

## Berle and Social Businesses: A Consideration

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### I. INTRODUCTION

Adolf Berle and Gardiner Means's *The Modern Corporation and Private Property*<sup>1</sup> has been thoroughly mined by scholars and used to support numerous theses,<sup>2</sup> yet it still provides a rich source for consideration. Corporate legal theory has not yet determined how best to treat the issue of separation of ownership and control or fully resolved "who should receive the profits of industry."<sup>3</sup> Berle's belief that corporate powers should be exercised in trust for shareholders has had limited traction, but his ideas continue to influence debate. This Article takes Berle's statement that "when a convincing system of community obligations is worked out . . . the passive property right of today must yield before the larger interests of society"<sup>4</sup> to argue for the creation of social businesses. Social businesses are entities that are profit-making, but not profit-maximizing—non-loss, non-dividend firms dedicated to serving a social goal. Just as *The Modern Corporation* was, in part, a response to the political and economic times in which it was written, our current economic struggles and the wrath directed at corporate communities provide an opportunity to consider alternatives to current business models and to think about how we might expand our view of the role and purpose served by business entities by encouraging social ventures. Such an expansion will benefit not only the populations reached by businesses' activities, but also the perception of business itself.

Some may doubt that social businesses can be created and maintained. After explaining the concept of social businesses and why Berle

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1. ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (Transaction Publishers 1991) (1932).

2. See, e.g., Symposium, *In Berle's Footsteps—A Symposium Celebrating the Launch of the Adolf A. Berle, Jr. Center on Corporations, Law & Society*, 33 SEATTLE U. L. REV. 777–1376 (2010).

3. BERLE & MEANS, *supra* note 1, at 293.

4. *Id.* at 312.

might have supported their creation, I will suggest legal frameworks that could accommodate them and discuss several social businesses currently in operation in Bangladesh. By no means do I suggest that all businesses should operate in the social business form. I argue instead that there is room for both traditional profit-maximizing firms and social businesses in the corporate lexicon, and that the addition of social businesses will greatly enrich the landscape. Berle was prescient in noting, “[B]usiness practice is increasingly assuming the aspect of economic statesmanship.”<sup>5</sup> Business entities play a critical role in society, beyond their economic impact. Social businesses allow the “social” aspect of the social science of economics to regain credibility in the conversation about the function of business.

## II: WHAT SOCIAL BUSINESSES ARE AND WHY BERLE MIGHT HAVE ENCOURAGED THEIR CREATION

It may seem antithetical to suggest that Berle, long associated with the concept of shareholder primacy, might support a form of business entity that does not care about maximizing returns to shareholders. But Berle cared a great deal about the power exercised by firms and the accompanying responsibility. Recognizing the growth of public corporations and the separation of ownership and control that occurred in the “quasi-public” corporate form, he argued that such entities owed “[n]ew responsibilities towards the owners, the workers, the consumers, and the State . . . .”<sup>6</sup>

Proponents of social businesses make similar arguments. Corporations have become dominant economic actors at every level of our society. Social businesses are a means to harness the power of the corporate form and use it to further societal welfare, a notion perfectly in keeping with Berle’s viewpoint. Also, the creation of social businesses is a reaction to changing economic and social times, just as Berle’s understanding of the structure and function of the corporate form depended on an understanding of the historical and temporal context in which he wrote.

The idea that businesses should operate not just to make money but also to address social concerns is gaining traction around the globe. A 2000 Business Week/Harris poll asked Americans which of the following statements they supported: (1) corporations should have only one purpose, to make the most profit for their shareholders, and the pursuit of that goal will be best for America in the long run; or (2) corporations should sometimes sacrifice some profit for the sake of making things

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5. *Id.* at 313.

6. *Id.* at 7.

better for their workers and the communities in which they operate?<sup>7</sup> Ninety-five percent of the respondents selected the second option.<sup>8</sup>

Leading business people are recognizing society's desire to have businesses do more than maximize profits. The book, *Creative Capitalism: A Conversation with Bill Gates, Warren Buffet and Other Economic Leaders* is one prominent example of the groundswell of interest in this idea.<sup>9</sup> The book is a compilation of essays and commentary on capitalism, philanthropy, and global development that takes as its starting point a speech Bill Gates delivered at the World Economic Forum in Davos.<sup>10</sup> In that speech, Gates acknowledged that many of the world's problems are too big for philanthropy—even on the scale of the Gates Foundation—and that free-market capitalism would need to help solve them.<sup>11</sup> In the same compilation, Ed Glaeser notes, “[I]f more corporations are going to be ‘creative,’ then we surely need to consider new contractual forms that reflect the fact that firms may want to do other things in addition to making money for their shareholders.”<sup>12</sup> This is both an acknowledgment of the power of business to address social needs and recognition of the prevailing strength of Berle's emphasis on shareholder primacy.

To be sure, many established businesses currently participate in programs designed to address global social problems. One of many is (RED), a project that works with major companies including, among others, Nike, Starbucks, and Dell to make unique branded products and donates fifty percent of the proceeds from these products to the Global Fund to invest in HIV and AIDS programs in Africa.<sup>13</sup>

Other ventures try to adopt a hybrid model under which a for-profit company also runs (and finances) a related nonprofit venture. Yet another model alters the traditional foundation model (which limits the type of investments foundations can make)<sup>14</sup> by joining for-profit and nonprofit investing. The Omidyar Network is a prominent example of such a hybr-

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7. Robert Hinkley, *28 Words to Redefine Corporate Duties: The Proposal for Corporate Citizenship*, MULTINATIONAL MONITOR, July–Aug. 2002, at 18–19, available at <http://multinationalmonitor.org/mm2002/02july-aug/july-aug02corp4.html>.

8. *Id.*

9. CREATIVE CAPITALISM: A CONVERSATION WITH BILL GATES, WARREN BUFFET, AND OTHER ECONOMIC LEADERS (Michael Kinsley ed., 2008).

10. Bill Gates, Remarks at the World Economic Forum (Jan. 24, 2008), in CREATIVE CAPITALISM, *supra* note 9, at 7.

11. *See id.* at 7–16.

12. Ed Glaeser, *Let's Move Beyond Milton Friedman's Icy Purity*, in CREATIVE CAPITALISM, *supra* note 9, at 62.

13. *See How (Red) Works*, (RED), <http://www.joinred.com/aboutred> (last visited Mar. 28, 2011).

14. *See generally* Michael D. Gottesman, *From Cobblestones to Pavement: The Legal Road Forward for the Creation of Hybrid Social Organizations*, 26 YALE L. & POL'Y REV. 345 (2007).

id fund. Omidyar is an organization started by eBay founder Pierre Omidyar that “has completely abandoned the traditional foundation structure [to fund] both for-profits and non-profit projects that will add up to social good and market-rate returns”<sup>15</sup> and is “dedicated to harnessing the power of markets to create opportunity for people to improve their lives.”<sup>16</sup> It consists of a 501(c)(3) and a limited liability company, using the LLC to invest in for-profit entities and the 501(c)(3) to make grants. Omidyar Network’s work is based on the belief that “business can create extraordinary opportunity and value, and that market-based solutions can generate significant social returns.”<sup>17</sup>

By advocating for the creation of social business, I am not suggesting that these types of programs and hybrid ventures be discontinued. Their efforts contribute great value and make real differences; however, it should be acknowledged that, while the relatively rare large and well-funded ventures of this type may enjoy long-term success, in other cases the hybrid model is not ideal.

“This conjoined structure really has problems . . . . Embedded in it is an inherent risk that individuals are profiting from donations that were made for public benefit. . . .” On occasion, the need to generate returns for investors overwhelms the social mission. In other cases, the business falters altogether and cannot support the non-profit.<sup>18</sup>

Whenever the nonprofit, socially motivated component of an enterprise is in any way dependent upon the for-profit component, potential problems lurk due to the tension between the dual goals of profit-making (maximizing) and advancing social welfare.

Social businesses are different in important ways from these approaches that try to harness the power of business to advance social welfare. The idea of a social business was first conceptualized by Mohammad Yunus, the founder of the Grameen Bank (the Bank) and the winner of the 2006 Nobel Peace Prize—together with the Bank—for his pioneering work in microcredit.<sup>19</sup> A social business, as conceived by Profes-

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15. Douglas McGray, *Network Philanthropy: The Men Behind eBay Are Leading a High-Tech Revolution that is Turning Charitable Giving on its Head*, L.A. TIMES, Jan. 21, 2007, § 1 (Magazine), at 14.

16. *About Us*, OMIDYAR NETWORK, [http://omidyar.net/about\\_us](http://omidyar.net/about_us) (last visited Mar. 28, 2011).

17. *Financials*, OMIDYAR NETWORK, [http://omidyar.net/about\\_us/financials](http://omidyar.net/about_us/financials) (last visited Mar. 28, 2011).

18. Stephanie Strom, *A Marriage of Differing Missions*, N.Y. TIMES, Oct. 26, 2010, at B1 (quoting Kevin Doyle Jones, Partner, Good Capital).

19. *The Nobel Peace Prize 2006*, NOBELPRIZE.ORG (Apr. 2, 2011), [http://nobelprize.org/nobel\\_prizes/peace/laureates/2006/](http://nobelprize.org/nobel_prizes/peace/laureates/2006/).

sor Yunus, is part of the burgeoning field of social entrepreneurship<sup>20</sup> but has a very precise, narrow definition.<sup>21</sup> To qualify as a social business, an entity must engage in ordinary, viable business enterprise. It must identify and fill a market need for goods or services. Unlike a traditional business, however, a social business must be created and run for the express purpose of pursuing specific, articulated social goals, rather than maximizing profit.<sup>22</sup> It must, at a minimum, cover its costs and will ideally generate profits. A social business competes in the marketplace with other social and traditional, profit-maximizing ventures. It is completely self-sufficient, not dependent on grants or donations for its daily operations. It is in all respects a typical business, except that instead of providing returns to its shareholders, it uses what would have gone to shareholders to further societal welfare. Investors receive back the amount of their

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20. For further discussion of the relation between social entrepreneurship and social business, see *infra* Part III.

21. Those who are skeptical about the possibilities presented by social businesses should take note that Mr. Yunus and the Grameen Bank showed similar innovation when they developed the notion of microcredit. Microcredit was initially viewed as a “radical experiment.” See Isobel Coleman, *Defending Micro Finance*, FLETCHER F. WORLD AFF., Winter 2005, at 182. The experiment began in the 1970s. By the 1980s, it was seen as a better alternative to traditional development programs that generally involved large-scale, capital-intensive infrastructure projects such as dams and power plants, funded by large-scale international financial institutions such as the World Bank. Projects funded under this “top-down” bureaucratic approach had numerous flaws. They were often co-opted by the governments whose populations were intended to benefit from the project, were largely designed and implemented without the participation of the target populations, and often not only failed to achieve their desired result, but also caused serious adverse consequences in the communities in which they were implemented.

In contrast to this top-down approach, microcredit reaches target populations directly and provides the poor with access to markets through the provision of credit, capital, and training. Its success is attributable to many factors, chief among them its use of market mechanisms to achieve its aims. Microcredit “explicitly uses market incentives to create a credit market for the poor . . . characterized by two features: readily available funds and repayment requirements.” Kenneth Anderson, *Microcredit: Fulfilling or Belying the Universalist Morality of Globalizing Markets?*, 5 YALE HUM. RTS. & DEV. L.J. 85, 87 (2002).

From its humble beginnings, microcredit has grown exponentially and has gained currency across the political spectrum and with international institutions, including those that at one time relied exclusively on traditional development models. Some of the high points in the rise of microcredit include, but certainly are not limited to, the following examples: in 1998, The United Nations General Assembly declared that 2005 would be the International Year of Microcredit, and in 1999, the World Bank, in conjunction with a consortium of international lending groups, created the Consultative Group to Assist the Poor (CGAP), which now operates with a multimillion-dollar budget. Perhaps the ultimate recognition of the utility of microcredit and express acknowledgment of the important role it now plays in development and poverty alleviation came in 2006 when Mohammad Yunus and the Grameen Bank were awarded the Nobel Peace Prize “for their efforts to create social and economic development from below.” NOBELPRIZE.ORG, *supra* note 19.

22. Although there are similarities between them, social businesses differ from social entrepreneurship. Social entrepreneurship is driven by an individual or individuals and may take any number of forms. A social business is a very precise business model—a non-loss, nonprofit company with a social objective. Thus, a social entrepreneur may start a social business, but the concepts are distinct.

original investment, enabling them to reinvest in another such venture, but receive no other economic return from the social business.

Social businesses in general may take one of two forms, although each must fulfill the requirements detailed above. The first, a “Type I” social business, is started by its investors to address a specific social concern and reinvests all of its profits in expanding the business to better address that concern. Examples of Type I social businesses (discussed in greater detail below) include enterprises such as a water treatment and delivery operation that provides potable water to otherwise underserved areas and a yogurt factory that makes a product that provides nutritional value to populations facing malnutrition issues. A “Type II” social business is a profit-making company owned by poor or otherwise disadvantaged people, either directly or through a holding entity. The profits of a Type II social business may be used to benefit both the employees of the entity and the community in which it is located. Examples of Type II social businesses include a fisheries operation that employs individuals who would otherwise not be able to find work.

The critical difference between a social business (whether Type I or Type II) and a traditional business lies not in the business model used, but in the goals pursued. Unlike a traditional business, any profit generated by a social business must be used (after repayment to its investors of their original investment) to further the enterprise and its social goals.<sup>23</sup> A social business thus eliminates the profit-maximization goal of traditional enterprises and instead focuses on benefit maximization. This clearly presents difficult governance issues, but those issues differ from those identified by Berle in important ways.

First, a social business requires that traditional corporate fiduciary duty analysis be reconsidered. Shareholder primacy cannot be the driving force behind directorial action. The concern that Berle voiced that “[t]he stockholder is therefore left as a matter of law with little more than the loose expectation that a group of men, under a nominal duty to run the enterprise for his benefit, and that of others like him, will actually observe this obligation”<sup>24</sup> is removed. Stockholders in a social business cannot expect directors to run the enterprise for their benefit because they become shareholders knowing that this is not the case.

Furthermore, the problems associated with the separation of ownership and control that so troubled Berle are not the same in a social business. While there clearly are “owners” of a social business in that shares are sold (and eventually may be traded if the long-term goal of a social

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23. MUHAMMAD YUNUS, CREATING A WORLD WITHOUT POVERTY: SOCIAL BUSINESS AND THE FUTURE OF CAPITALISM 24 (2008).

24. BERLE & MEANS, *supra* note 1, at 244.

stock market is realized), the interests of such owners are very different from the interests of owners of a traditional business. Because all of the profits of a social business go towards furthering the goals of that business, investors in a social business tend to invest because they support the goals of the enterprise, not for personal enrichment. While the lack of a personal profit motive on the part of shareholders does not eliminate the governance issues of a social business, it does significantly reduce them by aligning the interest of managers and owners more closely. Managers will be rewarded for operating a business that successfully advances the social goals valued by its owners.

Acknowledging that the concept of shareholder primacy vanishes with the creation of a social business raises the question of why anyone would invest in a social business. Skeptics may believe that no rational individual or entity would ever choose to invest in such an entity because that investment offers no more economic return than a return of the original amount invested. With limited investment funds, why would any person or company elect an investment with no potential upside when there are other possibilities available that offer the chance of superior investment returns?

Several reasons underlie the decision to invest in a social business. On an individual level, an investor's personal identification with and support for the social goals of the business provide strong incentive to become involved. Further, many individuals have a strong impulse to give to "worthy" causes—demonstrated by the \$303.75 billion given as charitable donations in the United States in 2009.<sup>25</sup> "Giving" the money to a social business in the form of an investment in a social business is a preferable method of supporting desired goals because the monies invested this way are not simply "given" but are returned to the investor, who can then use that capital again (ideally to invest in another social business!). Social business investing does not need to replace charitable giving, but can serve as another outlet for those wishing to use their capital to further social good.

Companies also have incentives to invest in social businesses. Social ventures can provide important access to markets, which companies can then capitalize on with their profit-maximizing operations. There is a large and as yet mostly untapped market at the "bottom of the pyra-

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25. See *Charitable Giving Fell 3.6 Percent in 2009, 'Giving USA' Finds*, PHILANTHROPY NEWS DIGEST (June 20, 2010), <http://foundationcenter.org/pnd/news/story.jhtml?id=296700002>. This amount reflects a 3.6% decline from prior years—not surprising given the state of the economy in 2009. See *id.*

mid.”<sup>26</sup> If a social business serves that market, a participant in that venture may gain access to populations it otherwise would have difficulty reaching.<sup>27</sup> Additionally, companies may recognize that a social business can provide them with useful research and development opportunities. Social businesses allow experimentation and exploration free from the constraints of a traditional, profit-maximizing model. Results of such efforts may produce outcomes that can be transferred to other markets. Finally, a venture that is operating as a nonprofit may choose to invest in a social business so that it may begin to operate on a for-profit basis and thereby escape continued reliance on grants and donations for survival.

In sum, while there are many challenges to encouraging investment in a social business, the same can be said for encouraging investment in any venture. There are rational incentives for such investment, and skepticism should not prevent progress in the creation of companies intended to further social good.

### III. IS THE CREATION OF SOCIAL BUSINESSES POSSIBLE UNDER CURRENT U.S. LAW?

I have argued elsewhere that U.S. corporate law, with its emphasis on shareholder primacy, does not at present easily lend itself to the creation of social businesses.<sup>28</sup> This should not deter us from seeking to harness the power of capitalism to achieve social good. Just as Berle recognized that the traditional conceptions of property that formed the basis for U.S. corporate law had ceased to be accurate and that “[n]ew terms, connoting changed relationships [had] become necessary,”<sup>29</sup> so too is it now time to expand our understanding of the purposes and functions that business entities may play. Surely not every venture can or should be a social business, but there is room in the marketplace for this business model. As corporations gained in size and influence, Berle acknowledged their increasing importance on the economic, social, and political scenes of his time. Now there is growing recognition that governments and charities alone cannot solve the serious social problems facing our society and that the power of corporations should be brought to bear

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26. See generally C.K. PRAHALAD, *THE FORTUNE AT THE BOTTOM OF THE PYRAMID* (2006) (discussing the wisdom of targeting the “poorest of the poor”).

27. The desire to reach untapped markets was one of the incentives that caused Groupe Danone to enter into a social business in Bangladesh. See *infra* Part IV.A. In fact, skeptics suggest that this may be the driving motive behind entry into such ventures by large, profit-driven corporations. While motivations are difficult to discern, the bottom line is that the social business *was* created and the social needs are being met. As long as the result is achieved, does it matter why it happened?

28. Celia R. Taylor, *Carpe Crisis: Capitalizing on the Breakdown of Capitalism to Consider the Creation of Social Businesses*, 54 N.Y.L. SCH. L. REV. 743 (2009/2010).

29. BERLE & MEANS, *supra* note 1, at 303.



upon them.<sup>30</sup> With this perspective in mind, let us consider what steps could be taken to encourage the growth of a social business sector.

There are several scenarios under which social businesses could begin to flourish. One approach simply uses existing “unincorporation”<sup>31</sup> forms. Another relies on the creation of a new business entity—either a “B Corporation” or the LC3, a low-profit LLC. These possibilities are discussed below.

#### *A. Unincorporation Forms of Business Entities: Limited Partnerships and Limited Liability Companies*

The prevailing emphasis in U.S. corporate law on shareholder primacy makes the traditional corporate form a poor entity choice under which to attempt to organize and operate a social business, due to the fiduciary duty concerns this emphasis places on corporate directors. The ordinary corporate model simply does not accommodate the functions of a social business whose very purpose is not to maximize wealth, but to enhance social good. While the ability of corporations to engage in socially directed action (including making charitable donations) is now widely accepted, such actions are still subject to fiduciary duty limitations.

But what of other types of business entities? Just as the ways of conducting business had evolved and developed when Berle was writing *The Modern Corporation*, so too have dramatic changes occurred in the models of business entities now available for entrepreneurs to consider. Most important among these changes is the growth in the use of the unincorporation model, including limited partnerships (LPs) and limited liability companies (LLCs).

Unincorporations offer to organizers of social businesses advantages not available under traditional corporate law. Most importantly, under Delaware law (and the law of at least ten other jurisdictions), organizers of unincorporations can contractually limit or eliminate fiduciary duties,<sup>32</sup>

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30. See, e.g., CREATIVE CAPITALISM, *supra* note 9; YUNUS, *supra* note 23, at 3–19.

31. This term is credited to Larry Ribstein, who writes widely on the subject. See, e.g., Larry E. Ribstein, *The Unincorporation and Corporate Indeterminacy*, 2009 U. ILL. L. REV. 131.

32. The LP version (the LLC version is substantively the same) provides:

(d) To the extent that, at law or in equity, a partner or other person has duties (including fiduciary duties) to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement, the partner’s or other person’s duties may be expanded or restricted or eliminated by provisions in the partnership agreement; provided that the partnership agreement may not eliminate the implied contractual covenant of good faith and fair dealing.

(e) Unless otherwise provided in a partnership agreement, a partner or other person shall not be liable to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement for breach of fiduciary duty for

subject only to the prohibition that the charter documents for such entities “may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.”<sup>33</sup> Rather than relying on default rules of fiduciary obligation, the parties in an unincorporation do the work themselves by fashioning contracts (charter documents) that provide the discipline and incentives that corporations expect from fiduciaries.

Uncorporations’ ability to eliminate or restrict fiduciary duties does not exist in laws governing corporations, which typically limit waivers of the duty of care by retaining a good faith qualifier.<sup>34</sup> This ability gives organizers of unincorporations the opportunity to carefully draft organizational documents to create social businesses that do not seek to maximize shareholder welfare. If the charter documents of the entity are explicit in the purpose and functioning of the entity and make it clear that no return over the original investment will be due to shareholders, those contractual terms should prevail over claims that directors must always maximize profits.

In a 2003 speech, Delaware Supreme Court Chief Justice Myron T. Steele endorsed the view that contractual terms explicitly stating managerial obligation in an unincorporation context should take precedence over corporate fiduciary duties.<sup>35</sup> In that speech, Chief Justice Steele stated that when dealing with unincorporations, courts should begin their analysis by looking to the parties’ agreement and applying a contractual analysis rather than analogizing to traditional notions of corporate governance.<sup>36</sup> The default good faith provision found in the relevant unincorporation acts should be considered only when it is clear that the parties

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the partner’s or other person’s good faith reliance on the provisions of the partnership agreement.

(f) A partnership agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a partner or other person to a limited partnership or to another partner or to an other person that is a party to or is otherwise bound by a partnership agreement; provided that a partnership agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.

DEL. CODE ANN. tit. 6, § 17-1101(2011).

33. *Id.* § 17-1101(f) (applying to LPs); *id.* § 18-1101(e) (applying to LLCs). At least thirteen other state LLC statutes provide for waiver of fiduciary duties without specific restrictions. See LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN & KEATINGE ON LIMITED LIABILITY COMPANIES § 9 apps. 9-6 (2d ed. Supp. 2009).

34. See, e.g., DEL. CODE ANN. tit. 8, § 102(b)(7) (2011).

35. Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1 (2007).

36. *Id.* at 1.

“would have agreed to proscribe the act later complained of . . . had they thought to negotiate with respect to that matter . . . .”<sup>37</sup>

Assuming that the organizational documents for a social business are drafted clearly, investors in that business should be aware of the purpose of the entity when they make their investment; because they know that shareholder primacy will not be the driving purpose of the venture, they will not be able to argue that nonprofit maximization would have been proscribed. Thus, the default good faith requirement of the relevant unincorporation legislation (typically demanding no bad faith deviation from an implied contractual obligation of good faith) would not be implicated.

Founders of an unincorporation designed to operate a social business will need to exercise great care in drafting their organizational documents, but there is some guidance from the courts as to how fiduciary carveouts may be interpreted. In *Miller v. American Real Estate Partners*, Vice Chancellor Strine explained what factors the Delaware courts will consider when determining whether the organizers of an unincorporation intended to waive default fiduciary duties.<sup>38</sup> Although the court applied default fiduciary duties, it emphasized the importance of the agreement:

The DRULPA puts investors on notice that fiduciary duties may be altered by partnership agreements, and therefore that investors should be careful to read partnership agreements before buying units. In large measure, the DRULPA reflects the doctrine of *caveat emptor*, as is fitting given that investors in limited partnerships have countless other investment opportunities available to them that involve less risk and/or more legal protection. For example, any investor who wishes to retain the protection of traditional fiduciary duties can always invest in corporate stock.<sup>39</sup>

The court also emphasized that

just as investors must use due care, so must the drafter of a partnership agreement who wishes to supplant the operation of traditional fiduciary duties. In view of the great freedom afforded to such drafters and the reality that most publicly traded limited partnerships are governed by agreements drafted exclusively by the original general partner, it is fair to expect that restrictions on fiduciary duties be set

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37. *Id.* at 17 (quoting *Katz v. Oak Indus., Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986)). *See generally*, Ribstein, *supra* note 31 (discussing Delaware cases applying this principle to permit waiver of fiduciary duties in LPs and LLCs).

38. *Miller v. Am. Real Estate Partners*, No. CIV.A.16788, 2001 WL 1045643, at \*7 (Del. Ch. Sept. 7, 2001).

39. *Id.* at \*8 (footnote omitted).

forth clearly and unambiguously. A topic as important as this should not be addressed coyly.<sup>40</sup>

*Miller* thus indicates that generally in unincorporation cases in Delaware, an explicit agreement will be enforced according to its terms.<sup>41</sup> While the courts have not suggested specific language, they have indicated that explicit, unambiguous terms removing (or reducing) traditional fiduciary duties will be honored. As noted by Chief Justice Steele, Delaware law “leaves little, if any, room for argument over whether the contract relationship has triumphed over the status relationship in Delaware limited partnership and limited liability company internal governance scrutiny.”<sup>42</sup>

To the extent that the agreement does not explicitly exclude default duties, the court will apply such duties unless they cannot be reconciled with the terms of the agreement. Organizers of unincorporations intended to be operated as social businesses can use this guidance to carefully delineate the rights and expectations of investors at the outset and thereby avoid application of the traditional fiduciary duties that are implicated by shareholder primacy.

The unincorporation business form presents great opportunities for people organizing businesses with explicit social goals. At this stage of development, however, there are still impediments. Unincorporations formed to operate as social businesses would receive no tax advantage and therefore might not be as attractive an investment vehicle for social contributors. Further, although several jurisdictions allow the elimination of fiduciary duties through contract in unincorporations, not all follow that approach, creating some uncertainty as to the full extent of protection afforded. Additionally, even in a jurisdiction whose law permits contractual limitations on fiduciary duties, complete elimination in the manner suggested above has yet to be tried and is, therefore, untested. Finally, the unincorporate regime was not crafted with the intent to allow businesses to actively advance social good. While the model may be flexible enough to accommodate such ventures, there might be problems signaling and identifying the goals and mission of any particular unincorporation. Clarity in the marketplace is important; therefore, a traditional unincorporate entity may not be the best alternative to use when organizing a business with the purpose of advancing social good.

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40. *Id.* (footnote omitted).

41. *Id.* at \*7–12.

42. Steele, *supra* note 35, at 14.

### *B. Other Entity Choices*

Some proponents of an expanding role for business entities in advancing social good recognize the problems discussed above. Rather than work within existing and confining legal regimes, these proponents advocate the creation of new legal forms that would perhaps better serve their goals. Two such entities that have generated significant attention are the B Corporation and the LC3, each of which is discussed below.

#### 1. B Corporations

B Corporations (“B” stands for benefit or beneficial) were originally conceived of by Jay Coen Gilbert. They are corporations that choose to qualify under a certification system that designates them as socially responsible to consumers and investors. B Corporations agree to engage in “triple bottom line” accounting, focusing on social, environmental, and economic returns. Examples of such entities include Ben and Jerry’s, Burt’s Bees, and Numi Tea, among others.<sup>43</sup> To gain the “B Corporation” designation (granted by B Lab), a corporation must be incorporated in a state that has a constituency statute allowing directors to consider the interests of stakeholders and must amend its articles of incorporation to state explicitly that managers must consider the interests of employees, the community, and the environment.<sup>44</sup> B Corporations must also pay B Lab one-tenth of one percent of revenue and score at least 40 out of 100

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43. *B Corp Directory*, B CORPORATION.NET, <http://www.bcorporation.net/community/search> (last visited Mar. 29, 2011).

44. The recommended language for inclusion in a B Corporation’s articles of incorporation states:

In discharging his or her duties, and in determining what is in the best interests of the Company and its shareholders, a Director shall consider such factors as the Director deems relevant, 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 and its subsidiaries, and the community 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 society and the economy of the state, the region and the nation.

*Legal Roadmap*, B CORPORATION.NET, <http://survey.bcorporation.net/become/legal.php> (last visited Mar. 29, 2011). Also specifically recommended for inclusion is language designed to preempt fiduciary duty claims:

Notwithstanding the foregoing, any Director is entitled to rely on the definition of “best interests” as set forth above in enforcing his or her rights hereunder, and under state law and such reliance shall not, absent another breach, be construed as a breach of a Director’s fiduciary duty of care, even in the context of a Change in Control Transaction where, as a result of weighing other Stakeholders’ interests, a Director determines to accept an offer, between two competing offers, with a lower price.

*Id.*

on a survey B Lab administers to rate the corporation's adherence to social goals.<sup>45</sup>

The hope of B Corporation supporters is that the language in a B Corporation's articles will provide sufficient protection so small businesses will be less reluctant to take on outside investors for fear that those investors will insist on profit-maximization. The danger that a socially driven business may be forced to move away from its social goals due to shareholder pressure is demonstrated by the fate of Ben & Jerry's. Known for its socially progressive policies, the company received a buyout offer from the Dutch conglomerate Unilever in 2000.<sup>46</sup> Founders Ben Cohen and Jerry Greenfield resisted the offer and, with other investors, put together a counteroffer of their own at a lower price.<sup>47</sup> Shareholders of the publicly traded company sued, and corporate law mandated that the directors accept the higher offer with the end result that Ben & Jerry's was acquired by Unilever in April 2000 for \$326 million.<sup>48</sup> Had Ben & Jerry's been a B Corporation at the time, it theoretically could have relied on that status as an additional defense to the takeover.

B Corporation advocates received a boost when Maryland became the first jurisdiction to legally allow the creation of B Corporations in April of 2010.<sup>49</sup> Maryland's law lets businesses commit to a specific public good and requires businesses to report on their contributions to that goal and submit to auditing of their impact.<sup>50</sup> Vermont followed suit in May 2010, passing the Vermont Benefit Corporations Act.<sup>51</sup> Other jurisdictions, including California and Colorado, are considering similar legislation.

While official recognition of B Corporation status is a step forward for proponents of the new entity form, significant problems with the use of the form remain. The ability to state in articles of incorporation that a goal of the company is furthering social good does little to determine how that company will be treated under established principles of corporate law. Questions also remain about the legal implications of the form.

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45. More information on the requirements for becoming a B Corporation is available online. See *Become a B Corporation*, B CORPORATION.NET, <http://www.bcorporation.net/become> (last visited Mar. 29, 2011).

46. Hannah Clark, *A New Kind of Company*, INC., Nov. 29, 2007, at 23, available at <http://www.inc.com/magazine/20070701/priority-a-new-kind-of-company.html>.

47. *Id.*

48. *Id.*

49. John Tozzi, *Maryland Passes 'Benefit Corp.' Law for Social Entrepreneurs*, BLOOMBERG BUSINESSWEEK (Apr. 13, 2010), [http://www.businessweek.com/smallbiz/running\\_small\\_business/archives/2010/04/benefit\\_corp\\_bi.html](http://www.businessweek.com/smallbiz/running_small_business/archives/2010/04/benefit_corp_bi.html).

50. I am unaware of any Maryland corporations that have adopted the B Corporation status to date.

51. VT. STAT. ANN. tit. 11A, § 21.01-.14 (2011).

For instance, would the suggested language in a B Corporation's articles of incorporation provide it any real legal protection if it is sued by a shareholder alleging a breach of directorial fiduciary duty for putting stakeholder interest ahead of, or even on par with, shareholder interest? If B Corporation status does not alter the underlying concept of shareholder primacy, that status will not protect B Corporation directors in such a situation. The requirement that B Corporations be established in jurisdictions that have corporate constituency statutes highlights this uncertainty, given the weak protection these statutes afford.<sup>52</sup>

B Corporation statutes in states such as Maryland and Vermont do not explain the impact of granting "for benefit" status on traditional corporate governance concerns. This leaves many questions unanswered. Can shareholders of a B Corporation change the law applicable to their entity through the recognition of stakeholder interests in their charter documents, or must the corporate law of the state in which such an entity incorporates be modified to expressly allow such a shift? Is the B Corporation a likely vehicle for current public corporations, which would have to generate sufficient voting support to amend the articles to include B Corporation designation? Will a B Corporation incorporated in a jurisdiction that allows directors to consider stakeholder interests be legally protected in its business activities in a jurisdiction that does not?

Practical concerns about B Corporations must also be considered. Such corporations will be limited in their access to capital, as investors seeking maximum economic returns will direct their money elsewhere. Unlike true social businesses, B Corporations are expected to generate returns for their investors. Thus, while investors in social businesses do not evaluate their investment in a social business in the same pool as their investments in return-generating investments, investments in a B Corporation would be placed in that pool, and B Corporations might find it hard to compete.

Additionally, it may be difficult to maintain clear focus on the social goals that constitute part of a B Corporation's mission because, unlike with social businesses, those goals are only one part of the reason for the being of the entity, not the reason the venture was established in the first instance. "Legacy drag" may set in, meaning once the original founder of the B Corporation is no longer the driving force behind its operations, the focus may change, and the social aspect of the entity may lose importance. To the extent B Corporations articulate general statements about their missions and strive to "further community interests,"

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52. See LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 104-05 (2001).

for example, the goals may become more difficult to define. It may then become more challenging to clearly articulate methods of achieving the goals, thus presenting opportunity for intra-corporate disagreement.

Finally, even if B Corporation certification became popular and the legal issues were resolved, such entities would still be limited to a “do no harm” type of social responsibility. By this I mean that directors of B Corporations would be legally entitled to disregard the notion of shareholder primacy and take other stakeholder interests into account, but they would not be legally entitled to ignore shareholder interests. B Corporation directors may decide not to take a particular action that would be profit-maximizing because they conclude that it would harm the environment (thereby doing no harm), but they still must be concerned that their actions ultimately redound to the benefit of their shareholders. Unlike the managers of a social business, the managers of a B Corporation may not act *exclusively* to advance a social good.

## 2. L3Cs: Low-Profit Limited Liability Companies

Another recent innovation in business entity form is the L3C, or low-profit limited liability company, a variant of the LLC specifically intended to allow the entity to pursue social goals. L3Cs are organized in the same way as ordinary LLCs but are designated as low-profit organizations with explicit charitable or educational goals. The purported advantage of using the L3C form is the ability to enable a properly organized L3C to qualify as a suitable recipient of program related investment (PRI). In brief, PRI is investment from private grant-making foundations that support socially beneficial activity. PRI at present does not provide a significant amount of capital for social enterprise because there are severe hurdles. To ensure that an investment qualifies as PRI (and thus is appropriate for the foundation to engage in and will count towards the required five percent of net worth that foundations must spend each year), the foundation must ensure that the investment or loan satisfies particular criteria<sup>53</sup> and typically must seek assurance from the Internal Revenue Service that the investment or loan qualifies. This can be an expensive and time-consuming process and prevents the effective use of PRI funds for social enterprise investment.<sup>54</sup>

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53. For example, in making the investment or loan, the foundation (1) must be motivated solely by a desire to accomplish its exempt purpose; (2) may not have as a significant motivating factor the production of income or the appreciation of property; and (3) must not be engaged in any electioneering. See Treas. Reg. §§ 53.4944-3(a)(1)(i)–(iii) (2011).

54. For a more detailed discussion of this issue, see Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 355–58 (2009).



To circumvent the problems associated with the current PRI system, designers of L3Cs decided to draft legislation that tracked the language of the IRS regulations concerning PRI so that if such legislation “were adopted, any social enterprise that qualified for L3C status under state law would ipso facto qualify for program-related investments under the IRS Code.”<sup>55</sup> Theoretically, this would enable a foundation that wanted to invest in a social enterprise in the form of a PRI to do so without concern that the IRS would disallow the investment as non-qualified.

The idea of L3Cs received a vote of confidence when legislation authorizing their creation was enacted in Vermont in 2008. It has spread to other jurisdictions, including Montana and Wyoming, where efforts are underway to enact similar legislation.<sup>56</sup> Nevertheless, the utility of L3Cs remains in doubt. The efficacy of the L3C designation depends on the willingness of the IRS to support the idea, and there is currently no evidence that it will do so. Given that advance approval from a federal tax authority is required to assure that investment in an L3C will be classified as PRI, it is unlikely that L3C status conferred by a state will serve as a proxy for federal approval without IRS action.<sup>57</sup>

Despite the advantages that may arise if the IRS takes action to approve of the L3C designation, at present the designation remains aspirational only and does not provide a certainty for social venturers who wish to engage in enterprises that advance social good rather than maximize profit.

#### IV. SOCIAL BUSINESSES IN ACTION

There are many legal challenges to the formation of true social businesses in the United States. These challenges should not, however, prevent entrepreneurs from exploring opportunities. Many ventures that seem difficult, or even impossible, can be achieved if visionaries simply take action. The law is in a constant state of growth, and development can accommodate demands placed upon it by the marketplace. As discussed above, there is a growing desire on the part of the general public and the business community to use corporate power to advance social welfare. Rather than wait, entrepreneurs should simply take the advice of Professor Yunus of Grameen Bank,<sup>58</sup> who said to me when I asked how

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55. *Id.* at 372–73.

56. For updated information about efforts to enact L3C legislation, see *Here's the Latest L3C Tally*, INTERSECTOR PARTNERS, L3C (Mar. 29, 2011), [http://www.intersectorl3c.com/l3c\\_tally.html](http://www.intersectorl3c.com/l3c_tally.html).

57. See Carter G. Bishop, *The Low-Profit LLC (L3C): Program Related Investment by Proxy or Perversion?*, 63 ARK. L. REV. 243, 267 (2010).

58. Professor Yunus has credibility in giving this advice as his organization, the Grameen Bank of Bangladesh, has several social businesses currently in operation.

to convince skeptics to move forward on social businesses, “Tell them to just do it.” The following discussion describes some of the many examples of social businesses in progress.

*A. Type I Social Businesses: Examples From Bangladesh*

1. Grameen/Danone

A social business is a profit-making, non-dividend-paying entity that is formed and operated with the specific intent of addressing an identified social need.<sup>59</sup> The first Type I social business created under the aegis of the Grameen Bank was Grameen Danone Foods Limited (GDFL), a company registered under the Companies Act (Bangladesh). Jointly founded by Groupe Danone and Grameen Bank, GDFL was formed with the objective of providing fortified yogurt to undernourished children in Bangladesh. The parties entered into a memorandum of understanding (MOU) in March 2006 pursuant to which one half of the total amount of approximately \$1.1 million start-up funds would be provided by Danone and a group of four Grameen companies.<sup>60</sup> The mission statement of the MOU stated expressly that Groupe Danone Foods was to be a social business with the mission of reducing poverty and bringing daily nutrition to the poor with the aim of sharing the benefits with its community of stakeholders. The MOU called for Grameen Danone to design a manufacturing and distribution model that involved local communities; this would include sourcing supply from local farmers, hiring local populations to staff the manufacturing plant, and contributing to the creation of jobs.<sup>61</sup> The MOU further stated that the business was to be run to incur no losses and to generate a small profit. That profit was to be used to repay the initial investments of Danone and the Grameen companies as soon as possible.<sup>62</sup> In a deviation from the pure no-loss, non-dividend model of a social business, the parties agreed to pay a one-percent dividend “as a way of publicly recognizing the ownership of [the] company and to make it possible for Danone to show a figure in the appropriate line of its balance sheet.”<sup>63</sup> After repayment of the initial investments, all future profits were to be reinvested in the venture to expand and improve its operations.

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59. See discussion *supra* Part II (description of the basic characteristics of social businesses).

60. YUNUS, *supra* note 23, at 144.

61. *Id.* at 144–45.

62. *Id.* at 138.

63. *Id.* Mohammad Yunus notes “Now, in hindsight and with further thought, I am in favor of removing the dividend clause . . . . If Danone agrees, we’ll do that, to make it match with the definition of social business as . . . a non-loss, non-dividend business.” *Id.*

Grameen Danone Foods opened its first yogurt plant in Bogra, Bangladesh, in March 2008. The facility aims to produce 3,000 tons of highly nutritious yogurt<sup>64</sup> per year from milk supplied by 300 micro farms that were established with credit from Grameen Bank. When the plant opened, Grameen also announced that it would provide additional financing to expand capacity at the Bogra plant and to open a second facility near Dhaka.<sup>65</sup> The yogurt is to be sold at a low cost in the rural villages of Bangladesh where populations would otherwise face malnutrition issues, and at a higher cost in the more affluent areas of the country, such that the higher cost sales subsidize operation.

Like any business, GDFL confronted many start-up challenges. It encountered problems in the preservation of the yogurt throughout the distribution process. The shelf life of the product was relatively short, and there is little, if any, refrigeration capacity in parts of the target distribution areas. In addition, the original labor structure proved unworkable. The yogurt was originally delivered from the plant to rural villages in “baby taxis” (essentially motorized golf carts) and was then picked up and sold by local “yogurt ladies.” This model imposed unworkable costs because the salaries demanded by the baby taxi drivers were too high, and the local culture in the villages caused the yogurt ladies to “hire” friends and relatives to assist in distribution and then demand that each “helper” receive the same set daily salary paid to the true employee.<sup>66</sup>

GDFL took steps to address these issues, including changing the method of delivery of the product from baby taxi to rickshaw and putting the yogurt ladies on commission rather than salary, but the issues depressed the returns generated by the venture. After its first year of operations, GDFL was having trouble generating enough profits to cover costs, an essential attribute of a successful social business. This is not to suggest that GDFL will not succeed in the long term. It is not unusual for firms to flounder at their inception and then overcome their problems and become profitable. If anything, it demonstrates that social businesses face the same challenges, and present the same opportunities for success, as traditional ventures.

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64. For more details on the operations of the enterprise, see *id.* at 129–47. See also, Sheridan Prasso, *Saving The World One Cup of Yogurt at a Time*, FORTUNE, Feb. 19, 2007, at 96; Carol Matlack, *Danone Innovates to Help Feed the Poor*, BLOOMBERG BUSINESSWEEK (Apr. 28, 2008, 2:08 PM), [http://www.businessweek.com/globalbiz/content/apr2008/gb20080428\\_971498.htm](http://www.businessweek.com/globalbiz/content/apr2008/gb20080428_971498.htm).

65. *Danone Plans to Open Second Yogurt Plant in Bangladesh*, ECON. TIMES (Apr. 30, 2008, 2:17 AM), <http://economictimes.indiatimes.com/latest-news/danone-plans-to-open-second-yogurt-plant-in-bangladesh/articleshow/2996720.cms>.

66. See generally, Asad Kamran Ghalib & Farhad Hossain, *Social Business Enterprises—Maximising Social Benefits or Maximising Profits? The Case of Grameen-Danone Foods Limited* (Brooks World Poverty Inst., Working Paper No. 51, 2008) (a full accounting of GDFL and its struggles).

## 2. Grameen Veolia

Another Type I social business involving the joint efforts of Grameen Bank and a large corporation is Veolia Water.<sup>67</sup> As with Grameen Danone, Veolia Water was conceived to address a serious social problem facing Bangladesh: the fact that much of the water available in rural Bangladesh is contaminated with arsenic and is therefore not safe to drink.<sup>68</sup> Despite efforts by the World Bank and others to remedy the situation,<sup>69</sup> the problem has persisted. In 2007, Veolia Water entered into a MOU with Grameen Healthcare (a part of the Grameen family of companies) to provide safe and affordable drinking water to rural populations of Bangladesh. The original business plan did not call for the sort of cross-subsidization (in the form of two-tiered pricing) used by Grameen Danone Foods. Instead, the goal was to be able to provide affordable water by, among other things, subsidizing its distribution through the sale of electrical services (which Veolia Water also provides), streamlining the distribution process, and allowing the use of microcredit to pay for water supplies.<sup>70</sup>

As with Grameen Danone Foods, the water venture encountered challenges from the outset. Although the technical aspects of the project went smoothly—a treatment plant with connected pipes and tap points was built and brought into operation—the consumption side of the process did not go according to plan. The venture encountered difficulties that were both economic and social. The price set by the venture initially was targeted to be one taka per liter (approximately 1.4 cents) if purchased at the treatment plant. That cost could not be offered system-wide due to the additional costs associated with distribution. Believing that villagers would not be willing to pay different prices for water based solely on where they received it, Grameen Veolia Water decided to charge three taka for ten liters at all distribution sites. This higher price discouraged sales and contributed to the fact that initially only ten to fif-

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67. Veolia Water is part of a larger entity, Veolia Environment, which operates waste management, energy, public transport, and water systems. MUHAMMAD YUNUS & KARL WEBER, *BUILDING SOCIAL BUSINESS: THE NEW KIND OF CAPITALISM THAT SERVES HUMANITY'S MOST PRESSING NEEDS* 135 (2010).

68. For a discussion by the World Health Organization of the problems caused by arsenic in drinking water in Bangladesh and elsewhere, see Allan H. Smith et al., *Contamination of Drinking Water by Arsenic in Bangladesh: A Public Health Emergency*, 78 BULL. OF WORLD HEALTH ORG. 9, 1093 (2000), available at [http://www.who.int/bulletin/archives/volume78\\_9/en/index.html](http://www.who.int/bulletin/archives/volume78_9/en/index.html).

69. The problem of unsafe water draws significant international interest. The United Nations calls for remediation of the problem in Millennium Goal 7. Specifically, Target 7.C states a goal to “[h]alve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation.” *We Can End Poverty 2015: Millennium Development Goals*, UNITED NATIONS, <http://www.un.org/millenniumgoals/environ.shtml> (last visited Apr. 1, 2011).

70. See YUNUS & WEBER, *supra* note 67, at 141–42.

ten percent of the target population participated. Perhaps more significant than the pricing problem were the social issues confronted by the venture. The populations the project was intended to serve generally were not accustomed to paying for water. Further, they did not grasp the severity of the health risk posed by drinking arsenic-contaminated water, as the dangers posed are long-term, not immediate.<sup>71</sup>

The venture continues to look for solutions to these problems. One idea is to alter the business model to include cross-subsidization. Because the production capacity of the treatment plant far outpaced the demand for water at the price of three taka per ten liters, the venture decided to bottle some of the excess water and sell it to institutional buyers at a higher cost, using the profits to subsidize the rural sales. Additionally, the venture decided to experiment with providing direct in-home water service to those villagers who could afford it—again using the profits generated from such sales to subsidize sales to less affluent villagers. The venture is still very much a work in progress and faces ongoing challenges.

### 3. Grameen GC Eye Care Hospital

In 2001, Grameen Bank established the Prevention Blindness Project to address the issue of blindness in Bangladesh. The venture became the Grameen GC Eye Care Hospital, which is run as a social business in Bogra, Bangladesh. A second Eye Care Hospital opened in Barisal, Bangladesh, in 2009 and two more such hospitals are planned. The mission of the hospitals (run under the umbrella of Grameen Healthcare) is:

[To] design and develop a bottoms-up Healthcare infrastructure that can take lessons from successful efforts around the world and improve upon them to deliver the highest quality Healthcare, in an efficient and sustainable manner, primarily to the poorest of the poor but also to the non poor, who may pay a little more than the target population.<sup>72</sup>

Grameen GC Eye Hospital is run on a cost-subsidy basis. Fifty percent of patients pay a subsidized amount, forty percent pay a premium amount, and ten percent are treated for free—and may have a subsidy paid to their family for the time they are out of work due to the surgery.

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71. As Mr. Yunus nicely puts it, many think “this water may make me sick in twenty years. But who knows? In twenty years I might be dead anyway. So why worry about it?” *Id.* at 146. Further, he accurately notes that this is not unlike affluent people who drink, smoke, and overeat. *Id.*

72. *The Mission*, GRAMEEN HEALTHCARE TRUST, <http://www.grameenhealth.org/> (last visited Apr. 1, 2011).

Each patient fills out a simple questionnaire to determine the amount owed. The model has worked so well that the Eye Hospital has generated profits (the sign of a successful social business) that it is using to build a new floor for training.

The key to the success of the Eye Care Hospital is that it delivers high-quality care at an affordable cost in high volume, and it has highly trained technicians doing most of the examination and preparation work so that the ophthalmologists can focus on the operation. It also stresses efficiency at every turn to keep costs as low as possible. This effort even reaches the grounds of the facility where there is a vegetable garden generating funds through the sale of its produce (and thereby paying the salary of the gardener).

The success of the Grameen GC Eye Care Hospitals demonstrates that social businesses can achieve self-sufficiency while providing social benefit. Unlike a charity, the venture is not dependent on external funding and, unlike a traditional business, it is free to concentrate on furthering its identified social goal rather than maximizing profit for its shareholders. The Grameen GC Eye Care Hospital has a model that other social businesses can emulate.

### *B. Type II Social Businesses: Works in Operation and in Progress*

A different model of a social business is a Type II social business. Unlike the Type I social businesses discussed thus far, which produce a product intended to address a social concern, a Type II social business produces a product for general market consumption and addresses a social need by hiring poor or otherwise disadvantaged populations to operate the business. The entity may be owned by the population it is intended to serve, or it may be owned by a trust that is dedicated to using its profits for the same end. Given the complexities of ownership by the beneficiary population,<sup>73</sup> it is more likely that the ownership will be through a trust.

#### 1. Grameen Fisheries Foundation

Grameen Bank created Grameen Fisheries Foundation (GMF) as a nonprofit organization in 1994 to mitigate poverty through aquaculture and fisheries activities. It expanded functions and activities in the year 2000 to integrate livestock and dairy development activities through the Community Livestock and Dairy Development Project. This was a joint

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73. It is not impossible to structure a social business that is owned by its beneficiary population. An outstanding example of one is the Grameen Bank, which is owned by the population that borrows from it.

project with the Bangladesh Ministry of Finance and received funding from the United Nations Development Program. The venture was registered with the joint stock companies of the Government of Bangladesh in 2003.

GMF is a Type II venture—it seeks to organize the local people living on the banks of ponds or their close vicinity who are otherwise unemployed or hiring themselves out as day laborers. GMF formed the villagers into groups consisting of five beneficiaries each. GMF then trained six to eight of the beneficiary groups in aquaculture, rural development, and social development activities. The groups also were given all inputs, including: fry, fertilizers, manure, feeds, ice, nets, and boats.

The venture took over derelict fishery pools and, so far, has brought 636 out of 808 ponds under its control. The fish are sold in ordinary market transactions and any net profits are used to expand the operations so that more employees can be hired. The fisheries project demonstrates the second type of a social business. It is run like any for-profit venture but has stated a goal of hiring disadvantaged populations. Although the fisheries project did not begin life as a social business (it was first a non-profit), it shows the capacity of nonprofits to evolve and free themselves from dependence on external (and uncertain) funding sources.

## 2. Women's Bean Project

There are many entities that show potential to fully operate as a Type II social business, although they are not yet fully self-sufficient. One example is the Women's Bean Project, based in Denver, Colorado (Women's Bean). Women's Bean is organized and currently operates as a 501(c)(3) nonprofit entity, but it shows that such entities have the capacity to evolve into Type II social businesses using only revenues to fund operations.

Women's Bean began as a job and life training skills program for women (many of whom are felons or past substance abusers) who could not otherwise find employment. The women produce a variety of products for sale, including a wide line of foodstuffs and, as of recent years, handcrafted jewelry. Although Women's Bean initially relied heavily on grants and outside funding (and thus was established as a 501(c)(3)), as of mid-2010, the venture generated approximately seventy-six percent of its revenue from sales of its products.<sup>74</sup> It uses revenues to expand product lines and to increase the number of women who can participate in the program. At the conclusion of each woman's term in the program, she is placed at a job in the local community.

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74. Interview with Tamara Ryan, CEO, Women's Bean.

Unlike many nonprofits, the venture is run like a business. It has a professional CEO who has been in office for approximately seven years and has overseen significant revenue growth. The entity is overseen by a nineteen-member board that provides business and other expertise, another distinction from many typical nonprofit entities.

If Woman's Bean can increase its revenue such that it is capable of covering one hundred percent of its expenses through its operations, it will be a true social business and will be able to end its reliance on external, and unreliable, funding sources. Given that the access to reliable sources of external capital is cited by the CEO of Women's Bean as the largest hurdle facing the venture, removing the need to rely on external capital would be significant. This example highlights an advantage of operating as a social business rather than as a nonprofit.<sup>75</sup>

#### V. CONCLUSION

When Berle and Means examined business entities in the early 1930s, they saw changed institutions in which widely dispersed owners had little or no say over how their capital was used. They therefore focused their attention, in part, on how to solve the problems caused by this separation of ownership and control. Berle's belief that corporate managers' power should be exercised "only for the ratable benefit of all the shareholders as their interest appears"<sup>76</sup> is the basis for the shareholder primacy theory of corporate governance. Although Berle later moderated his position on shareholder primacy,<sup>77</sup> the idea that shareholder interests should be paramount in determining appropriate corporate behavior continues to dominate U.S. law.

But stopping with the notion of shareholder primacy shortchanges Berle's insights. Berle understood that corporations were radically changed entities that exercised great power, and he was concerned with how that power should be used. Berle's perception that corporations exercise great economic, political, and social power has become truer over time. Social businesses are a means of acknowledging that businesses have gained power and, therefore, responsibility. This entity form allows the operation of ventures that begin to answer to the "development of social pressure [that] demand[s] that the power shall be used for the ben-

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75. Of course, revenues would have to increase sufficiently to offset the loss of tax breaks that would occur if Women's Bean abandoned its nonprofit status. This suggests that social businesses should perhaps be eligible for preferential tax treatment. This issue is worthy of more consideration than it will receive here.

76. BERLE & MEANS, *supra* note 1, at 220.

77. See William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 135, 147, 149 (2008).



enefit of all concerned.”<sup>78</sup> Social businesses allow “a convincing system of community obligations”<sup>79</sup> to be identified and enable the power of the business model to be brought to address those obligations. While not every business can or should operate as a social business, those that do justify an expansion of our corporate universe and support a shift away from the strict shareholder primacy model. Berle identified important changes in the ways businesses operated in his time and considered how those changes should be accommodated. We can now do the same and enable the development of social businesses.

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78. BERLE & MEANS, *supra* note 1, at 310.

79. *Id.* at 312.