Global Responsibilities
Who Must Deliver on Human Rights?

Edited by
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All of the chapters that follow were written or published in the past three years. Most of the contributors refer to each other's work, often at length. As such, the volume represents the latest, most self-conscious and interconnected work on obligations, rights, and globalization.

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The "responsibilities approach" to human rights explored in these pages is in its relative infancy. It will develop and have a great impact only as a collective project. I warmly invite comments and criticisms, which may be sent to: akuper@ashoka.org

Andrew Kuper
CHAPTER 12
The Moral Dimension of Corporate Accountability

MELISSA LANE

Introduction
Calls for the greater accountability of corporations have filled the political landscape in recent years, from anti-globalization activists and academics alike. But is corporate accountability more than a placeholder for the millennial aspiration to popular control of capitalism? It is argued in this chapter that while corporate accountability to the law is essential, both legal and looser ideas of social accountability need to be bolstered by a robust understanding of what may be called either "corporate moral accountability" or "corporate moral responsibilities". Although I defend the validity of the former term, I eventually adopt the latter on grounds of familiarity. After distinguishing between legal, social, and moral accountability, I proceed to ask whether corporations can be subject to moral responsibilities, and whether they should be. I conclude by canvassing specific responsibilities that corporations might be held to bear.

First, some general remarks on the sudden popularity of "accountability" as a concept in political life, and its place in the vocabulary of political thought. At least two currents converge in contemporary Anglo-American appeals to accountability. One is the legacy of the Thatcherite and Reaganite revolutions in government. The introduction of competition and private
sources of supply into the public services at once undermined traditional chains of accountability directly to ministers while promising new forms of accountability. Particularly in Britain, where centralized parliamentary government continues to promote reforms along similar lines, clients have become customers to whom service-providers are accountable, while new agencies can be established to regulate and set standards for private suppliers. Yet accountability can slip through the cracks of these vaunted new mechanisms: The extent to which corporate confidentiality clauses can undermine accountability constitutes a dark underside of these developments.3

The other driver for accountability-talk in recent years has been the broad discourse of globalization. Despite endless academic rebuttals, popular and media discussion has been haunted by the idea of globalization undermining the power of the state. Power in these stories attaches instead either to multinational corporations, or to international bodies and regimes such as the World Bank, International Monetary Fund, and World Trade Organization. (Because the next chapter will discuss some of these international bodies and regimes, the focus here will be on corporations.) The globalization story speaks of “private” corporations undermining “public” power, as in this representative quotation from Benjamin Barber:

International markets spin out of control not just because the economy has been globalized, but because, nation by nation, we have conspired in the transfer of sovereignty from popular hands that are transparent and accountable to private hands that are neither.4

Such an exhaustive distinction between public power and private corporations, however, overlooks important senses in which corporations can be considered “public,” more public certainly than ordinary “private” individuals. Many corporations are “public” corporations in the sense that they are open to public shareholding and trading. Moreover, they are constituted by the public power of the state that grants them incorporation, unlike private individuals who exist independently of state action. Incorporation itself exists to further general public purposes, invented as a literal privilege reserved for those bodies whose incorporation would serve the state or Crown or public interest. Because corporations are publicly created and often publicly owned, their power feels to many citizens like a quasi-public power rather than a purely private power. Accountability thus becomes envisaged as a bridle for the power of such entities, a new mechanism distinct from the traditional solution of national electoral control, but somehow still linked to the fundamental value of political legitimacy.

For these two reasons, and no doubt for others, accountability has come to occupy a central place in political discourse and debate, despite having been a rather marginal concept in political theory and the history of political thought. While various mechanisms of accountability have been observed in diverse regimes—beginning with the Athenian requirement that magistrates give an account of their actions at the end of their period of office—political theorists have tended to see accountability as a rather technical instrument for achieving legitimacy. Those who have focused on it have largely confined their interest to the accountability of elected representatives to their electorate.6 Indeed, the paradigm of election has mesmerized political theorists, to the extent of distracting them even from the question of the accountability of the executive to the legislature that has preoccupied their colleagues in political science. Yet accountability through election is the very context that the Thatcherite/Reaganite legacies and the effects of globalization purportedly conspire to marginalize. In the absence of an electorate and a clear theory of political legitimacy, those interested in extra-legal forms of corporate accountability find few resources in political theory on which to draw.

Legal, Social, and Moral Accountability
Can political theory now rise to the occasion by defining accountability as a concept? Several instructive attempts have been made to do so. Most identify a two-party relationship, A being accountable to B, and stress that A must be at least answerable to, and at most sanctionable by, B, for some set of actions.7 Yet this two-party structure does not apply to the case of moral accountability. Again, political theorists tend to assume that accountability obtains only where some institutional mechanism exists to enforce it, yet this too is inapplicable to the idea of moral accountability. Similarly, most definitions assume that accountability runs from A to B just in case A has been authorized by B to act on her behalf. Yet this principal-agent structure, embedded as it is in economics, does not capture all the senses of accountability in the common law (where, for example, trustees are not agents for a principal in the same sense; explicit authorization is not always required; and an agent’s act may create new accountabilities of the principal to third parties).8

As these points indicate, the attempt to define a single skeletal concept applicable to all contexts of accountability may be misguided. Rather than attempting to define one here, I shall instead rely on a working hypothesis that conceptions of accountability display family resemblances—one drawing on ideas of answerability, responsibility, and sometimes scrutiny and sanction—in the various contexts in which they arise. The two
primary contexts that apply to corporate accountability are the legal and the moral, though they are both implicated also in a looser conception of social accountability. An evaluation of these contexts and the conceptions of accountability embedded within them provides the framework within which the unspecified demand for "corporate accountability" must be understood.

The notion of corporate accountability to the state, within the law, is straightforward. Law sets requirements for which corporations are held accountable by the courts, responding to initiatives by public prosecutors or private plaintiffs, and wielding a range of sanctions from fines to imprisonment of corporate officials. In adversarial legal systems, the emphasis is not on what the corporation voluntarily acknowledges, but rather on what prosecutors or plaintiffs can elicit in the course of the trial. Correspondingly, sanctions are ordinarily seen as effective because of the financial loss they impose and the compensation they recover, rather than because they evoke acknowledgement and reform on the part of the corporation. The emphasis in the legal context of accountability is on the ability of the court to require corporate accountability and to sanction it where necessary. This includes both financial and operational accountability (for health and safety, environmental impact, and so on), and also internal accountability in terms of the required structure of the board and its relationship to the management and to shareholders. Thus this conception exemplifies the assumptions that accountability must involve requirement, specific mechanisms, and sanction.

Calls for reform of the legal treatment of corporate crime have focused in part on smarter sanctions, which can evoke and interact with corporate self-awareness and so the possibility of future behavioral change, in part on the need to impose in extremis the ultimate sanction of "corporate capital punishment" or dissolution. The issue of globalization, for its part, has raised the question of the extent to which corporations can already be held accountable in one jurisdiction for crimes committed in another, and the extent to which laws can be developed to impose such accountability. More general demands for greater corporate accountability are translated into calls for further legal control of working conditions, minimum pay, environmental standards, and other such desiderata. So, for example, the passionate call for a "Framework Convention on Corporate Accountability" made by CorpWatch in January 2002 consists entirely of proposals for new legal requirements on corporations (including reporting requirements, consultation, extended liability, rights of legal redress and legal aid, and community rights to resources, veto rights over development, and rights to compensation). These would be backed by sanctions including suspending stock exchange listing, fines, and de-chartering or withdrawal of limited liability status. As this example shows, despite existing limits to the scope of corporate accountability within the law, even trenchant critics of corporate activity continue to hold that law provides the most effective way in which corporations can genuinely be held accountable.

This contention is fundamentally correct. Accountability in its fullest sense can only be demanded of corporations by and through the law. But this conclusion should give activists calling for "greater corporate accountability" pause. For in an imperfect world, legal accountability of corporations leaves gaping holes not only in weak states, but also in mature democracies. First, the laws applying to corporations may be out of date, so that corporations can exploit new technical or social developments before law catches up to hold them accountable for doing so. Next, the laws passed are often shaped by the intervention of special interests (including corporations themselves), so that they do not demand accountability for certain wrongs that corporations do. Finally, even where laws exist to hold corporations accountable, the corporations may choose to risk non-compliance and may defeat any attempt at prosecution, in both cases relying on legal staff who often dwarf public prosecutors in the skills and resources they command. For all these reasons, legal accountability alone—despite its virtues of clarity and sanction—falls far short of the expectations for control of corporations so prevalent in popular discourse today.

For this reason, the call for "corporate accountability" sometimes appeals instead to a vaguer notion of informal social—rather than legal—accountability. Modeling itself on the legal, the demand for "corporate accountability" to the "public" implies that some actors in civil society (often the very non-governmental organizations—NGOs—making the demand) can stand in for the state in being entitled to hold corporations accountable on behalf of the public. Civil society processes of publicity, pressure, boycott, and so on are de facto treated as the appropriate institutional mechanisms to enforce that accountability. But civil society actors have neither authorized the corporations to exist (a state has done that) nor are they uncontroversially identifiable as being owed accountability (as is the state). While civil society pressure is not illegitimate per se, it does not contain within itself an objective account or arbiter of its own legitimacy. The danger of goalposts being moved, or fixed where they should never have been placed, is real.

Such social pressure risks falling into the trap of opposing static invocations of virtue, the NGOs proclaiming their virtue, the corporations defending theirs. Instead, what is needed is an objective criterion, not one that will settle the issue as a deus ex machina, but that can rather provide the interpretative terms and standards for the parties on both
sides to debate. This is the role of moral accountability. Moral accountability underpins calls for greater legal and social accountability alike by providing a standard of expectation and assessment, while in the meantime opening the door to corporate initiative as well as activist pressure. It places the corporation and its critics on an equal footing in which both sides can seek to defend the principles they adopt and their judgment of the application of those principles in a given case.¹³

What then is moral accountability? Whereas law fits the common assumption that A is accountable to some distinct and identifiable B (the corporation is accountable to the law), morality does not. For morality holds both that A is accountable to herself to her own judgment, and that A is accountable to moral agents generally—but not that there is someone identifiable, B, who stands in a uniquely privileged position. Moral accountability can apply to any agent capable of governing their conduct according to moral requirements, without this implying that the agent is a "moral agent" in the full sense of the term, one to be accorded rights and respect as well as responsibilities.

Accountability to oneself derives from religious assumptions that one is accountable to God for one's actions and one's beliefs.¹⁴ But God being a normally silent, and in the last hundred years a largely disappearing partner for many, the onus of accountability is thrown back on the individual and her own judgment. One must take responsibility for one's beliefs and one's actions and for scrutinizing and judging them in accordance with what (one believes) the substantive canons of morality demand. Here, there is no two-place relation: Scrutiny is a reflexive matter, and A's own judgment of her responsibility is more fundamental than any external pressure or sanction.

Like accountability to oneself, accountability to moral agents generally is a feature of contemporary thought with a specific genealogy. The secularization of moral thought performed in different ways by Hume, Smith, Kant, Bentham, and their followers has made it almost axiomatic that morality is a matter of what one owes other people. While this standard is in the nature of a thought experiment for the deduction of moral principles, such a stance for moral theory cannot wholly isolate itself from social pressures in which the moral and the social indeed intermingle. The need to ask oneself what one owes other people opens the door to the claims that some of those actual others might make, and so to an open-ended if imperfect engagement with real others and real scrutiny, which cannot be entirely rejected on pain of losing one's own internal standard of judgment. Sanction may accompany scrutiny, though it will do so not via any institutional mechanism but rather via the informal interactions of everyday life: One may be shunned, lambasted, embarrassed, or avoided if one is judged to have failed in something one was accountable to do. So there is no single B, no institutional mechanism, and no "obligation" on or "requirement" of A to account to B, yet a meaningful sense of accountability here persists.

Consider, for example, works by Robert E. Goodin¹⁵ and Thomas Scanlon¹⁶ both of whom make accountability central to their accounts of basic moral demands. It is claimed that one is accountable to others for acting in such a way as to protect the interests of the vulnerable (Goodin) or for acting according to principles that others could not reasonably reject (Scanlon). In both of these characteristic modern moral systems, accountability inheres in relationships among (moral) equals without any need for explicit authorization or contracting to establish its basis or terms.

There is a sense in which such talk of moral accountability is merely a metaphor, a way of testing what morality requires rather than a specification of obligations owed to and enforceable by distinct other people. Morality does not require me to miss my plane in order to listen to the haranguing of a street preacher, for example. But it is also true that what moral accountability does require of me can only be settled by judging between claim and counterclaim. If I plug my ears and close my mind to all counterarguments to my own view of my moral duties, I cannot know that that view is justified. While in theory I could generate all possible counterarguments myself, in practice moral agents will be enmeshed in debate with others who advance claims that they might not have thought of themselves and that they owe to themselves and to others generally to consider. Moral accountability thus shades into social accountability again, but it does so now with a putative objective standard in mind for social actors to debate. If corporation Y should listen to what NGO Z says, and vice versa, this is not because of the identity of either, but because of the strength of the arguments put forward. This is a subtle distinction, but one that opens the door in the best case to cycles of argument rather than cycles of intimidation. Moral accountability in short seeks objective moral standards, but lives in the competing contestation of claims about what those actually are.

One common objection made, for example, by the pressure group Corpwatch is that moral accountability is merely "voluntary" (we might better say "optional," since voluntariness is a key feature of moral action in Kantian theory) in contrast with compulsory or mandatory legal accountability.¹⁷ But this is to misunderstand the nature of moral demands. While they govern voluntary actions, moral demands are not equivalent to demands that one arbitrarily chooses or fails to choose to impose on oneself. Even in a Kantian view, while moral requirements are imposed on the will by itself, this is done in conformity with reason. Moral demands may
require agents to establish binding commitments rather than to operate through "voluntary" (in the conventional sense) initiatives. To say that corporations have moral responsibilities does not imply that these enjoin only optional corporate actions, nor, as argued earlier, that legal accountability is either obsolete or secondary. Moral demands will not by definition have the compulsory mark of the legal. Nevertheless, they needn’t be considered to be purely "optional," because they may require mandatory actions and they may also require that corporations work toward a legally binding regime on themselves and others.

Moral accountability, then, has a life of its own, independent of the existence of agent-authorization or accountability-compulsion. It is applicable to those whose conduct can and should be governed by moral requirements deriving from the ways in which people should be treated, not only to those natural persons who figure in the fundamental justifications for such requirements. Legal and moral accountability confront us with two sharply divergent conceptions of the term. The legal conception stresses institutional mechanisms, defined assessors, and sanction over sense of responsibility; the moral conception is devoid of the institutional and the well defined, and stresses responsibility over sanction. Having defended a conception of moral accountability, however, it is now prudent to replace that term with the term "moral responsibility." Because the legal conception of accountability with its attendant sanctions and mechanisms is so much closer to the popular everyday usage of the term, it is easiest to conform to popular usage by restricting the term "accountability" to the legal conception that to avoid fruitless controversies about the fact that the moral conceptions lack such sanctions and mechanisms.

The thesis of this chapter can now be stated as follows: Legal corporate accountability is the highest priority, but needs to be supplemented with corporate moral responsibilities. Compared with some elements of the "corporate social responsibility" (CSR) literature, the corporate moral responsibilities approach emphasizes moral constraints on what corporations ordinarily undertake, rather than additional optional positive actions that they may choose to take. It is more important that corporations not avoid paying taxes than that they give a small donation to charity. Compared with other discussions of CSR, the present approach does not simply involve social pressure, but explicitly identifies an underlying moral standard that can serve as common (or contestable) ground between corporations and their critics. The emphasis here is also on the prevention of harm caused by corporations, rather than as in David Miller’s chapter on the rectification of harm however caused; the specific question of what responsibilities corporations have to rectify situations of injustice that they have not caused is addressed in the chapter by Onora O’Neill.

Yet it will be immediately objected that corporations cannot bear moral responsibility—for they are not full moral agents—and that they should not bear it, for they are entitled and should be expected simply to realize their profit-making purpose. The remainder of this chapter considers whether corporations can bear moral responsibilities; whether they should be held to do so; and what, if anything, it is for which they should be morally responsible.

Can Corporations Be Subject to Moral Responsibilities?

In the early years of the common law doctrine of equity, a breach of the terms on which land held in trust was sold could invalidate the sale only if the purchaser knew of the trust arrangement: for only then could he be bound in "conscience" to obey it. Corporations posed a problem for such a doctrine, for they were held to have no conscience and so to have no moral prohibition—hence to be subject to no legal prohibition—on breaking the terms of a trust. But the doctrine evolved, through a notion of "reasonable expected knowledge," to the evasion of the conscience restriction altogether. So for practical purposes the law came to hold corporations, like anyone else, responsible in such circumstances. The historian Maitland summed up the situation thus: "... we read in our old books that a use cannot be enforced against a corporation because a corporation has no conscience ... [but] we have rejected the logical consequence of a certain speculative theory of corporations to which we still do lip-service." 18

While the practical import of the theory of corporations as having no conscience may, as Maitland observed, have fallen away in the common law, it survives today in philosophical and practical objections to the idea of corporate moral responsibility. Many claim that corporations are essentially amoral, moral duties having no purchase on them: The idea that they might observe moral standards in their conduct without legal or other external compulsion is simply a delusion. Such views implicitly agree with Maitland’s "old books" on the common law, exemplified best in the comment by the eighteenth century Lord Chancellor Edward, First Baron Thurlow (1731-1806): "Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?" 11

Without soul or body of its own, a corporation is either a fiction; an artificial legal form conferred on a preexisting group; or an artefact all the way down. The artifice-all-the-way-down theory has attracted most support in recent years, usually articulated in the terms of the common law treating corporations as "artificial persons" as opposed to "natural" ones. 20 The moral responsibilities of such an artificial person may derive either from those of its representatives (for an artificial person must itself be
represented by a natural person or persons if it is to be able to act) or from its own peculiar constitution.

Certain moral responsibilities do carry over to the artificial person from the natural ones who act in its name. Because all natural persons have the fundamental moral duty not to enslave others, no role can absolve them of that duty per se: Therefore, since no one could morally act for it to do so, no corporation can permissibly enslave people either. Conversely, not all moral duties of natural persons apply to corporations. Corporations have no duty of filial piety, for example, nor do their representatives qua representatives. Nor are corporations necessarily entitled to the protection of their rights, since rights in their case derive from positive legal stipulation rather than from fundamental moral features. Corporations are not "full moral agents" in the sense that they are equally and fundamentally entitled to moral protection and liable to moral responsibilities; in the case of artificial persons, moral protection and moral responsibility may not be commensurate and may well derive from utterly distinct roots. Even the recent judicial extension of Bill of Rights protections to American corporations has been an uneven, incomplete, and somewhat inconsistent march.

New moral responsibilities accrue to natural persons who represent corporations in their capacity as representatives. Because these representatives represent institutions of a certain kind—instutions that can, as specified in the chapter by Michael J. Green, make decisions and act on them, and whose capabilities to amass and analyze information and to effect changes in the material world may far exceed those of most ordinary people—they incur new moral responsibilities to do with their exercise of these new capabilities. Unlike the duty not to enslave, these new moral duties are role responsibilities that attach to natural persons in their capacity as representative of a corporation and so attach to the corporation itself.21

Another way of seeing why corporations should bear moral responsibilities even though they are not full moral agents can be illuminated by reversing the agency perspective that we have been considering. Assuming that most fundamental moral values will revolve around natural persons (whether their rights, or their welfare, or their moral worth), it is important to look at morality not only from the standpoint of the agent but also from that of the patient, the person affected by the actions of others. To that agent, the actions of a corporation look more like the actions of a natural person than they do the result of the forces of nature. To appeal to Rousseau's distinction in Emile, a person can legitimately resent the actions of a corporation in a way in which it would be mad to resent the effects of fire. This is because the actions of a corporation are recognizably constituted by human agency at various levels: the human agency authorizing the corporation's existence, buying shares in it, acting in its name, and so on. Although the corporation is not itself a natural person, it is the effect of human agency and, as argued earlier, understandable as the effect of public rather than private human agents in several meaningful senses. So from the perspective of the patient who may suffer from moral wrongdoing, the question of whether the harms were caused by a corporation or by a natural person is secondary to the fact that they are morally blameworthy and demand rectification.

Returning to the capacity of agents, we should not be distracted by the question of corporate motivation for moral behavior. The motivation for compliance with moral principles is, as Onora O'Neill argues in this volume, less important than the capacity for it. Motivation may draw on the motivation of the representatives who don't themselves wish to be associated with immoral action on behalf of the corporation; a corporate culture that prizes and so informs good corporate conduct of which representatives and employees can be proud; or a prudential assessment of the long-term requirements of the "license to operate" or the "business case" for moral action (and here informal social pressure can play a crucial role in changing the balance of corporate calculations). Reputation (both of the representatives as natural persons, and of the corporation as valued by those natural persons associated with it) and prudence, and the complex interplay between them, can go a long way to providing adequate motivation for moral responsibilities both for corporations and for natural persons alone.

Perhaps the best response to the vexed ontological debates about corporate agency, however, is Maitland's pragmatic one. As with the doctrine of equity, we have practical ways of going on which sidestep the perplexities of these debates. Corporations are not alone in raising deep questions about representation and artificial personhood. Similar problems arise in the case of the state. Yet we can hold states to have certain moral duties—for example, to abide by the principles of natural justice, or to provide compensation for historical injustices—without having to settle the vexed ontological question about whether they are moral agents and what moral features their artificial personality bestows upon them.

I have argued that corporations "can" bear moral responsibilities, in the sense that it is not impossible for them to do so. But there is another sense of "can" to be confronted. This is the question of whether an agent "can" be held to bear moral responsibilities while other agents of the same kind are shirking theirs. The problem here is one of contingent compliance.22 There may be some moral duties that I bear subject to all (or enough) of those who also bear them doing their part, but that in the absence of such general compliance lose their purchase on me as well. Do I have a duty not to cheat on an examination determining my future if I know (and know that it is well
known) that most others will cheat? Similarly, a CEO may demand to know how one could expect her company to refrain from making facilitation payments in a country where this is common and expected practice, so that she can expect her competitors to gain a competitive advantage if she refrains. The problem here is not whether corporations have the capacity to act, but whether they "can" so act while engaged in competition that could undermine and destroy their very existence.

I am skeptical about this argument both in the individual and the corporate case. Moral life can depend on someone being prepared to pierce the pretenses of a corrupting situation, as Václav Havel prepared to this essay "The power of the powerless," which described and enacted the refusal to adhere to the systemic lies of the Czechoslovak Communist regime as a condition for moral truth. 23 Was Havel's act supererogatory? Perhaps there was for him no moral way to behave in a non-supererogatory fashion: His contemporaries were not justified by morality in colluding, whether or not they were required by morality to resist. Here there is at the minimum a moral duty to seek ways to make resistance possible, by persuading others—other individuals, or other corporations—to do so as well. In the case of corporations, this task is made easier by the fact that many are not "powerless" to begin with. Those corporations that are relatively powerful, at least, have the chance to change the terms of the game, finding ways to make moral action profitable by new technologies or by reputation effects on its employees, customers, suppliers, or host states. Business is adept at turning challenges into opportunities—why not moral challenges too? Contingent compliance should not be accepted as an excuse either from individuals or from corporations without evidence of creative efforts to break the deadlock.

Should Corporations Accept Higher Standards of Moral Responsibility Than the Law Demands?

I have argued that a suitable conception of moral responsibility can in practice apply to corporate agents. But this leads us to ask whether it should so apply. The question is best addressed by confronting two trenchant objections, each associated with a broader theory of the place of corporations in society. The first objection, associated with what I will call the "liberty theory," holds that the corporation's moral duty to its shareholders or owners excludes it from most other moral responsibilities. The second objection, buttressed by what I shall call the "efficiency theory," looks not to the interests and rights of individual shareholders but rather to the interests of society as a whole, arguing that the social good (itself a moral good, if you will) is not best served by having corporations accept higher standards of moral responsibility than the law demands.

Consider the first objection. This is that the duty to put shareholders' interest in a good return first is not only a legal duty, but also a moral one. As Milton Friedman put it in a classic intervention in 1970, "the social responsibility of business is to increase its profits." 24 On this view, this social responsibility (conceived as a moral duty) trumps most rival moral duties that might be offered as part of the content of corporate responsibility. It is the board's fiduciary duty to the shareholders that should, within the limits of the law, be the overriding determinant of business conduct. 25 The objection can root itself in a broader theory of corporations as founded in the exercise of associational liberty. Because people are free within the law to set up institutions directed at particular purposes, those institutions should be free to pursue those purposes and those alone. Moral suasion from outside is illegitimate, and the corporation need not adopt moral constraints on its actions other than those arising from the law.

This objection can be defused by two considerations. First, by pointing out that fiduciary duty is not interpreted in either boardroom or courtroom practice as a maximizing duty. Onora O'Neill has perceptively commented that to imagine that corporations think only of maximizing shareholder returns is similar to imagining that states think only of pursuing self-interest against other states; both claims can be made true by stipulation, but are experientially false on any ordinary understanding. Second, by noting that the "liberty theory" itself offers shareholders ample opportunity for exit, and that this protects them so long as the moral conditions shouldered by the corporation are publicly acknowledged by it. Should shareholders disagree with the moral constraints applied by the management (the guiding principles of which should be made public in advance), they can simply exit. The hazard to which they are thus exposed is no greater than that to which they are exposed by the market generally. 26 Liberty makes it easy for shareholders to escape, but it does not preclude the assumption of moral responsibilities: Indeed, part of the value of liberty is that it makes it possible for people to act as they should, while allowing others the freedom to decline to do so should they so choose.

Consider now the second objection. This appeals, as mentioned earlier, not to the interests of particular shareholders but rather to those of society as a whole, arguing that these interests are undermined by corporations accepting higher standards of moral responsibility than the law demands. This claim is based on a social theory oriented not to the protection of individual liberty, but to the maximal achievement of social efficiency measured by Pareto-optimality. Legal penalties in this view are understood
as assigning costs to action, which rational agents should then include in their calculations alongside other costs and benefits. The law, then, is ideally the perfect mechanism for calibrating social efficiency, and corporations should not gum up the works by applying blanket moral injunctions instead of subtle cost–benefit analyses to their choice of action.

An oddity of this view is that it holds that law is not necessarily to be obeyed. Law should aim not ipso facto to eliminate prohibited action, but rather to make sure that those who do it value this more than those (as represented in the law) who value that it not be done. So it is perfectly legitimate to work out how much it is worth to one to break the law, and then to do so if the expected value is high enough. As advocates of this view have argued: “Managers not only may but also should violate the [legal] rules when it is profitable to do so.”

Efficiency theory does offer a plausible interpretation of certain minor legal offenses. If the real aim of the law were to eliminate undesirable parking, for example, it would impose penalties far higher than ordinary parking fines; as it is, many Manhattanites daily decide that it is cheaper and more convenient to risk a fine than to park elsewhere. Cigarette taxes are an even more egregious case. The British Chancellor of the Exchequer would be in serious difficulties if such taxes actually deterred smoking altogether, as he depends on the revenue that they are expected to generate.

But there are well-known difficulties with the assumption that the law always calculates its penalties so as to allow prohibited action (only) on the basis that the social costs are considered. Many of these difficulties, which take us from the realm of the ideal into that of the imperfect, apply in particular to laws affecting corporations. One problem, for example, is that the penalty needed to deter everyone from some prohibited activities would be so great as to drive corporations into bankruptcy—yet the social cost of such bankruptcy itself outweighs the cost of the prohibited activity. This is known as the “deterrence trap,” as Fisse and Braithwaite explain: “the inability of corporations, especially highly leveraged corporations, to pay fines of the amount needed to reflect the gravity of the offence and the low risk of detection and conviction.” Only someone with an overly narrow view of efficiency could conclude that because it is too expensive to deter the biggest companies from polluting altogether (should they be inclined to break pollution law if it is not too costly for them to do so) it is socially efficient for them to decide and proceed to pollute.

This means that we cannot assume (as ideal efficiency theory does) that the law always sets its penalties exactly right to achieve the social effect that the legislature wants, even if that effect may include some people or groups breaking the law. Law does not provide an absolute standard of social efficiency, so that moral claims that go beyond the law cannot automatically be judged to create social inefficiencies by so doing. Conversely, efficiency theory would allow companies to break the law in certain circumstances, a result that is anathema to the liberty theory that puts its trust in the limits of the law.

The attempt to invoke the law as the only legitimate constraint on corporate action (so excluding morality) cannot rely on either efficiency or liberty for a full justification. It is further undermined by the point that corporations often profoundly affect the shape of laws themselves. Corporate political donations and influence mean that the limits of the law cannot necessarily be taken to mark out a neutral and rational domain of action for corporations, as both the liberty and efficiency theories assume. A given corporation may enjoy certain latitude for action due to its own lobbying or that of other firms in the same field. Now the liberty theory may be able to cope with this, by clinging to a strictly procedural account of lawmaking such that whoever wins, so long as they do so legally, the outcome is legitimate—though such strict proceduralism begins to look a little bit ostrich-like. Efficiency theory, however, collapses in the face of corporate lobbying.

The arguments that corporations should not accept moral responsibilities beyond the law, either out of duty to their shareholders or because of their place in the overall scheme of social efficiency, are not conclusive enough to bar such responsibilities prima facie. The points made in the previous section about moral patients, for whom the assumption of moral responsibilities by their possible violators is a matter of urgency, suggest that corporations may and should assume those moral responsibilities that they rightly bear. In the final section we will consider some candidates for the content of these responsibilities.

What Might Corporate Moral Responsibilities Include?

The first response to the question of what corporate moral responsibilities might include is that the question must be put to corporations themselves, though not by any means only to them. To ask anyone to shoulder a moral responsibility is to ask them to accept it responsibly, that is, affirming what it requires of them whether or not they have actually worked this out for themselves, or simply approved a candidate version offered by others. This chapter has argued that corporations have the obligation to affirm their moral responsibilities and to make these public, and that doing so will involve their engaging with rival accounts of corporate moral responsibilities offered by others (such as philosophers and NGOs). But here lurks a difficulty. Such a process of judgment seems to require a richer account of agency than the one defended above: Now corporations have
not only to be able to decide to regulate their conduct in accordance with moral norms, but also to take part in adjudicating the content of those norms themselves. Is this a dangerous, or an impossible, task?

It certainly gives rise to a final set of objections. For if corporations are asked to go beyond the law, they will inevitably go beyond social consensus as well, and end up taking sides on contested social issues. Corporations that reorganize their activities to accommodate a stringent definition of animal rights, for example, will face criticism from some that the animal-rights contribution to social well-being is far less important than that of the contribution of human rights, as well as commendation from others on the reverse grounds. And they may also contribute to changing the general balance of cultural views on this question. But do we want corporations to play such a crucial role in ethical debate?

Moreover, is not corporate discretion to do and decide on the good, also corporate license to do and decide for the bad? By asking corporations to be responsive to social claims, without there being a fixed legal mechanism by which they could be held responsible for such responsiveness, one is opening the door for them to do all kinds of harmful things in the name of society. Clever corporate managers will leap at the chance to install soft-drink machines in schools, for example, on the pretense that they are doing so to benefit society in the shape of children.

Both of these points raise serious difficulties for advocates of corporate moral responsibility. Yet neither constitutes grounds for rejecting such responsibilities outright. It is true that there will be inevitable disagreement in an imperfect world, both inside and outside corporations, as to what substantive and important social goals are, or conversely, what the avoidance of serious harm to society might mean. But the suggestion that corporations should only respond to broad social goals when the goal in question already commands a broad social consensus overlooks the nature of the dynamic process of establishing moral standards and moral accountability itself. The very process of attempting to build a social consensus around some goal—for example, divestment from South Africa—will involve trying to sway companies and other institutions (including, in that instance, cities and other public bodies) to adopt it, an adoption that will then enhance the degree of perceived social consensus and so sway others, and so on.

As artificial persons set loose in a world of natural persons, walking among us in a common society, corporations will inevitably be called upon to respond as other natural agents do to issues of moral concern. This fact underscores the value of the pragmatic account of corporate moral agency given in the previous section. It would be artificial to exclude corporations from this process of seeking to change social values, a process that is always in motion and behind which the law inevitably lags. The attempt to draw a line on the basis of historical experience—as if one were to say, “it would have been legitimate for corporations to resist Nazi genocide, since that was clearly and uncontroversially wrong, but it is not legitimate for them to take a stand on child labor about which reasonable people disagree”—imputes a current consensus to the very much contested past (not all “reasonable people” thought it right to stand up to Nazi genocide at the time). It ignores the fact that in their own day, all such moral claims are likely to be disputed.

The problem of corporate discretion to do harm under cover of doing good is part of the broader problem of contestation. Moral debate is essentially open to contestation, and corporate self-interpretation of their moral duties will constitute only one voice in the moral dialogue. NGOs, activists, government, journalists, and the like are able to weigh in, to challenge the corporate self-identified moral standards, and to propose alternatives to which the corporation must respond. The value of a moral conception of corporate accountability, as opposed to a purely social one, is that it makes clear that the standards sought are those of objective morality rather than those of any particular group, even while inviting all interested groups to contribute to the moral dialogue about what those standards are. The search for objectivity enlivens debate because it means that no one group's views are inherently privileged above those of any other. Meanwhile, the fact that the corporation must take responsibility for its own moral standards, rather than simply reacting to external demands, is more likely to strengthen its commitment to embed those responsibilities within its organization.

As the argument above implies, it is not the role of this chapter to decree the content of corporate moral responsibility from on high. It is the task of all moral agents, including the corporation itself, to set about defining that content, and to acknowledge in so doing that others will have rival definitions of it to contest. If corporations cannot be insulated from moral pressures, their decision-making processes both at shareholder and management level will be made on the same basis as those made elsewhere in society, and will contribute to the formation of the social consensus that they cannot therefore be expected to presuppose. Yet that is cold comfort to corporations struggling with public pressure in all kinds of directions and on all kinds of issues, not to mention suspicious to activists who fear that all this high talk will come to naught. Are there any guidelines that can be derived from the discussion so far?

The foregoing suggests two principles: one substantive and one procedural. For the purposes of advising corporations as to which demands they might best accept (without ruling out of court a priori any demand that
someone in society might try to press), it matters whether the demand does or does not relate to a generally agreed social goal. Human rights are an example of an agreed social goal, being recognized by every country in the world in some form (at a minimum via signing of some international treaty) and by international law, though in both cases the direct legal responsibility of corporations for human rights remains quite sharply limited. It is relatively uncontroversial from the standpoint of the social consensus on values for companies to acknowledge a moral duty (going beyond their legal duty) to respect human rights, though the question of whether such rights are best respected by divesting from, say, Myanmar remains hotly debated and socially divisive. A company might take a stand on that question, adding its voice to the determination of the particular issue, on the basis of its more general and socially consensual commitment to human rights. Contrast this with the case of animal rights, which do not command anything like a comparable consensus in national or international law. It is therefore more justifiable for a company to assume an extra-legal moral duty based on human than on animal rights, though it is open to animal rights activists to try to create a new consensus.

The procedural principle arising from the foregoing discussion is that of publicity. Corporations have a duty to make the results of their moral deliberations known, and to publicize the moral constraints under which they take themselves to be operating. This duty derives from the structure of moral accountability discussed in Section II. It was argued there (in effect) that all those to whom moral responsibilities apply have an imperfect obligation to participate in debate about the responsibilities that they take themselves to have and the way in which they have sought to carry them out. Here, social and moral accountability will come in practice to intertwine, as observers debate the principles adopted by a given company and the way in which those principles have been applied in practice. The duty of publicity further includes the duty not to obscure information that may help to verify or falsify the assertions publicly made. Such self-avowal of principles and practice may prove unexpectedly stringent for companies, since they can be checked. Paradoxically, negative duties, such as the duty to avoid corruption, may when publicized become far more demanding than the compliance with the positive duty of giving the occasional charitable contribution.

David Miller’s account of responsibility in this volume can assist us in making further suggestions of a second-order kind. In the case of harms that a corporation may itself cause, the corporation is likely to bear causal, moral, and (because of its institutional powers) at least some capacity responsibility both for preventing and for rectifying those harms. I lay more emphasis on prevention than Miller does, because it is here that the assumption of additional moral responsibilities may make a real difference, before any clean-up operation by the law comes into play. Community-initiated responsibility in these contexts is something that may be unfamiliar and initially uncomfortable for corporations, though corporations vary dramatically in their relationships with local communities: Those involved in textile manufacturing may deliberately hold themselves aloof from a temporary and cheap workforce, while those involved in extraction industries often have no choice but to involve themselves deeply with the communities on the site of the resource. The idea of community-initiated responsibility, however, is something that corporations would do well to consider. Through their representatives, they are party to relationships as well as to contracts. And just as they can in practice recognize the claims of equity, so they may be expected to come to recognize the claims of community.

In the case of harms caused by other agents, such as social, political, or economic turmoil in a place where a corporation arrives, the capacity of the corporation to help rectify these harms may be considerable. But here we must consider the cautionary point made by Michael J. Green, that there may be overriding role responsibilities that trump the claims of capacity, as well as the distinction made by Onora O’Neill between primary and secondary agents of justice. Corporations cannot be primary agents of justice—they are not representative in the requisite sense—and they do have the responsibility to pursue if not to maximize their profit. Corporate capacity needs to be harnessed to public legitimacy, perhaps through partnerships with local, regional, national, or international governmental agencies, if externally caused wrongs are to be addressed in the appropriate way.

A final second-order candidate for the content of corporate moral responsibility is the sharp restriction—either by voluntary corporate action or compulsory state law—of the roles of corporations in political debate and decision making. In both of the political theories of the role of corporations discussed above—the liberty theory and the efficiency theory—it is assumed that the state of the law broadly represents the appropriate level of coercive regulation of corporations. Yet if corporations are actively engaged in lobbying and influential through political donations, the resulting distortion in the law—or even merely the suspicion thereof—threatens to undermine this fundamental assumption. If the law is not what it should be because of corporate interference, then it is not plausible to say that corporations are more or less adequately accountable to society by obeying the law.

Further moral responsibilities will depend on the particular moral theory that one adopts. Goodin’s theory of the duty to protect the vulnerable, for example, could be applied to the case of those vulnerable to the
harmful externalities of corporate activity, as well as to workers vulnerable to damaging conditions of work. The refusal to dictate a moral theory from on high is consonant with the broader thesis defended in this chapter, insofar as corporations are morally accountable not least for considering and defending their decisions about what morality requires of them, just as we are morally accountable for considering and defending our counter-claims on them in turn. The establishment of moral standards is not the same as their realization, but it is a first step, and while a world of corporate moral responsibility would not be a world without the need for legal accountability, it would be one in which less might fall through the inevitable legal cracks.

Notes

1. Precursors of this chapter were presented as a paper at the American Political Science Association Annual Meeting (2002) and in political theory seminars and workshops that autumn in Cambridge, Sussex, and Reading. Many people made helpful comments, including especially John Abraham, Andrew Chyliy, Alan Comarttie, Monique Deveaux, Amanda Dickens, John Dryzek, Lawrence Hamilton, Serena Osilase, Emile Perreault-Saussine, Tom See, Marc Stears, and John R. Wallach. Andrew Kuper and Andrea Sangiovanni additionally and kindly commented on a peer-reviewed draft, for which Jo Myhill contributed valuable research assistance. I have also learned much from exchanges with Marion Fremont-Smith, Jill Horwitz, David Held, David Howarth, Onora O'Neill, Mark Philip, Anita Ramu, Emma Rothschild, David Buncman, Adam Toove, and Richard Tuck.

2. There is an extensive literature on these questions, much of it couched in terms of "corporate social responsibility" or "voluntary approaches to corporate responsibility" (my reasons for avoiding these terms will be explained in what follows). For an overview and a rich bibliography, see the NGOs (Non-Governmental Liaison Service of the United Nations) Development Dossier, Voluntary Approaches to Corporate Responsibility: Readings and a Resource Guide, written by and available from the United Nations National Research Institute for Social Development, May 2002. A major form taken by corporate moral responsibility is that of corporate codes of conduct, on which see the chapters by David Held and S. Prakash Sethi in this volume.

3. On corporate subjectivity, see George Monbiot, Captive State: The Corporate Takeover of Britain (London: Macmillan, 2000). Simpler problems were experienced in the Australian state of Victoria after its wholesale introduction of privatization policies into the public services.


5. See the overview given in Jon Elster, "Accountability in Athenian Politics," in Adam Przeworski, Susan C. Stokes, and Bernard Manin (eds.) Democracy, Accountability, and Representation (Cambridge: Cambridge University Press, 1999), pp. 253–76; for a more detailed general historical account, see Jennifer Tolbert Roberts, Accountability in Athenian Government (Madison: University of Wisconsin Press, 1982). It was Grotius's emphasis on accountability in ancient Athens in his History of Greece that did so much to overturn the view of Athenian democracy as mob rule, and this probably did much to influence his friend John Stuart Mill's reflections on the subject of accountability, on which see Mark Philip, Mill, Joquetville and the Corruption of Democratic Accountability," paper presented at the 2002 Annual Meeting of the American Political Science Association and available on its website.
bibliography for the nature of corporate agency is given in Melissa Lane, "Autonomy as a Central Human Right and its Implications for the Moral Responsibilities of Corporations," in T. Campbell and S. Miller (eds.) Human Rights and the Moral Responsibilities of Corporate and Public Sector Organizations (Dordrecht: Kluwer Academic Publishers), pp. 145-65, the concerns of which overlap with those of this chapter.

21. Sorting out the attribution of action and moral responsibility between natural person, role representative, and corporation as artificial person is complicated, but the fundamental connection between these constituents cannot be gainsaid. Indeed, while moral philosophers may worry about whether corporations can have moral responsibilities, or whether only natural persons can, the criminal law is more resistant to "piercing the corporate veil" to hold individuals liable for (their part in) corporate misconduct than it is to the general idea of corporate crime per se.

22. The problem is discussed for individual ethics by Liam B. Murphy, "The Demands of Benevolence," Philosophy and Public Affairs 22:4 (1993), who argues for a principle on which all should continue to do their fair share regardless of the compliance of others in certain circumstances.


25. The question of overriding duties is considered by Green, but neglected by Miller.

26. One is tempted to go further and to point out with Keynes that most stock market activity resembles casino gambling more than it does fiduciary entrusting; the whole fiduciary model is only dubiously applicable to secondary trading in any case.


28. Ross and Braithwaite, Corporations, Crime and Accountability, p. 82. Their proposal for avoiding this trap is to include a range of non-monetary penalties, such as continued federal oversight of corporate management or in the extreme case "corporate capital punishment," in the penalty spectrum.

29. One "responsible," despite its appearing tautologous, to avoid the loaded term "autonomously," which would plunge us back into the waters of moral agency.

30. The question of whether Nike was contributing to free-speech protected public debate, or engaging in misleading commercial speech, is now being argued before the United States Supreme Court in the case of Nike v. Kasky, No. 02-573. See Linda Greenhouse, "Free Speech for Companies on Justice's Agenda," New York Times, 20 April 2003.


32. Again, voluntary corporate forbearance from political activity is a proposal considered by Engel, "An Approach to Corporate Social Responsibility," pp. 70-84, though he is skeptical on the grounds that corporations will not know how much political activity is optimal.

Concerns about order and justice in the globalizing world economy have often been addressed to international organizations. Protesters gather in large numbers around meetings of the International Monetary Fund (IMF) and the World Bank in order to highlight perceived injustices wrought by these organizations. More and more, these demonstrations have called for greater accountability.

Do the arguments of these protesters have any merit? The IMF and World Bank were originally designed to stabilize exchange rates and channel investment for new projects in war-torn and developing countries. But their jurisdiction has subsequently expanded to include some of the most basic decisions about the budget and economic structure of a large number of the world's countries. Yet while their responsibilities have increased, their accountability has not. Borrowing countries have only token representation within the decision-making bodies of these organizations, and little real power. The decisions of these organizations are not subject to public review, and in most cases the processes leading to them are not even made public. The procedures of these institutions are not, however, set in stone, and it is time for them to be made accountable in ways that more adequately reflect their increased purview over the world's national economies.