

# Michigan Business & Entrepreneurial Law Review

---

Volume 4 | Issue 1

---

2014

## The Compliance Case for Social Enterprise

Joseph W. Yockey

*University of Iowa College of Law*

Follow this and additional works at: <https://repository.law.umich.edu/mbelr>



Part of the [Business Organizations Law Commons](#), [Nonprofit Organizations Law Commons](#), and the [Social Welfare Law Commons](#)

---

### Recommended Citation

Joseph W. Yockey, *The Compliance Case for Social Enterprise*, 4 MICH. BUS. & ENTREPRENEURIAL L. REV. 1 (2014).

Available at: <https://repository.law.umich.edu/mbelr/vol4/iss1/1>

<https://doi.org/10.36639/mbelr.4.1.compliance>

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Business & Entrepreneurial Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# THE COMPLIANCE CASE FOR SOCIAL ENTERPRISE

Joseph W. Yockey\*

## ABSTRACT

*Social enterprises generate revenue to solve social, humanitarian, and ecological problems. Their products are not a means to the end of profits, but rather profits are a means to the end of their production. This dynamic presents many of the same corporate governance issues facing other for-profit firms, including legal compliance. The author contends, however, that traditional strategies for corporate compliance are incongruent to the social enterprise's unique normative framework. Specifically, traditional compliance theory, with its prioritization of shareholder interests, stands at odds with the social enterprise's mission-driven purpose. Attention to this distinction is essential for developing effective compliance and enforcement policies in the future. Indeed, arguably the greatest feature of the social enterprise is its potential to harness organizational characteristics that inspire the values and culture most closely linked with ethical behavior—without resort to more costly or intrusive measures.*

## TABLE OF CONTENTS

INTRODUCTION .....	2
I. EMERGENCE OF THE SOCIAL ENTERPRISE .....	4
II. TRADITIONAL UNDERSTANDINGS OF CORPORATE COMPLIANCE .....	8
III. LIMITS OF TRADITIONAL COMPLIANCE STRATEGIES .....	10
A. <i>General Limitations</i> .....	10
B. <i>Specific Issues for Social Enterprises</i> .....	12
1. Normative Considerations .....	12
2. Additional Practical and Political Considerations .....	16
IV. SOCIAL ENTERPRISE AND THE SHIFT TO VALUES-BASED COMPLIANCE .....	18
A. <i>Integration of Purpose</i> .....	19
1. The Challenge .....	19
2. The Solution .....	22
B. <i>Culture</i> .....	23
C. <i>Power of Form</i> .....	27
1. New Standard Form Options .....	27

---

\* Associate Professor, University of Iowa College of Law. My thanks go to Paul Gowder, Emily Hughes, Lyman Johnson, Mike Koehler, Haskell Murray, Todd Pettys, Jason Yackee, Charles Yockey, and Sze Sze Yockey for their helpful comments and conversations. I am also grateful to Stephen Kirschner and Xiao Xiao for their excellent research support, and to Dean Gail Agrawal for the summer research stipend that made this project possible. For Emma.

2. Why the New Forms Matter ..... 28  
 3. Form and Psychology ..... 30  
 V. CONSEQUENCES AND RECOMMENDATIONS ..... 32  
     A. *Hire the Right People* ..... 32  
     B. *Engage with Stakeholders* ..... 35  
     C. *Promote Board Heterogeneity and Diversity of Expertise* ..... 36  
     D. *Reassess Enforcement Policy* ..... 38  
     E. *Prioritize Collaboration and Dialogue* ..... 41  
 CONCLUSION ..... 45

*Whoever walks righteously and speaks honestly, who spurns what is gained by oppression, who waves off contact with a bribe . . . that one shall dwell on heights, with fortresses of rock for stronghold.*

Isaiah  
33:15-16

INTRODUCTION

Social enterprises strive to make the world a better place. They use market-based strategies and techniques to advance a specific social mission. Even though they organize as for-profit companies, the pursuit of money comes second to advancing the public good: profits are the means to an end, rather than an end in and of themselves. Social enterprises’ key point of departure from charities and other socially responsible companies is that neither financial gain nor charity is ever incidental to other objectives. According to Brakman Reiser, they “pursue social and business goals together, viewing them as synergistic and mutually reinforcing, as equal partners in their business vision.”<sup>1</sup>

As a continuously expanding and evolving business model, social enterprises come in all shapes and sizes. Some work to alleviate the sanitation crisis in Africa by franchising affordable public toilets.<sup>2</sup> Others focus on hiring hard-to-employ individuals<sup>3</sup> or designing products for the clean-energy sector.<sup>4</sup> Many social enterprises are closely held start-up corpora-

1. Dana Brakman Reiser, *For-Profit Philanthropy*, 77 *FORDHAM L. REV.* 2437, 2450 (2009); see also Briana Cummings, Note, *Benefit Corporations: How to Enforce a Mandate to Promote the Public Interest*, 112 *COLUM. L. REV.* 578, 582 (2012) (noting that social enterprises “serve two ‘co-equal’ masters (two bottom lines) at once,” measuring success in terms of both financial and social performance).

2. Jonathan Kalan, *The Silicon Valley of Shit: Nairobi is Ground Zero for Sanitation Innovation*, *GOOD* (Nov. 18, 2011), <http://www.good.is/posts/the-silicon-valley-of-shit-nairobi-is-ground-zero-for-sanitation-innovation>.

3. Alicia E. Plerhoples, *Representing Social Enterprise*, 20 *CLINICAL L. REV.* 215, 227 (2013) (describing business model of the social enterprise Greyston Bakery).

4. See, e.g., March of the Lettuce Bot, *ECONOMIST*, Dec. 1, 2012, at 5, available at <http://www.economist.com/news/technology-quarterly/21567202-robotics-machine-helps-lettuce-farmers-just-one-several-robots> (describing innovations in pesticide-reducing robots by Blue River Technology).

tions, but that is certainly not the only option.<sup>5</sup> The common thread across the field is that all social enterprises, in addition to serving the public good, are *firms*. They need to do the things that every firm needs to do: they must raise capital, generate income, hire talent, and train employees. They also need to worry about legal compliance.

In some respects the compliance concerns facing a social enterprise are no different than the ones facing every company. Agency costs are never zero. As long as humans join in a common enterprise, the risks of cheating, fraud, shirking, and other forms of corporate malfeasance will remain. That said, matters become more nuanced in a social enterprise. Traditional compliance strategies focus on protecting shareholder wealth, typically by monitoring corporate agents and threatening them with sanctions if they engage in illegality or self-dealing. Of course, social enterprises must also be mindful of monitoring, but a shareholder-centric vision of compliance is largely incompatible with their overarching emphasis on mission rather than profits. Moreover, what might seem like sensible tactics in other for-profit firms, such as extensive surveillance and the risk of monetary penalties, can actually undercut compliance efforts in a social enterprise because they encourage agents to prioritize one's self-interest above other values. In the end, social enterprises need a compliance theory that does not just speak in terms of shareholders and strict cost-benefit analyses. They need one that captures the delicate balance at the heart of their hybrid purpose.

This Article has three primary goals. First, it will explore whether there is anything unique or special about social enterprises when it comes to compliance with the law and matters of business ethics. Second, after answering that question in the affirmative, it will discuss what this finding means for strategies of internal compliance and public enforcement policy. Finally, it will argue that the potential compliance benefits of organizing as a social enterprise represent one of the most compelling justifications so far for supporting the social enterprise movement and continuing its close study. Put simply, the social enterprise's mission-centric nature and concomitant organizational characteristics set up nicely to inspire a corporate culture that makes ethical conduct more likely to occur. This has important implications for the regulators, investors, employees, and consumers who interact with these firms, and it is something that even the most cynical skeptics of social enterprise theory should celebrate.

The Article proceeds as follows. Part I provides background on the origins, characteristics, and growth of the social enterprise sector. Part II

---

5. See Brett H. McDonnell, *Committing to Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations* 8 (Univ. of Minn. Law Sch. Legal Studies Research Paper Series, Research Paper No. 14-21, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2423346](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2423346); see, e.g., BEN & JERRY'S, <http://www.benjerry.com/values> (last visited Sept. 25, 2014) ("Our Social Mission compels us to use our Company in innovative ways to make the world a better place."); PATAGONIA, <http://www.patagonia.com/us/patagonia.go?asetid=2329> (last visited Sept. 25, 2014) ("[W]e came to realize our environmental and social responsibilities, and then began to act on them.").

looks at the range of compliance issues that arise for all firms and discusses traditional compliance theories. Part III then explains the limitations of those theories, with Part IV offering specific reasons why social enterprises should be treated differently. Part V concludes by proposing new approaches to governance and enforcement that will match and reinforce the social enterprise's distinctive qualities.

### I. EMERGENCE OF THE SOCIAL ENTERPRISE

The notion that a business can make money while advancing the public interest is not new. Whether through the sale of pharmaceuticals, electric cars, or organic produce, for centuries there have been companies hoping to earn profits by finding solutions to social problems. The inherently contractual nature of corporate law means that corporate constituents are free to pursue whatever objective they can agree upon and to which the market will respond.<sup>6</sup> For-profit firms also provide many ancillary social benefits—such as jobs—and often claim to be operating for the public good, even if their only goal is profit, since capitalism presumes that the pursuit of profit is *de facto* in the public interest.<sup>7</sup>

However, there is growing attraction to a business model that more closely and powerfully aligns with a distinctly social purpose.<sup>8</sup> This is partly a reaction to the widely held perception that most for-profit corporations focus solely on maximizing shareholder wealth, showing little regard for the negative social or environmental consequences of their actions.<sup>9</sup> Some commentators even suggest that corporate directors and managers owe a legal duty to put profits ahead of every other concern.<sup>10</sup> For the most part, the suggestion that corporations must maximize profits at all costs has been discredited.<sup>11</sup> Legally and practically, corporate con-

---

6. See Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm*, 127 HARV. L. REV. F. 273, 281–82, 288 (2014) (describing contractual flexibility of corporations through charters and bylaws); see also DEL. CODE ANN. tit. 8, § 101(b) (2012) (providing that Delaware corporations may be formed to conduct “any lawful business or purposes”).

7. Milton Friedman, *The Social Responsibility of Business Is to Increase Profits*, N.Y. TIMES MAG., Sept. 13, 1970.

8. See McDonnell, *supra* note 5, at 7–8.

9. See Joan MacLeod Heminway, *To Be or Not to Be (A Security): Funding For-Profit Social Enterprises*, 25 REGENT U. L. REV. 299, 301 (2013); Robert T. Esposito, *The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for Benefit Corporation*, 4 WM. & MARY BUS. L. REV. 639, 661–62 (2013).

10. See Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 736 (2005) (recognizing but criticizing the belief that “traditional fiduciary duties require corporate managers . . . to maximize corporate profits”); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441 (2001) (“[T]here is today a broad normative consensus that shareholders alone are the parties to whom corporate managers should be accountable . . .”).

11. See Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 169 (2008) (“Do [state corporate statutes] . . . limit the corporate purpose to share-

trollers are free to make any business decisions they see fit, including ones that sacrifice profit in the name of performing a social good.<sup>12</sup> Yet, whether they take to the streets as part of Occupy Wall Street or not, large swathes of the population look skeptically at the behavior of traditional corporations.<sup>13</sup> Corporations generate a tremendous amount of good, but they also fan the fires of problems like corruption, climate change, poverty, and dangerous working conditions. Disasters such as the British Petroleum oil spill and the Bangladeshi clothing factory collapse, to say nothing of the lasting aftershocks of the global financial crisis, only add extra grist to the mill.

The concept of a social enterprise came out of this environment. More and more people want companies to be truly good; they want to support and work for companies that put principles of sustainability, fair wages, fair trade, and overall public benefit at the center of their business strategies, even if doing so means slightly lower profits.<sup>14</sup> Social enterprises seek to meet this demand. These are businesses that pursue social good as their core mission, sometimes broadly and sometimes more narrowly, but always with a purpose of making money to solve unmet social problems, rather than solving social problems to make money. They look like traditional firms in the sense that they engage in commercial activity and generate revenue by selling products or charging fees. However, they do all of this while following the mantra of “profit with a purpose.”<sup>15</sup> Isolated add-on practices that are consistent with the tenets of Corporate Social Responsibility (CSR)—such as paying fair wages—are not enough. Social enterprises originate instead from commitments to larger values (e.g., social justice or environmental sustainability) and apply those values to every strategic decision.

Until recently, founders of a social enterprise would have initially been drawn to the nonprofit form. But now they increasingly choose the social

---

holder wealth maximization? . . . hell no.”). See generally Judd F. Sneirson, *Green is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987 (2009).

12. See M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571, 572 (2009); see also Mark A. Underberg, *Benefit Corporations vs. “Regular” Corporations: A Harmful Dichotomy*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 13, 2012, 8:31 AM), <http://blogs.law.harvard.edu/corpgov/2012/05/13/benefit-corporations-vs-regular-corporations-a-harmful-dichotomy/> (discussing directors’ ability to consider interests of other constituencies).

13. See Robert J. Bies, *Reducing Criminal Wrongdoing within Business Organizations: The Practical and Political Skills of Integrity*, 51 AM. CRIM. L. REV. 225, 226–27 (2014).

14. See Julie Battilana et al., *In Search of the Hybrid Ideal*, STAN. SOC. INNOVATION REV. 51, 55 (2012); Hans Rawhouser et al., *The Diffusion of New Legal Forms for Social Hybrids* (Mar. 20, 2014) (working paper) (on file with author); Charlotte Seager, *Generation Y: Why Young Job Seekers Want More Than Money*, GUARDIAN (Feb. 19, 2014, 1:59 PM), <http://www.theguardian.com/social-enterprise-network/2014/feb/19/generation-y-millennials-job-seekers-money-financial-security-fulfilment>.

15. Wendy Stubbs, *Investigation of Emerging Sustainable Business Models* (July 11, 2014) (unpublished manuscript) (on file with author).

enterprise model in order to reduce dependency on donations and bolster their sustainability by tapping the same capital markets that launch traditional for-profit firms.<sup>16</sup> The lingering difference between a social enterprise and a traditional corporation is that the former's goal of providing returns to shareholders comes second to an overriding goal of social performance.<sup>17</sup> In fact, one of the biggest challenges for a social enterprise is avoiding so-called mission drift, where the pursuit of profit starts to overshadow the pursuit of public benefit.<sup>18</sup>

Sanergy is a good example of a firm matching the archetypal description of a social enterprise. Recognizing that over half the Kenyan population lacks access to adequate sanitation, Sanergy attempts to mitigate that problem by building and franchising low-cost, pay-per-use sanitation systems called Fresh Life Toilets.<sup>19</sup> Sanergy's toilets are a welcome sight in Nairobi's slums, where previously the only affordable options were pit latrines that had an unfortunate habit of flooding.<sup>20</sup> While this might be reason enough for enthusiasm about Sanergy, the company does even more. Its toilets feature a proprietary system that makes it easy to collect

---

16. See Battilana et al., *supra* note 14, at 52–53. Though nonprofits can and often do earn income from their activities—think of an art museum's ticket prices and gift shop—they do not feature traditional equity shareholders and are restricted in how they can use the revenue they generate. For example, nonprofits cannot distribute earnings to directors, managers, trustees, or members without risking their tax-exempt status. This constraint on distributions, arguably the defining feature of the nonprofit, helps to lock assets into the organization's social objective, but it cabins the ability to attract capital. Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALA. L. REV. (forthcoming 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2389024](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2389024).

17. There is a potential source of confusion between social enterprises and firms that claim to follow particular social or religious beliefs. For example, Hobby Lobby has been a mainstay in the news following the Supreme Court's recent decision in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. (2014) (No. 13-354, 2013 Term) (holding that the U.S. Department of Health and Human Services may not require closely held corporations to provide certain health insurance coverage for methods of contraception that violate the sincerely held religious beliefs of their owners). Hobby Lobby is a closely held corporation whose owners are Evangelical Christians. They state an intention to run their business “in a manner consistent with Biblical principles.” *Id.* slip op. at 14. This commitment informs their attitudes toward specific social issues: Hobby Lobby stores close for business on Sundays, they refuse to engage in profitable transactions that promote alcohol, they donate corporate funds to Christian charities, and they object to certain forms of contraception. *Id.* These activities reflect a desire to impact society in ways that are consistent with their religious beliefs, but they do not transform their business into a social enterprise. Hobby Lobby's social emphasis remains incidental to its primary revenue-generating activity of selling retail craft supplies. Stated another way, Hobby Lobby “does not exist first and foremost to solve a social problem,” which is the defining characteristic of a social enterprise as the term is used in this Article. Keren G. Raz, *Toward an Improved Legal Form for Social Enterprise*, 36 N.Y.U. REV. L. & SOC. CHANGE 283, 289–90 (2012).

18. Battilana et al., *supra* note 14, at 53.

19. *Sanergy: Creating a Sustainable Sanitation Cycle in Kenya*, ACUMEN, <http://acumen.org/investment/sanergy/> (last visited Dec. 26, 2014).

20. See Kalan, *supra* note 2.

waste and convert it to electricity and fertilizer.<sup>21</sup> These are two scarce commodities in the region that the company's franchisees can sell on the open market. This helps African farmers and makes energy more affordable, all while easing Kenya's sanitation crisis.

Other social enterprises focus less on products that solve social problems and more on how they can generate public good through their everyday operations. Hot Bread Kitchen and Greyston Bakery are both bakeries that sell a wide selection of high-quality breads, but, uniquely, they also adhere to strict workforce development programs. Each company staffs its operations with hard-to-employ individuals, such as low-income immigrants, and actively teaches them skills that they can apply when looking for jobs across the wider foodservices industry.<sup>22</sup> In this way, the companies combine two previously separate models: a charitable model akin to a classic nonprofit that guides their hiring and training practices, and a profit-making model that tracks the traditional corporation and drives fiscal health.<sup>23</sup> Greyston Bakery's slogan says it all: "We don't hire people to bake brownies. We bake brownies to hire people."<sup>24</sup>

No matter what social enterprises do, though, their legal form does not define them. A social enterprise may organize as a corporation, a partnership, a cooperative, or an LLC. It might also choose one of several new statutory forms that facilitate the social enterprise movement. Options in the latter category include the benefit corporation, the L3C, and the flexible-purpose corporation.<sup>25</sup> Perhaps most notably, the progress being made in this sector blurs the lines between for-profit and non-profit companies.<sup>26</sup> On one hand, social enterprises advance the philanthropic pursuits of non-profits through the equity and revenue-sharing strategies of for-profits. On the other, they attempt to go farther than traditional socially responsible for-profit corporations by uniting social and economic goals within a single, mutually reinforcing strategy.<sup>27</sup> Social enterprises thus carve out a distinct place in the market—a "fourth sector" of the economy.<sup>28</sup> They also raise a variety of novel theoretical and practical

---

21. *Id.*

22. See Plerhoples, *supra* note 3, at 227 (describing the business model of the social enterprise Greyston Bakery); HOT BREAD KITCHEN, <http://hotbreadkitchen.org> (last visited Oct. 20, 2014).

23. Battilana et al., *supra* note 14, at 51.

24. GREYSTON BAKERY, <http://greyston.com> (last visited Aug. 7, 2014).

25. See McDonnell, *supra* note 5, at 4.

26. See Rawhouser et al., *supra* note 14, at 5 (describing spread and common features of social enterprise legislation).

27. Battilana et al., *supra* note 14, at 52.

28. See Andrew J. Hoffman et al., *Hybrid Organizations as Agents of Positive Social Change: Bridging the For-Profit and Non-Profit Divide* 15 (Mich. Ross Sch. of Bus. Working Paper No. 1149, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=16750](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=16750) 69; Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 338–41 (2009).



issues.<sup>29</sup> The focus here is on one issue that has yet to garner much attention: legal compliance.

## II. TRADITIONAL UNDERSTANDINGS OF CORPORATE COMPLIANCE

All firms entertain the risk of wrongdoing. Corporate history is replete with cases where bad actors did bad things, as well as plenty of examples where well-meaning people behaved illegally or unethically for potential personal gain. The ongoing search for ways to allay opportunism and other agency costs is arguably the cornerstone of corporate law.<sup>30</sup> This is a big reason why casebooks in business associations devote so much attention to fiduciary duties and shareholder derivative suits. It also explains the strong corporate enforcement presence at the U.S. Department of Justice (DOJ) and Securities and Exchange Commission (SEC). Companies will, through their agents, always misbehave. Other people and methods exist to try to stop them.

“Compliance” is the general term used to describe the rules, policies, and systems that firms use to detect and deter agent misconduct within their ranks.<sup>31</sup> Much of the focus is on preventing legal and accounting violations. But, compliance programs must also address unethical, albeit not criminal, actions and encourage adherence to organizational objectives in general. The dominant approach to promoting compliance stems from rational choice theory.<sup>32</sup> This theory presumes that individuals make decisions about whether to comply with rules in light of their rational self-interest.<sup>33</sup> Fear of punishment is thought to be the principal motivator of behavior, with individuals deciding whether to act only after weighing the potential gain from wrongdoing against the possibilities of detection and sanction.<sup>34</sup> If detection risks are low and personal gain from malfeasance is high, we should expect rational actors to commit a wrong. By contrast,

---

29. See Robert Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59 (2010); J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1 (2012); Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?* 46 WAKE FOREST L. REV. 591 (2011); Yockey, *supra* note 16.

30. See Larry E. Ribstein, *Agents Prosecuting Agents* 5 (Ill. Program in Law, Behavior and Soc. Sci., Research Paper No. LBSS11-01, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1737915](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737915) (citing Adam Smith and his *Wealth of Nations*: “Being the managers of other people’s money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance with which partners in a private copartnership frequently watch over their own.”).

31. See Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 72 (2002).

32. JONATHON JACKSON ET AL., *Compliance and Legal Authority*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES (2d ed., forthcoming 2015); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 190–93 (1968).

33. JACKSON ET AL., *supra* note 32.

34. *Id.*

if the likelihood of detection is high or the severity of possible sanctions is great, compliance ought to be more likely. Strategies for compliance under this view thus focus on finding the right balance between monitoring and penalties to promote ethical behavior.

The influence of rational choice theory colors many of the compliance tools found in corporations today. Whether talking about boards of directors, reporting lines, codes of conduct, periodic inspections, whistleblower programs, independent directors, or any number of formal governance and monitoring structures, the goal is usually the same: to present agents with a credible risk of detection and punishment. If employees are caught failing to obey a firm's code of conduct, for example, their failure is typically tied to a range of disciplinary measures up to and including termination.<sup>35</sup> When this possibility is high enough, the expectation is that it will keep managers, employees, and agents on the straight and narrow.

The same emphasis permeates public enforcement policy. Congress has long called for punitive sanctions for most corporate crimes and regulatory offenses, and recent legislative efforts to crack down on corporate crime continue to reflect a command-and-control mindset.<sup>36</sup> The Federal Sentencing Guidelines and the DOJ's internal charging policies further encourage firms to monitor and detect wrongdoing by factoring these activities into enforcement and sanctioning decisions.<sup>37</sup> Given the prospect of respondeat superior liability, the hope is that the chance for leniency in exchange for implementing corporate compliance programs will prompt firms to closely supervise their employees.<sup>38</sup> This approach is also meant to take some of the surveillance pressure off of external enforcers as firms receive incentives to police their own workforce—of which they presumably have more intimate knowledge—and cooperate with prosecutors to identify individual violators. Where internal compliance programs fail, either because firms lack the power or market incentives to completely control their agents' behavior, external enforcers pick up the slack through strategies that rely less on cooperation and more on traditional means of investigation.<sup>39</sup> Tactics include subpoenas, wiretaps, industry-wide surveil-

---

35. See Gary R. Weaver, *Encouraging Ethics in Organizations: A Review of Some Key Research Findings*, 51 AM. CRIM. L. REV. 293, 304–07 (2014).

36. *Id.* at 293 (citing as example the Sarbanes-Oxley corporate reform statute); Tom Tyler et al., *The Ethical Commitment to Compliance: Building Value-Based Cultures*, 50 CAL. MGMT. REV. 31, 31 (2008) (describing command-and-control compliance strategies as emphasizing detection of wrongdoing through monitoring and reporting systems, as well as encouraging proper behavior through discipline and incentive structures).

37. David Hess et al., *The 2004 Amendments to the Federal Sentencing Guidelines and Their Implicit Call for a Symbiotic Integration of Business Ethics*, 11 FORDHAM J. CORP. & FIN. L. 725, 725–26 (2006).

38. See RESTATEMENT (SECOND) OF TORTS § 317 (1965) (the legal principle of respondeat superior mandates that a corporation is vicariously liable for an employee's wrongdoing, even where the employee violates express instructions or existing compliance requirements); Hess et al., *supra* note 37.

39. See Ribstein, *supra* note 30, at 6–7.

lance, use of confidential informants, and whistleblower reward programs.<sup>40</sup>

Compliance remains a highly nuanced and evolving field. In addition to the classic detect-and-punish model, much of the recent focus in compliance theory is on developing methods to instill strong ethical values and cultures within firms. The move toward a values-based approach to compliance is critical to compliance in social enterprises, but it is important to keep in mind that rational choice theory is still very much at the fore of the conversation. For instance, while the Federal Sentencing Guidelines urge firms to promote “an organizational culture that encourages ethical conduct and a commitment to compliance with the law,” the specific practices they recommend rely mainly on traditional ideas for detection, monitoring, and reporting.<sup>41</sup> The DOJ and SEC maintain a similar stance. They routinely stress the importance of ethical corporate cultures in the workplace, but most of the compliance features they endorse track a “don’t get caught” mentality.<sup>42</sup>

### III. LIMITS OF TRADITIONAL COMPLIANCE STRATEGIES

#### A. *General Limitations*

The main attraction of compliance programs that are built around rational actor theory is that they support objective methods and metrics. Firms and regulators can use fines, settlements, investigations, arrest rates, indictments, and codes of conduct to provide clear evidence that they are ferreting out wrongdoing and applying appropriate sanctions. These measures also facilitate quick responses to new problems and provide psychological comfort to people hoping to do something in the face of illegal behavior.<sup>43</sup> For example, command-and-control tactics like police sweeps and raids make it easier for enforcement authorities to show an anxious public that they are taking steps to manage crises.<sup>44</sup> The same is true when companies announce new or revised compliance programs in the wake of scandal: firms get something tangible that they can cite when trying to restore market confidence in their ability to prevent future problems. Even more directly, penalties and formal compliance structures provide agents with a reference point for ordering their conduct. Agents know that if they commit X violation then they risk Y consequences. This puts a price tag on wrongdoing.

---

40. See Joseph W. Yockey, *FCPA Settlement, Internal Strife, and the “Culture of Compliance”*, 2012 WIS. L. REV. 689, 692–96 (2012).

41. See Weaver, *supra* note 35, at 293 (quoting U.S. Sentencing Guidelines Manual § 8B2.1(a) (2012)).

42. See *id.* at 294–95.

43. See Tom R. Tyler, *Reducing Corporate Criminality: the Role of Values*, 51 AM. CRIM. L. REV. 267, 280–85 (2014).

44. *Id.* To illustrate this point, fans of the HBO series *The Wire* might recall the city-wide raids and “dope on the table” strategy demanded by the Baltimore Police Commissioner near the end of Season 1.

Unfortunately, many of the traditional methods of compliance that emanate from rational choice theory suffer from significant shortcomings. The first concern is that questions of lawful behavior are often less clear-cut than these methods suggest they should be. Compliance with authority is a complex phenomenon. It requires actors to make highly subjective, context-specific decisions that depend on more than law and economic theory. Misbehavior can stem from peer pressure, individual bias, environmental factors, and other transient influences that firms and regulators cannot fully anticipate in the face of ever-present information asymmetries. This is one reason why tools such as codes of conduct and employee handbooks rarely bolster compliance unless organizations already employ workers who are predisposed to taking them seriously.<sup>45</sup> Recent research further finds that individuals do not always engage in the type of deliberative processes that rational choice theorists predict. Many people react to situations and make moral judgments reflexively without pausing to weigh the costs and benefits of their actions or the risks of detection.<sup>46</sup> Formal and static tools meant to deter wrongdoing *ex ante*—including codes of conduct and statutory sanctions—lose much of their efficacy in this dynamic.

A second challenge is the likelihood of over- or under-deterrence. Penalties in a rational choice framework must be set at a level that will be high enough to discourage people from committing a wrong but not so severe that they will cause firms to go out of business (in which case innocent employees, creditors, and shareholders could be unduly punished for the violations of others).<sup>47</sup> This is an extremely difficult task for policymakers working with incomplete information or personal motives that conflict with the public's best interests.<sup>48</sup> Even assuming *arguendo* that the economic benefits of wrongdoing can be calculated with some degree of precision (e.g., the amount of ill-gotten financial gains), the costs of non-economic sanctions are far trickier to judge. Companies vary with respect to the reputational harm they will suffer following a corporate indictment or investigation, and this is not something that regulators and judges always grasp or price accurately.<sup>49</sup>

If the potential combination of legal and non-legal sanctions becomes too high, there is a danger that the total cost of enforcement—including

---

45. See Weaver, *supra* note 35, at 300–02.

46. See *id.*; see also Scott J. Reynolds, *The Non-Conscious Aspects of Ethical Behavior: Not Everything in the “Good” Organization is Deliberate and Intentional*, 51 AM. CRIM. L. REV. 245, 257–59 (2014).

47. See Christine Parker, *The “Compliance” Trap: The Moral Message in Responsive Regulatory Enforcement*, 40 LAW & SOC'Y REV. 591, 591–92 (2006).

48. See Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 903–05 (2014).

49. See Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1783–84 (2011).

compliance costs—will become socially inefficient.<sup>50</sup> Firms may monitor agents too closely, thereby reducing the benefits of delegating power, or their emphasis on compliance could lead agents to become overly risk averse.<sup>51</sup> The resulting costs will then get passed on to consumers in the form of higher prices, or to employees in the form of lower wages.<sup>52</sup> A separate difficulty arises because corporate sanctions may be insufficient to induce managers to take compliance seriously. Managers might turn a blind eye to crime if it improves profits, confident in the fact that they will not bear the full costs of any fines levied against their employer (a non-human legal entity).<sup>53</sup>

Finally, many business offenses, including bribery and embezzlement, take place in secret, with offenders going to great pains to cover their tracks. These circumstances already present a low probability of detection, but the growing size and complexity of modern corporate offices and transactions makes matters worse.<sup>54</sup> A parallel danger is that regulators' willingness to credit strong internal compliance programs may lead firms to focus on structures that simply check the minimum number of boxes that government agencies demand—regardless of whether they have the means or expertise to implement them effectively.<sup>55</sup> Showing leniency to firms that hand over individual wrongdoers can also backfire. Even if an employee is correctly held responsible, other agents could see external cooperation as an attempt to save higher-ranked officers from taking the blame. This threatens to create an almost adversarial relationship between employees and management, potentially contributing to internal strife and breakdowns in communication as people within the firm wonder whose side their superiors are on.<sup>56</sup>

## B. *Specific Issues for Social Enterprises*

### 1. Normative Considerations

Social enterprises are not immune from the foregoing issues and raise several more of their own. The most immediate concern stems from the

---

50. See Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 COMPETITION POL'Y INT'L 3, 5 (2010).

51. See Ribstein, *supra* note 30, at 5.

52. See *id.*

53. See Ginsburg & Wright, *supra* note 50, at 17.

54. See Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1625 (2007) (discussing how private organizations are relatively opaque and larger firms with hierarchical layers present even greater challenges).

55. See Joseph W. Yockey, *Choosing Governance in the FCPA Reform Debate*, 38 J. CORP. L. 325, 328 (2013); Hess et al., *supra* note 37, at 731–32 (arguing that corporations are not being encouraged to develop new solutions to existing (or potential) problems, but only to meet a certain minimum level of behavior).

56. See John Hasnas, *A Context for Evaluating Department of Justice Policy on the Prosecution of Business Organizations: Is the Department of Justice Playing in the Right Ballpark?*, 51 AM. CRIM. L. REV. 7, 26 (2014); see also Yockey, *supra* note 40, at 715.

realization that traditional compliance theory reflects a conception of the firm rooted in shareholder primacy theory. Starting with Berle and Means in 1932, the normative underpinnings of the shareholder primacy theory stretch back to the basics in corporate literature by focusing on the potential divergence of interests between managers and shareholders.<sup>57</sup> The risk of this divergence in manager-shareholder relations is the classic principal-agent problem. Because corporate managers control money that is not their own, they can act opportunistically to maximize their own self-interests (e.g., income, status, pleasure, a comfortable office) in ways that do not match the interests of shareholders (presumed under this view to be profits).<sup>58</sup>

The consequence of this understanding of the firm is that systems must be created so shareholders can monitor management to ensure that their interests are properly aligned.<sup>59</sup> The classic compliance strategies mentioned above reflect this position. These strategies essentially seek to answer the question of “how investors get the managers to give them back their money.”<sup>60</sup> As a result, the board of directors is traditionally understood as a monitoring body elected by shareholders to prevent actions that hinder shareholder wealth maximization.<sup>61</sup> Audited balance sheets and the mandatory disclosure regime of the federal securities laws are meant to provide investors with sufficient information to protect their financial interests. Investor protection is also the mandate of the SEC’s Division of Enforcement, and the DOJ’s corporate charging guidelines begin by stating that prosecutors and corporate directors share the same goal of protecting the firm’s owners, shareholders, from the effects of criminal misconduct.<sup>62</sup> Both agencies pursue penalties to deter agents from taking illegal actions that, for example, increase short-term profits for shareholders to trigger parallel increases in performance-based compensation.

Social enterprises, too, must be cognizant of monitoring and the need to mitigate agency costs. The people who work for them are not transcendently good; they may be admirably drawn to the firm to solve a social ill, but we cannot infer that their “goodness” extends to every aspect of their lives. No, the problem with applying traditional compliance theory is not that social enterprises present zero risk of misbehavior. Rather, the prob-

---

57. See generally ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

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

59. *Id.*

60. Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737, 738 (1997).

61. See Sanjai Bhagat & Roberta Romano, *Empirical Studies of Corporate Law*, in *HANDBOOK OF LAW AND ECONOMICS* 945, 992–93 (A. Mitchell Polinsky & Steven Shavell eds., 2d Vol. 2007).

62. See Memorandum from Mark Filip, Deputy Att’y Gen., to Heads of Dep’t Components & U.S. Att’y’s, *Principles of Federal Prosecution of Business Organizations* (Aug. 28, 2008), available at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>.

lem with traditional compliance theory is its presupposition that shareholder wealth is the most important interest in every firm, where using other people's money to promote social good is often seen as another agency problem that takes cash from shareholders.<sup>63</sup> The social enterprise is a unique breed of company. It relies on shareholders for capital and seeks profits to fund operations, but both strategies are the means to an end of human flourishing. Most companies that start out with a social problem in mind do not first consider the nonprofit form.<sup>64</sup> They want to make money for investors; that is their principal objective. If they generate excess cash, then maybe managers can use corporate resources to protect the environment or donate to charity (although even that freedom is disputed by strict adherents to shareholder primacy).<sup>65</sup> Social enterprises reverse this equation. They make money to do good. In prior generations they would have been nonprofits, but they have chosen a new for-profit model to take advantage of market tactics to escalate their impact.

Managers in a social enterprise must consequently balance the mission and profit goals of a wide range of constituents, including employees, customer-beneficiaries, and investors.<sup>66</sup> This understanding has obvious implications for capital formation and accountability,<sup>67</sup> but it also indicates a clear focal point for the development of compliance theory. Compliance strategies that emphasize the protection of shareholder wealth above all else are simply inapposite to the social enterprise's DNA. Put another way, prioritizing mission over shareholder wealth does not necessarily reduce to a form of agency costs. It is what social enterprises are designed to do and, ideally, is what will allow them to maximize firm value in the long run.<sup>68</sup>

---

63. See Philipp Krueger, *Corporate Goodness and Shareholder Wealth*, J. FIN. ECON. (forthcoming 2014); Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 22 J. APPLIED CORP. FIN. 32, 32–33 (2010) (arguing that CSR activities divert time away from core managerial obligations).

64. Bright B. Simons, *What Makes Social Entrepreneurs Different*, HARV. BUS. REV. BLOG (Jan. 11, 2013, 8:00 AM), <http://blogs.hbr.org/2013/01/what-makes-social-entrepreneur/> (“Commercial entrepreneurs are different. They're out to standardize a business model. That model might solve a social problem — but if it's profitable and doesn't fix the problem, that's okay, too.”).

65. See Friedman, *supra* note 7, at 122–24; see also David P. Baron, *Corporate Social Responsibility and Social Entrepreneurship*, 16 J. ECON. & MGMT. STRATEGY 683, 683–87 (2007) (describing the debate about whether shareholder primacy norms and theories create room for corporate philanthropy).

66. Of course, in closely held firms, where managers and shareholders are often the same people, the agency cost and compliance analysis takes on a different dimension. Remaining closely held allows founders to preserve control while minimizing the risk of activism from other shareholders. Monitoring and information costs are lowest when owners are few in number, share the same goals, and transact with each other on a regular basis. Consensus building also becomes easier under these conditions.

67. See Yockey, *supra* note 16.

68. See Simons, *supra* note 64; see also Battilana, *supra* note 14, at 55.

The implications of this dynamic give credence to Dobell's observation that "[p]eople interact differently in different institutional settings, with their different reward systems or incentive structures."<sup>69</sup> Compliance, like much of corporate governance, is contextual. It will vary by type of business, type of capital structure, and type of workforce. If shareholder wealth maximization is seen as preeminent, then a manager's take on compliance will focus on serving that objective. A social enterprise, with its hybrid purpose of mission and profit, requires a compliance approach that fits its distinct normative premise. Any compliance strategy that managers put into place must deter individual wrongdoing while simultaneously reinforcing the firm's two bottom lines. Compliance becomes about balancing mission and profits, even if that means taking steps to elevate third party effects ahead of shareholder interests.

To illustrate the potential challenge that this orientation presents, consider a hypothetical involving foreign bribery. The developing world is often where social enterprises can do the most good, but, sadly, the developing world is also where corruption tends to be the most prevalent.<sup>70</sup> Can a social enterprise do business in a country where nearly every public official requests bribes? The U.S. Foreign Corrupt Practices Act (FCPA) prohibits firms from paying bribes to foreign officials for the purpose of getting business.<sup>71</sup> Firms that violate the statute face stiff monetary sanctions.<sup>72</sup> However, in the rational actor/shareholder primacy tradition of compliance, if the risk of detection is low and the potential gains from a corrupt transaction are high, managers might be tempted to go ahead and make a payoff to increase shareholder profits. One might also assume that investors might evaluate issues like corruption based on how likely they are to increase the value of their shares.<sup>73</sup> If bribery is profitable to the company, who are they to stop it?

For social enterprises, though, since shareholder wealth is not their exclusive aim, the question of whether to bribe is not just a matter of weighing detection probabilities and potential profits. Managers must also anticipate, assess, and work through how the ancillary effects of corrup-

---

69. Rachel Culley & Jill R. Horwitz, *Profits v. Purpose: Hybrid Companies and the Charitable Dollar*, 2 (Univ. of Mich. Law Sch. Pub. Law & Legal Theory Working Paper No. 272, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2055368](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2055368) (quoting Professor Rob Dobell).

70. See *Corruption Perceptions Index 2013*, TRANSPARENCY INTERNATIONAL, <http://www.transparency.org/cpi2013/results> (last visited Oct. 22, 2014) (indicating that developing countries such as Somalia, North Korea, and Afghanistan are perceived as being among the most corrupt countries in the world).

71. See Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(a)(1-3) (2012).

72. See Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 907 (2010); Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 498 (2011); Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 782-83 (2011).

73. See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1228-29 (1985).



tion—including market distortion, erosion of the rule of law, and negative effects on morale—will influence their pursuit of mission and their intended beneficiaries.<sup>74</sup> For instance, because shareholders in a social enterprise seek both financial and social returns, they often view themselves as quasi-donors.<sup>75</sup> To them, learning that the firm paid a bribe could be more off-putting than the failure to hit earnings estimates. The same is true for a social enterprise's employees and customers, both of whom are often drawn to the social enterprise model principally because of its promise of shared value. It follows that social enterprises need a compliance theory that comprehends the broader interests and perspectives that accompany their hybrid identity.

## 2. Additional Practical and Political Considerations

Two final points also deserve mention. The first is that many founders of social enterprises come from backgrounds other than business and have no experience running one.<sup>76</sup> They are often highly idealistic but lack the knowledge and skills necessary to anticipate or respond to new compliance challenges.<sup>77</sup> Even wholly scrupulous and well-meaning people can get themselves into trouble if they do not understand the importance of establishing and adhering to basic internal controls.<sup>78</sup> A particular worry is that socially oriented employees will be more susceptible to fraud. Social enterprises must guard against the risk that agents will see everything

---

74. Bright Simons describes this observation nicely:

[S]ocial entrepreneurs are more interested in understanding the social, economic, political, and cultural context of the problems they are trying to solve than traditional entrepreneurs are. They can be more analytical. It is unthinkable, for instance, to imagine a social entrepreneur treating research on the health effects of tobacco use the way the tobacco industry, market analysts, and investors did in the 1960s and '70s. It is the business of a social entrepreneur to stay ahead of the curve when it comes to the social impact of various phenomena, and to be academically honest about what they learn.

Simons, *supra* note 64.

75. See, e.g., Steven Russolillo, *Man Who Bet It All on Tesla Answers Critics*, WALL ST. J. (May 20, 2013, 11:55 AM), <http://blogs.wsj.com/moneybeat/2013/05/20/the-man-who-bet-it-all-on-tesla-answers-his-critics/>; John Tozzi, *More 'Patient Capital' for Social Ventures*, BLOOMBERG BUSINESSWEEK (Apr. 3, 2009), <http://www.businessweek.com/stories/2009-04-03/more-patient-capital-for-social-venturesbusinessweek-business-news-stock-market-and-financial-advice>.

76. See Andreas Heinecke et al., *Leadership in Social Enterprise: How to Manage Yourself and the Team*, SCHWAB FOUND. FOR SOC. ENTREPRENEURSHIP, 7–8 (2014), available at [http://www.schwabfound.org/sites/default/files/file\\_uploads/leadership\\_in\\_social\\_enterprise\\_2014.pdf](http://www.schwabfound.org/sites/default/files/file_uploads/leadership_in_social_enterprise_2014.pdf).

77. See generally James Austin et al., *Social and Commercial Entrepreneurship: Same, Different, or Both?*, 30 ENTREPRENEURSHIP THEORY & PRAC. 1, 11 (2006); Alan Hirzel, *To Grow, Social Enterprises Must Play by Business Rules*, HARV. BUS. REV. BLOG (Jan. 9, 2013, 2:07 PM), <http://blogs.hbr.org/2013/01/to-grow-social-enterprises-must/>.

78. See Ben DiPietro, *Nonprofits Face Up to More Compliance*, WALL ST. J. BLOG (May 17, 2013, 6:30 AM), <http://blogs.wsj.com/riskandcompliance/2013/05/17/nonprofits-face-up-to-tighter-compliance/>.

through rose-tinted glasses, or that they will falsely assume everyone with whom they interact shares their concern for the firm's mission.<sup>79</sup>

A second issue is that many social enterprises are small startups, and smaller and medium-sized firms often have fewer capital resources to spend on professional advisors and fewer employees to implement the recommendations they make.<sup>80</sup> They are frequently self-funded, relying on a mixture of personal cash, credit cards, bank loans, and small investments from friends and family.<sup>81</sup> These financing options may be enough to get a business off the ground, but they are often inadequate to cover compliance and professional costs down the road as operations expand.<sup>82</sup>

This latter point goes to a larger political issue. There is nearly universal agreement on the value of fostering the social enterprise sector. On the right, many find supporting social enterprises more attractive than additional public involvement with social causes.<sup>83</sup> Observers on the left argue that the government is failing to adequately address various social problems, and they view social enterprises as helpful gap-fillers.<sup>84</sup> The strong, unified push to encourage social enterprise makes it important to develop a compliance theory that positively affects the movement's growth and impact. In addition to the good that social enterprises perform through their products and services, some argue that social enterprises offer significant potential for inspiring new job creation in developing countries.<sup>85</sup> Others believe that social enterprises can restore faith in political and economic systems currently under siege.<sup>86</sup> If these estimations are even slightly on target, then that is enough to make social enterprises worthy of attention. Governments and charities cannot solve every public welfare problem. The private sector also has an essential role to play.

---

79. *Id.*

80. See Jakob Svensson, *Who Must Pay Bribes and How Much? Evidence from a Cross Section of Firms*, 118 Q. J. ECON. 207, 207 (2003). Companies and individuals with less "refusal power" also tend to face a higher frequency of bribe demands as corrupt public officials come to recognize that they have fewer alternative options available. *Id.* at 218.

81. See Darian M. Ibrahim, *The (Not So) Puzzling Behavior of Angel Investors*, 61 VAND. L. REV. 1405, 1406, 1417 (2008).

82. Even if some market risks might be fairly easy to calculate (e.g., fluctuations in supply costs), risks like bribery demands or potential legal actions are considerably less quantifiable.

83. See Yockey, *supra* note 16, at 14.

84. *Id.*

85. See Richard McEachran, *The Difficulty of Starting Up a Social Enterprise in a Warzone*, GUARDIAN (Aug. 16, 2013, 2:59 AM), <http://www.theguardian.com/social-enterprise-network/2013/aug/16/social-enterprises-in-warzone>.

86. *See id.*

#### IV. SOCIAL ENTERPRISE AND THE SHIFT TO VALUES-BASED COMPLIANCE

Concerns about classic compliance theory, both generally and in the specific context of social enterprises, compel a search for new ideas. The alternative with the most traction is frequently described as values-based compliance. Under this approach, rather than emphasizing risks of detection and sanction, the focus is on developing an internal culture that encourages agents to identify and internalize a desired set of values, ideals, and practices.<sup>87</sup> The expectation is that strategies grounded in sociology and psychology will lead agents to see compliance as congruent with their own beliefs.<sup>88</sup> Compliance then becomes more reflexive as agents come to see it as an organic extension of their own identity and the organization's purpose, rather than something forced upon them by an isolated and disconnected (and perhaps misinformed) external authority.<sup>89</sup>

This approach parallels the trend in sports medicine of training movement, not muscles.<sup>90</sup> The idea is simple. Conventional thinking in athletic training previously emphasized the exercise of muscles in isolation.<sup>91</sup> During the offseason, a professional football player might devote considerable time to working his biceps on an arm curl machine before moving to another part of the gym to strengthen his quadriceps on a leg extension machine. The benefit of this model is that the athlete's biceps and quadriceps gain strength and bulk; he can then lift more weight and push off the ground more powerfully. But the problem with this approach, and the reason it is now passé, is that an athlete's muscles never work in isolation on the playing field.<sup>92</sup> A quarterback who drops back for a pass exerts force on multiple parts of his body at once. On just his knee, there will be a combination of lateral, circular, and vertical forces—with each force accelerating or decreasing to varying degrees on each play. The philosophy of training movement rather than muscles takes this observation as the basis for educating the body to move most efficiently and effectively in accord with how it moves in a specific discipline. Thus, training programs occur in a movement-based context and correspond to the motions that arise during sport. For the quarterback, that means training his body in ways that will lead him to unconsciously endure and react to the forces converging on his knee as he twists and turns to avoid tacklers.

---

87. Weaver, *supra* note 35, at 295–96; *see also* Tyler, *supra* note 43, at 283–85.

88. Weaver, *supra* note 35, at 295–96; *see also* Tyler, *supra* note 43, at 268–77.

89. *See* Hess et al., *supra* note 37, at 763–64.

90. *See* Gretchen Reynolds, *Train Like a German Soccer Star*, N.Y. TIMES (July 16, 2014, 12:01 AM), [http://well.blogs.nytimes.com/2014/07/16/train-like-a-german-soccer-star/?\\_php=true&\\_type=blogs&\\_r=0](http://well.blogs.nytimes.com/2014/07/16/train-like-a-german-soccer-star/?_php=true&_type=blogs&_r=0).

91. *See* DUNCAN MACDOUGALL & DIGBY SALE, *THE PHYSIOLOGY OF TRAINING FOR HIGH PERFORMANCE* 281–82 (2014); *see also* Exos, *Train Movement, Not Muscles* (Dec. 20, 2008), <http://www.coreperformance.com/daily/movement/train-movements-not-muscles.html>.

92. *See* Reynolds, *supra* note 90.

Values-based compliance attempts to do something similar in corporate governance. It encourages a multi-dimensional approach to addressing ethical issues as they arise. It seeks to minimize the chance that agents will zero in on just one goal (i.e., profits), educating them instead to intuitively consider every organizational priority when approaching any situation. The ultimate goal is that agents come to behave responsibly and in the ways the organization prefers because they believe it is natural and legitimate to do so—not because they are afraid of being caught.<sup>93</sup>

Reaching the stage where agents internalize values in this way is not always easy. It may require changes in management, training, messaging, hiring, corporate governance, and, in some cases, even interior design.<sup>94</sup> But there are many potential upsides. Traditional command-and-control strategies are static, require considerable investment in surveillance, and typically come only in reaction to an ever-changing set of new or short-term problems. They depend on the nearly impossible task of accurately pricing misconduct *ex ante*, and they falsely assume that agents act only after taking time to reflect. In contrast, compliance driven by values is cheaper, teaches agents to adapt instinctively and proactively to changing or ambiguous conditions, and does not rely solely on problematic cost-benefit analyses. It is also more sustainable over the long-term given its emphasis on systemic change rather than reactive, one-off fixes to isolated problems. These characteristics are attractive to every firm, but there is arguably no greater vehicle for testing their promise than the social enterprise.

### A. *Integration of Purpose*

#### 1. The Challenge

The first stage in cultivating values-based compliance is to conceptualize the goals and ideals that a firm wishes to champion. Doing so provides a framework for assessing whether a firm's values align with those of its agents, and vice versa. Contrary to popular belief, the controllers of traditional firms do not always emphasize maximizing shareholder profits at all costs. From a purely practical perspective, most managers understand that corporate performance depends on balancing the interests of a wide range

---

93. See Tyler, *supra* note 43, at 268–77. This argument should not be taken to mean that deterrence and sanctions are irrelevant. As Tyler notes, “[w]e do not know how much illegal behavior would occur if companies believed that they could commit fraud or engage in other forms of illegal behavior with no risk of being caught and punished.” *Id.* at 270. The point is simply that culture is a very important piece—if not the most important—of the overall compliance puzzle.

94. See Weaver, *supra* note 35, at 296 (describing one company that eliminated separate executive dining facilities to support a culture of mutual respect and responsibility) (citing LINDA KLEBE TREVINO & GARY R. WEAVER, *MANAGING ETHICS IN BUSINESS ORGANIZATIONS: SOCIAL SCIENTIFIC PERSPECTIVES* 193 (Stanford Business Books, 1st ed. 2003)).

of stakeholders.<sup>95</sup> Illegality or the poor treatment of employees, creditors, suppliers, and local communities can lead to adverse public relations, labor unrest, declining sales, greater regulatory scrutiny, and, ultimately, loss of share value.<sup>96</sup> There is also increasing market demand for products and investment opportunities that promote social responsibility,<sup>97</sup> and many firms now find that sustainability initiatives lower energy and utility costs.<sup>98</sup> These developments, coupled with the broad decision-making protection of the business judgment rule, encourage managers to sponsor virtually any socially- or stakeholder-oriented objective that they deem necessary to serve the firm's best interests.

The situation gets more complex when we shift to how values are spread and understood within the firm. As a threshold matter, corporate purpose dictates the development of structures and processes meant to advance it.<sup>99</sup> The simpler and more direct the corporate purpose, the easier it becomes to integrate it into corporate governance activities.<sup>100</sup> Thus, if shareholder wealth maximization is a firm's singular purpose, the aim of corporate governance will be to achieve that end at the exclusion of other values.<sup>101</sup> One of the challenges in incorporating stakeholder and sustainability concerns into firm governance, then, is the temptation to compartmentalize them—to view them as important but still separate from financial considerations. This is a variation of the “two- masters” argument that arises in almost every debate about the responsibilities of corporate managers.<sup>102</sup> As managers move beyond a narrow view of shareholder primacy to weigh additional factors, there is a danger that they will perceive a lack of any objective, leading to what Jensen describes as “confusion and a lack of purpose.”<sup>103</sup> They may feel bound to make

---

95. See Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1433–34 (2006).

96. See *id.*; Derek Bok, *Comment on “The Business of Business Schools”* (by Robert Simons), 8 CAP. & SOC., no. 1, 2013, at 3.

97. See Henderson & Malani, *supra* note 12, at 582–85.

98. See, e.g., *More Wind Energy Means Lower Electricity Prices*, SUSTAINABLEBUSINESS.COM (Feb. 13, 2014, 3:38 PM), <http://www.sustainablebusiness.com/index.cfm/go/news.display/id/25517>.

99. See Lyman Johnson et al., *Rethinking How Business Purpose is Taught in Catholic Business Education*, 32 J. CATHOLIC HIGHER EDUC. 59, 61 n.4 (2013); see, e.g., Lyman P. Q. Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 434–35 (2013).

100. See Henry Hansmann, *Ownership of the Firm*, 4 J. L. ECON. & ORG. 267, 277 (1988).

101. Cf. Johnson et al., *supra* note 99, at 61 n.4 (asserting that the focus of a corporation's activity will change as its purpose changes, and that if a corporation's purpose is to maximize shareholder wealth, it will seek means to achieve that end).

102. See generally Ronald J. Colombo, *Toward a Nexus of Virtue*, 69 WASH. & LEE L. REV. 3 (2012) (discussing the importance of making corporate officers focus not only on the bottom line financials, but also on noneconomic values).

103. Jensen, *supra* note 63, at 34. But see Robert Phillips et al., *What Stakeholder Theory Is Not*, 13 BUS. ETHICS Q. 479, 481 (2003) (arguing among other things, that “[m]anaging

trade-offs between social and financial goals, or between different corporate constituencies.

For example, much of the discussion surrounding corporate social responsibility focuses on whether an emphasis on non-shareholder interests will increase or decrease firm value.<sup>104</sup> There is less consideration of whether this practice is wise apart from its impact on the bottom line, or if it can be integrated throughout all facets of business strategy.<sup>105</sup> The result is often that corporate philanthropic activity becomes disconnected from ordinary operations, handled by separate staff, or maintained through the creation of a separate legal entity.<sup>106</sup> Something similar happens in the context of stakeholder governance. Proponents of stakeholder governance often ask which of the various competing stakeholders should receive the most consideration—that is, to whom managers should be most accountable—instead of asking how they can inspire stakeholders to work together constructively toward a common purpose.<sup>107</sup> The primary question among stakeholders typically “remains ‘do I have mine,’ rather than evincing a genuine concern for the corporation’s mission and common good.”<sup>108</sup>

The tendency to see social, stakeholder, and financial objectives as related-but-separate raises several issues for value-setting. Should a firm support non-shareholder constituents only when financially attractive, or should it commit to doing so out of a larger sense of ethical obligation? Whatever path the firm chooses will influence how internal and external actors perceive the company’s values. A firm that markets itself as “green” but relies solely on greenwashing tactics sends employees a decidedly mixed message about the importance of environmental sustainability.<sup>109</sup> Similarly, promoting environmental concerns only up to the

---

for stakeholders involves attention to more than simply maximizing shareholder wealth . . .”).

104. See Phillips et al., *supra* note 103, at 481 (“[F]or stakeholder theory, attention to the interests and well-being of some non-shareholders is obligatory for more than the prudential and instrumental purposes of wealth maximization of equity shareholders.”).

105. See Ioannis Ioannou, *Redefining Strategy in the Age of Sustainability and Social Responsibility* (Draft 2014) (on file with author) (“[T]o the extent that stakeholder theory is associated with the stream of work that has empirically explored corporate social performance (CSP) . . . it has paradoxically suffered from Edward Freeman’s separation fallacy: the strand of literature on CSP tends to conceptualize social and financial performance as independent and distinct constructs (e.g., exploring whether CSP is an antecedent to financial performance and vice versa), thus failing to address the broader sustainability issues in an integrated and holistic manner.”).

106. See Reiser, *supra* note 1, at 2450 (discussing how Google.org was formed as a for-profit subsidiary of Google, Inc. to work alongside the nonprofit Google Foundation to pursue charitable activities).

107. See Colombo, *supra* note 102, at 74–76.

108. Johnson et al., *supra* note 99, at 71–72.

109. The term “greenwashing” refers to marketing practices that are meant to deceive consumers into believing that a company is operating in an environmentally friendly way. See Eric L. Lane, *Greenwashing 2.0*, 38 COLUM. J. ENVTL. L. 279, 280–81 (2013).

point of clear profitability threatens to color the judgment of managers and employees whenever those factors come into tension. Agents may rate profitability higher than ethical or social considerations since the former lends itself to objectivity and provides a simpler baseline for measuring success—and that is even assuming they accept the premise of socially conscious business practice at all. Agents might also tend to drift toward actions that are clearly legally defensible under current law given that doing so is often easier than running decisions through a loose program of social responsibility.<sup>110</sup> In sum, even entirely well-meaning corporate controllers risk fragmenting their agents' sense of values if they take a patchwork approach to how or when shareholder and non-shareholder interests should be taken into account.

## 2. The Solution

The social enterprise offers a way around these concerns by focusing on a mission-centric purpose at inception. At its fifteenth century roots, the word “corporation” referred to “associations of individuals united for a special purpose.”<sup>111</sup> The social enterprise is arguably the best embodiment of this etymology. It is an organization of persons who take collective action to pursue the common goal of public benefit. It draws inspiration from the progress being made toward stakeholder governance and then goes beyond it to offer a more comprehensive vision of corporate purpose. Profits remain necessary to sustain the firm's mission, but social enterprises pursue profits and mission reciprocally, shaping their strategies to reflect a synergistic relationship between the two.<sup>112</sup> This does not mean that decisions in a social enterprise are easier than those in traditional CSR-practicing firms, but it should give agents more precise direction for aligning their conduct toward the same overarching goal.

The golf swing provides a useful analogy. For a golf swing to function properly, meaning that the golf ball follows its optimal trajectory upon impact, a player must develop the proper mechanics. The player's shoulders, hips, legs, and hands must work in harmony to set the golf club on a parabolic swing plane that corresponds to the target line. If any individual aspect of the swing sequence falls out of position—e.g., the left arm buckles on the downswing—the shot will stray and the player's score will suffer. In theory, the social enterprise's prevailing dual purpose will keep agents' values on the proper plane; that is, in alignment with the firm's desired objective.

In contrast, when a purportedly socially conscious firm sends agents mixed (or conflicting) information about what it values through its marketing, governance, or sourcing practices, the risk increases that individual

---

110. See Bies, *supra* note 13, at 227.

111. Meese & Oman, *supra* note 6, at 287–88 (quoting *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888)).

112. See Reiser, *supra* note 1.

agents will diverge from those values in ways that put the firm's social agenda off-track. Hence, if a breakfast cereal manufacturer limits its environmental commitment to using natural ingredients, its agents will not necessarily discern the value of sustainability and charity in other facets of corporate activity. A social enterprise that organizes solely to hire hard-to-employ individuals or provide affordable clean energy should not face the same issue. It offers a tighter social lens through which to filter decisions. The promotion of a distinct value is the firm's explicit organizational purpose, and everything it does is to be done with that purpose in mind.<sup>113</sup> Competing stakeholder interests naturally come into play in this model and must be balanced—including those of shareholders—but rather than simply fighting over which stakeholder gets the biggest piece of the pie, managers can situate stakeholder interests and resolve conflicts within what Johnson, Naughton, and Bojan call a “framework of a coherent vision of the common good.”<sup>114</sup> This should diminish the chances of internal discord and variance that might come when firms with less integration of purpose departmentalize their social and economic values.

### B. Culture

With an understanding of the social enterprise's distinct integration of purpose at hand, the next step in promoting values-based compliance is developing a corporate culture that reinforces that purpose and the values it embodies. But what is corporate culture? Humans have long understood that one typically places at the center of her life whatever she treasures the most. For example, in medieval urban planning, houses of worship were often built in the middle of town.<sup>115</sup> Religion was a chief feature in daily life. Emblematically and practically, its importance was made manifest by putting churches at the physical heart of local activities and within easy reach of constituents. The meaning of culture has its origins in two Latin words that came to reflect this understanding: *cultus* (worship) and *cultura* (to cultivate).<sup>116</sup> Over time, these words fused into the term “culture” to describe the beliefs, values, and social norms that are

---

113. The founder of Plum Organics describes this point as follows: “When [social enterprise] ideas become inscribed in your corporate bylaws [as part of being a benefit corporation], it becomes the compass of the company.” Ariel Schwartz, *Inside Plum Organics, The First Benefit Corporation Owned by a Public Company*, *FAST COMPANY* (Jan. 22, 2014, 8:08 AM), <http://www.fastcoexist.com/3024991/world-changing-ideas/inside-plum-organics-the-first-benefit-corporation-owned-by-a-public-co>.

114. See Johnson et al., *supra* note 99, at 77 (quoting Pope John Paul II, *Centesimus annus* (Vatican City: Typis Polyglottis Vaticanis, 1991), 47).

115. See generally Keith D. Lilley, *Cities of God? Medieval Urban Forms and Their Christian Symbolism*, 29 *TRANSACTIONS OF THE INSTITUTE OF BRITISH GEOGRAPHERS* 296, 300 (2004) (discussing the Christian symbolism of urban cities in the medieval period).

116. *MERRIAM-WEBSTER DICTIONARY* (2013).



ubiquitous among and fostered by a specific ethnic, religious, or social group.<sup>117</sup>

Culture in the corporate setting is consistent with this account. Weaver describes it as the “formal and informal practices, positions, and routines that collectively influence employees’ behavior.”<sup>118</sup> Colombo adds that it is the “vehicle for imparting and maintaining the moral principles and the values, good and bad, that animate life in the organization.”<sup>119</sup> Put more casually by Reynolds, corporate culture is “the way we do things around here.”<sup>120</sup> These descriptions underscore the fact that each firm features a unique ecology shaped by its history, its mottos, the personalities of its controllers, its formal governance structures (e.g., organizational charts and internal policies), and its informal rituals (e.g., employees eating together every Tuesday).<sup>121</sup> They also have significant implications for compliance. The growth of the professional compliance industry means that almost every firm instructs its employees in training sessions and policy handbooks to abide by company rules and obey the law. Yet, managers have long understood that formal efforts will fall short if they do not operate within an internal environment of ethics and lawfulness.

The social enterprise offers a uniquely promising model for shaping a compliant culture in line with the goal of mission-plus-profits. Everything starts with integration of purpose. Like the medieval town, agents take their cultural cues and expectations from the values that firms place at their organizational centers. The clearer and more important those values become, the better the chance the members of the firm’s community will contemplate and internalize them.<sup>122</sup> They will come to shape the firm’s collective identity and create shared understandings among firm members. This, in turn, ought to motivate character development and activities that are consistent with them.<sup>123</sup> The social enterprise’s de-emphasis on shareholder primacy is particularly important in this regard. Organizations that promote shareholder wealth above all else can expect their cultures to fortify that viewpoint through values such as competitiveness or risk-taking.<sup>124</sup> These are not always bad qualities to have, and they can be quite important to economic success, but agents who perceive that management

---

117. See Amir N. Licht, *Culture and Law in Corporate Governance* (Chapter of Oxford Handbook of Corp. Law and Governance, Working Paper No. 247, 2014).

118. See Weaver, *supra* note 35, at 302–03.

119. Colombo, *supra* note 102, at 69 (quoting Edwin M. Hartman, ORGANIZATIONAL ETHICS AND THE GOOD LIFE 85 (1996)).

120. Reynolds, *supra* note 46, at 260.

121. See *id.*

122. See Colombo, *supra* note 102.

123. See Weaver, *supra* note 35, at 295.

124. See Renee B. Adams et al., *Shareholders and Stakeholders: How Do Directors Decide?*, 32 STRAT. MGMT. J. 1331, 1332–33 (2011).

is self-interested and driven primarily by the pursuit of financial gain show greater tendency to misbehave.<sup>125</sup>

For example, when performance and compensation are tied principally to corporate financial gain, as they are in many traditional firms, agents face a strong incentive to rationalize whatever action is necessary to increase profits—even if it involves doing something that might strike them as illegal or unethical under different circumstances.<sup>126</sup> The same is true when it comes to other potential influences. The norm of shareholder primacy that still permeates much of corporate America means that officers who act responsibly—in ways that lower profits—often find themselves on the outs with members of their peer group.<sup>127</sup> Over time, this climate increases the likelihood that agents will be socialized in ways that cause them to abandon values that they previously held dear.<sup>128</sup> It is plausible that profit maximization will then become the fallback tiebreaker whenever managers or directors face a choice between different courses of action. This might explain why so many corporate leaders continue to show lapses in moral and ethical judgment.<sup>129</sup>

On the flip side, organizational policies and practices that routinely emphasize attention to stakeholder concerns are found to reduce misconduct by eliciting a culture where there is less temptation to cheat or hide information.<sup>130</sup> In this respect, the benefit of the social enterprise is that it goes further than other companies that profess a general interest in social responsibility or stakeholder governance. By honing in on a specific mindset of social mission at the top of their organizational hierarchy, social enterprises are capable of demonstrating more authenticity and legitimacy in their objectives—in contrast to firms that promote multiple and potentially conflicting values. Authenticity and legitimacy play a powerful role in shaping internal firm behavior.<sup>131</sup> Managers who demonstrate an authentic interest in prioritizing and safeguarding mission over profits can expect to stimulate the same behavior in their employees.<sup>132</sup> Put simply, the higher that mission goes on management's list of priorities, the more

---

125. See Licht, *supra* note 117, at 26–27; Reynolds, *supra* note 46, at 259; Weaver, *supra* note 35, at 302.

126. See Colombo, *supra* note 102, at 67–70.

127. *Id.* at 53. (“What (outside the corporation) might count as ‘character’ tends to be more of an obstacle than a boon to corporate success for many people.”) (quoting Robert C. Solomon, *Victims of Circumstances? A Defense of Virtue Ethics in Business*, 13 *BUS. ETHICS Q.* 43, 44 (2003)).

128. *Id.* at 53–54. (“Structural factors also work to separate a corporate officer from his or her personal moral compass. The multiple levels of authority—from shareholders, to directors, to officers, to other employees—engender confusion over the question of ultimate moral responsibility for corporate decision making. This evokes both the chilling Nuremberg refrain of ‘just following orders’ . . .”).

129. See Johnson et al., *supra* note 99, at 81.

130. See Weaver, *supra* note 35, at 300–01.

131. Reynolds, *supra* note 46, at 262–65.

132. See *id.*; Tyler, *supra* note 43.

likely it will influence how agents interpret and process specific ethical situations. Problems come when firms drift from their commitment to particular values, sowing seeds of uncertainty about the priorities that agents should focus on as they attempt to resolve ethical dilemmas.

It is imperative not to state too strong a claim. The above is not meant to suggest that social enterprises become utopias of compliance and good behavior simply by virtue of their organizational mandate. Much depends on the character of ownership and management, as well as strategies for hiring and governance. Social enterprises also cannot be completely selfless; indeed, if they forgo the pursuit of profits they will not be in business for long. Yet everything about a social enterprise is pointed toward solving a market failure or fixing a previously ignored social problem. This baseline portends a professional environment where the people who commit to it can find the support, identity, and sense of place necessary to sustain it.<sup>133</sup>

Scholars who identify with the virtue ethics tradition get closest to the mark when describing the qualities of the “excellent” or “virtuous” company.<sup>134</sup> They understand that corporate culture explains many of the actions taken by employees, both positive and negative. More pointedly, though, they maintain that positive virtue within a firm’s culture correlates with the idea that success is measured by factors other than money—including the well-being of others, the quality of goods produced, and the sense of dignity and accomplishment that one feels in being a part of the organization.<sup>135</sup> These are qualities that many people are intrinsically drawn to and will seek to perpetuate when afforded the opportunity. Profits still matter, but firms risk unethical conduct and workplace dissatisfaction when they allow them to subvert attention away from other values.<sup>136</sup> Colombo summarizes this view well:

[A] major step toward creating a corporate environment more hospitable to virtue would be to invert the means-end relationship between product and profit. The production of a product . . . should not be viewed as a means to the end of profits, but rather profits should be viewed as a means to the end of production.<sup>137</sup>

---

133. See Hess et al., *supra* note 37; Tyler, *supra* note 43.

134. See Colombo, *supra* note 102, at 72–77.

135. See *id.* at 72–73.

136. See *id.* at 70–73 (“Pope John Paul II’s encyclical *Centesimus Annus* articulated this position quite well, and it is worth quoting from at some length: ‘When a firm makes a profit, this means that productive factors have been properly employed and corresponding human needs have been duly satisfied. But profitability is not the only indicator of a firm’s condition. It is possible for the financial accounts to be in order, and yet for the people—who make up the firm’s most valuable asset—to be humiliated and their dignity offended. Besides being morally inadmissible, this will eventually have negative repercussions on the firm’s economic efficiency.’”) (quoting JOHN PAUL II, ON THE HUNDRETH ANNIVERSARY OF RERUM NOVARUM: CENTESIMUS ANNUS 68–69 (1991)).

137. *Id.* at 72.

The social enterprise attempts to do precisely that. In fact, that is the social enterprise in its purest form.<sup>138</sup>

### C. Power of Form

#### 1. New Standard Form Options

A final component of social enterprise theory that ought to energize a compliant and ethical corporate culture is the function of legal form. As mentioned above, the spread and influence of social enterprise has given rise to a host of new standard-form business associations. In just three years, and with near-unanimous votes in favor, over half of the states enacted social enterprise legislation.<sup>139</sup> The most popular of the new laws are those authorizing the Public Benefit Corporation (PBC).<sup>140</sup> A few slight differences aside, PBC statutes require controllers to create a “public benefit,” consider stakeholder interests when making decisions, and adhere to explicit standards for transparency and accountability.<sup>141</sup>

---

138. Battilana et al., *supra* note 14, at 52 (“In the [social enterprise] ideal, managers do not face a choice between mission and profit, because these aims are integrated in the same strategy. More important, the integration of social and commercial value creation enables a virtuous cycle of profit and reinvestment in the social mission that builds large-scale solutions to social problems.”).

139. See Yockey, *supra* note 16.

140. Note the difference between a statutory benefit corporation and a certified B corporation. The latter refers to companies that undergo a process of private certification administered by B Lab Company (“B Lab”), a nonprofit organization that seeks to facilitate social enterprise and social investment. *The Non-Profit Behind BCORPs*, B CORPORATION, <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps> (last visited Apr. 22, 2014). B Lab bases its certification on a review of whether a firm adequately uses “the power of business to solve social and environmental problems.” *Id.* B Lab also conducts periodic audits to ensure compliance with its standards. *Id.* Companies that organize as benefit corporations can also be certified B corporations, but obtaining certification is neither necessary nor sufficient for statutory compliance. Likewise, a certified B corporation may or may not be organized as a statutory benefit corporation. Current estimates put the number of certified B corporations at approximately 1,100, and the total number of benefit corporations at around 325. BENEFIT CORP. INFO. CENTER, <http://benefitcorp.net/find-a-benefit-corp> (last visited Apr. 22, 2014); Interview with J. Haskell Murray, Assistant Professor of Management and Business Law, Belmont University (Feb. 7, 2014).

141. J. Haskell Murray, *Social Enterprise Innovation: Delaware’s Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 201, 211–12 (2014). Some states also feature separate social enterprise legal provisions that differ from benefit corporation laws. For example, even though it includes an independent benefit corporation provision, Oregon’s corporate code also allows firms to include an instruction in their charters that requires managers to conduct business “in a manner that is environmentally and socially responsible.” OR. REV. STAT. § 60.047 (2013). Additionally, California recently authorized the creation of “flexible purpose corporations” (FPCs). CAL. CORP. CODE § 2600 (2014). FPCs are corporations that (1) expressly pursue profits and at least one charitable purpose activity, or (2) commit to minimizing any adverse short- or long-term effects on stakeholders. *Id.* § 2602. Unlike benefit corporations, FPCs are not bound to provide a public benefit as assessed against a third-party standard. *See Id.* § 14610. Their directors also are not bound to consider any particular corporate constituents when making decisions. *Id.* § 2602. The State of Washington also recently enacted legislation authorizing the creation of a “social purpose corporation,” defined as a firm in which directors may consider social purposes in addition to profits “as they deem

Delaware's statute is a good example of how these requirements fit together. Under the law, a PBC must identify in its certificate of incorporation one or more public benefits that it will pursue.<sup>142</sup> "Public benefit" is defined as a positive effect (or the lessening of negative effects) on persons, entities, communities, or interests, including those of an artistic, charitable, cultural, educational, literary, medical, religious, scientific, or technological nature.<sup>143</sup> Controllers of a PBC must manage the firm's affairs in a way that balances shareholders' financial interests, the interests of those who are materially affected by the corporation's activities, and the pursuit of the specified public benefit(s).<sup>144</sup> They must also publish a report every two years that details their efforts to promote the identified public benefits, and the statute provides a unique shareholder derivative remedy for use in monitoring social performance.<sup>145</sup> The latter two requirements are safeguards meant to ensure that managers will use their broad discretion to advance the firm's mission rather than selfish or unrelated goals.

## 2. Why the New Forms Matter

The traditional rationale for the PBC form is that it liberates managers from the duty to maximize shareholder profits so they can focus on stakeholder-centric objectives without fear of reprisal. However, this justification is unsatisfactory.<sup>146</sup> Existing state corporate law already supplies managers with sufficient flexibility to depart from norms of shareholder primacy in virtually every situation.<sup>147</sup> But this does not mean that benefit corporation laws are pointless. Standard forms can be influential beyond

---

relevant" but are not required to evaluate the impact of their decisions on any specific list of firm stakeholders. WASH. REV. CODE § 23B.25.050 (2014).

142. DEL. CODE ANN. tit. 8, § 362(a) (2013).

143. *Id.* § 362(b).

144. *Id.* § 362(a). For discussions of Delaware's PBC statute, see generally J. William Callison, *Benefit Corporations, Innovation, and Statutory Design*, 26 REGENT U. L. REV. 143 (2013); Murray, *supra* note 141.

145. DEL. CODE ANN. tit. 8, §§ 366(b), 367. Shareholders meeting a 2% ownership requirement may maintain a derivative suit to enforce the directors' duties to promote a specified public benefit. *Id.* Many other states with benefit-corporation-laws require managers to provide an assessment of whether their pursuit of a public benefit satisfies an independent third-party standard that is comprehensive, credible, and recognized for assessing social and environmental performance. See, e.g., OR. REV. STAT. ANN. § 60.750 (2014).

146. Yockey, *supra* note 16, (manuscript at 20–23); Underberg, *supra* note 12.

147. See Yockey, *supra* note 16, (manuscript at 18–19) (describing the broad discretion that corporate managers enjoy, as well as other legal options for social entrepreneurs (e.g., nonprofits, LLCs, closely held firms, etc.)); see also Henderson & Malani, *supra* note 12, at 573–77 (describing breadth of legal discretion that managers have to make socially oriented decisions under corporate charity statutes, constituency statutes, and the business judgment rule judicial framework); Ribstein, *supra* note 95, at 1470 (arguing that managers enjoy so much discretion that it will be "only the most unimaginative board that is unable to show how a 'reasonable' use of resources could plausibly enhance the firm's goodwill.").

the provision of default terms. Most notably, they show an ability to affect internal behavior in ways germane to the refinement of corporate culture.

This argument has both practical and theoretical dimensions. On the practical side, form educates internal and external actors about what they can expect from firms that adopt it. For example, recall how the social enterprise's integration of purpose and sense of authenticity is significant for developing a culture infused with matching values. A social enterprise that adopts a social-enterprise-specific business form will be even better positioned to maximize these effects. Rawhouser et al. note that doing so "provides a stronger indication that the dual mission of the organization (written in the organization's charter) is authentic and can reduce identity confusion among employees."<sup>148</sup> At the same time, the internalization of values becomes easier when organizational traits match employees' personal beliefs and were significant factors in drawing them to the firm in the first place.<sup>149</sup> Individuals gravitate toward statutes and the values they represent in light of law's professed legitimacy. States that enact subject-specific laws like PBC statutes thus help to guide behavior ex ante by signaling that certain values are given particularly high importance.<sup>150</sup>

These points are perhaps easiest to clarify by looking at the alternative. A firm that does not organize as a formal social-enterprise-specific entity or which simply professes a general acceptance of CSR principles makes it harder for outsiders to observe and measure its social commitment.<sup>151</sup> If an employee who highly values the social enterprise ideal joins such a firm, she may need to bend or compromise her beliefs to fit the firm rather than slip seamlessly into a formal structure meant to reaffirm them. She then becomes more likely to leave for other opportunities. Even if she stays, her feelings of disengagement or dissatisfaction could produce a negative (or at least neutral) effect on the firm's existing culture. Highly visible forms like the PBC offer the market differentiation necessary to nip such sorting problems in the bud. They should also discourage defec-

---

148. See Rawhouser et al., *supra* note 14.

149. See Gilles Hilary & Kai Wai Hui, *Does Religion Matter in Corporate Decision Making in America?*, 93 J. FIN. ECON. 455 (2009) (reviewing literature on this point); Deborah E. Rupp & Cynthia A. Williams, *The Efficacy of Regulation as a Function of Psychological Fit: Reexamining the Hard Law/Soft Law Continuum*, 12 THEORETICAL INQUIRIES L. 581, 585, 588 (2011).

150. See Richard H. McAdams & Janice Nadler, *Testing the Focal Point Theory of Legal Compliance: The Effect of Third-Party Expression in an Experimental Hawk/Dove Game*, 2 J. EMPIRICAL LEGAL STUD. 87, 88, 93 (2005) (noting that, by making one result or goal a focal point, legal rules "guide expectations toward that outcome" and create "self-fulfilling expectations that [the] outcome will occur.").

151. Arguably, this concern could be mitigated through social certification programs, like B Lab's "B Corp" initiative, but these programs lack the force, influence, expressive power, and legitimacy of law. See B LAB, <http://www.benefitcorp.net/business/become-a-benefit-corporation> (last visited Sept. 29, 2014); Yockey, *supra* note 16, (manuscript at 24-25).

tion from the form's corresponding values since doing so will presumably be more easily observable within the firm and across the larger sector.<sup>152</sup>

A similar, but arguably more theoretical, way in which form can influence corporate culture relates to the expressive power of law. Laws send potent signals about societal beliefs that come part and parcel with their black-letter requirements.<sup>153</sup> They help to inculcate individual behaviors and preferences independently of any separate punitive sanctions. In this view, federal air and water pollution statutes suggest that environmental stewardship is a moral imperative, while the FCPA expresses the view that bribery is wrong. By the same token, PBC statutes reinforce the value of balancing social, stakeholder, and financial concerns in business management. Incorporating as a PBC tattoos this normative framework on the PBC's charter and highlights the standards that should inform employee conduct.

Look no farther than the PBC's stakeholder governance mandate and disclosure rules. Employees who must fulfill these requirements are more likely to contemplate stakeholder interests and social performance since doing so is fundamental to their job responsibilities.<sup>154</sup> In this way, legal form validates certain moral values and renounces others.<sup>155</sup> It is harder, for example, to disregard a mission of positive social impact when one is conditioned by law to provide a narrative account of her progress toward that goal. One social entrepreneur puts it like this: "I think it's more that now whenever we sort of come across something, we think oh well, we should or shouldn't do that because we're a [benefit corporation]. So I feel like it is holding us to . . . do the right thing . . ." <sup>156</sup> A statutory scheme that encourages employees to develop habits that are consistent with social values thus makes it easier to instill a culture that prioritizes doing good.<sup>157</sup> At the very least, it becomes cleaner "to get virtue's ball rolling"—to use Colombo's phrase—by formally excising the vestiges of a shareholder primacy norm linked with higher rates of misconduct.<sup>158</sup>

### 3. Form and Psychology

Several recent discoveries in social psychology complete this picture. Compliance research has long focused on conscious thought, with an emphasis on behavior that is assumed to come only after deliberate reflec-

---

152. See Licht, *supra* note 117 (discussing network effects).

153. Susanna Kim Ripken, *Corporate First Amendment Rights After Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209, 248–54 (2011).

154. See Yockey, *supra* note 16, (manuscript at 41).

155. See Colombo, *supra* note 102, at 70–73.

156. See Stubbs, *supra* note 15.

157. See *id.* at 14 (quoting one social entrepreneur as follows: "[Becoming a B Corp] creates a very strong decision-making, ethical decision-making culture throughout the business.>").

158. See Colombo, *supra* note 102, at 28.

tion.<sup>159</sup> However, a growing body of evidence reveals that humans make decisions both consciously and non-consciously (automatically).<sup>160</sup> Some even maintain that non-conscious mental processes are the most influential in decision-making.<sup>161</sup> Perhaps most noteworthy, though, is the fact that researchers now show an ability to “prime” non-conscious processes in ways that directly affect behavior. Reynolds catalogues numerous studies where researchers have been able to regulate individuals’ skills and attitudes through the use of indirect means such as environmental factors, symbols, and terminology.<sup>162</sup> In one case, subjects inundated with concepts tied to being a professor scored better on an intelligence test than those primed with the traits of a “soccer hooligan.”<sup>163</sup> A comparable outcome occurred when groups of women were primed with stereotypical notions about being less adept at mathematics than men.<sup>164</sup> In a final study, corporate managers with engineering backgrounds were given a survey asking for their opinions about using bribery to gain business.<sup>165</sup> Managers who received survey materials featuring only symbols of engineering (e.g., gears and compasses) were far less accepting of bribery than those given materials containing only economic imagery (e.g., dollar signs and business charts).<sup>166</sup>

These results foretell exciting possibilities for legal form and culture. They offer hope to firms looking to shape instinctual responses in situations where they lack the time or ability to influence an agent’s process of deliberation. Firms adopting social-enterprise-specific forms may now be able to use their governance structures, slogans, and symbols to play a measurable role in spreading values that focus less on self-interest and material gain, and more on the mission of public service. By contrast, firms that talk a good game about compliance and sustainability risk watering down their messages through symbols and structures that are not in full alignment with those values. For example, elements of priming that center on profit-making and competition may prompt agents to take more legal or ethical risks than managers prefer, or to focus on personal career advancement instead of mission.<sup>167</sup> Likewise, internal structures that re-

---

159. Reynolds, *supra* note 46, at 246–47.

160. *Id.*

161. *See id.* at 247–50.

162. *Id.* at 247–49.

163. *Id.* at 249.

164. *Id.*

165. *Id.* at 254.

166. *Id.*

167. *Id.* at 252 (“When organizations are concerned about ethics in their halls, their first step is typically to specify the ethical standards that their members are to follow. We usually think of this as a very formal process, but as this research suggests, it is possible for individuals to non-consciously set and/or infer the ethical standards of a context. To the extent that symbols, instructions, activities, or others establish an association to a particular set of normative expectations (often rooted in stereotypical understandings of institution, occupations, etc.), individual behavior is more likely to become consistent with those ethical norms. Thus,



volve around surveillance and the threat of sanctions could impart counterproductive feelings of distrust and fear if they are not properly calibrated against other values.<sup>168</sup>

## V. CONSEQUENCES AND RECOMMENDATIONS

The normative expectations that social enterprises inspire provide yet another reminder of the complex interplay between compliance, culture, and ethics. Of course, we should not delude ourselves into thinking that the social enterprise model is a cure-all. Some self-defined social enterprises have failed, and others surely will fail, when it comes to corporate wrongdoing.<sup>169</sup> The point is merely that the social enterprise's organizational characteristics show the potential to be better and more consistent at promoting the values and culture allied with ethical and compliant behavior.<sup>170</sup> This contention has significant implications for everyone who interacts with social enterprises. For example, if the structural and cultural influences within them make compliance more likely, then that should lower the risk of external sanctions. Investors will surely want to consider this possibility as they assess risk and return, and it will be particularly attractive to investors looking to support ethical, responsible firms.<sup>171</sup>

The hope going forward is that others will begin to test this and similar claims through additional empirical research into the habits and outcomes within the social enterprise sector. In the meantime, below are a few suggestions for reform and future practice that follow from the discussion above. Many of them would be useful ideas for all companies to explore, but they acquire a particular edge in the case of social enterprises.

### A. Hire the Right People

Compliance begins on the inside. Legal form and organizational purpose put social enterprises on the right track, but the people within the firm remain responsible for actually integrating purpose into practice. The values inherent in a social enterprise's workforce thus become vital. According to Adams, personal values are the "abstract desirable goals that

---

organizations are able to set ethical standards in more ways than perhaps current understandings suggest.").

168. Tyler, *supra* note 43, at 273.

169. See, e.g., Alicia Plerhoples, *Whitewashing & the Public Benefit Corporation: An Example*, SOCENTLAW (Jan. 22, 2014), <http://socentlaw.com/2014/01/whitewashing-the-public-benefit-corporation-an-example/> (providing examples of noncompliance).

170. This should not suggest that traditional, non-social enterprises are somehow "bad;" indeed many do very good work. Rather, my aim is to highlight the grounds for optimism that follow from the social enterprise's unique foundation in mission.

171. See generally Colombo, *supra* note 102, at 84. ("I do not, however, believe that corporate virtue is a futile hope. Indeed, I conclude with Geoff Moore that virtue-driven firms are not only possible, but likely to flourish: They would do so because the concentration on excellence in the practice and not on external goods per se, would, in many cases, actually improve their performance across a range of parameters rather than diminish it.") (citations omitted).

serve as guiding principles in peoples' lives."<sup>172</sup> They go beyond goals for specific situations, becoming one's moral compass and measuring stick for legitimacy.<sup>173</sup> Empirical evidence confirms that corporate managers of all stripes draw on their values when making business decisions, even to degrees that may contradict legal rules.<sup>174</sup>

The good news for social enterprises is that their founders often possess many of the values associated with low incidence of misbehavior. They are commonly styled as caring, conscientious, and future-oriented—qualities shown to be strong predictors of ethical leadership.<sup>175</sup> Bear in mind, though, that social entrepreneurs are not completely selfless or faultless. Indeed, they are still human, and many desire the comforts and security that follow from personal wealth.<sup>176</sup> But personal wealth cannot be the sole or even primary motivation of social entrepreneurs. Founding a social enterprise generally means foregoing lucrative opportunities with traditional firms, and the very nature of the work tends to generate lower revenues because targeted customers are frequently very poor. When these factors are coupled with formal structures that prioritize mission and stakeholder interests, the decreasing emphasis on wealth achievement, risk, and competition likely minimizes the temptation to commit wrongdoing for personal gain.

Of course, if a social enterprise remains private and closely held, founders should preserve control and attention-to-mission more easily. In that case, there is no divergence of interests between ownership and management since they are usually one and the same. The founders, their families, or their hand-picked successors would possess the majority of the firm's equity shares (or at least the votes), and thus would have little incentive to shift towards maximizing profits and away from mission. For all firms, monitoring and information costs are lowest when owners are few in number, share the same goals, and transact with each other on a regular basis.<sup>177</sup> But not every social enterprise wants to remain small or closely held. Many pursue sizable growth and expansion to increase their level of positive social impact.<sup>178</sup> More important, as social enterprises expand, training, compensation, and hiring take on greater urgency when it comes to reinforcing organizational values throughout a larger and more diverse

---

172. Adams et al., *supra* note 124, at 1333.

173. *See id.*

174. *See id.* at 1348.

175. *See* Hirzel, *supra* note 77; Simons, *supra* note 64; Weaver, *supra* note 35, at 310.

176. *See generally* Colombo, *supra* note 102 (discussing the benefits of virtue directed decision making in the corporate sector, ways to promote corporate decision-makers to use noneconomic factors in their evaluations, and the potential roadblocks to moral decision making).

177. *See* Henry Hansmann, *Ownership of the Firm*, 4 J. L. ECON. & ORG. 267, 277 (1988).

178. *See* Stubbs, *supra* note 15, at 8 (quoting one social enterprise: “[W]e’re also driven by growth because of the impacts; the bigger we are the more clients we have, the more impact we can have, the more money we have to actually put towards positive investments.”).

workforce.<sup>179</sup> Founders and managers will need to educate employees on filtering ethical decisions through a matrix of social and economic goals—and then teach practical steps for how to do so. They will also need to reward employees who put their training successfully into practice in ways that do not detract from the firm’s mission. Admittedly, this can be a challenge for social enterprises because some may perceive training as taking funds away from their social mission. While this sentiment is laudable, managers must not let it distract from the potential long-term problems that can arise when ethics training receives short shrift.

Still, even the best training programs must accept that virtue and ethics cannot always be taught. These traits develop over a long period of time, beginning at an early age, and mature from influences that are not exclusively in a firm’s control. More importantly, the value-setting influence of culture and environment becomes strongest when individuals start out receptive to their influence. This explains why corporate codes of conduct and policy manuals are generally most effective at moderating behavior when agents agree with what they are trying to accomplish from the outset.<sup>180</sup> People bring their morals and beliefs with them when they show up to work, and formal and informal efforts at internalization are simply less challenging when the targeted group is already heading in the right direction.<sup>181</sup>

Accordingly, a social enterprise’s hiring strategy will ideally involve an assessment of a candidate’s pre-existing values and her ability to appreciate the need for balance and contemplation that is essential in promoting a hybrid purpose.<sup>182</sup> The importance of this review comes on top of appraising a candidate’s intelligence, technical ability, and similar job-specific traits. The aim would be to look into a candidate’s character, searching for evidence of universalism, honesty, benevolence, compassion, public service, prudence, trustworthiness, and experience in the social enterprise sector. Signs of trustworthiness in particular suggest lesser risk of opportunistic behavior, especially when spread throughout groups of employees.<sup>183</sup> It similarly befits social enterprises to gauge a candidate’s source of personal drive. Some individuals motivate themselves intrinsically out of a desire to act a certain way, while others require extrinsic stimulation in the form of either reward or punishment. These differences are important because compliance research reveals that agents who rely

---

179. Battilana et al., *supra* note 14, at 54.

180. See Weaver, *supra* note 35, at 300–02.

181. See Gustavo Grullon et al., *Religion and Corporate (Mis)Behavior* (Feb. 12, 2010) (unpublished manuscript) (on file with author), available at <http://ssrn.com/abstract=1472118>; Hilary & Hui, *supra* note 149, at 455 (“In actuality, firms do not make decisions, people do and what they do outside work is likely to affect the ways they make these decisions inside work.”).

182. Colombo, *supra* note 102, at 76–77 (“For an ethics training program to bear fruit, it would seem as though its participants would need to be already in possession of a modicum of virtue.”).

183. See Licht, *supra* note 117, at 13.

on extrinsic motivation are less likely to act consistently with organizational values absent concrete external stimuli.<sup>184</sup> In contrast, the compliance tendencies of people disposed toward intrinsic motivation are more reliable and less wavering in the face of new or evolving ethical situations.<sup>185</sup>

Finally, social enterprises must not overlook the importance of retaining at least some employees and advisors who are proficient in formal compliance measures. As noted earlier, many people drawn to social enterprises are idealistic and optimistic. This is one of the best features of the sector, but it suggests that some managers and employees may need additional grounding in complicated regulatory requirements. Being mission-driven is obviously helpful, but agents will court potential problems if they let the idea of doing good distract from less exciting bureaucratic obligations. Gaining (or hiring) the experience necessary to navigate murky compliance waters is an important step in preserving the ability to take advantage of the unique structural and cultural benefits that follow from organizing as a social enterprise. This concern only increases as firm size decreases. Smaller firms of all types, and particularly those with fewer capital resources, are more likely to commit routine compliance mistakes.<sup>186</sup> Fortunately, in addition to the availability of standard auditors, the recent rise of the social auditing industry increased the number of organizations devoted to social and environmental performance auditing.<sup>187</sup> Retaining a social auditor adds another cost, but many free social auditing services exist, and, in any event, cost concerns must be balanced against the unique compliance issues that social enterprises present.

### B. *Engage with Stakeholders*

Any assessment of social enterprise governance provides good occasion to revisit the importance of regular stakeholder engagement. Whether talking about traditional or non-traditional firms, employee receptivity to values increases when managers proactively communicate the reasons why they are significant and then meaningfully solicit feedback and questions.<sup>188</sup> Doing so creates a greater sense of shared responsibility between management and employees.<sup>189</sup> It also bolsters feelings of proce-

---

184. Tyler, *supra* note 43, at 273.

185. *Id.*

186. See Elizabeth K. Keating et al., *The Single Audit Act: How Compliant Are Non-profit Organizations?* (Harvard Univ. Hauser Ctr., Working Paper No. 16, 2003), available at <http://ssrn.com/abstract=372263> (describing the compliance rates of different sized nonprofit organizations with tax regulations).

187. See Margaret M. Blair et al., *The New Role for Assurance Services in Global Commerce*, 33 J. CORP. L. 325, 337–38 (2008).

188. See Weaver, *supra* note 35, at 309.

189. See *id.* at 297; see also Yockey, *supra* note 16, at 34 (“[Agents] are more likely to accept and abide by organizational directives and norms, and to resist pressures to go against them, when they have a thorough understanding of the reasons behind them and feel they play a meaningful part in their development.”) (citations omitted).

dural fairness within the organization and makes managers' messaging take on more force.<sup>190</sup> In turn, employees who feel they are treated fairly and valued by management report higher levels of job satisfaction and conscientiousness—results shown to stimulate ethical behavior, particularly when employees are able to observe and interact with managers who model the same ethical values that they preach.<sup>191</sup>

These findings are especially significant for social enterprises. On their own, formal compliance structures and policies are often insufficient to provide agents with the tools necessary to address fluid and uncertain ethical challenges.<sup>192</sup> How leaders counsel their employees on these issues thus becomes strongly predictive. If they provide ongoing counseling from the perspective of shareholder primacy or avoiding sanctions, agents will start to focus less on the core values of the social enterprise and more on attitudes of self-interest.<sup>193</sup> On the other hand, if managers frame decisions by balancing stakeholder interests and promoting mission, then employees are more likely to mimic that behavior. This should be easier for social enterprises because they already attract talent that tends toward greater emotional commitment to the desired organizational values. Social enterprises that organize as PBCs will further benefit from the form's structural requirements that mandate a stakeholder-centric perspective on governance. The managers who work for these firms must justify their decisions to a wide range of corporate constituents, forcing them to assess multiple (and potentially competing) interests a part of their everyday lives.

### C. Promote Board Heterogeneity and Diversity of Expertise

Social enterprises adopting the corporate form—as either traditional for-profit corporations or as PBCs—will by necessity feature the archetypical legal compliance structure: the board of directors. As noted, a social enterprise's hybrid purpose makes managers and directors responsible for balancing the values and interests of a diverse group of stakeholders. Traditional for-profit corporations must stay attuned to these groups as well, but they have the luxury of falling back on the relatively clear fiduciary guidepost of shareholder primacy. In that case, and with firms that value profits above all else, a homogenous board—composed of people from strong business and economic backgrounds—may function well. These directors will know what is expected and to whom they are principally accountable, and shareholders can adjust their monitoring efforts accordingly.

The board situation becomes more complicated in a social enterprise. Because directors need to weigh the firm's mission against the goals and

---

190. See Weaver, *supra* note 35, at 309.

191. See *id.*; Hess et al., *supra* note 37; Phillips et al., *supra* note 103.

192. See Yockey, *supra* note 55, at 373–75.

193. See Weaver, *supra* note 35, at 297–98.

values of multiple constituencies, the board's diversity and its composite level of expertise take on greater importance. On one hand, the board's very legitimacy—and thus its ability to positively shape corporate culture—may depend on how well it is understood to be safeguarding the mission's pursuit. On the other hand, accomplishing that objective requires insights from people who appreciate the diversity of factors affecting its pursuit. That is to say, social enterprise boards should be made up of multiple members who are committed to the firm's primary mission but who also possess the skills and leadership necessary to understand the complexity of their responsibilities. They must provide strategic advice about mission and monitor agents' commitment to it. This requires a board with directors from multiple backgrounds and who vary along a continuum of idealism and practicality. Having too many directors who look only at mission may result in a form of capture, where the sustainability of the firm is put in doubt as issues like regulatory compliance and capital formation receive less attention than social performance. Likewise, an oversaturation of directors with traditional corporate backgrounds increases the risk of mission drift and its negative attendant effects on corporate culture and compliance.

Crucially, the wisdom of having diverse boards is not about mandating specific results. The broad discretion that the business judgment rule guarantees means that board decisions generally stand so long as directors are informed, acting in good faith, and free from conflicts of interest.<sup>194</sup> Rather, the benefit of board heterogeneity and diversity of expertise is about process—the gathering and review of multiple viewpoints during the steps that lead up to a particular outcome.<sup>195</sup> Several states appear to recognize the merits of this approach by requiring benefit corporations to appoint a “benefit director” to monitor the promotion of social benefits.<sup>196</sup> A person in this position can act as a key “moderating influence,” helping to ensure that issues like fidelity to mission feature in every high-level discussion about business strategy.<sup>197</sup> This is a sound idea regardless of whether a social enterprise elects to organize as a PBC or other social-enterprise-specific standard form.

---

194. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993), *modified on reh'g*, 636 A.2d 956 (Del. 1994); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

195. See MARTIN GELTER & GENEVIEVE HELLERINGER, *Constituency Directors and Corporate Fiduciary Duties*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* (Andrew Gold & Paul Miller eds., Oxford Univ. Press, forthcoming 2014), available at <http://ssrn.com/abstract=2341660>.

196. Murray, *supra* note 141, at 209–12. The Model Benefit Corporation Legislation provides that appointing a “benefit director” is mandatory for public companies. Murray, *supra* note 29, at 4. Many states have enacted the Model, including California, New Jersey, and New York. *State by State Legislative Status: Enacted Legislation*, BENEFIT CORP INFO. CENTER, <http://www.benefitcorp.net/state-by-state-legislative-status> (last visited Oct. 29, 2014).

197. See GELTER & HELLERINGER, *supra* note 195.

#### D. Reassess Enforcement Policy

Turning to a vantage point outside the firm, the social enterprise's compliance potential raises several issues for public enforcement policy. One issue is cost. Strategies for external surveillance and prosecution are expensive and time consuming.<sup>198</sup> Regulators cannot be everywhere. Yet structural, legal, and normative considerations suggest that social enterprises ought to be prone to compliance, which would lessen some of the regulatory burden. Most importantly, if the social enterprise's internal dynamics translate to cheaper and less frequent enforcement activity, then public resources can shift to areas of greater urgency.<sup>199</sup>

An obvious caveat is that regulators and prosecutors will need assurance that social enterprises truly do approach compliance in a unique and powerful way. They will need the ability to analyze social enterprises differently and discern whether a values-based culture is functioning to minimize the chances of wrongdoing. This poses a potential problem. Enforcement agencies generally boast strong backgrounds in investigations, settlement negotiations, trials, appeals, and administrative hearings.<sup>200</sup> They often lack expertise or experience in corporate governance, organizational culture, psychology, and sociology.<sup>201</sup> As a result, they may struggle to appreciate how a diverse range of organizational purposes and cultures will affect corporate behavior. Regulators similarly show an inclination to take a one-size-fits-all approach to enforcement that emphasizes efficiencies of scale.<sup>202</sup> They appear less amenable to tailored enforcement tactics that focus on whether firms of different size, form, and per-

---

198. See Tyler, *supra* note 43, at 269 (“The use of power, particularly coercive power . . . requires a large expenditure of resources to obtain modest and limited amounts of influence over others.”).

199. *Id.* at 272–73 (“Further, when legal authorities can call upon the values of the regulated group to encourage desired behavior, either because of an internal ethical culture or because of the legitimacy of legal authorities, society has more flexibility in how it deploys its resources. In particular, it is better able to use collective resources to benefit the long-term interests of the law since they are not immediately required to ensure public order.”); see also Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1419 (2002) (“Lawyers and judges must make a judgment on the gravity of third-party injuries. They should also weigh the mechanisms outside of criminal law for ameliorating collateral consequences. The stronger and more available those mechanisms, the weaker the case for restraining criminal law to avoid third-party consequences. In a strong economy, job losses from prosecuting firms weigh less heavily than in times when lost jobs are not easily replaced. Similarly, care for dependent family members weighs less heavily against incarceration when extended family, close friends, or adequate social services are available to provide care in the offender’s place.”).

200. See Hasnas, *supra* note 56, at 23.

201. See *id.*

202. See Cristie L. Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 AM. BUS. L.J. 1, 29 (2008).

sonnel will respond differently to varying external stimuli or compliance strategies.<sup>203</sup>

The potential consequence of these failings cannot be understated. Enforcement strategies that do not take firm differences into account are likely to be inefficient. For example, it is plausible that the unique market pressures they face will make social enterprises more wary of non-legal sanctions (e.g., public shaming and harm to reputation) than monetary penalties. The reputational consequences of wrongdoing or mission drift will likely make it harder for them to attract and retain the employees, customers, and investors who are so often drawn to social enterprises chiefly because of their missions. Knowing of such idiosyncrasies is key for regulators who hope to avoid perceptions of unfairness. In fact, if regulators fail to gain sufficient expertise to adequately evaluate the effects of corporate culture and form, they could end up making matters worse. A sanctions-based mentality that disregards the quality of internal culture may encourage more bad behavior rather than less. Of course, this is not to say that sanctions are irrelevant. Sanctions are necessary to communicate that misbehavior is wrong and worthy of punishment. They are also necessary to prevent firms from taking advantage of a sanction-less system. However, when sanctions begin to displace the role of culture and values, they start to crowd out the latter's benefits.<sup>204</sup> Employees may begin to act primarily out of self-interest and fear of sanction rather than through a process of internalization.

Admittedly, a strong emphasis on sanctions can lead to some short-term success (as parents of toddlers might attest), but it is rarely sustainable.<sup>205</sup> It is primarily unsustainable because it overlooks that some individuals act in accordance with rules and the law purely because they believe it is right and just to do so. To quote Aquinas, “[m]en who are well disposed are led willingly to virtue by being admonished better than by coercion, but men who are evilly disposed are not led to virtue unless they are compelled.”<sup>206</sup> What he means is that some people have natural

---

203. See Kenneth A. Bamberger & Deirdre K. Mulligan, *New Governance, Chief Privacy Officers, and the Corporate Management of Information Privacy in the United States: An Initial Inquiry*, 33 *LAW & POL'Y* 477, 480–82 (2011).

204. Colombo, *supra* note 102, at 22–23 (2012) (“Law is limited in its ability to make people virtuous. According to some modern virtue ethicists, the development of virtue requires liberty of action—the ability to choose ill in addition to choosing good. The coercive power of law is largely at odds with this important voluntary dynamic, thereby frustrating the development of virtue. This position is best articulated by Robert George, who has argued that: ‘Morality . . . is, above all an internal matter, a matter of rectitude in choosing: one becomes morally good precisely, and only, by doing the right thing for the right reason.’ If, conversely, one conducts himself or herself appropriately out of fear of legal sanction, all that is achieved is ‘outward conformity with what morality requires,’ via an appeal to ‘subrational motives.’”).

205. *Id.* at 23 (“Do we consider ‘virtuous’ the individual who does not steal in the presence of a security guard, or instead the individual who does not steal in the absence of a security guard?”).

206. See *id.*



propensities that make them primarily responsive to a big regulatory stick. Others, though, possess an inherent commitment to virtue. For them, defaulting to a threat of sanctions will not produce higher likelihoods of compliance. Instead, it signals that authorities view them with distrust and misgiving.<sup>207</sup> This approach threatens to undermine their intrinsic tendency to act consistently with positive values, causing them instead to revert to the problematic balancing of costs, benefits, and likelihood of detection.<sup>208</sup> If left unchecked, it can also poison an otherwise promising organizational culture.

This analysis reveals two important lessons. First, an undifferentiated methodology to enforcement policy is practically imprudent. Regulators would be wise to take matters slowly and carefully when approaching business associations, like social enterprises, that exhibit unique characteristics relevant to compliance. Similarly, to the extent they are not already doing so, persons in positions of regulatory power need to spend more time developing the knowledge of organizational theories that go beyond the classic rational-actor model—or they need to be replaced by people who will.<sup>209</sup> Then, if a social enterprise's institutional and cultural practices reveal a legitimate commitment to ethical behavior, regulators will come to realize that they are freer to use a lighter touch before turning to more drastic measures.<sup>210</sup> As the author explains in other work, this might include softer, less-expensive strategies like negotiation and appeals to self-regulation.<sup>211</sup> At the very least, our evolving understanding of psychology, corporate culture, and social enterprise underscores the need for regulators and prosecutors to keep pace with insights from other disciplines and develop new skill-sets and policies to complement them.

Second, regulators who are unable or unwilling to adopt a context-specific approach to enforcement will cast doubt on their own legitimacy. By way of illustration, it is assumed that most people will agree prosecutors and judges should take a differentiated approach to cases involving young children. All other facts being equal, there would be outrage over imposing identical sanctions for assault regardless of whether a perpetrator is

---

207. See Tyler, *supra* note 43, at 273 (“[T]he use of sanctions undermines value-based motivations because it sends a message to the potential targets of the sanctions that the authorities view them as untrustworthy and suspect. As a result, people become more suspicious and less trusting of the law and legal authorities.”).

208. See Colombo, *supra* note 102, at 22–23. A sanctions-based policy is also misaligned with the reality that many people take action without taking the time for rational deliberation; see also Weaver, *supra* note 35, at 300–02.

209. See Yockey, *supra* note 55, at 373–75.

210. See Tyler, *supra* note 43, at 286 (“The pyramid of regulation is one example of the application of this approach. Ayres and Braithwaite argue that everyone should initially be approached through appeals to values. Most will respond. The few who do not can then be treated as subject to punishment. In this manner, resources can be directed toward the small group that needs surveillance and sanctioning while the majority, who respond to values, is addressed in terms of appeals to values.”); see also Colombo, *supra* note 102, at 27.

211. See Yockey, *supra* note 55, at 325.

five or thirty-five years old. Moving to a far less extreme example, consider how one might react if regulators approach a social enterprise that is open and receptive to values-based compliance not by making an appeal to ethical values but instead by only threatening sanctions. For many, that course, too, would be a model of inefficient governance.<sup>212</sup> It sends a message that regulators are out of tune with how their decisions affect broader public policy concerns. It also suggests that they are incapable of balancing the competing interests and social consequences that invariably come into play in the pursuit of justice.<sup>213</sup>

#### *E. Prioritize Collaboration and Dialogue*

The final recommendation is perhaps the most difficult. To fully appreciate the compliance and enforcement implications of social enterprise theory, the social enterprise field must commit to an ongoing discussion about what corporate virtue and ethics truly ought to mean in this context. There needs to be criteria for determining how social enterprise ideals should shape behavior in specific cases—and particularly those that involve moral ambiguity. For example, consider the reference above to a potential conflict regarding foreign bribery. Should managers of a social enterprise pay an illegal bribe when they believe it is morally justified? And who decides the measure of morality? Social entrepreneurs, customers, and prosecutors may bring very different perspectives to these questions. Compliance and lawfulness have contested meanings depending on one's beliefs, worldview, and interpretative framework. What looks entirely justifiable to a social enterprise dedicated to clean energy expansion may appear to a prosecutor as nothing other than a clear black-letter rules violation.<sup>214</sup>

---

212. See Tyler, *supra* note 43, at 286.

213. See Brown, *supra* note 199, at 1384–85 (“Attention to third-party interests highlights that criminal practice is a regime not organized by overriding retributive or crime prevention commitments but characterized by pragmatic balancing of competing interests. In that mix, culpability, while a primary concern of criminal law, is neither the motivating goal of criminal law nor an absolute constraint on an instrumentalist regime. Culpability remains important . . . . But culpability is balanced against (among other things) civil and private alternatives to criminal law (*i.e.*, other means for achieving crime prevention), and the social interests—third-party interests—affected by criminal law.”); see also R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to “Seek Justice”*, 82 NOTRE DAME L. REV. 635, 673 (2006). (“By using a sledgehammer where a scalpel may suffice, the prosecutor may not be pursuing a “substantial purpose” within a fair reading of Rule 4.4.”).

214. A related problem is that it is often hard to separate aggressive but lawful behavior from illegal actions that generate significant social harm. Unlike the harms that result from non-corporate crimes such as rape or murder, the harms that follow from something like bribing a customs official are difficult for many to see or judge. It’s difficult to imagine that prosecutors possess the necessary socio-economic expertise to correctly make such determinations in every situation. They may neglect to consider mitigating factors such as the social harm-to-benefit ratio of a particular illegal action, or the challenge of accurately divining a defendant’s mental state when facing situations like those involving bribe demands or threats. Moreover, prosecutors’ eagerness to charge and settle may cause them to overlook

The first step in making sense of these challenges is to open up channels of dialogue and education. Assuming that they will respond fairly and with integrity, regulators may not know of a particular moral or compliance dilemma facing a social enterprise unless the latter tells them about it. The potential benefits of this approach will only increase as more parties with skin in the game become involved. Where a variety of stakeholders weigh in on questions of ethics, virtue, and compliance—including not just social enterprises and regulators, but consumers, trade groups, lawyers, and religious leaders—not only is a consensus more likely to emerge, but also the very process of hashing one out can make subsequent acceptance more tractable.<sup>215</sup>

To take one example, regulators might look differently on an issue like anti-corruption enforcement if they learn from firms, religious groups, and NGOs that the prospect of bribery demands is keeping social enterprises out of certain countries, or that firms are not basing compliance decisions along strictly cost-benefit lines. Even if there will still be disagreement on questions of what is morally right or wrong, simply talking about these issues provides better information about the moral and practical complexities facing the parties involved. This should impress upon regulators the need to preserve a sense of fairness and public support. It might also prompt them to search for alternative strategies that obviate ethical tensions in the first place. For example, if DOJ personnel learn from credible, well-meaning people that bribery risks are negating the benefit of social enterprise activities, they may come to place more emphasis on mitigating the demand-side problems of bribery through diplomacy and cooperation with foreign counterparts.<sup>216</sup> Taking anti-corruption enforcement in such a protective direction would relieve some of the pressures that socially oriented firms might confront in the field and allow them to more easily

---

the incentives that social enterprises have to monitor for illegality that are independent of the risk of criminal sanction.

215. See Saule T. Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. PA. L. REV. 411, 428 (2011).

216. Alternatively, regulators might prioritize enforcement efforts in accordance with the social harms caused by the offense at issue. For example, bribes paid in response to extortionate threats or for the purpose of expediting the receipt of a legal benefit may warrant the lowest enforcement priority, especially when weighed against the social value of the services provided by a social enterprise. Indeed, for all firms, this view is made at least partially explicit through the FCPA's exemptions for (1) "grease payments" that expedite the performance of "routine governmental action" and (2) reasonable "promotion" expenses. 15 U.S.C. § 78dd-1. FCPA officials have also said informally that they do not focus on the little things when making enforcement decisions, stressing that companies should not expect scrutiny for taking steps like buying foreign officials a nice dinner after a business meeting. This is hardly surprising. Small payments that resemble gifts, grease payments that expedite goods through customs, and payments made in response to extortion are likely to arouse public sympathy rather than anger or blame. The "warm glow" that many associate with social enterprise could make them even more sympathetic in these circumstances. By contrast, when bribes are paid to receive illegal benefits, they presumably deserve and receive a much higher level of enforcement attention and moral condemnation. This is true regardless of firm type.

focus on their core objectives of delivering valuable products and services. By the same token, if they are not already doing so, social entrepreneurs who interact with regulators and other groups ought to take the ancillary harms of bribery more seriously—and see anti-bribery enforcement as more legitimate—once their gaze expands beyond their direct business objectives.

Neither of these results is likely to happen without a sincere process of multi-stakeholder engagement and an openness to change.<sup>217</sup> To get there, a formal public-private association that includes representatives from social enterprise, government, non-profits, and other groups can be instrumental. An association that forms for this purpose might be called the “Social Enterprise Compliance Initiative” (SECI). Because social enterprises feature a new blend of activities and pose unique compliance concerns, the most significant benefit of such an association is that it can bring actors together through public seminars, conferences, and lobbying efforts to share knowledge and raise awareness about what life is like for them on the ground. For instance, company stories about issues like the frequency of bribery demands from customs officials might lead to government-sponsored experiments with online procurement systems or privatized automated shipping programs. Similarly, in the corporate governance context, a process of multi-stakeholder collaboration can generate strategies for cost-effective auditing procedures within the social enterprise sector, methods for designing compensation and incentive structures tailored to the needs of social enterprises, and professional networks that will make it easier for social enterprises to link up with socially oriented investors and investment firms.<sup>218</sup>

Even beyond the impact of specific recommendations, the presence of an association that operates with these goals in mind can play a positive part in motivating good behavior and discouraging bad. It has the potential to foster shared values and beliefs among the sector while simultaneously creating informal market pressures that encourage voluntary

---

217. See Parker, *supra* note 47.

218. Sticking with the example of bribery, another idea related to public-private collaboration is the possibility of leveraging collective action in order to strengthen the bargaining power of social enterprises as they confront corrupt demands. One of the biggest challenges for small firms is the feeling of helplessness they experience when corrupt officials make bribery appear to be the only option to get anything done. Large firms may have the resources and security to push back during negotiations over a corrupt payment, but small firms typically do not. As a result, if social enterprises can put up a unified front in opposition to bribery, it could start to level the playing field. There are many ways this might happen. Firms can collect and disseminate information about corrupt practices/officials in particular markets, perhaps by taking advantage of the speed of smart phones and social media. The information they gather could eventually lead to databases of corruption hotspots that firms can use to steer clear of areas that present the highest risks. It might also be worth sharing with law enforcement officials as they seek to effectively allocate resources. Other options include joint negotiations with government officials to minimize the number of one-on-one interactions that each firm will need to experience, as well as informal partnerships with larger firms that have the leverage to limit, if not avoid, bribe requests.

compliance with those values.<sup>219</sup> To be sure, none of this is to say that governments should abandon enforcement against misbehaving firms, only that regulators must balance their enforcement agenda to consider all relevant forces. Public-private collaboration advances this effort by fostering collective engagement, innovation in crime prevention and detection, information sharing, and the development of common standards and norms.

One might reasonably wonder whether social enterprises will voluntarily cooperate with other groups if doing so means giving up the potential competitive advantage of a proprietary compliance strategy. Here again, though, is why the unique makeup of social enterprises becomes so important. Firms that prioritize profits above other objectives often lack the incentive to share helpful information with their competitors.<sup>220</sup> In that situation, firms that move early could see their profits slip as others start to copy their techniques. But by definition, profits are not the overriding organizational purpose of a social enterprise. The hybrid nature of social enterprise thus creates more room for industry or sector-wide cooperation.

This observation is already coming to fruition. Social enterprises frequently cooperate to trigger group discounts and gain access to service providers.<sup>221</sup> They also exhibit a high degree of homogeneity and teamwork. For example, Hoffman finds that social enterprises “seek a leadership role in their industry,” noting that, “while other companies seek to influence institutions to reduce regulations and external costs to protect their advantage, [social enterprises] seek to influence institutions to draw other companies into emulating them.”<sup>222</sup> Comments from individual social entrepreneurs underscore this point. One notes as follows:

And I think maybe longer-term, helping to power a collective community around challenging a new way of doing business and perhaps because we are already on that journey, we feel a heightened level of responsibility to share that with other businesses in the community that are sort of in tune towards that but don't necessarily have the confidence, or know that you can actually do business in that way and really you don't need to bend your values and that there are the people alongside you doing business in that way.<sup>223</sup>

---

219. See Robert B. Ahdieh, *Law's Signal: A Cueing Theory of Law in Market Transition*, 77 S. CAL. L. REV. 215, 284–88 (2004); Omarova, *supra* note 215, at 428; Yockey, *supra* note 16.

220. See Peter Molk, *The Puzzling Lack of Cooperatives*, 88 TUL. L. REV. 899, 924 (2014).

221. Murray, *supra* note 29, at 44. Many social enterprises work with industry groups, government agencies, and other stakeholders to develop standards for sustainable production and industry practices. For example, in an effort to facilitate transparency and information sharing, Seventh Generation, a social enterprise that manufactures ecologically friendly cleaning products, now publicly discloses its product formulations so that competitors can learn from its advances. See Hoffman, *supra* note 28, at 15. Other social enterprises interact extensively with their suppliers and communities to establish mutually beneficial arrangements on practices ranging from price and wage structures to employee training programs.

222. Hoffman, *supra* note 28, at 15.

223. Stubbs, *supra* note 15, at 10.

Another says that organizing as a benefit corporation “opened me up to a whole network of, not only like-minded people, but also people who had achieved so much and that could inspire me to do the same.”<sup>224</sup> In this sense, social enterprises act as “institutional entrepreneurs . . . promoting . . . practices that will eventually become established as industry norms that all must follow.”<sup>225</sup> They are part of an expanding ecosystem that encourages and supports collaboration among similarly purpose-driven businesses, investors, and employees. One can expect that these initial efforts at networking will translate just as effectively into the compliance domain.

#### CONCLUSION

The rapid proliferation of social enterprises means that issues of corporate governance and compliance are increasingly pressing within the sector. As demonstrated in this Article, formal compliance tools typically require a complementary and reinforcing corporate culture to be successful. Social enterprises show promise in this regard by virtue of the normative values they embody. Together with recent developments in social psychology and new socially oriented business forms, they offer a unique platform for modeling compliance strategies that reinforce mission-centric ideals and take us beyond a stagnant shareholder primacy vision of the firm. More work remains to be done, but this result is of immediate relevance to the growing number of social entrepreneurs and, in time, may prove to be the social enterprise’s most significant contribution to corporate legal theory.

---

224. *Id.* at 11.

225. Hoffman, *supra* note 28, at 15.

