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Stakeholder Duties: On the Moral Responsibility of Corporate Investors

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Abstract Stakeholder theory usually focuses on the moral responsibility of corporations towards their stakeholders. This article takes the reverse perspective to shed light on the moral responsibility of stakeholders—specifically, investors or 'financiers'. It explicates a distinction between two types of financiers, creditors and shareholders. Many intuitively judge that shareholders have greater or more extensive moral responsibility for the actions of the corporations they invest in than do bondholders and other creditors. Examining the merits of possible arguments for or against treating owners and creditors differently elucidates which arguments can support the moral duties of investors generally, and different duties for different groups of investors specifically. The paper considers three possible lines of arguments, rooting investors' responsibility, respectively, in how they *enable* corporate conduct, how they *benefit* from it, and to what extent they are *complicit* in it. The paper argues that a notion of complicity is the only tenable ground for holding investors liable; sketches an account of complicity based on the recent philosophical literature on collective intention and collective action; and concludes that shareholders but not creditors can generally be seen as complicit on this account.

Keywords Collective intention · Complicity · Corporate ethics · Ethical investing · Financial ethics · Responsibility · Stakeholder theory

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Introduction

Much of stakeholder theory has been a one-way street, focused on investigating the moral claims of various stakeholders on corporations, and conversely managers' duties to these stakeholders. Certainly as presented by its founder, stakeholder theory is a theory of management: it speaks of what managers ought to do, or more specifically for whom they ought to manage (see e.g. Freeman et al. 2007). Most of the vast and varied literature spawned by the stakeholder approach takes the same perspective. The bulk of that literature consists of defences or refinements of stakeholder theory, which aim to either strengthen and elaborate its philosophical underpinnings (for example Phillips 2003) or to nuance the type of answers a stakeholder approach may plausibly give (Donaldson and Preston 1995). A smaller part is made up of those who criticise the conceptual coherence or the practical usefulness of stakeholder theory (e.g. Orts and Strudler 2002). But virtually all of the attention enjoyed by the stakeholder approach follows its original perspective, which asks what claims various stakeholders have on corporate managers or the corporation itself, rather than what, morally speaking, must be asked of the stakeholders.

There is nothing wrong about this focus, given that stakeholder theory originated as a rejection of the view that companies ought to be run for the sole benefit of shareholders. It is understandable that the theory aimed to shift the focus from what shareholders can morally claim from 'their' corporation to what all stakeholders can claim. From both a theoretical and a pragmatic perspective, however, the opposite direction of moral liability seems just as important. If there is a moral relationship between the corporation and its stakeholders, then this relationship surely generates moral duties and responsibilities for the

stakeholders, not simply moral claims and prerogatives. Putting this differently to avoid personifying 'the corporation', the stakeholder approach treats all stakeholders of the same company as (at least potentially) being linked to one another in morally relevant ways. Surely such moral relevance affects what one ought morally to do as well as what one may morally claim.

This alternative perspective—which we may think of as 'stakeholder duties'—has not, of course, gone unnoticed (see for example Goodpaster 1991; Spurgin 2001; Sandberg 2011). It seems fair to say, however, that it represents a minority approach to stakeholder theory analysis. That is reason enough to devote more attention to it.

At the same time, a burgeoning literature takes for granted that corporate stakeholders—in particular, investors—incur some sort of moral liability for the corporations they invest in. I have in mind the ethical (or 'socially responsible') investing literature.[1] What is more, a specific aspect of stakeholder responsibility has taken on great practical relevance recently; namely, the moral responsibility of investors or 'financiers' for corporate activity. Investments—and divestments—partially motivated by ethical concerns are no longer negligible in scale, so assessing the moral responsibility of investors is timely. Sandberg (2011) gives the example of the Swedish fund company KPA Pension, which has run an ad campaign presenting the public with the question 'What are you investments doing right now?' juxtaposed with pictures of weapons or environmental or social degradation. There are many other examples.

This article aims to link stakeholder theory and ethical investing research by proposing some general philosophical arguments about the 'inverse perspective' of the stakeholder approach—the moral responsibilities rather than the moral claims of corporate stakeholders on the corporation or one another. Both theories can be enriched by stronger theoretical foundations for what stakeholders' moral liability for corporate conduct can plausibly be said to be. Here, I focus on those who become stakeholders by investing. I seek to shed some light on the responsibility incurred by investing in a corporation by explicating a distinction between two types of investors: creditors (bond investors) and shareholders (equity investors). Many intuitively judge that shareholders have greater or more extensive moral responsibility for the actions of the corporations they invest in than do bondholders and other creditors. Some of the largest and most ethics-conscious investors in the world are sensitive to the difference: the preparatory report for the ethical guidelines of Norway's pension fund, for example, suggests that an investor's complicity with a corporation's unethical acts may depend on 'whether the investment is in equity or bonds' (Graver 2003). Others argue (and Norwegian policymakers ultimately concluded) that bondholders are morally liable to the same degree as shareholders, or more generally, that any moral relationship created by financing does not vary by the mode of that financing.

I argue that by examining the merits of possible arguments for or against treating owners and creditors differently, we can assess which arguments can support the moral responsibilities of investors generally, and the relative responsibilities of different groups of investors specifically. I examine three possible lines of arguments. The first is that investors' moral responsibility for corporate acts depends on the extent to which they *enable* corporate actions by providing financing. In this perspective, any differential moral assessment of bond- and shareholders would have to demonstrate that corporate activity is differentially enabled by debt versus equity forms of financing. The second is that investors become morally implicated by the financial benefit they can claim on the corporation. If the source of moral liability is being the beneficiary of possibly immoral actions, then it stands to reason that the different financial claims of bondholders and shareholders could implicate them differently in the corporations' conduct. On examining both of these two first lines of argument I conclude that neither succeeds in establishing that shareholders and bondholders have different moral responsibilities relating to their investments. This is because of a broader failure: neither can underpin a plausible justification for investor moral responsibility at all, given the way investing is typically practised in reality.

But thirdly, an argument can be mounted that investors might be morally implicated in corporate conduct because they are *complicit* in such conduct in a way that does not depend on being causal enablers or financial beneficiaries. This article argues that a notion of complicity is the only tenable ground for holding investors liable to any meaningful extent and sketches an account of complicity based on the recent philosophical literature on collective intention and collective action. The main idea is that one can become morally complicit in an action by delegating to a corporation the authority to enter such an action on one's behalf. If such an account can show different degrees of complicity for creditors and shareholders, this argument explains why one group should be held more responsible for corporate acts than the other. The paper concludes that shareholders but not creditors can generally be seen as complicit on this account.

[1] Note, however, that much of the literature on ethical investing is non-normative and consists of empirical studies of how well ethical investment strategies work. One survey article of this kind of literature is United Nations and Mercer (2007).

Preliminaries

I will start by making some preliminary clarifications, assumptions and simplifications that help focus the argument on the narrow issues this article aims to address. First of all, I take it for granted that corporations can indeed act immorally. Though this is uncontroversial in everyday discussions of business, it presupposes a number of philosophically tricky moves. Notably it assumes that it makes sense to say that corporations act at all; it assumes, that is, that corporations can be said to be the subjects of actions. It additionally presupposes that morality applies to their acts—in other words that they are not merely subjects but moral agents—since otherwise they could not possibly act contrary to morality. I believe that these claims can be defended, but this article is not the place to do so.[2] Here, I simply proceed on the assumption that corporations can act wrongly and focus on the question of what moral responsibility investors have for wrongful actions by the corporations in which they invest.

I have so far used the terms 'moral responsibility' loosely and interchangeably with 'moral liability' or 'being morally implicated'. I will not distinguish between the many things these terms can refer to. In particular, I will not distinguish between 'forward-looking' responsibility in the sense of a duty to try to prevent future immoral acts and 'backward-looking' responsibility in the sense of blameworthiness or perhaps a duty to compensate for immoral acts in the past. I believe the basic arguments that follow do not depend in any important way on an exact and philosophically satisfactory definition of responsibility. I think they are instructive as they relate to that concept in its basic and relatively inchoate everyday use. I also believe that any specification of a narrower definition of moral responsibility would still have to grapple with the considerations I present in this article in much the same way. I do return to this assumption towards the end of the paper, where I address two specific rebuttals claiming that the appropriate understanding of moral responsibility as it applies to investors is immune to the arguments that follow; I think these rebuttals can be refuted. In any case, I shall not attempt to refine the notion any further. If upon doing so it is found that my arguments are not robust to a wide range of possible such refinements, I am content to accept that they may only hold for certain narrow notions of moral responsibility.

Having said all this, I do not doubt that the *implications* of my argument, if it is sound, may differ enormously depending on what exactly is meant by responsibility. For different notions of responsibility will themselves have different implications for what one, being responsible, must do or is deserving of (or both). To have 'moral responsibility' for the BP oil spill in the Gulf of Mexico could mean that one ought to have acted to stop it; or that (even though one could not have stopped it) one owes compensation to those who have been harmed by it; or that (even if neither of these is true) one is a proper object of moral disdain and criticism, one from whom others ought to disassociate themselves. But all this goes beyond the more modest aim of this article, which is (to continue with the example) to assess some possible claims about whether BP's bondholders or stockholders are morally responsible for what BP does—regardless of what an affirmative answer would further imply.

In another terminological and conceptual simplification, I draw a dichotomy between stocks and bonds; between equity investment and capital market lending.[3] In reality, there is no such dichotomy. A variety of financial instruments exist that package investors' legal (and presumably moral) claims on a corporation in different ways. As far as claims on its cash flow are concerned, any specification of claims one cares to cook up can be captured by an appropriately structured financial security. But for conceptual analysis the basic binary distinction remains useful. It helps to isolate specific aspects of investing that may be grounds for moral responsibility. The fact that there is a spectrum of securities between 'pure' stocks and 'pure' bonds, and that even these are hard to define, naturally causes difficulties of delineation as one attempts to apply the conclusions of the conceptual analysis to concrete cases. But this comes with the territory of ethical reasoning. Delineating the real world more finely than the theoretical model is a task that needs to be carried out. But it is not the one that needs to be carried out first.

Finally, in everything that follows I ignore the fact that most investors have little clue what the corporations they invest in actually do (most probably do not even know

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[2] I contribute to such an argument in Sandbu (2010, 2011).

[3] I also ignore altogether business that is organised in other legal structures than public corporations (such as partnerships) as well as other non-capital market forms of financing. This leaves out, in particular, bank lending. Carlos Joly has pointed out to me that much lending to business is still carried out by banks; and that banks will frequently impose clauses in their loan agreements that restrict what the borrower may do (typically, of course, out of financial, not moral, concerns). Moreover, loans can be bought and sold, which makes them not all that unlike bonds. The arguments in the main text still apply to such loans, however: the presence of other lenders and the possibility of selling a loan book for the sake of capital gains weaken, as I explain, both the enabling nature of bank lending and the claim that it reaps ill-gotten gains. To the extent that this is not true, of course, I accept that my conclusions do not hold. The complicity argument discussed later may well have to see bank loans as more akin to equity than to bonds. And as far as the enabling argument is concerned, it certainly seems that at least an initial bank lender whose borrowers have no access to alternative financing, does indeed have an enabling function.

which corporations they have placed their money in). I also set aside the complication that much investment is intermediated—for example through mutual fund investment—and that even if there is knowledge of the investment objects at some chains in the link, that knowledge does not trickle down to end retail investors. Ignorance can often be an adequate defence against claims of moral responsibility. But that is a different and more general theme, which does not shed light on the particular issues this article addresses. If my argument about when even knowing investors are or are not responsible is accepted, then a richer analysis could be built by including the likelihood that most investors are ill-informed. But I focus here on the narrower scope of knowledgeable investors.

The Enabling Argument

I am a burglar, and a good one at that. But I am only recently out of jail, and have no capital for the tools of my trade. To raise funds for my lock picks, crowbar, a bag to carry the loot, silent shoes etc., I offer you one of two business propositions. The first is to lend me the funds I need against a promise or contract providing that I will return the amount with an attractive rate of interest in, say, 3 months (enough time for me to put the equipment to good use throughout the summer). The other is to give me the funds on the agreement that I will give you whatever booty I manage to haul after I have deducted a reasonable salary for myself. In either case, I keep the burgling kit.

Most will think that by investing in my shadowy money-making activity, you carry some moral responsibility for my wrongful conduct. People may, however, differ on which of the two types of investments are worse—in the sense of placing heavier responsibility for my moral wrongs on your shoulders—and on the reasons for which a monetary investment in me should taint you with the immorality of my conduct. My own intuitions in this example are weak. My purpose here is to set out, distinguish, and assess some analytical arguments for possible answers.

The most obvious way in which your financing of me gives you moral responsibility for my activities is that they *enable* my immoral conduct. This is a straightforward consequentialist argument: without your financing, I would not have been able to burgle houses, so by investing you allow burglaries to happen that would not otherwise happen. Your investing has morally bad consequences for which you are morally responsible. This is the perspective that Sandberg (2011) attributes to the pension fund advertisements asking 'what are your investments doing right now?'—that is, whether investor financing 'makes a difference' to a company's conducts. It underpins studies such as Leys et al. (2009), which simply takes for granted that investment ethics must be forward-looking and considers exclusively whether an investment or divestment decision can change any ethically relevant facts in the future.

Whether shareholders or bondholders are more responsible, according to this perspective, depends on which form of financing is more enabling. Formally, we have

Argument 1

(a) Investors are morally responsible for a corporation's immoral conduct to the extent that they enable that conduct by financing it.

(b) Equity financing is (more/less/neither more nor less) enabling than lending through the capital bond market. Therefore:

(c) Equity investors are (more/less/neither more nor less) morally responsible than bond investors for the corporation's immoral conduct.

An immediate problem with Argument 1 is how to pin down a specific version of the second premise (b). Does lending or equity investment better enable a corporation to do what it wants, including immoral acts? On the face of it, a million dollars, say, lets me do the same thing whether I raise it through bonds or equity. One may argue that equity funding is more enabling because it does not have to be paid back. And lending could in principle come with the condition that the money lent only be used for specific purposes. (Though this is rare in capital market lending, and in any case runs up against the problem of fungibility: even lending for morally acceptable purposes frees up other money to pursue immoral ones.) But one may equally well argue that because bonds require interest payments (usually) and the return of the principal, it forces the borrower to engage in whatever money-making activity is available to it whereas equity funding at least leaves open the freedom to eschew unsavoury lines of business. On this line of reasoning, bond investors are *more* morally responsible than equity investors because they more strongly encourage immoral behaviours. Encouraging is not the same as enabling, but it has the same consequence of making immoral acts more likely to be committed, which is equivalent within the frame of this consequentialist argument.

In any case, I submit that attempts to distinguish between bond and equity investments for the purposes of premise (b) are fruitless. For if premise (a) is correct, then the most obvious conclusion is that *neither* shareholders nor bondholders are morally responsible for their corporation's conduct, because neither in fact enables. This is certainly true on an act-consequentialist analysis. The point of capital markets is precisely to allow companies to raise financing from a large number of investors, each of which is individually insignificant (and even large investors, such as pension funds, represent thousands if not millions of

individuals). No individual investor's choice to refrain from taking part in an immoral corporation's rights or debt issuance disables that corporation's capacity to commit any wrongful act. Conversely, no individual investor's participation enables the corporation to do something wrong that it was not already able to do.

This consideration is even more definitive for the secondary securities markets. By far the most securities trades—of both equities and bonds—happen in such markets, where investors pick their investments from securities that have already been issued in the past and now merely change hands between investors, rather than participate in new issues from the corporations. Buyers of equity or debt securities in secondary markets are incontrovertibly 'investors in' corporations of whom the question of moral responsibility is legitimately asked, but they have in no way *financed* the corporation in the sense of providing it with funds. If any money has changed hands between secondary market investors and the corporation, it is exclusively the other way (through dividend and coupon payments and principal redemptions). How, then, can such investors be said to enable its actions—even if we sidestep the question of each individual investor's insignificance?

A proponent of Argument 1 may here resort to some version of rule-consequentialism. It is not, she may say, that any individual investor enables a corporation's conduct by lending to it or taking an equity stake, but that investors as a group do so—and individual investors are morally responsible because their act of investing, when practised by enough others, enable the immoral conduct in question. This argument can be extended to investors in secondary markets: the existence of a secondary market makes it more attractive for investors to buy into original issuances of bonds or shares, since they know that they can always sell them in the secondary market rather than hold on to their securities until the debt matures (or forever, in the case of equity). By placing money in the secondary market, an investor commits an action that, if sufficiently generalised, encourages more investment in primary issues.

If such a rule-consequentialist argument can be made to work, it will revive the difficulty of determining whether lending or equity funding is 'more enabling'. But I doubt that it can, for it leads us to absurd conclusions. Here is one: (generalised) investing in original issuance of corporate securities clearly has different consequences than (generalised) buying of the same securities in secondary markets. The former provides the corporation with finance. The latter does not; what it does is to reduce the price at which the former provides the corporation with finance. Even if both of these (generalised) actions 'enable' the objectionable corporate conduct, they clearly do not do so to anything like the same degree. But if Argument 1 is sound, that would mean that if current bondholders and shareholders are morally responsible for the corporate conduct at all, those who acquired their bonds or shares on the secondary market are much *less* responsible than people who first bought the shares and bonds at issuance. This is so even if the wrongdoing for which we are investigating moral responsibility is happening now but the financial securities were issued decades earlier. If this were true, then people who held BP stock long ago are more morally responsible for the contamination of Louisana's beaches in 2010 than BP's current share- and bondholders. This scarcely seems believable—in which case we have a *reductio ad absurdum* of the rule-consequentialist attempt to rescue investor moral responsibility from Argument 1.

The Benefits Argument

Return to the example of my enterprising burglary habit. Another common intuition is that you have moral responsibility for my burglary because you stand to benefit from it. The returns on your investment are dirty money, so your (potential) benefit from my actions sullies your hands.[4] Moreover, with the second (equity-like) type of investment, you stand to benefit *more* the more I burgle; whereas with a loan, your return is the same no matter what I do, so long as I can honour my debt to you. With the 'equity' investment, in other words, your financial interest seems more strongly aligned with my immoral conduct and therefore more sullied—it has a greater character of 'profiteering' from immorality.

More formally, then, we should consider

Argument 2

(a) Investors are morally responsible for a corporation's immoral conduct to the degree they stand to benefit financially from it.

(b) As residual claimants, equity investors stand to benefit more from a corporation the more lucrative is its conduct. Bond investors, as creditors, do not have the same interest in the pecuniary *success* of the company's immoral actions. Therefore:

(c) Equity investors bear heavier moral responsibility than bond investors for the corporation's immoral conduct.

But the problems with this argument are immediately obvious. Looking first of all at the second premise (b), it is not at all clear that the ways in which the two types of investor stand to benefit are all that different. Bondholders usually receive coupon payments. But shareholders receive

[4] Nowhere do I intend to suggest that *I*—and more generally the wrongdoing corporations in which investors place their money—am any *less* morally responsible because you—and investors generally—are responsible as well. That my moral taint rubs off on you does not make my hands any cleaner.

dividends. Of course coupon payments are specified in advance, whereas dividends are discretionary and conditional on the corporation's performance. But not all bonds pay coupons; and some corporations care (and are expected to care) a lot about paying regular and stable dividends. Even when this is not so, we may question why the difference should cast bondholders in the morally more flattering light. One may just as plausibly argue that because bondholders have first priority to their pre-specified returns from whatever immoral business activity is being engaged in, *they* have greater moral responsibility.

I shall not pursue that question further, for the deeper problem is with the first premise (a). In a world of tradable securities the notion of financially benefiting 'from' a corporation's activities is problematic. We have already pointed out that many and perhaps most investors acquire their portfolios in secondary markets.

Similarly, in normal market conditions they can and do offload their investments in a (public) corporation in the secondary market. Most investing is done with this expectation in mind: investment behaviour would look very different if there were no secondary markets. It follows that for many investors, their financial gain or loss is determined in both intention and fact by the fluctuating prices of the securities in stock and bond markets, not directly by any pay-outs from the corporation at all.

Now one may argue that the price of a corporation's stock or bonds will depend *indirectly*, at least in part, on that corporation's profitability, and therefore on its actions. So it is true that the fortunes even of an investor who neither seeks nor receives a payout from the corporation vary according to what the corporation does. And so, a proponent of Argument 2 may say, investors do stand to benefit from a corporation's immoral conduct after all, and the argument goes through. But surely this is far too roundabout a sense in which investors 'benefit from' the immoral conduct for Argument 2 to succeed. There are financial securities whose value is designed to depend on a corporation's conduct in a way that closely resembles stocks and bonds even though they have no legal connection with the corporation in question. This is true of derivatives: the prices of stock options and credit default swaps come close to replicating the price movements in the stock or bond against which they are defined. But it seems absurd to say that someone who sells insurance against a corporation's default (through a credit default swap) must have the same moral responsibility for that corporations' actions as someone who lends the corporation money—even though what they stand to benefit from the corporations' fortune (or lose from its misfortune) is the same.[5]

At this point an advocate of Argument 2 may insist that what matters is not the benefit an investor realizes, nor what investors can reasonably expect to realize. Instead, he may argue, what matter morally are their *legal rights* to different kinds of benefits: fixed interest payments or residual profits. Now to avoid the problem pointed out in the previous paragraph he needs to make the stronger claim that what matters morally is a legal right to claim certain kinds of benefit *from the corporation in question* (for of course the holder of a derivative has legal rights to certain benefits closely tracking the capital gains or losses on actual stocks or bonds—but this is a legal claim on the counterparty to the derivatives trade, not on the corporation itself). But at this point it is unclear what role is left for financial benefit to play in the moral argument. If this reasoning is plausible, then it is because the ability to make legal (or perhaps moral) claims on the corporation itself generates moral responsibility for the corporation's actions. But then the argument has gone away from a notion that investors have moral responsibility because (and according to how) they stand to benefit financially, in favour of a notion that the investor, by entering a certain type of legal relationship with the corporation, comes to be complicit in its actions. That is the argument we turn to now.

The Delegated Agency Argument

I have suggested that attempts to differentiate—or equate—the moral responsibilities of bondholders and shareholders for the conduct of the corporation they invest in by referring to how its activities benefit them or are enabled by their investments are self-undermining. Arguments 1 and 2 falter because, if the ground on which investors are morally responsible is what their first premise says (enabling or financial benefit, respectively), either must lead us to conclude that investors have scant moral responsibility at all, regardless of the financial instrument through which they invest. Returning to the burglary example, we can paraphrase my refutations of Arguments 1 and 2 as pointing out two ways in which the supposed analogy between that example and the financing of publicly listed corporations breaks down. One way the analogy breaks down is that corporations raise finance by issuing securities in capital markets and that no individual investor, especially those in secondary markets, enables the corporate acts in the way that you enable my burglary. That is to say, no investor 'makes a difference'. The other way it

[5] A similar point can be made about investors in *other* companies whose return is correlated with that of the corporation acting immorally. Suppose that instead of investing in Thievery Corporation, you instead put your money into Burglar Alarms Inc. In terms merely of how correlated the return is with immoral activity, can we morally distinguish between the two investments?

breaks down is that investors' financial benefit from owning corporate debt or equity securities is unlike your benefit from my burgling. Because of the existence of secondary markets, investors can and often do rely more or less exclusively on the financial benefit of capital gains from reselling the bonds or shares.

But even if we re-establish the analogy with capital markets it seems possible to revive the intuition that investors in the burglary example have moral responsibility for the burglaries. Assume that, unlike in the original version, I don't ask you for either a loan or an equity investment; instead I issue pieces of paper where I solemnly promise to pay the bearer either a specified regular coupon and a lump-sum at a specified maturity, or payments at the time and in the amount of my choice but on the understanding that I will pay out the surplus after drawing a reasonable share of the booty for myself. (Assume also that there is honour among thieves, and that it is rational to believe my promises.) I offer these promises to anyone interested in as small a denomination as they care to invest, and specify that the promise is valid to any bearer, so these are in effect tradable securities. If you now buy a \$0.01 investment in my activity from one of the hundreds or thousands of investors who snapped up the pieces of paper when I first issued them, you are not enabling my burglary. Nor are you necessarily benefiting from it: you may simply be thinking that the security was too cheap (because of a recent police action against burglary) and hope to sell it at a profit (because you think the police actions will end), with no regard for a dividend or a coupon payment. In terms of financial benefit and in terms of enabling my activities, you are in the same position as someone who invests in a manufacturer of burglar alarms. Arguments 1 and 2 do not hold, even if they may have applied in the original, simpler, version.

And yet even after filtering the example in this way, one suspects that there remains a residual of something morally untoward about your investment. This suspicion, I propose, is that you are 'in on the act'. That is to say: the intuition that the investor has moral responsibility for the burglar's actions is an intuition that the burglary is not uniquely the burglar's action, but also to some extent the *investor's* action. Inasmuch as the burglar burgles *on the investor's behalf*, the investor is a co-author of the wrongful act, and therefore *complicit* or morally co-responsible for it (the notion of complicity is analysed thoroughly by Kutz (2000)). In this perspective, investors have moral responsibility for the corporate acts if the corporation represents them. And in this, the two types of investment seem strikingly different. Equity investors are much more appropriately seen as represented by the corporation than bondholders. Our intuition for why this is so is owed in part to shareholders being residual claimants, so that the return on shareholders' investment depends on profits from the corporation's conduct in a way that that bond returns do not. But aside from this (which we have seen may not ultimately be a morally relevant distinction), the more important consideration is that legal construction *makes* corporations represent their shareholders in a way that it does not for bondholders. Conversely, shareholders themselves can be seen as delegating to corporate managers—by voting for them—their authority over corporate decision-making.

Admittedly, many writers have objected to seeing such considerations as grounding any special claims for shareholders (see for example Boatright 1994 or Stout 2002). Now it should be noted that I am offering them as grounds for moral responsibility, rather than grounds for moral claims. Even so, the argument under consideration does treat shareholders as 'special', so I will address some of the main objections in the next section. For now I put them aside in order to explicate the argument.

The thought that shareholders are morally responsible for corporate conduct because the corporation acts on their behalf can be formalised as

Argument 3

(a) Investors are morally responsible for a corporation's immoral acts to the degree that the corporation *acts on their behalf* in carrying out those acts.

(b) As heirs of the original incorporators' rights of representation vis-à-vis the corporation, shareholders are rightly seen to jointly delegate agency to the corporation, in a way that bond investors never do. So the corporation represents the shareholders in a way it does not represent bondholders. Therefore:

(c) Equity investors bear heavier moral responsibility than bond investors for the corporation's immoral conduct.

I have argued elsewhere that this is the correct view of why and to what extent shareholders are morally responsible for corporate conduct.[6] Here I simply sketch the relevant parts of the argument for the view as it applies to the question addressed in this article. The first premise (a) is hardly new; it is a version of the presumably uncontroversial idea that one can be morally responsible for wrongful actions one has made another carry out on one's behalf. As Thomas Hobbes pointed out long ago, this is something a group of people can do together to. Our ability to jointly delegate our agency explains how a *collective* can 'own' an action:

> A multitude of men are made one person when they are by one man, or one person, represented; so that it be done with the consent of every one of that multitude in particular…every man giving their common

[6] See Sandbu (2010).

> representer authority from himself in particular, and owning all the actions the representer doth, in case they give him authority without stint; otherwise, when they limit him in what, and how far, he shall represent them, none of them owneth more than they gave him commission to act.[7]

A group of individuals, in other words, can be complicit in an action if they have 'authorised' someone to act in such a way on their behalf.

The second premise (b)—that shareholders jointly delegate their authority in the way Hobbes describes—is what needs explaining. For surely it is only in rare cases that shareholders in fact expressly authorise any specific actions by corporations at all, let alone immoral actions. (Indeed most of the time investors have no idea what their corporation is doing.) But the recent philosophical literature on joint intentionality and joint agency provides a solution to this problem. There are many competing accounts of joint intentionality, but most are compatible with the argument advanced here. For illustration, consider Margaret Gilbert's concept of 'joint readiness':

> *[A] set of persons are jointly ready to share in action A in circumstances C* if and only if it is common knowledge among them that they have mutually expressed their quasi-readiness so to share.

where quasi-readiness

> involves *a conditional commitment of one's will*, made with the understanding that if and only if it is common knowledge that the relevant others have expressed similar commitments… the wills are together committed or dedicated to the pursuit of the goal in question in the circumstances. (Gilbert 1989, pp. 198–9)

Note, further, that people can commit their wills not just to actions but to intentions. When Gilbert's conditions hold, not only does each individual share in the group's doing A, they also share in the *intention* to do A together.[8] And even if the group never succeeds in doing A together, they do succeed in jointly *intending* to do A together. Now since intentions can be open-ended, a group can share an intention to act together even if each member is largely ignorant both as to who exactly shares in the intention and what precisely it is that they intend to do together. Gilbert uses as an example

> this question from Peter to his wife Rita: 'Where are we going on holiday this year?' Their holiday plans may already have been made by Rita, according to a joint commitment of the two to the effect that she may make these plans. They are now therefore jointly committed to going to wherever she has decided to go. (Gilbert 2006, p. 103)

Peter delegates agency with respect to this decision to Rita, who is thereby given the moral authority to act on behalf of both: their collective intention is whatever she decides it to be.[9] It suffices for joint intentionality that the parties commit to doing *something* together, without specifying exactly what. They must, however, minimally commit to some procedure for determining (at a later stage) whatever is open-ended about the actions the collective intends to take.

But this is precisely what is done when a company is incorporated. In legal incorporation, the incorporators jointly authorise a decision procedure (a board of directors, which in turn delegates to executives) to exercise agency on their behalf with respect to how the capital they put at the new corporation's disposal is to be deployed—within specified parameters or for specified purposes. (Corporate law will provide details on the exact decision procedure, by which they choose to abide by incorporating.) When they sell their shares in the corporation, they transfer their rights

[7] Hobbes, *Leviathan*, Chapter XVI (Hobbes 1991 [1651]). In the term 'by…one person' Hobbes includes the possibility of being represented by a group, e.g. a board of directors: 'And if the representative consists of many men, the voice of the greater number must be considered as the voice of them all.' *Ibid.*

[8] The attitudes of the individuals jointly committed to sharing in the action are what have been called 'we-intentions'—intentions about what we, as a collective, shall do together (see Tuomela and Miller 1988). Collective or joint or shared intention (terminologies differ across authors) then consists of a combination of 'we-intentions' in the members of the collective. Bratman (1993) defines a shared intention to J (in a two-person case) thus:

We intend to J if and only if:

Footnote 8 continued

1. (a) I intend that we J and (b) you intend that we J.
2. I intend that we J in accordance with and because of 1a, 1b, and meshing subplans of 1a and 1b; you intend that we J in accordance with and because of 1a, 1b, and meshing subplans of 1a and 1b
3. 1 and 2 are common knowledge between us. (p. 106)

And J is our shared intentional action when we J as a result of 1, 2 and 3.

Arnold (2006) points out that these conditions can logically be fulfilled by groups larger—indeed much larger—than two; thus large groups such as corporations can have shared intentions. In practice it may be harder for a large group to form such a joint intention—but this is precisely the problem legal incorporation is designed to solve.

[9] Note that this is a feature of intentionality generally, not just of joint intentionality. I can intelligibly form an individual intention (an I-intention) to do whatever somebody else (my friend/son/therapist) decides for me, even if I do not know what that will be. Note also that the same example works for larger groups than two: her entire extended family may be committed to going wherever Rita decides the extended family will go.

with respect to the corporation to new shareholders—who, as it were, step into the incorporators' shoes. It is in this sense we may say that incorporators and later shareholders jointly delegate their agency with regard to corporate decision to the company management.

It should be clear now why Argument 3 allows a distinction to be made between the degree to which shareholders and bondholders are morally responsible for corporate wrongdoing. Equity investing and lending differ in whether they enmesh the investor in the kind of joint delegated agency that gives rise to complicity. Shareholders can be seen as having jointly delegated authority to act on their behalf. This is not true of bondholders, who have never gone through a process like incorporation (or assumed the position of someone who has) and whose relationship with the corporation is one of a contract rather than one of representation.[10] Even if Argument 3 is correct, of course, it does not mean that bondholders have *no* moral responsibility for corporate conduct—just that they have an appreciably different and lighter moral responsibility compared to shareholders, other things being equal. But that does not rule out, for instance, that their moral responsibility for serious wrongdoings could indeed be so grave that it they would have a moral duty to divest from the bonds in question.

Objections and Conclusions

I have asked whether the moral responsibility that investors bear for corporate wrongdoing differs across two classes of investor—bondholders and shareholders—and considered three possible avenues for assessing a difference. The first two fail, but in instructive ways. They show that if the criterion for investors' responsibility is either that they enable or financially benefit from corporate wrongdoing, then *neither* class of investor can be held morally responsible to any significant degree. The fact that my refutation of Arguments 1 and 2 relies on characteristics of modern capital markets reflects an important moral fact: that the types of relationships we conventionally see as underpinning moral responsibility have been undermined by the growth of financial capitalism. Traditionally, financing was based on direct relationships between an investor and a business (indeed they were often one and the same), and in personal relationships it is easy to apply Arguments 1 and 2 to establish the moral responsibility of the investor for business conduct. But in modern capital markets, these connections are pulverised. The challenge for moral theory is to show why moral responsibility is not pulverised, too.

That, I have proposed, is the merit of Argument 3, which justifies our intuition that capital market investors may indeed have moral responsibility for their corporation's conduct. But if Argument 3 is correct—if moral responsibility flows through the complicity generated by the corporation acting *on the investor's behalf*—then the moral responsibility borne by shareholders is of an altogether different order, and weightier, than that attributable to bondholders. It means that while the institution of the publicly traded joint stock company does not remove the moral connection between investor and the corporate acts, impersonal securitized debt markets may to a greater extent do so.

Before concluding, I address objections to the line of argument I have advanced. An earlier version of this article raised two objections, both claiming that my arguments are not robust to different definitions of the term 'moral responsibility'. Christopher Kutz suggests that they are only valid with a strong definition of moral responsibility as being the proper object of blame or punishment for immoral acts.[11] But for some harmful effects of business actions, such as climate change, it is rarely the case that corporations *intend* to do wrong; it is rather an unwanted side effect of legitimate activities. Therefore, Kutz argues, the question is not one of blame or punishment, but simply of whether investors have a special role in bearing the cost involved in changing course. The burden of proof for such a role, he suggests, is much lighter than what I assume in this article. I have two answers. One is that not all corporate misbehaviour fits this mould. Companies do also commit outright wrongs for which they should be blamed or punished, and it is important to ask whether investors should take a share of that blame or punishment. The other answer is that even for the case of climate change, Kutz shifts the focus to what it is legitimate for third parties (e.g. governments) to impose on investors (e.g. through carbon emissions limits). That is an important question. But the question remains *what investors themselves ought to do*—for example in the absence of sanctions imposed by others, or in response to what others impose on them. Does the BP spill mean that there is a moral problem with investing in oil companies? That is a question an ethically conscious investor must ask; Kutz's reframing does not help to address it. I suggest that my arguments will be relevant to any attempt at an answer.

The second objection asks whether the appropriate notion of moral responsibility of investors is not rather one of 'moral taint', where investors become morally

[10] This distinction is well-understood in the lay debate on 'who corporations are for'. What I suggest is that the lay view that 'the corporation is for its shareholders' has much truth to it—though a proper understanding yields conclusions that are much less favourable to shareholders' pecuniary interests than what is often said.

[11] Kutz, comments at the Oslo Climate and Finance conference, September 2010.

implicated in wrongdoing simply because they are associated with an immoral corporation. For being morally tainted, it is not necessary to have either of my three channels through which responsibility may be transmitted—enabling, financial benefit, or complicity. Even so, it seems to me that these channels remain at least *relevant* to how morally tainted one is by association with a company. But more importantly, moral taint is not, I submit, the right way to think about investor responsibility. This is not only because of the general problem that moral taint is both subjective and insufficiently indiscriminate.[12] It is also specific to the business case: moral taint captures the wrong associates of the corporation. For it seems that most investors are not usually seen as morally tainted at all, whereas perfectly innocent employees of an Arthur Andersen, a Lehman Brothers or a BP are often stigmatised for their employer's misdeeds. Moral taint spreads too haphazardly to provide a good account of whatever is *special* about the responsibility of investors.

I must also briefly address a particular objection to the specific view I have defended—the delegated agency argument. It relies, as I spell out in greater detail in Sandbu (2010), on a claim about how we should morally understand the fact of legal incorporation.[13] The claim is, roughly, that the fact of legal incorporation entails that the corporation and its managers ought, in a moral sense, to represent the shareholders. This claim tends to be resisted because it figures in some 'shareholder primacy' views that assert, as Milton Friedman most famously did, an ethical duty for managers to create as much profit for shareholders as possible. A good example of such rebuttals is Stout (2002). We must first of all note the *non sequitur* that Stout and others in her camp commit: as I argue at length elsewhere (Sandbu 2010), seeing the managers as shareholders' representatives does not in fact entail shareholder primacy conclusions. Representing someone, in the morally relevant sense, will entail tending to the moral responsibilities of those one represents. One cannot, as Goodpaster (1991) points out with his aptly named *Nemo Dat* principle, be morally permitted to pursue someone's interests on their behalf by means they themselves are not morally permitted to employ. So we must distinguish between 'representing shareholders' and 'being morally bound to maximise profits' (or whatever it is shareholders care about). The former simply does not entail the latter. Given the common conflation of these two notions, however, rebuttals to the notion that shareholders are morally special usually target both indiscriminately. Here I can only briefly show why such rebuttals fail against the idea of shareholder representation even if they succeed against the idea of shareholder primacy.

Legal scholars such as Stout object to lay arguments that shareholders are special because they 'own' the corporation, or because they are the residual claimants to profits. As a matter of legal fact, these claims are, of course, incorrect (Stout 2002). But at issue here is whether shareholders are special, *morally* speaking. Since shareholders are the successors of the original incorporators, it therefore matters whether the act of incorporation puts incorporators in a moral relationship with the corporation that differs from the relationship any other 'stakeholder' may be in. Now this is something about which the law itself tells us precisely nothing. Corporate law delineates the legal relationships the incorporators enter; what that means morally is a question for moral philosophy. And any plausible moral theory must entertain a moral difference between *setting up* an institution of collective action and *engaging with* such a collective. In the case of corporations, every stakeholder does the latter, but only incorporators do the former. There is no plausible moral theory under which their intentions in doing so are irrelevant. On the contrary, it is precisely because they renounce legal rights to dispose over the capital they put into the corporation and severely limit their legal powers over how the corporation is run—as Stout rightly highlights—that we may presume that they do so not because they do not care about these things, but because they find such legal renunciations conducive to the realisation of certain goals they have in common (usually but not necessarily profit). But if so, then the incorporators do intend for the corporation to act on their behalf, and they do consider the managers their representatives. Now the delegated agency argument (Argument 3) derives from this a moral complicity with the corporation's actions. Here I simply defend the premise of Argument 3: that corporate officers represent incorporators (and their successor shareholders) in a moral sense even though they do not do so in a legal sense. If, as I suggest, incorporators set up the corporation with the intention that its management pursue their goals (why else did they do it?), the burden of proof is surely on those who think that this is morally irrelevant. That is a burden which must be carried by a normative moral argument, not by a positive analysis of how the law allocates legal rights and responsibilities.

As a final remark, it is worth noting that in this analysis I have ignored the various exonerating factors that may mitigate shareholders' responsibility. The most obvious ones are ignorance (most shareholders do not know,

[12] As Silver (2006) points out, '[t]here are no rules *internal to moral taint* constraining how people make judgments about who is relevantly related to whom'—allowing for example the 'barbaric kind of thinking' according to which all Jews are responsible for the death of Jesus.

[13] There is also a separate claim about how moral responsibility acquired by incorporators is inherited by later shareholders. I ignore this here as I think it is less controversial than how to interpret the act of incorporation itself. An argument is developed in detail in Sandbu (2010).

although they often ought to know, what their corporations are up to) and, more importantly, impotence (there is very little shareholders can do to alter corporate conduct). Thus I do not want to claim here that no matter what the facts, shareholders are morally responsible for corporate conduct.[14] But I do claim that unless mitigating factors can be advanced, the presumption must be that shareholders do indeed have such moral responsibility. This may in some cases entail that they have a moral duty to divest, or that they have a moral duty to use their voting rights and other means of influencing management to push their corporation away from its wrongful conduct, even if that would lead to a loss of financial reward for themselves.

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[14] Nor, of course, do I want to claim that bondholders have no responsibility at all, if the simplifying assumptions do not hold. One can presumably even imagine unusual circumstances in which bondholders are *more* responsible than shareholders. See also footnote 3.