, *Teaching Individual Representation Alongside Institutional Advocacy: Pedagogical Implications of a Combined Advocacy Clinic*, 16 CLIN. L. REV. 451, 452 (2010). A number of clinics including domestic violence, criminal defense, immigrants’ rights, and community economic development clinics have employed the combined advocacy approach. See M. Chris Fabricant, *Rethinking Criminal Defense Clinics in “Zero-Tolerance” Policing Regimes*, 36 N.Y.U. REV. L. & SOC. CHANGE 351, 344-45 (describing adoption of a combined advocacy approach for the Pace Criminal Justice Clinic and noting that “a growing trend in clinical education, combined advocacy incorporates individual representation and broad-scale advocacy initiatives.”).

¹⁵⁸ See, e.g., Lisa Bernstein, *The Silicon Valley Lawyer as Transaction Cost Engineer?*, 74 OR. L. REV. 239, 248-51 (1995) (noting that venture capital lawyers in Silicon Valley serve as information facilitators and promote business norms and customary practices within the field by counseling unknowledgeable start-up clients about the reasonable range of deal terms).

have existed before. Because the rule of law and mechanisms to achieve sustainability in the corporate sector are under-developed, the social enterprise sector needs this kind of legal assistance.¹⁵⁹

As a starting point to engage Clinic students with knowledge creation and information sharing in the social enterprise sector, Clinic students are involved in two partnerships. First, the Clinic has partnered with Law for Change, an online legal resource for social innovators operated by Lex Mundi Pro Bono Foundation.¹⁶⁰ Students provide legal content to the Law for Change website. Students write blog entries on laws or cases that they come across during their client representation that may affect other social entrepreneurs. Students also draft brief legal guides on discrete legal issues that arise from the legal research and work that students accomplish for a Clinic client. For example, a student might draft an advisory memo on the benefits and disadvantages of converting to a benefit corporation determinate on a social enterprise's business model. Through the partnership with Lex Mundi Pro Bono Foundation, a student may draft a longer practice-oriented white paper on a legal issue that he has addressed for a social enterprise client in the Clinic.¹⁶¹ The student posts the white paper on the Law for Change website so that others in the sector, whether lawyers or entrepreneurs, can learn how to navigate a particular law or issue. By drafting a practice-oriented white paper on a legal issue that a social enterprise might encounter, the Clinic student is engaging in information sharing as well as creating possible best practices for the sector. The student, too, must reflect on his work for the individual social enterprise client he represents over the semester; and think about the ways in which a particular piece of legal work might assist other social enterprises or advance the sector in general. The student also must identify and synthesize the "value-add" component of his legal work, while drafting the practice-oriented white paper in a manner that is accessible and understandable to both other lawyers and non-lawyers.

¹⁵⁹ Compare ORSI, *supra* note 16, at 16 ("[Transactional attorneys] have a great deal of work ahead to bring our laws into sync with the realities of a sharing economy [S]haring economy lawyers are well positioned to collect stories and examples, and to develop best practices and policy recommendations to adapt our laws to the needs of a changing economy."). See also, IFAC, *supra* note 72, at 8 (noting that certain governance practices are essential to sustainable success).

¹⁶⁰ *About Us*, LAWFORCHANGE, http://www.lawforchange.org/lfc/About_Us.asp (last visited Dec. 10, 2012).

¹⁶¹ Students work with their professors and clients to obtain *informed* consent from clients, avoid any identifying aspects of the legal representation, and maintain confidentiality of client information, including client-specific business strategies or other secrets that the client does not want revealed. Because of client confidentiality and time constraints, not all students draft materials for the Law for Change website.

Similarly, the SENL Clinic partners with Ashoka and two other law school clinics—the International Transactions Clinic at the University of Michigan Law School and the Small Business & Community Economic Development Clinic at The George Washington University Law School. Ashoka, founded by lawyer Bill Drayton in 1980, is a leading organization in the social entrepreneurship sector. Ashoka supports approximately 3,000 social entrepreneurs across 73 countries. The goal of the collaboration between Ashoka and the three legal clinics is to advance the development of the legal sector that supports social entrepreneurship. Our collaborative approach is two-pronged. With Ashoka as their client, students at the three law schools collaborate to develop and share best practices for the sector by producing legal toolkits and research that help Ashoka further its charitable mission of supporting the social entrepreneurship sector. The students also represent social entrepreneurs identified by Ashoka in transactional and business legal matters that help them launch and scale their social enterprises.

By stepping into the role of legal advocate, students begin to see that lawyers are not neutral arbiters of the law. While some argue that a lawyer's role is amoral and client autonomy is sacrosanct,¹⁶² other legal ethicists call upon lawyers to deliberately shape their clients' preferences to serve justice.¹⁶³ Representing social entrepreneurs, many of whom are novices and actively seek out attorneys for strategic advice around sustainability issues, prohibits students from taking an amoral approach to the law. Students are called on to actively shape their clients' interests by advising them on the pursuit of charitable or sustainable objectives. Moreover, students must consider "fairness." For example, Clinic students may represent a nonprofit client on a transaction to provide services in a low-income community or developing country. Students research the particular service industry, and provide the nonprofit client with advisable business terms based on what other nonprofits do in the sector and based on applicable law. If the nonprofit client wishes to deviate widely from customary business terms in order to take advantage of the unrepresented and disadvantaged party in the transaction, a student must consider the ethics of assisting the client.

V. LIMITATIONS

There are several conceptual and practical challenges to representing social enterprise clients in a clinic. Some of these challenges

¹⁶² See e.g., Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, AM. B. FOUND. RES. J., Vol. 11, No.4 613-35 (Autumn 1986).

¹⁶³ See e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988).

arise out of serving organizational clients generally, whether they are social enterprises or not. Such limitations include: (1) whether matters are so complex that students do not have an active role in the client representation to the detriment of student learning;¹⁶⁴ (2) the considerable amount of time needed to find and select clients with appropriate projects for students compared to court-referred litigation clients; and (3) objections from the private bar and potentially members of the clinical community in serving for-profit clients. Because other articles discuss these issues in the context of other organizational clients that are not social enterprises,¹⁶⁵ the limitations discussed below focus on those that are particularly acute for the representation of social enterprise clients.

A. *Chasing Trends*

First and foremost, one must consider whether corporate sustainability and the entire social enterprise movement is a short-lived trend that will be replaced by another trend in the corporate sector. If social enterprise is just a fad, focusing on it may not prepare law students for legal careers, and would be a waste of useful law school resources. For example, the benefit corporation and other new organizational forms may never be used in significant numbers or adjudicated by courts in meaningful and useful ways: such was the case with constituency statutes of the 1980s, which were enacted in many states but never ripened to their full potential.¹⁶⁶ Or an economic boom could decrease the imperative for companies to focus on demand for resources and human capital, or environmental effects. It is also inevitable that many social enterprises and corporate sustainability initiatives will fail. That is the nature of entrepreneurship and experimentation.

One can look to the potential benefits to corporations as a ba-

¹⁶⁴ See Katherine R. Kruse, *Biting Off What They Can Chew: Strategies for Involving Students in Problem-Solving Beyond Individual Client Representation*, 8 CLIN. L. REV. 405, 410, 429 (2002).

¹⁶⁵ See, e.g., Kosuri, *Impact in 3D*, *supra* note 8, at 42-45 (discussing the challenges of representing “impact” clients in an entrepreneurial law clinic).

¹⁶⁶ Constituency statutes were promulgated in many states in the 1980s to protect local corporations in response to increased out-of-state takeover activity. Generally, a constituency statute allows directors to consider the interests of non-shareholder constituencies when making business decisions for the corporation. Non-shareholder constituencies include employees, customers, creditors, suppliers, and the communities where the corporation is situated or does business; the national, state, and local economies; both the long-term and short-term interests of shareholders and the corporation; other community and societal factors. 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, 782 (2008).

rometer of whether the social enterprise movement will endure and sustainability goals will constitute a long-term shift in corporate behavior. That is, some advocates believe that sustainability issues are important to the well-being of the world's economic, financial, and social health, and therefore worth pursuit for their own sake. More importantly, corporate managers see an untapped potential in pursuing social and environmental objectives because greater social, environmental, and economic equality and sustainability will lead to larger markets of customers and consumers for their products and services. So while some may advocate equality and sustainability for their own right, corporate managers may advocate it because, in the long run, it opens up new markets.

For example, Proctor & Gamble ("P&G") operates an initiative called "Protecting Futures: Keeping Girls in School" through which it partners with non-governmental organizations to provide puberty education, sanitary protection, and sanitary facilities to girls in developing countries.¹⁶⁷ The goal of the initiative is to provide the means for girls to attend school during their menstrual cycles (purportedly girls in the targeted countries miss school a few days a month while managing their menstrual cycles). While the goal is admirable, undoubtedly corporate managers at P&G must also see the potential to capture the loyalty of future customers and expand into a new market—if the girls stay in school, do well, and obtain employment they will have the funds to continue using the P&G products by *purchasing* them.

Similar logic is the basis of many corporate social responsibility initiatives, including those corporations who establish and/or fund educational programs—these companies see the need to continue to educate their future workforce, often with technological skills in math, science, and engineering. There is no denying that corporations also have to contend with the effects of climate change, increased natural resource demand, and political unrest on their manufacturing, supply chains, workforce, product distribution, consumer market, and other business operations. It will not be easy or profitable for corporations to continue business as usual without some understanding, acceptance, and incorporation of sustainability goals. For these reasons—both profit-driven and resource-driven—it is unlikely that the new emphasis on sustainability in the corporate sector will fade.

B. Transfer to Future Practice

Although the clinical legal education community focuses on

¹⁶⁷ *Always and Tampax: Protecting the Futures of Girls*, PROCTOR & GAMBLE, http://www.pg.com/en_US/sustainability/social_responsibility/protecting_futures.shtml (last visited Jan. 11, 2013).

teaching students the practice methods and proficiencies they need to enter post-graduation law practice, it remains to be seen *empirically* if clinics truly prepare law students for practice. In *The Clinic Effect*, Professors Jeffrey Selbin and Rebecca Sandefur analyzed the data from a longitudinal study of the careers of new lawyers. Selbin and Sandefur found that 62% of respondents rated clinical courses and training as “helpful” to “extremely helpful” in “making the transition to . . . early work assignments as a lawyer.”¹⁶⁸ This positive finding for clinical legal education comes with limitations, as Selbin and Sandefur point out. Notably, the study only tested recent law graduates’ perception of how clinics prepared them for their careers, and not whether clinics prepared them for their careers.

The question remains as to whether students actually translate and transfer the proficiencies they learn in law school courses and clinics to post-graduation practice.¹⁶⁹ Intuitively, it would seem that the closer the subject matter and skills learned in class are to actual practice, the more easily a student can translate and transfer such knowledge and skills to practice. Despite the observation that “no client would entrust a multimillion dollar transaction to law students,”¹⁷⁰ some transactional law clinics might be at an advantage in preparing students for future practice precisely because they focus on the substantive law that students entering corporate practice post-graduation will encounter and employ. And while for-profit companies generally do not entrust their transactions to law students, many for-profit and nonprofit start-up social enterprises will and do. This may have something to do with the age and outlook of social entrepreneurs themselves—they tend to be younger than the average corporate manager and often view youth as characteristic of untapped talent and innovation rather than inexperience. Additionally, the social entrepreneurship ethos of “giving back” aligns with many social entrepreneurs’ aspirations to “give back” by facilitating law students learning “on the job,” as they themselves have. Thus, students representing social enterprises in the SENL Clinic may very well engage in similar “start-up” legal work that they will perform post-graduation.

However, aligning subject matter and skills taught in a clinic with future practice alone is insufficient to ensure transfer of skills learned

¹⁶⁸ Jeffrey Selbin & Rebecca Sandefur, *The Clinic Effect*, 16 CLIN. L. REV. 57, 83-85 (2009).

¹⁶⁹ Kreiling, *supra* note 84, at 284 (“Unless law school clinical legal education is structured to teaching a method that can be transferred to and used in the world of professional practice, the impact of clinical education on lawyer competency will be minimal.”); *see also supra* note 14.

¹⁷⁰ Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475, 485-86.

in clinic to future practice. As stated above, a key component of clinical legal education is reflective practice—i.e., the ability to learn from one’s own experience. This is accomplished in the clinical setting “by requiring students to articulate their ‘theories of action’ in recurring professional settings,” comparing actual results to expected results, identifying ineffective practice and the reasons why the student’s practice was ineffective, and providing quality feedback.¹⁷¹

CONCLUSION

This article has explained the reasons that the Social Enterprise & Nonprofit Law Clinic explicitly engages in the study of social enterprise and corporate sustainability, and represents social enterprise clients. Such client selection helps prepare students for practice in a corporate sector that increasingly emphasizes corporate sustainability. Serving social enterprise clients acts as a catalyst for discussion and understanding of corporate laws as they relate to pursuing financial, social, and environmental objectives. Clinic students also learn valuable problem-solving skills and engage in information facilitation and knowledge creation essential to legal advocacy for an emerging sector. The effect of the SENL Clinic’s approach will be borne out with time, as alumni of the Clinic are tracked and surveyed about their experiential experience and its impact on their post-graduation law practice.

¹⁷¹ Kreiling, *supra* note 84, at 291-95.