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Full of Questions and Wonder: Roberta Karmel's Legacy

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FULL OF QUESTIONS AND WONDER: ROBERTA KARMEL'S LEGACY

Alan R. Palmiter[*]

ABSTRACT

Roberta Karmel has been perhaps the keenest observer and commentator on the securities industry and its regulation for the past five decades. Her observations about securities regulation—during the SEC's precocious adolescence and into its young adulthood—have framed the academic inquiry of all of us who have written on the subject during this period. But more valuable to us than her observations have been her questions, full of wonder and penetrating insight. We securities academics, the enterprise of securities regulation, and especially market capitalism, all owe an enormous debt of gratitude to Professor Karmel.

Roberta Karmel and I joined the law academy in 1986. I was a fledgling corporate/securities lawyer turned law professor; she was an already-recognized thought leader in the area. I have spent my career trying to catch up to her – I probably won't.

1. OUR FIRST MEETING

Roberta and I first met at an ALI meeting on the quite controversial and ultimately ill-fated *Principles of Corporate Governance*.[1] It was a one-day meeting at the Mayflower Hotel in Washington, D.C. My soon-to-be law dean suggested that I use his ALI credentials to attend the meeting and to dip my foot into what would become the swimming pool in which I would later swim laps. I was mesmerized by the discussion, quickly identifying that there was a rift at the meeting between corporate general counsels (and their view that the corporation was designed mostly for the pleasure of management) and corporate law academics (most of whom saw the corporation as an instrument of shareholder welfare and social good).

At lunch, I sat between Roberta and Frank Easterbrook. What a serendipity! Without fully understanding it at the time, I had somehow placed myself between the person who, for more than a generation, would ask the most penetrating questions of how securities law should be formulated to

* William T. Wilson, III, Presidential Chair for Business Law, Wake Forest University. I thank Emily Solley (Wake Law '22) for commenting on this essay. I also thank Gabriella Manduca (Brooklyn Law '20), a student in my Sustainable Corporations class at Brooklyn Law in Fall 2019, for encouraging me to summarize my Sustainable Corporations project in a Brooklyn Law School journal.

1. Joel Seligman, *Sheep in Wolf's Clothing: The American Law Institute Principles of Corporate Governance Project*, 55 GEO. WASH. L. REV. 325 (1986-1987).

guide markets to serve our collective interests,[2] and the person who embodied the unquestioning belief that markets, especially securities markets, could be trusted to lead us toward the collective good.[3] Whoever was sitting across from me at that round table in the mezzanine of the main meeting hall of the Mayflower Hotel saw me, with Roberta to my left, and Judge Easterbrook to my right.[4] Poetry does not get any better!

2. THE TRADITIONALIST/CONTRACTARIAN DIVIDE

In short, Roberta would spend her professional career questioning—in the most profound ways—the faith placed in markets by the law-and-economics movement.[5] And Judge Easterbrook would continue to hold as a matter of faith that the markets were trustworthy, even infallible. The two of them, I believe, embodied the divide between the "traditionalists" and the "legal economists" on questions of corporate and securities law.

Soon after this ALI meeting, Judge Easterbrook's book (with Professor Daniel Fischel) titled *The Economics of Corporate Law* would be published,[6] and at a George Mason conference celebrating the book, Frank Easterbrook would declare complete victory: "Nobody today can publish a law review article in the field of corporate or securities law without basing its thesis on law and economics." In short, from what I understood, Judge Easterbrook was saying, "I am the way, the truth, and the life. No one comes to [academic holiness] except through me."

But the confidence that Judge Easterbrook asked us to place in the market-based law-and-economics movement would fare poorly over the next couple of decades. The accounting scandals and collapse of dot-com market prices in the early 2000s tarnished the law-and-economics brand. A Nobel-laureate economist would describe it as a period of "irrational exuberance."[7] This forced the question: how can markets, especially developed securities markets, be irrational for longer than a fraction of a trading day or, now, a

2. Roberta S. Karmel, *The Financialization of Corporate Governance*, Brooklyn Law Sch. Legal Studies Paper No. 653, 1 (2020), https://ssrn.com/abstract=3748574 (discussing shareholder primacy and stakeholder theories of corporate purpose).

3. Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. R. 1416-48 (1989).

4. *Frank Easterbrook*, WIKIPEDIA, https://en.wikipedia.org/wiki/Frank_Easterbrook (last visited Nov. 28, 2021).

5. *See*, *e.g.*, ROBERTA S. KARMEL, REGULATION BY PROSECUTION: THE SECURITIES & EXCHANGE COMMISSION VERSUS CORPORATE AMERICA 15, 16 (Simon & Schuster, 1981); *see also* Roberta S. Karmel, *A Retrospective on the Unfixing of Rates and Related Deregulation in Regulated Exchanges: Dynamic Agents of Economic Growth*, *in* REGULATED EXCHANGES DYNAMIC AGENTS OF ECONOMIC GROWTH (Oxford 2010).

6. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE Law (Harvard Univ. Press 1996).

7. ROBERT J. SCHILLER, IRRATIONAL EXUBERANCE (2000).

trading second?[8] Then came the Financial Crisis of 2008, in which the global securities markets collectively failed to appreciate that financial instruments backed by sub-prime mortgages carried great downside risk, enough risk to nearly cause the collapse of the global financial system. The wisdom of the crowd—at least, when sitting in front of securities trading screens—was exposed as a charade.

But, at that lunch table in the Mayflower Hotel, all of this lay in the future. On that day, there had merely been a skirmish between the traditionalists and the legal economists. The ALI would resolve their confrontation by declaring each a winner. The traditionalists were permitted to write some rules that became part of the *Principles of Corporate Governance*, and the legal economists were permitted to write other rules in the document. And then the courts would largely disregard their disjointed compromise.[9]

3. GENIALITY

So that lunchtime conversation, at the least, should have had some fireworks. Already Roberta had staked out the position that when the Securities and Exchange Commission (SEC) enforced its rules on market integrity there should be limits on the agency's subpoena powers.[10] Securities professionals were humans, after all, she had claimed. And Judge Easterbrook had already made clear in his writings that the purpose of securities law was to be sure that the markets were being fed truthful information. Maybe they would, at the least, quibble about the means to ensure securities-market honesty.

But instead of fireworks, there was a genial conversation between the two. Roberta mentioned that her son was starting law school in Chicago, and Judge Easterbrook (who had just been named to the federal bench and would continue as an adjunct professor at the school) offered to keep an eye out for

8. Another leading law and economics scholar would complain that securities markets were being held to too high a standard. *See* Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1602 (2005). Of course, there would be adjustments, argued Roberta Romano, but the adjustments would be much less painful to our economy than attempts to tame the securities markets' episodic irrationality. "Let the markets be themselves!" she would essentially argue.

9. Minor Myers, *Measuring the Influence of the ALI's Principles of Corporate Governance on Corporate Law,* SOC. SCI. RESEARCH NETWORK (July 13, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884701.

10. *See* Karmel, *supra* note 6. Roberta would expand on the themes of this book, including by later arguing that the SEC should not seek to create new legal theories (or disclosure standards) in enforcement actions. This put the government prosecutor in novel cases, she pointed out, in the position of both seeking to represent the client (the public at large) and ensuring fair treatment of the individual defendant. The right way to proceed in making new SEC law, argued Roberta, was through formal rulemaking. Roberta S. Karmel, *Creating Law at the Securities and Exchange Commission: The Lawyer as Prosecutor*, 61 L. & CONTEMP. PROBS. 33, 45 (1998).

him. The morning's sometimes heated discussion about the nature of corporate fiduciary duties—contractual or normative—did not come up.

4. WHOSE CAMP AM I IN?

At the time I had no idea whose camp I was in. I had admired the arguments made that morning by Professor Donald Schwartz, one of the traditionalist leaders who sought to revive the Berle thesis that the corporation is a social entity with responsibilities to its constituents and society.[11] He had argued that fiduciary duties inhered in the corporate relationship and could not be willy-nilly dissolved by contract. I had also admired the arguments made by Judge Easterbrook, who made the point that well-informed actors, answerable to markets, should be permitted to choose their own most efficient rules, including the duties owed to each other. Each set of arguments resonated with me, and although I felt that Professor Schwartz was more humane, I was drawn to the intellectual force of Judge Easterbrook. And thank goodness, I, as an invited guest to the ALI meeting, would not have to cast a vote.

But, over time, we corporate law academics have been asked to cast our vote. We do so every time we teach such cases as *Smith v. Van Gorkom*. What is the role, what are the responsibilities, of directors seated in a boardroom? For example, with respect to the *Van Gorkom* case, do we signal whether the decision by the Delaware Supreme Court was "one of the worst decisions in the history of corporate law"[12] or do we tell our students, implicitly or explicitly, that the case simply recognized that at some point directors owe it to the corporation and its shareholders to pay attention.[13]

We cast our vote with the legal economists or the traditionalists every time we write an article and allow the thesis to gravitate toward a defense of the markets (and the corporate status quo) or an excoriation of the markets and their actors for not recognizing broader social duties. We do so when we

11. On that sunny day in May, I had no inkling—it was beyond my imagination—that I would later join Professor Schwartz's casebook several years after his early death. JEFFERY D. BAUMAN, ELLIOT J. WEISS & ALAN R. PALMITER, CORPORATIONS: LAW AND POLICY, MATERIALS AND PROBLEMS (5th ed. 2003). Much closer on the horizon was that I would co-author the Corporations E&E with Lew Solomon, who was the original co-author with Don Schwartz on their Corporations casebook. LEWIS D. SOLOMON & ALAN R. PALMITER, CORPORATIONS: EXAMPLES & EXPLANATIONS (1st ed. 1989); LEWIS D. SOLOMON, STEVENSON & DON SCHWARTZ, CORPORATIONS LAW AND POLICY, MATERIALS AND PROBLEMS (1st ed. 1984). The coincidences flowing across my life that day would take years and years for me to discover and appreciate.

12. Daniel R. Fischel, *The Business Judgment Rule and the Trans Union Case,* 40 BUS. L. 1437, 1455 (1985).

13. *See* Symposium, *Van Gorkom and the Corporate Board: Problem, Solution or Placebo?*, 96 NW. U.L. REV 449 (2002). Among the articles at the symposium with a more charitable view of the case were: William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and Its Progeny as a Standard of Review Problem*, 96 NW. U.L. REV 449 (2002); Lawrence A. Hamermesh, *A Kinder, Gentler Critique of Van Gorkom and Its Less Celebrated Legacies*, 96 NW. U.L. REV. 595 (2002).

decide to focus our reading and reflection (and citations) on Frank Easterbrook or Roberta Karmel.

5. MY MOVE TOWARD ROBERTA'S CAMP

Over time I would discover that I tended to agree much more with Roberta's approach to corporate/securities law. Although there would be alliances with the Easterbrook markets-know-best approach, I would tend to be much more comfortable questioning market-based outcomes.[14]

In fact, I would later accept Roberta's invitations to write for symposia at her beloved Brooklyn Law School on such topics as (1) the SEC's failed experiment in outsourcing oversight of mutual funds to fund directors,[15] (2) the regulatory structures that require institutional shareholders to invest the bulk of their portfolios in public securities markets, thus capping the growth of private securities markets,[16] and (3) the sincerity of corporate disclosures on important social topics, in particular climate change.[17]

My scholarly comfort zone and trajectory were thus much more influenced by Roberta's questioning approach to securities/corporate law than Judge Easterbrook's doctrinaire confidence. Although I was aware of Roberta's scholarship early on, I cited her infrequently.[18] And, as Judge Easterbrook had predicted, to be published in top journals, I cited to him and his camp more often.[19]

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14. That is until lately, when I observed that there is a new Capitalism. As a result of the confluence of managed and indexed fund managers seeing the inter-connection between companies in their portfolios, the clear performance advantage for companies that pursue ESG, and the marvels of the Internet, Capitalism is in the process of healing itself. *See* Alan R. Palmiter, *Capitalism, heal thyself*, (Wake Forest U. Research Paper, Oct. 13, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3940395.

15. Alan R. Palmiter, *Mutual Fund Boards: A Failed Experiment in Regulatory Outsourcing*, 1 BROOK. J. CORP. FIN. & COM. L. 161, 161 (2006).

16. Alan R. Palmiter, *Staying Public: Institutional Investors in U.S. Capital Markets*, 3 BROOK. J. INT'L L., 245, 245 (2009).

17. Alan R. Palmiter, *Corporate Triplespeak: Responses by Investor-Owned Utilities to the EPA's Proposed Clean Power Plan*, 83 BROOK. L. REV 983, 984 (2018).

18. Alan R. Palmiter, *Toward Disclosure Choice in Securities Offerings*, 1999 COLUM. BUS. L. REV. 1, 45 n.117 (1999).

19. In fact, I would cite Easterbrook with regularity. I remembered his words that nobody gets published without dutiful obeisance to the law-and-economics thesis that markets are and should be our lodestar. I didn't want to be a nobody. Alan R. Palmiter, *Rethinking the Corporate Fiduciary Model: A Director's duty of Independence*, 67 TEX. L. REV. 1351, 1357 n.9, 1364-65 n.41, 1368-69 n.59, 1369 n.63, 1374 n.83, 1415 n.299, 1422 n.335 (1989) (reviewed in DAVID SCIULLI, CORPORATE POWER IN CIVIL SOCIETY: AN APPLICATION OF SOCIETAL CONSTITUTIONALISM (NYU Press, 2001)); Palmiter, Alan R., *Duty of Obedience: The Forgotten Duty*, 55 N.Y.L. SCH. L. REV. 437, 464 (Nov. 23, 2010). Easterbrook even made it into my study books and casebooks: ALAN R. PALMITER, CORPORATIONS EXAMPLES & EXPLANATIONS 449 (9th ed. 2021) (once); *see* ALAN R. PALMITER,, SECURITIES EXAMPLES & EXPLANATIONS, 102, 105 (8th ed. 2021) (twice); BAUMAN, WEISS & PALMITER, CORPORATIONS (West Academic, 2006) (six times); Business Organizations (3rd ed., West Academic, 2020) (twice).

But the spirit of Roberta's articles began to permeate many of mine. I suspect that she noticed this, even if I did not, by inviting me to those Brooklyn symposia.[20] At one of the symposia, as I listened to the presentations, it suddenly dawned on me. We were all marionettes who Roberta had cleverly put on stage and deftly maneuvered to tell a quite coherent set of stories. My article on mutual fund directors arose from a simple question that Roberta had asked when she first invited me: "So I wonder, has the outsourcing by the SEC to mutual fund boards really worked?" You can hear her voice. And that question accomplished her purpose.

6. MY "SUSTAINABLE CORPORATIONS" PROJECT AS A TRIBUTE TO ROBERTA

This essay is meant as a tribute to Roberta's questioning nature. At the recent two-day symposium honoring her career and her person, she would often comment after each of the presentations in her honor by using the word "wonderful." I was the last of the presenters and noted that her word choice was appropriate. Over the years her writings have left so many of us full of wonder.

Now, sometimes for these Festschrifts, colleagues write a remembrance, often a vignette about how important the honoree had been in their lives, as some did during their symposium presentations. And sometimes colleagues write a bit of scholarship as a tribute to the honoree, as some are also doing. I thought I'd do something a bit different – a vignette followed by how Roberta's questioning nature has influenced a teaching/writing/advocacy project of mine, which has culminated in a book to be published next year by Wolters Kluwer. It's titled Sustainable Corporations.

This essay lays out a series of questions from that book, many of them similar to questions asked by Roberta over the years about the nature of corporate law and securities regulation. The organizing theme of these questions is what is (or whether there even can be) the sustainable corporation. It occurred to me as I listened to the presenters at the two-day symposium in Roberta's honor that many of the questions that she has asked over the years are echoed in the book. Although many of my answers in my

20. I must mention, and I do so with great affection, that Roberta also urged her former dean to invite me to the Brooklyn Law School for teaching visits. Twice, both times before the Financial Crisis of 2008, Dean Joan Wexler invited me to visit the law school. And twice I said family circumstances made it difficult. Then, when family circumstances made it possible, I mentioned that I was ready. And, not too long after in 2019, I visited Brooklyn Law School during the fall semester. I taught both Corporations in the evening program and Sustainable Corporations, a seminar in the afternoon. Even as I taught these courses, I failed to recognize fully how the questions that undergirded both courses, especially Sustainable Corporations, were questions planted by Roberta.

book attempt to go beyond the answers she propounded, the symposium illustrated that often the question is more important than the answer.

7. THE SUSTAINABLE CORPORATIONS ROADMAP

So, the questions that I next lay out follow the progression of the Sustainable Corporations book and thus the journey that I ask students taking the course to embark on with me. They are divided into five main topics:

(1) What is the nature of the U.S. corporation?

(2) How is the corporation's current design unsustainable?

(3) What voluntary actions have corporations been taking to ameliorate this design?

(4) What reforms have been initiated to re-design the corporation?

(5) How might the corporation be re-conceived to set it on a more sustainable trajectory?

Of course, as I'm sure almost every reader is noticing, my essay in honor of Roberta represents a conflict of interest. After all, I'm shamelessly promoting my book! But, perhaps, I am doing so fairly – in a way that honors Roberta and fulfills the goals of the *Brooklyn Journal of Corporate, Financial, and Commercial Law* for this symposium issue. If you are reading this, I am pleased to say it is because the Journal editors in consultation with Professor Karmel have concluded that my essay is fair game. Phew!

My purpose, besides honoring Roberta, is to outline my own search for the sustainable corporation. It is a journey that I believe many others in the corporate/securities law academy are on, as illustrated by the rich variety of recent corporate and securities law scholarship on sustainability topics. And, certainly, there are many in management schools who are on this journey, as well. It is one that I believe even more students are on, largely on their own, in law and management schools throughout the United States and the world. The book is meant to offer a roadmap—basically, a series of questions—that I believe we must confront in our search for the sustainable corporation.

So, rather than lay out here the specific questions presented by the book, I've included them in an exhibit at the end of this essay. These questions basically lay out the book's table of contents, and as you'll notice, they're all informed by questions Roberta has raised. But I decided that putting them here would make this a drudgerous read. So, they're in Exhibit A for anyone who is curious.

Instead, next is an abstract of the book that I prepared when pitching the book to the law publishers.[21] I hope it will be an easier way to understand the

21. I'm appreciative that Aspen Publishers (formerly part of Wolters Kluwer) will publish the book. I believe that my Aspen editor Anton Yakovlev (who is also an accomplished translator of Russian poetry) was instrumental in getting the top brass to see the merits of a book that really has no precedent in the law academy. My book will be part of the Aspen Coursebook Series, which includes titles such as NEGOTIATING BUSINESS TRANSACTIONS, WILLS, TRUSTS, AND ESTATES IN CONTEXT, and CONNECTING ETHICS AND PRACTICE. Most read like a law textbook. There is one,

project, and to see how influential Roberta's inquiring nature has been in my assembly of the questions and materials that constitute the project.

After this abstract, I consider how the questions raised in the book can be seen as having been informed by specific pieces of Roberta's scholarship over the past three decades.

SUSTAINABLE CORPORATIONS

ABSTRACT

Alan Palmiter

The corporation is a legal, cultural construct. It is a figment of the human imagination. This is what makes it so powerful.

Today, the corporation is presented in business schools and law schools as an entity imbued with various characteristics that minimize conflicts between its principal constituents: risk capitalists (the corporation's shareholders) and management (the corporation's top executives). In this construct, employees, customers, suppliers, and society at large are along for the ride. We teach the corporation as a kind of Newtonian physics: it's the gravity of our transactional curriculum.

But the corporation is not actually what it seems. It is not an entity responsible for its own dealings – but instead is an externalizing machine designed to push social and environmental costs onto others. It is not a mediator of conflicting stakeholder interests – but instead a profit-making apparatus designed to maximize short-term financial gains for shareholders. It is not a reflection of societal priorities – but instead a plutocracy run by an inward-looking cadre of self-perpetuating executives. And it is not a creature of law – but instead a political person empowered (long before *Citizens United*) to shape the regulatory landscape in which it operates.

But there are anti-gravity forces at work. Leading business schools and some law schools are now teaching that the corporation is rethinking and must rethink its purpose and embrace new responsibilities to people,

however, on Earth Law that's meant to engage beyond the classroom. It's a collection of essays by various authors, though with lots of court decisions and UN statements. It was interesting. I also submitted the book project, with this abstract and some sample chapters, to West Academic Publishing. I already have a casebook with them. They answered quickly and said they could not publish a book that used the words "an inward-looking cadre of self-perpetuating executives." I pointed out that this is not only the view held by many activist investors and many others about U.S. corporate boards of directors but there's empirical support for the proposition. But their minds were made up. Even though West has seemed quite pleased with my Corporations casebooks (before with Jeff Bauman and Elliott Wiess, and now with Frank Partnoy and Elizabeth Pollman), my proposed book on Sustainable Corporations was in their view unpublishable. This made me feel quite confident that the project was worth pursuing.

planet, and profits – the new triple bottom line. Voluntary corporate compliance with environmental norms, recent studies reveal, goes beyond what Newtonian physics would predict. The emergence of human capital management, likewise, is not just about shareholder profits. Further, the environmental/ social/governance movement (so-called ESG) is inexplicable and real. The leading institutional shareholder Blackrock announced it will not invest any of its $2.4 trillion in discretionary assets in any company that has failed to articulate a social purpose that is both measured and managed. The country's leading CEOs in the Business Roundtable a couple of years ago declared that the purpose of the corporation is to promote the interests of customers, employees, suppliers, communities, and shareholders – in that order. The Business Roundtable said it was compelled to redefine the corporation's purpose because the government has become dysfunctional.

Hmmm. Maybe the corporation is better explained by quantum mechanics – accepting that something can exist in two places at once. We must come to terms with the anti-gravity nature of the corporation; our assumptions about *homo economicus* are deeply flawed. For example, there are now benefit corporations that mandate a social purpose specified in their corporate charters. There are mandates—some governmental and some imposed by private groups—that compel companies to measure and disclose their ESG performance. Lately, the leading proxy advisory firm Institutional Shareholder Services ranks companies in deciles based on various environmental and social metrics. Thus, to guide shareholder voting and to ensure there can be no Lake Wobegon effect. Coca-Cola is said to be thinking of discontinuing its sale of toxic sugar water, including its eponymous beverage. A consortium of institutional shareholders, with a staggering $32 trillion of assets under management led the "we're still in movement." And there's a new corporate engagement dance between institutional shareholders and corporate managers, even at ExxonMobil.

But maybe all of this is just high-level greenwashing – the deceptive appearance of caring about the environment, our atmosphere, consumers, company employees, and other workers in the supply chain. There certainly is evidence that stakeholder capitalism is a delusion – that is, cynical business as usual. Yet, maybe we are entering a new phase of capitalism. Maybe capitalism can save itself from itself. Perhaps we are witness to the corporation re-conceiving itself as a moral system – after all, real responses to the "me too" movement have come from business, not from the government. There are glimmers that the corporation – long a super-organism, a beehive of jaw-dropping human collaboration – is morphing from a destructive caterpillar to a transcendent butterfly. Even more, perhaps we are seeing individuals in the corporation recognizing and rethinking their own internal dissonances, revealing the possibility of humanity in business.

> The mission for this coursebook is a simple one: to have every U.S. law school offer as an upper-level course—one sequenced after the basic Corporations course—one that would be named Sustainable Corporations. First, corporate law professors teach gravity, then we teach anti-gravity. That is, first we teach the incentive structure of the orthodox corporation, and then we teach the organic, human version of the corporation. Toward that end, the coursebook offers a synthesis of writings from law, management, philosophy, psychology, sociology, even biology – by academics, journalists, businesspeople, poets, bloggers, scientists, even religious leaders. The book starts by quoting Pope Francis's encyclical *Laudato Si* and concludes by describing the wisdom of trees.

8. ROBERTA'S PRESENCE IN MY PROJECT

As you can see, the Sustainable Corporations project proffers far more questions than it answers. I apologize to students early on when I teach the course. They are at first confused, believing that a law course should lay out answers or a way to find the answers, not merely questions. But, eventually, they seem to accept that there really are no clear answers to the many inquiries suggested by the course.[22]

So, the book asks many questions. But many boil down to a handful of meta-questions, and many of these meta-questions have been raised in Roberta's writings. Here, is a quick (and no doubt incomplete) list of the book's meta-themes, with Roberta's take on them and then the book's take on them:

(1) IS THE CORPORATION PRIVATE OR PUBLIC?

Roberta's take on this:

> The corporation should be more public. In her most recent 2020 piece on the financialization of corporate governance,[23] she says the following:
>
> > There is a robust debate in progress between proponents of shareholder primacy and proponents of stakeholder governance.

22. But maybe there is an answer. Capitalism appears to be in the process of saving itself from itself. *See* Palmiter, *supra* note 15. A remarkable paradigm shift, which began about three years ago, is underway. Big institutional investors are discovering that it's in their best interests (pure profit motive) to get rid of non-ESG companies from their managed portfolios and to invest in companies pursuing ESG. And, if their portfolio is indexed, these investors have incentives to discipline non-ESG companies, as happened at ExxonMobil with Engine No 1's palace coup and more recently at Tesla's 2021 shareholders' meeting. Why? It's become clear that ESG drives financial performance in companies - lots of it. The communications/information revolution wrought by the Internet is making this all happen fast, even exponentially.

23. Karmel, *supra* note 3.

> … Corporate purpose seems to be questioned whenever loss of faith in the business community leads to clamors for reform.[24]
>
> [What is the corporate purpose?] There are serious problems with both the shareholder primacy and stakeholder governance theories. They are both more theoretical and ideological than grounded in existing law. In my opinion, a better way to change the financialization of corporate governance [with a focus on stock prices, rather than corporate earnings] is to consider the protection of the individual stockholder and beneficiaries of retirement funds. Further, a reorientation of the SEC from policies adopted to accommodate institutional investors to policies aimed at protecting individuals should be made.

The book's take on this:

> Shareholder primacy, as typically understood, is pernicious. It is often the excuse used by corporate management for engaging in behavior that is contrary to the interests of consumers, employees, communities, the environment, society – even sometimes shareholders. That is, it is a smokescreen used by corporate managers to evade their own responsibility for the decisions they make on behalf of the corporation.
>
> Telling institutional shareholders (many of which are themselves corporations) to pay more attention to their beneficiaries or even imposing on them fiduciary duties to promote the interests of beneficiaries might be a useful first step, but corporate fiduciary duties typically come with the business judgment rule. And institutional shareholders thus presumably would have great latitude in deciding (and justifying) what is in their beneficiaries' best interests.
>
> Corporate fiduciary duties as we know them have essentially come down to sanctioning blatant conflicts of interest. An institutional shareholder that said, "We're putting off decarbonizing our portfolio because some fossil-fuel investments may serve our beneficiaries' long-term financial interests," would presumably be OK. And an institutional shareholder that said the converse, of course, would also be OK.

* * *

(2) CAN WE TRUST FOR-PROFIT ORGANIZATIONS TO SERVE THE PUBLIC GOOD?

Roberta's take on this:

> Yes, provided there is sufficient competition and self-regulation. In her 2000 piece on the implications of the demutualization of the stock exchanges,[25] she says: "reduction of SEC market regulation, rather than the

24. *Id.*

25. Roberta S. Karmel, *Turning Seats into Shares: Implications of Demutualization for the Regulation of Stock and Futures Exchanges*, 53 HASTINGS L.J.L.J. 67 (2000), file:///C:/Users/erinn/

> increase in regulation envisioned by current SEC concept and rulemaking releases, so that competition rather than regulation can determine outcomes."[26]
>
> A countervailing trend could be that national regulators will be unable to engage in as effective regulation of trading markets in a trading environment that moves across boundaries with the click of a mouse. Therefore, self-regulation will be required to assure that global markets are fair and honest.

The book's take on this:

> Not completely.[27] The corporation is unlikely to serve the full public good absent some help from the government. Corporations left to self-regulation – that is, adopting the level of ESG engagement that their institutional shareholders deem sufficient – are unlikely to fully meet current social needs, without sacrificing the ability of future generations to meet their needs. This is certainly true for those parts of our global economy that are outside market capitalism.[28] And, although consumers may put some pressure on corporations to do the right thing, ultimately price is king. Consumers are unlikely to pressure companies to fully internalize their social and environmental costs. This is the time-honored role of government, which will continue to have a role.

* * *

(3) CAN CORPORATE BOARDS COMPOSED MOSTLY OF NON-MANAGEMENT DIRECTORS (SO-CALLED INDEPENDENT DIRECTORS) BE TRUSTED TO FURTHER THE CORPORATION'S AND SOCIETY'S INTERESTS?

Roberta's take on this:

> Absolutely not. In her 2013 piece on whether the independent director model is broken,[29] she says the following:

Downloads/SSRN-id256867%20(1).pdf. Roberta also addressed this question indirectly with respect to whether law firms should be allowed to go public – that is, to accept investments from outside parties and even trade on public stock markets. Roberta S. Karmel, *Will Law Firms Go Public?*, Brooklyn Law Sch. Legal Studies Paper No. 321, 3 (2013), https://ssrn.com/abstract=2205709. Her answer to this question was decidedly different. In her view law firms, if allowed to accept outside investors, would lose their professionalism – a phenomenon that had happened as closely-held firms became public in other industries. Ultimately, it seemed to come down to whether you can count on self-regulation.

26. *Id.* at 3.

27. Lately, though, the data is pointing more and more to the possibility that Capitalism can save itself from itself. *See* Palmiter, *supra* note 15.

28. *See* Larry Fink, *Rich Countries Must Bear the Cost if We Can Ever Hope to Achieve a Net-Zero World*, N.Y. TIMES (Oct. 13, 2021), https://www.nytimes.com/2021/10/13/opinion/climate-change-imf-carbon.html.

29. Roberta S. Karmel, *Is the Independent Director Model Broken?*, Brooklyn Law Sch. Legal St. Rsch. Paper No. 348, 1, 2 (2013), https://ssrn.com/abstract=2302777.

> [T]he SEC has persisted in its path-dependent view that independent directors, ever more stringently defined, should dominate the boards of public companies.
>
> [B]oards of independent directors did not prevent the scandals of Enron, WorldCom, and other companies in the United States and Europe after the bursting of the technology bubble of the 1990s. Neither did such boards prevent the financial institution meltdowns of 2008. A rethinking of this model is therefore in order.
>
> In my opinion, public corporations should have a mix of independent and non-independent directors, and directors should be held to a duty to the corporation as a whole. The interests of employees, customers, and creditors should be balanced against a duty to shareholders, especially when those shareholder interests are short-term.

The book's take on this:

> Absolutely not, though for slightly different reasons. Directors of US public corporations are nearly all drawn from the same elitist corporate executive pool. Although they have been mostly white men, this is beginning to change. But even though there is recently more diversity on US public corporation boards, the world view of corporate directors is remarkably narrow. There appears to be a widespread belief in shareholder primacy – the kind that is OK with externalizing costs as a way to increase profits. Although there have been recent statements that the corporate purpose should encompass customers, employees, suppliers, the environment, and communities, as well as shareholders, there early indications are that corporate behavior is changing, but only slowly. There seems to be a widespread belief that the purpose of the corporation should be to satisfy customer desires, even when there is strong evidence these desires may be producing adverse social, health, even economic results. Corporations, I believe, must begin to see how their activities are inter-connected. Think of the Financial Crisis of 2008, the obesity epidemic, the opiate crisis, the climate crisis – in each case the corporate world blindly accepted that satisfying market demand is the appropriate path. And at the helm have been corporate boards composed primarily of independent directors. This must change!

* * *

(4) IS THE "SHAREHOLDER PRIMACY" CORPORATION A VIABLE MODEL FOR THE FOR-PROFIT CORPORATION?

Roberta's take on this:

The shareholder primacy model, like the stakeholder model, is "more theoretical and ideological than grounded in existing law."[30] Further, in her 2013 independent director piece, she pointed out:

> [The shareholder primacy] theory has recently begun to fall out of favor for several reasons. First, the theory is premised on the idea of shareholder homogeneity, the existence of which is becoming increasingly rare. Second, the theory, with its emphasis on shareholder value, gives managers a short-term focus, rather than a focus on the long-term development of the corporation. In addition, shareholder primacy is thought to have resulted in increased risk-taking by financial corporations, which led to the 2008 financial crisis.[31]

The stakeholder model, in Roberta's view, seems to hold more promise:

> The stakeholder theory competes with shareholder primacy because shareholder primacy "pushes managers to exploit non-shareholders in pursuit of shareholder gains." Robert Sprague argues that shareholder wealth maximization occurs in the long run when "managers act in the best interests of those who also have a stake in the success of the corporation—such as employees, suppliers, customers, and society. If corporate activities promote a healthy society, that society, in return, can support an environment of business growth."[32]

The book's take on this:

> Shareholder primacy, though not required by existing law, shapes corporate culture. And, here, culture may be more powerful than the law. Given the ways in which corporate law accedes to incorporation-based private ordering, it seems unlikely that the corporation (as currently understood) will on its own be able to confront and solve our major social and environmental challenges.[33] Perhaps the corporation should not be expected to do this – this is, at least, a widely held view. But given the corporation's pervasive influence in the political process, it's hard for many to see how the current shareholder primacy model can be a viable model for the corporation if it is to be an instrument in meeting current social needs while ensuring that future generations can meet their needs.
>
> Whether stakeholder capitalism is the answer is another question. Today, the ESG movement (whose rise has been meteoric) has hardly put a dent in GHG emissions, income/wealth disparities, and the structures of corporate governance. That is, if the proof is in the pudding, the pudding has yet to

30. Karmel, *supra* note 3 at 2.
31. Karmel, *supra* note 30 at 14-15.
32. *Id.* at 20-21.
33. But, again, this may be changing. It is possible that our current Capitalist system, with institutional shareholders pressuring for more ESG activities and companies seeking to satisfy this demand, is in the process of saving itself from its past sins. *See* Palmiter, *supra* note 15.

gel – though in the last few months (late 2021), there are signs that it is gelling.[34]

* * *

(5) WILL CORPORATE SUSTAINABILITY STANDARDS—ESPECIALLY ESG DISCLOSURE STANDARDS—CONVERGE, PARTICULARLY IN EUROPE AND THE UNITED STATES?

Roberta's take on this:

> In her 2005 piece on reform of public company disclosure in Europe,[35] Roberta sees some convergence in traditional public company disclosure – financial disclosure. She does not mention non-financial, sustainability disclosure. This was on the mind of very few back then – maybe only Al Gore, the inventor of the Internet.
>
> The law of the European Union and the United States with respect to offerings and annual and periodic reporting has in some ways now converged, but significant differences remain. In part, this is because regulatory reform on both sides of the Atlantic is being driven by local and political imperatives. Further, the European Union lacks an EU-wide securities agency, and civil enforcement of disclosure requirements by private parties is a matter of national law in Europe. Accordingly, despite the pressures for harmonization of disclosure regimes, the convergence of financial reporting requirements remains a somewhat distant goal.

The book's take on this:

> This time Europe is ahead of the United States. Perhaps fears of the Gulf Stream coming to a stop or moving farther South, as the result of a huge Greenland melt-off and a change in North Atlantic salinity, are more real to Europeans than to others.[36] The European ESG disclosure initiatives are way ahead in both their timing and ambition compared to what's been happening at the SEC. Nonetheless, there is a general belief that multi-national companies will want one set of sustainability ESG disclosure standards. While a reconciliation of financials may not have been that tough when it came to financial disclosure, reconciliation of ESG disclosures may be too costly, too tricky. And it would seem something that regulators—if they are really serious about getting good ESG disclosure and, as a result, good ESG performance (and the Europeans seem to be)—would not want companies wasting time and money with silly reconciliations. After all, with respect to climate change, we only have one global climate.

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34. *Id.*

35. Roberta S. Karmel, *Reform of Public Company Disclosure in Europe*, Brooklyn Law Sch. Legal St. Rsch. Paper No. 35, 1, 18, 23, 37, 38 (2005), https://ssrn.com/abstract=799344.

36. Rob Roebeling, Viju John, José Prieto, Vesa Nietosvaara, Christine Traeger-Chatterjee, Hayley Evers-King and Ben Loveday, *Observing the cooling of the North Atlantic Ocean during the last decade, using weather satellites*, EUMETSAT (Sept. 6, 2021), https://www.eumetsat.int/melting-greenland-ice-sheet-cools-north-atlantic-ocean.

* * *

(6) CAN THE SEC – OR REALLY ANY FEDERAL AGENCY – BE TASKED WITH CREATING ESG DISCLOSURE STANDARDS AND THUS CREATING MODELS OF CORPORATE SUSTAINABILITY?

Roberta's take on this:

> No. In her 2016 piece on independent agencies in the United States,[37] Roberta questioned the ability of independent agencies (including the SEC) to fulfill their promise of competence and independence, given the politicization of agencies due to partisan congressional influence and oversight. She also pointed out that agency capture undermines an agency's mission.

The book's take on this:

> Hmmm. This is a tough question. Yes, the SEC is politicized – maybe just as much as any of the agencies engulfed in the swirling politics inside the DC Beltway. But that doesn't mean the SEC cannot be trusted at all. If the agency's role is not to set the rules for the sustainable corporation, but simply to oversee the rule-setter – as would be the case, for example, if the Sustainability Accounting Standard Board (SASB) were designated the rule-setter for sustainability disclosure – then maybe there's a chance this hybrid model of regulation might succeed. In fact, elsewhere Roberta seemed quite OK with self-regulation of the US stock exchanges, under the watchful eye of the SEC – though this was in a different time and perhaps even a different subject. And maybe her 2016 views on the SEC's independence anticipated the ways in which Trumpism would seek to gut effective government, a phenomenon that she would decry in a 2019 piece.[38] But, the book agrees with Roberta—it's a close call on whether the SEC can be trusted.

* * *

I know that some of you may have been thinking: "Really? The book has addressed all of these issues?" Well, no. It touches on all of them, but in writing this homage to Roberta the book's author—again inspired by her questions and sometimes her answers—was able to imagine what the book will eventually say. The manuscript is not due for a few months.

37. Roberta S. Karmel, *Independent Agencies in the United State-Law, Structure, and Politics*, Brooklyn Law Sch. Legal St. Rsch. Paper No. 464, 1, 1 (Aug. 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2828353.

38. Roberta S. Karmel, *Little Power Struggles Everywhere: Attacks on the Administrative State at the Securities and Exchange Commission*, Brooklyn Law Sch. Legal St. Rsch. Paper No. 610, 1, 10-11 (Aug. 2019), https://ssrn.com/abstract=3444565 (decrying how courts had undermined the SEC's effectiveness by imposing cost-benefit review, becoming skeptical about deference to the agency, and thus eroding the SEC's independence).

10. SO MANY OTHER QUESTIONS

Anyone familiar with Roberta's writings would immediately notice that I have failed to acknowledge so many other questions that her writings raise and often answer:

- Should there be a new agency to oversee the sustainable corporation – given the limited bandwidth of the SEC and breadth of the issues that inhere in the sustainable corporation? Roberta asked and answered this question in 2010 with respect to whether there should be a systemic risk regulator.[39]
- Should there be a global regulator of sustainable corporations, given that multi-nationals dominate the world economy and their operations (as well as their investors) have essentially no national boundaries? Roberta asked and answered a related question in 2007 with respect to whether transnational stock exchanges, such as the proposed NYSE/Euronext exchange, could exist under existing SEC exchange regulations.[40]
- Should Congress specify duties of corporate directors (and officers), as opposed to leaving this to the courts, when such corporate insiders make decisions and take other actions that affect non-shareholder outsiders? Roberta asked and answered a similar question in 2015 with respect to whether Congress (rather than the courts) should specify the duties of corporate insiders when they trade on the basis of material, nonpublic information.[41]

OK. Did you read the footnotes to find out what Roberta's take on these questions was? I'm sure you did. Both Roberta's questions and her answers are always incisive.

* * * * *

Well, that's it. I am tickled to have been invited to participate in this symposium honoring Roberta Karmel. My hope is that I have done her inquisitive (and generous) spirit justice. My further hope is that you'll think about teaching Sustainable Corporations – whether you're a law professor or maybe just a law student.

For we are all teachers.

39. Roberta S. Karmel, *The Controversy Over Systemic Risk* Regulation, 35 BROOK. J. INT'L L. (2010), https://brooklynworks.brooklaw.edu/bjil/vol35/iss3/7 (stating yes, there should be systemic risk regulator and it should be a new agency independent of the executive and legislative branches).

40. Roberta S. Karmel, *The Once and Future New York Stock Exchange: The Regulation of Global Exchanges*, 1 BROOK. J. CORP. FIN. & COM. L. (2007), https://ssrn.com/abstract=958260 (stating no, unless the SEC's then-existing exchange regulations were modified, there appeared to have been too many impediments in the SEC regulations to the creation of global exchanges.).

41. Roberta S. Karmel, *The Law on Insider Trading Lacks Needed Definition*, Brooklyn Law Sch. Legal St. Rsch. Paper No. 413, 1, 2, 9, 12 (May 2015), https://ssrn.com/abstract=2607693 (stating yes, given that insider trading is not defined in the federal securities laws, a statutory definition is needed, particularly in light of a recent Second Circuit case that narrows the breadth of cases recently prosecuted by the SEC and DOJ).

EXHIBIT A

SUSTAINABLE CORPORATIONS: TABLE OF CONTENTS

(1) WHAT IS THE NATURE OF THE U.S. CORPORATION?

 What is the structure of U.S. law, in which the U.S. corporation is situated – what are the democratic tenets of U.S. law, how does U.S. law attempt to claim legitimacy, how legitimate is U.S. democracy, or Blockchain for that matter?

 What is the nature of the U.S. corporation—its history, its essential features, the nature of U.S. corporate law, the U.S. corporation's assumption of shareholder primacy, the corporation as incorporation-based private ordering, how this compares to other company law regimes (particularly in Europe)?

 What is the nature of the U.S. public corporation – again, its history, its essential relationships (primarily between shareholders and management), contemporary operation of those relationships, the persistence of the shareholder wealth maximization (SWM) norm, the regulatory framework of U.S. securities regulation?

(2) WHAT ASPECTS OF THE U.S. CORPORATION (PRINCIPALLY THE U.S. PUBLIC CORPORATION) MAKE IT UNSUSTAINABLE?

 What is corporate limited liability, and how does it contribute to the U.S. corporation's unsustainability – the history of corporate limited liability, its exceptions, and alternatives (such as shareholder liability for mass torts, corporate criminality, and charter revocation)?

 What is corporate short-termism, and how does it contribute to the U.S. corporation's unsustainability – the nature and effects of corporate short-termism, corporate law's attitudes toward short-termism, proposals to ameliorate short-termism, the data on R&D spending and capital outlays?

 What are the group dynamics on boards of directors in U.S. public corporations, and how does this contribute to the U.S. corporation's unsustainability – the selection process for corporate directors, the tendency toward board groupthink, the judicial attitudes toward this groupthink, and proposals to address some aspects of board groupthink?

 What are the ways the corporation (particularly the U.S. public corporation) is a political actor, and how does this contribute to the U.S. corporation's unsustainability – the history of U.S. corporations in politics, the effects of corporate lobbying and political expression after *Citizens United* on government regulation, and recent shareholder initiatives on corporate political activities?

(3) WHAT ARE THE WAYS IN WHICH THE U.S. CORPORATION (AGAIN, PARTICULARLY THE U.S. PUBLIC CORPORATION) HAS

UNDERTAKEN VOLUNTARILY TO ADDRESS ASPECTS OF ITS UNSUSTAINABLE DESIGN – USING AS A FRAMEWORK THE TRIPLE-BOTTOM-LINE OF PLANET, PEOPLE, PROFITS?

 Planet. What has been the corporation's attitude toward and compliance with environmental regulation – the nature of U.S. environmental regulation, the shifts in corporate attitudes about environmental compliance, the legislative and judicial attitudes about corporate compliance, the private-public partnerships that have emerged in this area?

 People. What has been the corporation's experience with corporate social responsibility (CSR) and its recent incarnation as the Environmental/Social/Governance (ESG) movement – the corporate statutory answer, the judicial attitudes toward CSR, the corporation's responsibilities under international law, the nature of human capital management (HCM), the meaning of the Business Roundtable's statement on the corporate purpose, the nature of corporate greenwashing?

 Profits. What has been the corporation's experience with shareholder wealth maximization (SWM) – the institutionalization of U.S. stock markets, the changing face of socially-responsible investing (SRI), the nature and results of recent shareholder activism, the rise of ESG investing, the nature of the duties of institutional shareholders?

(4) WHAT HAVE BEEN THE ATTEMPTS TO MORE FUNDAMENTALLY RE-STRUCTURE THE U.S. CORPORATION TO OVERCOME ITS UNSUSTAINABLE DESIGN – THAT IS, WHERE DO PROPOSALS TO GENETICALLY RE-ENGINEER THE CORPORATE DNA CURRENTLY STAND?

 What has been the story of the social-enterprise movement, which seeks to combine both profits and a social/environmental purpose in a single business enterprise – the nature of the benefit corporation, the experience with benefit corporations in the United States (with a look also at Europe), what studies show when people are asked to "do good"?

 What has been the story of mandatory ESG disclosure by the SEC (and by financial regulators in Europe) – the purposes and effects of disclosure mandates in effecting changes in business outcomes, the story of the SEC's attempt to mandate disclosure by companies on climate change, the emergence of private ESG ratings and sustainability accounting, recent proposals at the SEC to mandate ESG disclosures?

 What has been the story of Ceres, the non-profit consortium of large institutional shareholders and corporate management – the origins of the organization, the stated goals of the organization, the organization's roadmap for sustainability and its vision of the 21st century corporation, the progress reports for this roadmap, the stock price effects of joining Ceres, a comparison to the Sustainable Companies Project in Europe?

(5) WHAT ARE SOME WAYS TO RETHINK THE CORPORATION, AND THUS TO RE-IMAGINE ITS PURPOSES AND TRAJECTORY – THAT IS, HOW MIGHT THE PRINCIPAL TOOL OF CAPITALISM BE REINVENTED SO CAPITALISM CAN SAVE ITSELF FROM ITSELF?

 What are the ways in which the corporation behaves (or seeks to behave) as a moral actor – the emptiness of the SWM norm, the corporation as a system with multiple inputs and multiple outputs, the moral foundations of human (and thus corporate) action, the triplespeak in which corporations engage, the moral actions of corporations meant to fill the governmental void?

 What has been the early experience with stakeholder capitalism, and is it a delusion – the failure of the ESG movement to show results, the prevalence of greenwashing throughout the corporate system, glimmers of hope as millennials begin to influence product, labor, and capital markets?

 What is happening inside of the human actors who compose the corporation—the collaborative nature of the corporation, the untoward results of *homo economicus* incentives, the contortions to have agency theory explain the corporation, business ethics as a smokescreen, the possibilities created by personal introspection, the dark matter in the corporation not explained by agency theory?