

‘The contributions in this innovative Handbook make a definitive case that corporate law and governance are central to achieving sustainability. Providing a rigorous analysis of the central issues in sustainability and in-depth case studies from around the globe, this Handbook is a critical resource for scholars, students and practitioners of corporate law.’

- *Afra Afsharipour, Professor of Law and Martin Luther King, Jr. Hall Research Scholar, University of California, Davis School of Law*

‘This seminal volume is academically superb and inspirational. Company law and corporate governance drive economies and cultural norms. The accomplished Editors have gathered expert partners to explain how we must organise companies to become sustainable so that humans can live.’

- *Janet Dine, Professor of International Economic Development Law, Queen Mary University of London, School of Law*

‘This Handbook is an essential reference for anyone working on one of today’s most pressing challenges, which is the transition to a climate-neutral and sustainable economy. It is high on Europe’s political agenda. Yet nobody should underestimate the implications and scale of such a transformation. It is cross-cutting by nature and requires a transdisciplinary policy approach.’

- *Valdis Dombrovskis, The European Commission’s Vice-President for the Euro and Social Dialogue, also in charge of Financial Stability, Financial Services and Capital Markets Union*

‘It is increasingly clear that business must play a central part – even a leadership role – in addressing our global sustainability crisis. The challenges are profound, and Sjøfjell and Bruner have marshalled many of the world’s greatest experts to help identify ways to move ahead. Having this book on your desk is like having those experts on call.’

- *Kent Greenfield, Professor of Law and Dean’s Distinguished Scholar, Boston College Law School*

‘Amidst an increasingly pervasive sense of uncertainty and anxiety, we are experiencing a multi-dimensional crisis of sustainability, at whose heart lies the corporation. This timely volume, bringing together distinguished authors to address the corporate aspects of sustainability, will be an essential reference point for scholars, practitioners and policymakers.’

- *Paddy Ireland, Dean and Professor, Faculty of Social Sciences and Law, University of Bristol*

‘This is an important and comprehensive volume on a topic that is of immense significance for academics, policymakers and practitioners. The editors have brought together the leading researchers in the field to produce a volume that provides profound insights into the intersection of corporate governance, law and sustainability. It deserves to be widely read and referenced.’

- *Colin Mayer, Peter Moores Professor of Management Studies, Saïd Business School, University of Oxford*

‘This magisterial volume brings together a comprehensive collection of chapters treating law, legal theory and law reform possibilities. Especially valuable is the impressive array of country-specific case studies from around the world. Essential reading for anyone interested in the crucially important question of the impact of business activity and corporate law on sustainability.’

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‘This book is a monumental work of scholarship. In terms of substantive scope, geographic reach and diversity of insight it is quite simply staggering. Its analysis of the contemporary financial, environmental and social challenges facing global business corporations is unsurpassed in

originality and rigour. This timely collection will be an essential cornerstone of every corporate governance scholar's book collection for many years to come.'

- Marc T. Moore, *Chair in Corporate Law,*
University College London

'The great, even existential, question of our time is whether the DNA of the private corporation can be modified so that business is transformed from the instrument of non-sustainability to the driver of sustainable human living. The Handbook suggests pitfalls and paths towards the corporation redeeming itself – and thus us.'

- Alan R. Palmiter, *William T. Wilson, III, Presidential Chair for Business Law,*
Wake Forest University

'This volume is a thoughtful compilation of case studies and reflective comments on corporate governance in the rapidly developing field of sustainability. The breadth of the authors' perspectives and jurisdictions allow the discerning reader different lenses through which to consider regulatory policy options and a range of sustainable business practices.'

- Janis Sarra, *UBC Presidential Distinguished Professor, Peter A. Allard School of Law,*
The University of British Columbia

'This Handbook should be required reading for policymakers business leaders, and other stakeholder groups. The authors pose thought-provoking questions upending traditional views of sustainability and soft law norms. They propose practical, actionable, tough solutions to some seemingly intractable problems related to disclosure, due diligence, and multi-stakeholder governance.'

- Marcia Narine Weldon, *Lecturer in Law, University of Miami School of Law*

'Sjøfjell and Bruner's book is a brilliant contribution to the most pressing questions of corporate law and governance today. It challenges the 'trade off mentality' that construes ecological and social issues as of corporate concern only if they pose financial risks to the firm. This book provides an extremely important basis for re-conceptualizing how we think about corporate obligations.'

- Cynthia A. Williams, *Professor and Osler Chair in Business Law,*
Osgoode Hall Law School

'This Handbook makes a path-breaking contribution to the re-orientation of law and corporate governance to the pressing sustainability agenda of safeguarding Earth's life-support systems. Bringing together authorities from across disciplines and jurisdictions, it provides a holistic overview of sustainability perspectives, policies and practices, including regulatory and corporate responses to mounting threats to planetary ecology.'

- Hugh Wilmott, *Professor of Management, Cass Business School and Research Professor in*
Organization Studies, Cardiff Business School

THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY

The emerging field of corporate law, corporate governance and sustainability is one of the most dynamic and significant areas of law and policy in light of the convergence of environmental, social and economic crises that we face as a global society. Understanding the impact of the corporation on society and realising its potential for contributing to sustainability is vital for the future of humanity. This book comprehensively assesses the state of the art in this field through in-depth discussion of sustainability-related problems, numerous case studies on regulatory responses implemented by jurisdictions around the world, and analyses of predominant strategies and potential drivers of change. This book will be an essential reference for scholars, students, practitioners, policymakers, and general readers interested in how corporate law and governance have exacerbated global society's most pressing challenges, and how reforms to these fields can help us resolve those challenges and achieve sustainability.

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The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability

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For Claire, Cullen, and Katarina, with hopes for a better world.

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Forewords

A limited liability company is an artificial person that is incapacitated and inanimate until its corporate leaders are appointed – its directors. The company has no heart, mind, soul or conscience of its own. Whether the company is or is not seen to be a good corporate citizen depends on the consciousness of its corporate leaders.

Throughout the twentieth century corporate leaders erred in focusing on increasing shareholder wealth with the three criteria for a company's success being increased profit, share price and dividends. This followed the Milton Friedman thesis that as long as this was done without deception, this was the sole purpose of the company. Corporate leaders consequently steered companies in the paradigm of a shareholder-centric governance model in the belief that creating wealth at the top would result in the trickling down to the impoverished at the bottom. The trickle became treacle, and it stuck.

The Global Financial Crisis of 2008 effectively destroyed the model of looking at how companies are directed and managed solely through a financial lens.

At the beginning of the twenty-first century, it was known that companies both public and private had used or were using natural assets faster than nature was regenerating them. This clearly was not sustainable. In corporate terms the planet was eating into shareholders' funds. Consequently, environmental, social and governance issues became of more and more importance. An analysis of companies listed on the great stock exchanges such as the S&P 500 showed by the end of the twentieth century, about 70 per cent of the market cap of some iconic companies were made up of so-called intangible assets which are not additives in a balance sheet according to Financial Reporting Standards.

The United Nations then developed the Principles of Responsible Investment. Companies entering the capital market to raise funds have come to realise that due diligence today is not only a financial one, but also, the great financial institutions in the capital market will do a due diligence that results in their duty of care to their ultimate beneficiaries being discharged. Due diligence has changed completely and will contain an audit of what is happening in the supply chain: Has there been effective leadership? Is there trust and confidence in the company by the community in which the company operates? Is there legitimacy of operations? Are there adequate and effective controls? Does the board exercise oversight on an informed basis? Does the company have a business model and a long-term strategy that has focused on the long-term health of the company rather than focusing on increasing shareholder gains?

As can be seen from the chapters in this volume, there are different governance models in various countries. How companies are directed and managed in one jurisdiction does not

necessarily apply in another. Consequently, the need for a company in any jurisdiction to develop a group corporate governance framework has become essential. The days of the holding company merely rubber-stamping its policies onto subsidiary companies have gone. Directors in subsidiary companies have a duty to act in the best interests of that company in that country. The holding company can put some of its directors on that board, but that director has to act in the best interests of that subsidiary company.

The twentieth century was one of unsustainable development through ecological overshoot, which has been scientifically established.

Environmental, social and governance factors have become more important in investment decisions by asset owners and asset managers. Institutional investors today understand that in order to discharge their duty of care to their ultimate beneficiaries, they have to invest in the equity of a company that has a business model which creates long-term value but in a sustainable manner.

As the company has no conscience, whether it is or is not seen to be a conscious corporate citizen depends on the state of mind of its corporate leaders. The conscious corporate leader today has to focus on the long-term health of the company rather than the short-term wealth of its shareholders.

Corporate reporting became outcomes-based with the development of integrated reporting based on the International Integrated Reporting Council's Framework of December 2013. The strategy has now become outcomes-based. Companies develop strategies from inputs including the activities of how the company makes its money, its outputs and then its outcomes. How, in making its money, has it impacted the three critical dimensions for sustainable development, namely the economy, society and the environment? Does its strategy deal with the negative impacts to eradicate or ameliorate them and to enhance the positive impacts?

Conscious corporate leaders today understand that they have to steer the business of the company in a manner which endeavours to have a positive impact on the three critical dimensions for sustainable development. They also understand that the limited liability company, being the chosen medium through which business is conducted globally, is at the junction of the three critical dimensions for sustainable development.

The Sustainable Development Goals (SDGs) of 2015 are outcomes-based, for example, clean water, clean energy, etc. The timeline is to achieve these outcomes by 2030. More companies are choosing those of the 16 goals which are pertinent to their business and incorporating them into their business strategy. The 17th goal is for collaboration. The chapters in this volume make it clear that without collaboration, in a flat, borderless, electronic world, we may not achieve the SDGs by 2030.

Corporate leaders need to collaborate in the best interests of discharging the moral duty of ensuring that those who come after us have a sustainable planet.

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Debates about corporate governance among legal scholars have lost their way in the last few decades. When I first started researching and writing about corporate governance in the early 1990s, it seemed to me that the most important questions to be addressed in thinking about corporate governance were, first of all, what is it that corporations are supposed to do? What is the purpose of corporations, and whose interests should they serve?¹ If we know the answer to that question, then we can ask, what is the best way to achieve that goal? But by the mid-1990s, most legal scholars in the United States (not so much in other parts of the world) had adopted the view that the purpose of corporations is to create value for shareholders, and correspondingly, the function of corporate governance is to maximise the value of the corporation for shareholders. In the last three decades, thousands of books and articles started from the premise that corporate governance is supposed to maximise share value. These publications analysed whether the best way to do this is to incentivise managers and directors, or lower barriers to hostile takeovers, or eliminate poison pills, or encourage shareholder activism, or eliminate staggered boards, or allow shareholders to weigh in on executive compensation, or implement other changes. Pushed aside in this whole debate was the fundamental question of what we as a society are trying to achieve – it was just accepted that the goal was increasing value for shareholders. The debate was about the means to achieve that.

After the financial crisis of 2007–2008, Christopher Bruner was among a small group of scholars to begin explicitly revisiting the underlying assumption.² Now he and Beate Sjøfjell have brought together a group of around 60 scholars from around the globe to try to wave a gigantic red flag: Look at where this share-value maximisation formulation of corporate purpose is taking us! Business activity on the planet earth has already caused us to transgress at least four different ‘planetary boundaries’ (climate change, biosphere integrity, biogeochemical flows and land-system integrity).³ Can we reconceive corporate purpose (and, correspondingly, corporate governance) so that corporations help to meet what Sjøfjell has called the ‘grand challenge of our time’?⁴ That is, can business operate in a way that achieves a ‘social foundation for humanity everywhere, now and in the future’ by meeting basic human needs, while protecting human rights, and also being ‘sustainable’?⁵ Bruner and Sjøfjell define sustainability as operating so that ‘the needs of the present generation are met “while safeguarding Earth’s life-support system, on which the welfare of current and future generations depends”’.⁶

The answer these scholars give is clear-headed, but grim: there is very little in our current corporate law and corporate governance arrangements around the globe that hold out the promise that they will be able to constrain corporate business activity to achieve sustainability. Their response to this depressing assessment, however, is to take on the challenge, by helping to establish ‘sustainability-related study of corporate law and corporate governance as a field’. The hope is that if scholars take seriously the idea that corporations must be governed not just for profits, but for sustainability, they will focus their research efforts on how this might be achieved. They will bring data to bear on what practices are proving to be consistent with sustainability,

¹ See M.M. Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century* (Brookings Institution, 1995), ch. 6: ‘Whose Interests Should Corporations Serve’, pp. 202–34.

² See, e.g., C.M. Bruner, ‘Conceptions of Corporate Purpose in Post-Crisis Financial Firms’, (2013), 36 *Seattle University Law Review*, 527–61.

³ B. Sjøfjell and C.M. Bruner, ‘Corporations and Sustainability’, Ch. 1 in this volume.

⁴ See B. Sjøfjell, ‘Responding to the Grand Challenge of Our Time’, in E. Eftestøl-Wilhelmsson, S. Sankari, and A. Bask (eds.), *Sustainable and Efficient Transport. Incentives for Promoting a Green Transport Market* (Edward Elgar, 2019), ch. 1.

⁵ *Ibid.*

⁶ See B. Sjøfjell and C.M. Bruner, ‘Corporations and Sustainability’, Ch. 1 in this volume.

and what practices are not; they will highlight firms that are attempting to achieve sustainability; and they will call out approaches to corporate governance that undermine sustainability.

One of the urgent needs that Bruner and Sjøfjell see that a field of sustainable corporate governance must address is the fact that corporations can organise themselves in business groups, as sprawling collections of subsidiaries and affiliates and supply chains, spread out over many countries, and financed through hundreds of different securities issued in dozens of countries, so that no one jurisdiction can easily regulate the whole. Corporations can (and do) thereby hide their ‘dirty’ business in the places that are the hardest to regulate. To begin to address this problem, the editors bring together scholars with expertise in over 30 countries and all six inhabited continents. These scholars examine dozens of specific case studies to identify strengths and shortcomings in actual corporate experiences, and to evaluate the factors that can drive change where needed.

This collection thus makes a powerful beginning. The pathway forward is not clear, however, so others must now join in. There remain vastly more unresolved issues than there are clear policy prescriptions, and time is short.

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Preface

The work with this book is concluded at a time of school strikes for the climate, extinction protests in cities around the world and several state leaders declaring a climate emergency – developments that resonate with the sense of urgency informing our work. It is also a time of populist nationalism and science denial. In stark contrast, our book’s analysis of corporate law and corporate governance is positioned firmly within a framework of state-of-the-art natural sciences and a recognition of the necessity to transcend the compartmentalisation of the laws and policies of any given society. We see this as necessary if we are to achieve sustainability, which we define in our introductory chapter as securing the social foundation for humanity everywhere, now and in the future, within the ecological limits of our planet.

While corporate law and corporate governance remain predominantly national regulatory fields, achieving corporate sustainability is a decidedly global undertaking – as the contributions to this book amply demonstrate. The book functions as a holistic work, and this structural unity is reflected throughout – notably, in our common substantive engagement with the concept of corporate sustainability, and in consistent cross-referencing to other chapters that further discuss relevant regions, jurisdictions, legal structures, regulatory strategies and themes. As will be apparent to the reader, this wide-ranging book engages with dynamic legal and market phenomena. While the book speaks as of April 2019, our contributors provide substantial background on relevant sources of law and regulation, permitting students, scholars, practitioners, policymakers and general readers alike to engage directly with underlying legal and market structures that will continue to affect the pursuit of corporate sustainability for the foreseeable future.

We are deeply grateful to our international team of contributors who have provided insights and analysis from regions and jurisdictions around the world towards this common aim. Their expertise, dedication and perseverance are sources of inspiration.

The EU-funded project Sustainable Market Actors for Responsible Trade (SMART, 2016-2020), of which Beate and several of the contributors are members, has sponsored significant research on corporate sustainability that has proven foundational for this book. The support of the SMART team and our broader joint international networks is greatly appreciated.

In pursuing this project, we have moreover been supported by wonderful institutions and colleagues. For professional and financial support, Christopher is grateful to the University of Georgia School of Law, and Beate is likewise grateful to the University of Oslo Faculty of Law. We also want to express our deep thanks for the sustained financial and logistical support that the University of Oslo has dedicated to this project – including hosting a symposium in March 2018 that provided an invaluable opportunity for our contributors to present their own chapters,

exchange ideas and discuss broader themes in the field of corporate law, corporate governance and sustainability. With the University of Oslo Faculty of Law's generous support, we have benefited from the services of language editors Chris Saunders and Alasdair Graham-Brown, while the Faculty's Department of Private Law has provided us with the research assistance of master's degree students Petter K. Stensholt, Ingrid Stray Reutz and Jonas Thorsdalen Wik. Administrative coordinator of the Oslo Faculty's Research Group Companies, Markets and Sustainability, Mona Østvang Ådum, has given us practical assistance throughout. We thank them all. We also thank Kim Hughes and Tom Randall of Cambridge University Press for their consistent support and encouragement.

As always, however, our warmest thanks go to our families, whose patience, good humour and optimism make everything possible. For reasons that we hope the book itself will amply convey, Christopher dedicates this book to his daughter and son, Claire and Cullen Bruner, and Beate dedicates this book to her daughter, Katarina Sjøfjell.