

Mapping the State of Social Enterprise and the Law

2017–2018

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Grunin Center

The Grunin Center for Law and Social Entrepreneurship was founded to create new ways for law and lawyers to support positive change in the world. Our mission is to accelerate the effective participation of globally oriented lawyers and enhance the community of legal institutions engaged in social entrepreneurship and impact investing.

To this end, the Grunin Center will publish *The State of Social Enterprise and the Law* annually. The first in the series, this report seeks to capture some of the difficulties in defining the field, as well as the encouraging progress that has been made in law schools, academic research, and state legislation. Looking forward, we expect to see continued development in each of these areas as students demand more from their schools, and constituents from their legislators.

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Introduction

The field of social enterprise and impact investment has been in flux in the last decade. Legislators, philanthropists, attorneys, and entrepreneurs have all instituted radical changes in their efforts to craft a legal and financial framework that could systematize the amorphous field. Not without controversy, the field remains unsettled terrain. Some questions that currently generate heated debate within the social entrepreneurial and impact investing field are: 1) Would it advance the field to develop standard definitions and possibly standardized documentation? 2) How should social enterprises and investments in this field be treated for tax purposes? Is there a case to be made for tax subsidies? and 3) Are new corporate forms of legal entities necessary to further the growth of the field?

This report takes a step back and evaluates the state of social enterprise and the law in the United States. It describes considerations and challenges in defining the field of social entrepreneurship and impact investing, legislative developments in the United States with respect to forms of legal entities that are available to social entrepreneurs, the role of U.S. legal education in training a new generation of lawyers knowledgeable about the field of social entrepreneurship and impact investing, and the last decade of legal scholarship in the field of social entrepreneurship and impact investing.

Case Study

The experience of social entrepreneurs Galen Welsch and Randy Welsch in founding their company, Jibu, sheds light on the tangible impact that the legal framework for social enterprises has for businesses on the ground. In 2012, Galen and Randy co-founded Jibu to provide affordable drinking water to East Africans and to equip emerging entrepreneurs in East

Africa with the leadership skills to launch and own their own drinking water businesses.¹ They incorporated the company in the state of North Carolina as a low-profit limited liability company (“L3C”).² The L3C is a for-profit entity similar to an LLC but which by law must align its profit-making activities with its charitable mission.



Children with Jibu drinking water in Kampala, Uganda

The L3C is a relatively new type of legal entity in the United States. Conceived in 2006 by Robert Lang, CEO of the Mary Elizabeth & Gordon B. Mannweiler Foundation, with assistance from Marcus Owens of Caplin & Drysdale and Arthur Wood of Ashoka,³ L3Cs were intended to attract investments from private foundations in the United States.

¹ Jibu, <https://jibuco.com/corporate-team/> (last visited March 19, 2018).

² E-mail from Galen Welsch, Co-Founder and CEO, Jibu, to Alice Thai, student, NYU School of Law (March 11, 2018, 11:37 AM) (on file with author).

³ Sue Woodrow & Steve Davis, *The L3C: A New Business Model for Socially Responsible Investing*, Federal Reserve Bank of St. Louis (Winter 2009-2010), <https://www.stlouisfed.org/publications/bridges/winter-20092010/the-l3c-a-new-business-model-for-socially-responsible-investing>. Caplin & Drysdale is a law firm based in Washington, D.C. Ashoka is an international organization that promotes socially responsible investing and social entrepreneurship.

Private foundations are leery of making investments that could jeopardize their charitable purpose,⁴ but private foundations in the United States can make program related investments (“PRIs”) to for-profit entities without penalties after overcoming certain bureaucratic hurdles.⁵ The IRS defines PRIs as investments whose primary purpose is to accomplish charitable purposes, such as religious, literary, and educational purposes, and not to produce income.⁶ The bureaucratic hurdles of ensuring compliance with the private foundation rules governing PRIs and the severe penalties of making an investment that does not satisfy the PRI requirements (imposition of an excise tax and possibly even a loss of tax-exempt status) can deter foundations from making PRIs.⁷ By incorporating the PRI tax requirements into the statutory language of the L3C, it was hoped that the IRS would agree that the L3C could provide a kind of “safe harbor” for PRIs such that investments into L3Cs could be presumed to qualify as PRIs under the IRS code.⁸

Vermont became the first state in the country to recognize L3Cs in 2008,⁹ and over the next nine years, several states followed—including North Carolina in 2010.¹⁰ To date, however, the IRS has not recognized the L3C as a per se vehicle for attracting qualifying PRI investments.¹¹ Foundations can still make PRIs into L3Cs, but they must overcome the same

⁴ 26 I.R.C. § 4944.

⁵ “Currently, the only truly safe route to making a PRI is either to (1) go through the process of obtaining a private letter ruling from the IRS or (2) obtain an opinion of knowledgeable tax counsel.” Cassady V. Brewer & Michael J. Rhim, *Using the ‘L3C’ for Program-Related Investments*, 21 *Tax’n Exempts* 11, 12 (2009).

⁶ 26 I.R.C. § 4944(c); 26 I.R.C. § 170(c)(2)(B).

⁷ *Id.* at 12-13.

⁸ Cassady V. Brewer & Michael J. Rhim, *Using the ‘L3C’ for Program-Related Investments*, 21 *Tax’n Exempts* 11, 11 (2009).

⁹ H.0775 “Low-Profit Limited Liability Companies” Vermont Legis. Session 2007-2008, <http://www.leg.state.vt.us/database/status/summary.cfm?Bill=H.0775&Session=2008>.

¹⁰ S.B. 308, 2010 (N.C.).

¹¹ Jill Manny, *Much Ado About Nothing: A Comment on Tyler’s Paper on Regulating Charitable Hybrids*, 9 *N.Y.U. J.L. & Bus.* 587, 590 (2013).

bureaucratic hurdles to ensure compliance with the PRI rules as with PRIs made into other for-profit forms of entities. As a result, there is no preferential tax treatment of PRIs when made into L3Cs.

As Galen and Randy deliberated among the potential choices of corporate entities for Jibu, they looked at both typical legal entities and those being developed under new social enterprise statutes. The co-founders considered registering Jibu as an LLC with an operating agreement explicitly stating its charitable purposes, but they rejected this route because they wanted the corporate form to signal to investors and the general public Jibu's commitment to pursuing both social impact and financial returns.¹²

At the time they were making this choice of entity decision, it still seemed possible that the IRS might provide helpful guidance to the effect that investments into L3Cs should qualify as PRIs. Accordingly, the co-founders of Jibu decided that L3Cs might have slightly more traction with potential investors, particularly those that were private foundations. They also thought that the L3C form provided more flexibility than another new social enterprise form that was gaining attention in the United States at the time, the benefit corporation.¹³ Whereas the requirement for the social purpose of an L3C is that it acts in furtherance of a “charitable or educational purpose,”¹⁴ the benefit corporation must intend to have a “material, positive impact on society and the environment.”¹⁵ Furthermore, the benefit corporation must “consider the interests of a

¹² E-mail from Galen Welsch, Co-Founder and CEO, Jibu, to Alice Thai, student, NYU School of Law (March 11, 2018, 11:37 AM) (on file with author).

¹³ *Id.*

¹⁴ Mystica M. Alexander, Benefit Corporations—The Latest Development in the Evolution of Social Enterprise: Are They Worthy of a Taxpayer Subsidy?, 38 Seton Hall Legis. J. 219, 237 (2014).

¹⁵ *Id.* at 243.

broad variety of stakeholders, including, but not limited to, the community, employees, and consumers.”¹⁶ As a result, in 2012, they chose to incorporate Jibu in North Carolina as an L3C.

To attract investors and partners who were unaccustomed to making grants to for-profit entities, the co-founders of Jibu also decided to create yet another organization, Overflow, a 509(a)(3) supporting charity organization with social goals that overlap with those of Jibu L3C.¹⁷ These two organizations, while legally separate,¹⁸ work in tandem toward mutual goals. Whereas Jibu L3C focuses on bringing clean water to East Africans and empowering individuals to run their own businesses, Overflow focuses on the leadership development and training components of Jibu.¹⁹ While the original plan was for Overflow to attract traditional grant funding and then direct those funds in the forms of grants and PRIs to Jibu L3C, it has turned out that the majority of grants attracted to date have been made directly to Jibu L3C, not through Overflow.²⁰

One year after Jibu formed as a L3C in 2012, faced with growing criticism about the value of L3Cs, the state legislature of North Carolina decided to repeal its L3C statute.²¹ This repeal went into effect January 1, 2014.²²

The experiences of Jibu’s co-founders exemplify how the theoretical debates taking place within the social enterprise and impact investing field interact with each other and what they

¹⁶ *Id.*

¹⁷ E-mail from Galen Welsch, Co-Founder and CEO, Jibu, to Alice Thai, student, NYU School of Law (March 11, 2018, 11:37 AM) (on file with author).

¹⁸ The two organizations do not share any board seats or management.

¹⁹ E-mail from Galen Welsch, Co-Founder and CEO, Jibu, to Alice Thai, student, NYU School of Law (March 11, 2018, 11:37 AM) (on file with author).

²⁰ *Id.*

²¹ For the original Senate Bill, see <https://www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S439v6.pdf>. For commentary on its repeal, see <https://www.forbes.com/sites/annefield/2014/01/11/north-carolina-officially-abolishes-the-l3c/#35e585463d7f>.

²² S.B. 439 § 34, 2013 (N.C.).

mean on the ground for social entrepreneurs and impact investors. The lack of defined terms in the social enterprise field, such as the kinds of ventures that should be considered social enterprises and thus entitled to benefits that come with the “social enterprise” label caused new legal structures such as the L3C to develop. But unfamiliarity with the L3C form and lack of IRS guidance about how it would treat investments made into L3Cs has made it challenging to attract investors into the L3C form. Additionally, some companies, like Jibu, are seeking both investment and grant capital. Accordingly, these social entrepreneurs, like Jibu’s co-founders, create tandem organizations – pairing a for-profit organization with a charity – so that they might receive both investments and grants.

North Carolina’s repeal of its L3C statute embodies a central debate taking place as to whether these new legal entities are necessary or whether existing forms like the C-corporation or the LLC are sufficient. When asked if Jibu foresees risk in maintaining its L3C current structure in light of North Carolina’s repeal, Galen responded that he did not predict any risks, but thought there may be better opportunities for Jibu with other legal forms in the future. Jibu may even eschew the new social enterprise forms altogether.²³ With hindsight, Galen has observed that, though the L3C form helped from an “aesthetic perspective,” it has rarely helped from a “legal perspective.”²⁴ As a result, in terms of fundraising, the co-founders have debated incorporating as a C-corporation to better account for larger funders and to facilitate international transactions.²⁵ The experiences of entrepreneurs like Galen as they run their companies and seek to attract funding on a greater scale raise important questions about the utility of new social enterprise forms.

²³ E-mail from Galen Welsch, Co-Founder and CEO, Jibu, to Alice Thai, student, NYU School of Law (March 11, 2018, 11:37 AM) (on file with author).

²⁴ *Id.*

²⁵ *Id.*

Defining the Field

There remains a central question in the field of social entrepreneurship as to whether agreement on standardized definitions would advance the field. The current lack of agreed definitions poses unique challenges for social entrepreneurs and those that service them.²⁶ On the other hand, though the murkiness of what qualifies as social entrepreneurship can be seen as a hindrance, it may be a blessing in disguise in that it leaves flexibility in venture formation. The legal community in particular is likely to play a critical role in tackling issues that can arise from the current definitional ambiguity.

In their recent book, Social Enterprise Law: Trust, Public Benefit and Capital Markets, Professors Dana Brakman Reiser and Steven A. Dean stake their claim, saying “Here, social enterprise means a for-profit firm dedicated to achieving a blend of profits for owners and good for society (mission).”²⁷ It is worth noting that this definition of social enterprise is narrower than that used by some others. For example, Professor Alicia Plerhoples has noted that “[m]any social enterprises attempt to solve social or environmental problems while also pursuing financial returns for themselves and their investors; others do so in non-profit organizational forms so as to reinvest financial returns in the nonprofit organization.”²⁸ And still others focus on the person, not the legal entity. For example, Ashoka, a nonprofit organization founded by Bill Drayton that has pioneered the field of social entrepreneurship, defines social entrepreneurs as “individuals with innovative solutions to society’s most pressing social, cultural and

²⁶ Impact investing also has struggled with definitional issues too. Jess Daggars & Alex Nicholls, *The Landscape of Social Impact Investment Research: Trends and Opportunities*, University of Oxford 6-7 (2016).

²⁷ Dana Brakman Reiser & Steven A. Dean, *Social Enterprise Law: Trust, Public Benefit and Capital Markets* (2017).

²⁸ Alicia Plerhoples, *Representing Social Enterprise*, 20 *Clinical L. Rev.* 215, at 220-221 (2013).

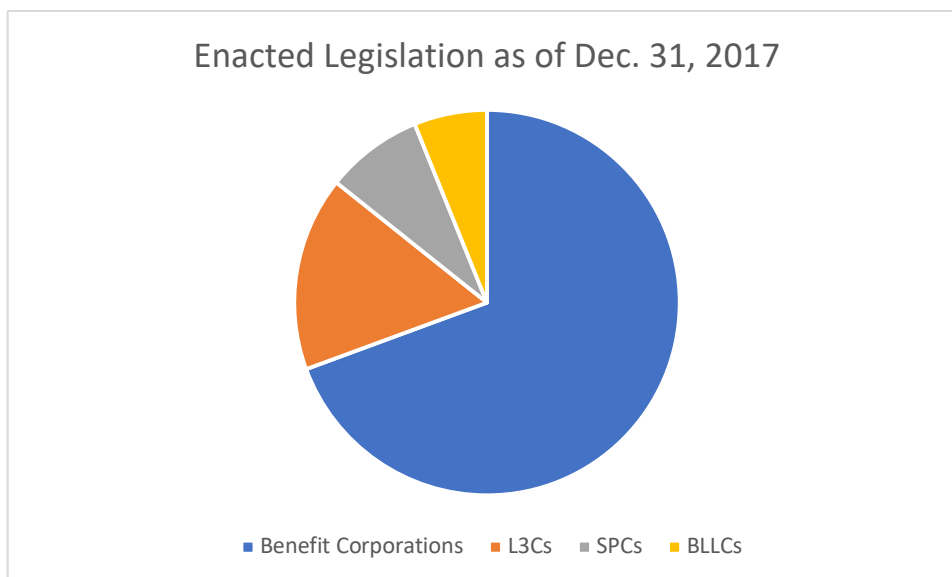
environmental challenges.”²⁹ In the current world of competing definitions, it is clear that there is not yet a consensus over whether form or function (or some combination of the two) ultimately determines what constitutes a social enterprise. Accordingly, in our report, we do not commit to any definitions, but rather follow the definitions that state legislatures and academics have adopted in their respective universes.

Mapping State Legislation

The variety of legal entity forms now available in the United States also complicates the state of social enterprise. As of December 31, 2017, 38 jurisdictions across the country have at least one social enterprise statute enacted. Benefit corporations are the most popular, recognized by 33 states and the District of Columbia. The L3C is offered in eight states, the social purpose corporation (“SPC”) in four, and the benefit limited liability company (“BLLC”) in three.³⁰ To add to the complexity, not all social enterprise statutes are the same. State legislatures have often adopted unique structures, language, and provisions in these statutes.

²⁹ See Ashoka website, “Social Entrepreneurship: Building the Field” (<https://www.ashoka.org/en/focus/social-entrepreneurship>) (last reviewed on March 31, 2018).

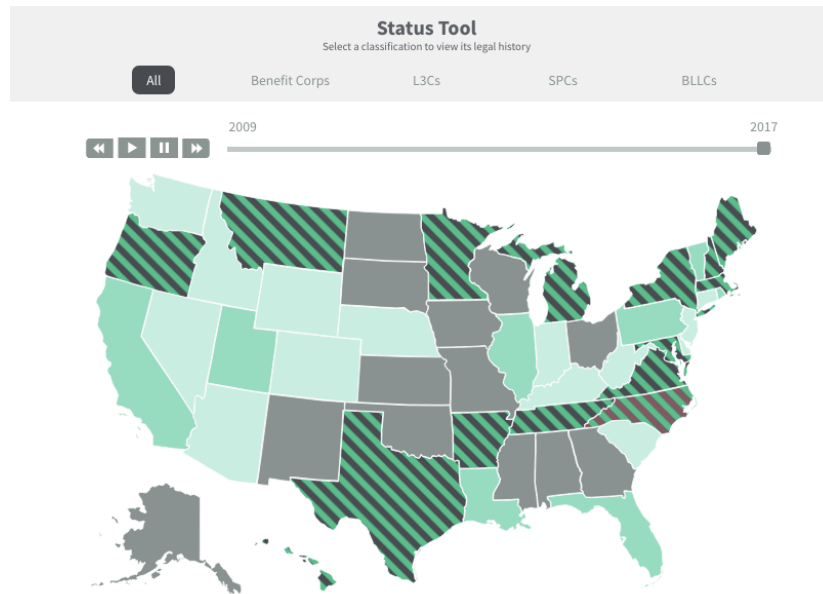
³⁰ See www.socentlawtracker.org



The rapidly evolving nature of this legislative landscape in the United States inspired Shawn Pelsinger and Robert Esposito,³¹ both Jacobson Fellows in Law and Social Enterprise at NYU Law during the 2013-14 academic year, to create the Social Enterprise Law Tracker.³² Designed as a comprehensive online resource for legal practitioners, the Social Enterprise Law Tracker compiles relevant legislative actions across the 50 states and the District of Columbia. Using an interactive map, the Social Enterprise Law Tracker aims to make it easy for users to see at a glance which states allow for the various legal structures, as well as how legislation has spread across the country from 2009 to the present day. The Social Enterprise Law Tracker is the first such tool to provide comprehensive mapping of social enterprise legislation in the United States.

³¹ Shawn Pelsinger (J.D. '09, LLM '10, N.Y.U. School of Law) is now an adjunct professor at Columbia Law School. Robert Esposito (J.D. '10, Wake Forest University School of Law) is now an associate at Paul, Weiss, Rifkind, Wharton & Garrison LLP.

³² See www.socentlawtracker.org



What does the Social Enterprise Law Tracker reveal as of the end of December 2017?

First, it is important to note what the tool’s categorizations represent. Benefit corporations are a type of corporate entity authorized by state law. They must be distinguished from “B Corporations,” which are companies that have been certified by the independent non-profit organization, B Lab.³³ Furthermore, while benefit corporation statutes are often based on the Model Benefit Corporation Legislation, particular features vary across jurisdictions.³⁴

Similarly, SPC and BLLC statutes are not uniform. While California, Washington, and Florida recognize SPCs as a distinct corporate form, Texas simply allows all for-profit corporations to adopt a “social purpose.”³⁵ As no other jurisdiction is currently considering SPC legislation, it is unclear which model will be followed, if any, for future SPCs. BLLCs have only

³³ However, B Lab has been and continues to be a major advocate for benefit corporation statutes.

³⁴ For example, some but not all benefit corporation statutes require a benefit director to sit on the board. For Model Benefit Corporation Legislation, see

http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf.

³⁵ <http://www.statutes.legis.state.tx.us/Docs/BO/htm/BO.23.htm>

been enacted in three states and each state has done it differently. Oregon has one statute for “benefit companies,” allowing both corporations and LLCs to adopt the form.³⁶ Pennsylvania also uses the term “benefit company,” but only in reference to BLLCs, and has a separate statute for benefit corporations.³⁷ Maryland has a standalone BLLC statute and does not use the term “benefit company.”³⁸ Connecticut, which has an existing statute for benefit corporations, introduced a bill in 2017 that, if adopted, will recognize BLLCs as a distinct entity separate from benefit corporations.³⁹

Despite these confusing distinctions, the Social Enterprise Law Tracker reveals a few trends. Benefit corporations continue to be the most popular type of legal form set forth in social enterprise statutes, with seven new bills under consideration in 2017. SPCs and BLLCs have yet to gain the traction that benefit corporations have seen over the past several years. L3Cs have seen slightly more growth than either SPCs or BLLCs, but legislative attempts at enacting L3C statutes are experiencing a more significant failure rate than any of the other entity types. For example, in 2011, benefit corporations saw seven new statutes enacted and only one failed attempt. In the same year, L3Cs saw eight statutes enacted, but ten bills failed to make it out of their various legislative committees.

L3Cs are also the only form of legal entity to see its legislation repealed. As discussed in the Jibu case study, North Carolina repealed its L3C statute effective January 2014, citing it as “deadwood” in the context of existing LLC law.⁴⁰ This repeal illustrates the uncertainty

³⁶ https://www.oregonlegislature.gov/bills_laws/ors/ors060.html.

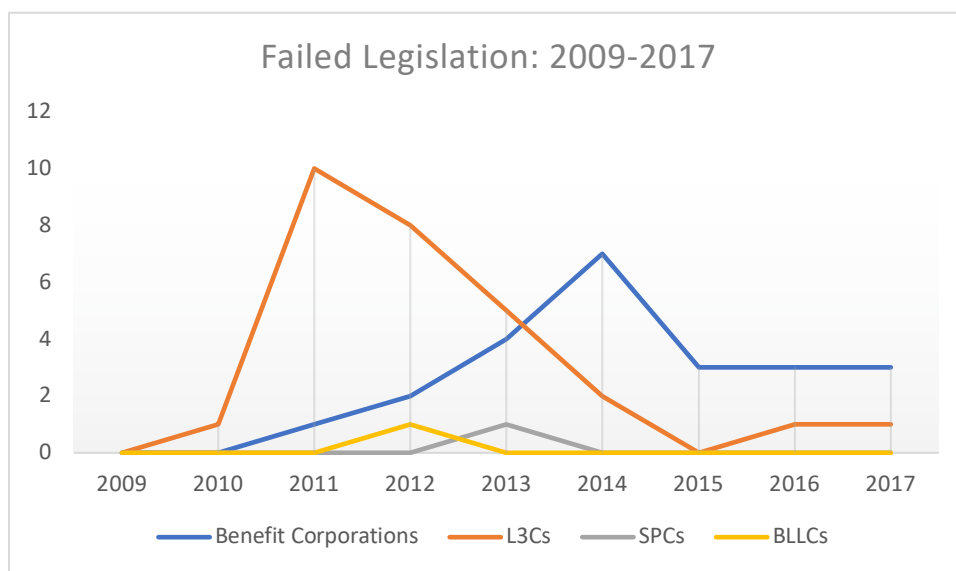
³⁷ <http://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=15&div=0&chpt=88;>
[http://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=15&div=0&chpt=33.](http://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=15&div=0&chpt=33)

³⁸ http://mlis.state.md.us/2011rs/chapters_noln/Ch_500_sb0595E.pdf.

³⁹ <https://www.cga.ct.gov/2017/TOB/s/pdf/2017SB-00012-R01-SB.pdf>

⁴⁰ For the original Senate Bill, see <https://www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S439v6.pdf>. For commentary on its repeal, see <https://www.forbes.com/sites/annefield/2014/01/11/north-carolina-officially-abolishes-the-l3c/#35e585463d7f>.

surrounding the current state of the social entrepreneurial field. As legislators and scholars work to discern the laws that would establish the best foundation for the field of social entrepreneurship and impact investing, the legislative landscape continues to change at a rapid pace, and entrepreneurs and investors must be flexible to accommodate these changes. Jibu was fortunate in that it did not have to make any substantial changes after North Carolina repealed its L3C statute. North Carolina continues to allow Jibu and other L3Cs incorporated in the state to maintain the label of L3C, but now effectively treats these companies as LLCs.⁴¹



In 2017, trends from previous years generally held steady, with seven states considering legislation for benefit corporations, four for L3Cs, one for BLLCs, and none for SPCs. Notably, each of the 11 states considering legislation in 2017 to authorize the formation of benefit corporations or L3Cs are doing so after having previously failed with different versions of their respective bills. Moreover, in spite of the North Carolina experience with L3Cs, it seems that

⁴¹ Senate DRS85104-ML-71X, A Bill to be Entitled an Act to Amend and Restate the North Carolina Limited Liability Company Act and to Make Other Conforming Changes, General Assembly of North Carolina Session 2013, <https://www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S439v0.pdf>.

some states are still interested in introducing legislation to authorize this form. On the other hand, Kentucky, Texas, and Wisconsin were the only states to enact new social enterprise legislation in 2017, and all three statutes authorize the formation of benefit corporations.

It is difficult to predict whether these trends will persist. Further academic research, new empirical evidence, or a shift in advocacy efforts for the various legal entities could all affect the development of new legislation. The Social Enterprise Law Tracker will continue to monitor this evolving legislative landscape and serve as a resource for the social enterprise community.

Given the breadth of entity options now available across the country, which are social entrepreneurs choosing? This is a difficult question to answer, as not all states make such data available. These numbers attempt to provide a snapshot of entity uptake from publicly available data, either through B Lab's tracking efforts (as of November 2017)⁴² or state' online business entity searches (as of March 2018).⁴³ As of November 2017, there were 4,981 registered benefit corporations across the country (though not all are active). The states with the most registered benefit corporations are Nevada (974), Delaware (774), Colorado (513), New York (457), and California (269). Oregon, a close sixth, has 267 registered benefit corporations. Oregon also has 1,113 registered benefit LLCs.⁴⁴

Vermont, the first state to enact the L3C statute in 2008, saw 210 businesses choose the structure by November 2015.⁴⁵ That number has since grown to over 500. Michigan, a close second, has 506. Illinois has 308, Wyoming has 136, Maine has over 100, and Rhode Island has

⁴² For B Lab's list of Known Benefit Corporations, see <https://data.world/blab/benefit-corporations-list/workspace/file?filename=Known+Benefit+Corporations.csv>

⁴³ For example, by searching "L3C" as part of the entity name on a state's business entity search page. All L3C statutes require the "L3C" designation or some variation thereof in the company name. Numbers reflect total businesses incorporated and are not filtered for active companies.

⁴⁴ Data on BLLCs in Maryland and Pennsylvania was not available.

⁴⁵ J. Haskell Murray, *The Social Enterprise Law Market*, 75 Md. L. Rev. 541 (2016)

22.⁴⁶ North Carolina, before repealing its L3C statute in 2014, had 129 registered L3Cs. Washington, which has enacted only social purpose corporations, has 337 such entities registered.⁴⁷

Mapping U.S. Law Schools

The 2017 Deloitte Millennial Survey captured an important trend in the millennial demographic: namely, the millennial generation expects business to do more to improve society. For example, 59% of millennials felt business should be accountable for protecting the environment and 53% felt business should be accountable for engendering social equality.⁴⁸

Millennial students also have begun to expect more of their educational institutions in the field of social entrepreneurship and impact investing. Institutions of higher education are responding to this growing student interest in learning about and developing skills that could be applied to businesses engaged in making positive social and environmental impacts. Courtney McBeth, a researcher at the University of Pennsylvania, has studied how higher education is evolving in this regard. McBeth found that between 1993 and 2017 U.S. universities created 49 centers that focus on social impact.⁴⁹ Some of these centers have been established as university-wide initiatives; other centers are located inside graduate schools.⁵⁰ Law schools, however, have been largely missing from this trend, that is until the spring of 2017 when NYU Law School

⁴⁶ Data for Louisiana was not available.

⁴⁷ Data for SPCs in California, Florida, and Texas was not available.

⁴⁸ Deloitte Millennial Survey 2017,

<https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-deloitte-millennial-survey-2017-executive-summary.pdf>.

⁴⁹ Courtney McBeth, *Mission Markets: The Emergence and Evolution of Social Impact Centers in the U.S.*, 2017. Note that the term “center” is used broadly in this research as different standards are applied by universities as they determine what constitutes a center, program, or institute.

⁵⁰ *Id.* Many of these centers began in elite business schools, but in recent years these centers are showing up in other schools too.

launched the Grunin Center for Law and Social Entrepreneurship (the “Grunin Center”), the first center of its kind located in a law school.

In the 2017-2018 academic year, the Grunin Center mapped the extent to which law schools in the United States are embedding themes of social entrepreneurship and impact investing into their curricula and extracurricular activities, as well as in legal scholarship.⁵¹ While the Grunin Center’s surveys may not have fully captured all that is happening in U.S. law schools, we learned that around 30% of all accredited U.S. law schools (over 60 law schools) currently are supporting curricular offerings, extracurricular activities, or legal research and writing by faculty and students in the field of social entrepreneurship and impact investing. And some law schools, like NYU Law, are engaging actively in all three areas.

a. Curriculum

Findings from the Grunin Center’s surveys in late 2017 and early 2018 show the emerging state of social enterprise and impact investing curriculum currently offered in U.S. law schools. At least 43 law schools have faculty teaching courses that include some mention of social entrepreneurship and/or impact investing.⁵² And some law schools have standalone courses on these topics. Another finding is that interdisciplinary courses also are combining law with other disciplines to address themes of social entrepreneurship and/or impact investing.⁵³

⁵¹ See Appendix A for a listing of law schools that responded to the Grunin Center’s surveys.

⁵² For those surveyed professors who noted that they currently are teaching a doctrinal course that addresses or embeds themes of social entrepreneurship and/or impact investing, over 80 percent identified their field of expertise as corporate law/enterprise organizations.

⁵³ The Grunin Center survey identified 13 survey respondents that are teaching interdisciplinary courses or classes that address social entrepreneurship and/or impact investing. Business is the most likely field for these interdisciplinary courses (10 respondents) but other disciplines are also being introduced into these courses like public policy, engineering, medicine, arts/design, environmental studies, and urban planning.

Many of the law school course offerings in the field of social entrepreneurship and impact investing are taking place in experiential courses. For example, some survey respondents (10) noted that they are teaching simulation courses that embed themes of social entrepreneurship and/or impact investing.

But most experiential courses that address social entrepreneurship and/or impact investing are taking place in law school clinics – particularly transactional clinics. A Grunin Center survey of U.S. transactional clinics shows that at least 27 law schools (representing 30 transactional clinics) currently are serving clients that self-identify as social entrepreneurs or impact investors.

This is a relatively new practice area for many transactional clinics. Twelve transactional clinics started serving these types of clients in just the last three academic years. Most of the 30 transactional clinics responding to this survey are serving social enterprises (22), while nearly a quarter (8) are serving both social enterprises and impact investors. The top four areas of legal advice being provided by transactional clinics to their social enterprise/impact investor clients are:

- Formation/Choice of entity (28 clinics);
- Contracts and agreements (28 clinics);
- Governance (27 clinics); and
- Intellectual Property (25 clinics).

To help law schools do more to embed themes of social entrepreneurship and impact investing into law school courses (doctrinal, interdisciplinary and experiential courses), survey respondents identified a number resources that would be helpful. The five most frequently cited resources in demand include: case studies (with teacher guides) (29 survey respondents),

exercises (simulations, small group exercises, drafting exercises, negotiation exercises, etc.) (29 survey respondents), library of teaching tools (forms of contracts and training tools) (29 survey respondents), bibliographies for pertinent readings (27 survey respondents); and updates on legal developments (26 survey respondents).

b. Extracurricular activities

Law schools are also supporting or sponsoring activities for law students outside of the classroom that involve social entrepreneurship and/or impact investing. The Grunin survey identified at least 17 law schools that are doing this through a variety of extracurricular activities, such as conferences, centers/programs/institutes, career placements, student groups, mentoring, field trips, student-run impact investment funds, special series of law reviews/journals, competition teams, certificates, CLE programs, moot courts, and scholarships.

c. Legal research and writing

Law schools also are supporting legal research and writing by their faculty members and by their law students on topics related to social entrepreneurship and impact investing. These legal scholars, however, point to the need for more resources to help them research and publish in the field of social entrepreneurship and impact investing. One clear need is for more symposia dedicated to topics in this field (31 survey respondents). Other resources that would be helpful include scholarship recognition (16 survey respondents), journals dedicated to articles about social entrepreneurship/impact investing (16 survey respondents), an AALS section focusing on social enterprise/impact investing (12 survey respondents) and writing workshops (11 survey respondents).

Mapping the Legal Literature

Academic research plays a unique role in the advancement of the social enterprise and impact investment field. Among other things, academic research can help define the field, observe new trends, build theoretical models to explain empirical reality, and generate new empirical data that could be used by non-academics. Persuasion of a preconceived position or ideology is generally not the purpose of academic research.⁵⁴ Rather, it “aims to provide dispassionate and accurate accounts of ‘reality’ informed by traditions of theory and analyses that are outside the researcher herself.”⁵⁵ As a result, the uniquely robust and rigorous nature of academic research makes it incredibly valuable to developing the field of social enterprise and impact investment.

Although the law plays a crucial role in the development, scaling, and success of social entrepreneurship and impact investing, surveys of academic research thus far have focused on literature arising from finance and other business school disciplines.⁵⁶ Legal scholarship in the field of social entrepreneurship and impact investing has not received similar attention. Recognizing this gap, the Grunin Center in conjunction with Professor Anne Tucker of Georgia State University College of Law and her research assistant, Abigail Stout, set out to record the contributions of English language legal literature published between 2007 and 2017 and to identify unexplored areas for further legal scholarship. This project is the first of its kind.

⁵⁴ Jess Dagers & Alex Nicholls, *The Landscape of Social Impact Investment Research: Trends and Opportunities*, University of Oxford 19 (2016).

⁵⁵ *Id.*

⁵⁶ E-mail from Anne Tucker, Professor, Georgia State University College of Law, to Alice Thai, student, NYU School of Law (March 25, 2018, 9:02 AM) (on file with author). For example, the Oxford literature review of social impact investment research focuses on academic papers from third sector research, finance and economics, business and management, and public policy and social policy research. See Dagers & Nicholls, *supra* note 52 at 11-13.

According to Professor Tucker, while academics have compiled bibliographies of select articles that address legal issues in the social enterprise field,⁵⁷ this is the first literature review to provide a comprehensive and critical look at a decade of legal scholarship in the field of social entrepreneurship and impact investing.⁵⁸

To conduct this legal literature review, we first identified linguistic terms prevalent in the social enterprise and impact investment field.⁵⁹ These terms were then used to search legal research databases. These databases included Westlaw, LexisNexis, and SSRN. We limited our search to articles published in the last decade, starting in 2007 (when the term “impact investing” was coined) and ending in 2017. Legal articles that mentioned the search term or concept at least three times were included in the review. Once identified, these articles were coded for certain characteristics. First, we categorized the article as having either a theoretical/explanatory focus, a policy/government/legal intervention focus, or a private ordering intervention focus. Second, we categorized the article’s subject matter as either corporate law, taxation law, or international law. Third, we categorized the article’s authors as either academic, policy, or industry/practitioner. Fourth, we categorized the article’s legal entity focus as for-profit companies/enterprises, not-for-profit companies/enterprises, or blended/hybrid. Finally, we recorded the discussion of related research topics in the article.

⁵⁷ See, for example, J. Haskell Murray, *Social Enterprise Law: Selected Journal Articles*; John Tyler et. al., *Bibliography of Materials Re: Hybrid Entities for Social Ventures* (2016).

⁵⁸ This legal literature review has not been completed and is an ongoing project. We briefly explain our research methodology here and present preliminary findings. We expect to present our findings at a social enterprise and impact investment conference in June with leading scholars. A white paper that performs a deep analysis of the findings will be published this summer.

⁵⁹ A complete list of these terms is in Appendix B.

This legal literature review has identified around 250 articles. Prominent examples of article topics that focus on social entrepreneurship include the value of new legal entity types,⁶⁰ how these entities should be taxed,⁶¹ whether the emphasis of new legal entity types on public benefit and social responsibility implies that traditional corporate forms lack a social conscience,⁶² how new legal entity types can be used to organize firms in various sectors such as litigation finance firms⁶³ or firms seeking to reduce carbon emissions,⁶⁴ and how the growth of the social entrepreneurship field may influence the charitable sector.⁶⁵ Articles with an impact investment emphasis often focus on the potential for social impact bonds (SIBs) to fund particular social services, such as efforts to reduce recidivism⁶⁶ or provide civil legal services,⁶⁷ and the tax implications of SIBs.⁶⁸

⁶⁰ See generally Robert T. Esposito, *The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation*, 4 WM. & MARY BUS. L. REV. 639 (2013); Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALA. L. REV. 767 (2015).

⁶¹ See generally Lloyd Hitoshi Mayer & Joseph R. Ganahl, *Taxing Social Enterprise*, 66 STAN. L. REV. 387 (2014); Joseph M. Binder, NOTE: *A Tax Analysis of the Emerging Class of Hybrid Entities*, 78 BROOK. L. REV. 625 (2013).

⁶² See generally Steven J. Willis, *Corporations, Taxes, and Religion: The Hobby Lobby and Conestoga Contraceptive Cases*, 65 S.C.L. REV. 1, 48 (2013); Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 448-449 (2013).

⁶³ Jared F. Knight, NOTE: *Of Conflicts and Corporations: Analyzing Corporate Forms for Future Litigation Finance Firms*, 41 J. CORP. L. 993 (2016).

⁶⁴ Michael P. Vandenberg & Jonathan A. Gilligan, *Beyond Gridlock*, 40 COLUM. J. ENVTL. L. 217, 275-276 (2015).

⁶⁵ See Jaclyn Cherry, *Charitable Organizations and Commercial Activity: A New Era Will the Social Entrepreneurship Movement Force Change?*, 5 J. BUS. ENTREPRENEURSHIP & L. 345 (2012); Kimberly A. Lowe, *The Use of Benefit Organizations by Charitable Organizations*, 2016-JUL BUS. L. TODAY 1 (2016).

⁶⁶ See e.g., Etienne C. Toussaint, *Incarceration to Incorporation: Economic Empowerment for Returning Citizens Through Social Impact Bonds*, 25 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 61 (2016).

⁶⁷ See e.g., Ben Notterman, *Leveraging Civil Legal Services: Using Economic Research and Social Impact Bonds to Close the Justice Gap*, 40 HARBINGER 1 (2015).

⁶⁸ See e.g., Orly Mazur, *Social Impact Bonds: A Tax-Favored Investment?* 9 COLUM. J. TAX L. 141 (2017).

Perhaps not surprisingly, the extent of academic analysis of choice of entity and new social enterprise statutes tracks the amount of activity in legislative initiatives. More specifically, the benefit corporation is the corporate form that has seen the most academic analysis. During the period 2007-2017, the benefit corporation was discussed in over 150 articles. The L3C was discussed in over 110 articles, the public benefit corporation in 50, and the flexible purpose corporation in 52.

Another finding of this legal literature review that reflects one of the above themes is that topics of social entrepreneurship and impact investing are of significant interest to law student scholarship. Law school students are clearly interested in exploring and analyzing legal developments in the field of social entrepreneurship and impact investing. This is evidenced by the number of law student notes uncovered by this literature review. Our review so far has identified over 80 student notes.⁶⁹

Conclusion

The tremendous amount of changes occurring in state legislatures and U.S. law schools and the growing emphasis on scholarship regarding legal developments in the field of social enterprise and impact investment manifest the field's increasing traction within the legal and business communities. While debate persists as to the necessity of new legal structures, jurisdictions across the U.S. continue to introduce legislation authorizing new types of social enterprises, particularly benefit corporations. In the last ten years, legal practitioners and academics provided legal perspective to the social entrepreneurship and impact investment field.

⁶⁹ Student notes were excluded from the formal count but will be included in an appendix in the white paper.

They evaluated the legal value of new corporate forms, provided conceptual frameworks to tax new corporate forms, analyzed potential impacts of the social entrepreneurship field on legal interpretation of other corporate forms and the charitable sector, and presented novel ways of using the new corporate forms. Nevertheless, the social entrepreneurship and impact investment field at this early stage has been marked by much uncertainty. It will be interesting to see how the field will change in the next decade.

Recognition of Tepper Family

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Appendix A

U.S. Law Schools active in social entrepreneurship/impact investing in 2017-2018
(based on their responses to the Grunin Center's mapping surveys)⁷⁰

Albany University
University of Baltimore
Boston College
Brooklyn University
Cardozo University
Chapman University
University of Chicago
University of Chicago-Kent
University of Cincinnati
Columbia University
University of Denver
Duke University
Elon University
Florida International University
Fordham University
Georgetown University
George Washington University
Georgia State University
Harvard University
Hofstra University
Indiana University
University of Iowa

⁷⁰ Desktop research indicates that this is not an exhaustive list of all law schools active in this field. At least seven other law schools appear to be engaged in one or more of the following: relevant courses, extracurricular activities, and legal scholarship, but these law schools did not respond to the Grunin Center surveys.

Lewis & Clark University
Marquette University
University of Miami
University of Michigan
University of Minnesota
University of Missouri
University of Missouri-Kansas City
University of Nebraska
New York University
University of NC-Chapel Hill
Northeastern University
University of Northern Kentucky
Notre Dame University
Pace University
University of Pennsylvania
University of Pittsburgh
University of Richmond
Saint Louis University
Santa Clara University
University of South Dakota
University of Southern California
Southern Methodist University
Southwestern University
Stanford University
University of Tennessee
University of Tennessee-Knoxville
University of Texas

Vanderbilt University

University of Vermont

Villanova University

Wake Forest University

University of Washington

Wayne State University

Yale University

Yeshiva University

Appendix B

Search Terms:

Impact invest
social invest!
social impact invest!
"social franchise"
social w/2 enterprise!
"social entrepreneur"
"hybrids"
"double bottomline"
"triple bottomline"
L3C or "low profit limited liability company"
"benefit corporation" or benefit w/2 corp!
"flexible purpose corporation"
"public benefit corporation"
"social impact bond"
"social finance"
"pay for success" or "pay for results"
"blended finance"

