

MY SEARCH FOR THE SUSTAINABLE CORPORATION

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DRAFT

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This is a story about a journey—my journey—in search of the Sustainable Corporation. The story is my contribution to the Ohio State symposium on “Conscious Capitalism” held on March 9, 2023. For me, it was a return to my college alma mater, so I walked the campus. After fifty years, many landmarks are unchanged—my sophomore dorm, a “mirror lake,” the math building, the main concert hall, my off-campus house. But I have changed; the world has changed.

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I. THE STORIES THAT BEGAT THIS STORY

My journey in search of the Sustainable Corporation began for me about fifteen years ago. Two journalistic pieces unsettled my worldview. In 2005, I read “The Climate of Man,” a three-part exposé by Elizabeth Kolbert. She described how our modern extractive-technological society was creating a new climate. It was a harrowing account of how humanity was destroying the stable climate of the Holocene and stepping into the chaos of the Anthropocene.

The other piece was a 2007 *Rolling Stone* interview of James Lovelock. He made clear that climate change was happening now. He described the possibility of the Gulf Stream, which brings warm water from the Caribbean

to Northern Europe, re-routing or even stopping. If Greenland's ice sheet continues to melt, he explained, changes in the salinity of the North Atlantic could affect the flow of the Gulf Stream—with catastrophic consequences.

I am a corporate law professor. So, these accounts led me to think about the subject at hand—the corporation. Although I authored student books on Corporations and Securities Regulation, they did not address how business contributed to this new, grim trajectory for humanity. Around this time, Wake Forest's then-president Nathan Hatch addressed the faculty and urged that we undertake scholarship with a purpose, not just to be published. I told myself I would.

II. NO ROADMAPS TO TURN TO

It was a slow start. The role of the corporation in climate change seemed hardly to be acknowledged. Of course, the rising “climate change movement” blamed the oil and gas industry for producing fossil fuels. But the industry was simply satisfying consumer demand—and more than happy on behalf of consumers to justify itself. There were also those who criticized the corporate design as inherent in our extractive/technological/industrial society.

But there were no real solutions for how the corporation might be redesigned to become sustainable. Some advocated for more government regulation—thus, to change the incentive structures in corporations to become more environmentally and socially conscientious. But these calls for government regulation—such as a carbon tax or a higher minimum wage—failed to address the withering and controlling role of the corporation in the political process.

III. A LAW REVIEW SYMPOSIUM TO AID MY SEARCH

This was—and perhaps remains—the great conundrum. How can we hope to redesign the corporation to address the externalities it creates, where the corporation itself controls the mechanisms that might lead to its redesign? It was this question that led me in 2011 to organize a law review symposium at Wake Forest in which I asked others to address the “whether” and the “what” of the Sustainable Corporation.

At the symposium, I framed what has been described as the “super wicked” problem of the corporation—namely, its indifference to the future. I asked everyone to imagine three scenarios: (1) a corporate decision leading to rising long-term returns—“life is good”; (2) a corporate decision leading to first rising, then declining, returns—“future is dicey”; and (3) a corporate decision leading to first rising, then negative, returns—“future is bleak.”

The symposium participants knew the answer. When calculating the present value (“PV”), of financial returns in the future, returns more than twenty-five years out (whether positive or negative) have negligible effects

on present value. The PV of “life is good” is only slightly higher than the PV of “future is bleak.” And if the “future is bleak” scenario’s numbers are tweaked to create a bit more short-term returns, its PV exceeds the PV of the “life is good” scenario. Super wicked!

In short, the financial model from which corporate valuation—and thus corporate decision-making—arises creates an indifference about the future. Live now, for tomorrow we will die. In other contexts, I have asked these questions: How much would you pay to keep your child from harm tomorrow? How much would you pay to keep your great-great-grandchild from harm? Corporate attitudes about the future arise from ingrained human attitudes.

At the symposium, participants imagined different dimensions of the Sustainable Corporation. The speakers and their papers alluded to the current design of the corporation—an amalgam of state and federal law, of enabling and mandatory rules, of internal and external norms. All of them were law-trained, and they identified the elements of the Sustainable Corporation as mostly arising from changes to existing law. That is, they reimagined the legal entity.

I should mention that one law professor declined my invitation to participate in the symposium. He had written extensively on the business response to environmental regulation. At first, business saw this command/control regulation as a cost, then as a societal duty, then as an opportunity for efficient compliance, then as a way to create market differentiation. He said, “The topic is the most important of our time, but I only write for business journals.”

As I introduced the speakers at this first-ever Sustainable Corporations symposium, I wondered out loud whether the symposium (and its presentations and papers) was worth the carbon footprint generated by the participants’ travel to North Carolina. We seemed to be in the usual law symposium bubble in which we assume that a solid idea, an artful argument, or a perceptive analysis will have some positive effect. It is the nature of the law academy.

IV. A COURSE ON SUSTAINABLE CORPORATIONS TO FORMALIZE MY SEARCH

Soon after the symposium, I received an invitation to teach a course in Bergamo, Italy, on comparative company law. The comparison of U.S. corporate law and European company law was something with which I was familiar, having taught such a course for many summers in Wake Forest’s comparative law program in Venice. I said yes, but on the condition that I could teach the subject by looking at the elusive (even mythical) “U.S. Sustainable Corporation.”

My host in Bergamo, Professor Enrico Ginevra, accepted my offer. So, I had to create a new course. I enlisted three Wake Forest law students to help

structure the course and assemble reading materials for it. Drawing from the Wake Forest symposium, we cobbled together a lesson plan: (1) the nature of the U.S. corporation; (2) its unsustainable design; (3) the emerging triple-bottom-line corporation; (4) proposals to redesign the corporation.

Beginning in the spring of 2013 and then for ten more springs, I taught the course to upper-level law and management students in Bergamo. I then brought the course to Wake Forest, where it included law, management, and sustainability students. Whether the students had taken a course in corporate law or not, the topics were intuitive: how modern business is structured, what makes it unsustainable, whether voluntary efforts are enough, what the law might say.

And, from the beginning, the course ended with a strange crescendo. It turned the corporation inside-out, looking not at the conflicts between different corporate constituents, but rather the internal conflicts with which we arrive at any mutual endeavor. In law school, I had asked myself: “Why am I here? What is my role as a law student and as a soon-to-be lawyer? Am I being true to myself? Am I keeping my word?” The questions made me uncomfortable.

These questions, I discovered, had also been framed by Michael Jensen—the godfather of agency theory—as involving “personal integrity.” In 2013, I invited Jensen to a Wake Forest law symposium titled “Agency Theory: Still Viable?” One question was whether incentives in the corporation worked. A Dutch law professor, Jaap Winter, presented a powerful paper. His thesis was that much of corporate governance is empty or counterproductive.

So, my search for the Sustainable Corporation began to turn away from corporate law, as usually understood. I would ask my students, which is more powerful, law or culture? They often answered culture—and I agreed. Cultural shifts do not happen because of new corporate governance norms, new disclosure rules, new operational standards. Those things follow after corporate culture shifts. So, my search headed in new directions.

V. THE SUSTAINABLE CORPORATION AS A STATE OF MIND

As I continued to think about the corporation’s unsustainability, I became convinced there was no magic elixir—no set of heuristics that, once implemented, would give life to this mythical beast. Instead, I came to see the Sustainable Corporation as one in which “integrative thinking” is hard-wired in all of the governance, engagement, disclosure, and operational aspects of the business. That is, the Sustainable Corporation is simply a radical, open-hearted state of mind.

How does one describe, much less teach, a state of mind? Over the years in teaching the course, I found it useful to begin class with a piece of art—a photograph, a painting, an abstract sketch. Soon I was adding music videos. For example, what music expresses the nature of U.S. democracy? I chose

Jimi Hendrix's rendition of "The Star-Spangled Banner" at Woodstock. Or what music captures the modern business corporation? Dolly Parton's "Working 9 to 5."

VI. THE SUSTAINABLE CORPORATION TOLD THROUGH ALLEGORIES

The COVID pandemic made clear to many that the time is now. The reading materials for my course on Sustainable Corporations had become a book. I approached West Publishing and was told the book, which described "U.S. corporate boards as inward-looking cadres of like-minded executives," was not publishable. But Aspen Publishing decided the book, including its polemic tone and unusual format, might have an audience. It was published in September 2022.

But a printed book is not a vehicle for music videos. So, for my book on Sustainable Corporations, I collected (sometimes confabulated) stories, fables, parables, riddles—placing them as end-of-chapter "concluding thoughts." What follows is a roadmap of my search for the Sustainable Corporation told through five of these attempts at allegorical poetry. Modernity's huge challenges compel us to reimagine what it is to be human.

A. *What Is the Meaning of Life?*

The first unit of the book, the beginning of the journey in search of the Sustainable Corporation, begins by laying out the basics of U.S. law. It questions the legitimacy of U.S. democracy, a system of government established by landed, white (many slave-owning) men. Our systems of power continue to privilege wealth derived from market capitalism. For example, a recent study finds that federal law and policy only happens when supported by elites and corporate interests.

The unit goes on to describe the U.S. corporation as human collaboration guided by an amalgam of public and private rules designed to satisfy financial and consumer markets—again the overarching power of market capitalism. The essential corporate structure privileges those who provide capital, especially equity shareholders, leaving others to their market protections. Federal securities law lays out the disclosures that must be provided these privileged investors.

A Buddhist Koan

A young man, looking to find the meaning of life, came to a wise sage.

“Dear, sage, what is the meaning of life?” asked the young man. The sage looked at him and then asked, “Do you have a child?” “Yes, I have a daughter,” answered the young man. “How would you feel if she were to die?” asked the sage. “I would be devastated. I would not be able to go on living. I do not know what I would do without her,” the young man answered.

“Do you have any siblings?” asked the sage. “Yes. I have a sister, and she has a son,” answered the young man. “And how would you feel if her son died?” asked the sage. “I would be very sad for my sister. It would be so difficult to see her suffering. And I would miss my young nephew,” answered the young man.

“And what if a neighbor’s child died?” asked the sage. “That would be terrible. I would feel for them. Though not as much as I would for my sister.”

“And what if the child of a person across town were to die?” asked the sage. “That would be sad news. I would hope the family would be able to go on. But I would probably not pay much attention,” answered the young man.

“And a stranger in a faraway land. What if they lost a child?” asked the sage. “Oh, I probably would not notice,” answered the young man. “After all, that is life.”

The sage then said, “You already know the meaning of life.”

So, this story about the meaning of life—a Buddhist koan—is expressed in other ways, such as the saying that “all politics is local.” Or the survey finding that 35% of Americans would not spend \$1 of their own money to fight climate change. Or the way that corporations are designed to externalize environmental and social harm—“that is somebody else’s problem.”

Yet, we live in an interconnected world. The death of a child on the other side of the globe is relevant to us—to each of us. How do we make it so that our politics are not just local, that collectively we care about the climate crisis, and together we are concerned about social justice for all? How do we remake the corporation to recognize and respond to our interconnected world? These are the questions that animate our journey. Read on, fellow traveler.

B. What Is the Difference Between Commerce and Business?

The second unit of the book explores the corporation’s unsustainable design. On the assumption (a delusional one) that business activities happen in isolation, the corporation treats human participants as expendable factors of production and assumes a world of unlimited natural resources. For example, limited liability (described by the Supreme Court as a “bedrock principle of law”) allows corporations to insulate financial assets from environmental risks.

The unit goes on to describe other aspects of the U.S. corporation, grounded in corporate law and business culture, that mold it into an “externalizing machine.” Its short-termism discounts future costs, allowing it to disregard its environmental and social harm. Its decision-making is guided by like-minded, inward-focused business executives. And the corporation protects itself from social oversight by using its hegemony over the political process.

A Study of Etymologies

One day you take a drive in the countryside. You notice a pottery shop in a quaint little town. So, you stop to check it out. The ceramic pots are beautiful. You ask the woman at the counter, “Who makes these pots?”

She answers, “I throw them, my son paints them, and then we fire them in the kiln in the studio out back.” You decide to buy one. As you leave the shop with your pot, you think to yourself, “Did I just engage in a business transaction or a commercial transaction? The pottery shop is a business, but then my purchase was in commerce.”

The etymology of “business” is interesting. The word comes from “busy-ness”—the state of being busy. And “busy” in old English means “anxiety” or “concerned.” That is, business can be understood as the state of being anxious.

The etymology of “commerce” is also interesting. The word comes from the Latin “com” and “merx,” where “com” means bringing together—think combine, commingle—and “merx” means something of value—think merchant, mercantile, market. So, commerce is bringing together things of value. But “merx” is also the root for the old French “merci”—or grace or mercy. That is, commerce can be understood as the bringing together of mercy.

“Hmmm,” you think to yourself. “The transaction in which I bought the pot felt more like an exchange of things of value, even of mercy, than an exchange of anxiety. Of course, sometimes shopping is an exchange of

anxiety. Spending money (made at a job I do not much like) for the plastic bowls from a store (made and sold by those who do not much like their jobs, either)—that is business. But the pot? Well, that was an exchange of mercy. The potter and her son made something of beauty with their hands and hearts. And I hope they felt the money I gave them was of equivalent value.”

The essential point of this reflection is that the exchanges that make up our market capitalism, the ones in which corporations are designed to engage, need not be mindless. The externalizing tendencies of the corporation arise from our collective indifference to whether and how our activities in the corporation are connected to others and the natural world we share. The corporation, largely an expression of market forces, can change if we change.

There are some signs this is happening. Lately, investors have begun to focus on their overall portfolios, rather than individual companies in the portfolio—so-called portfolio primacy. Thus, a company like ExxonMobil whose products intensify storms, droughts, and fires—all costs borne by other companies in the portfolio—is seen by some investors a portfolio liability! Investors now have reason to sell or discipline ExxonMobil, thus leading the company to internalize its costs.

C. What Is the Purpose of Market Capitalism?

Market capitalism has gotten a bad rap. Its mindlessness has put humanity at risk. Our extractive, consumerist, tech-industrial society—whose principal operative unit is the corporation—cannot continue on its current trajectory. We are reaching (sometimes exceeding) the carrying capacity of the natural world. And capitalism—often described as racist, sexist, classist—leaves intact, and sometimes aggravates, our indifference to others.

This has led to calls for new human structures. Communism sought to redistribute wealth to workers by reducing the power and accumulated wealth of capitalists. Socialism has been a milder version, with government seeking to correct market imbalances by regulating how goods and services are distributed in society. Lately, environmentalism seeks to further limit how these markets lead to degradation of our diverse natural systems.

Rethinking Market Capitalism

What is the purpose of market capitalism? Is it to just to make money for capitalists? Or is it something bigger? Perhaps the purpose of market capitalism has been—and might even again be—to free us of suffering.

Think about what you feel when you go to your favorite grocery store or

spend a weekend morning at the local farmers' market. The produce, glistening under the store lights or in the sunlight, was brought to you through the forces of market capitalism. The shelves with their neatly arranged boxes, the ingredient labels reminding you that every decision we make about food is a moral decision. The baskets of homemade breads and jams, each telling you how many people were involved in their production.

The food is there to relieve our hunger, our thirst, our suffering. That the food in the store or in the market may have some elements of badness, even evil, does not change its essential character. It is essential goodness. Inescapable is its great inter-connectedness with all that we are and all the planet on which we live offers us.

Should we begin to think of capitalism as humanism? As collective action, but with a unified purpose—a unified voice? Its anthem Giuseppe Verdi's "Va, pensiero"? Through market transactions, we seek to free ourselves, to reach a promised land.

It is possible to imagine the essential transaction on which market capitalism is based. I have two goats, and you have five bags of grain. We agree to an exchange. You will now have something you did not have—that you value. And the same for me. But I know one of the goats is sick. After the exchange, you and others in your village eat the goat and become sick. Our transaction was an anonymous one, and I have departed. I externalized a cost.

Is market capitalism the culprit? I would say it is my indifference to you and your village that is to blame. This indifference has led to the situation in which we (humanity) now find ourselves. And we have become dependent on market capitalism. We are no longer hunter-gatherers or even agriculturists. Even the destitute among us wear Nike shirts and hold iPhones. The idea that some new "ism" can replace capitalism seems at the best utopian and at worst false.

D. *Why Is Economics Not Enough?*

The capitalist response to our unsustainable situation has been the ESG movement. If the problem is indifference to the environment, to others, to life's inter-connectedness, we will throw more technology and incentives at the problem. This is fine and good. For example, a carbon tax—now masquerading as carbon import duties—may well have salubrious effects. But these solutions are incomplete. They leave intact our indifference.

Market capitalism asks us to value stuff, not the sounds and smells of a crisp fall day or the wetness of a tear dripping down a toddler's face. We are disconnected from what it is to be human. What will we profit if we re-gain

our economic world but continue to be estranged from our souls? At the root of our headlong descent into unsustainability is not so much our pillaging, but that we are indifferent to the harm we are causing.

The Limits of Economics

This is a story told by Armen Alchian, an economist who taught at UCLA in the 1940s through the 1980s. Many believe he should have won a Nobel prize in economics. His work on institutional economics and property rights is widely viewed as groundbreaking.

One day Professor Alchian arrived late for his introductory Econ class at UCLA. He explained to his students:

I am sorry for being a few minutes late to class. There was an accident on the freeway. So, I stopped and there was a car that was really banged up. Then I noticed there was a woman inside the car, and she seemed to be badly hurt. I thought she needed to go to the hospital right away.

So, I was about to get her in my car and take her to the hospital when I remembered that this would cause me to be late to class. And I realized that my tardiness would be an imposition on all of you. So, I thought about how much you would be put off by me starting class fifteen to twenty minutes late and maybe rushing through the lecture.

Now I assumed that many of you would be OK with this if I paid you \$10. So, I did some quick calculations. There are 120 of you. Assuming you would value the inconvenience of me being tardy at \$10 per student, I should pay you a total of \$1200 for showing up late for our class.

So, I told the woman that I would take her to the hospital but only if she could give me \$1200. She was losing consciousness and did not answer. So, I continued on my way.

What do you think of this story? Maybe you are appalled. What sort of human being was this economist Armen Alchian? His economic analysis seems so flawed—so morally wrong. Or maybe you thought he did the right thing. After all, students were counting on him to start class on time. Everything in life has a price.

Or does it? Well, it turns out that Armen Alchian was a teacher of mine. He told this story, which he had dreamt up, to make the point that economic analysis does not work for everything. I met him at a one-week teach-in

for law professors who had gathered to learn how to use economic analysis in our scholarship and classroom teaching.

At the end of the conference, Alchian took me aside and said about our week of law and economics: “Do not believe any of the stuff that we talked about this week. It is all made up.” Perhaps the committee that in the 1980s decided on the Nobel prize in economics knew this about Professor Alchian and was worried what he might say during his acceptance speech.

Market capitalism is delusional. It asks us to assume that price is equal to value. It plays on our indifference to the costs that our market transactions visit on Gaia and other living beings. If you want to visualize this indifference, think of the bewildered eyes of people at a gas station that has run out of gasoline. We think of pumping gasoline into our car as happening in a vacuum, disconnected to the person standing at the other pump or the clouds overhead.

So, the Sustainable Corporation is one that exists in a sea of market transactions, and it arises when the transactions in which such corporations engage happen not in a vacuum but with a consciousness of their inter-connectedness to all that is life. I believe the ESG movement is in an ever-so-slight awakening—a new consciousness—to our inter-connectedness. It is happening perhaps too slowly, though it is happening faster than I imagined possible.

E. *What Is My Role?*

So, if the Sustainable Corporation is not a set of heuristics, not a new set of incentives, and not a new legal structure, how can it happen? First, it happens when those engaged in and with the corporation are able to discern the context of their collaboration—that is, the life cycles of the transactions that constitute the corporation. Second, this means that those engaged in the corporation must be aware of—awakened to—their role in this collaboration.

As some begin to observe what has been called the Great Turning—with academic articles titled “Private Climate Governance,” “Welfare Corporatism,” and “Millennial Capitalism”—we are called to take on existing roles with new perspectives. For example, my students have commented that the Sustainable Corporation, as I have presented it to them, is a journey into “modernity, humanity, and ourselves.”

An Aztec Fable

Sustainable Corporations begins as follows:

You will discover that throughout the book I will be asking you to look in the mirror. How can we embark on such an important journey without also thinking about where we fit in? In this regard, I am reminded of an Aztec fable:

Once upon a time in ancient Mexico, there was a great fire. The animals gathered at the fire's edge, confused and unsure how to deal with the great conflagration. Then, the resplendent quetzal bird flew to a nearby stream, filled its beak with water, flew back over the burning landscape, and emptied the water from his beak on the fire. He then flew back toward the stream. When the owl saw this, he cried out and said, "Quetzal bird, what are you doing? You cannot put out the fire!" Unperturbed, the quetzal bird answered, "That may be true. But it is the best I can do." And off the quetzal flew toward the stream to refill its beak with water.

And off we fly, too.

The Sustainable Corporation offers fresh roles to many actors: engaged, re-imagined investors; top-level execs with new leadership styles; mindful, productive employees with a purpose; aware customers flexing their purchasing power; supply-chain participants guided by life cycle analysis; local communities supporting the transition; government setting and enforcing emerging norms. And as change accelerates, there will be new roles.

One new role for me is as a law professor who integrates the Sustainable Corporation into my existing courses. Now, when I teach BusOrg, I describe the rising interest in business sustainability—especially among Millennials—thus giving new significance to corporations vs. LLCs vs. partnerships. The same goes for Securities Regulation, where investment (public and private) is pivoting. My students understand when I tell them: "My purpose is to get you battle ready."

VII. WHAT DOES AWAKENED "CONSCIOUS CAPITALISM" LOOK LIKE?

If capitalism is awakening and the corporation is recognizing and confronting its unsustainable design, what is the goal? Nature offers an answer. We can learn from the wisdom of trees. Robin Wall Kimmerer is a botanist, professor, and member of the Citizen Potawatomi Nation. In her book, *Braiding Sweetgrass*, she explains that science is finally validating the wisdom of the trees and of the forests in which they live. Here is her (excerpted and paraphrased) explanation:

Our elders were right—the trees talk to one another. They communicate via pheromones wafted on the breeze. When one tree

is under insect attack—gypsy moths gorging on its leaves or bark beetles under its skin—it sends out an alarm. The downwind trees catch the drift and manufacture defensive chemicals. The attacking insects meet their match. The individual tree benefits, and so does the entire grove.

Another mechanism for synchrony is underground. Trees in a forest are interconnected by subterranean networks of mycorrhizae. These fungal strands inhabit tree roots and forage for mineral nutrients, delivering them to the tree in exchange for carbohydrates. In this way, the trees in a forest are connected, redistributing nutrients from tree to tree—the rich giving to the poor. A forest is a web of reciprocity, the trees acting as one.

When I read this passage at the “Conscious Capitalism” symposium, the last presentation of the day, I was not sure whether the professors and the students in the audience would understand. After all, we were in a fluorescent-lit lecture hall. But I think we all could feel the presence of the trees and the forests. So, drawing from Wall Kimmerer, my book *Sustainable Corporations* concludes: “We are all interconnected. Through unity, survival. All flourishing is mutual.”

