

Letter to Dale Oesterle

Alan R Palmiter*

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[PDF with “live” hyperlinks available at

<https://drive.google.com/file/d/1AO5OR6Dowt5Nk3cJFxYbtued76TVkY4I>]

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* William T. Wilson, III, Presidential Chair for Business Law, School of Law, Wake Forest University.

I detest footnotes. Except for this one, this letter has none. Does anyone use footnotes when they write a friend? Are there footnotes in Walt Whitman’s [Leaves of Grass](#)? Or the [US Constitution](#), for that matter? Why does the law academy insist on footnotes? For one, they are archaic. A hyperlink sends you to the relevant text – like [323 U.S. 214, 227 \(1944\)](#) – much, much faster than the typical citation: “Go to the US Supreme Court reporter in the law library; look for volume 323; open the case, which starts at page 214, look for something on page 227; and then be outraged that US citizens of Japanese ancestry were denied access to their home town during WWII.”

For another, footnotes are pedantic. Academics cite to other academics in footnotes, to pretend that they’ve read the drivel written by others – in the hope that others will read their drivel. Footnotes are mostly drivel-reinforcement – no? And then, some footnotes are where authors (law professors are not “writers”) put their clever insights, hoping not to interrupt the flow of the drivel in the text of their writings. Sometimes these asides are more interesting than the main show, but usually they’re just pedantic.

Finally, footnotes are an impediment to following and understanding the text. Maybe that’s their purpose. The reader is asked after almost each sentence to look at the bottom of the page, read something that’s mostly useless, and then return to the body of the text. By the time the reader finds where they were, their train of thought is derailed. That’s why my E&Es have no footnotes, same for your masterful M&A Nutshell. Now those are good legal writing. It’s why my Sustainable Corporations book, mentioned later in this letter, has no footnotes. Not one.

But what I really detest is the Blue Book. It’s put out by Chicago in order to keep law academics from thinking. That’s right. Law students are so concerned about whether a comma gets italicized or not in the citation of a law review article that they don’t notice that the law review article is drivel. Or, worse, that it advocates something that is both logically untenable and morally unacceptable. I’m convinced that this is why Chicago put out the Blue Book, so that law students and law scholars would not notice that Law & Economics is dangerous. More on this later.

August 10, 2022

Dale, my friend,

I don't remember where and when we met. But it was inevitable that we would. We are both Michigan grads, [you a triple "M Go Blue."](#) I graduated from [the law school five years after you did.](#) And had my parents not gone off to Bolivia in the early 60s, but stayed in Monroe, Michigan, I'd likely have been a double maybe even a triple "[M Go Blue,](#)" too.

Your visits to Wake Forest

I also don't remember exactly when or how we began our regular collaborations, which lasted for about twenty-five years. I remember that you came to Wake Forest for four law review symposia that I had helped organize: [1989](#) (D&O liability), [1991](#) (CERCLA liability), [1997](#) (limited liability entities), and [2015](#) (Internet offerings). In fact, I remember that in 1993 my dean chastised me when I showed him the proposed speaker list for the symposium. "Alan, you've invited Professor Oesterle before. You should branch out and invite some other folks, too." So, I waited a few years.

You invited me to [an Ohio State law symposium](#) in 2012, for which I wrote a piece questioning whether financial crowdfunding could ever work -- because it's basically [the financially illiterate leading the financially illiterate.](#) The visit to my college school was memorable because we had lunch at the OSU Faculty Club, the same place where as an OSU freshman I had lunched 40 years with the chair of the electrical engineering department. His dry personality convinced me not to continue in the engineering school at OSU, but instead to switch to math, something that I found easier and more coherent. It also allowed me to take courses on art history, business law, and astronomy.

As I now read the titles of the articles you wrote for the Wake Forest symposia, I'm struck by how prescient you were. And also, how much your work has seeped into my work, including my most recent project -- a textbook on Sustainable Corporations -- that I'd like to tell you more about in a bit.

So, in your Wake Forest articles, you knew that directors and officers were protected from individual liability, resulting in their sense of being above the

law. You knew in 1991, some seven years before the Supreme Court decided [United States v. Bestfoods](#) in 1998, that the courts would encourage corporations to be irresponsible about their toxic waste sites. You knew in the 1990s that limited liability entities would proliferate, and that we'd end up with essentially three business forms (the member-managed LLC, the manager-managed LLC, and the corporation). Finally, you knew that securities offerings would move to the Internet – even as the SEC made an opening foray into online financial crowdfunding – and that the SEC would have to overhaul its capital formation rules, something [it did partially in 2021](#).

In short, you've smelled the future. This is unusual in the law academy, where most of our colleagues are enamored with [smelling the past](#). And bemoaning that things in the [present are not more like the past](#). It's a quite conservative crowd – at least in their ability to confront, much less embrace, the future. I've always liked that you not only see how things are, but have imagined how they might be. And how they should be, without being utopian. (You once pointed out to me that I was sometimes “utopian.”)

Our only collaboration

Our only collaboration was a [1994 article](#) about judicial schizophrenia in shareholder voting cases. You were a bit nervous about the title. But I insisted. The article, which ended up in the Iowa Law Review, described a series of Delaware cases involving shareholder voting rights. The judges seemed not to have a consistent rule of law, we pointed out. But perhaps this observation reflected our failure to see that judges don't really follow the law, but rather their own instinctive, intuitive, invisible, instantaneous moral reactions to a case. That is, we were ahead of our times, but didn't know it.

As you may know, [I don't much believe in legal analysis](#). Neither did Cardozo nor does Posner today. Judges do not — and I see more and more evidence of this — decide cases based on legal analysis. It's all instinct, experience, intuition, emotion – and it happens invisibly and instantaneously. Followed by a smokescreen: the motivated reasoning that we call an “opinion.”

Most everyone has read Benjamin Cardozo's [The Nature of the Judicial Process](#). And more lately there's Richard Posner's [How judges think](#). Why don't we take them at their word?

"Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge." ([Cardozo, 1921, p. 167](#))”

As I teach BusOrg for the umpteenth time, the nature of the judicial mind becomes clearer and clearer. It shows itself in almost every opinion that I read. Including [Meinhard v. Salmon](#) (NY 1928) -- the partnership case involving a New York wool merchant (financier Meinhard) and a New York real estate mogul (manager Salmon). Cardozo said that Salmon owed Meinhard “a punctilio of honor the most sensitive.” And despite their fixed twenty-year joint venture, Cardozo said that Salmon’s duties extended to a new building project that began after the venture’s twenty-year term. The case makes no sense until you know that the two were lovers. Or that’s what somebody said at an AALS annual meeting, I think in Florida. Today the two of them might be married. The new project is best understood as part of their marital falling out. Remember the Cardozo remedy: equitable distribution (a 50/50 split of the new venture, with Salmon getting one extra share so he’d remain the controlling owner).

I keep asking, why don’t we take thoughtful judges at their word? They say that they don’t decide cases based on the law — or at least, not the “law” as we teach it. Why are we teaching law as the end all, when it’s not what judges use to decide cases? [Christopher Columbus Langdell](#), I believe, was a myth-maker — out for monetary gain. HLS, after all, was and remains a [lucrative bar-prep course](#). Judges, before and now, decide cases based on their moral matrices.

But this isn’t a letter about how judges decide cases or how law school might be reformed.

What you taught me

I write mostly to tell you how important you have been for me. There are three things that you said to me – that you taught me -- that have molded my professional life:

- (1) **Culture matters.** “Never ever make a choice of a law school based on who is the current dean; instead, focus on the law school’s culture and the kinds of people who you would work with.”

I’ve gotten desultory showings of interest from other law schools. I have had no interest in going anywhere else. Wake Forest is my home. Even though I’ve visited at Los Andes (Bogota, Colombia), Michigan (our alma mater), Padova (twice), Brooklyn (before the pandemic), Bergamo (ten times, including twice during the pandemic), it is good to have a home.

Over the course of my time, I’ve been responsible for starting the pass/fail grading option (maybe a mistake), the summer program in Venice (a huge triumph), our LLM and SJD programs (keeping our law school afloat), and

our MSL program (diffusing social justice). I would have started a new campus in Charlotte, but after a near-unanimous faculty vote to approve our expansion two colleagues rushed to the dean's office and said, "Don't do it. Alan's nuts. It won't work." The dean decided not to pursue a second campus in Charlotte, and I would later thank my two colleagues profusely.

Not only does culture matter in our academic homes. It also matters in the business world. I regularly ask students, "What is easier to change culture or law?" They invariably answer, "Law is easier to change." That's why it has seemed that the corporation would never become sustainable, because no matter what legal norms we invent – like ESG disclosure, board diversity, or even a directorial duty of obedience to the law – corporate culture will win out. Think about the power of the "[shareholder wealth maximization](#)" norm and the "[business judgment rule](#)."

- (2) **Execution is important.** "You know, Alan, coming up with an idea for an article is not the tough part, it's executing the plan that matters. It's a bit like a painting. Acrylic or oil? Canvas or wood? Horizontal or vertical? And on and on."

I don't consider myself to be that well-known or influential in the academy. I once was with Jack Coffee at a symposium in Tilburg, Netherlands. He said, "You've got a [book on Securities Regulation](#), right? My students have told me they use it." At the symposium I had presented a [piece on the profile of the typical US mutual fund investor](#) (basically, they're Homer Simpson). Jack said I should send him the piece so that he could cite it. I didn't bother.

So, recently, I compared my output to Jack's. I've had about [7,900 SSRN downloads](#), Jack more than [102,000](#). In fact, this past fall I finished the most important writing of my life, and it's gotten about 566 SSRN downloads. It's a 13-page essay called [Capitalism, heal thyself](#). Jack wrote on a narrower, though related subject – [the future of ESG disclosure](#) -- and his piece has gotten 1,333 SSRN downloads.

In fact, I decided to do an "audit" of my law scholarship, most of which in one way or another informed *Capitalism, heal thyself* – as well as my book on Sustainable Corporations that Aspen Publishing will publish this summer. Of the fifteen law review articles/essays that I use in the book, more than half have never been cited on SSRN. My scholarly production, measured by how many people are paying attention to me, has been pitiful.

But that hasn't kept me from trying to be an artist. I love the [observation by St. Francis of Assisi](#) that a person who works with their hands is a laborer, a person who works with their hands and head is a craftsman, and a person

who works with their hands, head, and heart is an artist. I strive to be an artist.

That's why I've laid out my book on Sustainable Corporations as a "gloss" of Yusuf/Cat Stevens's [On the Road To Find Out](#). You'll love the music video that accompanied his 2020 remake of both the song and his album [Tea for the Tillerman](#). I've attached as Appendix B the "gloss." As you'll notice my Sustainable Corporations book is meant to take students and teachers on a road not only in search of the elusive "sustainable corporation," but also into themselves. In fact, the [music video](#) begins with a quote by Rumi: "When will you begin that long journey into yourself?"

So, the Sustainable Corporations textbook is a bit unusual in its format. Each chapter ends with "concluding thoughts" that are fables, poems, stories, kaons, philosophical digressions, even transcripts of YouTube videos. I've attached a sampling of them as Appendix C – you'll have to wait for the book to see all seventeen! And each chapter also ends with a suggested music video. I've attached these as Appendix D.

This is now getting to be a longish letter. But you don't have to read all the stuff that I've put at the end or listen to all the music videos if you don't want. The point is that I've tried to make my law writing palatable to folks who are used to reading tiresome law review articles, stuff that mostly ends up in the same warehouse as the Ark of the Covenant – remember that [scene from Raiders of the Lost Ark](#)?

- (3) **Do what's right.** "After the NYSE threatened me with a lawsuit [for having suggested in an [article that the NYSE should become a for-profit corporation](#)], I'm thinking of passing title of our house to Pat."

Yep. You risked your house for an argument you made in a law review article – a well-reasoned one that proposed an ownership structure that was later adopted by the NYSE when it changed in 2006 from being a non-profit to a for-profit corporation. How many people in the academy would do that – risk their house? Most won't even risk saying something that might offend Jack Coffee so he might not cite their work. (Sorry, Jack, I'm having some fun at your expense.)

Gotta tell you that when [Capitalism, heal thyself](#) came out this past fall and I began circulating it to colleagues in my law school and at other law schools, some wouldn't respond. I'm mostly a nice guy. But some folks in my law school went silent. And the silence was almost deafening in the corporate law academy – at least from the high-fallutin' quarters. For example, I sent it

to the “usual suspects” – a reference I’m sure you’ll understand – and it was as though they were all on an Internet-less trip to Tahiti.

Below, as Appendix D, is the follow-up piece to *Capitalism, heal thyself* – in its entirety. I’m guessing you can see why most folks went silent. I was putting into jeopardy their whole academic careers. If capitalism is indeed awakening, then most everything we’ve thought about our legal, political, and social constructs is ... not quite right anymore. In some ways, it’s a bit like what’s happening to folks in Russia who simply cannot accept that there’s a war in Ukraine. “No, it’s just a military operation to deal with the neo-Nazis who’ve somehow installed themselves in government. The pictures of the bombed hospitals are all fake.”

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OK. That’s my letter to you. As you leave the law academy, please know that you left so much for me and for so many others. I’m guessing that others who read this – if anyone bothers to read it – will recognize what you have meant in their lives, too. That is, many others will find resonant my reflections on what you taught me.

Dale, my friend, take good care,



Appendix A

My research agenda (content of Sustainable Corporations book)

Alan Palmiter

The Sustainable Corporations book that I'm writing for Aspen Publishing is not something that came out of the blue. In fact, without really planning it, the project is the culmination of three decades of writing and research. It's as though over the past three decades I was purposeful – and perhaps I have been – in a methodical search for the “sustainable corporation.”

Chapter	Topic	Main readings (see notes below for + / * / #)
0.1 Introduction	A journey through the corporation, toward ESG	Palmiter, MSL SusCorp Summer Intensive (2020): Book proposal to Aspen and West (West said no; Aspen yes)
1.1 Intro US law	American law and its legitimacy	Palmiter, Comparative Comp Law (Bergamo 2013-present): Scheb & Scheb, <i>American Legal System</i> (2009) ##
1.2 Intro US corp	Basics of US corporation and corporate law	Palmiter, <i>US Corporate Elephant</i> (2005) (lectures for Italian notarial board) + * #####
1.3 Intro US PHC	Overview of US public corporation + SEC regs	Palmiter, <i>Public Corporation as Private Constitution</i> (2008) (structural comparison of two hierarchies) ++ #####
2.1 Ltd liability	Nature of corp limited liability (exceptions)	Palmiter & Partnoy, <i>Ch 13: Corp Env Liability</i> (West 2009) (SCOTUS defers to ltd liability, fundamental corp principle) + *
2.2 Short-termism	Short-termist nature of corporation (DCF)	Palmiter, <i>WF Symposium: Sustainable Corporation</i> (2011) (“super wicked” problem of discounting future harm) **
2.3 Bd mono-culture	Structural bias and myopia in US corp boards	Palmiter & Partnoy, <i>Ch 16: Sh voting, Ch 21: Director conflicts</i> (ICB 2009) (proxy voting + demand excused) +
2.4 Corp politics	Corporation in politics (lobbying + ex end)	Palmiter & Partnoy, <i>Ch 17: Corporation as political actor</i> (ICB

		2009) (background and effect of <i>Citizens United</i>) +
3.1 TBL: planet	Corporate environmental stewardship	Palmiter, <i>Duty of Obedience: The Forgotten Duty</i> (2010) (director liability for env non-compliance) +
3.2 TBL: people	Corporate social responsibility	Palmiter, <i>Ch 11: Corp fiduciary duties – an intro</i> (E&E 2019) (<i>Dodge v. Ford Motor</i> + other-constituency statutes) +
3.3 TBL: profits	Socially responsible investing	Palmiter, <i>Mutual fund voting of portfolio shares: why not disclose?</i> (2001) (resulted in SEC disclosure rule) ***
4.1 Social enterp	Benefit corporations – history and critique	Palmiter, Comparative Company Law (WF summer programs, 1993-2010) (“serving two masters”) +
4.2 ESG disclosure	SEC guidance and proposed ESG disclosure	Palmiter, <i>Climate disclosure: a failed SEC mandate</i> (2015) (critique of SEC’s 2010 climate change guidance) ++ ##
4.3 Ceres	Non-profit Ceres + 2010 sustainability roadmap	Palmiter, <i>Sustainable corporations</i> (Bergamo, 2013-2021) (summary and evaluation of Ceres roadmap) ###
5.1 Corp moral	Corporation as moral system	Palmiter, <i>Corporate triplespeak: IOUs response to EPA’s Clean Power Plan</i> (2018) (intro to moral psych) ****
5.2 ESG - delusion?	Stakeholder capitalism -- a delusion?	Palmiter, <i>Capitalism, heal thyself</i> (2021) (observation that Capitalism is awakening to world’s inter-connectedness)
5.3 Pers integrity	Truth and trust (integrity) as essential to corporation	Palmiter, <i>Incompleteness of agency theory: dark matter in US corporation</i> (2011) (seeing corporation inside-out) #####

Notes [red highlighting indicates zero SSRN citations]

- + Palmiter, *Corporations: E&E (1999–2020 / 9 editions)* (introductory/overview student text designed for law and MBA students)
- ++ Palmiter, *Securities Regulation: E&E (1998–2021 / 8 editions)* (introductory/overview student text designed for law and MBA students)

- * Member, Multistate Essay Exam Drafting Committee (2011–2021) (drafting and reviewing bar exam questions on corporate law for Uniform Bar Exam)
- ** Palmiter, *Law & Valuation* (online textbook) (1999–2006) (laying out basics of business valuation – including modern DCF methods – and use in various legal contexts)
- *** Palmiter, *Shareholder proposal rule: a failed experiment in merit regulation* (1993) (describing potential of rule for environmental/social shareholder activism)
- **** Palmiter, *Corporate governance as moral psychology* (2017) (intro to moral psychology + playful critique of works by Lyman Johnson and David Millon through this lens)

- # Palmiter, *Rethinking the Corporate Fiduciary Model: A Director's Duty of Independence* (1989) (beyond duties to others -- care and loyalty – duty to be true to oneself)
- ## Palmiter, *The CTS Gambit: Stanching the Federalization of Corporate Law* (1991) (analyzing US Supreme Court's decision not to federalize judicial supervision of corporate takeovers)
- ### Palmiter, *U.S. Mutual Funds: The Awakening Behemoth?* (2006) (summarizing data on emerging corporate governance power of US mutual funds)
- #### Palmiter, *Staying Public: Institutional Investors in U.S. Capital Markets* (2009) (describing rules and practices that compel investing in public markets, thus limiting private investing)

Appendix B

Sustainable Corporations [On the Road To Find Out](#)

A book titled Sustainable Corporations will be published by Aspen Publishing this summer. My hope is that the book will be used in courses with the same title. And that many professors and students will use the book as a roadmap as they search for the elusive sustainable corporation – one that meets current human needs, without sacrificing the needs of those to come.

The Table of Contents for the book is rather dry, even boring. The book, I believe, is not boring. It is engaging ... and teachable. Further, I'm confident you don't need a background in corporate governance and finance to teach it. It will be enough if you have a background in law, sustainability, environmental studies, psychology. Or a curiosity about these topics.

What follows is a "gloss" of the Table of Contents. Using the lyrics of Cat Stevens's (Yusuf's) [On the Road To Find Out](#), I describe what the different chapters of the book seek to accomplish and how they go about doing it. The book can be taught in an intensive four-week course or in a more traditional fourteen-week course. My belief is that it should be taught as a seminar with no more than twenty to twenty-five students.

Alan Palmiter

<p><i>Well, I left my happy home To see what I could find out I left my folk and friends With the aim to clear my mind out</i></p>	<p>The course asks students to leave the comfortable confines of law school and to question whether</p> <ul style="list-style-type: none"> • we have a functioning democracy or something else (1.1, 3.3, 5.2) • the corporation's many dualities work (2.1, 2.2, 2.3, 2.4, 4.1, 4.2) • judicial opinions mean what they say (2.1, 2.3, 3.2, 5.1) • "social enterprise" is really what we want (4.1, 4.2, 4.3, 5.1) • the corporation is a legal/economic phenomenon (1.1, 3.2, 5.1) • incentives are key to human trust (1.4, 3.1, 5.3) <p>So, first, the course invites students (and professors) to clear their minds:</p> <ul style="list-style-type: none"> • Unit 1 – Introduction to US corporation
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	<ul style="list-style-type: none"> • Unit 2 – Corporation’s unsustainable design.
<p><i>Well, I hit the rowdy road And many kinds I met there And many stories told me on the way to get there</i></p>	<p>The course proffers a series of stories – it’s a true journey:</p> <ul style="list-style-type: none"> • Unit 1 - the revelatory stories of US law, US corporate law, and US securities regulation (thus mostly publicly traded corporations) • Unit 2 - the disturbing stories of the corporation’s unsustainable design (limited liability, short-termism, board mono-culture, political action) • Unit 3 – the contemporary stories of the triple bottom line (Planet – environmental stewardship / People – an evolving CSR / Profits – ESG investing) • Unit 4 – the unfolding stories of redesigning the corporation (benefit corporations, mandatory ESG disclosure, shareholder/management consortia) • Unit 5 – the deep stories of rethinking the corporation (moral psychology, stakeholder capitalism, being true to one’s word, personal integrity, and trust)
<p><i>So on and on I go, the seconds tick the time out So much left to know, and I'm on the road to find out In the end I'll know</i></p>	<p>We have no time to dally. The planet is giving us only a few epochal seconds to take action – together – and move away from the Great Unraveling and toward the Great Awakening. There is, indeed, much to know. The book is based on three principles:</p> <ol style="list-style-type: none"> (1) data matter (Thomas Piketty) (2) i ’s actions that count not words (Mohatma Gandhi) (3) e attentive, be present, be kind (Joanna Macy – an environmental systems thinker)
<p><i>But on the way I wonder Through descending snow</i></p>	<p>Paradigm shifts are difficult. They make us feel alone and vulnerable. This course is meant to be a paradigm shift – it will cause some students and some professors to feel uncomfortable.</p>

<p><i>And through the frost and thunder</i></p>	<p>Some students, however, have commented to me that the course took them from despair to hope. In a world that seems so grim, this is not easy. Others said the course offered, every day, a sense of awakening.</p> <p>But what does one do with this sense that we are part of a larger purpose? Do we move toward the thunder or away from it?</p>
<p><i>I listen to the wind come howl Telling me I have to hurry I listen to the robin's song Saying not to worry</i></p> <p><i>So on, and on I go, the seconds tick the time out So much left to know, and I'm on the road to find out</i></p>	<p>Time is not on our side. Mother Nature is moving inexorably, many of her cleansing processes now set into motion. That's why this course, I hope, will expand like a nuclear chain reaction – one course generating two more courses, those two generating each two more, and so on.</p> <p>But the robin's song, sweet and full of portent, beckons us. Every chapter ends with “concluding thoughts” – each a robin's song. Sometimes a fable, sometimes a puzzle, sometimes a poem. Each tells us that we – especially our students – can change the world. They want to change the world. And I believe they can.</p> <p>What to know?</p> <ul style="list-style-type: none"> • The corporation is highly adaptable (1.2, 1.3, 2.2, 3.1, 3.2, 3.3, 4.3, 5.1) • Some things, like board mono-culture, are on the wane (2.3, 3.1, 3.2, 4.1, 5.3) • “Otherness” thinking is on the rise (2.4, 3.2, 3.3, 4.3, 5.1) • Mechanisms exist for corporate transformation, such as securities disclosure and the empowerment of enlightened shareholders (1.3, 2.2, 2.4, 3.3, 4.2, 5.1) • Each of us can make a difference (0.1, 5.1, 5.2, 5.3)
<p><i>Well I found myself alone</i></p>	<p>Hope and longing are topics covered in the book – and thus in the course.</p>

<p><i>Hoping someone would miss me Thinking about my home and the last woman to kiss me</i></p>	<p>What motivates us to behave as we do? Our need to be recognized (a need for self-esteem) is the driving force behind our tendency to blame others, to deny our own responsibility (5.1). We also believe that the best way to “incentivize” someone is with carrots and sticks, not from within (4.1, 5.3).</p> <p>The course offers moments of solitude to reflect on the corporation’s assumptions – and what they promote (1.3, 2.1, 2.4, 3.1, 3.2, 3.3, 4.1, 5.1, 5.2, 5.3)</p>
<p><i>Well sometimes you have to moan When nothing seems to suit you But never the less you know Your locked towards the future</i></p>	<p>We are indeed locked towards the future. The poet/essayist John O’Donohue would ask people he met, “Where is yesterday?” Nobody could answer his question. It’s gone.</p> <p>We spend a lot of our time in the paradigms of the past. Among them, we are locked into duality thinking: “what is is, what is not cannot be” (2.1). But it seems that reality – like the one described by quantum mechanics -- can only be unlocked by non-duality thinking (4.1, 5.1).</p> <p>What is the corporation?</p> <ul style="list-style-type: none"> • It is both inside and outside (2.1, 3.1) • It is both for shareholder profits and stakeholder well-being (1.3, 2.2, 3.2, 3.3, 5.1) • It is both public (an instrument of the state) and private (an individualistic phenomenon) (4.2, 5.2, 5.3)
<p><i>So off and on you go, the seconds tick the time out There's so much left to know and I'm on the road to find out</i></p>	<p>We have a tendency to shy away from action. We go off and on, off and on. But the seconds are ticking away. The course acknowledges that there is much to know, and that we face great uncertainties. Certainly, parts of the book will be outdated soon after publication, and other parts will be proved wrong. But just because we cannot know everything does not mean we should not act on what we know.</p>

<p><i>And I found my head one day When I wasn't even trying And here I have to say</i></p>	<p>For me, it was September 21, 2021, as I walked to class. “Oh, my goodness. It’s happening. It’s really happening. Capitalism is saving itself from itself.” I told my students. They were a bit stunned. So, I wrote it up. <u>Capitalism, heal thyself.</u></p> <p>Well, I had been trying to figure out the puzzle of the Sustainable Corporation – to find it. For at least 10 years. But I didn’t expect that I (with my students) would be among the first to find it.</p> <p>You know, it’s curious, but in all Asian languages “heart” and “mind” are the same word – or this I’ve heard. That means, in addition to finding my head, I think I came closer to also finding my heart. I see this in the shining eyes of many of my students.</p>
<p><i>Cause there is no use in lying, lying Yes, the answer lies within So why not take a look now Kick out the devils sin Pickup, pick up a good book now</i></p> <p><i>[Repeat]</i></p>	<p>We have been deceiving ourselves. We’ve been delusional. We’ve believed the world is not interconnected. That many of the things that we do are other people’s problems, not ours (2.1, 2.2, 2.3, 2.4). But the answer is right before us – within us (5.1, 5.3). And we are beginning to see the crumbling of this delusion – itself a sort of sin (3.1, 3.2, 3.3, 5.2).</p> <p>Notice it’s not that you pick up “the” good book. Just pick up “a” good book. Maybe this one. I hope it’s a good book.</p>
<p><i>Pick up, pick up a good book now</i></p>	<p>Well, the book – in both electronic and hard-copy format – should be available this summer. Along with PPT slides, group projects for every class, suggested videos (mostly on YouTube) for professors and students to watch. These videos are also covered and described in the PPTs.</p> <p>Now, every good book should have a soundtrack. So, each chapter ends with a music video. In fact, <i>On the Road To Find Out</i> is the music video – <u>gotta watch it</u> [4:09] – that is presented in the final</p>

	<p>chapter of the book, an epilogue. Or there's the original version of the song [5:08]. I like the more mature version. And so did my students. During the last class of the semester when I played it, they closed their eyes and swayed to the music. They were on the road.</p> <p>So, this introduction to the book is how the book ends. What is first is last. And what is last is first.</p>
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Appendix C

**Sustainable Corporations
Alan Palmiter**

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Ch 0.1 Overview

**Concluding thoughts
An Aztec fable**

You will discover that on our journey in search of the sustainable corporation, I will be asking you from time to time to look in the mirror. How can we undertake such an important journey without also thinking about who we are and 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 can’t put out the fire!” Unperturbed, the quetzal bird answered, “That may be true. But it’s the best I can do.” And off the quetzal flew toward the stream to refill its beak with water.

So, off we fly!



Ch1.1 US law [basics and legitimacy]

**Concluding thoughts
A Buddhist kaon**

A young man, looking to find the meaning of life, came to wise sage. "Dear, sage, what is the meaning of life?" asked the young man.



Ch 1.2 US corporate law [incorporation-based private ordering]

Concluding thoughts We, Pencil

Every year I say the following to my Corporations students:

Are there any among you who could make a pencil? Imagine you're on a deserted island for a lifetime. Could you make one? You know what it's supposed to be. But do you know how to make graphite? How to saw wood into a hexagonal rod? Or how to concoct yellow paint — probably using fancy petrochemicals? Or the rubber for the eraser? Or the metal that holds the rubber eraser in place? Do you know metallurgy? Or, by the way, do you know how to extract latex from a tree? And then boil it down to make rubber?

Ch 1.3 US public corporation [governance of listed companies]

Concluding thoughts Business versus commerce

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.”

Let me help. 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 don’t much like) for the plastic bowls from a store (made and sold by those who don’t much like their jobs, either) – that’s 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.”

But now the hard question. Would your purchase of the ceramic pot be less an exchange of mercy if the potter had voted for a candidate in the last election different from the one you did?

Ch 1.4 US securities regulation [transparency + accountability]

Concluding thoughts Using the tools at hand

An investor, disappointed with his stock investment in a legacy automaker, approached Saint Peter. “I know I won’t be up here for a while, but I really think God should bail me out here.”

Ch 2.1 Corporate limited liability [externalization of harm]

Concluding thoughts A short history of Western Civilization

The inside-outside nature of the corporation has deep roots in Western civilization. In the sixth century BCE, two philosophical traditions in Greece took on the question of the nature of reality -- and thus the distribution of power in society. Heraclitus was of the view that reality is dynamic, always changing, a unity of opposites: “No man ever steps into the same river twice.” Parmenides, on the other hand, was of the view that reality is one, change is impossible, existence is timeless and uniform: “Whatever is is, and whatever is not cannot be.”

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The classic Greek philosophers, and then Western civilization, largely opted for Parmenides – consider the “categorization project” of Aristotle. The so-called Enlightenment, as well. One modern expression of this is that the corporation is seen as a duality: inside and outside. Those inside have no responsibilities to those outside unless there is a contract or some government regulation that imposes duties on insiders. Thus, unless regulated, environmental pollution occasioned by those inside the corporation is generally viewed as someone else’s concern.

This means, according to the long-dominant paradigm of commerce, the inter-connectedness between business insiders and those outside the business is understood to be bounded by the “nature” of the corporation. That’s the way things are, say many. But Heraclitus might point out that this disconnect – that is, the notion that the corporation draws a line between inside and outside -- is not borne out by experience. But Parmenides would be of the view that interconnectedness is not inherent in reality. Non-duality thinking—for example, the notion that the corporation can be understood as both inside and outside the line at the same time -- simply cannot be according to Parmenides. Or according to the dominant paradigmatic understanding of the corporation, which has held so many in a mental vice.

Isn’t it time to face reality and for us to begin to work at non-duality thinking?



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Ch 2.2 Corporate short-termism [deference under business judgment rule]

Concluding thoughts What do we count?

The problem of short-termism is a counting problem. How do we count things happening now and the same things in the future? Do we count the future things less, the same, maybe more?

Here’s a counting question for you to consider.

How many words are there in blue berries?

- A. One
- B. Two
- C. Three
- D. More than three
- E. Please, let’s move to the next chapter on “board mono-culture”

Ch 2.3 Board mono-culture [groupthink]

Concluding thoughts How does one change groupthink?

Here's a classic story.

In early 1942, just months after the United States formally entered World War II, the US government faced a big problem. American men leaving for active duty had created a shortage of six million workers. Predictions were that the country's productivity would come to a halt by the end of 1943. The solution: bring women into the workforce.

Ch 2.4 Corporations in politics

Concluding thoughts Special risks of corporate political speech

Political speech is a high-risk social phenomenon. While we can often test the truth of other forms of speech – such as whether Honda indeed makes life simpler or whether this course sets you on a personal journey – political speech aims at our primitive, tribal mind and does not come with ready means to test its validity. Is America already great? Or does it have to become great again?

Ch 3.1 Triple bottom line: Planet (environmental stewardship)

Concluding thoughts Why do we blame others?

Many of us, me included, tend to blame others for our troubles. For example, this is a common way that people react to environmental calamities, including climate chaos. “That company is just terrible. How could they let that happen? Why did it take them so long to clean up the mess?” Or we blame government. “The EPA should have addressed that issue long ago. Didn't they see that having powerplants clean up their smokestacks would

lead to leaching from coal-ash ponds? Can't government do anything right?"

Ch 3.2 Triple bottom line: People (corporate social responsibility)

**Concluding thoughts
Stand by me**

Adapted from a story by [Elizabeth Gilbert](#)

Some years ago, I was stuck on a crosstown bus in New York City during rush hour. The bus was filled with cold, tired people. Many were irritated—with one another, with the sleety weather, with the world itself. Two men barked at each other about what might have been a shove. A pregnant woman got on, but nobody offered her a seat. Rage, not mercy, was in the air.

Ch 3.3 Triple bottom line: Profits (socially responsible investing)

**Concluding thoughts
Purpose of market capitalism**

What is the purpose of market capitalism? It is, perhaps, to free our souls of suffering. Through collective action and thus a unified voice.

Think about what you feel when you go to your favorite grocery store or spend a weekend morning at the local farmers' market. The food 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. Its essential goodness. Inescapable is its great inter-connectedness with all that we are and all that this our planet offers us.

Should we begin to think of capitalism as *pro humanitate*? Its anthem *Va, pensiero*? It is not a crazy idea.

Ch 4.1 Social enterprise – benefit corporation

Concluding thoughts Is past prologue?

One day a young man walked into a village. He noticed an old woman hanging clothes on a clothesline in front of her house. He approached her and asked, “Excuse me, ma'am. I have a question.” The woman looked up from her work. “Yes, please tell me. What is your question?” The young man said, “Well, I'm thinking of moving to this village, and I wanted to know what it's like.” The woman answered, “Tell me about the village where you now live.” The young man said, “It's really not that nice. People treat each other unkindly. It's a difficult place in which to live. I'm ready to get out.” The woman paused and looked at the young man, “I think that you'll find this village to be quite the same.”

Later that day, another young man walked into the village. Seeing the woman on her porch knitting, he approached her and asked, “Ma'am, excuse me. May I ask you a question?” The woman looked up from her knitting, “Yes, what is your question?” The young man said, “I'm thinking of moving to this village, and I'm wondering what it's like.” The woman asked, “And what is the village like that you're now living in?” The man said, “Well, it's quite nice. The people are friendly. Everyone gets along. But I think it's time for me to make a change.” The woman paused and looked at the young man, “I think that you'll find this village to be quite the same.”

You see, our past experiences and even our disposition (think SWM corporation) are likely to color our perception of present experiences (think benefit corporation). That is, our experiences in a village in which we once lived – whether not so nice or actually quite good -- may lead us to view a new village in the same way. Maybe the benefit corporation should not be the goal, but instead maybe the goal should be to inculcate attitudes of otherness in shareholder capitalism.

Ch 4.2 ESG disclosure

Concluding thoughts Full disclosure on becoming a father

Ch 4.3 Shareholder-management consortia: Ceres

Concluding thoughts Why join Ceres?

So, apparently, this is a true story.

Ch 5.1 – Corporation as moral system

Concluding thoughts [The Cocktail Party in Your Head](#)

Emily, PG Erickson (Jan 27, 2022)

Ch 5.2 Stakeholder capitalism – a delusion?

Concluding thoughts Law and economics

This is a story told by [Armen Alchian](#), an economist who taught at UCLA in the 40s through the 80s. Many believe he should have won a Nobel prize in economics. His work on institutional economics and property rights are widely viewed as groundbreaking.

One day Professor Alchian arrived late for his introductory economics class at UCLA. He said the following to his students:

I'm sorry for being a few minutes late to class. There was an accident on the freeway [that's how Californians refer to expressways]. So, I stopped and there was a car that was really banged up. Then I noticed there was a woman inside the car who 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 15 to 20 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, and assuming your inconvenience is worth \$10 per student, I should pay you \$1200 for being tardy.

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're appalled. What sort of human being was this economist Armen Alchian? His economic analysis seems so flawed – simply 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 doesn't 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 came up to — I'm not sure why me ... maybe it was because I had figured out some of the math that he used in the class — but this is what he said about our one week of law and economics, "Don't believe any of the stuff that we talked about this week. It's 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.

Ch 5.3 – Personal integrity [keeping one's word]

Concluding thoughts Little League (and about the author)

Not many people know that I played Little League baseball for one spring. It was 1966. I was in sixth grade in Toledo, Ohio. Marty Ball's dad was the

coach. We had uniforms and baseball caps, and we played other sixth-grade teams.

Appendix D

Awakening Capitalism: A Paradigm Shift

Alan R. Palmiter

William T. Wilson, III, Presidential Chair for Business Law, Wake Forest University

[25 Nov 21]

The corporation forged by “[awakening Capitalism](#)” represents a paradigm shift. And it seems to be the ending of one cycle and the beginning of another – that is, we are at a [critical juncture](#). We are called to reconceptualize the modern corporation and market capitalism at many levels.

- (1) **The reuniting of ownership and control.** The separation of ownership and control described by Berle and Means both narrows and shifts. (Their [1932 book](#) on this topic is the [most cited in the literature of corporate governance](#).) Institutional shareholders, acting on behalf of their investors, take on nearly direct control of the corporation on major issues, displacing the management-centric corporation of the last century. Using fully the voting mechanisms of the corporate form – including [engagement](#) and [shareholder proposals](#) -- institutional shareholders now can signal the directors they want, even installing them if needed, and can choose the business strategies of the corporation. Almost at whim.

How the institutional shareholders organize themselves will be interesting. The concerns that they could be seen as forming some sort of “cabal” – subject to both antitrust and political interference – seems misplaced. First, the securities laws (which anticipate some shareholder coordination) [generally preempt the antitrust laws](#). Second, the big institutional shareholders are likely to continue to [call the political shots](#).

- (2) **The beginnings of an internalizing system.** And yet in another fundamental way, this new corporation no longer exists as [an externalizing machine](#), as described by Monks and Minow. (Their [many books on this topic](#) have been influential in the movement advocating progressive corporate law.) Instead, for the first time, the corporation becomes an “internalizing machine.” The ecological and social harm once created and externalized by the corporation now comes back to rest within the corporation itself. Recalibrated modern portfolio theory – what some call “portfolio primacy” -- now calls on

diversified shareholders to prevent and discipline any particular corporation's externalization of harm.

At first, this internalization is likely to be of the large, threatening externalities – think [climate change](#) and [income disparities](#). But as the mechanisms of awakening Capitalism become more finely tuned, one can see the ripples in the pond extending further and further. There will be a continuing role for government (local, national, and international) and for NGOs – but now acting in tandem with corporations.

- (3) **A revamping of agency theory.** The re-purposed corporation no longer confronts the same agency costs described by Jensen and Meckling. (Their [1976 article](#) identifying the nature of the modern corporation is the [most cited](#) in the “law and economics” literature on corporate governance.) Agency theory now melds with modern portfolio theory to describe a corporation in which shareholder primacy gives way to a combination of stakeholder and shareholder primacy. Non-dualistic thinking, [introduced by Jensen](#) a generation after his ground-breaking article, finds its place.

Although shareholders remain as the nominal owners of the corporation, they exercise their ownership prerogatives tempered and guided by a variety of stakeholder interests. In fact, curiously, stock price becomes a quite useful way of measuring whether managers have served these broader corporate purposes. And as stock ownership spreads within the corporation, income disparities predictably become less acute.

- (4) **Corporations as priority setter.** The new corporation further shifts societal priority setting away from the state and more toward the corporation. No longer is the state critical in reducing corporate externalities. Instead, the corporation by (increasingly) internalizing the harm it had once externalized begins to displace the state's function in this regard. The extent of the displacement is hard to predict, but already such things as workplace protections have moved significantly from governmental oversight to institutional shareholder oversight – think [living wage](#) and the [Me-too movement](#).

Of course, this priority setting is not only in the normal locus of corporate decision-making, the board of directors. Instead, it arises from an amalgam of shareholder oversight, board function, and the pressures brought to bear by increasingly awakening markets – product/service, labor, supply chain, even communities. That is, the

setting of priorities reflects awakening Capitalism's recognition that all is inter-connected.

- (5) **The future of democracy.** How institutional shareholders coalesce in this new role is also hard to predict. Although some [mechanisms for coordination exist](#) – such as Institutional Shareholder Services – it is likely that with the [growing power of the Big Three and the Big Twelve](#) that more direct coordination might arise -- and perhaps already has. It seems unlikely – yes, unlikely -- that government will confront this arrogation of its power given capitalists' ongoing domination of the political process.

At one level this would seem awful, a return to a form of monarchical rule – some might even describe it as the tyranny of the market capitalists. But these new “masters of the universe” are not free agents, [bound only by a sense of noblesse oblige](#). They are, rather, themselves controlled by market power. Imagine one of the Big Three suddenly deciding to make investment returns the old-fashioned way, by identifying companies that sought to externalize costs. This would be – today and going forward – a losing investment strategy. Investors who got wind of this would likely abandon not only any of the Big Three, but any of the Big Twelve, that opted to do this. That is, democracy ([perhaps as it always has been to some extent](#)) will come even more to be expressed through markets.

But, as all of this happens, the greatest near-term significance of the paradigm shift is that the corporation -- and its role in this awakened Capitalism -- will be able to confront climate change. This, for me, is the cause for greatest celebration. That we might re-think some of our assumptions about the corporation and even re-state some theories of the corporation (and even of democracy) is not as important that we are now collectively confronting climate change and other human-made scourges. Forget theory – we are finally taking action. We have given ourselves a chance!

So, like my essay observing and calling on [Capitalism \[to\] heal thyself](#), these observations are meant as a call to action – a call to investors (large and small), to those who inhabit the corporation (in so many roles), to those in the political process (again local, national, international), to journalists and bloggers (the fourth and fifth estates), and to the donors and doers in the nonprofit sector (including the university). Specifically, it is a call to us in the academy (both teachers and students) to teach and to learn!

But most important, it's a call for everyone born after 1980 to take hope, to see that each of us has a role, and to embrace life with a renewed sense of purpose. It's the clarion call of wild geese flying overhead in a beautiful "V." Let's roll.

Notes

A related essay, *Capitalism, heal thyself*, describes this "awakening Capitalism." This essay is available on SSRN - https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3940395. Here's the abstract:

A paradigm shift is underway. The corporation -- much reviled as an externalizing, short-termist, inward-focused, politically manipulative machine -- is undergoing a fundamental change. A real metamorphosis.

This is good news. Capitalism has developed mechanisms to start a transformation of the world's economy. Already this is underway. The corporations that undergird Capitalism are beginning to confront the harm they created. Capitalism is in the process of healing itself.

There are three powerful forces at work. First, large institutional investors (all of which hold both managed and indexed portfolios) are either focusing on ESG investing in their managed portfolios or using their voting power in their indexed portfolios to demand ESG actions by portfolio companies. Why? These big investors -- as they seek better financial returns -- are realizing that portfolio companies that externalize harm ... are not sustainable investments.

Second, it has become clear (and is becoming clearer) that corporations have better financial returns when they seek to pursue environmental, social, and governance actions (ESG) -- often much better than corporations that continue their delusional thinking that the world is not interconnected, that externalizing harm is a profitable business strategy. All big corporations -- motivated to seek profits -- are now pursuing real ESG.

Third, there are the (almost miraculous) communication and information advances of the Internet. Investors learn in milliseconds what is happening with companies. And corporations can learn, coordinate, and implement new ESG tactics almost overnight.

And there are also powerful feedback loops that only accelerate these phenomena. Companies that infuse real ESG into their operations – not the fake stuff that the financial markets are getting better and better at ferreting out – attract money from the big institutional investors engaged in ESG investing. And with additional capital or a higher stock price, these real ESG companies increase their real ESG operations, attracting further real ESG investing.

But there is a timing issue. Just as these developments are happening exponentially, Mother Nature has begun her own feedback loops. For example, the fires in Siberia -- which make the West Coast fires (as devastating as they've been) look like a kid playing with matches -- are thawing the tundra and unleashing ungodly amounts of methane. Next year will probably be worse. And this is just one of many feedback loops. It's sometimes hard to take.

Can Capitalism catch up? The race is on, and Capitalism started late and is behind. But Capitalism, unlike Mother Nature, does not work on an annual, solar cycle. It works on at least a quarterly cycle when companies file their financial 10-Qs. And, given the way that financial analysts have every incentive to know as much about public companies as the companies themselves, Capitalism is really working on an almost minute-to-minute cycle.

And Capitalism has allies. Regulators around the world are looking at how to make ESG disclosure more useful. The nonprofit sector, including foundations and NGOs, is pressuring the institutional investors and the banks to push even faster both their ESG investing and their ESG engagement. Although motivated to save the planet and serve humanity, the sector is a powerful catalyst for even more focused and data-driven ESG investor and corporate activities. The motive to seek profits and the motive to do good come together!

So, as we watch and participate in this race, much is about guessing the future. But we humans don't grasp exponential change very well. Our brains don't seem well designed to handle it. We are linear thinkers - extrapolate from past, draw a straight line. Some of us notice the tangent - the rate of change at a specific moment. But we can't really imagine the future – our future – is being written by the second derivative.

It's a short, rollicking 13-page read, interspersed with about four pages of graphs and drawings. I've tried to keep it simple so everyone can see what's happening and what we face. And to identify the roles each of us must take on.