

HYBRID ENTITIES AND THE PSYCHOLOGICAL CONTRACT WITH EMPLOYEE-STAKEHOLDERS

Norman D. Bishara *

ABSTRACT

The emergence of hybrid organizational structures that mix social and financial goals, specifically the benefit corporation legal form and certified B Corps, comes with promises that the social mission focus of these businesses will generate numerous positive spillovers for their employees. Benefit corporations are designed to provide greater attention to the interests of non-owner stakeholders—particularly employees—and employee treatment, voice, and participation are explicitly part of the B Corp certification regime. However, as they are founded and mature it remains unclear if these hybrid organizations make good on the promise to actually provide an ideal vehicle for protecting and promoting employee interests when compared to traditional corporate structures. This Article first discusses the impetus for the benefit corporation and B Corps in the context of corporate governance, the development of corporate social responsibility theories, and the changing workplace. Drawing on psychological contract theory and various trends in the U.S. employment environment, I argue that benefit corporations and B Corps establish a new psychological benefit contract (PBC) with their employees. I find that as currently structured these new hybrid organizations will achieve mixed results when promoting employee welfare and protection, empowerment and voice, dignity, and other policy interests.

* Associate Dean and Associate Professor of Business Law & Ethics, Stephen M. Ross School of Business at the University of Michigan. The author is grateful to the participants and organizers of the Social Enterprise and Entrepreneurship Symposium hosted by the University of Connecticut Business School and the Thomas J. Dodd Research Center for first inspiring this research. This work was also improved by the useful input and discussions that occurred when earlier drafts were presented as part of the IESE Business Ethics Department Seminar Series, the IESE-LUISS Hybrid Organizations Conference, the International Association for Business and Society Annual Meeting, and the 2017 Susilo Symposium on Ethics in the Global Economy at Boston University.

INTRODUCTION.....	304
I. BENEFIT CORPORATIONS, B CORPS, AND THE SOCIAL RESPONSIBILITY CONTEXT.....	312
A. The Promise of a World Dominated by B Corps and Benefit Corporations.....	312
B. Background on the Benefit Corporation and B Corp Movements.....	315
C. Benefit Corporations and B Corps in the CSR Context	317
II. THE EVOLVING NATURE OF EMPLOYMENT AND THE U.S. WORKPLACE.....	322
III. BENEFIT CORPORATIONS AND B CORPS: THE EMPLOYEE INTERESTS DIMENSION.....	328
A. The Psychological Contract Theory in Employment	328
B. A New Psychological Benefit Contract: Hybrid Entities and Employees.....	330
C. Do Hybrid Entities Truly Protect and Empower Employees?... 333	
i. Workplace Quality and Wages	336
ii. Job Satisfaction and Branding for Employees	337
iii. Enforcement Mechanisms for Employee Welfare.....	339
iv. Employee Participation and Voice.....	341
v. Alleviation of Negative Trends in the Employment Landscape	342
CONCLUSION	343

INTRODUCTION

A growing number of business leaders are also social entrepreneurs seeking to successfully combine two seemingly divergent concepts: the efficiency and profit producing aspects of a successful business and the mission-driven, society-enhancing aspects of successful nonprofit entities. There is a trend among some businesses toward social and financial goals becoming more integrated¹ and increased support for a broader definition

1. See LYNN STOUT, SERGIO A. GRAMITTO & TAMARA BELINFANTI, CITIZEN CAPITALISM: HOW A UNIVERSAL FUND CAN PROVIDE INCOME AND INFLUENCE TO ALL 66 (2019) (arguing that increased voluntary social disclosure in the last few years “anecdotally demonstrates that the world of social concerns and the corporate world are moving closer together,” and adding that “other aspects of this trend is include the rise of new corporate forms such as ‘benefit corporations’ or ‘social purpose corporations,’ which are explicitly formed to pursue both financial and social value creation; the establishment of social stock

of business purpose even among traditional firms,² yet these pro-social aims and profit goals—often conceived as social and financial performance, respectively—can sometimes create friction among stakeholders and even lead to mission drift.³ Moreover, the mixed goals of social and financial performance are not facilitated by U.S. corporate law⁴—and in fact many believe the modern corporate governance framework is dominated by a legal regime that *requires* managers to put shareholder interests before all other stakeholder concerns.⁵ To address this tension there has been a concerted effort to develop a series of so-called hybrid legal entities—businesses that aim to generate profits and pursue social aims simultaneously⁶—to remove or otherwise neutralize this

exchanges, which are only available to corporations that commit to returning both financial and social value.” The authors go on to add that “numerous studies . . . repeatedly show that millennials want to work for companies that demonstrate values and ethics”).

2. See Marc Benioff, Opinion, *We Need a New Capitalism*, N.Y. TIMES, Oct. 14, 2019, <https://www.nytimes.com/2019/10/14/opinion/benioff-salesforce-capitalism.html>. Benioff, as CEO of Salesforce, Inc. and a member of the Business Roundtable, has argued for a new approach to understanding the purpose of business to address wealth inequality and a range of social issues:

The culture of corporate America needs to change, and it shouldn't take an act of Congress to do it. Every C.E.O. and every company must recognize that their responsibilities do not stop at the edge of the corporate campus. When we finally start focusing on stakeholder value as well as shareholder value, our companies will be more successful, our communities will be more equal, our societies will be more just and our planet will be healthier.

Id.

3. See Alnoor Ebrahim, Julie Battilana & Johanna Mair, *The Governance of Social Enterprises: Mission Drift and Accountability Challenges in Hybrid Organizations*, 34 RES. ORGANIZATIONAL BEHAV. 81 (2014) (exploring the governance challenges that organizations that pursue a social mission must confront); Michael Pirson, *Social Entrepreneurship: A Blueprint for Humane Organizations?*, in HUMANISM IN BUSINESS: PERSPECTIVES ON THE DEVELOPMENT OF RESPONSIBLE BUSINESS SOCIETY 248, 249 (Heiko Spitzbeck et al. eds., 2009) (stating that “[s]ocial entrepreneurs . . . are largely credited with having transformed and developed the third sector to become entrepreneurial and competitive in precisely the same sense as businesses are”).

4. See Leo E. Strine, *Making It Easier for Directors to “Do the Right Thing”?*, 4 HARV. BUS. L. REV. 235, 241 (2014) (“American corporate law makes corporate managers accountable to only one constituency—stockholders.”).

5. Lynne L. Dallas, *Is There Hope for Change? The Evolution of Conceptions of “Good” Corporate Governance*, 54 SAN DIEGO L. REV. 491, 494 (2017) (“Most legal scholars take the triumph of the current shareholder value maximization conception of good corporate governance as a given, so entrenched that it is unlikely to change.”).

6. In this Article, a broader definition than a strict legal view of a hybrid entity as only applying to legal incorporation is used, which is consistent with management scholars view of “hybrids” being defined by mixed goals within one entity (i.e., not just profit seeking or just social goals). Nardia Haigh, John Walker, Sophie Bacq & Jill Kickul, *Hybrid*

potential conflict.⁷ Despite the best of intentions, is there a risk that these legal formats and certified entities fail to reach the goal of generating positive workplaces for their employees? In other words, what, if any, is the connection between new hybrid legal forms or benefit compliance certifications and worker interests? Or, worse, is there a risk that the new legal forms or the voluntary compliance regimes may actually *harm* worker welfare?

Thanks to the work of a variety of policy advocates over the last decade, social entrepreneurs in the United States looking for an ideal corporate legal form to assist in accomplishing their goals for bettering society through business activity now have several options for how to legally structure their organizations. In particular, hybrid business entities can now formally incorporate in a number of ways, such as in the form of benefit corporations, Social Purpose Organizations (SPCs) and low-profit limited liability companies (L3Cs), which have begun to emerge in various states.⁸ Foremost among the legal forms is the benefit corporation, a type

Organizations: Origins, Strategies, Impacts, and Implications, 57 CAL. MGMT. REV. 5 (2015). These scholars craft a definition for hybrid organizations as follows:

[hybrids are] those enterprises that design their business models based on the alleviation of a particular social or environmental issue. Hybrids generate income and attract capital in ways that may be consistent with for-profit models, nonprofit models, or both. Authors contributing work to this special issue refer to hybrid organizations (or hybrids) by a variety of terms including “social hybrid venture,” “benefit corporation,” and “hybrid firm,” but central to the use of all terms is the duality of social impact alongside financial sustainability. The term “hybrid organization” reflects the propensity of such enterprises to blend traditionally for-profit practices with traditionally nonprofit practices.

Id. at 5. *But see* FAQ, BENEFIT CORP., <https://benefitcorp.net/faq> [<https://perma.cc/ZU3W-NFJZ>] (asserting that benefits are not “hybrids” under their definition).

7. Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 591 (2011). Reiser sums up the tension this way:

Founders of social enterprises believe profits and social good can be produced in tandem and wish to form organizations that will pursue these dual missions. They will, however, encounter obstacles to articulating and enforcing such dual missions if they adopt either a traditional nonprofit or for-profit form of organization. Nonprofit forms bar profit distribution and for-profit forms will create practical, if not legal, pressure to favor profit maximization over social good when the two come into conflict. And these two imperatives will certainly, at times, conflict.

Id. (citations omitted).

8. J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 4–5 (2012); William H. Clark, Jr. et

of corporation where the entity is set up to explicitly pursue both profit making and social interests. The benefit corporation business form is, to date, the most popular form of social enterprise legislation in the United States, with the form now authorized by thirty five U.S. states and the District of Columbia, and is also under consideration by several other states.⁹ Italy is the only country that has adopted benefit corporations into law so far.¹⁰

Concurrent with the development of benefit corporations, there is also the closely-related B Corps certification designation from the nonprofit B Labs, which also aims to alleviate this potential conflict between profits and purpose through voluntarily adopted legal and regulatory structures.¹¹ The popularity of this designation is growing for companies of various sizes. For example, there are now nearly three thousand B Corps scattered

al., *The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public*, BENEFIT CORP. 14–15 (Jan. 18, 2013), https://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf [<https://perma.cc/9EHN-QVX7>].

9. DAN BROWN, HANNA DOWNING, AVA HAGHIGHI & CAROLINA HENRIQUEZ-SCHMITZ, *MAPPING THE STATE OF SOCIAL ENTERPRISE AND THE LAW* 4 (2019), https://socentlawtracker.org/wp-content/uploads/2019/05/Grunin-Tepper-Report_5_30_B.pdf [<https://perma.cc/39YZ-NFZL>]. In the 2019 edition of this annual report of the Grunin Center for Social Enterprise Law at New York University Law School, authors found that Benefit Corporations remain the dominant form of social enterprise legislation, specifically that:

Benefit corporations are the most popular, recognized by 35 states and the District of Columbia. The L3C is offered in eight states, the BLLC in five states, and the SPC in four states. Beyond the absolute number of social enterprise laws adopted across the United States, the Social Enterprise Law Tracker reveals a number of interesting trends in the social enterprise landscape. The benefit corporation continues to be the most popular type of legal form, although in 2018, it experienced more failed legislative attempts at enacting authorizing statutes (six states) than any of the other entity types. While certainly not as widely adopted, BLLCs [Benefit Limited Liability Corporations] appear to be slowly gaining traction, with three bills under consideration in 2018, two of which have since been enacted. SPCs have not seen much activity in recent years, and legislative attempts at enacting L3C statutes failed in three states in 2018.

Id. See also *State by State Status of Legislation*, BENEFIT CORP., <http://www.benefitcorp.net/policymakers/state-by-state-status> [<https://perma.cc/S7FS-DT74>] [hereinafter *State by State Status of Legislation*] (cataloging benefit corporation information, including a tally of the adopting states and the model legislation promoted by B Lab and its supporters).

10. The Italian law, which took effect in 2016, is the Italian Financial Act for 2016, Law No. 208/2015 (2016). See Gianluca Riolfo, *The New Italian Benefit Corporation*, EUR. BUS. ORG. L. REV. 1 (2019), <https://www.semanticscholar.org/paper/The-New-Italian-Benefit-Corporation-Riolfo/bfe7eae143b4c2b2bc1a8364dcbfbdcbca4f22df> (analyzing the new corporate model introduced in Italy in 2015).

11. Murray, *supra* note 8; Clark, *supra* note 8.

across seventy-one countries.¹² The distinction between benefit corporations (the legal corporate form) and B Corps (a certification regime)—and the reasons why the distinctions are relatively unimportant for the purposes of the psychological contract with employees of these often overlapping models—is discussed in Part I.

By focusing on utilizing business techniques to achieve social goals these hybrid companies are essentially embracing an ethical approach centered on the positive social outcomes for stakeholders *beyond* profit generation. In addition, these entities—and particularly the benefit corporations and certified B Corps discussed in this Article—also aim for ethical business operations and broad stakeholder engagement. This approach is a direct response and rebuke of the shareholder maximization corporate governance justification.¹³ Also, unlike with traditional for-profit corporations, the importance of stakeholder considerations, such as fostering employee voice and participation,¹⁴ are embedded in these businesses' incorporation documents and other corporate operations guidelines.¹⁵ In the case of B Corps, successfully attaining and keeping the certification requires evidence of promoting employee welfare related to voice mechanisms, ownership, and participation in firm decision-making.¹⁶

The general view is that these hybrid legal entities and certified B Corps are ethical and that this corporeal attribute extends to how workers are treated overall.¹⁷ Consequently there is a perception that employees are

12. B Lab, *Overview* (2019), <https://www.bcorporation.net> [<https://perma.cc/2QHT-MS5Y>].

13. See RICK ALEXANDER, *BENEFIT CORPORATION LAW AND GOVERNANCE: PURSUING PROFIT WITH PURPOSE 2* (2017) for a description of the genesis of the benefit corporation becoming added to Delaware General Corporation Law at the encouragement of B Labs, the B Corp certification organization, in part as a reaction to corporate governance rules that focused only on shareholder interests.

B Lab has requirements for certification: first, the company must meet a strict standard of social and environmental performance; second, the company must have a corporate governance model that mandates accountability for all stakeholder interests. For corporations, however, that second aspect violates the shareholder primacy model central to traditional corporate law. . . .

Id.

14. See, e.g., Elizabeth Morrison, *Employee Voice and Silence*, 1 ANN. REV. ORGANIZATIONAL PSYCHOL. & ORGANIZATIONAL BEHAV. 173 (2014) (discussing the “upward voice” and which factors motivate employee participation).

15. B Lab, *Meeting the Legal Requirement*, <https://bcorporation.net/certification/meet-the-requirements> [<https://perma.cc/AY8T-YK8N>].

16. Clark, et al., *supra* note 8.

17. See, e.g., Janine S. Hiller, *The Benefit Corporation and Corporate Social Responsibility*, 118 J. BUS. ETHICS 287 (2013) (providing details about the place of benefit

better off working for hybrid entities than working for traditional for-profit corporations. It is this ethical persona with regard to stakeholder engagement that, in part, underlies the positive branding increasingly associated with benefit corporations and B Corps. These companies are diverse in terms of their size, industry, and location; and range from apparel and lifestyle companies, to food producers, environmentally-focused businesses, and a range of service providers. For now, publicly traded B Corps and benefit corporations are rare. As discussed *infra* in Part III.C. with a brief case study, the online retailer Etsy was originally a B Corp, but eventually let the status lapse a few years after going public as a result of having to address pressures from additional shareholders.¹⁸

The potential for positive spillovers for a range of potential stakeholders from these sorts of “doing well by doing good” companies is clear and thoroughly discussed in both the academic and practitioner literatures. However, an important question remains: are the embedded employee engagement and empowerment dimension of benefit corporations and certified B Corps entirely beneficial for employees? In other words, do these hybrid entities live up to the claims and high expectations that they facilitate worker empowerment and voice, and enhance employee welfare (including along metrics of career advancement and compensation) alongside other policy interests? While it may seem that benefit corporations and B Corps are unambiguously advantageous for their employees, there is more to the story beyond the rosy headlines and prominent product labels about the benefits of these new types of businesses when it comes to their employees. As the number and complexity of hybrid entities increase, so does the number of employees opting to work for these entities, and a closer examination of the tradeoffs of working for a hybrid entity is warranted. This Article critically reviews the supposed virtues of hybrid entities and B Corps when it comes to empowering and benefiting their employees, including the impact these firms have on employee dignity.

One instructive approach to understanding the employee dimension of hybrid entities is to see this relationship as an example of an addendum to the so-called “new psychological contract” in the workplace that has been used to explain recent trends in employment law.¹⁹ This unwritten contract

corporations in relation to society and corporate social responsibility).

18. David Gelles, *Inside the Revolution at Etsy*, N.Y. TIMES, Nov. 26, 2017, <http://www.nytimes.com/2017/11/25/business/etsy-josh-silverman.html>.

19. See Katherine V.W. Stone, *The New Psychological Contract: Implications for the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001) (discussing how the changes to the psychological contract can lead to situations where

deviates from the once traditional employee-employer relationship that was based on employee loyalty in exchange for job security and gradually increasing remuneration correlated to job tenure, which has broken down in the last few decades.²⁰ The approach in this Article is to examine the implicit set of promises that are now arising between hybrid entities and their employees. I characterize this exchange between hybrid firms and their employees as what I call a psychological benefit contract (PBC).

The arguments that benefit corporations and B Corps have a new psychological contract with employees draws on the well-known psychological contract theory (PCT) developed by business organizations scholars to explain the evolving employer-employee relationship.²¹ PCT posits that the employer-employee relationship is marked by the parties' understanding of the nature of the relationship and expectations for current and future interactions, which are shaped by forces like culture and law.²² The psychological contract sets expectations of employee tenure, job training, or even flexible work hours, *that are not necessarily legally enforceable rights*.²³ PCT is useful for exploring and critiquing the supposed benefits of hybrid entities to promote employee welfare because it helps explain the balance between the parties' interests.

The PBC is in essence a new version of the existing general psychological contract in the workplace, and this version is marked, on one side, by benefits and assurances (both voluntarily assumed legal and ethical obligations) provided by the employer under the auspices of being designed as a hybrid entity pursuing simultaneous social and financial goals. These include the admirable ethical treatment of workers and clearly demarcated avenues for employee voice and participation in management, alongside a range of workplace benefits that vary across companies. An intangible benefit may be the job satisfaction and "feel good effect" related to helping achieve a social mission or the ethical perspective embedded in hybrid entities from their inception.²⁴ On the other side of the agreement are

employers demand more loyalty through mechanisms such as restrictive covenants, but at the same time employers may provide less to employees in terms of reduced job security).

20. *Id.* at 552.

21. See generally DENISE M. ROUSSEAU, PSYCHOLOGICAL CONTRACTS IN ORGANIZATIONS: UNDERSTANDING WRITTEN AND UNWRITTEN AGREEMENTS (Gillian Dickens ed., 1995) (providing a theory of psychological contracting); Denise M. Rousseau, *Psychological Contracts in the United States: Diversity, Individualism, and Associability in the Marketplace*, in PSYCHOLOGICAL CONTRACTS IN EMPLOYMENT: CROSS-NATIONAL PERSPECTIVES 251 (Denise M. Rousseau & René Schalk eds., 2000).

22. ROUSSEAU, PSYCHOLOGICAL CONTRACTS IN ORGANIZATIONS, *supra* note 21.

23. *Id.*

24. See, e.g., Joseph W. Yockey, *Using Form to Counter Corruption: The Promise of*

implicit promises from the employee to remain loyal to the entity and to wholeheartedly engage in the collective efforts to achieve those social and business goals. This Article, *infra* in Part III, also explores some largely unintended ways that the new PBC in hybrid entities may undermine worker welfare in terms of things such as job mobility, advancement, and possible compromises related to wages and benefits.

Much of the focus thus far in the discussion of hybrids, such as B Corp certified companies and benefit corporations, is on the institutionalization of social entrepreneur's beyond-the-bottom-line goals and ethos in a business and legal format.²⁵ This Article, in contrast, focuses on both the potential positive impact and drawbacks of benefit corporations and B Corps on the important topic of employee welfare. In Part I, the Article first explains the impetus for the benefit corporation in the context of corporate governance, the development of stakeholder and corporate social responsibility (CSR) theories, and the ensuing debate. It also explains the development and characteristics of the B Corp certification regime, while focusing on the employee dimension of the accreditation requirements.

Next, Part II briefly examines the evolving nature of the modern employment relationship and the changing workplace in the United States to establish the context for the state of employee-employer relations generally. Part III contains a theoretical discussion of psychological contract theory. In that section I also argue that a new example of a psychological contract—the psychological benefit contract—arises between any entity with mixed social and profit goals and its employees. It then explores and evaluates how these entities may promote employee welfare and protection, worker empowerment and voice, dignity, positive branding to attract talented employees, and other policy interests. A set of conclusions follow. These include suggestions for additional research to

the Public Benefit Corporation, 49 U.C. DAVIS L. REV. 623, 641 (2015) (concluding that, in the context of benefit corporations and anti-corruption efforts, “[i]t is difficult for values to take root in a firm without a strong expression of organizational ethics and ideals. The more complex, varied, or inconsistent those values appear to be, the harder it will be for agents to discern them—let alone internalize them” and the public benefit corporation form “mitigates this risk by coming off the rack with a clear sense of mission.”) (citation omitted).

25. ANDREW KASSOY, BART HOULAHAN & JAY COEN GILBERT, BROOKINGS INST., IMPACT GOVERNANCE AND MANAGEMENT: FULFILLING THE PROMISE OF CAPITALISM TO ACHIEVE A SHARED AND DURABLE PROSPERITY 2 (2016), https://www.brookings.edu/wp-content/uploads/2016/07/b_corps.pdf [<https://perma.cc/4EW7-B3BL>] (“For business to be a long-term agent of change, two things are needed: First, *legal innovation* is necessary to align the interests of business with the interests of society and to allow companies and investors to pursue a higher purpose than just profit maximization, especially as they scale using the capital markets.”) (emphasis in original).

further explore the nature of hybrid entities' relationship to employee-stakeholders.

I. BENEFIT CORPORATIONS, B CORPS, AND THE SOCIAL RESPONSIBILITY CONTEXT

With the social entrepreneurship movement in the last few decades, it became clear that harnessing management techniques to achieve social goals could lead to positive outcomes beyond what traditional nonprofit and government models could reliably produce.²⁶ In part, benefit corporations have their origin in related concerns that the positive results of the rigor and discipline of business efficiency in pursuit of profits is in conflict with the mission-driven decision-making and stakeholder focus of nonprofit organizations. Thus, the advent of benefit corporations can be interpreted as a legal innovation to solidify and protect hybrid organizations from claims that traditional corporations legally must pursue shareholder value maximization. In addition to benefit corporation legal designation, B Corp certification requires firms to voluntarily adopt a series of policies for social outcomes focused on the environment and non-owner stakeholders, especially employees.

In order to better understand the place of employee interests within the benefit corporation model of governance, it is useful to first take a forward looking view of what the hybrid economy, in its extended and mature form, might look like to consumers. Second, this Part examines the impetus for reform that led to the new legal incorporation format. Finally, the third section of this Part places the search for a new legal option for social entrepreneurs in the context of the longstanding corporate social responsibility debate in the United States.

A. The Promise of a World Dominated by B Corps and Benefit Corporations

Imagine, for a moment, a world where you are a conscientious consumer living happily in "B Corpia," a state where all of the companies (i.e., the for-profit organizations) are certified B Corps. This enlightened jurisdiction where you happen to reside has also recently enacted benefit corporation legislation, so many of those companies are likely incorporated as benefit corporations, or will soon be, as a way of legally committing to a series of social and financial ideals. These aspirations include taking into

26. *Id.*

account the interests of a range of stakeholders—not just the owners—whenever making decisions and implementing corporate policies. This is all in pursuit of dual goals of making a profit like corporations have done for centuries alongside explicit social goals (i.e., the so-called triple bottom line of measuring success with the positive impact on people, planet, and profits). For social entrepreneurs, the State of B Corpia is their version of a utopian world where all the businesses pursue a social and environmental mission, all while making a profit—and while considering broad stakeholder interests.

In your home state that you are beginning to imagine, you will be pleased to know that on any given day you could eat well and consume a wide variety of appealing products and use many quality services all day long—and feel good about your choices, too. With the B Lab organizations directory of nearly 3,000 certified B Corps in seventy-one countries across 150 industries as your guide,²⁷ you can now embrace the “B Corp Movement” from sunrise to sunset, from your morning beverage (Equator or Stumptown Coffee, or Bigelow Tea, perhaps), to your breakfast yogurt (Stonyfield Organic, or soon Danone’s range of products may be an option if it is certified as planned), to a healthy and tasty lunch and dinner at home or at a restaurant (Cabot Creamery, Bamboo Sushi, Walden Local Meats, Tofurky, Real Oyster Cult oysters, Native American Natural Foods), or with things you bake on your own (King Arthur Flour). You could also top it off with some delicious ice cream (Ben & Jerry’s or Bluemarble) or a bite of chocolate (Tony’s Chocolonely, Divine Chocolate, or Lake Champlain Chocolates). In this world you could also purchase fashionable, eco-friendly and ethical clothing and footwear (Patagonia, Eileen Fisher, or Toms shoes), perhaps to wear on a trip you are planning (visit.org or Bodhi Surf + Yoga). You could even feel good about engaging with the services and products ranging from your home health aide, your internet service provider, environmental consultant, architect, yoga instructor, car dealer, wind and solar energy company—or even your lawyer.²⁸

Throughout this day you could also pause to reflect on the products and services of some companies in your community that you are supporting as they pursue their noble social and environmental causes, which are

27. For the update to date count of the number of certified B Corps, see the B Labs website homepage at bcorporation.net [<https://perma.cc/2QHT-MSSY>] (last visited Aug. 1, 2019).

28. For a comprehensive list of these B Corps and the nearly 3,000 currently certified B Corp businesses, visit the listing on the B Labs website at bcorporation.net/directory [<https://perma.cc/Y2QY-KM9P>], which permits searches by name, industry, and region.

baked into these hybrid business models. For example, some of these B Corps have open hiring plans that hire workers regardless of their work experience and social histories (Greyston Bakery,²⁹ whose brownies are in some of those Ben & Jerry's ice cream options) or focus on hiring workers without asking about criminal records, in part to aid their return to society after prison (Cascade Engineering).³⁰ Finally, at the end of this busy day you can toast to yourself for a life well lived and without any ethical compromise or angst about your consumption choices—whether it is with a beer (New Belgium, Brewgooder, Brewery Vivant, and others), a glass of red or white wine (Fetzer Winery), or even a fine port wine (Symington brands).

As appealing as it sounds, this state does not really exist—at least not yet. While this mythical world of B-Corp only business that was just described is not yet solidified, these are all current B Corps or examples of products and services from B Corp populated industries, even if they are not now available with easy access all in one place. As you can gather from the parenthetical examples of real B Corps and benefit corporations, some are household names for sale in nearly every convenience store or outdoor equipment retailer worldwide, while others are only familiar to their clients or customers in their specific region.

In this mythical world of the State of B Corpia, it is easy to engage with social enterprises that profess to serve both financial and social interests. However, in the real world of complex corporate governance structures where we all must live, there is actually an increasing level of access to these B Corps and others, assuming these firms have the scale and distribution network to reach your local store, or at a minimum your mailbox. Because of this increase in access, both for consumers and for employees of these hybrid entities, B Corps and benefit corporations deserve some additional scrutiny on how they serve one key stakeholder group: their employees.

29. *Open Hiring*, GREYSTON, <https://greyston.org/open-hiring/> [<https://perma.cc/LLU6-YBWS>]. See also Tina Rosenberg, *No Background Check, Drug Test or Credit Check. You're Hired!*, N.Y. TIMES, May 29, 2019 (describing the Open Hiring approach by stating, “[i]f you want a job at Greyston Bakery in Yonkers, N.Y., just north of the Bronx, it’s yours. There’s no background check, drug test, credit check or call to references. Greyston won’t even interview you.” This is because the bakery hires anyone who add their name to a waitlist and “[w]hen a job comes open and your name is next, you start work as a paid apprentice.”).

30. For the Cascade Engineering hiring policy and position on Returning Citizens, see *Returning Citizens*, CASCADE ENGINEERING, <http://cascadeng.com/returning-citizens> [<https://perma.cc/6FF9-MWX7>].

B. Background on the Benefit Corporation and B Corp Movements

For decades, the dominant model of social engagement in the U.S. was in the form of charitable donations flowing from wealthy patrons. Philanthropy (i.e., charity) has long been an important source of funding for social missions in the nonprofit context. However, since the 1990s business-minded individuals who wanted to use their commercial skills to better society have begun to experiment with variations of the existing business models. These so-called social entrepreneurs want to solve societal problems using business-focused techniques.³¹ Accordingly, “social entrepreneurs believe social good can be produced along with profits and desire hybrid forms of organization to smooth a single enterprise’s path to realizing both goals.”³²

To pursue this mix of business and social goals, several hybrid legal formats have been proposed and adopted into state law across the country. In a few years, five types of “blended” or hybrid legal forms have been adopted in various jurisdictions.³³ The benefit corporation, first enacted in Maryland in 2010,³⁴ has now been adopted into law by thirty-five states, with other states still considering draft legislation to authorize benefit corporations.³⁵

The effort to promote the passage of the Model Benefit Corporation Legislation (MBCL) across the U.S. is spearheaded by the nonprofit B Lab,³⁶ which began its efforts in 2006.³⁷ The model legislation includes a third-party standard provision, and B Lab certification is the leader among numerous available certification regimes. The third-party standard

31. See, e.g., Pirson, *supra* note 3 (discussing how businesses can implement social entrepreneurship). For a further discussion of the usage of “social enterprise,” see Murray, *Choose Your Own Master*, *supra* note 8, at 4 n.4.

32. Reiser, *supra* note 7, at 591.

33. See Murray, *Choose Your Own Master*, *supra* note 8, at 4–5 (mentioning states adopting legislation allowing low-profit limited liability company (“L3C”) and benefit corporations, as well as states with the similar benefit limited liability company statute (“BLLC”), flexible purpose corporation statute (“FPC”), or a social purpose corporation (“SPC”).

34. Reiser, *supra* note 7, at 594.

35. *State by State Status of Legislation*, *supra* note 9.

36. See B Lab, *How to Pass Benefit Corporation Legislation*, BENEFIT CORP., <https://benefitcorp.net/policymakers/how-pass-benefit-corporation-legislation> [<https://perma.cc/95KX-SQTP>] (“B Lab has assisted in passing the laws in all states that have enacted it and we are working on passing it in the majority of the remaining states”).

37. See *About B Lab*, B LAB, <https://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps/our-history> [<https://perma.cc/5S5V-TWMJ>] (discussing the founding principles and history of the B Lab nonprofit).

requirement for benefit corporations is intended to serve a transparency and accountability function to ensure that the entities continue to pursue their stated mission.³⁸

Notably, corporate entities—including traditional for-profit corporations and limited liability companies, and L3Cs—are eligible to pursue B Lab’s extensive B Corp certification process, and not just the formal, state-level authorized benefit corporation incorporation option.³⁹ To receive the B Lab certification, a business must be a corporate entity (i.e., not a sole proprietorship or a nonprofit) and either currently be a benefit corporation, or become a benefit corporation *if* the state of incorporation allows for the designation.⁴⁰ Alternatively, if becoming a benefit corporation is unavailable in the state of incorporation, the firm must amend its articles of incorporation to adopt an expanded set of duties to consider social mission and stakeholder interests in addition to shareholder interests.⁴¹

The social purpose embedded in the model of either a benefit corporation or a certified B Corp, by design, also has implications for internal stakeholders. For example, B Lab has provided model language to be added to an entity’s articles of incorporation.⁴² The language addresses legal concerns that the default fiduciary duties under state corporate governance law are inadequate to protect directors’ decisions that may balance stakeholder concerns or long-term interests to the detriment of shareholders.⁴³ Specifically, B Lab’s suggested language to amend articles

38. Transparency, in the form of corporate disclosure, is an important part of modern social reporting regimes. See David Hess, *The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights*, 56 AM. BUS. L.J. 5, 6 (2019) (noting that “[t]he regulation of business through mandatory public disclosures is ubiquitous. For instance, the primary tool of the Securities and Exchange Commission (SEC) is disclosure, not substantive regulation of a company’s governance.”). See also Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 924 (2019) for a discussion of the reporting options related to disclosing the environmental impacts of corporate actors (i.e., sustainability), with the options that are used generally in social reporting (“Experts also use a variety of terms to describe corporate sustainability and sustainability reporting. Among these are ‘CSR’ (Corporate Social Responsibility), ‘ESG’ (Environmental, Social, and Governance), ‘triple bottom line,’ and ‘societal impact.’”). *Id.* at 932. These approaches to corporate disclosure are sometimes also described as “non-financial” disclosures. *Id.* at 931.

39. See B Lab, *Certification*, <https://www.bcorporation.net/certification> [[https://perm a.cc/5E6V-SFQE](https://perm.a.cc/5E6V-SFQE)] (detailing the benefits of b-corp certification).

40. See B Lab, *Meeting the Legal Requirement*, *supra* note 15 (describing the requirements and procedures for b-corp certification).

41. *Id.*

42. *Id.*

43. *Id.*

of a corporation states, in part, that a director:

shall give due consideration to the following factors, including, but not limited to, the long-term prospects and interests of the Company and its [shareholders], and the social, economic, legal, or other effects of any action on the current and retired employees, the suppliers and customers of the Company or its subsidiaries, and the communities and society in which the Company or its subsidiaries operate, (collectively, with the [shareholders], the “Stakeholders”), together with the short-term, as well as long-term, interests of its [shareholders] and the effect of the Company’s operations (and its subsidiaries’ operations) on the environment and the economy of the state, the region and the nation.⁴⁴

Interestingly, the language mandates the consideration of the impact of any decision on employees—even retired employees—as key stakeholders. Also of note is that the language states that it is *not* “intended to create or shall create or grant any right in or for any person other than a [shareholder] or any cause of action by or for any person other than a [shareholder].”⁴⁵ The mechanism for a shareholder suit to enforce the promise of pursuing a social mission, the benefit enforcement proceeding, is spelled out in the Model Benefit Corporation Legislation.⁴⁶ In effect, this provision explicitly acknowledges the corporate governance primacy of shareholders, thus eliminating any doubts that other stakeholders may have standing to enforce compliance with the benefit corporation’s stated social mission or stakeholder engagement.

C. Benefit Corporations and B Corps in the CSR Context

The seemingly perennial debate over the proper purpose of the corporation, and if there is a social responsibility for corporations, can be simplified—albeit perhaps oversimplified—to opposing models: a

44. FREDERICK H. ALEXANDER, *THE PUBLIC BENEFIT CORPORATION GUIDEBOOK*, at app. 10 (2016), <https://higherlogicdownload.s3.amazonaws.com/GOVERNANCEPROFESSIONALS/a8892c7c-6297-4149-b9fc378577d0b150/UploadedImages/Topical%20Pages%20Documents/PublicBenefitCorporationGuidebook.pdf> [<https://perma.cc/L683-RZAT>].

45. *Id.*

46. Model Benefit Corporation Legislation § 305 (2019), http://www.benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf. [<https://perma.cc/B9CH-E4LQ>] See also Clark, et al., *supra* note 8, at 17–19 (stating that benefit corporations must file an annual report that describes how they pursued a social mission, using a third-party standard).

shareholder theory versus a stakeholder theory of the corporation.⁴⁷ On one side, the stakeholder model takes a view of responsibility that goes beyond maximizing shareholder interests to consider other stakeholders, such as customers, supplier communities, societal elements, the environment, and particularly internal stakeholders such as employees.⁴⁸ Companies may voluntarily move in a stakeholder-centric direction, perhaps because some “recognize the economic benefits of being perceived as a ‘good corporate citizen.’”⁴⁹ Some companies will “go to considerable lengths to develop this perception . . . [to] deliberately position themselves in their media relations to appeal to consumers through this strategy,” while others “have chosen to incorporate or reincorporate themselves as ‘benefit corporations’ explicitly dedicated to pursuing social and environmental goals.”⁵⁰

In contrast, the shareholder-centric explanation of the corporation—and corporate purpose—sees the entity as a vehicle for maximizing the interests of owners, with other groups having subservient interests that are, in theory, protected by a modest level of government oversight.⁵¹ Historically, the origins of a manager’s primary duty, enshrined in corporate governance rules, to serve shareholders and their interests before considering other stakeholders or societal concerns⁵² is traced to the early twentieth century writing of Adolf Berle and Gardner Means.⁵³ The agency

47. See, e.g., John Mackey, *Putting Customers Ahead of Investors*, REASON (Oct. 25, 2005), <http://www2.pitt.edu/~woon/courses/mackey.pdf> [<https://perma.cc/K7SB-KLKJ>]. In this essay that was part of a debate with shareholder Mackey, the co-founder and former CEO of Whole Foods Market, arguing for his belief:

that the enlightened corporation should try to create value for *all* of its constituencies. From an investor’s perspective, the purpose of the business is to maximize profits. But that’s not the purpose for other stakeholders—for customers, employees, suppliers, and the community. Each of those groups will define the purpose of the business in terms of its own needs and desires, and each perspective is valid and legitimate.

Id.

48. Yves Fassin, *The Stakeholder Model Refined*, 84 J. BUS. ETHICS 1, 113–35 (2009) (discussing the evolution of stakeholder categorizations over the previous 25 years).

49. STOUT, GRAMITTO & BELINFANTI, *supra* note 1, at 64.

50. *Id.* (citing Suntae Kim, Matthew J. Karlesky, Christopher G. Myers & Todd Schifeling, *Why Companies Are Becoming B Corporations*, HARV. BUS. REV. (June 17, 2016)).

51. For perhaps the most often-cited articulation of shareholder profit maximization as the purpose of business, see Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 1970, at 17.

52. See LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 15–23 (2012) (describing the history of shareholder primacy arguments in the United States).

53. ADOLF BERLE & GARDNER MEANS, *THE MODERN CORPORATION AND PRIVATE*

concerns discussed by management academics Michael Jensen and William Meckling are also credited with helping to solidify the shareholder primacy focus of managers.⁵⁴

Milton Friedman's 1970 magazine article *The Social Responsibility of Business Is to Increase Its Profits* is the best known and most influential response to arguments that stakeholders should be considered in corporate decision-making.⁵⁵ Friedman's essay is reacting to early calls for corporate social responsibility, and his primary assertion is that, "[t]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."⁵⁶ While Friedman recognized that managers are moral actors with philanthropic desires, he relegated those interests to their non-work life and essentially rejected a role for any sort of humanistic management. On the contrary, he argued that "in practice the doctrine of social responsibility is frequently a cloak for actions that are justified on other grounds rather than a reason for those actions."⁵⁷ He added that, while

it may well be in the long-run interest of a corporation that is a major employer in a small community to devote resources to providing amenities to that community or to improving its government [because that] may make it easier to attract desirable employees, it may reduce the wage bill or lessen losses from pilferage and sabotage or have other worthwhile effects.⁵⁸

Friedman's conclusion is that corporate actions, while they may have positive impact on stakeholders beyond shareholders (including employees), are justified because they are in the self-interest of the business and its owners, not out of a goal of pursuing social responsibility.⁵⁹

PROPERTY (1932). *But see* E. Merrick Dodd, *For Whom are Corporate Managers Trustees*, 45 HARV. L. REV. 1145, 1148 (1932) (offering a contrasting view in the early debate over the role of corporate fiduciaries). For a discussion of the Berle-Dodd debate about the corporation, see Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1189–90 (2002).

54. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (developing a theory of the ownership structure of the firm).

55. Friedman, *supra* note 51.

56. *Id.*

57. *Id.*

58. *Id.*

59. See *id.* (arguing that "this is one way for a corporation to generate goodwill as a by-product of expenditures that are entirely justified on its own self-interest").

In contrast, proponents of the stakeholder model of managerial decision-making for the corporation argue that the interests of non-owner stakeholders must also be considered along with shareholders' interests.⁶⁰ Initial conceptions of the stakeholder model of the corporation include primary stakeholders such as employees, customers, and suppliers.⁶¹ Over time scholars have argued that other stakeholders' interests warrant managerial consideration, including more abstract concerns such as working with the government, the media, or defending the environment.⁶²

Legal scholars have also often entered this broad discussion about the proper role of the corporation in society and the legal parameters for decisions motivated by goals other than so-called shareholder value maximization. Notably Professor Lynn Stout asserted that long-held assumptions from non-lawyer academics and some businesspeople that the corporate governance laws require shareholder primacy are false and otherwise misguided.⁶³ Stout argued at length that the misunderstanding of corporate law on the issue of shareholder primacy and maximizing shareholder value is harmful to the interests of shareholders and other stakeholders, and society.⁶⁴ Other commentators also conclude that fears of a shareholder maximization constraint on a director's discretion are both widely held and mistaken.⁶⁵ In addition, the American Law Institute's

60. See generally R. EDWARD FREEMAN, *STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH* (1984) (detailing the elements and concerns of the stakeholder approach).

61. *Id.*

62. See, e.g., Fassin, *supra* note 48 (discussing Freeman's original stakeholder model and subsequent additions to stakeholder theory leading to an "adapted stakeholder model").

63. See Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 164 (2008) (criticizing the importance of a seminal case). *But see* Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 VA. L. & BUS. REV. 177 (2008) (critiquing Stout's critique of the well-known *Dodge v. Ford* case, which was decided in 1919).

64. See STOUT, *supra* note 52 (challenging shareholder interest maximization as a requirement of United States corporate governance law). See also Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 736–37 (2005) (challenging assumptions that a corporation's managers must solely maximize shareholder profits).

65. See, e.g., Mark A. Underberg, *Benefit Corporations vs. "Regular" Corporations: A Harmful Dichotomy*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (May 13, 2012), <http://corpgov.law.harvard.edu/2012/05/13/benefit-corporations-vs-regular-corporations-a-harmful-dichotomy/> [<https://perma.cc/R6Z5-2A4J>] (discussing the impact of strongly differentiating between benefit corporations and other forms of incorporation). The shareholder interest maximization debate has had a somewhat renewed life based on recent rebuttals to Stout and others from Leo Strine, then Chief Justice of the Delaware Supreme Court. See Leo E. Strine, *Can We Do Better By Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449 (2014); Strine, *Making It Easier for Directors to "Do the Right Thing"?*, *supra* note 4; Leo E.

Principles of Corporate Governance makes clear that the directors of traditional corporations retain the discretion to consider a range of issues when executing their business judgment, including social and stakeholder issues.⁶⁶

The management literature on stakeholder theory provides some insight into the aspirational role of these new models. For example, stakeholder theory proponents assert that stakeholder salience—including traditional primary stakeholders like employees—is higher and more influential than the influence of expanded stakeholders included in a broader view of the firm, such as governments and communities.⁶⁷ This debate over the purpose of the corporation and managerial responsibilities under the law continues in various forums, perhaps most pointedly in the context of corporate social responsibility discussions.⁶⁸

Yet despite these convincing arguments from some legal academics (particularly Stout)⁶⁹ that managers already have the discretion to make long-term decisions that take into account the interest of non-shareholder stakeholders, concerns over constraints on managerial discretion have remained.⁷⁰ Many in the social entrepreneurship community continue to have concerns over managers and directors' discretion when operating in a traditional corporate structure because of arguably mixed judicial interpretations of the scope of their fiduciary duties.⁷¹ This is all happening amid a world of corporate governance where more companies are engaging

Strine, *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135 (2012).

66. PRINCIPLES OF CORP. GOVERNANCE § 2.01 (AM. LAW INST. 1994). The guidelines state initially that a corporation “should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.” In addition, a firm, “[m]ay take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business,” and “[m]ay devote a reasonable amount of resources to public welfare, humanitarian, educational and philanthropic purposes.” *Id.*

67. See Bradley R. Agle, Ronald K. Mitchell & Jeffrey A. Sonnenfeld, *Who Matters to CEOs? An Investigation of Stakeholder Attributes and Salience, Corporate Performance, and CEO Values*, 42 ACAD. MGMT. J. 507, 520 (1999).

68. See, e.g., Aneel Karnani, Opinion, *The Case Against Corporate Social Responsibility*, WALL ST. J., Aug. 23, 2010, <http://www.wsj.com/articles/SB10001424052748703338004575230112664504890> (arguing that CSR is ineffective and even harmful, and that social outcomes should remain with the authority and responsibility of government actors, not with businesses). For further discussion, see *infra*, Part I.C.

69. See, e.g., STOUT, *supra* note 52, at 11 (“[M]aximizing shareholder value is not a requirement; it is just one possible corporate objective out of many.”).

70. See Strine, *supra* note 4, at 241–42 (describing how the current corporate “accountability structure” exclusively favors stockholders’ interests in managerial decision-making).

71. Clark et al., *supra* note 8, at 7–14.

in voluntary sustainability disclosure that, along with the rise of benefit corporations, is said to be part of a trend of the merging of the worlds of social concern and corporate matters.⁷²

As a result, the efforts to find a suitable corporate legal form to enshrine the hybrid entity as a vehicle for social entrepreneurship continue, with one result being the now relatively widespread adoption of the benefit corporation since 2010.⁷³ Simultaneously, the nature of work and how employees related to employers in the United States is also in transition. These workplace trends are the subject of the next section.

II. THE EVOLVING NATURE OF EMPLOYMENT AND THE U.S. WORKPLACE

In the last few decades there have been significant changes to the work environment of U.S. employees and their expectations. During this same period, the corporate social responsibility of business and the proper role of managers have been the subject of a heated debate. This section briefly discusses some of the major trends that underlie the changing workplace and provides context for the place and possible impacts of benefit corporations and B Corp compliance on their employees.

Over the course of the late 20th century, major shifts in the employment relationship began occurring in the U.S. labor market. In a pronounced shift, the size of organized labor and collective bargaining agreements precipitously declined.⁷⁴ As a result, the protections for some workers that came with unions are potentially lost. However, another shift has occurred: a steep rise in the number of contingent workers, also known as temporary workers.⁷⁵ The number of these workers has grown and

72. STOUT, GRAMITTO & BELINFANTI, *supra* note 1, at 66. Of note is a recent statement from the 200 CEOs that make up the Business Roundtable that seemingly changes course and abandons an earlier adherence to the goal of shareholder value maximization:

Breaking with decades of long-held corporate orthodoxy, the Business Roundtable issued a statement on “the purpose of a corporation,” arguing that companies should no longer advance only the interests of shareholders. Instead, the group said, they must also invest in their employees, protect the environment and deal fairly and ethically with their suppliers. David Gelles & David Yaffe-Bellany, *Shareholder Value Is No Longer Everything*, *Top C.E.O.s Say*, N.Y. TIMES, Aug. 19, 2019, <http://www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html>.

73. STOUT, GRAMITTO & BELINFANTI, *supra* note 1, at 66.

74. See, e.g., *There’s an App for That*, THE ECONOMIST (Dec. 30, 2014), <http://www.economist.com/briefing/2014/12/30/theres-an-app-for-that> (citing Bureau of Labor Statistics data that union membership in the U.S. has declined by half since the 1990s).

75. See, e.g., Alison Davis-Blake & Joseph P. Broschak, *Outsourcing and the Changing Nature of Work*, 35 ANN. REV. SOC. 321, 322 (2009) (describing how the increased use of

doubled as a percentage of the workforce.⁷⁶ Under the older model of unions, “everybody seemed to benefit” because “workers got security, benefits and steady wage rises; companies got a stable workforce in which they could invest with a fair expectation of returns.”⁷⁷

One interesting result of the use of technology for employees and contingent workers is the recent increase in “on-demand” online labor-based business in the so-called gig economy. This includes business models such as platform-based transportation services like Uber and Lyft or targeted personal service platforms like TaskRabbit or Handy, which highlights this trend toward untethered freelance work.⁷⁸ The connotation of “freelancer” suggests a level of autonomy that could be the next stage in a long line of changes to the nature of work as great as the demise of the guild system, the advent of the industrial revolution, and the rise and fall of organized labor movements.⁷⁹ Some scholars point out that there is reason to be skeptical of employee prospects in the new on-demand economy because of evidence of firms’ opportunistic behavior and the difficulty of these dispersed employee networks to organize and push for better treatment.⁸⁰

Employment and labor law researchers have noted the impact of these macroeconomic shifts in the labor market on workers’ relationship to employers, particularly in the new knowledge economy where use of intellectual property and information management is more prominent than traditional manufacturing.⁸¹ The widespread use of technology to improve

contingent workers, including outsourcing, has changed the nature of work and the workplace).

76. THE ECONOMIST, *supra* note 74.

77. *See id.* (“But the model started to get into trouble in the 1970s, thanks first to deteriorating industrial relations and then to globalisation and computerization.”).

78. THE ECONOMIST, *supra* note 74 (suggesting through the subtitle of the article—“There’s an app for that”—that “[f]reelance workers available at a moment’s notice will reshape the nature of companies and the structure of careers.”).

79. As one discussion of the on-demand work model put it: The huge companies created by the Industrial Revolution brought armies of workers together, often under a single roof . . . this was a step down for many independent artisans who could no longer compete with machine-made goods; it was a step up for day-labourers who had survived by selling their labour to gang masters. THE ECONOMIST, *supra* note 74.

80. Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. 85, 100 (2017) (pointing out that “Uber drivers probably lack the sorts of communal ties that often enable worker organizing”).

81. *See, e.g.*, Norman D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKELEY J. EMP. & LAB. L. 287 (2006) (discussing the rise of the knowledge economy in the U.S. and implications for employee-employer contracting). *See*

efficiency in the workplace has also had important effects on the application of U.S. employment law.⁸²

For example, the treatment and status of on-demand drivers for services like Lyft and Uber have led to numerous legal battles. In one case, *O'Connor v. Uber Technologies Inc.*, Uber has argued that its drivers were independent contractors and not employees under California labor laws.⁸³ An attempt to settle the case for \$100 million was rejected in August 2016 as inadequate by the court, and other similar cases in the U.S. and elsewhere continue over the status of contingent workers.⁸⁴ While rulings on the permissibility of Uber's class action waiver clauses has led to class action de-certification for most plaintiffs in the *O'Connor* case⁸⁵ and a recent settlement proposal by Uber, the question of the employee status of these sorts of gig economy drivers remains unclear.⁸⁶

In another development in this area of law from early 2018, in *Dynamex v. Superior Court of Los Angeles* the California Supreme court adopted a new test for determining a worker's status as an employee and not an independent contractor.⁸⁷ The test used in California now presumes that when a worker is hired they are an employee, not an independent contractor.⁸⁸ While the full implications of the *Dynamex* case are not yet clear for gig economy companies, it is likely they will have a more difficult time classifying workers as independent contractors going forward.⁸⁹

The automation of human work due to technological advances and the improvement of artificial intelligence is another often discussed trend in the

also Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMP. LAB. L. & POL'Y J. 313, 313–14 (2003) (noting the impact of new information technology and global labor markets on employees' declining bargaining power).

82. Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L. J. 1, 27 (2001).

83. *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2013 WL 6354534 (N.D. Cal. Dec. 5, 2013).

84. Joel Rosenblatt & Edvard Pettersson, *Uber Deal Offers Drivers \$1 Each to Wipe Away Labor Threats Valued in Billions*, BLOOMBERG (Feb. 2, 2017), <http://www.bloomberg.com/news/articles/2017-02-02/uber-to-pay-7-75-million-to-settle-california-drivers-suit>.

85. *O'Connor v. Uber Techs., Inc.*, 904 F.3d 1087, 1094–95 (9th Cir. 2018).

86. Joel Rosenblatt, *Uber to Pay \$20 Million to Settle Driver Classification Suit*, BLOOMBERG (Mar. 12, 2019), <http://www.bloomberg.com/news/articles/2019-03-12/uber-to-pay-20-million-to-settle-driver-classification-lawsuit>.

87. *Dynamex Operations W., Inc. v. Superior Court of L.A.*, 416 P.3d 1, 34 (Cal. 2018) (adopting the so-called "ABC" test for determining employee status).

88. *Id.*

89. Hassan A. Kanu, Erin Mulvaney & Patrick Dorrian, *California Independent Contractor Test Applies Retroactively*, BLOOMBERG L. (May 2, 2019), <https://news.bloomberglaw.com/daily-labor-report/california-independent-contractor-test-applies-retroactively>.

U.S. workplace. The concern is that firms will be able to increasingly automate tasks, jobs will disappear, and the employment relationship will suffer. Predictions vary as to the likely consequences of automation with some well-publicized estimates that nearly half of U.S. jobs could be impacted,⁹⁰ although these large estimates have been tempered by clarification that these are in fact the top of the possible predicted range.⁹¹ Nonetheless, historical evidence demonstrates how technological advancements can also create new jobs and industries.⁹² Management scholars have further described the potential benefits of automation in terms of opportunities for new efficiencies and job creation even among job destruction for some employees.⁹³ Alongside the challenges to the role of the gig economy—from the back and forth estimates of the significance of the gig economy itself and role of future automation—policy makers are still trying to get a sense of the scope of the economic and moral implications of new patterns in technological displacement of traditional work.⁹⁴

Aside from concerns related to contingent and on demand workers, another important technology-enabled trend is remote work whereby employees, to varying degrees, work outside of traditional centralized office environments. These flexible work arrangements have been on the rise over the last few years.⁹⁵ Remote work arrangements can have benefits

90. *Automation and Anxiety: The Impact on Jobs*, THE ECONOMIST (June 23, 2016), <http://www.economist.com/special-report/2016/06/23/automation-and-anxiety> (citing research that “47% of workers in America had jobs at high risk of potential automation”).

91. *Will a Robot Really Take Your Job?*, THE ECONOMIST (June 27, 2019), <http://www.economist.com/business/2019/06/27/will-a-robot-really-take-your-job> (explaining that a previous misunderstanding of an academic study led to exaggerated fears of the likelihood of job loss due to automation).

92. *See id.* (discussing evidence that there is a long history of automation fears dating back to the industrial revolution and that technological displacement may create different jobs).

93. *See, e.g.*, Walter A. Hill, *The Impact of EDP Systems on Office Employees: Some Empirical Conclusions*, 9 ACAD. MGMT. J. 9 (1966) (finding that, at the time, automation was likely to increase management employment while reducing clerical workers); Leon C. Megginson, *Management in Perspective Automation: Our Greatest Asset—Our Greatest Problem?*, 6 ACAD. MGMT. J. 232 (1963) (arguing that automation would lead to positive economic changes and encourage employee adaptability).

94. For example, New York’s governor has recently appointed a panel of experts and policy makers to evaluate the economic, workforce, and ethical implications of robots on the state. Jimmy Vielkind, *New York State Creates Group to Study Rise of Robots*, WALL ST. J., July 24, 2019.

95. *See, e.g.*, GALLUP, STATE OF THE AMERICAN WORKPLACE 4 (2017) (finding that between 2012 and 2016, “the number of employees working remotely rose by four percentage points, from 39% to 43%, and employees working remotely spent more time doing so”).

for employees in terms of greater personal control over schedules and autonomy, and also for employers through reductions in overhead expenses and turnover, as well as for improving employee satisfaction.

Within all of these changes the most overarching change in the last few decades is what has been called the boundaryless career.⁹⁶ This career paradigm is one in which an individual can expect to have numerous jobs across many employers over the course of their working life. This is an era of increased job mobility where the individual who can adapt will have opportunities for personal and professional growth across an industry or industries and not simply within a single large employer.

Organizational studies scholars Arthur and Rousseau's book *The Boundaryless Career: A New Employment Principle for a New Economic Era* was influential in explaining this new way of looking at employment arrangements and defining it against the older, withering model of lifetime employment with a single firm.⁹⁷ They explain this new arrangement in contrast to the old order of predictable careers taking place over time in a single organization that is a "bounded, or organizational career" of "orderly employment arrangements achieved through vertical coordination in mainly large, stable firms."⁹⁸ Arthur and Rousseau write that the organizational career had been "the dominant employment form through the mid-1980s" that is no longer dominant.⁹⁹ As they further explain, a boundaryless career is "the opposite of 'organizational careers'—careers conceived to unfold in a single employment setting."¹⁰⁰

Finally, amongst all of these other changes, another important trend among some workers is the emphasis on seeking meaningful work—often of a socially conscious nature—with organizations that provide opportunities to be personally fulfilled at work.¹⁰¹ From the employer's perspective, this can be part of efforts to increase employee loyalty and "buy-in" for the company's mission that will ultimately benefit the business. For example, there are estimates that at least thirty percent of U.S. workers are disengaged at work alongside evidence that firms with

96. Michael B. Arthur & Denise M. Rousseau, *Introduction: The Boundaryless Career as a New Employment Principle*, in *THE BOUNDARYLESS CAREER* 3 (Michael B. Arthur & Denise M. Rousseau eds., 1996).

97. *Id.*

98. *Id.* at 3.

99. *Id.* at 4.

100. *Id.* at 5.

101. See Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-Existent Problem*, 44 *ST. MARY'S L.J.* 617, 624–25 (2013) (stating that companies were able to obtain better employees by being socially conscious).

engaged workforces have better financial performance.¹⁰² There is also evidence that employers have adapted to gain an advantage in employee recruiting by highlighting the socially conscious nature of their businesses or other activities.¹⁰³ This desire for meaningful work can be addressed by autonomy and self-directedness at work, including the participatory act of job crafting by employees.¹⁰⁴ There are, nonetheless, limits on the type of jobs and amenable workplaces that allow for job crafting.¹⁰⁵

The extent to which “mission matters” to all types of workers may be hard to determine. For instance, there is evidence that younger and highly educated workers tend to care about their employer’s social focus and workplace quality more than other groups.¹⁰⁶ It may also be the case that certain types of workers have the luxury of seeking employment with mission-driven organizations and the wherewithal to find work in the most accommodating workplaces.

While this shift toward less job security and investment in employees may work well for some types of highly-sought-after, highly-skilled workers, others in the labor force have found themselves with less power in the employment relationship when it comes to things like bargaining over restrictive covenants.¹⁰⁷ Moreover, the scale of for-profit employers in the U.S. is changing, leading to a high concentration of power in a declining number of large companies and a shift away from pensions to employer-sponsored retirement savings plans.¹⁰⁸ With all of these changes to the

102. See GALLUP, *supra* note 95 (providing survey evidence that 33% of U.S. workers are not engaged at work and asserting that engagement as measured by Gallup is related to fostering high-performing firms).

103. Blount & Offei-Danso, *supra* note 101 (discussing a perceived trend that “[e]ntrepreneurs sought to hire the best talent and discovered the most efficient strategy for achieving a competitive advantage was through differentiation. Due to competition, image became a large element of employee recruiting.”).

104. See Justin M. Berg, Jane E. Dutton & Amy Wrzesniewski, *Job Crafting and Meaningful Work*, in PURPOSE AND MEANING IN THE WORKPLACE 81, 81–86 (Bryan J. Dik, Zinta S. Byrne & Michael F. Steger eds., 2013) (defining meaningful work concepts and providing a review of the organizational behavior literature on the topic).

105. See *id.* at 99 (discussing the boundary limits of job crafting).

106. For some indication of this possible cream skimming of educated workers, see Blount & Offei-Danso, *supra* note 101, at 624.

107. See generally Norman D. Bishara & Michelle Westermann-Behaylo, *The Law and Ethics of Restrictions on an Employee’s Post-Employment Mobility*, 49 AM. BUS. L.J. 1 (2012) (applying concepts of autonomy and employee choice to the contracting relationship between employers and employees).

108. See, e.g., GERALD F. DAVIS, *MANAGED BY THE MARKETS: HOW FINANCE RESHAPED AMERICA* 191 (2009) (discussing the shift of employees as pension-holders to investors as traditional benefit plans have evolved to 401(k) plans and as employees thus become participants in the financial markets).

workplace and increased uncertainty for workers, hybrid entities may potentially play a sort of mediating role in the modern employee-employer relationship. The next section examines the potential for benefit corporations to provide an ideal business structure for fostering employee welfare, including along this job satisfaction dimension.

III. BENEFIT CORPORATIONS AND B CORPS: THE EMPLOYEE INTERESTS DIMENSION

Building on the above discussion on some of the trends in the U.S. workplace, corporate governance, and corporate social responsibility, this section now explains a theoretical view of the employer-employee relationship in light of Psychological Contract Theory. With that context, the section then begins a further inquiry into the usefulness and promise of hybrid organizations, specifically the benefit corporation legal structure and B Corps. This Part first discusses the state of the employer-employee psychological contract, applies the psychological contract theory to hybrid organizations, and then examines the likelihood that businesses such as benefit corporations and B Corps provide an advantageous business structure for maximizing employee-stakeholder welfare.

A. The Psychological Contract Theory in Employment

The discussion of psychological contract theory (“PCT”) chiefly comes from the work of organizations and scholars conducting this work since the mid 1990s.¹⁰⁹ This conception of the unwritten contract surrounding the formal employment agreement is useful to understanding not only traditional for-profit employment, but, as discussed below, this theory can also shed light on the employer-employee relationship developing among hybrid entities and their employees.

Essentially, PCT posits that the employer-employee relationship is marked by the parties’ understanding of the nature of the relationship and expectations for current and future interactions, which are shaped by forces like culture and law.¹¹⁰ Unlike explicit or implicit agreements recognized by law, the abstract psychological contract sets the terms for things as varied as expectations of job tenure, employer-provided training, or even flexible work hours, which are not necessarily legally enforceable rights.¹¹¹

109. See, e.g., ROUSSEAU, PSYCHOLOGICAL CONTRACTS IN ORGANIZATIONS, *supra* note 21 (providing a theory of psychological contracting).

110. Rousseau, *Psychological Contracts in the United States*, *supra* note 21.

111. *Id.*

In this evolving world of workplace expectations, Katherine Stone has discussed the “new psychological contract” at work in the context of human capital law and policy research.¹¹² As she explains, “the term ‘psychological contract’ refers to an individual’s beliefs about the terms of his or her employment contract . . . It is a subjective concept, expressing an individual’s belief in the existence of a bilateral relationship with his or her employer.”¹¹³

Under an older psychological contract, workers provided their long-term loyalty to employers in exchange for an implicit promise of long-term employment. However, with the shifts in the labor market, the new psychological contract in the workplace is marked by the use of short-term employment relationships where the reciprocal loyalty between employers and employees is fleeting. This, as discussed in Part III, is related to the reality that modern workers understand that they will have many jobs throughout their careers.

This new psychological contract can lead to both efficiencies and advantageous flexibility for both parties, such as the most desirable workers achieving wage gains associated with job-switching across competitors.¹¹⁴ In this short-term focused model, however, there may be less incentive or time for employers to invest in their employees. This changed workplace that is populated by a higher percentage of contingent workers with diminished loyalty to their current employer may itself lead to less job satisfaction for employees.¹¹⁵

As Professor Stone has demonstrated, the demise of the traditional internal labor markets within firms has complicated other positive aspects of the employer-employee relationship in the modern, boundaryless context—namely employee commitment and organizational citizenship behavior.¹¹⁶ This evolution means that, despite the decline of long-term relationships, “[f]irms can no longer succeed if employees simply perform their tasks in a reliable but routine manner . . . [t]hey need employees to commit their imagination, energies, and intelligence on behalf of the firm.”¹¹⁷

This leads to a paradoxical situation for employees. Employers want the best and most motivated employees with a high degree of commitment

112. Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001).

113. *Id.* at 549–50.

114. Rousseau, *Psychological Contracts in the United States*, *supra* note 21, at 263–65.

115. Davis-Blake & Broschak, *supra* note 75, at 482–83.

116. Stone, *supra* note 112, at 556.

117. *Id.*

to the firm, but the same firms do not offer a reciprocal level of commitment. The older model allowed for loyalty from both parties in the psychological contract in which the employee could rely on an implicit promise to move within the firm as long as their performance was satisfactory. This was a system of long-term relationships and, for some, lifetime employment with the same large firm. The current model, in contrast, eliminates that promise.

For employees with the requisite skills and mobility, the new psychological contract can still be rewarding. The prototypical example of the worker who thrives in the new world is a highly skilled Silicon Valley software engineer who moves easily from employer to employer based on where the newest and most highly-compensated work with the best mix of benefits is available. However, other workers who are unable to adapt and do not possess the general skills needed to succeed get left behind in terms of missing the benefits of job mobility. Those employees may falter in their careers and encounter forced mobility when their employer's needs change and without the traditional internal market at a large firm to provide retraining and other opportunities.

B. A New Psychological Benefit Contract: Hybrid Entities and Employees

The new psychological contract described above in terms of the overall private sector workforce may seem disheartening for employees. Yet, in the context of the emerging set of hybrid organizations, there is an opportunity for a new version of the psychological contract in employment that is overtly employee-focused. I call this new implicit arrangement that is embedded in the employee-employer relationship of hybrid organizations a "psychological benefit contract" or "PBC." Placing this arrangement in terms of a benefit contract is, in part, to recognize that the structure of these firms specifically includes the goal of considering an employee dimension in decision-making.

This hybrid organization-specific psychological contract is initially determined by the framing embedded in the stated purpose of these organizations to pursue both social and financial performance. In the case of the benefit corporation, the legal requirements of incorporation dictate that the hybrid organization must consider employees' interests—even retired employees—in any decision that affects that important stakeholder group.¹¹⁸ The required consideration of stakeholder impact is the defining

118. The legal and structural elements of benefit corporations and B Corps concerning

mechanism enabling the psychological benefit contract. This means that the employer is bound to provide more process and consideration to employees than is the case for traditional corporations.

This requirement seemingly institutionalizes the positive treatment of employees that may be possible, but not legally formalized, with any hybrid organization that lacks this legal designation. Thus, the psychological benefit contract in a benefit corporation is defined first by the legal commitment to take a stakeholder view of corporate purpose.¹¹⁹ Second, beyond the legal aspects of the commitment to employees, benefit corporation employees will perhaps have more intangible assurances that come with their elevated status. The positive branding of the organization is likely to attract employees interested in the hybrid's dual mission, whatever the exact focus of the social goals. With that comes some implicit promises to somehow reward those employees that are also motivated to assist in pursuing that mission. The rewards are likely to include an appreciation of their voice and participation in the organizations and access to internal labor markets akin to the old psychological contract relationship.

In the case of certified B Corps, the psychological benefit contract has a similar basis in the initial framework of the hybrid entity and its pursuit of financial and social goals. B Corp certification is even more employee-centric than just a benefit corporation structure because of the extra layer of voluntarily-assumed process, and mechanisms for voice and management participation required to achieve the designation. In either case, because these hybrid forms focus on social outcomes through accountability measures, they will appeal to certain workers that share these values, such as younger workers.¹²⁰

B Corp compliance provides an additional layer of attention to employees, and thus forms a strong psychological benefit contract, by adding in several elements to the employer-employee relationship that are

employee-stakeholders is discussed *supra* Part I.A.

119. Notably, the legal enforcement mechanism—the benefit enforcement proceeding—may be less than effective in assuring that the employee-stakeholder focus is implemented as designed in the documents of incorporation. This important issue is discussed, *infra*, in Part III.C.

120. See Chris Miller, *Millennials and Hybrid Legal Structures Are Here to Stay*, STAN. SOC. INNOVATION REV. (Jul. 1, 2016), http://www.ssr.org/articles/entry/millennials_and_hybrid_legal_structures_are_here_to_stay [<https://perma.cc/J4LS-MW94>] (arguing that “[m]illennials and the movement to pioneer hybrid legal structures—new business forms that incorporate aspects of both nonprofits and for-profits—are animated by the same historic forces,” and that both are motivated by the shared values of authenticity, transparency, and accountability, and are sector-agnostic for how their goals are achieved).

largely absent from traditional corporations. For example, B Corp employees are assured that they will have mechanisms to exercise their voice within the organization because of the available structures to express their views and concerns. B Corps are likely to integrate more opportunities for employees to participate in management decisions, which is a way to make employee voice more tangible. Certified B Corps may provide varying degrees of participation opportunities, such as participation on management boards, joint ownership opportunities, and the other ways for employees to have an influence over company policies and decisions.

Another element of the psychological benefit contract between employees and the B Corp is that the voice and participation mechanisms may include employee empowerment and training opportunities to build skills related to the company and its dual missions. These opportunities can directly impact the employee's ability to advance—internally or externally—in their career development. Such advancement can include their personal satisfaction and fulfillment, but also the increase in measurable employee welfare metrics such as job tenure, greater employment benefits and retirement savings, and simply increased compensation.

One possible effect of these opportunities for employees that are tied to the B Corp's structure is that there are also reciprocal advantages for the hybrid organization on the other side of the psychological benefit contract. The hybrid employer—whether a benefit corporation and/or a B Corp—will have expectations that the employees will be more committed to the entity's mission in a way that exceeds assumptions about employees at single-mission for-profit companies where employees operate under a new psychological contract that focuses their efforts at career advancement outside of the firm. Those same employees will be participating in the hybrid's management and decision-making and the employer can rely on the collective expertise, paired with potentially more institutional knowledge from longer-employed workers, to improve both the social and economic missions.

The psychological benefit contract, thus, can be summed up as having reciprocal expectations and potential advantages for both the hybrid organization and for the employees. These expectations stem from the very hybrid nature of an organization with a stakeholder as well as a profit-making focus. Employees will expect more opportunities for participation and voice, as well as opportunities for training, and access to increased benefits and internal labor markets. On the other side of the benefit contract, the benefit corporation or B Corp is able to count on a high level of loyalty and commitment to the hybrid's dual missions, as well as

perhaps the employee's willingness to compromise on some parameters such as competitive compensation. In the most positive view of the psychological benefit contract, both the interests of the employer and the employee are aligned so that both are enthusiastically striving for a common mission. The next section goes further and explores what are some of the positive outcomes of the benefit contract in employment, as well as some of the potential drawbacks, when viewed critically from an employee welfare dimension.

C. Do Hybrid Entities Truly Protect and Empower Employees?

In light of the new psychological benefit contract with hybrid organizations, the next issue is to evaluate how employees of these entities actually fare in terms of their personal welfare and other outcomes. This section first presents a specific example of certified B Corps that underwent a major transition phase and then discusses the employee-focused aspects of the benefit corporate structure generally. Ultimately, the section evaluates benefit corporations on various employee welfare dimensions to determine if these entities are able to maximize employee interests in a manner that is superior to other existing legal formation options.

Etsy, the popular online marketplace for handmade and artisanal items, is perhaps the cautionary tale for social entrepreneurs, particularly those who dream of taking their business ideas to scale. As it grew quickly, Etsy remained known as a socially-driven company that was heralded as a champion of stakeholder engagement and progressive business practices operating an online marketplace. The company eventually became a certified B Corp, but not a benefit corporation, a designation that was not originally available in the State of Delaware where Etsy is incorporated.¹²¹ Etsy embraced and marketed its status as a socially responsible company and, since it became a certified B Corp in 2012, Etsy was able to raise its B Corp certification score by twenty-five points.¹²² The company was also known as an exceptional place to work. For example, Etsy reported an 80% employee satisfaction rate in 2013, which

121. See Alex Barinka, *Etsy's IPO Is a Direct Challenge to Wall Street's Beliefs: Will Investors Embrace a Company that Says it Cares About More than the Bottom Line?*, BLOOMBERG NEWS (Apr. 2, 2015), <http://www.bloomberg.com/news/articles/2015-04-02/etsy-s-ipo-is-a-direct-challenge-to-wall-street-s-beliefs> [<https://perma.cc/4UXF-U347>] (stating that Etsy has been a certified B Corp for over three years).

122. Katie Hunt-Morr, *Etsy's 2013 Values & Impact Annual Report*, ETSY (Feb. 13, 2014), <https://blog.etsy.com/news/2014/etsy-values-impact-annual-report-2013/> [<https://perma.cc/HBE4-7EF7>].

was 20% higher than the United States company average at the time.¹²³

Etsy is particularly notable for the precedent that it set when becoming a publicly-traded company in the 2015, which made it the largest certified B Corp ever listed on an exchange.¹²⁴ With the new pressures of dispersed shareholders, some wondered if Etsy could continue a tradition of extraordinary treatment of its employees.¹²⁵ These employee-centric initiatives at Etsy had included providing a majority of the cost of healthcare, wages in excess of a living wage, and perks like pay for time volunteering outside of work time and organic meals at the office.¹²⁶ Of note is that Etsy was never a benefit corporation, but would have had to convert to that format in the future to maintain its status as a certified B Corp incorporated in Delaware—although that change became more difficult to undertake because of the required shareholder vote once the company went public.¹²⁷ The issue was that under B Lab rules, Etsy had to have become a benefit corporation by August 2017 or lose its B Corp status.¹²⁸ Etsy's choice of not convert to a benefit corporation prior to going public may have been related to concerns about negative reaction from potential investors.¹²⁹

Once Etsy became a public company, it was closely watched for signs that it is straying from its social aims and emphasis on all stakeholders, not just shareholders.¹³⁰ In particular, as the company grew and faced the

123. ETSY, ETSY VALUES & IMPACT ANNUAL REPORT 2013 26 (2014), http://blog.etsy.com/news/files/2014/02/Etsy-Progress-Report_2013.pdf [<https://perma.cc/Z825-BKLU>]

124. In April 2015, Etsy filed its Form S-1 with the Securities and Exchange Commission to begin the public offering process. Barinka, *supra* note 121.

125. *Id.*

126. *See id.* (“At Etsy, this includes giving all employees 40 hours of paid volunteer time every year, paying employees more than 40 percent above the local living wage, and covering 80 percent of workers’ health insurance premiums, according to the company’s 2013 Values & Impact Annual Report.”).

127. *See* Therese Poletti, *Etsy IPO Challenges Company’s Socially Conscious Reputation*, MARKETWATCH (Apr. 7, 2015), <http://www.marketwatch.com/story/etsy-ipo-challenges-companys-socially-conscious-reputation-2015-04-07> [<https://perma.cc/QW4R-8QA5>] (writing that a shareholder vote is now required).

128. *See* Gelles, *supra* note 18. Etsy later received an extension from B Lab in which to incorporate under the Delaware Public Benefit Corporation statute, the company’s new management the B Corp certification was abandoned. *Id.*

129. One leading commentator, for instance speculates “that the company’s investment bankers, led by Goldman Sachs, and its lawyers, may have advised Etsy against becoming a benefit corporation before the IPO” because “[n]obody wants to be first, they don’t want to make mistakes, there is no precedent, they don’t want financial exposure” and “a company committed to the social good in addition to profits is often viewed unfavorably by stock investors.” Poletti, *supra* note 127.

130. As one journalist put it, “[w]ill life as a public company change Etsy? We’ll know by 2017.” *Id.*

pressures of stockholders to act with shorter-term interests in mind, it was closely watched to see if the benefits to employees remain or get lost to cost cutting in the name of profit generation. Moreover, Etsy would serve as an important test case to see if a socially-minded company can scale up and still live its stakeholder-focused values: will employees remain highly satisfied with their jobs and how will the pressures of the market impact employee welfare at the company?

The first few years of Etsy's life as a public company have been difficult on a few dimensions. Issues with further scaling the company have led to periods of declining growth and then shareholder concerns, which have come to threaten its "high-minded long-term mission."¹³¹ With the new pressure to perform financially, one CEO was fired and the new CEO has made hundreds of further job cuts, with the obvious harm to employee morale.¹³² Some of the employee perks and the Etsy culture have changed amid the new pressures of being a public company, leading some to question the ability of hybrid companies to maintain all of their founding values, at least if they aspire to larger scale operations and financial success.¹³³

Despite the demise of some of Etsy's social and employee-centric initiatives when faced with the harshness of public market shareholder pressures, do benefit corporations (and B Corps) uniquely create positive spillovers for employee stakeholders? Do these hybrid entities treat employers better than other legal forms? To address these questions, this section next examines the likelihood that benefit corporations have a positive impact on employee welfare and interests, including workplace quality and wages, job satisfaction, including branding to attract

131. See Gelles, *supra* note 18. In describing Etsy's concerns after its initial public offering, one profile of the company pointed out that:

once Etsy went public in 2015, it was evaluated just like any other company traded on the stock market. By late last year, expenses were growing fast. And even as the company reported \$88 million in revenues during the third quarter, it posted a net loss of \$2.5 million. After a few quarters of tepid results, investors grew impatient and a classic clash of corporate governance came spilling into view - how would a company like Etsy balance the short-term demands of its shareholders with its high-minded long-term mission?

Id.

132. See Gelles, *supra* note 18.

133. *Id.* (noting that Etsy is likely to see financial growth under the new management and with cost cutting, "but it may never again be the sensitive community fostered by [the found and previous CEO]," and "[o]nce a beacon of socially responsible business practices with a starry-eyed work force that believed it could fundamentally reimagine commerce, Etsy has over the past year become a case study in how the short-term pressures of the stock market can transform even the most idealistic of companies").

employees, and the participatory role of employees in corporate governance, including the promotion of employee voice. This section also discusses the issues of employee benefit enforcement proceedings as a possible mechanism for protecting employee interests, in addition to other attributes of the benefit corporation model, such as the third-party certification process.

i. Workplace Quality and Wages

From B Lab's perspective, it is clear that employees see advantages with these sorts of hybrid social enterprises related to workplace quality. For instance, the B Lab website claims that "B Corps create higher quality jobs and improve the quality of life in our communities" and "[a]s a result of our collective success, individuals and communities will enjoy greater economic opportunity, society will address its most challenging environmental problems, and more people will find fulfillment by bringing their whole selves to work."¹³⁴ While there does not appear to be research yet on some traditional measurements of workplace quality, like worker safety on the job, there is of course anecdotal evidence of the quality of B Corp and benefit corporation offices and job sites, including increased efforts by manufacturers such as Patagonia to improve working conditions in factories as a member of the Fair Labor Association.¹³⁵

Competitive wages also matter for attracting and retaining talented workforces, and B Lab recognizes that with a certification metric related to the percentage of a company's workers receiving a living wage. Although, it must be noted that what employees' value in a workplace is a complex question, and salary is not always at the top of the list of what matters in a particular position.¹³⁶

134. *Why B Corps Matter*, SISTEMA B, <http://www.sistemab.org/en/b-corp/why-b-corps-matter/> [<https://perma.cc/T85F-LPRH>].

135. See Patagonia, *Beyond Factory Audits with the FLA*, THE CLEANEST LINE (Nov. 9, 2010), <https://www.patagonia.com/blog/2010/11/beyond-factory-audits-with-the-fla/> [<https://perma.cc/64UK-GKPB>] (discussing Patagonia's audit by the Fair Labor Association and compliance with CSR procedures).

136. Interestingly, for employees several factors, including a company's values, matter more than salary. A recent large scale survey of workers found that, for U.S. workers, the top 10 workplace factors that matter most are: 1. Company's financial stability; 2. Good relationships with superiors; 3. Good work-life balance; 4. Company values; 5. Appreciation for your work; 6. Good relationships with colleagues; 7. Job security; 8. Interesting job content; 9. Employer reputation; 10. Attractive fixed salary. Rainer Strack, et al., *U.S. Workers: A Little Less Swagger*, BOS. CONSULTING GROUP & NETWORK (Oct. 6, 2014), http://www.bcgperspectives.com/content/articles/human_resources_leadership_talent_us_workers_little_less_swagger/ [<https://perma.cc/3BN9-UWKQ>].

Another feature of benefit corporations broadly related to compensation is that, for employees from certain backgrounds, there are loan forgiveness programs from a handful of business schools. At least three high-profile business schools—New York University’s Stern School of Business, Yale School of Management, and Columbia Business School—have extended their loan forgiveness programs to cover graduates employed at benefit corporations or other social enterprises, like certified B Corps.¹³⁷

Interestingly, working at a B Corp, or for that matter any mission-driven organization, and being satisfied with the work might actually suppress wages for employees. If employees value intangible benefits from their work and derive value from working for a socially minded organization, they may be willing to accept lower wages.¹³⁸ Over time it is also possible that salaries at mission-focused entities will not grow as fast as in for-profit companies. Moreover, it is possible that benefit corporation employees will choose to stay in their current position longer because of the company’s attractive values and intangible benefits, and thus forgo the possible wage increases from job mobility.¹³⁹

ii. Job Satisfaction and Branding for Employees

A commonly accepted value of the benefit corporation and B Corp is that the hybrid form provides a differentiator in branding between the social mission usually associated with nonprofit organizations and the efficiency of for-profits.¹⁴⁰ One of the reasons for adopting the benefit

137. See, e.g., Murray, *supra* note 8, at 52 (discussing the labor cost aspects of social enterprises, including loan forgiveness options and suggesting that the programs “could have a significant impact on attracting talent to social enterprises”).

138. See *id.* (stating that “even without loan repayment, prospective employees may be willing to accept a somewhat lower salary if they believe the company is socially and environmentally responsible”).

139. Whether benefit corporations actually provide higher wages relative to other entities is an empirical question that, to my knowledge, has not yet been addressed. The best comparison may be to nonprofits since they are, like benefit corporations, mission driven.

140. Reiser, *supra* note 7, at 622. Professor Reiser explains that “[n]onprofits, in essence, sell their halo. When they offer products to consumers, affiliations to partners, and jobs to employees, they are selling a sense of righteousness or trustworthiness, or both.” In contrast, she adds, “[f]or-profits sell efficiency. They offer products of the highest quality and lowest price, affiliations to draw in revenue, jobs that pay a market wage, and training in efficient business operations.” But what about social entrepreneurs who have one foot in both sectors? Those entities, Reiser explains, “see themselves as offering something quite different. The profit motive makes them lean, efficient, innovative. But, their social mission keeps them virtuous and responsible. Thus, neither traditional nonprofit nor for-profit forms send the right message.” *Id.*

corporation is branding. This is because the choice of the legal benefit corporation form and the discipline of third-party certification broadcasts a signal to markets and stakeholders that the entity will intentionally blend business and social goals.¹⁴¹ For example, one of the reasons B Lab cites for “Why Companies Certify” is for employers to “Attract Talent.”¹⁴²

Closely related to the concept of employee branding in this case is the issue of individual employee identity. In the hybrid entity context, the psychological benefit contract can connect to the employee’s identity-related desires to feel good about their work and their employer—essentially garnering some intangible, yet valuable, affinity for the organization’s mission.¹⁴³ This is consistent with findings about the internal benefits of Corporate Social Responsibility (CSR) to employees by potentially fulfilling their psychological needs and other positive impacts.¹⁴⁴

One reason branding could be important as an indication of greater employee welfare is that the third-party certification to benefit reports could lead to a virtuous cycle where the benefit corporation’s managers value and reward employees in order to maintain the certification and improve the worker welfare ratings in, for instance, the company’s B Lab-monitored B Impact Report. The reported findings on employee satisfaction at companies like Etsy (in the period before its public offering) seem to bolster that claim.¹⁴⁵ However, branding a company as socially conscious or “good” to work for, is not a new technique that the benefit corporation model can claim as having pioneered.¹⁴⁶ Moreover, other more established reporting and accountability standards, including ones with a worker welfare component like the Global Reporting Initiative, already exist.¹⁴⁷ Ultimately, benefit corporation reporting will be most useful if it is

141. *See id.* at 592 (citing “four reasons why social entrepreneurs view hybrid organizational forms attractive: articulating and enforcing a dual mission, expanding funding streams, branding their enterprises, and achieving sustainability”).

142. B Lab, *Certification*, <https://www.bcorporation.net/certification> [<https://perma.cc/5E6V-SFQE>].

143. James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 509 (2015) (explaining how the breakdown of the old psychological contract fits in a context of how individual identity of works may be stronger within non-profit enterprises).

144. *See* Shuili Du, C. B. Bhattacharya & Sankar Sen, *Corporate Social Responsibility, Multi-faceted Job-Products, and Employee Outcomes*, 131 J. BUS. ETHICS 319, 320 (2015) (studying the impacts of CSR activity on positive employee outcomes).

145. ETSY, *supra* note 123, at 26.

146. Blount & Offei-Danso, *supra* note 101, at 624.

147. GLOB. REPORTING INITIATIVE, G4 SUSTAINABILITY REPORTING GUIDELINES: REPORTING PRINCIPLES AND STANDARD DISCLOSURES (2013), <https://www.globalreporting.org/resource/library/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf> [<https://>

shown to provide a superior level of disclosure and accountability through things like B Labs' random on-site audit of the B Corps it certifies.

While benefit corporations might attain a level of authenticity¹⁴⁸ by taking on extra fiduciary and reporting duties toward their social mission, it is unclear if that alone will ensure a better environment for employees over the long term. The risk is that branding to attract employees who value mission-driven employers will devolve into merely marketing and a sort of "virtue washing" at the expense of genuine dedication to improving society. Nonetheless, while it is difficult to draw conclusions about employee welfare from the reporting requirement, there remains an "embeddedness" factor. In other words, benefit corporations take on a voluntary mandate to consider "the employees and workforce of the benefit corporation, its subsidiaries and suppliers"¹⁴⁹ and that orientation may indeed set a positive and sustainable tone for the entire organization.

iii. Enforcement Mechanisms for Employee Welfare

The transparency, and the likely related accountability, coming from the required reporting on employee issues for benefit corporations and B Corps is an important part of publicizing and cataloging employee welfare. Yet, if *actually* promoting employee interests and participation is not required, per se, by the hybrid structures, are there more concrete mechanisms for enforcing employee welfare in these entities beyond the boundaries set up by employment law that apply to workers in any business?

The accountability mechanism unique to benefit corporations is the often discussed benefit enforcement proceeding.¹⁵⁰ The proceeding is described in § 305 "Right of Action" of the Model Benefit Corporation Legislation.¹⁵¹ Standing to use the proceeding mechanism is limited to the entity itself, a director of the entity, owners of 2% of outstanding shares, or

perma.cc/D6DV-8SYL].

148. See, e.g., B Lab, *Certification*, <https://www.bcorporation.net/certification> (describing how companies may obtain an additional certification as a benefit corporation).

149. Clark et al., *supra* note 8, at 11 (citing § 301 of the Model Benefit Corporation Legislation).

150. See Jacob Hasler, Note, *Contracting for Good: How Benefit Corporations Empower*, 100 VA. L. REV. 1279, 1319 (2014) ("Shareholders can enforce director compliance in a number of ways: by initiating a benefit enforcement proceeding, by starting a proxy contest, or by voting for governance terms that require regular auditing of directors' actions, as in certified B Corps.").

151. Clark et al., *supra* note 8, at 19.

5% owners of the benefit corporation's parent entity.¹⁵² In theory, other persons with standing to use the proceeding can be authorized to do so in the benefit corporation's articles of incorporation or bylaws.¹⁵³ Although the inclusion of employees as "other persons with standing" could be added to the corporate documents, that seems unlikely, in part because of the fear of nuisance suits related to a broader definition of parties with standing to use the enforcement proceeding.¹⁵⁴

As scholars have pointed out, the benefit enforcement proceeding is an imperfect mode of ensuring stakeholder protection. This is the case, "because only shareholders (and a few internal stakeholders) possess the right to sue, employees and various external stakeholders might not be protected, especially given the statutory bar from liability, except in the most extreme circumstances."¹⁵⁵ The enforcement proceeding can represent a form of legal risk for benefit companies; however, thus far there are few if any examples of reported litigation using this derivative action option.¹⁵⁶

By design, employees and other non-owner stakeholders are excluded from the right to sue a benefit corporation using the new benefit enforcement proceeding. Accordingly, it seems unlikely that employees or others effectively use the mechanism to force compliance with the consideration or substantive elements of employee interests. Theoretically, a right of redress for employees could be added to the corporate documents, or employees could qualify for standing if they are also a director or at least a 2% owner. While both cases are possible, however, it seems increasingly unlikely that as benefit corporations grow and mature any single employee will continue to qualify as a significant enough of an owner to achieve standing under those terms.

Another option to enforce compliance with a duty to consider employees or other stakeholders would be if the duty was spelled out

152. See *id.* (referring to § 305 (b) (1)-(2) of the Model Legislation).

153. See *id.* (referring to § 305 (b) (iv) of the Model Legislation).

154. The potential problem of nuisance suits if the standing to sue is too expansive is raised as a justification to § 305 in the Comment that immediately follows the draft language for that section. *Id.* at 20.

155. J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 366 (2014).

156. See Jesse Finfrock & Eric L. Talley, *Social Entrepreneurship and Uncorporations*, 2014 U. ILL. L. REV. 1867, 1881-82 (2014) (finding only one case using a benefit enforcement proceeding). See also Ian Kanig, Note, *Sustainable Capitalism Through the Benefit Corporation: Enforcing the Procedural Duty of Consideration to Protect Non-Shareholder Interests*, 64 HASTINGS L.J. 863 (2013) (discussing the idea of having a corporate entity in which profit seeking and the public good are united aims).

contractually in employment agreements. Along those lines, a collective bargaining agreement could function as a mechanism to protect employees, although unionization could put workers in opposition to employers from a bargaining and overall workplace cooperation perspective. Ideally, in such a stakeholder-friendly model, employer-employee cooperation should be the norm. However, either option seems unworkable and unlikely given the current nature and size of most hybrid entities. In any event, a contract enforcement option is not unique to the benefit corporation structure and requires significant *ex ante* bargaining that would need to include discussion of broader than usual stakeholder goals, with meaningful build-in protection mechanisms.

iv. Employee Participation and Voice

Another important element of employee welfare is the extent to which an organization allows for employee participation. The level of transparency and accountability provided by the third-party certification and reporting is a particularly promising aspect of benefit corporations when it comes to promoting employee welfare. Employee voice is important both as a management tool for business decision-making, but also has impact on employee happiness and engagement in the workplace.¹⁵⁷ There is also evidence that the empowerment of employees in B Corps enables those employees, because of their ownership and meaningful participation in the entity, to act as effective managers of external stakeholders.¹⁵⁸ In contrast, poorly designed organizational structures and management issues can lead to the negative situation of employee silence in the workplace.¹⁵⁹

157. See generally Elizabeth Wolfe Morrison & Frances J. Milliken, *Speaking Up, Remaining Silent: The Dynamics of Voice and Silence in Organizations*, 40 J. MGMT. STUD. 1353 (2003) (reviewing the literature on employee voice and reasons for employee silence).

158. See Anne-Laure P. Winkler, Jill A. Brown & David L. Finegold, *Employees as Conduits for Effective Stakeholder Engagement: An Example from B Corporations*, J. BUS. ETHICS 1 (2018), <https://doi.org/10.1007/s10551-018-3924-0> [<https://perma.cc/5NWP-8BG6>] (examining whether there is a link between employee ownership and involvement and their association with external stakeholder engagement).

159. Elizabeth Wolfe Morrison & Frances J. Milliken, *Organizational Silence: A Barrier to Change and Development in a Pluralistic World*, 25 ACAD. MGMT. REV. 706, 712–14 (2000). In their article Professors Morrison and Milliken identify organizational structures, policies, and practices related to the promotion or suppression of employee voice. They explain, “that when the unspoken yet dominant ideology within an organization is that (1) employees are self-interested, (2) management knows best, and (3) disagreement is bad, then management will erect structures and policies that either do not facilitate or that discourage upward information flow.” *Id.* at 712–13. Then Morrison and Milliken argue

Although benefit corporations are not generally focused on employee voice promotion as an outcome, the reporting structure and stakeholder consciousness of the model makes it more likely that employee participation and employee voice is fostered.¹⁶⁰ This is, in part, due to the greater likelihood that benefit corporations will take employee opinions and input into account more than traditional corporations because of the third-party reporting requirements. For instance, the B Corp certification requires quantifying worker welfare on dimensions like worker communication mechanisms, the percentage of employees with a living wage, and employee ownership.¹⁶¹ Moreover, by definition, benefit corporations and certified B Corps are designed to take into account employee-stakeholder interests and to balance those interests with the traditional profit-making role of all businesses.

v. Alleviation of Negative Trends in the Employment Landscape

Part II above discussed some of the important trends in the U.S. employment environment in relation to the state of employee welfare and the sometimes precarious position of employees in the American workplace. Whether or not benefit corporations alleviate some of the negative trends affecting workers is an important question to add to this discussion.

One way to frame and subsequently explore the issues is to return to the issue of a new psychological benefit contract in the hybrid entity workplace. In doing so, it is important to keep in mind that hybrid entities still have a relatively short track record in the economy with which to assess their relationship with employees. Despite the many positive aspects of the Psychological Benefit Contract for hybrid entities' employees, there are, however, potential tradeoffs for the employee that are often ignored or

that “[t]his tendency will be reinforced by managers’ desire to avoid any threatening information or feedback. Two common structural features of organizations dominated by these beliefs will be high centralization of decision making and lack of formal upward feedback mechanisms.” *Id.* at 713.

160. See Frances J. Milliken, Cindy M. Schipani, Norman D. Bishara & Andrea Prado, *Linking Workplace Practices to Community Engagement: The Case for Encouraging Employee Voice* 29 *ACAD. MGMT. PERSP.* 405, 415 (2015) (“Although [benefit corporation] statutes do not necessarily have an explicit voice-empowerment goal, increased opportunities for employee voice are embedded in this new corporate governance structure.”).

161. See RYAN HONEYMAN, *THE B CORP HANDBOOK: HOW TO USE BUSINESS AS A FORCE FOR GOOD* 53–55 (2014) (listing the elements of the “Quick Assessment of Worker Impact” metric for the required categories of compensation, benefits, and wages reporting).

glossed over in discussions of the virtues of benefit corporations and certified B Corps. Certainly, these types of entities will also appeal to employees who share their mission-based effort, even when professional gains and compensation may be sacrificed. Employees may receive short-term advantages like initial job satisfaction from the relationship as promised, but employees also risk longer-term harms to their welfare, such as stunted career advancement and reduced compensation. For example, in agreeing to the hybrid-entity psychological contract, the employee may be giving up advantages found in traditional for-profit entities, such as higher wages, career advancement, and professional skills development often afforded by larger and more market-based corporations where job mobility is more readily available.

Nonetheless, ideally benefit corporations and B Corps will demonstrate that they can provide longer term and higher quality employment opportunities, as well as invest in their workforces. The incentive to invest in employees may be high, in part, because as the benefit corporation space becomes more crowded and competitive, these entities will find themselves competing for talented employees—both from the private sector and elsewhere. Yet, in the short term, benefit corporations that are still in a startup stage may feel forced to rely on a higher percentage of freelance and other types of contingent workers until the company is larger and strong enough to support a workforce for the long term. A positive view of the benefit corporation model does give some hope that workers will be able to build a long-lasting and mutually enriching psychological contract with benefit corporations.

CONCLUSION

Assessing the employee welfare dimension of benefit corporations is a complex undertaking, and this Article is an attempt to begin that research process. This current research endeavor has looked at these emerging issues for hybrid entities and their employees in the context of the changing nature of the U.S. workplace, as well as from employee voice, compensation, and enforcement of stakeholder salience perspectives. From those perspectives, it seems that the benefit corporation form and B Corp certification have the potential to be innovative vehicles for employee voice and participation because of the mission-driven nature of the company and the depth of required reporting on employee issues. The benefit corporation model and B Corp's propensity to deliver superior employee compensation and other workplace benefits is difficult to measure and may not be known until further research is conducted as these

entities mature and grow. There is also a distinct possibility that there may be tradeoffs in terms of pay and traditional employee benefits for employees who want the potential psychological rewards of working for mission-driven hybrid organizations.

In addition, the most effect mechanisms for effectively enforcing a benefit corporation's promise to consider stakeholder interests and particularly important employee interests remains uncertain. As Professor Reiser concludes, "the benefit corporation lacks robust mechanisms to enforce dual mission, which will ultimately undermine its ability to expand funding streams and create a strong brand for social enterprise as sustainable organizations."¹⁶² Phrased in another, perhaps more cynical way, "[t]he reality that corporate decision-making is largely a function of corporate choice rather than corporate law is no less true for the new benefit corporation. The B Corp legal regime no more guarantees that those companies will make 'socially responsible' decisions than existing law prevents directors from doing so."¹⁶³

The important role for social entrepreneurs to promote employee welfare as part of their mission is seemingly more tied to the fulfillment of the third-party standards requirement than it is an automatic spillover of the benefit corporation's legal form. In other words, keeping up with the third-party standards and making them part of the company's "DNA" is crucial for hybrid entities—whether a benefit corporation, B Corp or any social enterprise—in order to stay true to the implicit promise to successfully execute a dual business and social mission. Social entrepreneurs who opt for benefit corporation formation or B Corp status have gone a long way already to commit to going beyond the "being nice and getting credit for it" superficial aspects of complying with bare minimum corporate social responsibility norms. There remains, however, a risk of these hybrid entities to overpromise but under deliver to stakeholders—including employees and shareholders—and then end up alienating several crucial constituencies simultaneously.

Finally, from the employee's perspective, what matters is the commitment of the B Corp or benefit corporation's managers and directors to properly represent stakeholder-promotion ideals, and not necessarily the legal form of the entity or certification compliance. In contrast, another potentially great risk to the legitimacy of the nascent benefit corporation model and B Corp certification is that if these businesses do not live up to their social enterprise ideals and the stated social mission—or if they fail at

162. Reiser, *supra* note 7, at 593.

163. Underberg, *supra* note 65.

financial performance—then they will leave employees disillusioned and more likely to leave for other organizations, perhaps somewhere else on the non-profit to hybrid to for-profit spectrum.