

CAN ENTITY LAW CURE CORPORATE SOCIAL IRRESPONSIBILITY? A RESPONSE TO *BECOMING A PUBLIC BENEFIT CORPORATION* BY MICHAEL DORFF

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I. INTRODUCTION

Professor Michael Dorff’s *Becoming a Public Benefit Corporation* is a useful and detailed analysis of the “Benefit Corporation” (“BC”), and Delaware’s analogous form “Public Benefit Corporation.”¹ This essay focuses on BC statutes based on the model legislation (the “Model Act”) drafted by B Lab, a private nonprofit corporation.² Professor Dorff’s pithy thesis is that BC and related statutes are “good reinforcement tools but not good enforcement tools.”³ I agree, but I am less sanguine than Professor Dorff about what this says about the statutes. At best, the BC statutes enable and facilitate socially responsible behavior by those corporations that *wish* to pursue it. The theoretical justification for BC laws is that “shareholder primacy” legally prohibits non-BC corporations from socially responsible conduct. But this theory is incorrect, rendering the BC statutes redundant. Even on its own terms, the statutes merely permit BCs to opt out of the supposed shareholder primacy rule: they do not attempt to change it, the

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1. The B Lab website no longer provides the text of the Model Act, but it is available via archived versions of the site. *See, e.g.*, MODEL BENEFIT CORP. LEGIS. (B LAB, Proposed Official Draft Jun. 24, 2014), https://web.archive.org/web/20150315051404/http://benefitcorp.net/storage/documents/Model_Benefit_Corp_Legislation.docx; As Professor Dorff points out, the Delaware statute shares much in common with the Model Act. MICHAEL B. DORFF, *BECOMING A PUBLIC BENEFIT CORPORATION: EXPRESS YOUR VALUES, ENERGIZE STAKEHOLDERS, MAKE THE WORLD A BETTER PLACE* 66 (Eric Nee & Johanna Mair eds., 2024).

2. DORFF, *supra* note 1, at 2-3; Frederick H. Alexander, *Saving Investors from Themselves: How Stockholder Primacy Harms Everyone*, 40 SEATTLE L. REV. 303, 313 (2017).

3. DORFF, *supra* note 1, at 5.

behavior of the corporations that remain subject to it, or the economic incentives that are the real reasons for corporate insensitivity. BC statutes, like existing corporate law, merely permit directors to follow their consciences or not, as they see fit, while creating the false impression of reform.

II. SHAREHOLDER PRIMACY

In the 30 to 40 states that offer it, BC status is entirely elective.⁴ Except where the relevant BC statute provides otherwise, a BC is governed by the jurisdiction's default business corporation statute, usually referred to as its General Corporation Law.⁵ Benefit corporations give a corporation the choice to *voluntarily* pledge in its articles that it “shall have a purpose of creating general public benefit.”⁶ A benefit corporation's charter may, but is not required to, enumerate one or more *specific* public benefits that serve as additional purposes.⁷

According to B Lab, “legal precedents and cultural expectations” require corporations “to make decisions exclusively through the lens of profit maximization for the benefit of the owners and shareholders - a concept known as shareholder primacy.”⁸ According to B Lab's former head of legal policy, the Model Act was intended to enable corporations to pursue socially responsible policies by freeing them from a supposed legal duty to shareholder primacy.⁹ Case law, legal commentary, and legal reformers often refer to such a duty. The classic cite is the hoary 1919 pronouncement of the Michigan Supreme Court in *Dodge v. Ford*: “A business corporation is organized and carried on primarily for the profit of the stockholders.”¹⁰ As many corporate scholars have pointed out, however, such pronouncements

4. *Behind the Legal Requirement: How U.S. and Canada B Corps Embed Purpose Into Their DNA*, B LAB (Mar. 24, 2022), <https://usca.bcorporation.net/zbtcz03z22bcm/behind-the-legal-requirement-how-u-s-and-canada-b-corps-embed-purpose-into-their-dna/>.

5. See for example CAL. CORP. CODE § 14601(a) (2012), defining a benefit corporation as “a corporation organized under the General Corporation Law that has elected to become subject to [the Benefit Corporation statute].”

6. MODEL BENEFIT CORP. LEGIS. § 201(a) (B LAB, Proposed Official Draft Jun. 24, 2014), https://web.archive.org/web/20150315051404/http://benefitcorp.net/storage/documents/Model_Benefit_Corp_Legislation.docx.

7. MODEL BENEFIT CORP. LEGIS. § 201(b) (B LAB, Proposed Official Draft Jun. 24, 2014), https://web.archive.org/web/20150315051404/http://benefitcorp.net/storage/documents/Model_Benefit_Corp_Legislation.docx.

8. *The Legal Requirement for Certified B Corporations*, B LAB, <https://www.bcorporation.net/en-us/about-b-corps/legal-requirements/> (last visited Oct. 22, 2024, 5:20 PM).

9. See Alexander, *supra* note 2, at 313-15.

10. 170 N.W. 668, 684 (Mich. 1919).

are mere dicta.¹¹ Corporate law imposes no enforceable duty to enrich shareholders.¹² Rather, “cultural expectations” (including the glorification of wealth and consumption, the acceptance of selfishness, and the supplanting of pensions with securities investments) push corporations to pursue profit at the expense of social welfare.

While corporate law often says vaguely that directors have a fiduciary duty to benefit shareholders, it also states the more specific business judgment rule (“BJR”).¹³ Under this doctrine, courts must defer to directors’ broad discretion to make decisions for the corporation.¹⁴ Although courts may evaluate the substance of decisions by other experts, such as doctors and (at least in theory) police officers, they may not do so for corporate directors. Courts may not ask whether a board decision benefits shareholders but only whether the directors acted in “bad faith:” that is, fraudulently or in self-interest. The allegation that directors failed to enrich shareholders does not even state a cause of action. Thus, this so-called “duty” cannot be enforced.

While *Dodge v. Ford* articulates a supposed duty to enrich shareholders, it grants directors near-total *immunity* from liability for breaching that “duty” and thus ensures that there is no meaningful duty in the legal sense.¹⁵ Note also that even when a corporation does make profits, they do not “belong” to shareholders in any legal sense. As *Dodge* further points out, the BJR protects the board’s discretion to refuse to distribute profits to shareholders.¹⁶

Contemporary Delaware opinions agree. Directors are not even required to make reasonable efforts (much less best efforts) to benefit shareholders.¹⁷ Their duty is simply to *avoid acting in bad faith* when exercising their discretion. Furthermore, they need not prove they acted in good faith:

11. Jeffrey M. Lipshaw, *The False Dichotomy of Corporate Governance Platitudes*, 46 J. CORP. L. 345, 365 (2021) (internal citations omitted); LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 3-4 (Berrett-Koehler Publishing, Inc., 1st ed. 2012).

12. See, e.g., STOUT, *supra* note 11, at 3-4.

13. *Bayer v. Beran*, 49 N.Y.S.2d 2, 6 (Sup. Ct. 1944) (internal citations omitted).

14. *Id.*

15. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 682 (Mich. 1919).

16. See *id.*; see also, e.g., 8 Del. C. § 170 (2010); CAL. CORP. CODE § 500 (2023); The welfare of shareholders is not indifferent to whether profits are retained or distributed. Modigliani and Miller’s famous theory to the contrary does not apply in the real world because it depends on counterfactual assumptions, such as the absence of transaction costs in the liquidation of shares and perfect rationality and risk indifference on the part of investors. See, e.g., Christian Tanushev, *Theoretical Models of Dividend Policy*, 3 ECON. ALTS. 299, 303, 306 (2016).

17. See *In re Walt Disney Co.*, 906 A.2d 27 (Del. 2006).

shareholder plaintiffs bear the burden of overcoming a strong presumption that directors acted in good faith.¹⁸

Even if the law purported to impose a duty to prioritize or maximize profits, it would be logically incoherent and unenforceable. A corporation cannot prove it is doing all it can to make profits. It is always possible, in theory, to do more to squeeze out more profit. For example, the company could lower wages or increase prices by a fraction of a cent, or switch to a slightly cheaper brand of paper towels in its restrooms. And any corporation with valuable assets but low cash flow could arguably enrich shareholders more by liquidating itself than by continuing to operate.

Like many commentators, Professor Dorff points to the more recent Chancery opinion in *eBay v. Newmark*¹⁹ as explicitly enshrining shareholder primacy in Delaware case law.²⁰ In the case, eBay, a minority shareholder of Craigslist, started a competing classified-ads website.²¹ Craigslist's two founders, James Buckmaster and Craig Newmark, were its only other shareholders and dominated its board.²² They asked eBay to sell its shares back to Craigslist. When eBay refused, the board adopted a shareholder rights plan (a.k.a. poison pill) that restricted eBay's ability to buy more shares or sell its shares to third parties.²³ eBay successfully petitioned the court to invalidate the rights plan.²⁴ According to the court, Buckmaster and Newmark, as directors, owed a fiduciary duty to Craigslist and all its shareholders and, as majority shareholders, owed a fiduciary duty to eBay as minority shareholder.

Because poison pills “fundamentally are defensive devices,” the court applied “intermediate scrutiny” under the *Unocal* doctrine rather than applying the deferential BJR.²⁵ The *Unocal* test first asks whether eBay posed some threat to Craigslist and whether the Rights Plan was truly motivated by that threat.²⁶ Invoking *Paramount v. Time*, Buckmaster and Newmark argued that eBay's potential acquisition of a control stake threatened Craigslist's corporate culture because eBay would abandon the company's “public-service mission in favor of increased monetization.”²⁷

18. See *id.* at 52; Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 372 (Del. 2006).

19. 16 A. 3d 1 (Del. Ch. 2010).

20. DORFF, *supra* note 1, at 28.

21. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 28 (Del. Ch. 2010).

22. *Id.* at 6.

23. *Id.*

24. *Id.* at 7.

25. *Id.* at 28.

26. *Id.* at 31-32; *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 953 (Del. 1985).

27. *eBay*, 16 A.3d at 32.

Craigslist does not charge for the vast majority of the ads it publishes; it charges only for job listings in certain cities and apartment listings in New York City.²⁸ The court found that Craigslist had no unique corporate culture, however, because “[g]iving away services to attract business is a sales tactic . . . not a corporate culture.”²⁹ The court found that the rights plan was actually motivated by Buckmaster and Newmark’s “personal preferences:” they “resented eBay’s decision to compete with craigslist and adopted the Rights Plan as a punitive response.”³⁰

While the foregoing analysis was sufficient to strike down the Rights Plan under *Unocal*, the court went on to criticize Buckmaster and Newmark’s stated preference against “monetization.” The court stated, “there is nothing inappropriate about an organization seeking to aid local, national, and global communities by providing a website for online classifieds that is largely devoid of monetized elements . . . The corporate form . . . however, is not an appropriate vehicle for purely philanthropic ends.”³¹

The discussion of fiduciary duty to enrich was merely dicta in both *Dodge* and *eBay*.³² In *Dodge*, the court did not find any breach of a fiduciary duty to enrich shareholders.³³ The court deferred to the expenditure of corporate funds on expansion and ordered a dividend based on a bad faith refusal to *distribute* profits, not on a failure to *make* profits. In *eBay*, *Unocal* (and not the more permissive BJR) was sufficient to invalidate the Rights Plan without discussing the duty to enrich shareholders.³⁴ Furthermore, both *Dodge* and *eBay* implicated not only directors’ general duty to shareholders but also majority shareholders’ fiduciary duties to minority shareholders, which do not receive BJR deference. *eBay* further involved board defensive tactics, which are subject to *Unocal* “intermediate” scrutiny, and not to the BJR. The court specifically stated that under *Unocal*, unlike the BJR, “more than mere subjective good faith is required.”³⁵

Like Professor Dorff, former Delaware Chief Justice and Chancellor Leo Strine argues that the duty of shareholder primacy is the “holding” of *eBay*.³⁶ Strine dismisses commentators’ attempts to narrow the import of *eBay* on

28. *Id.* at 8.

29. *Id.* at 33.

30. *Id.* at 34

31. *Id.*

32. *See Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919); *eBay*, 16 A.3d at 25-26

33. *See Dodge*, 170 N.W. at 685.

34. *eBay*, 16 A.3d at 35.

35. *Id.* at 28-30.

36. Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 774-75 (2015).

the ground that they are based on “deconstructionist linguistics and philosophy, such as critical legal studies, and . . . are premised on the idea that authors themselves can never understand what they intend to say or are in fact saying. For those of us who are more traditional, we tend to credit accomplished jurists . . . with understanding most of what they write.”³⁷ But Strine himself carefully restates the “holding” very narrowly, stating that fiduciary duty is breached when a director “*admits* that he [*sic*] is treating an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth” and that the BJR does not protect a director who “*confesses* that he [*sic*] in fact harbors the personal motive to put another interest, of whatever kind, ahead of the stockholders.”³⁸ Assuming Strine understands what he writes, he argues only that directors breach the “duty to enrich shareholders” *if they expressly state* that they were motivated by something else.³⁹ A duty not to admit intent to *abandon* shareholder enrichment is far less demanding than a duty to achieve or even to pursue it. Rather, it is an even more lenient version of the subjective “good faith” standard.

Strine’s careful narrowing of the “shareholder primacy duty” reflects the true bedrock principle of corporate law, the BJR. The directors’ own admission is the clearest and, perhaps, Strine seems to suggest, the only acceptable evidence of subjective bad faith. The BJR protects a board decision (including one that primarily benefits the public) as long the court can imagine directors believing in good faith that the decision would also benefit shareholders in some way. No proof of this benefit is required, and the policy need not be obviously related to the corporation’s business.

In *Kahn v. Sullivan*, for example, shareholders sued the board of Occidental Petroleum when it decided to build a \$50 million museum and pledge \$35 million for its operating expenses in order to display the personal art collection of Armand Hammer, Occidental’s CEO and board chair.⁴⁰ The Delaware Supreme Court affirmed the Chancery Court’s ruling that the decision was protected by the BJR.⁴¹ The court did not require the board to prove that the museum would benefit the corporation or its shareholders, much less that such benefit would be justified by the enormous expense. The court was satisfied by the company’s annual reports, which “have described the benefits and good will which it attributes to the financial support that

37. *Id.* at 775-76 (internal citations omitted).

38. *Id.* at 778-79.

39. *Id.* at 776-77.

40. 594 A.2d 48, 54-55 (Del. 1991).

41. *Id.* at 61, 63.

Occidental has provided for the Art Collection.”⁴² Directors can always believe in good faith that expenditures benefiting the public could generate “good will” toward the company. In addition to showing that “business decision” is broadly defined, this decision also shows that the “good faith” standard is low: the court ignored the fact that the museum benefitted and aggrandized Hammer personally by storing, maintaining, and exhibiting his personal property. Indeed, it was originally called the “Hammer Museum” and never the “Occidental Petroleum Museum.”

Craigslist’s policy of giving away most ad space also qualified for BJR protection. The court found that Buckmaster and Newmark violated the lenient good faith standard, but only because they expressly stated their disinterest in making money.⁴³ As the Chancery Court stated, the policy benefitted the public, but it was ultimately a “sales tactic” that increased the audience for Craigslist’s few paid ads.⁴⁴ The BJR prohibited the court from considering whether the policy was a net benefit to shareholders (or, indeed, whether it generated any benefit at all). Buckmaster and Newmark’s liability, then, could not have been based on a breach of a duty to enrich shareholders. Rather, it was based on a breach of their duty to act *in good faith*, *i.e.*, their subjective *intent* not to enrich shareholders as indicated by their disparagement of “monetization.”

Buckmaster and Newmark founded Craigslist as a free service and wanted to maintain that identity even after becoming a business corporation and accepting eBay’s investment dollars. It is hard to imagine another situation where a corporate director chooses to abandon profitmaking. Furthermore, even if a future corporate director should choose to prioritize public welfare over shareholder wealth, they would be unlikely to be found liable unless they were careless enough to admit it. Occidental Petroleum’s board, for example, would have violated its fiduciary duty if (and probably only if) it had expressly stated that supporting the museum was not intended to benefit shareholders.

The foregoing discussion of director discretion shows that a legal duty to enrich shareholders cannot explain corporate social irresponsibility. Despite the lack of a legal mandate, however, shareholder primacy is in the rational economic self-interest of corporate directors and their shareholders. High stock prices enhance directors’ professional reputation, their company’s credit rating, and their ability to retain control of the company. Equity compensation for directors is explicitly rationalized on the grounds that it makes directors gain from shareholder gain. As long as these incentive

42. *Id.* at 51.

43. *eBay*, 16 A.3d at 34.

44. *Id.* at 33.

structures exist, shareholder primacy will prevail whether or not it is legally mandated.

III. THE MODEL BENEFIT CORPORATION ACT

A. *Other Constituencies*

In making decisions for the corporation, “directors of a benefit corporation *shall consider*” the interests of other constituencies and the corporation’s ability to accomplish its general and specific public benefit purposes.⁴⁵ The Model Act nominally makes consideration of other constituencies mandatory, but only for corporations that choose BC status. Even for those corporations, the Model Act only requires *consideration* of other constituencies, not action in favor of any of them.

This passive, “enabling” approach to corporate social responsibility is borrowed directly from the “other constituencies” (“OC”) statutes of the early 1990s. As Professor Dorff points out, these statutes were part of the evolutionary history of the Model Act.⁴⁶ Many states adopted statutes that expressly authorized boards to consider how their decisions affect “any or all groups . . . action, including shareholders, employees, suppliers, customers and creditors of the corporation, and upon communities in which offices or other establishments of the corporation are located.”⁴⁷ Like the Model Act, these so-called “other constituencies” (“OC”) statutes were touted as freeing directors from the yoke of “shareholder primacy.”⁴⁸ An OC statute is not optional: it applies to all corporations in its jurisdiction, including benefit

45. CAL. CORP. CODE § 14620(b) (West 2012).

46. Attempts to pass an OC statute in California failed. A compromise, the flexible purpose corporation, was passed in 2011 and later renamed the “social purpose corporation.” See DORFF, *supra* note 1, at 1-3; see generally CAL. CORP. CODE §§ 2500-3503 (West 2015). That statute resembles an OC statute with the important distinction that “social purpose corporation” status is optional. As Professor Dorff notes, the Delaware public benefit corporation is similar. See DORFF *supra* note 1, at 66 (“Despite that decision to change the form of the statute entirely, the Delaware [public benefit corporation] statute’s substantive elements are often similar to the Model Act’s [benefit corporation] form.”). The drafters of the social purpose corporation statute participated in drafting the Model Act. *Id.* at 3.

47. See, e.g., 15 PA. STAT. AND CONS. STAT. ANN. § 1715 (West 2023).

48. Cf. Joan MacLeod Heminway, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, 74 WASH. & LEE L. REV. 939, 949 (2017) (“Although other constituency statutes do not deny the existence of a shareholder wealth maximization norm in director and officer action that complies with applicable fiduciary duties, they do offer corporate managers some cover in considering the interests of other stakeholders when they engage in management activities.”).

corporations.⁴⁹ But OC statutes contain no mandates or incentives. Directors *may* (if they wish) consider multiple stakeholder interests, but they need not protect any of them or favor any one of them.⁵⁰ Indeed, a recent study argued, based on empirical evidence, that firms incorporated in states with OC statutes “shifted away from prioritizing shareholder concerns, but . . . the shift did not accompany greater attention toward other stakeholder concerns.”⁵¹

B. Public Benefit Purposes

State corporate law once required corporate charters to state a specific business purpose, violation of which was actionable under the doctrine of *ultra vires*.⁵² Today, most states permit the charter to include a “catch-all” statement that the corporation may promote any lawful business or purpose.⁵³ Under the MBCA, this is the default purpose of every corporation unless its charter states otherwise.⁵⁴ California goes further, *requiring* charters to include a statutory “catch-all” purpose statement verbatim while *prohibiting* any other language about purpose, other than the language of limitation.⁵⁵

49. See DORFF, *supra* note 1, at 29 (“The majority of states – thought not Delaware – have passed constituency statutes that authorize directors to consider other corporate constituencies such as employees, customers, suppliers, and communities when making corporate decisions.”); see also FREDERICK H. ALEXANDER, *THE PUBLIC BENEFIT CORPORATION GUIDEBOOK: UNDERSTANDING AND OPTIMIZING DELAWARE’S BENEFIT CORPORATION GOVERNANCE MODEL* ch. 5, sec. III, subsec. B (2016) (“Constituency statutes are typically uniform in application, reaching all corporations incorporated within a given jurisdiction.”) (citing Christopher Geczy et al., *Institutional Investing when Shareholders are Not Supreme*, 5 HARV. BUS. L. REV. 73, 102 (2015)), <https://clinical.aals.org/wp-content/uploads/sites/3/2021/05/43390912-13.pdf> (last visited Nov. 3, 2024).

50. See, e.g., CAL. CORP. CODE § 14620(d) (West 2012); see also Anthony Bisconti, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land?*, 42 LOY. L.A. L. REV. 765, 783 (2009) (“However, statutes are permissive, not mandatory . . . while directors have the authority to consider other constituencies, they also have the discretion to not consider other constituencies.”) (citation omitted); DORFF, *supra* note 1, at 29.

51. Jitendra Aswani et al., *The Cost (and Unbenefit) of Conscious Capitalism* 30 (Sept. 3, 2022) (unpublished manuscript) (<https://ssrn.com/abstract=3926335>).

52. See Thomas Lee Hazen, *Corporate and Securities Law Impact on Social Responsibility and Corporate Purpose*, 62 B.C. L. REV. 851, 874-75 (2021) (“Corporate conduct that goes beyond the corporation’s stated purpose or implied powers is *ultra vires* and formerly was deemed void in all respects.”).

53. See, e.g., DEL. CODE ANN. tit. 8, § 101(a)(3) (West 2023); see also CAL. CORP. CODE § 202(b)(1)(A) (West 2023).

54. See MODEL BUS. CORP. ACT § 3.01(a) (A.B.A. BUS. LAW SEC. CORP. LAWS COMM., updated through April 5, 2024).

55. See CAL. CORP. CODE § 202(b)(1)(A)(4) (West 2023) (“The articles shall not set forth any further or additional statement with respect to the purposes or powers of the corporation, except by way of limitation.”); CAL. CORP. CODE § 14610(a)-(b) (West 2012).

Every benefit corporation “shall have the purpose of creating general public benefit” and may elect to state specific public benefit purposes in its charter.⁵⁶ It would nonetheless be misleading to say the Model Act “requires” corporations to serve general or specific public benefits. Most obviously, a duty to create “general public benefit” could include almost anything, making it impossible to violate or enforce.⁵⁷ Moreover, BC status is entirely optional, making the Model Act’s public benefit purpose provisions mere enabling legislation and not a mandate. Whether a benefit corporation has specific public benefit purposes and what they are is entirely up to the corporation. In most states, the default corporate law would permit a statement of general or specific public benefit purpose.⁵⁸ As noted previously, California’s general incorporation law does not permit specific statements of purpose in a charter.⁵⁹ Nonetheless, it does not appear to prohibit a charter from committing to general or specific public benefit as long as it is not described as a corporate “purpose.”⁶⁰

The incorporating state has no authority to police a BC’s failure to consider other constituencies or to pursue or provide general or specific public benefit. The only enforcement mechanism is a “benefit enforcement proceeding,” which may be filed only by the BC itself or derivatively by its shareholders, directors, or owners of at least two percent of its stock.⁶¹ The Model Act specifically denies standing to the intended beneficiaries of the corporation’s public benefit purpose.⁶² In a benefit enforcement proceeding, directors’ conduct would be subject to the BJR, which the Model Act expressly incorporates.⁶³ Even if a plaintiff were to prevail in an enforcement proceeding, directors could not be held liable for monetary damages unless stated otherwise in the charter.⁶⁴

A BC’s specific public benefit purposes are unlikely to be enforceable in litigation. In 2012, the privately held Patagonia Works became one of the first businesses (if not the first) to adopt the California benefit corporation

56. CAL. CORP. CODE § 14610(a)-(b) (West 2012).

57. See DORFF, *supra* note 1, at 84.

58. See Hazen, *supra* note 52, at 872-73.

59. CORP. § 202(b)(1)(A)(4).

60. See CAL. CORP. CODE § 204(d) (permitting articles to include “[a]ny other provision, not in conflict with law, for the management of the business and for the conduct of the affairs of the corporation . . .”).

61. See MODEL BENEFIT CORP. LEGIS. § 305; CAL. CORP. CODE § 14601(b) (West 2012).

62. See William H. Clark Jr. & Elizabeth K. Babson, *How Benefit Corporations are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 849 (2012).

63. MODEL BENEFIT CORP. LEGIS. § 301(e). Some states, such as California, do not include this provision, but neither do they purport to alter the Business Judgement Rule (“BJR”).

64. MODEL BENEFIT CORP. LEGIS. § 301(c); see CAL. CORP. CODE § 14620(f).

form. [I will use several examples of Patagonia’s governance because it is the most prominent and most reported-on California benefit corporation, not because it is a particularly bad actor.] The specific public benefit purposes listed in Patagonia’s articles include “Build the Best Product with No Unnecessary Harm” and “Conduct Operations Causing No Unnecessary Harm.”⁶⁵ Other specifically listed purposes are “Shar[e] Best Practices with Other Companies” (if doing so will have a “material positive impact on the environment”) and “Transparency,” which consists of disclosing the environmental impact of “representative items” and (as required for all California benefit corporations under CA 14630) reporting on its performance in serving its public benefit purposes.⁶⁶

Another stated public benefit purpose is “Providing a Just, Equitable and Supportive Working Environment.”⁶⁷ This consists of “endeavor[ing]” to be inclusive, and to provide its employees with health care, child care, and paid time off to volunteer for environmental groups.⁶⁸ The Articles do not mention wages, job security, or working conditions, however.⁶⁹ Furthermore, according to Patagonia’s website, none of the people who actually manufacture its products work for the company; rather, they are employed by subcontractors “across the globe.”⁷⁰

In June 2024, Patagonia gave ninety workers a choice: either relocate to one of seven specified “hub” cities or resign and take a severance package.⁷¹ They were given 72 hours to decide. These were employees who worked remotely answering calls from customers. Although Patagonia’s corporate headquarters is in Ventura, California, none of the “hubs” are in California.⁷² A Patagonia spokesperson said the change was “crucial” to maintaining a “vibrant team culture.”⁷³ But they also admitted it was a layoff (“our [customer service] team has been running at 200 to 300 percent overstaffed”)

65. PATAGONIA WORKS, *Seventh Amended and Restated Articles of Incorporation*, at 2-3 (last modified Aug. 5, 2022) <https://bizfileonline.sos.ca.gov/search/business> (type “Patagonia Works” in the search bar; then click on “Patagonia Works (660396);” next, click “View History;” click “Restated Articles of Incorporation – 8/5/2022;” finally, click “Download.”).

66. *Id.* at 3.

67. *Id.*

68. *Id.*

69. *See generally id.*

70. PATAGONIA, <https://www.patagonia.com/social-responsibility/> (last visited November 4, 2024).

71. Polly Thompson, *Patagonia Gave 90 Staff a Choice – Relocate Across the U.S. or Leave the Company. They Got 3 Days to Decide.*, ENTREPRENEUR (June 28, 2024), <https://www.entrepreneur.com/business-news/patagonia-to-90-workers-relocate-or-leave-decide-in-3-days/476288>.

72. *Id.*

73. *Id.*

and cost-cutting measure (“a California-based hub would not meet the criteria we set for a sustainable [customer service] model”).⁷⁴ The spokesperson did not mention that Patagonia had denied customer service workers’ previous requests for raises.⁷⁵ A Patagonia employee responded, “It feels like they’re full of shit, that they would rather spend their money on the world instead of their people.”⁷⁶ The same employee called the company “a big corp in sheep’s clothing.”⁷⁷ The affected workers have no standing to bring a benefit enforcement proceeding. Even if shareholders were to bring a derivative suit, the purpose statement is so vague it would be impossible to prove a violation.

Patagonia’s specific public benefit purposes also include its much more specific and generous “1% for the planet” policy, under which it pledges to contribute one percent of its “annual net revenue” to environmental activist groups. This policy may be admirable, but it is unrelated to BC status: Patagonia adopted it in 1985, long before the BC was invented.⁷⁸ (Furthermore, as noted above, a non-BC California corporation could probably include this policy in its charter as long as it was not described as a corporate “purpose.”)

In 2022, Patagonia, then valued at \$3 billion, announced that all of the company’s nonvoting stock, representing a 98% equity interest, had been transferred to the Holdfast Collective, a 501(c)(4) nonprofit.⁷⁹ All of the voting stock, representing the remaining 2% interest, belongs to the Patagonia Purpose Trust, controlled by the Chouinard family, founders of the company.⁸⁰ According to a statement by Patagonia’s founder featured on its website, “the money we make after reinvesting in the business will be distributed as a dividend” annually to the Holdfast Collective, which “will use every dollar received to fight the environmental crisis, protect nature and biodiversity, and support thriving communities.”⁸¹ This statement was dated September 14, 2022, one month after Patagonia filed its Seventh Amended Articles stating the 1% policy.⁸² It is unclear whether the two policies are

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *1% for the Planet*, PATAGONIA, <https://www.patagonia.com/one-percent-for-the-planet.html> (last visited Oct. 27, 2024).

79. Yvon Chouinard, *Earth is Now Our Only Shareholder*, PATAGONIA (Sept. 14, 2022), <https://www.patagonia.com/ownership/>.

80. *Id.*

81. *Id.*

82. *Id.*; See Restated Articles of Incorporation, CALIFORNIA SECRETARY OF STATE, <https://bizfileonline.sos.ca.gov/search/business> (search “Patagonia Works” in the search bar; click

consistent, but only the Holdfast Collective, the Trust (controlled by the Chouinards), and the board (elected by the Trust) have standing to enforce the 1% policy.

C. Transparency

A BC “shall” file an annual benefit report, which must include a narrative explanation of its attempts to accomplish its public benefit purposes and the results thereof.⁸³ It must also include an “assessment of the overall social and environmental performance of the benefit corporation *against a third party standard*.”⁸⁴ The Model Act specifically states that the report need not be audited.⁸⁵ Moreover, it does not specify any consequences for failure to file a report or for filing an inaccurate report.

B Lab is in the business of providing so-called “B Corp” certification to companies that meet its social responsibility criteria. B Lab actively lobbied states to adopt the Model Act, and once touted statutory reform as part of its mission. Its website now contains few references to B Lab’s drafting and lobbying role⁸⁶ and, as Professor Dorff notes, no longer provides the text of the Model Act.⁸⁷ Unsurprisingly, B Corp certification satisfies the statutory criteria to qualify as a required “third party standard.”⁸⁸ The annual cost of B Corp certification, which must be renewed every three years, depends on the applicant’s size: for example, \$2000 for corporations with less than \$500,000 in annual gross income, \$50,000 when income is between \$750 million and \$1 billion, and custom rates when income is greater than \$1 billion.⁸⁹

on the entity “Patagonia Works” then click on “View History” to see the most recent Articles of Incorporation filed on Aug. 5, 2022).

83. CAL. CORP. CODE § 14630(a)(1)(B) (West 2012).

84. MODEL BENEFIT CORP. LEGIS. § 401(a)(2); cf. CAL. CORP. CODE § 14630(a)(2).

85. CORP. LEGIS. § 401(c).

86. *Compare About B Lab*, B LAB, <https://www.bcorporation.net/en-us/movement/about-b-lab/> (last visited Oct. 1, 2024) (B Lab website that does not reference as specifics to any lobbying or drafting), with *The Road to a New Economy*, B LAB (Mar. 19, 2015), <https://web.archive.org/web/20150319062108/https://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps> (archived version of the B Lab website from 2015), and *About Benefit Corporations*, B LAB U.S. & CAN., <https://usca.bcorporation.net/benefit-corporation/> (last visited Oct. 24, 2024) (A table on the B Corp website describing the difference between B Corps and benefit corporations states that B Lab “[d]eveloped the model legislation [and] works for its passage and use”).

87. DORFF, *supra* note 1, at 221 n.1.

88. See *About Benefit Corporations*, *supra* note 86 (stating the best practice for benefit reports and using a “third-party standard”).

89. *Certification Fees*, B LAB U.S. & CAN., <https://usca.bcorporation.net/fees/> (last visited Oct. 24, 2024) (inputting a company’s annual gross revenue into the fee calculator will provide the annual fee cost).

D. Analysis

The requirements of stating general and specific public benefits purposes in the charter and filing an annual benefit report could potentially encourage BCs to be more socially responsible. Publicly stating a commitment to public benefits, especially in a formal legal filing like a charter, could create at least some degree of market, social, and internal pressure to honor those commitments, even in the absence of legal enforceability. Furthermore, under the theory of “therapeutic disclosure,” disclosure requirements can induce changes in corporate behavior. This is the apparent theory behind SEC disclosure requirements, such as those regarding executive compensation and the use of conflict minerals.⁹⁰ It can also alert a corporation to issues it may simply have been unaware of. Corporations may improve their behavior to comply with these norms or merely to avoid having shameful information in their disclosures.⁹¹ Applicants for B Corp status must answer a questionnaire called the Benefit Impact Assessment (“BIA”).⁹² The questions fall into five categories: governance, workers, community, the environment, and customers.⁹³ According to Rumpl, a small manufacturer of blankets, the BIA process “highlighted some areas where we excel, and others where we came up short, providing “a clear roadmap to improvement.”⁹⁴

Other companies, however, have found BIA scoring arbitrary and formalistic, and unable to account for the great diversity among applicant companies.⁹⁵ Such problems are not unique to the BIA, of course, but inherent in all “report card” systems of comparing diverse institutions (such as, for example, the law-school ranking system). B Corp certification requires an 80-point score out of a possible 200 but does not require a minimum score in any of the categories.⁹⁶ Thus, a high-scoring company

90. The judicial invalidation of the latter rule as “coerced speech,” (*Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 522, 530 (D.C. Cir. 2015)), and the Supreme Court’s campaign against the administrative state generally, suggest that therapeutic disclosure (if not mandatory disclosure in general) is not long for this world.

91. See Bryce C. Tingle, *Corporations on the Couch: Is Therapeutic Disclosure a Kind of Madness?* 55 UNIV. B.C. L. REV. 745, 745, 748-49 (2022).

92. *B Impact Assessment*, B LAB, <https://www.bcorporation.net/en-us/programs-and-tools/b-impact-assessment/> (last visited Oct. 26, 2024).

93. *Id.*

94. Sam Anderson, *B Corp Gone Bad? One Company’s Futile Fight Against a Beneficent Giant*, GEARJUNKIE (June 7, 2023, 4:49 PM), <https://gearjunkie.com/outdoor/chris-king-b-corp-controversy>.

95. See DORFF, *supra* note 1, at 114-15.

96. *B Impact Assessment*, *supra* note 92. (minimum verified score of 80 points needed to become B Corp certified); see also *How the B Impact Assessment is Scored*, B LAB SUPPORT

might be strong in, say, management accountability, diversity, and customer relations but weak with respect to wage equity and pollution. This system rewards companies for concentrating on certain areas. But it also excuses or covers up weaknesses and can reward gaming the system (with the help of “sustainability consultants”).⁹⁷ It can also disqualify socially conscious companies whose policies don’t fit into the BIA categories.

In 2022, for example, Nestlé’s Nespresso subsidiary received B Corp certification. Nespresso’s coffee makers are notorious for using a disposable, nonbiodegradable coffee “pod” for each serving of coffee.⁹⁸ Moreover, critics claim its coffee farmers earn “poverty incomes.”⁹⁹ On Nespresso’s publicly available BIA, its answer to a question asking for the company’s lowest hourly wage is labeled “sensitive” and redacted. A multiple-choice question asks if the company has verified certain aspects of its labor and environmental performance along its supply chain: Nespresso’s answer is “None of the Above.”¹⁰⁰ Another question asks for the percentage of employees paid a living wage, to which the answer is “N/A.”¹⁰¹

The year after Nespresso received certification, Chris King Precision Components (“King”), a small, respected maker of high-end bicycle parts, was denied B Corp recertification for reasons King claims not to understand.¹⁰² King has developed unique low-waste machining processes and cooling systems, uses canola oil instead of toxic lubricants, avoids outsourcing labor, and provides chef-cooked meals for employees who bicycle to work. The only B Lab representative to tour King’s facility described himself as “not privy to the B Lab certification process.”¹⁰³ B Lab appeared not to understand King’s technical innovations and suggested it increase its BIA score by purchasing carbon offsets, a controversial practice often characterized as “greenwashing.” Due to the time and expense required to satisfy B Lab, King gave up its certification.¹⁰⁴

PORTAL (May 20, 2020, 11:24 AM), <https://kb.bimpactassessment.net/support/solutions/articles/43000575263-how-the-b-impact-assessment-is-scored>.

97. Anjali Raval, *The Struggle for the Soul of the B Corp Movement*, FINANCIAL TIMES, (Feb. 18, 2023), <https://www.ft.com/content/0b632709-afda-4bdc-a6f3-bb0b02eb5a62>.

98. *Id.*

99. *Id.*

100. See *Nestlé Nespresso S.A.: 2022 Full B Impact Assessments*, B LAB, <https://www.bcorporation.net/en-us/find-a-b-corp/?query=nespresso&sortBy=companies-production-en-us> (search “Nespresso” in the search bar, then click on “Nespresso Global,” scroll down to “Additional Documentation” and then download the “Nespresso Transparent Assessments 2022) (last visited Jan. 9, 2025).

101. *Id.*

102. Anderson, *supra* note 94, at 11.

103. *Id.*

104. See *id.*

IV. CONCLUSION

As noted previously, the primary thesis of *Becoming a Public Benefit Corporation* is that the Model Act is bad for enforcement but good for reinforcement.¹⁰⁵ That is, it can help companies that wish to be socially responsible by helping them self-evaluate, identify good practices, and self-police. (Unfortunately, it can also allow companies to game the system and mislead the public.) But by its own terms, “reinforcement” applies only to companies that have *elected* to be BCs. The notion of therapeutic disclosure was developed with respect to the SEC’s disclosure rules, which are mandatory for *all* reporting companies.¹⁰⁶ In contrast, only BCs need to file annual benefit reports.¹⁰⁷ Electing BC status may (or may not) establish a credible commitment to social benefit,¹⁰⁸ but credible commitment theory is inherently non-mandatory: it attempts only to provide mechanisms for parties that *desire* to assure others (such as investors, customers, or other stakeholders) of the seriousness of their promises and to be held accountable to them.¹⁰⁹ But not all (and likely not most) businesses, investors, and customers are interested in making credible commitments, or indeed any commitments, to social responsibility.

The problem of corporate entity law is not that it imposes a strict duty to seek profit, but that it fails to impose any meaningful duty at all. Corporate social irresponsibility is not legally mandated, but motivated by greed, economic incentives, and the market for corporate control and encouraged by “cultural expectations” and practices. Corporate profits (or convincing promises of future corporate profits) lead to higher stock prices, which lead to higher director and officer salaries and equity compensation and stave off proxy fights and hostile takeovers. Corporate leaders who resist those incentives are not subject to legal sanction, but they hold their jobs at the pleasure of profit-seeking investors. For example, Emmanuel Faber, CEO

105. DORFF, *supra* note 1, at 5.

106. See Tingle, *supra* note 91, at 751-52 (discussing how therapeutic disclosures relate to securities regulation); Eva Su, *SEC Securities Disclosure: Background and Policy Issues*, CONG. RSCH. SERVICE (Aug. 20, 2024) (explaining SEC disclosure requirements) <https://crsreports.congress.gov/> (in the search bar, type “SEC Securities Disclosure; then choose the first article on the resulting list with the matching title); *Statutes and Regulations*, U.S. SECURITIES AND EXCHANGE COMMISSION, <https://www.sec.gov/rules-regulations/statutes-regulations>, (last visited Oct. 24, 2024).

107. *About Benefit Corporations*, *supra* note 86.

108. Cf. Lisa Fairfax, *Stakeholderism, Corporate Purpose and Credible Commitment*, 108 VA. L. REV. 1163, 1168 (2022) (“we cannot simply assume that corporations will be incentivized to adhere to their commitments, even if we assume they are acting in good faith when they make those commitments”).

109. *Id.* at 1186 (“credible commitments are necessary to ensure that actors adhere to *the promises they make* in an economic exchange”)(emphasis added).

and chair of the food manufacturing giant Danone, sought to become one of the first multinationals with B Corp certification for all of its sales.¹¹⁰ When activist shareholders rebelled against Faber's sustainability agenda, however, the board removed him.¹¹¹

Although it lacks legal bite, the rhetoric of shareholder primacy gives corporate greed a theoretical (albeit doctrinally inaccurate) justification that many people believe, and others cynically hide behind. Second, it incorrectly suggests that "corporate law," or more precisely, entity law, holds the key to corporate social responsibility.

Whether shareholder primacy is a duty or a myth, the Model Act does little, if anything, to fight it. The Model Act approach holds that the overwhelming majority of corporations are legally bound to shareholder primacy, while a small number of conscientious corporations may opt out of it. If this is true, corporate social responsibility is likely to *decrease*, because all actions by a non-BC in the interest of social welfare (such as philanthropy, emissions reduction, or paying more than minimum wage) are illegal and actionable unless the benefits to shareholders outweigh the costs.

Despite my earlier quibble with Strine over the "shareholder primacy" doctrine, I agree with the prescription he advocates for in the same article (and others).¹¹² He argues that corporate social responsibility is the domain not of corporate law but of direct substantive legal controls on corporate behavior (what Strine refers to as "externality regulation"). He argues that corporate law is not up to the task:

"[B]ecause the profit-pressure put on corporations by institutional investors is strong . . . stockholders will put pressure on corporate managers to seek as much profit as they can within the range of legally permissible conduct."¹¹³

Even assuming that BC shareholders do not exert such pressure, the vast majority of corporations are not BCs and are unaffected by BC laws. Our legislative system is broken in many ways, but it is at least theoretically capable of externality regulation. Business entity law, as currently understood, is not. It has come to mean the law facilitating the formation and "internal" self-governance of business entities according to the preferences of investors, managers, and creditors. Policing the "external" effects of corporate conduct has been left to "environmental," "labor," and other bodies of law. Thus, new types of enabling entity law, such as BC statutes, are

110. Raval, *supra* note 97.

111. *See id.*

112. *See* Strine, *supra* note 36, at 768 (discussing the author's position on how to make corporations more socially responsible).

113. *Id.* at 786-88.

fundamentally unable to make corporations responsive to the public interest. As long as corporate law is enabling in character, it will permit, and human self-interest will encourage, the externalization of the social costs of production.