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Legal Literature Review of Social Entrepreneurship and Impact Investing (2007-2017): Doing Good by Doing Business

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LEGAL LITERATURE REVIEW OF SOCIAL ENTREPRENEURSHIP AND IMPACT INVESTING (2007–2017): DOING GOOD BY DOING BUSINESS

DEBORAH BURAND*
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ABSTRACT

Although the ambition to do good by doing business is not new, the burgeoning realization of this ambition is. As the fields of social entrepreneurship and impact investing advance in size, scope and complexity, questions about the roles of corporations and capital markets in society intensify.

What is legal scholarship contributing to this discussion? This Article reviews the scholarly contributions of 260 articles written by over 150 authors about the fields of social enterprise, social finance, and impact investing. The Article maps the contributions of legal scholarship over the last decade—from 2007 (when the term “impact investing” was first coined) through 2017.

Building on prior literature reviews of business scholarship in the field of impact investing, this Article paints a picture of how and where legal scholarship is contributing most robustly to these fields. It also identifies topics and themes where more legal scholarship is needed to advance these fields. Beyond a call for merely more scholarship, this Article highlights the need for legal scholarship relevant to the practical as well as theoretical

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issues raised by the swelling tide of socially motivated business and capital. Finally, this Article concludes by identifying obstacles to and, importantly, opportunities for legal scholarship to build the fields and lay a path for new business forms and financing models to facilitate the mutual pursuit of profit and purpose.

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INTRODUCTION

*When doing good is making money, it's simple—
but doing good isn't always the most lucrative
decision, so what then?*

—Nobel Laureate Oliver Hart (October 2018)¹

In this Article we synthesize 260 publications in the fields of social enterprise, social finance, and impact investing, reflecting ten years of legal scholarship since the term “impact investing” was first coined in 2007. Through a systematic literature review cataloguing key article features, we track legal scholarship’s contribution to and commentary on how financial markets and corporate actors² are pursuing social and environmental goals alongside financial returns. As a byproduct of our efforts, we also observe trends in the fields and challenges to future growth.

The ambition to do good by doing business is not new but the burgeoning realization of this long-held hope is, even with all its attendant complexities. Consider, for example, the 1750 asset managers holding over \$70 trillion in assets under management that are signatories to the United Nations’ Principles for International Responsible Investment.³ Similarly, investors that

¹ Oliver Hart, *What's the social purpose of a company?*, UBS Nobel Perspectives (Oct. 12, 2018), <https://www.ubs.com/microsites/nobel-perspectives/en/latest-questions/2018/social-responsibility.html> [perma.cc/EVR2-5MUX].

² Our literature review covers public and private markets, as well as sources of public sector and private sector capital as some of our articles analyze the use of blended finance structures that make use of development and philanthropic capital to catalyze investments from the private sector. See, e.g., Marya N. Cotton & Gail A. Lasprogata, *Corporate Citizenship & Creative Collaboration: Best Practices for Cross-Sector Partnerships*, 18 J.L. BUS. & ETHICS 9 (2012) (describing cross sector partnerships between profit, nonprofit, governmental, and nongovernmental actors).

³ Signatories to the UN Principles for Responsible Investment (“PRI”) commit to undertake an investment approach that incorporates environmental, social and governance (“ESG”) factors into investment decisions so as “to better manage risk and generate sustainable, long-term returns.” In doing so, they commit to six principles that include: (1) incorporating ESG issues into their investment analysis and decision-making processes, (2) incorporating ESG issues into their ownership policies and practices, (3) seeking appropriate disclosure on ESG issues by their investees (portfolio companies), (4) promoting acceptance and implementation of these six principles within the investment industry,

identify as “impact investors” and, therefore, invest with the intention of generating social and/or environmental returns as well as financial returns held, as of the end of December 2017, as much as \$228 billion of “impact” assets under management.⁴ Continued growth is likely as institutional investors, like BlackRock, advocate for widespread investment strategies that take into consideration a portfolio company’s environmental, societal, and governance records.⁵

This focus on investing and organizing businesses to advance social and environmental objectives as well as financial returns reflects, at least in part, a demographic change taking place in the investor community.⁶ Called by some as the greatest intergenerational wealth transfer in history,⁷ it is estimated that as much as \$30 trillion is expected to transfer from baby boomers to millennials over the next 30 years.⁸ This wealth transfer is likely to have profound implications for financial markets and corporations if millennials undertake investment approaches aligned with their espoused values.⁹ More specifically, recent surveys of

(5) working together to enhance effectiveness in implementing the principles, and (6) reporting on their activities and progress towards implementing the principles for responsible investment. PRINCIPLES FOR RESPONSIBLE INV., <https://www.unpri.org/> [<https://perma.cc/K9GM-XY7U>].

⁴ Abhilash Mudaliar, Rachel Bass & Hannah Dithrich, Annual Impact Investor Survey—2018 (The Eighth Edition) (GIIN: June 2018), https://thegiin.org/assets/2018_GIIN_Annual_Impact_Investor_Survey_webfile.pdf [<https://perma.cc/ZV7P-8AQH>].

⁵ Larry Fink’s Annual Letter to CEOs, A Sense of Purpose (2017), <https://www.blackrock.com/corporate/investor-relations/2017-larry-fink-ceo-letter> [hereinafter Fink’s 2017 Letter to CEOs] (Larry Fink, Chairman and CEO of BlackRock, Inc., describes BlackRock’s decision to include ESG factors into its investment decisions by explaining that “a company’s ability to manage environmental, social, and governance matters demonstrates the leadership and good governance that is so essential to sustainable growth, which is why we are increasingly integrating these issues into our investment process.”).

⁶ Brittany De Lea, *Get Ready for One of the Greatest Wealth Transfers in History*, N.Y. POST, (Mar. 13, 2018), <https://nypost.com/2018/03/13/get-ready-for-one-of-the-greatest-wealth-transfers-in-history/> [<https://perma.cc/QNJ6-9ZNV>].

⁷ *Id.*; Lori Polemenakos, *How \$30 Trillion Wealth Transfer Impacts Financial Advisors*, MARKETING SOLUTIONS, (May 12, 2017), <https://www.leadingresponse.com/how-30-trillion-wealth-transfer-impacts-financial-advisors/> [<https://perma.cc/K6PU-5RRS>].

⁸De Lea, *supra* note 6.

⁹ *Id.*

millennials from around the globe have found that millennials “overwhelmingly feel that business success should be measured [in terms of more than] financial performance.”¹⁰ This rejection by millennials of a narrow view about the role of business may cause them to invest their inherited wealth differently than did the baby boomer generation that preceded them.¹¹

Some businesses are already proactively moving to integrate purpose as well as profit into their business models, governance, and decision-making.¹² New corporate legal forms are being introduced and adopted by businesses to house social entrepreneurial activities.¹³ Similarly, corporate governance structures are being rethought, and sometimes created anew to reflect and give voice to a broader range of stakeholder interests beyond that of shareholders.¹⁴ And a number of multinational corporations are looking to incorporate the United Nations’ Sustainable Development Goals (“SDGs”) into their decisions and operations.¹⁵

¹⁰ *Deloitte finds millennials’ confidence in business takes a sharp turn; they feel unprepared for Industry 4.0*, PR NEWSWIRE (May 15, 2018), <https://www.prnewswire.com/news-releases/deloitte-finds-millennials-confidence-in-business-takes-a-sharp-turn-they-feel-unprepared-for-industry-4-0—300646837.html> [<https://perma.cc/7978-CGNT>]; see 2018 Deloitte Millennial Survey at 5, <https://www2.deloitte.com/global/en/pages/about-deloitte/articles/millennialsurvey.html> [<https://perma.cc/2EZ5-TB7V>] [hereinafter 2018 Deloitte Millennial Survey] (in its 7th annual global survey of millennials, Deloitte surveyed more than 10,000 millennials across 36 countries from November 24, 2017 through January 15, 2018).

¹¹ 2018 Deloitte Millennial Survey, *supra* note 10, at 5–6.

¹² Rebecca M. Henderson, *More and More CEOs Are Taking Their Social Responsibility Seriously*, HARV. BUS. REV. 1, 2 (2018).

¹³ See generally Riley Jones, Margaret Suh, Alice Thai & Flynn Coleman, *Mapping the State of Social Enterprise and the Law*, 2017–18 GRUNIN CENTER FOR LAW AND SOCIAL ENTREPRENEURSHIP AT NYU SCHOOL OF LAW [hereinafter *Mapping the State of Social Enterprise*].

¹⁴ See, e.g., The UK Corporate Governance Code (Financial Reporting Council: July 2018), <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF> [<https://perma.cc/E3J6-LXKF>] (observing that to “succeed in the long-term, directors and the companies they lead need to build and maintain successful relationships with a wide range of stakeholders,” established new principles of corporate governance that became effective in January 2019 for all companies with a premium listing whether incorporated in the United Kingdom or elsewhere).

¹⁵ See G.A. Res. 70/1, *Transforming our World: The 2030 Agenda for Sustainable Development* (Sept. 25, 2015). For more information about the 17

As investor demographics change and business goals broaden, coupled with global, high-profile examples of inadequate governance and corporate misconduct creating harm (e.g., Wells Fargo's unauthorized accounts¹⁶), new focus turns to old questions about the very purpose of corporations in society. Milton Friedman's pronouncement over four decades ago that shareholder wealth maximization is the primary purpose of corporations and that "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game"¹⁷ is being challenged within academia¹⁸ and outside—by practitioners¹⁹ and policymakers.²⁰ Even Nobel Laureate Oliver

SDGs, see also the UN Sustainable Development Goals website at: <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> [<https://perma.cc/Y44H-S9RA>]; see also Aliana Pineiro et al., *Financing the Sustainable Development Goals: Impact Investing in Action*, GLOB. IMPACT INV. NETWORK (Sept. 2018), <https://thegiin.org/research/publication/financing-sdgs> [<https://perma.cc/LPB2-VV3T>].

¹⁶ See, e.g., Jackie Wattles et al., *Wells Fargo's 17-month nightmare*, CNN BUSINESS (Feb. 5, 2018), <https://money.cnn.com/2018/02/05/news/companies/wells-fargo-timeline/index.html> [<https://perma.cc/GC5Y-RLMP>].

¹⁷ See Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAGAZINE (Sept. 13, 1970) (He famously noted that the doctrine of "social responsibility" is a "fundamentally subversive doctrine in a free society." In this 1970 magazine article, Friedman then quoted himself from his book CAPITALISM AND FREEDOM, saying "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.").

¹⁸ See, e.g., COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD (Oxford Univ. Press 2018); J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, AM. U. BUS. L. REV. 1, 16 (2012); Lynn Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 166 (2008).

¹⁹ See Fink's 2017 Letter to CEOs, *supra* note 5:

Society is demanding that companies, both public and private, serve a social purpose. To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate.

²⁰ Senator Elizabeth Warren proposed legislation in August 2018 that would require corporations with more than \$1 billion in annual revenues to

Hart is questioning the soundness of Friedman's narrow view of the primary role of businesses.²¹

Not surprisingly, all this has led to calls for more academic research to take place in the fields of social enterprise and impact investing.²² While academics in business, finance, and public policy were first to the debate, legal academics have also joined the conversation.²³

The role of law and the creativity that lawyers bring to the table play important roles in responding to and shaping the market developments described above. As policymakers and regulators, lawyers in government set new rules of the game for both investor and corporate behaviors. As legal practitioners, lawyers help clients structure and document new legal forms, investment vehicles, and products. And as legal educators, lawyers in academia reimagine the education and skillsets needed by law students intent on engaging in a transactional/corporate practice or seeking other careers in business or policy. Preparing the next generation of lawyers to respond to demands that businesses do good in the world or, at the very least, avoid doing harm presents exciting new teaching opportunities. Consequently, law schools, at least in the United States, have begun to embed themes of social entrepreneurship and impact investing in their classrooms and extracurricular activities, as well as support legal scholarship in these fields by faculty and students.²⁴

Over the last decade, the body of legal scholarship has grown significantly, contributing to knowledge about, acceptance of, development, and deployment of social entrepreneurial activities

obtain a federal charter that obligates company directors to consider interests of all stakeholders—such as employees and community where company is based—not just shareholders. Accountable Capitalism Act, S. 3348, 115 Cong. § 1 (2018).

²¹ Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACC. 247, 248 (2017).

²² Thomas S. Lyons & Jill R. Kickul, *The Social Enterprise Financing Landscape: The Lay of the Land and New Research on the Horizon*, ENTREPRENEURSHIP RES. J. 147, 147 (2013).

²³ See Sarah A. Altschuller & Amy Lehr, *Corporate Social Responsibility*, 43 INT'L L. 577, 578 (2009).

²⁴ See *infra* notes 143–50 and accompanying text for a discussion of law school survey results on social enterprise and impact investing.

and impact investing. More could and needs to be done, however. This Article, therefore, is not merely a call for more legal contributions, but rather it highlights the need for more field-building scholarship that is relevant to the practical as well as theoretical issues raised by the swelling tide of socially motivated business.

Accordingly, it is important to take stock of the role that legal scholarship has played in the fields of social entrepreneurship and impact investing over the last decade. Only by creating a baseline snapshot of what legal scholarship has (or has not) addressed in the fields of social entrepreneurship and impact investing, can we better understand where and how legal scholarship should progress over the years to come. To this end, we conducted a systematic literature review of legal scholarship published in the English language between 2007 and 2017 addressing questions of social enterprise, social finance, and impact investing.

Our textual review of legal scholarship was inspired by research conducted by Jess Dagers and Alex Nicholls of Oxford University that culminated in a 2016 report called “The Landscape of Impact Investment Research: Trends and Opportunities.”²⁵ This 2016 Landscape Report documented the state of empirical and peer-reviewed literature on social impact investing and social finance.²⁶ Noting the absence of any references in the 2016 Landscape Report to legal literature, our examination of the state of legal literature over the last decade aims to explain how legal scholarship is contributing to the growing body of literature and business operations connected to the fields of social enterprise and impact investing.²⁷

Our legal literature review aims to identify the following: common legal themes agreed on by most legal scholars who are writing about these fields, areas where legal themes are unsettled, and white spaces where more legal research and scholarship is needed. In doing so, we follow the lead of Dagers and Nicholls and seek to help institutionalize impact investing and social

²⁵ Jess Dagers & Alex Nicholls, *The Landscape of Social Impact Investment Research: Trends and Opportunities* 1, 4 (Mar. 2016) [hereinafter the *2016 Landscape Report*].

²⁶ *See id.*

²⁷ *See id.*

entrepreneurship as fields deserving of both research and practice, and as academic paradigms of their own;²⁸ create a body of legal scholarship that is built upon a core set of ideas and theories, has common definitions, and represents a progressive accumulation of knowledge;²⁹ and identify potential opportunities for future collaborations of legal scholars with academics from other disciplines, as well as practitioners and policymakers.³⁰

More specifically, by capturing and analyzing the state of legal literature in these fields, we acknowledge the important work of our colleagues who are conducting legal scholarship; document how topics are maturing into a robust and growing area for legal scholarship; outline integral aspects currently being examined by legal scholars in connection with impact investing and social enterprise; and call for future legal scholarship on these and related topics.

The remainder of this Article is organized as follows. First, we describe the methodology used in our textual analysis of current legal scholarship and describe the findings of our legal literature review. Second, we describe the challenges and opportunities confronting legal scholarship and examine the roles that law schools play and might play in advancing this scholarship. Finally, we conclude with proposals for next steps and we identify a research agenda for future legal scholarship in the fields of social entrepreneurship and impact investing.

I. LITERATURE REVIEW METHODOLOGY

Our research efforts continue a tradition of cataloguing and summarizing field-building scholarship, including the 2016 Landscape Report, which surveyed 73 academic and 261 industry reports in finance,³¹ as well as a 2014 survey of 16 journal articles and 140 research reports on impact investing produced by Hochstädter and Scheck.³² Pioneering legal bibliographies also

²⁸ *Id.* at 3.

²⁹ *Id.*

³⁰ *Id.* at 4.

³¹ *Id.* at 3.

³² Anna Katharina Höchstädter & Barbara Scheck, *What's in a Name: An Analysis of Impact Investing Understandings by Academics and Practitioners*, 132 J. OF BUS. ETHICS 449, 452 (2014); see also John E. Clarkin & Carole L.

shaped our review, including the 2014 Social Enterprise Bibliography,³³ a 2016 bibliography of materials regarding hybrid entities for social ventures,³⁴ and the bibliographies published each year by the Grunin Center for Law and Social Entrepreneurship at NYU Law School in connection with the annual conference it co-hosts with the Impact Investing Legal Working Group (“IILWG”) on “Legal Issues in Social Entrepreneurship and Impact Investing—in the U.S. and Beyond.”³⁵

A. Scope

As noted above, the 2016 Landscape Report was a starting guide to building our literature review, but we deviate from that review in important ways in order to reflect our focus on legal scholarship, and the unique writing and publication conventions of our discipline. The 2016 Landscape Report qualified the inclusion of sources peer-reviewed, empirical studies, and thus had bright line criteria for assessing the eligibility of contributions produced and published outside of academia.³⁶ In contrast, we constructed a primary inclusion criteria based on publication in law

Cangioni, *Impact Investing: A Primer and Review of the Literature*, 6 ENTREPRENEURSHIP RES. J. 135, 135 (2015).

³³ The 2014 social enterprise bibliography compiled by J. Haskell Murray made available exclusively on SSRN, catalogued social enterprise law (fifteen articles); benefit and public benefit corporations (eleven articles); flexible and social purpose corporations (three articles); and L3Cs (eight articles). J. Haskell Murray, *Social Enterprise Bibliography* (2014), <https://ssrn.com/abstract=2427710> [<https://perma.cc/GX58-UGCA>].

³⁴ The bibliography (on file with authors) was compiled by John Tyler, Evan Absher, Kathleen Garman & Anthony Luppino in conjunction with the following article: Anthony Luppino and John Tyler, *Producing Better Mileage: Advancing the Design and Usefulness of Hybrid Vehicles for Social Business Ventures*, 33 QUINNIPIAC L. REV. 235, 237 (2015).

³⁵ See Conference Bibliographies for 2018, NYU SCHOOL OF LAW, <http://www.law.nyu.edu/centers/grunin-social-entrepreneurship/events/2018conference/program-bibliography>. See also Conference Bibliographies for 2017, NYU SCHOOL OF LAW, <http://www.law.nyu.edu/centers/grunin-social-entrepreneurship/events/program-bibliography> [<https://perma.cc/F78P-V78E>].

³⁶ *2016 Landscape Report*, *supra* note 25, at 5 (identifying peer review publication as a requirement to be included in the survey).

reviews or law-relevant publications in the United States.³⁷ Unlike the 2016 Landscape Report, we did not include industry reports and important contributions to the field by law firms, foundations, or international organizations.³⁸

Our primary inclusion criteria undoubtedly omit important voices and perspectives. We hope to expand our search parameters and qualification standards in future iterations of legal scholarship reviews to address these omissions and other issues noted below. We recognize the important contributions of non-U.S. publications and of industry reports that support the field's growth, maturation, and their necessary role in the lifecycle of impact investing development. The documented methodology of academic research, distance from financial incentives, and intended audience of fellow scholars generate a distinct tone and breadth to the scholarship.³⁹ Academic research rigorously connects accumulated knowledge of established academic disciplines, and builds theories that push knowledge boundaries and expand intellectual frontiers.⁴⁰ Academic research may also resonate with broader, public audiences as a trusted source of unbiased information.⁴¹ In omitting certain industry publications, we tolerate the risk of overweighting time-lagged research over emerging developments from law practice and theoretical contributions over more practice-oriented analyses.⁴²

Furthermore, it bears noting that there is a discipline-specific, rather than methodological, distinction between our

³⁷ For example, the publication *Taxation Exempts* is included in our review and flagged as practitioner focused, as are several substantive state bar journal articles.

³⁸ *2016 Landscape Report*, *supra* note 25, at 5.

³⁹ *Id.* at 20 (observing how academic research is shaped by different incentives and motivations than more practitioner-oriented research, and noting that academic research is valued by audiences outside of academia precisely because academic research “is oriented to knowledge generation, contribution to the public good and robustness, where robustness comes from theoretical underpinning, building on prior work, and peer review.”).

⁴⁰ The UNSIF Research Council: *A Discussion Paper* 1, 3 (2017), <https://carleton.ca/3ci/wp-content/uploads/Oxford-Research-Report-170915-PRINT.pdf> [<https://perma.cc/NYV6-BHEE>] [hereinafter UNSIF Research Council].

⁴¹ *Id.*

⁴² *Id.*

study and the 2016 Landscape Report. Finance and related scholarship typically present data and findings from a neutral position, largely omitting normative assertions and suggested reforms. Legal scholarship—which often involves a critical review of statutes/regulations, case law, and the implementation of both—can include normative positions and suggested reforms, whereas finance scholarship (and other related fields of scholarship) often omits such a prescriptive approach in favor of neutrally presenting empirical results.

Tracking with legal developments, our literature review spans a decade, with publications dating from 2007 through 2017. Dagers and Nicholls focused their review on a shorter publication period, from 2010 through 2016.⁴³ We also expanded our scope of review to include social enterprises, social entrepreneurship, and entity formation law.⁴⁴ Our discipline’s subject matter expertise and methodology guide legal scholars to explore legal structures, like enabling statutes for business entities, and how changing default rules facilitate some behaviors and discourage others. In contrast, Dagers and Nicholls narrowly defined the scope of their literature review to acknowledge the distinctiveness of the field of social finance and impact investing without swamping it with related inquiries.⁴⁵ We took a different tack because we think legal scholarship is more interdisciplinary by nature given the wide berth of the legal ecosystem and its far-reaching implications. Our larger number of search terms and expanded time span reflect this broader view. Omitting social enterprise and entity formation and limiting our review to articles published during the same six-year time period as Dagers and Nicholls would have excluded a significant portion of relevant legal scholarship that responds to important legal developments taking place in the United States before 2010.⁴⁶ For example, in 2008, the state of Vermont introduced the first statute enabling a “low profit” limited liability company to house social

⁴³ *2016 Landscape Report*, *supra* note 25, at 9.

⁴⁴ *Id.* at 11, tbl.3 (identifying social enterprise as a “related term” but omitting from the formal survey).

⁴⁵ *Id.* at 3.

⁴⁶ *Id.* at 9.

entrepreneurial activities, thus creating the first “hybrid”⁴⁷ entity in the United States.⁴⁸ Similarly, we choose 2007 as the start date for our literature review because that is the date that the term “impact investment” was first coined.⁴⁹

Adopting a 2007 start date of our legal literature review, therefore, creates a baseline by which to observe how legal scholarship has encountered and responded to the field of impact investing from the very start. Our results confirm the value of pursuing a longer and broader review of legal scholarship, allowing us to demonstrate legal scholarship’s unique, and uniquely qualified, contributions to the fields of social entrepreneurship and impact investing over the last decade.

B. Process

To catalogue legal scholarship, we develop a systematic approach to first identify relevant articles, and then record the relevant attributes and content contributions. First, we construct a set of primary search terms (see Appendix A for the complete list) based on the 2016 Landscape Report and added social enterprise terms to reflect our expanded review. Using these primary terms, we search the major legal databases of Westlaw, Lexis, SSRN, and general search engines such as Google Scholar to identify relevant articles.⁵⁰ With the assistance of trained and supervised law students, we review and hand code all relevant articles after

⁴⁷ “Hybrid entities” refers to business formed to pursue a combination of for-profit financial returns with a social or environmental mission. *See, e.g.*, Robert A. Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 59 (2010) (discussing hybrid entities and flagging a keyword of the article as “hybrids”); Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 337 (2009) (using the phrase hybrid social ventures).

⁴⁸ For a current version of the Vermont statute, see VT. STAT. ANN. tit. 11, § 4161 (West 2015).

⁴⁹ The term “impact investing” was coined at a convening hosted by the Rockefeller Foundation in 2007. *Innovative Finance: Shaping the Next Generation of Financing Solutions to Unlock Private Capita for Social Good*, ROCKEFELLER FOUND., <https://www.rockefellerfoundation.org/our-work/initiatives/innovative-finance/> [<https://perma.cc/Q3M5-DVBP>].

⁵⁰ We omitted Bloomberg Law from our search procedures, but do not believe that this omission impacted our results.

confirming that they are sufficiently related to our topics of interest and focused on legal scholarship.⁵¹

All articles included in our results contain at least one primary search term *and* engage in a substantive discussion of the topic.⁵² We also searched for secondary terms—what we think of as emerging topics or subthemes—within our pool of articles. The two steps combined catalogue social enterprise and impact investing issues raised in legal scholarship. With this information, we can identify areas crowded with legal scholarship. We also highlight the whitespaces, that is, singling out promising areas in legal literature where legal scholars have yet to engage or not yet engaged fully.

To understand the contribution of articles included in our literature review, we infer the intended audience of the article as academic or practitioner. We also categorize the article's substantive focus (academic, practitioner, or policy). Note that the two categories significantly overlap. Given the law review or related, law-relevant publication requirement for inclusion, the vast majority of the articles unsurprisingly appear intended for academics and focused on academic issues. We also identify the geographic focus of the article (again, U.S.-centric), the underlying subject matter (i.e., corporate law, tax law, or international law), and the profit-orientation of entities discussed in the article (for-profit, nonprofit, or both). To further understand the contribution of each article, we categorize articles as focused on the legal framework (i.e., how does it fit into existing theory?), legal policy (i.e.,

⁵¹ Trained and supervised NYU and Georgia State law students contributed to the search and coding efforts. We are exceptionally grateful for their time and industry.

⁵² We excluded articles that merely mention a key word in passing or in a footnote, but do not explore legal issues of social enterprise or impact investing as it relates to the key word. Similarly, we excluded articles that explore topics found in our secondary search terms but do not mention any of our primary search terms. So, for example, we did not include in our literature review Deborah Burand's 2009 article on developments in investments made into microfinance institutions even though that article includes the secondary search term "microfinance" because she did not put her analysis of the evolution of microfinance investments in the context of impact investing. See Deborah Burand, *Deleveraging Microfinance: Principles for Managing Voluntary Debt Workouts of Microfinance Institutions*, 27 J.L. & COM. 193, 195 (2009).

how does it fit into existing statutory structure?), private law (i.e., how are parties reflecting this in contracts?), and empirical (i.e., how can these issues be quantified with empirical research?). Finally, we include article author information⁵³ to understand who is generating impact investment and social enterprise scholarship, and from what schools. Collectively, these efforts create a mapping exercise of legal literature published over the last decade that also identifies thought leaders who are contributing to this growing body of legal literature and center of legal scholarship. We discuss the individual results below.

Capturing a snapshot of legal literature requires some difficult line-drawing to establish the literature review parameters. Even more difficult judgments were applied to individual articles. While there is room for healthy debate about the precise boundaries we drew, we think our project demonstrates, beyond room for quibbling, that legal scholarship over the last decade has contributed significantly to the knowledge, acceptance of, development, and deployment of social enterprise and impact investment.

II. STATE OF LEGAL SCHOLARSHIP

A. Results

Our literature review evaluates 260 articles that were published in U.S. law reviews and related sources between 2007 and 2017. Given the lag time inherent in researching and publishing a law review article, we do not ascribe the distribution of articles over this past decade as correlated to legal developments taking place in any given year. Yet, the general upward trend in the number of published articles in our review appears to reflect growing attention paid by legal scholars to the fields of social entrepreneurship and impact investing. And, as noted later, some publication spikes appear to be driven by the publication of specialized

⁵³ Another limitation of our approach is that we focused on first authors, which undoubtedly omits relevant information. For example, Anne Tucker does not appear in our literature review results despite the fact that she is a contributing author, but not first author per interdisciplinary tradition, on two pieces otherwise included in the literature review.

issues of law reviews that reflected symposia held or submissions invited on particular legal issues in one or both of these two fields.

Figure 1 shows the distribution of articles over the ten-year study period.

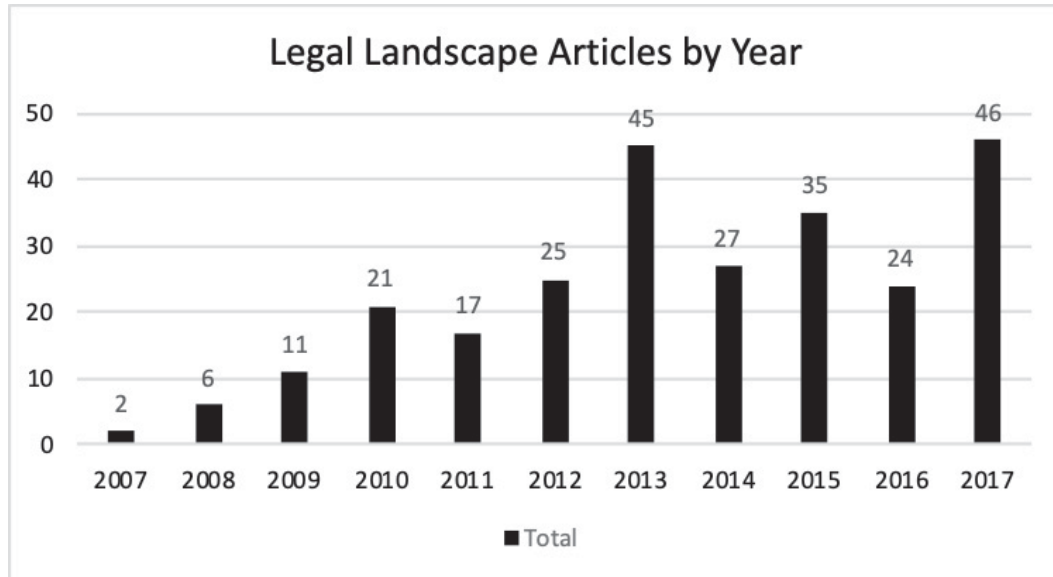


FIGURE 1: COUNT OF ARTICLES BY YEAR

The articles in our literature review overwhelmingly focus on U.S. law. This is not a surprising result given the inclusion criteria of publication in a U.S. law review or similar U.S. publication. Out of the sample, 223 articles discuss U.S. law, compared to 36 articles focusing on the law of other jurisdictions.⁵⁴

What topics do these articles discuss the most? Figure 2 shows the distribution of search terms⁵⁵ in a representative diagram. The legend, reading left to right and top to bottom, lists the terms in order of highest to lowest frequency.

⁵⁴ See Appendix A; *see also supra* Section I.B.

⁵⁵ See Appendix B for the complete list of search terms.

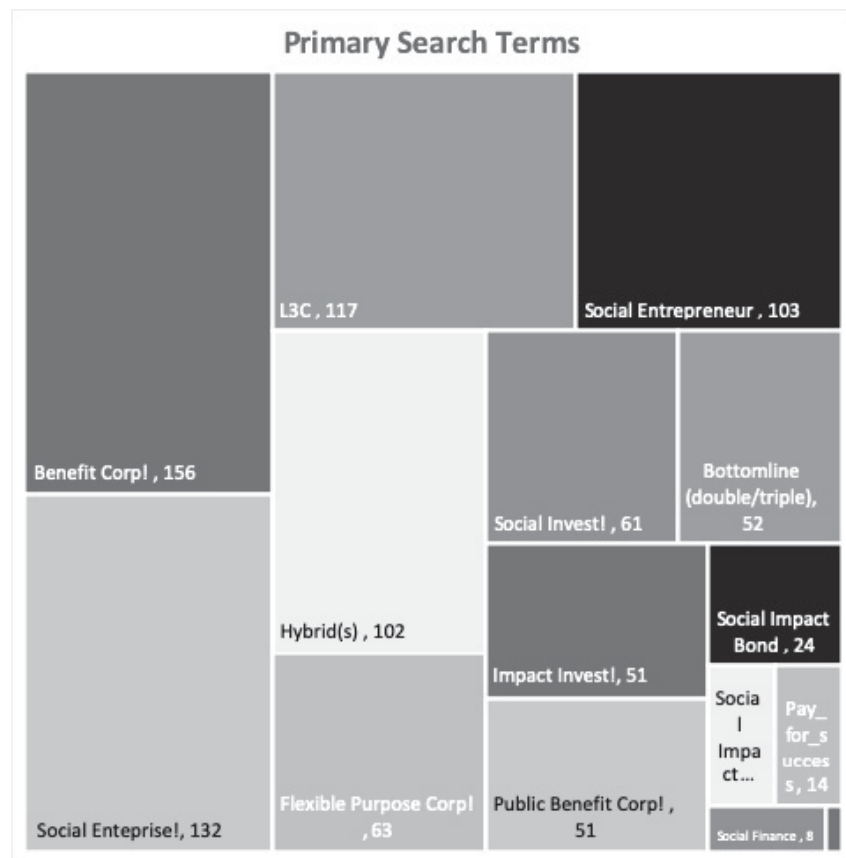


FIGURE 2: PRIMARY SEARCH TERMS

Over 100 articles discuss the 5 highest frequency terms: benefit corporations (156), social enterprise (132), L3C (117), social entrepreneurs (103), and hybrid entities (102). Between 50–60 articles discuss more narrow topics such as flexible purpose corporations and Delaware’s public benefit corporations, and double or triple bottom lines (consolidated into one category for reporting purposes). Other topics, like social impact bonds, social franchise and pay-for-success, have 25 or fewer articles each. When we consolidate overlapping topics into several broad categories, like alternative legal entities (i.e., L3C, benefit corporations, etc.), impact investment generally (social impact investment, social investment, impact investment), and performance-based financing (social impact bond, pay for success, and social finance), the numbers jump to 729, 129, and 46 article hits, respectively.

We label each article as focused on legal framework,⁵⁶ public policy,⁵⁷ private law⁵⁸ or empirical research.⁵⁹ These classifications are mutually exclusive so that each article can only be assigned to one category. Few of the articles include empirical analysis (9) or private law/transactions (9). Most articles focus on the legal framework (115) or public policy questions (119). Further, we also categorize articles by their substantive legal focus on corporate law, tax law, international law, or other law. These categories are not mutually exclusive, although most articles fall into one category or another with the following results: corporate law (259), tax law (39), and international law (15). Figure 3 shows the combined results for these two separate coding categories.

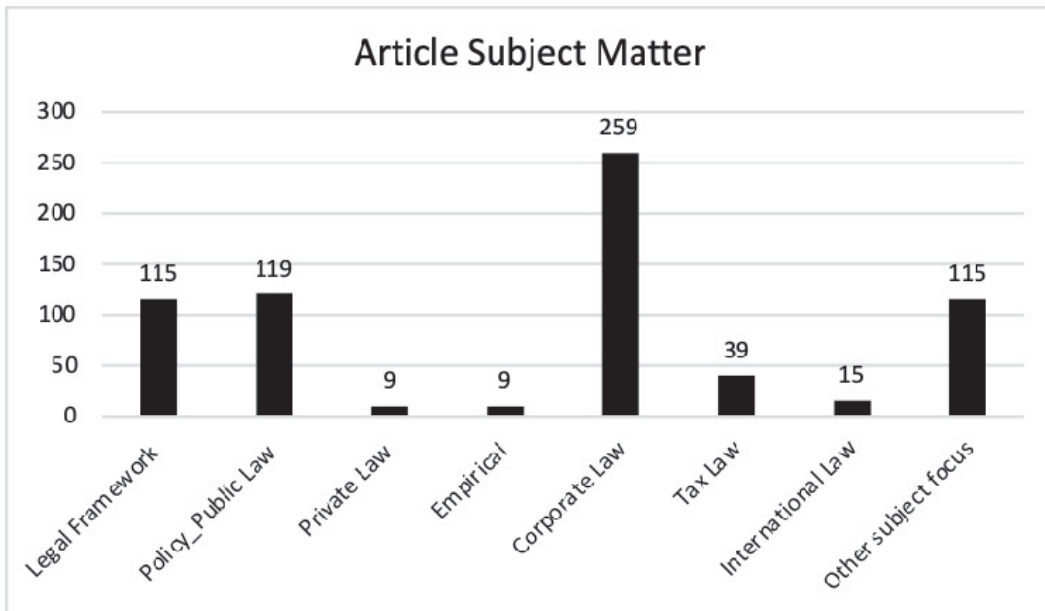


FIGURE 3: ARTICLE SUBJECT MATTER

⁵⁶ Coders were asked to answer yes or no to: Is the article focused on articulating a legal framework for organizing, understanding or theorizing about impact investment and social entrepreneurship?

⁵⁷ Coders were asked to answer yes or no to: Does the article primarily offer readers insights into policy or the existing set of positive (enacted) law and regulations in impact investment and/or social entrepreneurship?

⁵⁸ Coders were asked to answer yes or no to: Does the article primarily offer readers tools related to private ordering (contractual provisions, transactional solutions, etc.) working within the existing legal framework?

⁵⁹ Coders were asked to answer yes or no to: Does the article primarily offer readers new empirical evidence related to impact investor and/or social entrepreneurship?

We also investigate the type of business entity examined and whether those entities are organized as for-profit corporations (or the like), nonprofit entities, or a combination of the two. This category likely overlaps with our search term “hybrids,” but here the focus is not on the text of the article. Rather, we want to know if an author is writing about social entrepreneurship as applied to a for-profit, nonprofit, or blended entity that seeks to house profit and purpose motivations under one roof. Our review demonstrates a focus on for-profit entities (129) and blended (or hybrid) entities (98) over nonprofit (25).

Our literature review further examines article content by searching and categorizing secondary themes. The secondary themes represent niche areas within impact investment and social enterprise (i.e., ethical banking) or emerging terms that are worth tracking but are unlikely to have a decade of scholarship devoted to them. The most common secondary themes are discussions of corporate social responsibility and sustainability (116) and alternative finance (102). Areas with 15 or fewer articles include finance subthemes such as development, cooperative and community finance along with ethical banking. Public/private partnerships, crowdfunding, microfinance, impact measurements, and environmental social governance (ESG) themes are covered in 25–50 articles each. Figure 4 shows our results.

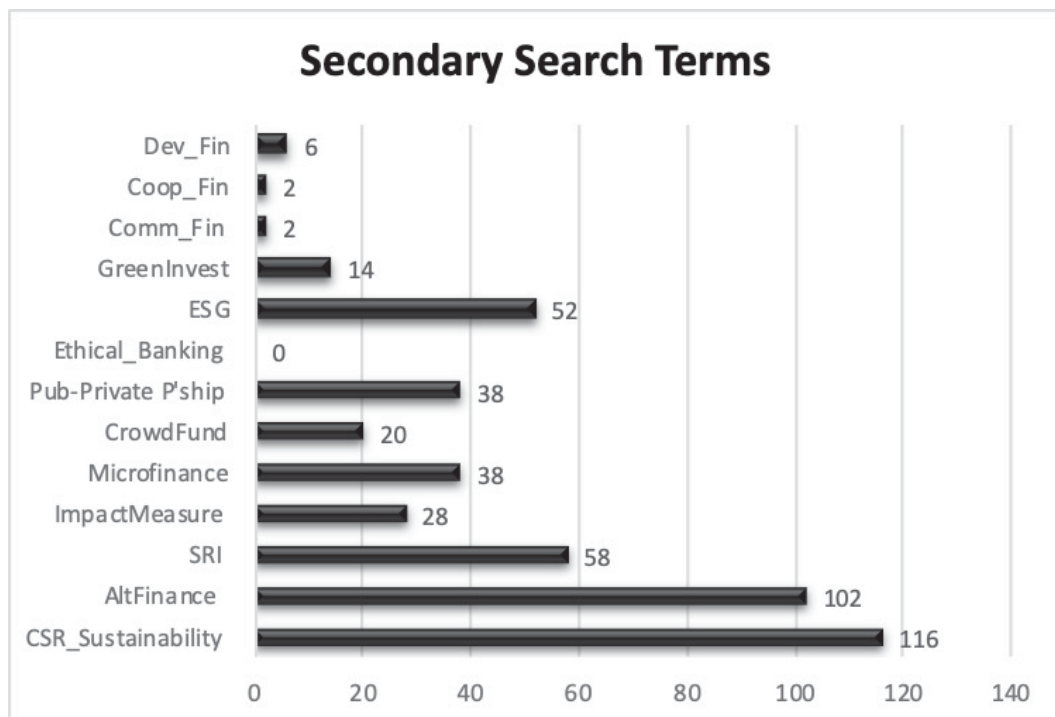


FIGURE 4: SECONDARY SEARCH TERMS

Academic articles dominate our literature review, in part a reflection of our inclusion criteria, with 218 articles compared with 36 practitioner articles and 2 policy/industry articles.⁶⁰ The following chart shows a time series of our sample, noting an overall spike in 2013, spurred by increases across all three categories. Interestingly, in 2017, we see another spike, but here academic articles exclusively drove the results while practitioner articles declined that year.

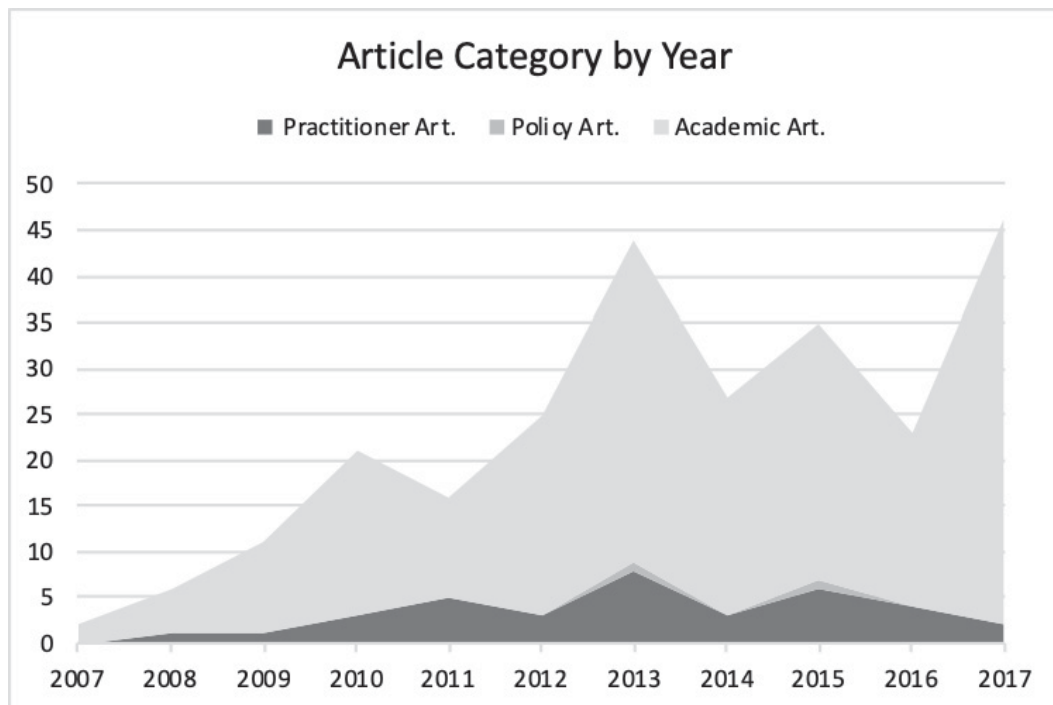


FIGURE 5: ARTICLE AUTHOR CATEGORIES BY YEAR

We also investigate who is producing the scholarship and where. In total, our literature review captures the writing of 181 authors.⁶¹ Clear experts in the field with multiple articles and ambitious research agendas emerge.⁶² The number of single-article

⁶⁰ See *supra* Section I.A.

⁶¹ See Appendix A.

⁶² In the category of five or more articles, three authors published twelve, ten, and seven articles. First authors with four or more articles include Cassady Brewer, J. William Callison, Joan MacLeod Heminway, J. Haskell Murray, Alicia Plerhoples, Dana Brakman Reiser, and Chief Justice Leo Strine, Jr. While this may not be indicative of the full pool of first authors included in our legal literature review, it is worth noting the relatively equal gender distribution across these seven authors.

authors—138—suggests breadth of interest in the field and perhaps even academic tourism, where scholars visit the topic, but quickly return to more familiar grounds.

1 article authors	2 article authors	3 article authors	4 article authors	5+ article authors
138	25	9	54	3

We observe journal placements for articles in the literature review and note that placements are widely distributed, so much so that there is no useful visual representation of the publication sources. In total, we observe nearly 150 different publication sources and note that “repeat players” in the field are journals that had a dedicated symposium or journal edition devoted to legal issues in the fields of either social enterprise or impact investment.⁶³

To examine impact, we also track the ranking of journals publishing articles in our literature review. Twenty-two specialty business law journals published 56 articles in our literature review, composing over 20 percent of the whole sample.⁶⁴ Thirty law journals ranked in the top 100⁶⁵ published 58 articles. A similar number of journals ranked 101–200 published 22 percent of articles.⁶⁶ Journals ranked 201 or higher, however, published over 40 percent of all articles in the literature review.⁶⁷ We also measure impact by number of citations to the articles included in our review.⁶⁸ In

⁶³ For example, *Seattle University Law Review*, *New York University Journal of Law & Business*, and *Vermont Law Review* published ten or more articles and each sponsored a symposium or dedicated a volume to topics captured in our literature review.

⁶⁴ *Hastings Business Law Journal*, *Virginia Law & Business Review*, *Berkley Business Law Journal*, and *William & Mary Business Law Review* are examples of specialty journals.

⁶⁵ See WASH. & LEE L.J. RANKING SYS., <https://managementtools4.wlu.edu/LawJournals/> [<https://perma.cc/R3P6-PKFZ>].

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Scholarly impact—how to define it and fairly measure it—is a topic ripe for debate. See, e.g., Letter from Law School Deans to Robert J. Morse, Director of Data Research for America’s Best Graduate Schools at U.S. News & World Reports (Apr. 13, 2019) (on file with authors); Letter from U.S. News & World Report to Law School Dean Community (May 2, 2019) (on file with authors). We measured scholarly impact, defined broadly, by any noted citation contained in the major commercial legal databases and Google Scholar on or before July 1, 2019.

aggregate, the numbers are impressive: 5206 citations. The bulk of citations (91 percent) occur in scholarly articles (law and other fields), with 5 percent in books (scholarly and treatises) and the remainder scattered among policy reports, administrative agency writing, dissertations/theses, and other writings. Citations vary widely between authors and articles, with 35 articles having no citations, to clearly dominant voices and pieces within the field, with 47 articles being cited 35 times or more in published scholarly articles. Six articles have more than 100 citations, with 2 published as part of a dedicated symposium issue, suggesting positive effects of dedicated issues and exposing articles to the experts in the field.⁶⁹ Figure 6 reports our results.

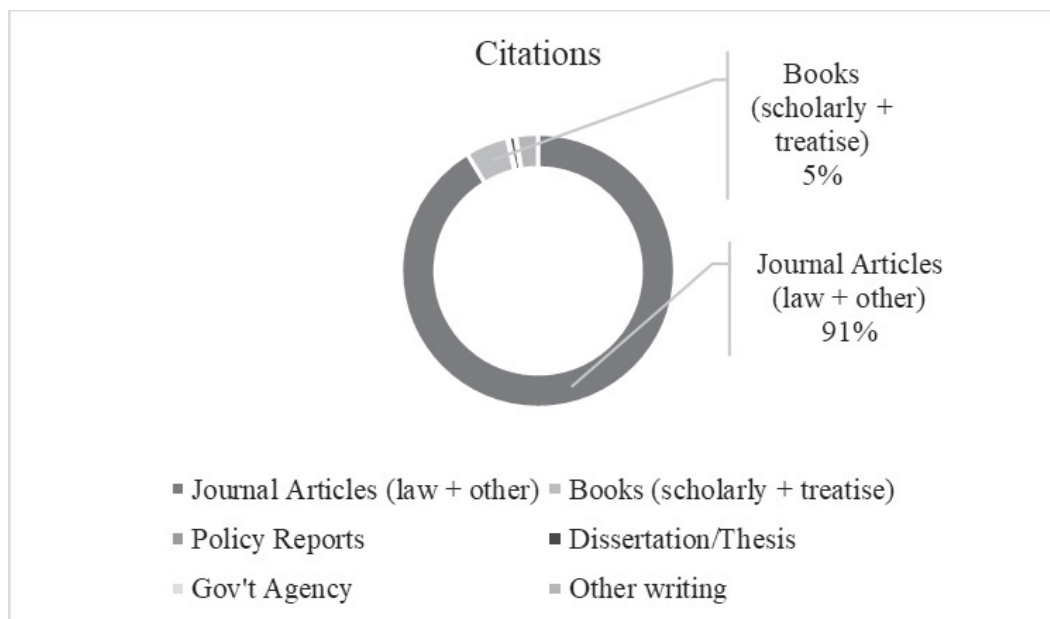


FIGURE 6: SCHOLARLY IMPACT BY CITATIONS

⁶⁹ The following articles have the highest citations, each over 100: William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 850 (2012) (112 citations); Robert A. Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 103 (2010) (109 citations); Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 377 (2009) (145 citations); David E. Pozen, *We Are All Entrepreneurs Now*, 43 WAKE FOREST L. REV. 283, 339 (2008) (105 citations); Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 624 (2011) (214 citations); John Tyler, *Negating the Legal Problem of Having “Two Masters”*: *A Framework for L3C Fiduciary Duties and Accountability*, 35 VT. L. REV. 117, 160 (2010) (102 citations).

Finally, we examine the author's institution to understand which institutions sponsor thought leaders in the space and support legal scholarship about the fields of social enterprise and impact investment. Recall that our results are limited to first author affiliation and thus are incomplete. Nonetheless, they provide a useful illustration of the breadth, if not yet depth, of institutional support by law schools in these fields.

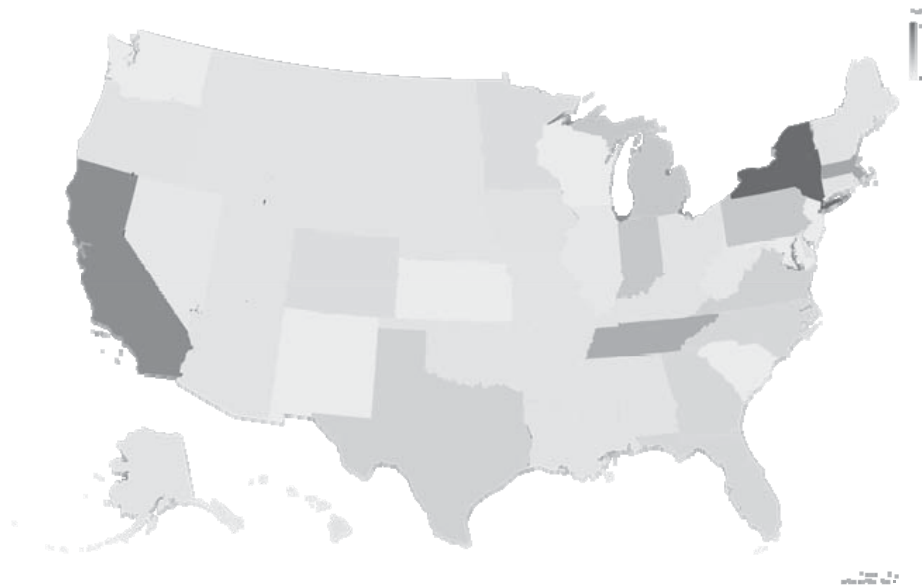


FIGURE 7: FIRST AUTHOR INSTITUTION BY STATE⁷⁰

B. Discussion

Daggers and Nicholls characterize academic literature on social impact investment as “a nascent field of research in which there was considerable interest and potential, but currently no substantial core of ideas, theory or data.”⁷¹ Key academic contributions, they observed, “are scattered and disparate, coming from

⁷⁰ Note the distribution of activity reflected in this chart likely reflects, at least to some degree, the overall distribution of law schools in the United States. For example, New York and California, highly active states according to our results, also contain a high number of law schools.

⁷¹ *2016 Landscape Report*, *supra* note 25, at 3.

diverse perspectives and approaching a range of topics that share little common ground.”⁷² Moreover, they concluded that the academic literature they reviewed lags behind practice.⁷³

This picture of the state of academic scholarship on social impact investment was much on our minds as we set forth to map the state of academic legal scholarship in the fields of social enterprise and impact investing. To what extent would legal scholarship support similar conclusions? In short, we found that the state of academic *legal* research in the fields of social enterprise and impact investment shares some, but not all, of the characteristics observed by Dagers and Nicholls in peer-reviewed finance literature. Happily, our literature review paints a somewhat brighter picture about the current state of academic legal scholarship and its trajectory. The less sunny story, however, is that legal scholarship appears to be even less integrated into practice than companion business school literature.

The results of our literature review are driven, in part, by our methodology tailored to legal scholarship with key differences noted above such as: (1) expanded time frame (2007–2017); (2) expanded search terms including social enterprise; and (3) publication and jurisdiction requirements.⁷⁴ These differences aside, our legal literature review led us to many of the same conclusions found in the 2016 Landscape Report regarding the challenges and opportunities to emerging academic scholarship.⁷⁵ This section synthesizes our key findings and maps them to the 2016 Landscape Report. We then identify both challenges and opportunities for expanding the breadth, depth and relevancy of legal scholarship in the fields of social enterprise and impact investing.

1. Growing Interest but Limited Consensus Around Boundaries and Lexicon

Academic legal scholarship on impact investment and social enterprise is nascent but gaining momentum, reflecting the

⁷² *Id.*

⁷³ *Id.* As noted previously, much of the research analyzed in the Dagers and Nicholls literature review is composed of practitioner reports (261 practitioner reports compared to 73 academic papers). *Id.*

⁷⁴ *See supra* notes 31–55 and accompanying text.

⁷⁵ *See supra* notes 56–72 and accompanying text.

early growth stages of these fields.⁷⁶ Dagers and Nicholls found the same in companion business school literature.⁷⁷

Lack of common language is a key signal that a field is emerging, but not yet mature.⁷⁸ In our literature review we observe the malleability of definitional boundaries, as well as overlapping and inconsistent term usage in social enterprise and impact investing (and their subcomponents). For example, one scholar's definition of "social enterprise" may not match another's; or, one scholar's depiction of a so-called impact investment may not be recognized as such by others.⁷⁹ Adding to this confusion is the proliferation of deliberate misnomers in these fields. For example, "social impact bonds" are rarely bonds.⁸⁰ Similarly, cash flow based payments on debt investments are sometimes called "demand dividends" even though they are typically attached to debt instruments, not equity.⁸¹ And then there are terms that are

⁷⁶ See *2016 Landscape Report*, *supra* note 25, at 3.

⁷⁷ *Id.* at 4.

⁷⁸ See *id.* at 3.

⁷⁹ See, e.g., Lorne Sossin & Devon Kapoor, *Creating Opportunities: A Vision for the Future: Social Enterprise, Law & Legal Education*, 54 OSGOODE HALL L.J. 997, 999, 1007 (2017) (describing need for definition of social enterprise where social enterprises are to receive public benefits; then canvases definitions from variety of sources before settling on following defining characteristics—(1) legal structure; (2) economic risk to generate revenue for a socially beneficial cause; and (3) revenue received must be used to advance some form of social mission); see also *Social Enterprise—What is Social Enterprise?*, SOCIAL ENTERPRISE. US, <https://socialenterprise.us/about/social-enterprise/> [<https://perma.cc/E6HE-UHPZ>] (defining social enterprises as "organizations that address a basic unmet need or solve a social or environmental problem through a market-driven approach."). Cf. Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681, 681 (2013) (defining social enterprise to be "an organization formed to achieve social goals using business methods."). Appendix B lists our primary and secondary search terms and definitions.

⁸⁰ See generally Lindsay Beck, Catarina Schwab & Anna Pinedo, *Social Impact Bonds: What's in a Name?* STAN. SOC. INNOVATION REV. (Oct. 2016), https://ssir.org/articles/entry/social_impact_bonds_whats_in_a_name [<https://perma.cc/D59T-W8CF>].

⁸¹ See generally *Demand Dividend: Creating Reliable Returns in Impact Investing*, SANTA CLARA U. 1, 3 (2013), https://thegiin.org/assets/Santa%20Clara%20U_Demand-Dividend-Description.pdf [<https://perma.cc/22WY-CM3P>] (describing the demand dividend as a debt vehicle designed to improve repayments to impact investors and access to capital for social enterprises).

so close in sound and words as to invite confusion over their meaning. For example, Oregon uses the term “benefit companies” without distinguishing between whether companies are organized as corporations or LLCs; whereas, Pennsylvania uses the term “benefit company” only in reference to a benefit limited liability company and has yet a different statute recognizing “benefit corporations.”⁸² Moreover, “B corporations” refers to a brand, not a legal form, and so should not be confused with benefit corporations, although the B Lab promotes both.⁸³

Absence of a common lexicon and fuzzy line-drawing complicated our classification and cataloguing efforts in this review. But, perhaps more importantly for the growth of these fields, a lack of agreed terminology muddles and impedes growth within a body of academic literature—legal and otherwise—that aptly describes and analyzes trends in these emerging fields. Consequently, scholars run the risk of talking past each other, thereby missing the opportunity to engage in direct dialogue that is necessary for rigorous academic scholarship. For example, as legal scholars create taxonomies for understanding and predicting field developments, they run the risk of being misunderstood if their readers are confused about baselines from which comparisons are being made. Hence, conclusions or predictions are reached about current and future states of these fields.⁸⁴ Agreement on

⁸² See *Mapping the State of Social Enterprise*, *supra* note 13, at 12.

⁸³ *Id.* at 11.

⁸⁴ Alina Ball, *Social Enterprise Governance*, 18 U. PA. J. BUS. L. 919, 926 (2016) (observing that term social enterprise does not have a precise definition and thus is commonly misunderstood, then offers definition that social enterprises are “those business enterprises that intentionally impact societal good.”). Ball further observes that precise definitions in this area matter are important to head off misuse and confusion about what constitutes a social enterprise. *Id.* (first citing Jim Schorr & Kevin Lynch, *Preserving the Meaning of Social Enterprise*, STAN. SOC. INNOVATION REV. 1, 2 (Sept. 14, 2012), http://www.ssi-review.org/blog/entry/preserving_the_meaning_of_social_enterprise [<https://perma.cc/XD8B-HPL5>] (provides example of misuse of term social enterprise by Salesforce.com and notes that “lack of general consensus on terminology in this area has been a constraint on the development of social capital markets, supportive policy environments, and other key pieces of the ecosystem needed to catalyze the growth of the field.”); then citing M. Tina Dacin et al., *Social Entrepreneurship: A Critique and Future Directions*, 22 ORG. SCI. 1203, 1203 (2011); and then citing Schorr & Lynch, *supra*, at 2).

definitional boundaries is a necessary first step in developing sound, conceptual frameworks upon which to build normative analysis and make policy recommendations.⁸⁵ This foundation remains incomplete highlighting both a challenge and an opportunity for the future of legal scholarship in the fields. As most lawyers would agree, words matter—a lot. Accordingly, one might expect that this is an area where legal scholarship can distinctively contribute to the fields of social enterprise and impact investing.

2. Legal Scholarship Lags Practice and Policymaking, Particularly with Respect to Impact Investing

Legal scholarship lags practice, particularly with respect to impact investments and transactions.⁸⁶ To put this in context, our literature review tracked only 182 total hits on impact investment and finance-related search terms contained in the articles surveyed, compared to 789 hits on the enterprise-related search terms.⁸⁷

⁸⁵ See generally Heerad Sabeti, *The For-Benefit Enterprise*, HARV. BUS. REV. (Nov. 2011), <https://hbr.org/2011/11/the-for-benefit-enterprise> [<https://perma.cc/KW84-HCBJ>] (founder of the Fourth Sector observes blurring of boundaries between for-profit and not-for-profit enterprises and limited legal systems that permit for blending of two has resulted in burdensome trade-offs); see also FOURTH SECTOR MAPPING INITIATIVE, <https://www.mapping.fourthsector.net/national-mapping-initiative-u-s> [<https://perma.cc/76AP-Q2RP>]. The Fourth Sector Mapping Initiative is developing a survey instrument and taxonomy of “for-benefit” organizations in the United States and beyond with the goal of creating a public research database of for-benefit corporations and fourth sector support organizations that can provide “insights into the growth, activities, models and trends in the fourth sector.” *Id.* As early steps to reach this goal, Fourth Sector plans to define the boundaries of the fourth sector, create a classification structure to differentiate and describe various types of for-benefit organizations, and develop a glossary of terminology. *Id.*

⁸⁶ Our conclusions regarding time lagged academic research (compared to practice) are similar to those in *2016 Landscape Report*, *supra* note 25, at 25.

⁸⁷ See Figure 2—Primary Search Terms. Our review contained seven finance-related, primary search terms: social invest, impact invest, social impact bonds, social impact investing, social finance, pay-for-success, and blended finance. Our review contained nine enterprise-related, primary search terms: benefit corp, social entrepreneur, bottom line (double or triple), social enterprise, hybrid(s), L3C, flexible purpose corp, public benefit corp, and social franchise.

The schism between academia and practice may be heightened here because we conditioned inclusion in our literature review based on publication in a legal journal.⁸⁸ Our decision to favor academic scholarship, thus, may understate the contributions of legal scholarship to practice.⁸⁹ This omission, while deliberate, means that our legal literature review may omit a significant and influential body of legal work in these fields, such as, for example, law firm briefing notes that are typically grounded in practice.⁹⁰

Intensity of academic interest in social enterprise compared to impact investment does not map to differences in practice activity between the two fields.⁹¹ Further, frequency of research on a given topic is no measure of the quality or impact of any single piece of scholarship. However, the extent to which legal scholarship focuses on topics related to social entrepreneurship over those about impact investing is striking. The stark contrast also suggests that legal scholars researching and writing on impact investing and related topics are less likely to be doing so in dialogue with other legal scholars.⁹² The consequences of this “lonely scholar” phenomenon may not be all bad, however, as it may drive some

⁸⁸ See *supra* Part I.

⁸⁹ This argument is bolstered by our U.S.-focused publication requirement as well. In contrast to our literature review, Dagers and Nicholls included contributions to and from practitioner-oriented publications. *2016 Landscape Report*, *supra* note 25, at 4.

⁹⁰ See, e.g., *Impact Business Group Case Study: Performance Aligned Stock*, WOMBLE BOND DICKINSON, <https://media.wbd-us.com/88/1053/uploads/wbd-impact-business-group-case-study.pdf> [<https://perma.cc/CB4U-RMZM>] (case study of new investment instrument called “Performance Aligned Stock” designed by members of the Impact Business Group at Womble Bond Dickinson with a group of impact investors and impact entrepreneurs for early stage investments in impact-focused companies that allows investors an exit that does not result in a forced sale of the company and achieves a predictable rate of return aligned with the company’s revenue growth, yet enables company’s founders to retain control of company and hence its mission); *Mission Related Investing: A Legal Framework for Integrating Mission into the Other 95%*, KLAUVENS LAW GROUP PLC, <https://klavenslawgroup.com/wp-content/uploads/2018/02/Mission-Related-Investing.pdf> [<https://perma.cc/G8CA-PJY3>] (discussing summary of existing legal framework applicable to mission-related investing in United States and steps U.S. foundations may want to consider before implementing a mission-related investment strategy).

⁹¹ See *supra* Part I.

⁹² See *2016 Landscape Report*, *supra* note 25, at 7.

legal scholars to find opportunities to collaborate and conduct research with scholars from other disciplines that are tackling topics related to impact investing.⁹³

Moreover, the decision to limit this literature review to articles published in U.S. law reviews may also understate the breadth and depth of legal academic scholarship.⁹⁴ Prominent legal scholars in the fields may also pursue publication outside of law reviews.⁹⁵ This is likely attributable to several factors. First, some of the legal topics being discussed and researched by legal scholars in these fields may be so rapidly changing that they are not well-suited to the longer publication horizons of law journals.⁹⁶ Similarly, to the extent that legal scholars are attempting to influence practice, authors look for (and find) publication opportunities reaching a broader audience beyond law journals.⁹⁷ Similarly, legal

⁹³ For example, one author, Anne Tucker, works with finance professors on a collaborative project through Wharton Social Impact Initiative. *See, e.g.*, Christopher Geczy et al., *Contracts with Benefits: The Implementation of Impact Investing* (Apr. 26, 2018), <https://ssrn.com/abstract=3159731> [<https://perma.cc/P6B6-BL4F>].

⁹⁴ *See supra* Part I.

⁹⁵ At the June 2018 Legal Scholars Convening at NYU, discussions with several of the more prolific legal scholars in these fields about our preliminary findings indicated that some legal scholars are looking beyond law journals to find outlets for publishing their research (notes on file with authors).

⁹⁶ Shape-shifting forms of pay for success financings and movements toward new legal structures and evolving contractual relationships may be particularly hard to publish in law review journals with extended review periods. *See, e.g.*, Bhakti Mirchandani, *Voices from the Field: Social Impact Bonds and the Search for Ways to Finance Public Sector R&D*, NONPROFIT Q. (Mar. 30, 2018), <https://nonprofitquarterly.org/2018/03/30/voices-field-social-impact-bonds-search-ways-finance-public-sector-rd/> [<https://perma.cc/E8U9-PGPU>].

⁹⁷ The Stanford Social Innovation Review is one publication outlet that has attracted a growing body of legal scholarship and analysis by legal academics and practitioners. *See, e.g.*, Dana Brakman Reiser, *The Rise of Philanthropy LLCs*, STAN. SOC. INNOVATION REV. 26, 26 (Summer 2018); Dana Brakman Reiser & Steven A. Dean, *Creative Financing for Social Enterprise*, STAN. SOC. INNOVATION REV. 50, 50 (Summer 2014); *see also* Allen R. Bromberger, *A New Type of Hybrid*, STAN. SOC. INNOVATION REV. 49, 49 (Spring 2011). Another outlet attracting legal analysis and guidance by practitioners is TrustLaw's publications. *See, e.g.*, Froriep et al., *Philanthropy and Social Entrepreneurship: A Guide to Legal Structures for NGOs and Social Entrepreneurs in Switzerland* (Nov. 27, 2017), <https://www.trust.org/publications/i/?id=f18a9dc0-6dc3-4b02-b0>

scholars engaged in shaping public policy in these fields may focus writing endeavors on developing op-eds or providing comments on regulatory developments.⁹⁸

Putting aside, however, *where* legal scholarship finds a publication foothold, there is still cause to worry that legal scholars are not engaging sufficiently with practitioners or policymakers in these fields.⁹⁹ This worry is fueled by both demand and supply considerations. On the demand side, it may be that legal scholars are not being invited to participate in field-building research opportunities and conversations with practitioners and policymakers as frequently as are academics from other disciplines. On the supply side, the legal scholarship that has taken place to date may not have addressed a research agenda that appears consequential to practitioners and policymakers.¹⁰⁰ So, while our review identified 120 articles that addressed or raised public policy questions,¹⁰¹ much of the legal scholarship captured by our review focused on topics in the field of social enterprise, not impact investing. Accordingly, the relevancy of legal scholarship to practitioners and policymakers who are active in the field of impact investing may be less apparent.

19-2940cedd7369 [<https://perma.cc/ED23-82BM>]; Thomson Reuters Found. et al., *Social Ventures: Which legal structure should I choose?* (Nov. 16, 2016), <https://www.trust.org/publications/i/?id=fb362caf-6795-4f23-aa20-212b9654e877> [<https://perma.cc/HLQ6-LSF7>].

⁹⁸ See, e.g., Carol Liao, Opinion, *B.C. MLAs should recognize 'benefit corporation' is an American branding exercise*, THE GLOBE & MAIL, (Oct. 21, 2018), <https://www.theglobeandmail.com/business/commentary/article-bc-mlas-should-recognize-benefit-corporation-is-an-american/> [<https://perma.cc/RWF8-HP7T>] (Prof. Liao, of the Peter A. Allard School of Law at University of British Columbia, argues in op-ed that existing Canadian laws permit business to promote public benefits so that enacting benefit corporation legislation is unnecessary); see also Examples of Program-Related Investments, 81 Fed. Reg. 24014 (Apr. 25, 2016) (to be codified at 26 C.F.R. pt. 53), <https://www.federalregister.gov/documents/2016/04/25/2016-09396/examples-of-program-related-investments> [<https://perma.cc/VC39-96B3>] (Federal Register publishes final regulations that provide guidance to private foundations on program-related investments and provides summary of public comments received regarding new examples of qualifying program-related investments).

⁹⁹ UNSIF Research Council, *supra* note 40, at 4.

¹⁰⁰ *Id.*

¹⁰¹ See *supra* notes 60, 98 and accompanying text.

3. *More Legal Scholarship Focused on Social Entrepreneurship than Impact Investing (yet Concentrations Occur Across and Within These Two Fields)*

Because our legal literature review looked at two distinct, albeit interrelated, fields of inquiry—that of social enterprise and impact investment—we also were able to compare and contrast the range of legal scholarship across these two fields. While some legal scholars conduct legal research about both social enterprises and impact investments,¹⁰² more often there is a divide across legal scholars as they choose to concentrate on one or the other field.¹⁰³

¹⁰² One notable and prolific example of a legal scholar who is examining questions related to the formation, governance and regulation of social enterprises as well as to the financing of social enterprises is Prof. Dana Brakman Reiser. See, e.g., Dana Brakman Reiser, *Regulating Social Enterprise*, 14 U.C. DAVIS BUS. L.J. 231, 234 (2014); Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681, 685 (2013); Dana Brakman Reiser, *The Next Big Thing: Flexible Purpose Corporations*, 2 AM. U. BUS. L. REV. 55, 56 (2012); Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 591–92 (2011); Dana Brakman Reiser, *Charity Law's Essentials*, 86 NOTRE DAME L. REV. 1, 5 (2011); Dana Brakman Reiser, *Blended Enterprise and the Dual Mission Dilemma*, 35 VT. L. REV. 105, 105 (2010); Dana Brakman Reiser, *Governing and Financing Blended Enterprise*, 85 CHI.-KENT L. REV. 619, 619 (2010); Dana Brakman Reiser & Steven A. Dean, *Financing The Benefit Corporation*, 40 SEATTLE U. L. REV. 793, 794 (2017); Dana Brakman Reiser & Steven A. Dean, *Hunting Stag with FLY Paper: a Hybrid Financial Instrument for Social Enterprise*, 54 B.C. L. REV. 1495, 1498–99 (2013).

¹⁰³ Scholars focusing on social enterprise include, for example, Prof. J. Haskell Murray, see J. Haskell Murray, *Adopting Stakeholder Advisory Boards*, 54 AM. BUS. L.J. 61, 64 (2017); J. Haskell Murray, *Social Enterprise and Investment Professionals: Sacrificing Financial Interests?*, 40 SEATTLE U. L. REV. 765, 766–67 (2017); J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 543 (2016); J. Haskell Murray, *An Early Report on Benefit Reports*, 18 W. VA. L. REV. 25, 26–27 (2015); J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 347 (2014); J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 5 (2012), to name a few of his many articles. Another scholar who has focused primarily on questions related to social entrepreneurship and pedagogy questions about teaching social enterprise law in a clinical setting is Prof. Alicia Plerhoples, see, e.g., Alicia E. Plerhoples, *Nonprofit Displacement And The Pursuit Of Charity Through Public Benefit Corporations*, 21 LEWIS & CLARK L. REV. 525, 529 (2017); Alicia E. Plerhoples, *Risks, Goals, and Pictographs:*

First, however, it is worth highlighting several of the findings described above that indicated concentrations occurring *across* these two fields. Most obvious is the predominance of corporate law over other areas of law, such as tax or international law.¹⁰⁴ Similarly, there are concentrations clustered around secondary themes that may cross these two fields. For example, the most common secondary theme is corporate social responsibility and sustainability (116 articles).¹⁰⁵ Other favored secondary themes, with 25–50 articles each, that likely cross these two fields include ESG (environment social governance), PPPs (public-private partnerships), microfinance, and impact measurements.¹⁰⁶

Our legal literature review also identifies several concentrations *within* each field. As noted above in the methodology section, within the field of social enterprise, a large preponderance of articles focus on choice of legal entity.¹⁰⁷ The proliferation of new social enterprise laws in the United States clearly spurred academic interest.¹⁰⁸ In 2008, the State of Vermont enacted the country's first low-profit limited liability company (also called L3C) statute.¹⁰⁹ From 2008 through December 31, 2017, 38 jurisdictions in the United States enacted at least one form of social enterprise

Lawyering to the Social Entrepreneur, 19 LEWIS & CLARK L. REV. 301, 302–03 (2015); Alicia E. Plerhoples, *Social Enterprise as Commitment: A Roadmap*, 48 WASH. U. J.L. & POL'Y 89, 93 (2015); Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?*, 14 U.C. DAVIS BUS. L.J. 247, 250–51 (2014); Alicia E. Plerhoples, *Representing Social Enterprise*, 20 CLINICAL L. REV. 215, 222 (2013). Fewer scholars, as noted above, are writing in the field of impact investing. Prof. Deborah Burand has made this field a focus of her scholarship agenda. *See, e.g.*, Deborah Burand, *Contracting for Impact: Embedding Social and Environmental Impact Goals Into Loan Agreements*, 13 N.Y.U. J.L. & BUS. 775, 782 (2017); Deborah Burand, *Resolving Impact Investment Disputes: When Doing Good Goes Bad*, 48 WASH. U. J.L. & POL'Y 55, 57 (2015); Deborah Burand, *Globalizing Social Finance: How Social Impact Bonds and Social Impact Performance Guarantees Can Scale Development*, 9 N.Y.U. J.L. & BUS. 447, 449 (2013).

¹⁰⁴ *See* Figure 5. Most of the articles surveyed have a legal focus on corporate law (213), although we identified some articles with a tax law focus (40) and a few with an international law focus (15).

¹⁰⁵ *See* Figure 4.

¹⁰⁶ *See id.*

¹⁰⁷ *See* Figure 3 and accompanying text.

¹⁰⁸ *See* VT. STAT. ANN. tit. 11 § 3001 (23) (2008).

¹⁰⁹ *Id.*

statute, and some states, such as Pennsylvania, Oregon and Florida,¹¹⁰ have enacted laws recognizing multiple legal forms for social enterprises.¹¹¹ The most popular of these legal forms in the United States is called the “benefit corporation.”¹¹² The enactment of these new laws triggers new areas of inquiry as legal scholars critique the necessity of creating specialized legal forms to house social entrepreneurial activities¹¹³ and compare the governance and operational requirements (or lack thereof) imposed by those legal forms.¹¹⁴

Animating this proliferation of articles is a debate taking place more generally among legal scholars and others over the purpose of corporations in society and, in relation, the extent to which corporate directors are required to place the profit-seeking interests of shareholders above all else.¹¹⁵ For enterprises that seek to generate both financial and social returns, this is more than a theoretical exercise, of course. Accordingly, developments in this field are likely to generate still more legal scholarship in the future—particularly as these new legal forms are tested in the courts and in the marketplace.

While our literature review captures far fewer articles about the field of impact investing, approximately 25 percent of the articles focus on the structures and goals of performance-based financings, particularly those that positively correlate social and

¹¹⁰ Pennsylvania and Oregon have enacted statutes authorizing benefit corporations and benefit limited liability companies (BLLCs). 15 PA. STAT. AND CONS. STAT. ANN. § 8893(a) (2016); OR. REV. STAT. ANN. § 60.758(2)(a)–(b) (2014); 15 PA. STAT. AND CONS. STAT. ANN. § 3311(a) (2012). Florida adopted simultaneously legislation authorizing both social purpose corporations and benefit corporations. *See* Fl. Bus. Corp. Act, FLA. STAT. ANN. § 607.501 (3) (2014); FLA. STAT. ANN. § 607.501.513 (2014).

¹¹¹ *See Mapping the State of Social Enterprise, supra* note 13, at 9.

¹¹² As of the end of December 2017, 33 states and the District of Columbia had enacted legislation authorizing benefit corporations. As of the end of November 2017, there were just under 5000 registered benefit corporations in the United States (not all are active). The five states with the most registered benefit corporations at that time were Nevada (974), Delaware (774), Colorado (513), New York (457), and California (269). *Id.* at 9, 14; *see also* B Lab’s list of Known Benefit Corporations, <https://data.world/blab/benefit-corporationslist/workspace/file?filename=Known+Benefit+Corporations.csv>.

¹¹³ *See, e.g., Murray, Adopting Stakeholder Advisory Boards, supra* note 103, at 64.

¹¹⁴ *See, e.g., Ball, supra* note 84, at 924–25.

¹¹⁵ *See, e.g., Stout, supra* note 18, at 164.

financial returns.¹¹⁶ Chief among these are social impact bonds (also called “SIBs”) and other pay-for-performance or pay-for-success instruments.¹¹⁷ Some of the legal scholarship in this area analyzes and describes trends in the contracting taking place, drawing on project finance structures and other related financial structures.¹¹⁸ Other legal scholarship considers the suitability and effectiveness of such investments in solving particular social problems, such as reducing recidivism rates.¹¹⁹

III. ROLE OF LAW SCHOOLS: CHALLENGES & OPPORTUNITIES

The 2016 Landscape Report found that many of the academics identified in that literature review were working in isolation without formal institutional backing.¹²⁰ Recent research of Dr. Courtney H. McBeth suggests that this might be changing, at least in the United States.¹²¹ She identified forty-nine centers

¹¹⁶ See Figure 2 and accompanying text. Our literature review counted 178 articles discussing some form of impact investing.

¹¹⁷ *Id.*

¹¹⁸ See, e.g., Deborah Burand, *Globalizing Social Finance: How Social Impact Bonds and Social Impact Performance Guarantees Can Scale Development*, 9 N.Y.U. J.L. & BUS. 447, 450 (2013); Ana Demel, *Second Thoughts on Social Impact Bonds*, 9 N.Y.U. J.L. & BUS. 503, 503 (2013); Rebecca Leventhal, *Effecting Progress: Using Social Impact Bonds to Finance Social Services*, 9 N.Y.U. J.L. & BUS. 511, 514–15 (2013).

¹¹⁹ See, e.g., Susan R. Jones, *Is Social Innovation Financing Through Social Impact Bonds The Last Hope For Community Economic Development Programs During The Trump Administration?*, 26 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 351, 356 (2017); Etienne C. Toussaint, *Incarceration to Incorporation: Economic Empowerment for Returning Citizens Through Social Impact Bonds*, 25 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 61, 66–67 (2016); Ben Notterman, *Leveraging Civil Legal Services: Using Economic Research and Social Impact Bonds to Close the Justice Gap*, 40 N.Y.U. REV. L. & SOC. CHANGE 1, 2–3 (2015).

¹²⁰ 2016 Landscape Report, *supra* note 25, at 8. More specifically, they found that about one-third of the academics interviewed were working in a team or at an institution that provided formal support into social impact investing (such as setting up an institution/research center that is dedicated to this topic or allocating time in a syllabus)—leading to their conclusion that majority of academics are working in isolation, driven by their own interest in the social impact investment field.

¹²¹ See Courtney McBeth, *Social Innovation in Higher Education: The Emergence and Evolution of Social Impact Centers* (2018) (unpublished Ph.D. dissertation, University of Pennsylvania), <https://repository.upenn.edu/dis>

focused on social impact that were launched within universities in the United States during the period from 1993 through 2017.¹²² According to her research, initially many of these centers were created at elite business schools, but more recently such centers have been founded within other schools, such as public policy schools,¹²³ or on an university-wide basis.¹²⁴

No centers at law schools were identified in McBeth’s research. Yet law schools are engaging (albeit less visibly than business schools) in the fields of social enterprise and impact investing. For example, in May 2017, NYU School of Law launched its Grunin Center on Law and Social Entrepreneurship (the “Grunin Center”).¹²⁵ The first center of its kind to be sponsored by a law school, the mission of the Grunin Center is to:

[A]ccelerate the effective participation and enhance the community of lawyers and legal institutions engaged in social entrepreneurship and impact investing. To fulfill this mission, the Grunin Center educates students and practicing lawyers about legal issues in the field of social entrepreneurship and impact investing; disseminates knowledge and legal research about legal issues and policy developments in this field; and collaborates with other field-building organizations, universities and research centers.¹²⁶

But this is not all. Surveys conducted in late 2017 and early 2018 by the Grunin Center suggest that many law schools and faculty in the United States are engaging in these fields—even

sertations/AAI10829090/ [https://perma.cc/YXN9-NQHZ] (note that Dr. McBeth uses the word “center” very broadly in her research, thereby capturing what some might call programs or even initiatives as well as institutions that are named centers).

¹²² *Id.* at 43, 63, 188–89.

¹²³ For example, the Wagner School of Public Policy at NYU has a social impact finance center. Law.NYU.EDU, <https://wagner.nyu.edu/impact/centers> [https://perma.cc/9V6Y-565G].

¹²⁴ For example, the Beeck Center at Georgetown University, GEORGETOWN.EDU, <http://beeckcenter.georgetown.edu/> [https://perma.cc/8KTV-7T48].

¹²⁵ One author, Deborah Burand, is a faculty co-director of the Grunin Center at NYU School of Law. Law.NYU.EDU, <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=42490> [https://perma.cc/LY35-QYZJ].

¹²⁶ See Grunin Center, *About Us*, Law.NYU.EDU, <https://www.law.nyu.edu/centers/grunin-social-entrepreneurship/about> [https://perma.cc/S6CK-7UZH].

without the visible presence of a dedicated center or public interface.¹²⁷ More specifically, over 30 percent of accredited U.S. law schools are embedding themes of social entrepreneurship and/or impact investing in their activities.¹²⁸ Over 60 law schools that are supporting one or more of the following activities related to social entrepreneurship/impact investing: (i) curriculum/teaching, (ii) extracurricular activities for students, and (iii) legal research and writing by faculty members.¹²⁹ Numbers are based on self-reported survey responses and thus likely underrepresent the level of activity in the fields.¹³⁰

Of the surveyed law faculty who responded to the Grunin Center surveys, nearly half (48.33 percent) said that they are conducting legal research in the fields of social enterprise/impact investing.¹³¹ This high level of legal scholarly interest in these fields is borne out by our legal literature review too. As noted in the findings section, we identify 181 legal scholars from 101 law schools who produced articles tracked in our legal literature review.¹³² These legal scholars published their articles broadly—in nearly 150 different publication sources.¹³³

Like other academic researchers, legal scholars, particularly those that are pre-tenure, face pressure to publish in top journals.¹³⁴ Daggars and Nicholls expressed similar concern regarding the pressure for top placements that may discourage scholars from writing in the space.¹³⁵ Our legal literature review

¹²⁷ Lorne Sossin & Devin Kapoor, *Creating Opportunities: A Vision for the Future: Social Enterprise, Law & Legal Education*, 54 OSGOODE HALL L.J. 997, 1010 (2017). Sossin and Kapoor observe that law schools are engaging in social entrepreneurship in at least two ways: as part of universities that share goals of social enterprise and may themselves by participating in or facilitating social entrepreneurship, and as part of larger legal community and law reform.

¹²⁸ See *Mapping the State of Social Enterprise*, *supra* note 13, at 16 n.52.

¹²⁹ See Appendix C for a list of these U.S. Law Schools.

¹³⁰ See *Mapping the State of Social Enterprise*, *supra* note 13, at 16 n.51.

¹³¹ PowerPoint from Grunin Center for Law and Social Entrepreneurship, *U.S. Law School Mapping Surveys—2017–2018*, at 12 (on file with authors).

¹³² See Appendix A.

¹³³ Among these publication outlets, some contained multiple articles where journals held a dedicated symposium/journal edition devoted to impact investing/social enterprise (notes on file with authors).

¹³⁴ *2016 Landscape Report*, *supra* note 25, at 24.

¹³⁵ *Id.*

revealed more mixed results than that of Dagers and Nicholls. We found that opportunities exist for competitive law journal placements as 20 percent of the articles in our literature review were placed in the top 100 law journals.¹³⁶ Specialty business law journals at highly ranked law schools also are publishing articles from these fields.¹³⁷ But, it should be noted that 40 percent of the articles in our literature review were published in less prestigious journals (those ranked 200 or higher).¹³⁸ This suggests that while competitive placement is not impossible for legal scholars interested in writing in these fields, it may be challenging. To the extent that more highly ranked journals—general and specialty—publish in these fields, it should encourage more scholarship particularly as aspiring legal scholars gravitate to topics that are likely to find a home in publication outlets that are career-enhancing.¹³⁹

A. Constraints on Legal Scholarship

Legal research shares a key constraint with research from companion fields in business literature: the scarcity of empirical analysis and researchable databases on social enterprise and impact investment.¹⁴⁰ The dearth of quantitative datasets available for scholars to describe, analyze and predict trends in market developments impedes growth in the field.¹⁴¹ This, of course, is not a problem unique to social entrepreneurship or impact investing scholarship. Legal scholars confront this issue as they engage in other lines of inquiry too, including, for example, corporate law, capital market regulation, and finance more generally.¹⁴²

But this problem is exacerbated in the fields of social entrepreneurship and impact investing by the fact that much of

¹³⁶ See WASH. & LEE L.J. RANKING SYS., *supra* note 65.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Thirty of the 100 top ranked journals published 59 of the articles identified in our legal literature review; 56 articles were published in journals ranked between 100 and 200. Only 25 of the articles tracked in our literature review were published in unranked publications. See *2016 Landscape Report*, *supra* note 25, at 25 and accompanying text; Sossin & Kapoor, *supra* note 79, at 997 and accompanying text.

¹⁴⁰ *2016 Landscape Report*, *supra* note 25, at 39.

¹⁴¹ *Id.* at 14.

¹⁴² See *supra* Section II.A.

social enterprise and impact investment occurs in private markets where information is not publicly available and datasets are hard to come by.¹⁴³ Reflecting this limitation, there are only a few articles (nine) in our legal literature review that include an empirical analysis. As (or if) the fields of social enterprise and impact investing become more mainstream and publicly held corporations engage in a greater amount of socially or environmentally impact-oriented activities and investing, it is likely that data will become more accessible to scholars and empirical research more prevalent.

Access to datasets is not the sole problem, however. The reluctance of law journals to publish articles featuring sophisticated empirical analysis or quantitative data is another constraint. This reluctance is understandable and perhaps appropriate given that U.S. law reviews managed by law students generally are not peer-reviewed so the quality of empirical analysis and datasets cannot be scrutinized nor assessed by experts.¹⁴⁴ Similarly, student

¹⁴³ It is rare, although not unheard of, to see a publicly held corporation organizing itself within one of the new legal forms created especially for social enterprises. For example, Laureate, an education company, is a publicly traded public benefit corporation and a certified B corporation. *See B Corp*, LAUREATE INT'L UNIVS., <https://www.laureate.net/aboutlaureate/b-corp> [<https://perma.cc/7C8C-WXLU>]. Similarly, it also is rare to see investors turning to capital markets in pursuit of investments that generate social as well as financial returns. And it is even more rare for publicly traded assets to correlate positively financial and social returns, such that the greater the social impact is the greater the financial return. One example, however, is the 2016 municipal bond offering by the District of Columbia, which issued \$25,000,000 of “Environmental Impact Bonds” to the public. These municipal bonds have a variable rate of return, the amount of which will depend on whether performance goals of reducing storm-water runoff are met by 2021 (the mandatory tender date is April 1, 2021). If runoff is reduced by more than 41.3 percent, DC Water will make an “outcome payment” to bondholders of \$3.3 million on the mandatory tender date. If runoff is reduced by less than 18.6 percent, bondholders will make a risk share payment to DC Water of \$3.3 million on the mandatory tender date. *See Fact Sheet, DC WATER ENVTL. IMPACT BOND*, <https://www.goldmansachs.com/media-relations/press-releases/current/dc-water-environmental-impact-bond-fact-sheet.pdf> [<https://perma.cc/3AWM-YURL>].

¹⁴⁴ One example of a law journal that actively seeks empirical legal scholarship is the *Journal of Empirical Legal Studies* (JELS). The JELS, which is not student managed, conducts a double-blind submission process so that neither the author nor the reviewers are known to each other. It is a peer-reviewed, peer-refereed, interdisciplinary journal. *See Journal of Empirical Legal Studies*, WILEY ONLINE LIBR., <https://onlinelibrary.wiley.com/page/journal/17401461>

managed, law journals rarely publish interdisciplinary articles.¹⁴⁵ While it is not likely, nor perhaps desirable, that this publication model will shift, it does point to the importance of finding publication outlets that are more accustomed to and practiced in evaluating research that is empirically grounded and/or crosses disciplines.¹⁴⁶

B. Opportunities for Legal Scholarship

Short of the expensive, and hence unlikely, proposition of launching many more centers at law schools focused on social entrepreneurship and impact investing, or creating new peer-reviewed models for law school–sponsored journals, what is needed to help legal scholars create more field-building research and find ways to connect that research more visibly and meaningfully to the needs of practitioners and policymakers in these fields?

Strengthening and maintaining links between academic research and practice/policy is important to ensuring that academic research is credible, relevant and useful.¹⁴⁷ Dagers and Nicholls found very limited overlap between the worlds of academics and practitioners in the field of social impact investing.¹⁴⁸ Of 261 practitioner reports they surveyed, only 15 percent had at least one author based in an academic institution.¹⁴⁹ This lack of overlap is likely more pronounced for legal scholars, sometimes even

/homepage/productinformation.html [https://perma.cc/8D3V-MUDU]. Another example is the Northwestern University Law Review, a student managed journal that has started publishing an annual issue “dedicated to empirical legal scholarship.” Its first empirical issue was published in spring 2019. Reviewers include empirically trained members of the Northwestern Pritzker School of Law and American Bar Foundation faculties. *See For Authors*, NW. U. L. REV., <https://northwestern-university-law-review.scholasticahq.com/for-authors> [https://perma.cc/YGX7-64FD].

¹⁴⁵ Barry Friedman, *Fixing Law Reviews*, 67 DUKE L.J. 1297, 1308–09 (Apr. 2018) (discussing that, absent special training or expert knowledge, law students are not able to properly analyze empirical interdisciplinary scholarship).

¹⁴⁶ Again, this is not an issue unique to legal scholarship that is focused on social entrepreneurship or impact investing, but lack of suitable publication outlets can constrain and impact not only the amount but also the direction that legal scholarship will take in these fields going forward.

¹⁴⁷ UNSIF Research Council, *supra* note 40, at 4.

¹⁴⁸ 2016 *Landscape Report*, *supra* note 25, at 8.

¹⁴⁹ *Id.* at 16.

in reports focused on policy and regulatory recommendations.¹⁵⁰ Accordingly, to the extent strengthening and maintaining links between academic research and practice/policy are important for advancing finance-oriented academic scholarship, improving these links may be even more important to fostering legal scholarship.

There are several steps that could be taken to ensure that legal scholarship evolves with a more practice and policy orientation: (1) improve legal scholars' access to data and outlets for publication of empirically grounded and/or interdisciplinary research; (2) develop communities where legal scholars can discuss how to create research agendas that are groundbreaking and field-building; (3) promote knowledge dissemination and research between law professors and their law students; (4) encourage more interdisciplinary research, writing, and teaching with other academic disciplines that are actively engaged in the fields of social entrepreneurship and impact investing; (5) promote pioneering legal scholarship agendas addressing whitespaces, rather than rereading existing scholarship; and (6) engage with mainstream corporate law, capital market regulation, and finance scholars through conferences, scholarships and collaborations.

First is to improve legal scholars' access to data so that they can engage in more empirical research, and to find more outlets for publishing that research.¹⁵¹ There are examples of this taking place already, but much more could be done. At the risk of being

¹⁵⁰ For example, it is worth noting the conspicuous absence of legal input into the GIIN's *Roadmap for the Future of Impact Investing: Reshaping Financial Markets*. A review of the organizations consulted (Appendix II) shows one law firm, Orrick, Herrington & Sutcliffe, was consulted. No law schools were consulted. In contrast, a number of business schools and related institutes were involved in contributing to this report that makes policy and action recommendations, including Bertha Centre for Social Innovation and Entrepreneurship, University of Cape Town Graduate School of Business; Booth School of Business, University of Chicago; Center for the Advancement of Social Entrepreneurship, Duke University Fuqua School of Business; Harvard Business School, Harvard University; Institute for Responsible Investing, Harvard University; Said Business School, Oxford University; and Wharton School, University of Pennsylvania. *Roadmap for the Future of Impact Investing: Reshaping Financial Markets*, GLOBAL IMPACT INVESTING NETWORK (Mar. 20, 2018), https://thegiin.org/assets/GIIN_Roadmap%20for%20the%20Future%20of%20Impact%20Investing.pdf [<https://perma.cc/TRY9-EFCL>].

¹⁵¹ At the June 2018 Legal Scholars Convening at NYU, several attendees made this point (notes on file with authors).

overly self-referential, both authors produce data-driven scholarship.¹⁵² Anne Tucker's research has built a database of impact investment contract terms with access to legal documents collected by the Wharton Social Impact Initiative.¹⁵³ Research on impact investment contract terms can refute some claims of greenwashing and reveal how the insertion of impact changes the structure (and outcomes) of deals.¹⁵⁴ Similarly, Deborah Burand's scholarship uses a database of social impact bond contracts housed at the Nonprofit Finance Fund to track the evolution of the governance provisions found in the documentation for many of the social impact bonds launched in the United States between 2012 and 2017.¹⁵⁵ Finding suitable publication outlets for empirical research is, of course, not an issue limited to legal scholarship in the fields of social enterprise and impact investing.¹⁵⁶ Yet it underscores the importance of taking a more deliberate approach to creating opportunities for interdisciplinary collaborations.

Second, developing more convenings where legal scholars can come together to discuss how their research agendas are responding to and contributing to developments in these fields would advance the role of legal scholarship. Law faculty are hungry for this engagement.¹⁵⁷ More than 85 percent of Grunin Center survey responses indicated that faculty scholarship in these fields would be improved by the opportunity to participate in symposiums dedicated to topics about social enterprise and impact investing.¹⁵⁸ A

¹⁵² See *Wired Wharton Impact Research & Evaluation Database*, WHARTON U. OF PA., <https://socialimpact.wharton.upenn.edu/research-reports/wired/> [<https://perma.cc/KA5Y-PMAE>]; see also *Projects*, NONPROFIT FINANCE FUND: PAY FOR SUCCESS, <https://payforsuccess.org/projects/> [<https://perma.cc/7F7Y-MRAN>].

¹⁵³ Anne Tucker is Affiliated Research Faculty with the Wharton Social Impact Initiative at The University of Pennsylvania and works on building a database of impact investment and social enterprise contracting terms through the Wharton Impact Research & Evaluation Database. *Wired Wharton Impact Research & Evaluation Database*, *supra* note 152.

¹⁵⁴ See, e.g., Christopher Geczy et al., *Contracts with Benefits: The Implementation of Impact Investing*, SSRN 26, (Oct. 26, 2018), <https://ssrn.com/abstract=3159731> [<https://perma.cc/8ZHX-E8J2>].

¹⁵⁵ See *Projects*, *supra* note 152; see also Dana Archer-Rosenthal, *A Comparative Analysis of the First 10 Pay for Success Projects in the United States*, PAY FOR SUCCESS: THE FIRST GENERATION (Nonprofit Finance Fund, Apr. 2016).

¹⁵⁶ See *supra* notes 144–50.

¹⁵⁷ *Mapping the State of Social Enterprise*, *supra* note 13.

¹⁵⁸ *Id.*

related finding that our literature review highlights is the power of law journal–sponsored symposia to spur more research and writing in these fields.¹⁵⁹ This suggests that, in addition to encouraging more such symposia, specialty journals focused on these fields would add value.

Building and strengthening the community of legal scholars in these fields while bridging the divide between legal practitioners and legal scholars is another crucial step. Early actors in the field, such as the Grunin Center,¹⁶⁰ endeavor to do this by hosting events focused on practitioners and academics alike.¹⁶¹ Another notable conference sponsored by a law school that brings together law professors to engage with practitioners and share their scholarship is the annual conference on social entrepreneurship held each spring at the University of Missouri–Kansas City.¹⁶² Another example from farther afield is the academic sidecar conference that takes place alongside the ESELA (formerly called the European Social Enterprise Law Association, now called ESELA—The Legal Network for Social Impact) annual conference in Europe each spring.¹⁶³

Promoting engagement of law professors with their students on topics of social enterprise and impact investing is the third step.

¹⁵⁹ See, e.g., *supra* note 54 and accompanying text describing our finding that law journals channel and spur research through symposia and special issues dedicated to social enterprise and impact investing.

¹⁶⁰ Other needs identified by surveyed faculty include scholarship recognition, more law journals dedicated to these fields, an AALS-sponsored section focused on these fields, and writing workshops.

¹⁶¹ For example, the Grunin Center now hosts an annual convening of legal scholars that is held immediately after a larger, more practitioner-oriented conference on “Legal Issues in Social Entrepreneurship and Impact Investing—in the US and Beyond.” The first Legal Scholars Convening, which took place in June 2018, was attended by 26 legal scholars. The definition of legal scholars for these Grunin Center convenings is broad and includes law faculty, fellows and practitioners who are writing and publishing in law journals about these fields. See *Legal Scholars Convening*, GRUNIN CTR. FOR L. AND SOC. ENTREPRENEURSHIP N.Y.U., <http://www.law.nyu.edu/centers/grunin-social-entrepreneurship/events/scholars-convening> [<https://perma.cc/ABA2-M9Y3>].

¹⁶² See *Annual Midwest Symposium on Social Entrepreneurship*, U. OF MO. KAN. CITY, <https://law.umkc.edu/mwse/schedule/> [<https://perma.cc/7LL4-PGZV>].

¹⁶³ See *Events The Impact Revolution: The Role of Law and Lawyers*, ESELA ANN. CONF., <https://esela.eu/events/esela-annual-conference-2019> [<https://perma.cc/QB5K-6LZ4>].

Education engagement can range from traditional courses to expanding experiential course offerings where law students represent social entrepreneurs and/or impact investors. Teaching tools for faculty interested in embedding themes of social entrepreneurship and/or impact investing in their classrooms would facilitate new or the expansion of existing course offerings.¹⁶⁴ Clinical law professors are another obvious key to bridging the practitioner/legal academic divide and engaging with students.¹⁶⁵ As of the spring of 2018, at least twenty-seven law schools in the United States (representing thirty transactional law clinics) serve clients who self-identify as either social enterprises or impact investors.¹⁶⁶ While the areas of legal advice provided by transactional clinics vary, there are practice areas common to many of these clinics.¹⁶⁷ Nearly all provide legal advice to social enterprises/impact investors about formation/choice of entity, contracts/agreements, and

¹⁶⁴ One initiative taking shape at NYU Law School is the creation of a legal library of case studies and other teaching tools for use by law professors interested in teaching in these fields—either in a law classroom or in an interdisciplinary classroom with professors from business or policy. A first step in this direction is the creation of an interdisciplinary case study focusing on impact investment vehicles that blend capital with varying return expectations. This case study, which is being funded by the Omidyar Network, will focus on the MicroBuild Fund, a demonstration impact fund sponsored by Habitat for Humanity International that draws on blended capital to spur housing micro-finance globally. See OMIDYAR NETWORK, <https://www.omidyar.com/investees/grunin-center-law-and-social-entrepreneurship> [<https://perma.cc/3DZ4-8YUN>].

¹⁶⁵ See Deborah Burand et al., *Clinical Collaborations: Going Global to Advance Social Entrepreneurship*, 20 INT'L J. CLINICAL LEGAL EDUC. 499, 504 (2014); Alicia E. Plerhoples, *Representing Social Enterprise*, 20 CLINICAL L. REV. 215, 255 (2013) (describing how her clinic at Georgetown deliberately focuses on representing social enterprises).

¹⁶⁶ See *Mapping the State of Social Enterprise*, supra note 13, at 17; see also Deborah Burand, Panel Presentation, *Business as Unusual: Clinical Presentation of Social Entrepreneurs and Impact Investors*, Transactional Clinical Conference, CHI.-KENT BLOGS (Apr. 2018), <http://blogs.kentlaw.iit.edu/2018tcc/files/2018/04/Presentation-Burand.pdf> [<https://perma.cc/CJR4-FYHF>] (providing early survey results and noting that social enterprises/impact investors represent a relatively small percentage of these transactional clinics' overall clientele (1–10 percent of 12 clinics' clientele, 11–25 percent of 7 clinics' clientele), but four clinics have made social enterprises/impact investors the focus of their transactional clinics' clientele (over 75 percent of their clinics' clientele)).

¹⁶⁷ *Id.*

governance.¹⁶⁸ And many (twenty-five of these surveyed transactional clinics) provide legal advice about intellectual property issues.¹⁶⁹ All of these practice areas could prove fruitful to informing legal scholarship that is grounded in the experiences of social entrepreneurs and impact investors.

Further, joint research projects in seminars, independent studies, and student notes are additional ways to enhance educational engagement. An example of how such research collaborations can take place is found in the Social Enterprise Law Tracker hosted by the Grunin Center at NYU Law.¹⁷⁰ The Social Enterprise Law Tracker is a student-developed visual representation of social enterprise forms available across the United States.¹⁷¹ Students publish an annual companion report analyzing developments and trends observed in the course of recording the evolution of social enterprise statutes in the Tracker.¹⁷² Student interest in these fields underscores the need for more engagement. In the course of researching articles for our literature review, we found nearly 90 law student notes focusing on topics in the fields of social enterprise and impact investing.¹⁷³ In retrospect, this finding

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *See About*, SOCIAL ENTERPRISE LAW TRACKER, <https://www.socentlawtracker.org/#/map> [<https://perma.cc/LT4F-E6SR>]. A future development that could be useful to legal scholars intent on grounding their research about social enterprise in empirical data is the database being created by the B-Lab with Wharton Business School that will include anonymized data about 90,000 corporations that have self-identified as mission-oriented companies (many of which are certified B-corporations).

¹⁷¹ *Id.*

¹⁷² *Mapping the State of Social Enterprise*, *supra* note 13. Three to four law students are recruited each year to update and analyze developments in the social enterprise laws being enacted across the United States. The current focus of the Social Enterprise Law Tracker is the choice of legal forms available throughout the United States for organizations that seek to house social entrepreneurial activities in a corporate form. Over time, the Social Enterprise Law Tracker is expected to expand in both the scope of laws tracked and the jurisdictions covered. The data entered by law students about the state of social enterprise laws is presented in a visual, map form online, making it accessible to the public at large.

¹⁷³ In our literature review, we identified 88 student notes written on our primary search terms demonstrating students' interest in these fields (notes on file with authors).

should not be surprising given the strong interest of millennials in working for or investing in businesses that advance social goals.¹⁷⁴

Encouraging more interdisciplinary research and writing in these fields is the fourth step. Attending conferences hosted by academics from other disciplines beyond the law may be one avenue.¹⁷⁵ Relatedly, law school–sponsored conferences on social enterprise and impact investment could invite participation by academics from disciplines outside of the law. Similarly, legal scholars also could be encouraged (and rewarded) to publish in peer-reviewed journals from other disciplines. For example, competitive research grants and prizes could be created to catalyze new research and provide a forum for a wider group of interested parties to collaborate and critique research.

Fifth, impact investment and other sources of capital streams for social entrepreneurs are underexplored topics generally, especially compared to social entrepreneurship scholarship focused on entity formation. See the table below for a summary of topical whitespaces.¹⁷⁶ Under the broad umbrella of impact and finance, impact bonds (and other forms of pay-for-success and pay-for-performance financings) is a clear whitespace.¹⁷⁷ Another is impact measurements. Eleven percent of the articles discussed this secondary theme, which is not reflective of the energy and focus of practitioners and industry on impact measurements.¹⁷⁸

¹⁷⁴ See 2018 Deloitte Millennial Survey, *supra* note 10.

¹⁷⁵ The following are recurring non-legal conferences that one or more of the authors have attended in recent years: Winter Innovation Summit, hosted by Sorenson Impact Center at the David Eccles School of Business, The University of Utah; Skoll World Forum on Social Entrepreneurship, hosted by Said Business School at the University of Oxford; Impact and Sustainable Finance Faculty Consortium Convening, hosted by Kellogg School of Management at Northwestern University; International Social Innovation Research Conference (university hosts vary from year to year).

¹⁷⁶ Term frequencies and percentages are listed in Appendix A.

¹⁷⁷ *Id.*

¹⁷⁸ See, e.g., Patsy Doerr, *Four Ways Social Impact Will Affect Businesses in 2019*, FORBES (Jan. 14, 2019) (discussing the evolution to standardize and make transparent social impact measurements); see also *Social Impact Investment 2019: The Impact Imperative for Sustainable Development*, OECD, (Jan. 19, 2019), <http://www.oecd.org/development/social-impact-investment-2019-9789264311299-en.htm> [<https://perma.cc/GT9C-F8BA>] (demonstrating the Organisation for Economic Co-operation and Development (OECD), lists the underdevelopment of impact measurement practices as a crucial barrier for social finance and key initiative for 2019).

Similarly, social finance broadly is a whitespace in our literature review with few articles focusing on the related topics of social finance generally, blended finance, development finance, community finance and cooperative finance. Greater adoption of specific market interventions providing capital to social (and other) entrepreneurs like microfinance and crowdfunding may motivate additional research. Finally, comparative approaches to social enterprise and impact investment, specifically as it relates to investment manager fiduciary duties, corporate purposes, choice of entity rules, corporate governance, and public/private partnerships will be both fruitful avenues for future scholarship as well as significant contributions to the field.

Legal Scholarship Whitespaces—by Topic
Impact investment & related terms (i.e., green investments, impact measurement, etc.)
Impact bonds & related term (i.e., pay-for-success or pay-for-performance financings)
Social finance (including development, blended, community, & cooperative finance)

Despite fear of stating the obvious, there is much to be gained by encouraging legal scholars interested in social entrepreneurship and impact investing to remain in active dialogue with their academic colleagues who are addressing the changing fields of corporate law, capital markets regulation and finance more generally, and are reexamining the role of business in society more specifically.¹⁷⁹ These practice developments, which reflect more holistic expectations about the roles business and capital should play in society, are shaping legal scholarship as old assumptions

¹⁷⁹ See, e.g., Stephen J. Choi et al. *Does Majority Voting Improve Accountability?* 83 U. CHI. L. REV. 1119, 1120–21, 1174–75 (2016); John C. Coffee, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 1 J. CORP. L. 1, 2, 6 (2015); Cynthia A. Williams & John M. Conley, *Trends in the Social [Ir]responsibility of American Multinational Corporations: Increased Power, Diminished Accountability*, 25 FORDHAM ENVIR. L. REV. 46, 46–47, 83 (2013).

about the purpose of corporations and the capital that fuels them give way to a new way of thinking.¹⁸⁰

Further, just as there are issues of relevance in legal scholarship arising from more mainstream scholarship about corporate and finance developments to the fields of social entrepreneurship and impact investing, so too can legal scholarship about social entrepreneurship and impact investing inform the research and scholarship of our more mainstream-oriented colleagues.¹⁸¹ For example, legal scholars writing about the fields of social entrepreneurship or impact investing may unearth and examine corporate and investor behaviors that represent a new way of doing business, unlike any seen before.¹⁸² Teasing out those differences and analyzing their consequences may have profound benefits that go far beyond the fields of social entrepreneurship and impact investing.

CONCLUSION

Our legal literature review catalogues 260 articles on social enterprise and impact investing published between 2007 and 2017—the first decade of impact investing. In doing so, we identify the main contributions that legal scholarship has made to these fields and whitespaces where future research could be useful, particularly in the areas of impact investing, capital streams for social entrepreneurs, transactions, and finance generally. Aside from creating a map of where legal scholarship in these fields has been, we articulate clear needs for the future direction of legal scholarship. What is needed is legal scholarship that shares one or more of these characteristics:

1. *Practice-oriented scholarship* (building scholarship that is field-building and of practical import to policy-makers and practitioners);

¹⁸⁰ See, e.g., LYNN STOUT ET AL., *CITIZEN CAPITAL: HOW A UNIVERSAL FUND CAN PROVIDE INFLUENCE AND INCOME TO ALL* 113–15 (Berrett-Koehler Publishers 2019); LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* (2012).

¹⁸¹ See, e.g., Tina Saebi et al., *Social Entrepreneurship Research: Past Achievements and Future Problems*, 45 J. OF MGMT. 70, 88–89 (Jan. 2019).

¹⁸² See, e.g., DANA BRAKMAN REISER & STEVEN A. DEAN, *SOCIAL ENTERPRISE LAW: TRUST, PUBLIC BENEFIT AND CAPITAL MARKETS* (Oxford Univ. Press 2017).

2. *Empirical scholarship* (creating scholarship that is grounded in data and experience);
3. *Collaborative scholarship* (undertaking scholarship that builds on and contributes to the legal scholarship being undertaken by our legal colleagues who are examining the evolution of more mainstream corporate and investor behaviors and expectations);
4. *Conceptual scholarship* (developing scholarship that contributes to shared terminology and creates conceptual frameworks for normative analysis about developments in these fields);
5. *Comparative scholarship* (organizing scholarship that deliberately crosses jurisdictional boundaries (within the United States and beyond) to compare and contrast varying legal and regulatory approaches to social entrepreneurship and impact investing); and
6. *Interdisciplinary scholarship* (conducting scholarship that engages academics from multiple disciplines to shed light on field developments and directions).

Finally, we see need to continue to track the development of legal scholarship in the fields of social enterprise and impact investing as separate and distinct from other fields of legal inquiry. We come to this conclusion because this is a time of significant experimentation in these nascent fields—across and within jurisdictions. Accordingly, there is much to be gained by focusing on social entrepreneurship and impact investing as fields deserving of legal scholarship in their own right. Over time, however, there may be cause to reassess this distinction, particularly if social entrepreneurship and impact investing truly “go mainstream.” At that point, we may find that legal scholarship in the fields of social entrepreneurship and impact investing also must become more mainstream, gathering the attention of legal scholars from a range of fields, including, but not necessarily limited to, those active in the fields of business law, capital markets regulation, and finance more generally. Until that time, however, there is much to be gained by tracking the ways in which legal scholarship is supporting the maturation, proliferation and advancement of the fields of social enterprise and impact investing.

APPENDIX A: BIBLIOGRAPHY OF SURVEYED ARTICLES

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APPENDIX B: PRIMARY SEARCH TERMS &
SECONDARY SEARCH TERMS

Primary Search Terms

The following is a list of the primary search terms. This list acts as a screen because articles included in the literature review must discuss in substance, at least one of the primary search terms. Definitions provided below.

Primary Search Term	Article Count	Percent
Benefit Corp!	160	62.9
Social Enterprise!	134	52.7
L3C	119	46.8
Hybrid(s)	104	40.9
Social Entrepreneur	103	40.5
Flexible Purpose Corp!	64	25.1
Social Invest!	63	24.8
Impact Invest	54	21.2
Public Benefit corp!	52	20.4
Bottom line ¹⁸³	52	20.4
Social Impact Bond	25	9.8
Social Impact Invest!	16	6.2
Pay_for_success	14	5.5
Social Finance	10	3.9
Social Franchise	1	0.3
Blended Finance	0	0

Secondary Search Terms

The secondary search term list reflects emerging topics and subthemes in articles included in the literature review. Definitions provided below.

¹⁸³ Comprised of double bottom line & triple bottom line.

Secondary Search Term	Article Count	Percent
CSR_Sustainability	116	45.6
AltFinance	104	40.9
SRI	58	22.8
ESG	54	21.2
Microfinance	40	15.7
Pub-Private P'ship	40	15.7
ImpactMeasure	28	11
CrowdFund	22	8.6
GreenInvest	14	5.5
Dev_Fin	6	2.3
Comm_Fin	2	0.7
Coop_Fin	2	0.7
Ethical_Banking	0	0

Primary Search Term	Definition
Social Invest!	This term concerns providing access to repayable capital for social sector organizations (SSOs), where the providers of capital are motivated to create social or environmental impact. As a result there is more of a focus on the investee.
Impact Invest!	This term concerns the use of capital invested in organizations that deliberately aim to create specified social or environmental value (and measure it) where the principal is repaid, possibly with a return. Investing capital to create specified social or environmental value, whether it is through direct allocation capital, investment in funds, or contractual agreements such as SIBs. The focus is therefore mainly on investor behavior and motivations.

Social Impact Bond	A public-private partnership that allows private (impact) investors to upfront capital for public projects that deliver social and environmental outcomes. If the project succeeds, the investors are repaid by the Government (Social Impact Bonds) or an aid agency or other philanthropic funder (Development Impact Bonds) with capital plus interest. If the project fails, the interest and part of the capital is lost. While commonly referred to as a “bond” the solution replicates in essence a payment-for-result scheme. The approach is also referred to as pay-for-success in the United States and as a social benefit bond in Australia. Social impact bonds are not commercial bonds, green bonds or other impact bonds.
Social Impact Invest!	This term concerns the use of capital invested in organizations that deliberately aim to create specified social or environmental value (and measure it) where the principal is repaid, possibly with a return. Investing capital to create specified social or environmental value, whether it is through direct allocation capital, investment in funds, or contractual agreements such as SIBs. The focus is therefore mainly on investor behavior and motivations. (<i>Same definition as impact investment.</i>)
Social Finance	This term encompasses the use of a range of private financial resources to support the creation of public social and environmental value or impact; social finance encompasses a range of models and research topics including Islamic finance; mutual finance; crowd-funding; community finance; targeted

	socially responsible investment; and social enterprise financing. Social finance does not necessarily entail the repayment of capital by ‘investee,’ or grantee, organizations.
Social Enterprise!	What distinguishes social enterprises is that they employ a business model that aims to achieve positive social or environmental impacts while also pursuing profits and/or financial sustainability. Social entrepreneurship is a business model, not simply a legal form. So both for profit and nonprofit organizations could qualify under this definition.
Social entrepreneur!	Social entrepreneurship is a business model, not simply a legal form. So both for profit and nonprofit organizations could qualify under this definition.
Social franchise	<p>Social franchising is a means of enabling social enterprises and the social economy through joint working and knowledge sharing and transfer.</p> <p>It is comparable to commercial franchising but it has a social purpose, most commonly the creation of employment for disadvantaged people.</p> <p>Both the social franchisor and franchisees should be social enterprises (i.e., businesses that trade and have a social purpose) and there should be:</p> <ol style="list-style-type: none"> (1) An organization that replicates a social enterprise business model—the social franchisor; (2) At least one independent social franchisee that has been replicated by the social franchisor; (3) A common brand under which the social franchisees operate; and (4) An interchange of knowledge between members.

L3C	A low profit limited liability company.
Benefit corp!	This term represents for profit corporation organized as a benefit corporation under state law allowing it to create legal structures for its intended social or environmental impact with varying degrees of accountability, transparency requirements, etc.
Flexible Purpose Corp!	A flexible purpose corporation (Social purpose Corporation-SPC-In CA) is a class of corporation in California lacking a profit motive when pursuing a social benefit defined in its charter.
Blended_finance!	Blended finance strategically combines development finance money with private funds to achieve the Sustainable Development Goals (SDGs) in developing countries.
Pay for success	See impact bond.
Public benefit corp	See benefit corporation; specific to the Delaware jurisdiction.
Double bottom line	Double bottom line (abbreviated as DBL or 2BL) seeks to extend the conventional bottom line, that measures fiscal performance—financial profit or loss—by adding a second bottom line to measure their performance in terms of positive social impact.
Triple bottom line	Triple bottom line (or otherwise noted as TBL or 3BL) is an accounting framework with three parts: social, environmental (or ecological) and financial. Some organizations have adopted the TBL framework to evaluate their performance in a broader perspective to create greater business value.
Hybrid(s)	This term represents entities that combine features of for-profit and not for profit organizations—contractual or structural.

Secondary Search Terms	
Alternative Finance _FinTech	Alternative financial represents forms of finance beyond three traditional investments of stocks, bonds, and cash. Used in alternative investments or in reference to shadow banking activities funded by institutional investors instead of banks. It can also describe financing and payment channels created in regions without traditional banking systems. Fin-tech represents technology-enabled online channels or platforms that act as intermediaries in capital formation and allocation activities to individuals and businesses traditionally outside of the traditional banking system.
Community Finance	Community finance refers to affordable financial services targeted to underserved communities and regions, often with an emphasis on education.
Crowd Fund	Crowdfunding finances new businesses by raising small amounts of capital contributed by a large number of individuals. Accessibility of vast networks of people through social media and crowdfunding websites facilitate crowdfunding by bringing investors and entrepreneurs together.
Cooperative Finance	Cooperative and mutual finance—a financial cooperative is a financial institution that is owned and operated by its members. The goal of a financial cooperative is to act on behalf of a unified group as a traditional banking service, think credit unions.

Development Finance	Development finance—national and international development finance institutions (DFIs) are specialized development banks or subsidiaries funded to support private sector development in developing countries. National governments usually own a majority position in DFIs lending creditworthiness and easing additional capital raising in private markets on competitive terms.
ESG	This term represents environmental, social and governance factors influencing investment or corporate operations.
Ethical Banking	This term encompasses any bank, financial institution, or system that operates based on values driven by environmental and social responsibility. Just as with ethical or responsible investment, ethical banking can rely on negative screening (avoiding investment in companies that cause harm to the planet or people) or positive screening (actively investing in companies that do good for the planet or people). ¹⁸⁴
Green Invest!	“Often conflated with socially responsible investing (SRI), green investments are essentially investment activities that focus on companies or projects that are committed to the conservation of natural resources, the production and discovery of alternative energy sources, the implementation of clean air and water projects, and/or other environmentally conscious business practices. Green investments may fit under the

¹⁸⁴ See, e.g., James Hurwood, *What is Ethical Banking? How to Make the Swap*, CANSTAR, (July 21, 2007), <https://www.canstar.com.au/home-loans/ethical-banking-make-swap/> [<https://perma.cc/M8HN-25VJ>].

	umbrella of SRI, but are fundamentally much more specific.” ¹⁸⁵
Microfinance	Microfinance is a general term to describe financial services, such as loans, savings, insurance and fund transfers to entrepreneurs, small businesses and individuals who lack access to traditional banking services.
Public-Private Partnerships	Public-private partnerships—a key motivation for governments considering public-private partnerships (PPPs) is the possibility of bringing in new sources of financing for funding public infrastructure and service needs. ¹⁸⁶
Impact Measure!	Impact measurement (social or environmental)—commits an investor to measure and report the social and environmental performance and progress of underlying investments. Reporting impact promotes transparency and accountability while informing the practice of impact investing and building the field. Investors’ approaches to impact measurement will vary based on their objectives and capacities, and the choice of what to measure usually reflects investor goals and, consequently, investor intention.
SRI	Socially responsible investing—sustainable, responsible and impact investing is an investment discipline that considers environmental, social and corporate governance (ESG) criteria to generate long-term competitive financial returns and positive societal impact.

¹⁸⁵ *Green Investing*, INVESTOPEDIA.COM, <https://www.investopedia.com/terms/g/green-investing.asp> [<https://perma.cc/WCU4-TBRD>].

¹⁸⁶ See *Public-Private Partnerships*, WORLD BANK GROUP, <http://ppp.worldbank.org/public-private-partnership/financing> [<https://perma.cc/JQM8-FQHZ>].

CSR (!) or Sustainability	This term stands for corporate social responsibility—movement aimed at encouraging companies to be more aware of the impact of their business on the rest of society, including their own stakeholders and the environment. Corporate social responsibility (CSR) is a business approach that contributes to sustainable development by delivering economic, social and environmental benefits for all stakeholders.
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APPENDIX C: LAW SCHOOL MAPPING

*U.S. Law Schools Embedding Themes of Social Enterprise and/or Impact Investing into Their Activities*¹⁸⁷

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
Florida International University
Fordham University
Georgetown University
George Washington University
Georgia State University
Harvard University
Hofstra University
Indiana University
University of Iowa
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

¹⁸⁷ Desktop research indicates that there are at least seven other accredited law schools in the United States that appear to have relevant courses/activities/scholarship, but representatives of those law schools did not respond to the surveys conducted in 2017 to 2018.

New York University
University of North Carolina–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
Yeshiva University