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Why the New Benefit Corporations May Not Prove to Be Truly Socially Beneficial

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Abstract: Social enterprises may take a variety of legal forms (limited liability companies, nonprofit entities, etc.). This paper focuses primarily upon one particular new form increasingly popular within the United States—the "Benefit Corporation." I evaluate whether US Benefit Corporations are likely to realize as much social benefit as is frequently claimed. Part One of the paper describes the features of Benefit Corporations as they are constituted in many states. Part Two lays out the benefits extolled by supporters of this US legal corporate form. Part Three challenges these claims and adduces some reasons for doubting whether Benefit Corporations will prove to be as socially useful as they claim to be. Part Four concludes with some suggestions for future lines of research into the nature of the firm and Benefit Corporations in particular.

Key Words: Benefit Corporations, B Corps, corporate governance, accountability

The financial meltdown of 2007 and the subsequent Great Recession have led many people to believe that corporations are on the wrong track. Instead of pursuing primarily shareholder value, corporations should, the argument goes, strive to contribute to the public welfare. This point of view has served to fuel interest in a relatively new type of corporations—social enterprises. Indeed, some commentators have argued that we are now "in the midst of a historical movement in which some of the core ideas of business, and of the law that governs it, are being reconsidered" (Greenfield 2014: 1). This social enterprises movement aims at "overturning the hegemony of shareholder value" (Nocera 2012: A19).

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new form increasingly popular within the United States—the "Benefit Corporation." I evaluate whether US Benefit Corporations are likely to realize as much social benefit as is frequently claimed. Part One of the paper describes the features of Benefit Corporations as they are constituted in many states. Part Two lays out the benefits extolled by supporters of this US legal corporate form. Part Three challenges these claims and adduces some reasons for doubting whether Benefit Corporations will prove to be as socially useful as they claim to be. Part Four concludes with some suggestions for future lines of research into the nature of the firm and Benefit Corporations in particular.

Part One: What Are Benefit Corporations? Why Has This New Form of Incorporation Come Into Being?

A Benefit Corporation is a new legal form of corporation pioneered within the United States where the form is being established by state statutes. These statutes aim at rectifying a perceived problem with current governance—namely, uncertainty as to whether directors and managers are legally bound to increase shareholder value or whether they may legally serve stakeholders' interests as well. Legal and management scholars have long been split over this issue of governance allegiance. Benefit Corporation statutes seek to eliminate the ambiguity by deciding the issue in favor of stakeholders. Benefit Corporation statutes explicitly mandate that the corporation's directors and managers consider the interests of non-shareholder stakeholders and larger social interests (Artz et al. 2012). Benefit Corporations generally will also consider shareholders' interests. Benefit Corporations, unlike nonprofit firms, can make profits, can be owned by shareholders, and can make distributions to them. The key difference between traditional corporations and Benefit Corporations is that the latter are not legally bound to pursue primarily shareholder value.

Two court cases are typically cited as evidence that the US needs Benefit Corporation statutes. The first case is the 1919 case *Dodge v. Ford*. Henry Ford wanted to use the firm's excess capital to benefit society instead of distributing cash to shareholders. The Michigan Supreme Court ruled in favor of the shareholders. Some scholars have contended that the decision was a judicial mistake (Stout 2008). Others have insisted that there are few, if any, additional cases that support shareholder sovereignty over director sovereignty; in the vast majority of cases, courts have supported the so-called business judgment rule rather than requiring that firms maximize shareholder wealth (Stout 2012). This rule states that directors' decisions should be honored as long as directors exercise their judgment in the business's interest, regardless of whether these judgments bring about the intended outcomes. Under the business judgment rule, courts will override managerial and board decisions only when "they are tainted with self-interest or grossly misinformed" (Greenfield 2014: 1). As long as managers and directors avoid these taints, then (the argument goes) they can give corporate money to charities or reduce pollution emissions beyond what the law requires if they so choose. Other scholars have noted that, as a matter of fact, courts have not required that directors seek to *maximize* profits; it suffices for directors to make decisions aiming at the long-term interests of shareholders.

Although shareholder sovereignty cases are rare and less important than the business judgment rule, proponents of Benefit Corporations contend that the mere existence of *Dodge v. Ford* prevents directors from appropriately attending to stakeholder interests. As Murray (2012) has argued, the lack of enforcement of a shareholder value norm does not mean that it does not exist. Shareholder maximization operates as a controlling norm in corporations precisely because so many businesspeople believe that it is a legal requirement.

A second case—*EBay Domestic Holdings, Inc. v. Newmark*—has also prompted activists to fight for the option for firms to incorporate as Benefit Corporations. EBay was a minority shareholder in Craigslist (styled craigslist). Craigslist (Newmark) claimed that it had instituted numerous measures to limit EBay's power in order to protect Craigslist's culture of being community-centered. In this case, Craigslist was forced to rescind these measures on the ground that protecting stakeholder interests must at some point increase shareholder wealth and that Craigslist directors had a fiduciary duty to further shareholder interests (Murray 2012). Although it could be argued that both Henry Ford and Craigslist would have prevailed in court if they had argued that their stakeholder efforts were in the long-term interest of the firm and thus of benefit to shareholders, the fact that the courts ruled against these defendants who had chosen not to make primary their duty to maximize shareholder wealth has prompted legislators to pass Benefit Corporation statutes.

Benefit Corporation statutes exist in Arizona, Arkansas, California, Colorado, Connectict, Delaware, Florida, Hawaii, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, Washington, DC, West Virginia (Benefit Corp Information Center 2016). As of December 2014, there were over 1100 registered Benefit Corporations. The form is proving popular. For example, Delaware passed its Benefit Corporation law only in 2013; within three months, 55 firms had already used the statute to incorporate as

Benefit Corporations (Plerhoples 2014). Minnesota had thirty-two Benefit Corporations within one month of its Benefit Corporation statute going into effect (Thompson Hall 2014). Other countries are now following suit. Italy passed Benefit Corporation legislation in 2015 (Benefit Corp Information Center 2015). Australia is considering draft legislation allowing for Benefit Corporations (Cooper 2016), while some individuals in Canada are pushing for Benefit Corporation legislation as well (Tobin 2014).

Many state Benefit Corporation laws allow for two different sorts of Benefit Corporations. A general Benefit Corporation typically commits to a broad purpose—e.g., generating a "net material positive impact . . . on society, the environment, and the well-being of present and future generations" (Frederikson & Byron Law Firm 2014). A specific Benefit Corporation, by contrast, specifies a particular social purpose in its Articles of Incorporation. A Benefit Corporation may elect to pursue both a general and a specific purpose (Frederikson & Byron Law Firm 2014). My concerns apply to both types equally, so for purposes of this analysis, I will not distinguish between the two subtypes of Benefit Corporations.

Part Two: Possible Benefits of Benefit Corporations

Benefit Corporations seek to operate as social enterprises. Although the notion of a social enterprise may not be very well-defined or well-understood (Defoumy and Nyssens 2010), the general idea is clear enough in the case of Benefit Corporations. Patagonia, Ben & Jerry's, Give Something Back Office Supplies, Kickstarter, and other firms have incorporated as Benefit Corporations to send a message that, unlike traditional corporations, they exist not primarily to make money for their owners but rather to realize social good through philanthropy, green practices, employment of minorities, etc. The Benefit Corporation legal form is seen as offering a substantial legal advantage. By mandating that boards explicitly and continually consider interests of stakeholders who do not own shares, Benefit Corporation statutes are seen as freeing directors to evaluate and promote the larger social good. Let us consider the ostensible advantages of Benefit Corporations in greater detail.

Becoming a Benefit Corporation Builds a Distinctive Brand Appealing to Socially Committed Investors, Employees and Consumers

Socially responsible investors want to put their money in firms that they perceive as doing social good while realizing a reasonable market return. However, a 2013 survey (Goodman 2013) revealed that 63 percent of surveyed customers are skeptical about firms' claims to be socially responsible. Incorporating as a

Benefit Corporation with the legal duty to pursue social benefit can help the firm send a credible message that it is serious about acting in a socially responsible way. Benefit Corporation status helps a firm's management to convey to the market that the firm is genuinely committed to doing business differently from standard corporations (Goodman 2013).

In addition, some businesses find that their status as Benefit Corporations enables them to attract younger employees who want to work for a firm with values that match their own. For example, when Green Spaces (an event venue firm) launched, would-be employees deluged the firm with offers to intern or to work with the firm (Goodman 2013). Such engagement has considerable economic value. A recent Gallup study suggests that employee disengagement costs US firms alone $450 to $550 billion per year (Gallup 2013). Some scholars have argued that the US has been suffering from an employee disengagement crisis from 2008–2012 (Minnesota Public Radio 2013). Benefit Corporations may serve to counter the decline in employee involvement with firms.

Consumers, too, may find Benefit Corporations advantageous. One can draw an analogy with nonprofits. The economics and law literature has many articles addressing the issue of why firms might prefer nonprofit over for-profit status. The most popular theory postulates that nonprofit status signals high or desirable quality (Hirth 1999; Glaeser and Shleifer 2001; Malani, Philipson, and David 2003). If we assume that consumers and producers in certain markets find it difficult to contract for a certain product quality (e.g., consumers find it difficult to observe product quality directly for themselves), then profit-maximizing firms in this market may be tempted to lessen quality with a view to cutting costs. Nonprofits presumably do not have the same incentive to cut back on quality. So, according to signal theory, nonprofit status signals high quality to the consumers (Malani and David 2008). By analogy, incorporating as a Benefit Corporation might signal to consumers that the firm's products or services are likely to be of higher quality than those offered by non-Benefit Corporations.

Benefit Corporations are turning to organizations such as B Lab to enhance their social branding even further (B Lab 2014). B Lab helps Benefit Corporations consolidate their brands by certifying firms (known as "certified B Corps") that can show that they do indeed generate social benefits through being energy efficient, transparent, employee-friendly, etc. Companies must complete a somewhat arduous process of documenting the social benefits they are providing. In addition, B Lab randomly spot-checks the performance of about 10 percent of the companies that it has certified (B Lab 2014). Not every Benefit Corporation is a certified B Corp; conversely, not every B Corp has legal status as a Benefit

Corporation. Etsy, for example, is a B Lab certified B Corp but is registered as a traditional Delaware C corporation (Bhatia 2014). However, the two branding mechanisms of certification and incorporation can work hand in hand to send a message to investors concerning a firm's identity as a social enterprise.

Incorporating as a Benefit Corporation Provides Clear Legal Guidance and Protection to Corporate Directors Who Wish to Pursue Social Benefits

As was noted above, it is debatable whether traditional corporate law statutes permit directors to work toward any goal other than shareholder value maximization. Defenders of Benefit Corporations argue that when a corporation incorporates under Benefit Corporation statutes, its directors can know for certain that they can legally consider the welfare of a variety of stakeholders. Of course, stakeholder interests can and frequently do conflict. So Benefit Corporation statutes do not require that boards maximize or somehow harmonize the interests of all stakeholders. But the Benefit Corporation legal form does provide reliable cover for board members who wish to oppose some proposed strategy because they judge that this strategy will harm the environment or injure employees' long-term interests. Indeed, Leo Strine, the pro-shareholder chief justice of the Delaware Supreme Court, has observed that Benefit Corporation legislation may be necessary to empower a non-stockholder constituency:

> Most fundamentally, nothing has happened in Delaware outside of the enactment of the Benefit Corporation statute *to provide practical power to any constituency other than stockholders*. Stockholders remain the sole constituency with voting rights and the right to sue to enforce the DGCL and fiduciary duties. And that is perhaps the main point. (Strine 2015: 31–32) (italics added)

Some directors are risk-averse. Given the widespread belief (mythical or not) that directors are required always to act so as to maximize shareholder value, directors are understandably skittish about violating that norm. Fellow directors (or directors at other companies) may insist that a director's primary duty is to the shareholder. In this kind of environment, directors may need to be reassured that they are legally protected when they consider a variety of stakeholder interests. Simply being told that standard corporate law gives them such freedom likely will not suffice in many cases to persuade directors that they truly are at liberty to look beyond profit maximization. Benefit Corporation statutes may thus help to combat a prevalent perception among directors that they are legally required to do whatever it takes to increase shareholder wealth (Rose 2007). Members of the board of a Benefit Corporation who are legally obligated to pursue social benefit may be emboldened to overcome their risk-aversion and to look after stakeholder interests.

Furthermore, Benefit Corporation statutes protect directors and the corporation itself from any monetary liability even if they should fail to pursue the Benefit Corporation's public purpose (Model Benefit Corporation Legislation 2014). So these statutes send a strong message that directors need not worry about becoming personally liable for failure if they serve on the board of a Benefit Corporation.

Registering as a Benefit Corporation Deals with the Vexed Issue of Director Duties When There Is a Takeover Bid

Even those legal scholars (e.g., Stout 2012) who are convinced that traditional incorporation statutes permit (without requiring) directors to look beyond shareholder value maximization have conceded that matters are less clear when it comes to directors' duties when their firm is the object of a takeover bid (Murray 2012). Corporate governance scholars have long recognized that managers sometimes oppose takeovers because they want to keep their jobs and fear that, if the firm is acquired, they will get the boot. The law, too, recognizes that shareholders are especially vulnerable when a takeover is in the offing. If the current stock price of firm X is $50/share and a potential acquirer offers $75/share, shareholders owning large blocks of X's shares stand to reap a considerable windfall if the acquisition goes through. The bidding firm Y typically believes that X has been badly managed or has been underperforming. With new owners in place, Y thinks that X can be made considerably more productive. So on this score, too, X's shareholders have some basis for wishing the takeover to go through. However, the shareholders generally are not in a position where they can force X's self-interested and entrenched managers to approve the acquisition. The law thus seeks to protect stockholders by requiring that directors consider shareholder interests if and when takeover bids appear to be viable (Fairfax 2002).

Directors of Benefit Corporations should similarly consider shareholder value when a takeover is in the offing (Stout 2012). However, they should equally evaluate the interests of employees, customers, and the larger community and public. If they believe, for example, that an acquisition will do more harm than good and/or is not in the long-term interests of the Benefit Corporation's stakeholders, they may legally reject the acquisition offer. Under regular corporate law, such a rejection is not permitted or is, at the very least, highly problematic. In 2000, Ben & Jerry's ice cream company was acquired by Unilever. The firm's founders, Ben Cohen and Jerry Greenfield, were opposed to the acquisition (Edmondson 2014). But, since the firm was not incorporated as a Benefit Corporation, the firm's directors felt they were legally bound to accept the Unilever bid because it resulted in a large shareholder payout (Page and Katz 2012). Even though some legal scholars contend that the ice cream company's directors were not, in fact, so bound, this case does suggest that directors feel that they have little room to maneuver at the point of a takeover bid. Proponents of Benefit Corporations maintain that this new legal form is needed to protect public firms with a well-established social conscience and mission (e.g., Ben & Jerry's) that may be targeted for takeover by a firm (e.g., Unilever) without such a mission (Page and Katz 2012).

Adopting the Benefit Corporation Legal Form Avoids Problems Associated with Other New Forms of Social Enterprises

Benefit Corporations represent only one of the new legal forms that can be used by social enterprise entities. A company may also constitute itself as a low-profit limited liability company ("L3C"). L3Cs generally follow Benefit Corporation guidelines but use the LLC framework. There is, however, one crucial difference. Although Benefit Corporations' directors are required to weigh societal and shareholder interests, these same directors are free to decide which interests deserve priority. By contrast, L3C statutes (e.g., those in Vermont) stipulate that directors must give priority to societal/communal interests over profit-making. By law, increasing stockholder value can never be a significant driver (Artz et al. 2012).

In theory, L3Cs make it easier for the entity to avail itself of program-related investments (Murray and Hwang 2011). Not-for-profit firms and social enterprises often desire foundation funding; consequently, this corporate form has been embraced by some such firms as a way to secure funding. However, in practice, such funding may not prove easier, for there may be potential tax problems for philanthropists who want to contribute to programs run by L3Cs (Artz et al. 2012). Program-related investments ("PRIs") must meet certain requirements in order to qualify as such. If they fail to meet these requirements, then a foundation's investment in an L3C may be deemed by the Internal Revenue Service to be a "jeopardizing investment." In that case, both the foundation and its administrators may wind up being heavily taxed. Moreover, the foundation manager may not be able to look to the foundation to absorb these personal costs (Artz et al. 2012; Bishop 2010). Individuals running foundations are understandably leery of incurring personal liability for taxes owed to the IRS, so to date L3Cs have not proven to be a very popular legal form for social enterprises.

L3Cs also may experience difficulties raising capital from the private sector because investors, including social investors, usually want market returns (Lydenberg 2007; Murray and Hwang 2011). Potential investors may worry that managers and directors at these low-profit firms do not even have shareholder interests on their radar screens (Bishop 2010). Lack of capital means that an L3C will struggle; its extant shareholders risking having the L3C go bankrupt. Benefit Corporations, in theory, avoid these tax and funding problems. There do not seem to be complicated tax implications with Benefit Corporations. And, unlike L3Cs, Benefit Corporations enable directors to look after shareholder interests. So entrepreneurs may find Benefit Corporations a more attractive way to fulfill their goal of serving the public with fewer risks than those attendant upon L3Cs.

Part Three: Why These Benefits May Not Materialize

The above benefits are the primary ones that may follow from incorporating as a Benefit Corporation. However, these benefits are far from certain, and there are numerous and substantial obstacles that may prevent Benefit Corporations from succeeding in their stated missions.

Branding as a Benefit Corporation May Not Effectively Signal Quality to Stakeholders

Significant anecdotal evidence suggests that potential employees are drawn to social enterprises (Honeyman 2014), so branding as a Benefit Corporation may help fledgling firms attract enthusiastic workers. However, whether such branding will prove attractive to *consumers* is more doubtful. Although it may be comforting to think that a Benefit Corporation brand will appeal to consumers (Westaway and Sampselle 2012), the research on nonprofit brand signaling high quality goods and services should give us pause. An extensive body of literature investigation on whether nonprofit firms actually produce better quality has yielded inconclusive results (Ortmann and Schlesinger 2003; Schlesinger and Gray 2005). When directly surveyed as to whether they believe nonprofits to be more trustworthy than profit-maximizing firms, participants' answers have proven inconclusive. For example, when it comes to assessing the goodness of nursing care, consumers found nonprofit hospitals to be trustworthy, but the majority believed for profit hospitals took better care of patients (Schlesinger, Mitchell, and Gray 2004). Consumers may not, therefore, interpret Benefit Corporations as offering more desirable products than those marketed by traditional corporations.

None of these surveys of potential nonprofit consumers moved beyond hypotheticals to deal with actual consumer decisions (Malani and David 2008). In some cases, when those polled were asked to explain the difference between for-profit and nonprofit firms, up to one third of the respondents could not give a coherent account of the difference. Given the subtle differences between traditional corporations and Benefit Corporations, consumers likely will struggle in this case as well to understand what the real advantages and disadvantages of the legal form of incorporation are. Students, for example, sometimes think that Benefit Corporations and/or B Corps are nonprofit firms. Given that nonprofits are sometimes seen as providing lower quality service than for profit companies, it is far from certain that incorporating as a Benefit Corporation will signal to consumers that the firm's services and/or products are especially meritorious or worthy of trust.

I would note as well that consumers are well aware of the phenomenon of "greenwashing." They know that corporate claims can be highly opportunistic. Recent studies suggest that consumers are right to be skeptical. Koehn and Ueng (2010) have shown that firms that have been involved in fraud are more likely to use corporate philanthropy than non-defrauding firms to try to regain the public's good will. Porter and Kramer (2006: 80) have claimed that many CSR efforts are merely "cosmetic"; while others (e.g., Vogel 2007) have noted a major disconnect between what firms' CSR reports claim and what the actual practices of these firms are. Recent studies have revealed that 1) when consumers get their information regarding a firm's CSR activities from the firm itself; and 2) when they doubt the sincerity of the firm's motives, then CSR activities hurt rather than benefit the firm's image (Yoon et al. 2006). So whether becoming a Benefit Corporation will bolster a firm's brand appears to depend crucially upon how the various stakeholders perceive the firm's intentions and its past history.

Serving as a Director of a Benefit Corporation Does Not Eliminate Legal Liability and May Even Increase It

One of the supposed advantages of Benefit Corporations is their charters' clarity regarding directors' duties. Directors, we are told, do not need to worry about being sued for a breach of duty if and when they pursue benefit goals other than shareholder maximization. But this advantage presupposes that directors are hugely concerned about being sued and being found legally liable for breaching their duties. Defenders of Benefit Corporations have provided no evidence that large numbers of directors are even concerned about legal liability. Traditional corporations (e.g., Ben & Jerry's) frequently commit to making directors whole in the event that they are found personally liable.[1] If liability is not a major concern for directors, then lessening it does not provide much obvious social value.[2]

Moreover, if directors are worried about being sued, then Benefit Corporations are not the solution to their fears. There are two related points to note. First, even if a state's Benefit Corporation statutes eliminate fiduciary duties for directors, directors can be found civilly (or even criminally liable) for behavior that is not a breach of fiduciary duty. Liability arises from actions (or lack of actions) taken by the company and/or from the firm's violations of regulations or laws. For example, whether directors face liability under the Employee Retirement Income Security Act of 1974 (ERISA) and the Fair Labors Standard Acts depends on how actively involved they are in the day to day operations of the corporation. A director may be deemed to be an "employer" if he or she becomes directly involved in labors matters such as the payment of wages or overtime. If the firm—be it a traditional company or Benefit Corporation—asks workers to work off the clock; and if the director knowingly allows this violation of wage statutes, directors may be fined for the firm's failure to pay the requisite wages.

This observation segues into a second point about the potential legal liability faced by Benefit Corporations' directors. Given that most Benefit Corporations are small; and given that they tend to attract activists who are committed to their mission, directors at these firms are likely to be more involved in the quotidian operations of the firm than directors at Fortune 500 firms. Active involvement, in turn, increases the likelihood that a court will deem these Benefit Corporation directors (1) to be "employers" because they are exercising operational control at the firm; or (2) to be de facto fiduciaries under ERISA because they have exercised discretionary control over a pension plan management or its assets (Monsky and Shimshak 2014). If so, then a would-be director worried about legal liability should think twice about serving on the board of a Benefit Corporation.[3] Liability may be *greater* rather than less in this type of firm. As Benefit Corporation directors become more aware of this issue, they may become more risk-averse. In that case, the social benefits that supposedly will arise from having emboldened stakeholder-friendly directors guiding Benefit Corporations may fail to materialize.

Attracting and Retaining Capital May Prove Difficult for Benefit Corporations

The forecasted benefits of Benefit Corporations can be realized if and only if these firms are able to sustain themselves. To do so, they must attract capital. In theory, Benefit Corporations and the benefit brand should be attractive to socially responsible investors. Some Benefit Corporation founders are pioneering innovative ways to capitalize their fledgling firms (Pirron forthcoming). There is some anecdotal evidence that capital is starting to flow to socially beneficial companies and that investors are obtaining competitive returns (BAnalytics 2016). And some scholars have started to argue that investors (not just SRI investors) may be willing to invest in Benefit Corporations because they implicitly construe them less as social enterprise entities and more as alternative ways to maximize shareholder value:

> The optional nature of Benefit Corporation statutes sends a different message. It says that Benefit Corporations have added responsibility not because governments require it, but because the directors and shareholders want it. If these statutes are to make economic sense, they must be seen as facilitating a contract between shareholders and directors with mutually agreeable terms. Shareholders with the option of investing in traditional corporations would not forego their right to maximized value unless the alternative deal was more appealing. To make that deal more appealing, Benefit Corporations do not abandon the shareholder value norm; they merely redefine what it means to maximize shareholder wealth. (Hasler 2014: 1301)

Hasler's argument in effect reinforces the point that healthy financial returns are crucial. Even investors in Benefit Corporations typically demand a reasonable return on their investment in a firm claiming to serve the public good. That accounts for why SRI funds tend to be marketed as offering competitive, attractive returns (Richardson and Cragg 2010; Brill et al. 1999). If the Benefit Corporation has venture capitalist funding or has pension fund investors whose fiduciary duty to pensioners obligates them to pursue good returns, then the managers of the firm will inevitably be under pressure to deliver financial returns (Boatright 1999). In this respect, there is no substitute for solid financial returns. Contrary to the popular assertion that Ben & Jerry's had to sell out to Unilever because corporate law gave them no choice (Page and Katz 2010), the real reason behind the sellout appears to have been the ice cream maker's distribution and cash flow woes (Hays 2000; Edmondson 2014; Wherry 2001). The jury is still out on how successful Benefit Corporations will be in generating cash.

Investors may be leery of investing in Benefit Corporations for a second reasons. As I noted above, shareholders in traditional companies are protected in cases of takeovers because directors generally are bound to accept the highest bid. Shareholders may not have this protection when it comes to takeovers of Benefit Corporations. Directors of Benefit Corporations may be able to justify accepting a lower bid if they can show that they "balanced" shareholder interests.

Even if investors are willing to risk entrusting their dollars to Benefit Corporations, numerous studies have shown that SRI investors will give up only a small amount of return in exchange for furthering the public good. Moreover, the percentage of dollars invested in SRI vehicles has held steady over recent years. It was 11.4 percent in 2012 (US SIF Foundation 2012), slightly down from 12.2 percent in 2010 (US SIF Foundation 2010) and then back up to 18 percent in 2014 (US SIF Foundation 2014). These statistics suggest that there may not be many new SRI investors coming into the market. If so, to secure capital for a new Benefit Corporation, its managers will have to convince SRI investors to switch their money from other social enterprises to these managers' Benefit Corporation. To the extent that that dynamic is in play, Benefit Corporations may not deliver much of a net increase to the public good.

Benefit Corporations will also experience competition from other new corporate forms touched upon earlier (e.g., the L3Cs). Even traditional corporations are increasingly paying at least lip service to the triple bottom line of people, profits, and planet. Indeed, some states have started to allow traditional corporations to include the pursuit of social benefits within their articles of incorporation. For example, Oregon statutes as amended in 2007 permit a firm to add "a provision authorizing or directing the corporation to conduct the business of the corporation in a manner that is environmentally and socially responsible" (Oregon statute as quoted in Murray 2012: 20fn84). If Benefit Corporations had come on to the scene twenty years ago, they would have had far less competition and been far more distinctive. As it stands, this new kid on the block likely will need to struggle mightily to get not only recognition but also investors.[4]

To earn a reasonable return and to entice investors, Benefit Corporations will need to keep a sharp eye on their costs. Costs are not inconsiderable. Benefit Corporations must produce and file an annual report describing how they are contributing to public welfare. General Benefit Corporations must identify and then use a third-party standard (e.g., B Lab certification standard) to analyze its operations. If the Benefit Corporation is of the specific benefit type, it must publish an account of how it has pursued and created the benefit specified in its charter (Fredrikson & Byron Law Firm 2014). If the firm has chosen to pursue both a general and a specific benefit, then its reports must meet the filing requirements for both types of Benefit Corporations. Failure to file such reports can be grounds for terminating the Benefit Corporation. Legal costs may prove significant. At present, there is uncertainty as to how exactly these firms must be managed. There will be shareholder lawsuits against Benefit Corporations; benefits corporations may have to pay to settle such suits.

Certification and legal costs are in addition to the costs the firm will incur as it seeks to realize the benefits it has promised to pursue. These benefits must be tracked and measured. Furthermore, the target for qualifying as beneficial keeps moving. Third-party certifiers of social enterprises keep raising the bar, making it harder to earn the points needed to secure certification. A general Benefit Corporation may be re-certified even if its point total drops from year to year. But investors and the other stakeholders may pressure the company to try harder to gain back these points in the next round of certification. If these dynamics prevail, one would expect to see a steady upward trend in compliance costs. Well-established Benefit Corporations may be able to cope with increasing costs. But fledgling firms may find it very difficult to cope and may even lose their status as Benefit Corporations if they fail to file appropriate documents (Murray 2014). Benefit Corporations, unlike nonprofit charities, receive no tax benefits that would help to offset these costs. Perhaps increasingly rigorous certification standards will make Benefit Corporations more attractive to investors. If so, capital infusions may help with increasing costs. Whether such infusions will materialize remains an open question.

Managing Competing Stakeholder Interests May Prove Especially Challenging for Managers and Directors of Benefit Corporations

A Benefit Corporation may find it hard in the long run to navigate the tricky shoals of competing stakeholder interests. Harris and Wicks (2014) have argued that stakeholder trust involves both a *competence* and a *good will* dimension. The trusting party wants the trustee to possess the relevant skills for the task the trustee is expected to perform. In addition, the trusting party desires that the trustee have and manifest good will toward him or her. Various stakeholder groups weight the desire for competency and for good will differently.

The firm-shareholder relationship tends to be impersonal and transactional; the relationship is often mediated by fund managers so the end shareholder may not even know which stocks exactly he or she holds. Driven by "instrumental logic," stockholders, including SRI investors to whom Benefit Corporations may seem appealing, primarily look to the *competence* of managers as evidenced by financial metrics (Harris and Wicks 2014). Community-oriented stakeholder and employees, by contrast, can be expected to place greater stress on the *good will* evidenced by a corporation (Harris and Wicks 2014). It may thus prove very challenging for Benefit Corporation managers to retain capital from both types of stakeholders, given that the two groups evaluate the goodness of such firm along different axes.

Of course, all firms face tradeoffs among stakeholders. I would argue, however, that the problem of competing stakeholder interests may prove more acute in the case of Benefit Corporations. These firms portray themselves as being essentially beneficial and trustworthy. Yet even a single decision to favor shareholders (perhaps to pay a dividend after a long period of not making such payments) may cause community-focused stakeholders to cry foul. For the latter may see this act as failing to show the good will on which they had based their trust in the Benefit Corporation. To put the point differently: In a stakeholder firm as classically envisioned by Evan and Freeman (1988), corporate managers are expected to be pragmatic. Tradeoffs are inevitable and have to be managed on an ongoing basis. In a Benefit Corporation, management likely will be held to a more ideological standard. The inevitable and necessary tradeoffs among stakeholder benefits and harms may generate intractable conflicts if stakeholders become moralistic. I would not go so far as to say that Benefit Corporations are fundamentally unmanageable. But I do think serious attention needs to be given to how such tradeoffs will be managed if they do turn out to be more acute in the case of Benefit Corporations.

Such difficulties likely will be ongoing. Under the original stakeholder theory, Evan and Freeman (1988) argue that firms are bound to consider stakeholder interests; but the two authors seem to envision that, in any particular case, some stakeholders will stand out as especially salient. If so, management should focus on how actions and policies are likely to affect that primary party. However, under some state statutes, Benefit Corporations are required by law to evaluate the effects of their actions on seven or more stakeholder groups in every single decision the firm makes (Callison 2013). Doing that means getting regularly enmeshed in stakeholder conflicts and differing expectations.

Holding Benefit Corporations and Their Managers Accountable Will Prove Challenging

Benefit Corporations do not have an assigned government regulator; the statutes look to stakeholders to hold these firms accountable (André 2012). In some states, the new Benefit Corporation statutes do not offer constituencies much in the way of tools for enforcing accountability. Although states such as Massachusetts, New York, and Delaware *require* Benefit Corporations to consider interests of specified stakeholders or of stakeholders materially affected by some decision, other states simply *permit* Benefit Corporations to do so (Greenfield 2014). It is not at all clear what disgruntled stakeholders are to do if their interests are not taken into account when management is not required to do so.

Benefit Corporations generally only commit to *pursue* certain benefits. Indeed, lawyers counsel that firms should not promise to realize these benefits because it is generally far harder to establish the actualization of benefits than the attempts to pursue them. Board minutes and annual benefit reports should align with the benefit the social enterprise has pledged to pursue in its filing papers, documenting what the firm has done in furtherance of its stated purpose. Pursuit, though, is a highly elastic notion. Did the firm pursue benefits wholeheartedly? Using half-measures? Would a single attempt to realize some benefit count as a pursuit? If management is incompetent when it comes to planning and executing environmental measures, do its efforts to, say, clean up a river genuinely constitute pursuit of this benefit? If a dentist does not have the foggiest idea of how to remove a tooth, we likely would describe her struggle to extract a tooth as an assault, not as a pursuit of a tooth removal. So why should just any effort by management to realize some benefit count as a true pursuit of benefit?

Benefit Corporations are often justified on the ground that management ought to have the right and duty to "consider" the interests of stakeholders other than shareholders. "Consider," like "pursuit," is an exceedingly vague notion. The history of business ethics is littered with cases where firms have considered stakeholder interests (in the sense of having recognized stakeholder interests) that they ultimately did little to further. Firms manufacturing industrial adhesives that found their way into the hands of impoverished Central American glue-sniffing children acknowledged these children as stakeholders and made some efforts at securing social services for the children. These efforts did not prove very effective, and the firms continued to manufacture the glue. The firms narrowly framed the problem as a social one ultimately beyond their economic purview. Although a kind of consideration was given to these children, it was done within a skewed frame that posited a complete dichotomy between social and economic problems. The glue sniffing was both social and economic, not either/or. So how nuanced does a firm's thinking need to be before it rises to the level of genuine consideration?

Another issue: Considering interests in the sense of taking them into account is sometimes immoral. As Aristotle would put it, interests must be considered in the right way, at the right time and for the right reasons. Firms that report fraudulent inflated earnings consider at least the short-term interests of shareholders. After all, shareholders typically desire higher rather than lower rates of returns on their investments. Some shareholders will suffer in the long run when the firm is forced to restate these earnings. But it would be hard to argue that the firm's managers did not think about—or even obsess about—shareholder expectations.

If a Benefit Corporation tries to balance stakeholder interests as part of pursuing its stated social mission, it encounters another problem. The whole notion of balancing items presupposes a fulcrum, a center point (usually immovable) upon which the balancing platform perches. What is the fulcrum in the case of Benefit Corporations? That point is not specified in the defenses of these Benefit Corporations. If we do not know what the fulcrum is, how can we possibly assess whether the pursuit of benefits more or less successfully balances relevant stakeholder interests? And how can directors and managers possibly know when and whether they have genuinely balanced (as Delaware Benefit Corporation law stipulates) "1) the pecuniary interests of the stockholders; 2) the best interest of those materially affected by the corporation's conduct; and 3) the specific public benefit or public benefits identified in [the firm's] certificate of incorporation" (Murray 2014: 355)? What will count as a balance in those cases where it is zero sum game among stakeholders?

Apart from these theoretical conundrums arising from conceptual elasticity and nuance, those who would hold Benefit Corporations accountable face some significant practical problems. Proponents of Benefit Corporations contend that we can look to the market to hold these corporations to the promises they have made. Reliance upon market monitoring presupposes that firms are transparent, that the information they provide is accurate; and that this information is readily available and easily accessed and searched. As was noted in Part One, Benefit Corporation statutes generally require firms to file an annual benefit report. However, as of this writing, there is no central database aggregating all of these reports, much less presenting all such reports in a searchable format. Benefit Corporations must be identified on a state by state basis; B Labs certification reports must be pulled up on a firm by firm basis, which makes firm comparisons tedious. Googling to find reports is difficult as well. Benefit Corporations call their reports by different names. One firm may publish its "annual giving report"; another may produce a "benefit report" or a "Benefit Corporation report." There is no standard naming convention for these reports. Nor is there even an easy way to search for and track Benefit Corporations themselves, because there are no standard naming conventions for this type of corporation.

Furthermore, although Benefit Corporations in most states must produce an annual benefit report in line with third party standards (Delaware and Colorado are notable exceptions; their recent Benefit Corporation statutes do not mandate annual reporting nor the use of third party standards), statutes do not require that a corporation use any *particular* third party standard. Most of the statutes state only that a third party standard must be used. They do not stipulate that the report be audited or certified by any third party.

At present, there are over 100 corporate social responsibility (CSR) raters that might be deemed to offer acceptable third party standards (Benefit Corp Information Center 2014). Some states (e.g., Hawaii and Oregon) mandate that benefit reports be posted publicly; but in the District of Columbia, benefit reports apparently need only to be filed with the mayor (Murray 2014). The Model Benefit Corporation Legislation guidelines do not even require that the reports be truthful (Model Benefit Corporation Legislation 2014). What happens when a benefit report is not produced and published or when stakeholders doubt the report's veracity? Shareholders may be able to initiate a benefit enforcement proceeding against the Benefit Corporation in question, but under the current Benefit Corporation statutes, other stakeholders have no authority to compel a report. In general, shareholders wishing to initiate such a proceeding must own 2 percent of the firm's shares or be an owner of a least 5 percent of the parent company of the Benefit Corporation (Murray 2014). In some of the states that allow for shareholder proceedings, proceedings cannot be initiated unless and until a benefit report has not been filed for two or more consecutive fiscal years (Murray 2014). In theory, a Benefit Corporation could file a report one year, skip the next year, file again, etc. Although such a scenario may appear unlikely, the general point holds: stakeholder ability to enforce accountability with respect to Benefit Corporations is minimal. In fact, I could not find a single instance of a Benefit Corporation being held accountable for failing to produce a report or for producing a misleading benefits statement.

A comparison with corporate responsibility metrics illustrates some of the practical difficulties with relying on third party standards. The various CSR rating agencies use different and often proprietary standards and models (Boylan 2012). The lack of uniformity means both that stakeholders have difficulty in determining how relatively "socially responsible" a firm is. Moreover, CSR scholars have found that firms touting their responsibility tend to highlight positive initiatives while remaining conspicuously silent about negative events (e.g., accidents at a plant). Rating agencies' scoring systems do not necessarily require firms to discuss cases where they have done harm (Scalet and Kelly 2010). A similar point applies to certifiers of Benefit Corporations. Given that Benefit Corporations may use CSR third party standards, the same lack of uniformity in standards will haunt any attempt to evaluate just how well a given Benefit Corporation is truly doing. In addition, Benefit Corporations' annual statements appear to extol efforts to clean up water supplies, to educate poor children, etc., but provide no instances where initiatives have gone awry.

Shareholders in particular should be concerned about the mechanics of accountability. In the event that shareholders decide to sue because they believe that their interests are not being appropriately served, they may find it difficult to get satisfaction. Legal scholars have voiced concern that judges will not be able to assess whether Benefit Corporation directors have fulfilled their fiduciary duties (Murray 2012). In general, the "ultimate legal purposes and roles of the for-profit firm—whether to maximize distributable profits and shareholder value or serve non-shareholder interests—provide the basis for defining, implementing, and evaluating fiduciary duties within the context of a larger economic system" (Tyler 2010). Since these standard roles are not operative in Benefit Corporations, the basis for evaluating fiduciary duties is thrown into doubt. Benefit Corporations are not required to give priority to any particular stakeholder/beneficiary group. Moreover, in some states, beneficiaries of Benefit Corporations qua beneficiaries are not owed any *fiduciary* duties. California's Benefit Corporation law, for example, explicitly states: "A director *shall not have a fiduciary duty* to a person that is a beneficiary of the general or specific public benefit purposes of a Benefit Corporation arising from the status of the person as a beneficiary" (emphasis mine) (California Corporations Code 2011).

Not only shareholders but also other stakeholders concerned about accountability may find themselves confused. Tyler trenchantly describes the framework problem facing the various stakeholders of hybrid entities like Benefit Corporations that are for-profit but that pursue social benefit:

> Unlike more traditional business operations, hybrid pursuits have generally functioned in clouds of confusion and difficulty for investors, managers, creditors, policy makers, and regulators. For instance, investors in hybrid enterprises need to know and understand the relationship between the hybrid purposes and the corresponding risk of loss and opportunities for gain. Managers need to understand the framework within which they are expected to make operational and structural decisions, how to determine priorities to pursue when inevitable conflicts arise among competing interests, and the extent to which they can be held liable for deviating from those expectations. As a related point, managers also need to know who can hold them accountable and by what right. Creditors should understand the fiduciary context within which managers make decisions that affect the credit-worthiness of the enterprise. Of course, regulators need to understand the scope of their responsibility for monitoring manager decisions and hybrid activities, including charitable, exempt purposes. (Tyler 2010, 118)

Waters are further muddied by the fact that Benefit Corporations—both general as well as specific—may legally change the purposes they specify in their filing papers and do so without penalty. It is not clear how and whether stakeholders of these firms will be notified of any such change in purpose.

Of all the stakeholders, shareholders may have the most to worry about when it comes to having their interests protected by these hybrid entities. As Boatright (1994) has argued, even in traditional firms, shareholders have the least formal protection of all stakeholders. The whole shareholder activism movement began in large part because boards were not sufficiently looking after owner interests (Banham 2012). Employees sometimes have unions to represent their interests; consumers can look to consumer protection agencies for help if they think a firm is harming them. Regulators have the power of the law behind them. Shareholders, however, must rely upon managers' taking their duties to investors seriously (Boatright 1994). Agency theory and the notion of directors' fiduciary duties aim at bolstering this fundamental duty. To the extent that Benefit Corporation statutes eliminate fiduciary duties, stockholders become even more vulnerable.

Thus far scholars and practitioners have proposed three solutions to the vexing issue of enforcing accountability: (1) look to managerial good will; (2) require Benefit Corporations to declare a primary master; and (3) expect the market to evolve accountability measures. With respect to option 1: I readily concede that we have ample evidence that individuals are not always narrowly self-interested. Parents and soldiers sacrifice their lives for the good of others. In that sense, Stout (2012) is correct to insist that it is a mistake to contend that we are all selfish, rational agents. On the other hand, it would be sheer folly to assume naively that all managers of Benefit Corporations will always operate in the best interests of their stakeholders. Faced with the prospect of losing their jobs, most employees (including managers) do become narrowly self-interested. Certain forms of compensation (e.g., stock options) seem to tempt many managers to engage in financial manipulation (Harris and Bromiley 2007; O'Connor et al. 2006). The Benefit Corporation's mandate offers managers many ways to dress up self-interest as public benefit. California law, for example, stipulates that directors of Benefit Corporations "shall consider the impacts of any action or proposed action upon all of the following:

(1) The shareholders of the Benefit Corporation.

(2) The employees and workforce of the Benefit Corporation and its subsidiaries and suppliers.

(3) The interests of customers of the Benefit Corporation as beneficiaries of the general or specific public benefit purposes of the Benefit Corporation.

(4) Community. . . .

(5) The local and global environment.

(6) The short-term and long-term interests of the Benefit Corporation. . . .

(7) The ability of the Benefit Corporation to accomplish its general, and any specific, public benefit purpose. (California Corporations Code 2011)

It would seem that almost *any* action that directors or management find attractive could be window-dressed as serving one of these seven interests. Those who are responsible for everyone may well wind up being accountable to no one. So we should not be sanguinely reliant upon managerial good will as a guarantor of stakeholder interests.

Asking Benefit Corporations to declare a primary master (Murray 2012)—consumers, employees, or community members—might seem at first blush to provide managers with the missing frame and fulcrum for identifying, assessing and balancing interests. It appears to offer judges some clarity for developing case law concerning managerial and directorial duties within Benefit Corporations. For example, if a Benefit Corporation were to designate consumers as its primary master, then presumably courts could look to managers and directors to use business judgment to promote consumer interests. As long as judgment was in the service of these interests, then managers and directors presumably would receive the protection of the law.[5] The difficulty with this primary master approach, though, is that it ignores the problem of metrics. A firm seeking to increase shareholder wealth can point to its rate of return or cite its increase in market share as a harbinger of profits to come.[6] But what measure exactly would be relevant in the case of consumer or community interests? A firm might cite its efforts to develop a new product, but if only a few people buy it, has the firm really acted in consumer interests? How many consumers need to spring for a pair of left-handed scissors in order for the market or the courts to say that the firm's managers and directors were pursuing the consumers' interests rather than some personal pipe dream? The problem of metrics would become even more acute if the firm were to choose the community as its primary master. Any community, even a small one, will have people with multiple and often conflicting interests. Would a firm strategy that pleased only 20 percent of the community meet the firm's duty to its beneficiaries? 5 percent? And how does one measure the community's satisfaction with the firm's activities on its behalf? Via surveys?

Looking to the market to evolve ways to hold Benefit Corporations accountable seems, on the face of it, to be eminently pragmatic. However, any market mechanism will still need to deal with the troublesome issue of metrics. Moreover, market accountability measures will still need to be supplemented by legal approaches. Benefit Corporation statutes themselves recognize as much by allowing shareholders (although not other stakeholders) to sue the firm. Shareholders would typically sue for breach of fiduciary duty, but, as we have seen, such suits may founder because Benefit Corporation directors' may not have any fiduciary duties and because it may be hard to specify what counts as an adequate discharge of any other sort of duty they may have.

Those who advocate for market-based accountability frequently cite the power of public pressure when mobilized through a free press. However, there is some evidence that firms do not change their behavior in response to specific CSR rankings (Scalet and Kelly 2010) promulgated through the market for information. Benefit Corporations might not prove that responsive either. Media pressure may not be that great, given how fragmented today's press is. And it is not clear whether journalists will be interested or will have the financial support needed to gather data on various Benefit Corporations and to bring pressure to bear if and when these corporations seem to be failing to adhere to their stated mission. Even if journalists have the interest to pursue such stories, what framework can they use for making the case that the Benefit Corporation has genuinely failed?

These matters are precisely what we do not at present understand. We certainly do not have well-developed methods of dispute resolution for handling the conflicts that are sure to arise. Scholars and practitioners have to do more thinking than they have done to date about the issue of Benefit Corporations' accountability.

Identifying with a Cause Can Result in Narcissistic Leadership at Benefit Corporations

Recent studies of the motivations of the founders of business enterprises suggest that entrepreneurial founders are extremely identified with a dominating motive, be it a desire to produce innovative and beneficial goods and services, to amass personal wealth, or to advance some cause (Fauchart and Gruber 2009). This identification with purpose gives their lives meaning and offers direction to their foundling firms. Insofar as Benefit Corporations, too, tend to be led by founding, visionary executives, we would expect dominating motives to be operative in this type of firm.

Identification can prove ethically problematic. Narcissists, for example, build up their sense of self-worth by identifying themselves with a cause or vision that they believe is entirely correct and superior to the beliefs held by others. If they become fully vested in this vision as the single or the most important source of their self-worth, they can start to exhibit worrisome leadership traits. Their vision and strategies may have less to do with the market and more to do with their personal psychological needs (Kets de Vries and Miller 1997). One would expect to find at least some narcissists at the helm of Benefit Corporations, given that these individuals are often very creative (Kohut 1966) and capable of thinking big and in very futuristic terms (Maccoby 2004). Narcissists, though, are arrogant, poor listeners who bristle at criticism (Boddy 2010). There is a danger, consequently, that leaders of Benefit Corporations, especially creative entrepreneurial founders with narcissistic propensities, will not be as responsive as shareholders and stakeholders might desire. They may also be slower to admit that problems exist with their vision or with their understanding of market forces, competitive pressures, etc. If narcissistic leadership were to become pervasive in this sector, we would have yet another basis for doubting whether Benefit Corporations will generate that much social benefit in the long run.

Benefitting Others Requires the Production of "Good Goods," Not a New Legal Form

I close this section with what I take to be the most serious reason for questioning whether Benefit Corporations will indeed deliver the social benefit they promise. The basic problem is benefits do not follow from legal structure alone. What we need are good corporations that serve society by delivering what Goodpaster and Naughton have termed "good goods" (Goodpaster and Naughton n.d.: 1). Two related arguments support this contention.

The first point is that all corporations should, in some way, advance the public or social good. In that sense, every corporation needs to be a "Benefit Corporation." Creating a special class of Benefit Corporations risks obscuring this key point and may ultimately undermine the entire idea of corporate responsibility. A comparison with so-called "social entrepreneurship" will clarify my concern. All entrepreneurship is intrinsically social. Every entrepreneur either promotes or harms the public good through his or her activities. Singling out some entrepreneurship as "social" tacitly implies that all other entrepreneurship is somehow anti-social and potentially morally illegitimate. McVea and Naughton (n.d.: 3) state the concern well:

> Social entrepreneurship can have the unintended consequence of perpetuating the false idea that "entrepreneurship" and business in general is largely a financial and private reality . . . :
>
> By attempting to build up a set of activities in the field of social entrepreneurship, do we risk limiting the traditional field of entrepreneurship to a mostly financial and private category?
>
> If "social entrepreneurship" is about contributing to the common good, does this mean that "entrepreneurship" is about maximizing private gains?
>
> If the adjective "social" is attributed to a set of activities to describe one form of entrepreneurship, does this mean that the rest of the field of entrepreneurship is "non-social"?

By analogy, does a distinct class of Benefit Corporations imply that all traditional corporations are merely financial and private? Are we implying that all traditional corporations are somehow non-beneficial? If so, are we not advancing a kind of "concentration thesis" that suggests that the "moral responsibilities of business can be *concentrated* in a subset of businesses called social enterprises, presumably leaving other enterprises [free] to focus simply on serving themselves" (McVea and Naughton n.d.: 6)?

The concentration thesis is historically false. The United States government has allowed individuals to incorporate precisely because we have expected that doing so will, in some measure, advance the common good and thus be in the public's interest. So any assertion that traditional corporations are somehow merely private or narrowly self-serving is unwarranted. Furthermore, many traditional firms manufacture or retail goods and services that have greatly improved people's lives. By offering high quality, long-lasting woolen goods and guaranteeing customer satisfaction, L.L.Bean has deservedly created a loyal customer base, especially among those who must be outside during bitterly cold winters. L.L.Bean is not a Benefit Corporation in the legal sense. Yet, when judged by the effects of its actions, it *is* a benefit corporation par excellence. Instead of creating a new class of Benefit Corporations, more good might be done by, say, requiring that all corporations add employee representatives or consumer advocates to their boards of directors.

This last observation points to the second reason for being concerned about the rise of a class of Benefit Corporations. Which legal form the corporation has or whom it promises to serve are secondary questions. The more salient issue centers on the character of the goods and services the firm delivers. Again, an analogy with social entrepreneurship is useful. Good entrepreneurs, be they called "social" or not, create goods and services that are good goods understood as goods and services addressing the needs of the world (McVea and Naughton n.d.). From this good goods perspective, a social entrepreneur who makes a badly crafted product that does not aid the poor is less truly social than Jeff Bezos who has made a host of previously unavailable goods available to consumers around the world through amazon.com. In a similar vein, corporations like Target and Costco, which have helped lower prices on clothing and food needed by the poor, have delivered good goods and thus have shown themselves to be socially beneficial. Of course, I am not denying that traditional firms like Target or amazon.com may sell some unhealthy food or toys that may not foster the development of children in appropriate ways. Rather I am making the point that *benefit does not flow solely or even primarily from legal structure*. Whether a firm is genuinely beneficial depends on the ethical soundness of the goods and services offered. A Benefit Corporation might, through ineptitude, distribute a harmful product all the while proclaiming that it is serving the poor, minorities, etc.

To the extent that the promised benefits are not conceptually grounded in any idea of "good goods," Benefit Corporations' managers are largely free unilaterally to proclaim some thing or activity to be beneficial. In the case of socially responsible investments, founders of SRI funds have been free to make their own determinations of what counts as socially responsible. Some funds screen against tobacco firms; others allow it. What we have is less a matter of socially responsible investments and more a matter of values matching (Koehn 1999; Boatright 1999; Hellsten and Mallin 2006). Some SRI funds screen out so-called "sin" stocks (tobacco, gambling, etc.), while other SRI funds such as Morgan Funshares have screened *for* these stocks (Boatright 1999). Fidelity Select Leisure Portfolio fund includes stocks from the casino and fast food industries (Carther 2014), even though some would judge gambling and fast food to be socially harmful. In the case of Benefit Corporations, we encounter a similar state of affairs, because what truly counts as beneficial is not rigorously specified. A Benefit Corporation might declare, for example, that it would offer products that would help individuals to overcome the supposed abomination of homosexuality or to avoid the Affordable Care Act mandates. Given the recent Supreme Court decision in the case of Hobby Lobby, "it is a reasonable fear that companies organized as Benefit Corporations could, if they chose to, claim a First Amendment-based exception to otherwise applicable anti-discrimination laws or insurance mandates" (Greenfield 2014: 1). Unless and until we are clear about what we mean by "social benefit," we have no well-grounded basis for expecting that Benefit Corporations will deliver any more genuine benefit than traditional corporations.

Part Four: Topics for Future Research

The above analysis suggests several key theoretical and empirical areas for additional research into both the ethics and efficacy of Benefit Corporations. Given that other countries have passed laws allowing for new forms of corporations, researchers should analyze how these forms resemble and differ from US Benefit Corporations. For example, the United Kingdom now allows firms to incorporate as "community interest corporations" (CICs). Are CICs subject to the same concerns as those detailed above? What could the US learn from the CIC experience, and the UK from the US experience with Benefit Corporations? Have other countries evolved some methods other than stakeholder pressure and stockholder-initiated benefit proceedings for holding accountable management of these new types of corporations? Are there grounds for preferring one method of enforcement to others? Even within the US, corporate law may be being influenced by Benefit Corporation statutes. For example, Pennsylvania corporate law specifies that directors may consider "the effects of any action upon any or all groups affected by such action" (15 Consolidated Statutes of Pennsylvania, §1750, 1990). In general, what impact are Benefit Corporation statutes having on the specification of director duties within corporate law?

Other key questions: By what measures should we assess the transparency of Benefit Corporations? Also, what duties should apply to managers and directors of Benefit Corporations if these parties do not have any fiduciary duties? How should courts determine whether these non-fiduciary duties have been adequately fulfilled? If Benefit Corporations are bound to "balance" various stakeholder interests, what exactly will count as an acceptable balancing act? And what qualifies as "pursuit" of the social benefit specified in a Benefit Corporation's charter?

Empirical questions abound as well. How effective have Benefit Corporations been at raising capital? How do earnings of Benefit Corporations compare with returns of comparable traditional corporations? How do paid stock dividends from the two types of corporations compare? Is crowd-sourced funding bolstering Benefit Corporations, or is it opening the door to non-Benefit Corporation competitors to market themselves as social enterprises? Are Benefit Corporations only talking about their successes, or do annual benefit reports discuss failures as well? Are the press and social media carefully monitoring Benefit Corporations and their foreign analogues, or are these new corporations being largely given a free pass? How do the boards of directors of Benefit Corporations compare with those of traditional corporations? Do the former have more or fewer independent directors than the latter? Are directors of Benefit

Corporations sued less frequently than directors of traditional corporations? To what extent do Benefit Corporations actually suffer from narcissistic leadership? Do consumers truly trust Benefit Corporations more than traditional corporations? If so, is such trust warranted? Both Benefit Corporations and CICs are attempts to use market-based institutions to ameliorate social problems such as poverty, discrimination, and pollution. Are these corporations realizing their goals more effectively than European welfare states' public partnerships with third sector organizations having similar goals? Is one approach proving more cost-effective than the other?

Conclusion

This article has adduced numerous grounds for questioning whether the new Benefit Corporations will ultimately realize the benefits they promise. It is far from clear whether these corporations will prove viable and whether they will create goods and services that are of genuine value or benefit to the community. On the one hand, as Robson (2015: 555) has argued, Benefit Corporations may be "accelerating a 'new normal' for business operations." On the other hand, as is evident from Part Three, this new form of incorporation raises a host of non-trivial philosophical and legal questions. To answer some of these questions and to assess fairly the ethical goodness of Benefit Corporations, we need empirical data of the sort specified above, data that we do not yet have. Although surely almost everyone would like to see corporations contributing to the public good in a responsible and sustained way, this vision is unlikely to be realized unless we start thinking long and hard about what truly counts as beneficial business activity and how businesspeople in Benefit Corporations as well as traditional corporations should best be held accountable for their choices. The advent of new legal forms of incorporation provides an opportunity for recommitting ourselves to just such an inquiry.

Notes

1. Ben & Jerry's director indemnification provision states: "No director of the Corporation shall be personally liable to the corporation or its stockholders for money damages for any action taken, solely as a director, based on a failure to discharge his or her own duties in accordance with Section 8.30 (entitled "general standards for directors") of the Vermont Business Corporation Act, except for: (i) the amount of financial benefit received by a director to which the director is not entitled; (ii) an intentional or reckless infliction of harm on the Corporation or the shareholders; (iii) a violation . . . [for unlawful distributions]; or (iv) an intentional or reckless criminal

act. The foregoing additional provisions shall not be construed in any way so as to impose or create any duty or liability" Ben & Jerry's Homemade, Inc., Amendment to Articles of Association, June 24, 1995, *Quarterly Report*, filed Aug. 7, 1995 as quoted in Page and Katz 2010: 241.

2. It could be argued that directors do care about their reputation. A bad reputation might prevent them from serving on other boards or might injure their pride. I concede this point but I still maintain that defenders of Benefit Corporations have provided little or no *evidence* to support the claim that directors are very concerned that they will be sued if they do not maximize profits.

3. Directors of an S Corp or a C Corp may also incur such liability if the corporation has family members or friends of management on the board.

4. On the other hand, one could argue that, while there may be more fish in the benefit bond, Benefit Corporations have helped to make that bond that much bigger.

5. However, as Murray (2012) notes, case law currently provides no clear guidance as to what sort of duty of loyalty directors owe to a Benefit Corporation.

6. Pava (2007), though, contends that there is no single number that accurately captures financial performance. For more on this issue of metrics in the Benefit Corporation context, see also Robson 2015.

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