

Corporate Moral Duties: Consequentialism, Collective Moral Agency and the “Ought” Implies “Can” Maxim

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ARTICLE INFO

Available Online November 2013

Key words:

Corporations;
moral obligation;
consequentialist duty;
moral agency;
“ought” implies “can”

ABSTRACT

The claim according to which corporations are morally responsible is a controversial one. At the same time, it is nowadays common to assign moral duties to companies, especially in work confronting the business and human rights issue. Can companies bear moral duties without being morally responsible? This article presents three different accounts of the duty to follow the course of action with the best consequences (consequentialist duty). The ascription of that duty to business is compatible with the claim that, by not being volitional agents, companies are not morally responsible for anything they do. The paper also addresses two possible objections against the claim that companies bear the duty of taking the course of action with the best consequences. These objections state that corporations are incapable of acting, be it in a general way (i.e. corporations do not possess the moral status of agents), be it regarding particular acts (the objection grounded on the “ought” implies “can” maxim).

1. Introduction

Moral duties regarding human rights are now usually ascribed to business enterprises, especially transnational corporations (Arnold, 2010; Wettstein, 2010; 2012; Bilchitz, 2010; Wood, 2012). It is a controversial issue, however, whether collectivities of individuals like corporations are morally responsible for what they do (Corlett, 2001; Velasquez, 2003; Mäkelä, 2007). Is it compatible with the refuse to acknowledge companies as morally responsible agents the claim that they are, nonetheless, bearers of moral duties? The answer may turn out to be affirmative insofar as concepts like “being morally responsible” and “to have a moral duty” are differentiated. Once moral responsibility and moral duties are set apart, it becomes possible to conclude that failure to attend to one or more requisites of moral responsibility, such as intention, does not prevent companies from being bearers of moral obligations.²

The paper begins by focusing on a particular instance of moral duty, the duty to follow the course of action with the best consequences (consequentialist duty). No matter how this duty is precisely conceived – i.e. in an objective, prospective or subjective way – it will become clear that its violation may take place regardless of an intentional behavior by the agent to whom the duty is assigned. Furthermore, exception made to the subjective account, the content of the consequentialist obligation is independent from the agent’s beliefs. Thus, even if corporations are not capable of performing intentional acts and hence are not morally responsible agents, they still can bear the duty to take the best (from a consequentialist standpoint) course of action. The fact, further, that companies lack beliefs of their own is neither an obstacle to intelligibly ascribing to them the duty at issue, at least when conceived in the objective or prospective fashions.

Drawing on the premise that an allegedly inability of companies to act intentionally does not prevent them from having (and failing to meet) moral obligations, the remainder of the article addresses two possible objections against the claim that corporations are bearers of the consequentialist duty. These objections correspond to two different meanings of the claim that, although non-volitional agents in general can have duties, this is not the case of corporations because (or to the extent that) they are unable to act in the morally relevant sense. Understood in a way, this amounts to say that corporations are *generally* unable to act, that is, that there are no acts that belong (in the morally relevant sense) to a collectivity of individual

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² Some conceptual remarks: throughout the article, the words “duty” and “obligation” are employed interchangeably, the same holding for “corporation” and “company”. Saying that an agent has a moral obligation to do ϕ is also considered tantamount to saying that morality requires her to do ϕ .

agents. In order to answer to the objection so understood, the paper argues for a conception of moral agency congenial to consequentialism, a conception according to which collectivities, including companies, do have the standing of moral actors.

Understood in another way, the claim that companies are unable to act has the more limited specific sense of stating, although displaying the status of moral agents, corporations are unable to perform certain acts, which, according to the "ought" implies "can" maxim, precludes them from having the duty to perform these same acts. On this, the article analyses, first, what collectivities "can" do, in an attempt to assess the importance of the "ought" implies "can" maxim for collective duties. It concludes that the potential threat of the objection stemming from the "ought" implies "can" maxim may be more serious than it seems, since collectivities are sometimes unable to do things that are achievable through the joint contribution of their members. This having been said, two arguments supporting the "ought" implies "can" maxim are scrutinized, the arguments from unfairness and from morality as a guide for action. It is claimed that the first argument has a weaker appeal when it comes to collective obligations, while the second argument is only able to sustain the "ought" implies "can" maxim under a rather extensive interpretation of "can" that considerably reduces the practical importance of the maxim as an obstacle to the duties of collective agents.

2. Corporations, moral duties and moral responsibility

That a corporation may bear legal duties is well known. But what about moral duties? May a company be morally required to do something? Or are individual agents (like managers and shareholders) the only bearers of moral obligations?

The question of knowing whether corporations can have moral obligations has gained relevance due to recent discussion regarding human rights constraints to business activity. Literature on this last issue often treats human rights as moral commands imposing (moral) duties to companies.³ Thus it is stated, for example, that companies are bound to respect basic human rights (Arnold, 2010), to act positively for satisfying human rights of people with whom they are particularly related (Wettstein, 2010; Bilchitz, 2010) and to exert their leverage in order to prevent human rights abuses committed by other agents (Wood, 2012; Wettstein, 2012). One may wonder if the moral duties referred to in these works are really duties of the companies themselves, or if instead the locution "duties of transnational corporations" constitutes merely a short-handed way to designate the duties that fall upon the individual members of business organizations.

Determining whether corporations are the real bearers of human rights duties requires an inquiry onto the conditions someone (or something) must meet in order to be a bearer of moral duties.⁴ Consider the following passage:

(O)ne might argue that corporations are properly understood as agents capable of intentional action and as such can be duty bearers that are morally responsible for their actions (Arnold, 2010, pp. 387-88).

Two points in the passage are worth of attention. The first is that it seems to enlist the capacity of acting intentionally as a necessary condition to moral duties ascription. It just "seems" to do so, however, because what this excerpt strictly says is that the status of duty bearer is granted in virtue of the capacity of acting intentionally, without explicitly ruling out the possibility of the same status being acquired in some other way. Considering, however, how hard is the task of demonstrating that corporations are intentional beings, it is fair to assume that, were Arnold to believe that there are other ways to become a bearer of moral duties rather than by displaying the capacity to perform intentional acts, he would have mentioned it. The second point concerns the link between moral duties and moral responsibility. Although suggesting that the two are in some way related, the author is not quite clear about how they are related. Do expressions like "to have a moral duty" and "to be morally responsible" have identical meaning? Or are they distinct, although related

³ Arnold (2010) distinguishes three ways of conceiving human rights, as moral, political and legal rights. In the sense of moral rights, human rights "are ethical demands" and "respecting rights is at a minimum an ethical requirement, though it may also be made a legal requirement via legitimate regulatory, judicial, and administrative mechanisms" (p. 379). Arnold further claims that, as ethical requirements, human rights impose moral duties on companies.

⁴ Of course, saying that companies can bear moral duties in general does not entail affirming that companies are bearers of moral duties on behalf of human rights. On the other hand, if companies are incapable of bearing any moral obligation, they will obviously be exempted from any human right duty.

in such a way that being the bearer of a duty is a condition to become morally responsible? In this case, what means to be morally responsible?

There is an extensive literature reputed intention as a requisite to the moral responsibility of corporations.⁵ French (1979), for example, a well-known advocate of companies’ moral responsibility, states that responsibility in the moral sense requires that an act performed by the responsible agent was the cause a certain event and that that act “was intended by the subject or that the event was the direct result of an intentional act of the subject” (p. 211).⁶ Once accepted that agents are morally responsible only for what they intentionally do and that “to be morally responsible” and “to have a moral duty” are equivalent, the relation between intention and moral obligation implied by Arnold’s passage is ratified: everyone (or everything) who is incapable of acting intentionally cannot therefore be a bearer of moral duties. On the other hand, if there *is* a difference between having moral obligations and being morally responsible, the fact that the capacity of performing intentional acts is a necessary condition to moral responsibility no longer entails that non-intentional agents are not charged with obligations.

Consider the definition of being morally responsible as being deserving of praise or blame for what one has done.⁷ Under this definition, moral responsibility and moral obligation become tied in so far as violation of a moral obligation is taken to be both a necessary and sufficient condition to moral responsibility in the latter’s negative sense (i.e. of susceptibility to blame). Accordingly, agents would only be blamable by violating a moral duty, and would be put in the position of being blamed whenever they violated a duty of this kind.

In order to further dissociate the concepts of duty and responsibility, it could then be stated that, while violation of a moral duty to do ϕ demands only that the agent take a course of action other than the one required from her (i.e. a course of action other than ϕ), responsibility is conditioned by the same agent being culpable for not doing ϕ . Assuming that there are non-culpable ways of not doing ϕ , it thus becomes possible to breach a duty without being responsible for it.⁸ Finally, granted that non-culpable acts may be non-intentional acts, one is bound to conclude that capacity to act intentionally, although arguably a necessary condition for being responsible, may not be a necessary condition for breach of a duty.⁹

An example of a moral duty that can be understood in such a way as to render instances of non-intentional breach possible is the duty to follow the course of action with the best consequences (consequentialist duty). The next section examines different accounts of this duty in order to demonstrate how they permit to separate the concepts of duty violation and responsibility (in the sense of susceptibility to blame).

3. The consequentialist duty: objectivist, prospectivist and subjectivist accounts

The distinction between the objective, prospective and subjective¹⁰ conceptions of moral obligation is commonly discussed in works related to moral consequentialism¹¹ (Driver, 2013; Zimmerman, 2006; Jackson, 1991; Railton, 1984). These works take moral duties as instances of a general duty to follow the course of action to which the best consequences are associated, regardless of how goodness of the

⁵ The debate on corporate moral responsibility may be seen, in turn, as part of a broader debate concerning moral responsibility of collective agents in general. For a summary and further references on this debate, see Smiley (2010).

⁶ Other scholars tying companies’ moral responsibility to intention are Arnold (2006) and Pettit (2007). Among opponents of corporate moral responsibility, on the other hand, there are those who refuse to see companies as morally responsible agents because of their inability to perform intentional acts (see Keeley, 1981; Velasquez, 2003).

⁷ See van dePoel (2011, p. 37) for a reference about the generalized use of the word “responsibility” in this sense in the philosophical literature.

⁸ The distinction between a morally wrong action and a culpable one is related to another distinction made by Austin (1956-1957, p. 2) between justifications and excuses. According to Austin, a justification renders morally permissible a course of action that would otherwise be wrong, while an excuse exempts an agent from be blamed by an action which remains wrong in spite of the excuse. For a recent defense of the difference between doing something (morally) wrong and being culpable, see Zimmerman (2004). For a critique, see Rivera-López (2006).

⁹ Zimmerman (2004, p. 264) distinguishes between “to violate” and “to fail to meet” a duty. While violation requires that the agent does wrong while knowing that what she is doing is wrong (or while being culpable of ignoring it), to fail to meet a duty of ϕ demands only that the agent follows a course of action other than ϕ , regardless if her behavior is intentional or not. This distinction is above ignored. It is worth noticing that, for Zimmerman, failing to meet a duty is morally wrong even when the agent does not do it intentionally.

¹⁰ See Zimmerman (2008). Nomenclature varies. Other authors refer only to “objectivism” and “subjectivism”, treating what is called above “prospectivism” sometimes as a subtype of the former, sometimes of the latter.

¹¹ In what follows, all references to consequentialism shall be understood as references to act-consequentialism.

consequences is defined. In order to differentiate more precise accounts of this general duty, reference is often made to an example first offered by Jackson (1991, pp. 462-463): Jill is a doctor who have to decide about the treatment of a patient suffering from a serious (although non-lethal) skin condition. She can minister to the patient three different drugs, A, which will improve the patient's state without entirely healing him, and B and C, whose effects are uncertain. It is known that one of the last two will cure the patient while the other will kill him, but not which of them will have which result, and the odds of healing and killing are the same (0.5/0.5) for both.

What Jill ought to do? Is she morally required to choose the treatment that will completely heal the patient (which, let us assume, is B), what amounts to follow the course of action that *actually* has the best consequences, or, alternatively, taking into account the risk of death and the mildness of patient's condition, is she required to give him A, which is to take the course of action that, in view of the available evidence, has the best expected results? Stating that Jill ought to take the course of action that actually has the best consequences means adhering to an *objective* conception of the consequentialist obligation, while requiring her to follow the course of action with the best expected consequences corresponds to conceiving such duty in a *prospective* way.

A third possible account – the subjective account – of the duty at issue may be introduced by means of a new version of the same example. Assume now that, because she ignores or misunderstands available evidence about the three possible treatments, Jill believes that prescribing drug C is the course of action with the best consequences, that is, she is sure that C will cure the patient. In its subjective sense, the consequentialist duty asks the doctor to follow the course of action that *she* believes has the best consequences, even when (as in the case just exemplified) the agent's beliefs about the consequences of her possible actions are wrong.

All the three accounts just mentioned allow for non-intentional cases of violation of the consequentialist obligation.¹² Under the objective account, a violation takes place whenever the course of action chosen is not the one that actually produces the best results, regardless whether the agent did not know, at the time she acted, which course of action this was. It is quite possible, hence, that, when deciding what to do, the agent intended to follow the course of action with the best consequences, thus failing to do so only because of her ignorance.

According to the prospective account, in turn, the agent violates the consequentialist duty by not following the course of action having the best expected consequences. Duty violation may be non-intentional in this case because, first, it is independent from the agent's knowledge that the course of action with the best expected consequences is other than the one she takes, what renders breach of the duty possible even when the agent wants to follow the course of action with the best expected results. Second, violation of the prospective duty may also be non-intentional in the sense that ignorance about evidences revealing which course of action has the best expected consequences may be involuntary. There are, of course, instances in which ignorance is attributable to choice, that is, instances in which the agent deliberately closes her eyes to evidence concerning the likely consequences of her behavior. Yet ignorance may also accrue from factors having nothing to do with the agent's will, such as lack of access to or incapacity to understand available data. When this is the case, violation of the consequentialist duty is involuntary not just in the sense that the agent wanted to follow the course of action having the best expected consequences, but also because her ignorance or misunderstanding of evidence indicating which course of action is the right one was involuntary.

Consider, finally, moral obligation from a subjectivist standpoint. Usually, violation of a duty conceived in the subjective way is intentional, since if the agent believes (correctly or not) that a course of action X is the one that will have the best consequences and notwithstanding follows another course of action Y, this case is the case of an agent who knowingly does something other than the act which, according to the agent's beliefs, would produce the best results. This, however, is not equivalent to say that the agent wanted to follow the wrong course of action. There may be instances in which, although the agent follows another

¹² This part of the article has the limited aim of demonstrating that different accounts of the consequentialist duty allow for non-intentional instances of violation, what allows for distinguishing the ideas of violating a moral obligation and being morally responsible (at least insofar as intention is taken to be a necessary condition for the latter). It is therefore beyond the scope of the paper to discuss which account of the consequentialist duty is the best. For recent work on this last issue, see Driver (2013), Graham (2010) (defending objectivism), Mason (2013) e Zimmerman (2008) (defending prospectivism).

course of action than the one she believes has the best consequences, her conduct is not voluntarily, as when she is physically coerced to do Y or does Y out of some irresistible compulsion.¹³

Would it also be correct to assert that, besides allowing for non-intentional instances of duty violation, the three accounts of the consequentialist obligation deem the agent’s intention irrelevant in what concerns compliant behavior? Put another way, are there non-volitional examples of compliance with the consequentialist duty? Thinking otherwise would mean to attach to the agent’s intentions regarding compliance a relevance that these same intentions do not have in the case of non-compliance (or violation). It is hard to imagine how such unbalance between positive and negative behavior could be justified. If the bare fact that Jill followed another treatment than the one that will completely heal the patient suffices to say that, from an objective standpoint, she acted wrongly, why would the that Jill abide by her duty by prescribing B be conditioned to her knowledge about this being the course of action with the best consequences? Something analogous holds for the prospective account: if, under such account, violation takes place whenever the elected medicament is other than A, why should compliance be taken as necessarily intentional, so that Jill would only do what morality requires from her in the case she administers drug A to the patient *because* she intends to take the course of action with the best expected consequences?

The analysis changes slightly when it comes to the subjective conception. In its subjective version, the consequentialist duty to do φ only exists if the agent believes (justifiably or not) that φ is the course of action with the best consequences. This suggests that, by performing φ , the agent willingly chooses the course of action that (she believes) has the best consequences. Again, however, this might not be the case, since the agent may have been coerced to do φ and, as with the other accounts, postulating in this case that the agent only acts on her duty when she follows the course of action she believes has the best consequences *because* she believes so would entail an unbalance regarding the role of intention in what concerns positive and negative behavior. What distinguishes the subjective account from the other two is thus only that the former attaches the content of moral obligation to the agent’s beliefs and, in so doing, renders this obligation intelligible only when assigned to agents that are able to develop beliefs concerning the consequences of their actions.

Accounts of the moral duty deeming agent’s intentions irrelevant are not necessarily followed by the conclusion that collectivities can be bearers of duties. There may be reasons, other than the lack of intentionality, to avoid treating companies as subjects of duties. One of these reasons is that collectivities cannot act, a claim that may be understood in two different ways. It can be said that someone or something is unable to act because she/he/it lacks the status of moral agent, such that there is no act that can be ascribed to her/him/it in the morally relevant sense. Collectivities would be incapable of acting in this sense if, from a moral standpoint, there were not acts performed by collectivities, but only acts by individual agents who constitute the former.

Understood in a rather different way, the claim referring to collectivities inability to act may refer to specific acts that groups are incapable of performing. Although displaying the status of moral agent, a collectivity may not have the duty to do φ if it is unable to do φ . Incapacity of acting in this second sense is, thus, incapacity in the sense of the well-known “ought” implies “can” maxim.

The next two sections face the challenge raised by the claim that collectivities are unable to act in the two interpretations just exposed.

¹³ The above analysis is subjected to the following caveat. No matter how (in the objective, prospective or subjective sense) the consequentialist duty is conceived, this duty may not be open to non-intentional instances of violation if the way in which consequences are described includes the intentions of the agent to whom the duty is imposed. This, of course, postulates a sort of consequentialism that uses the term “consequence” in a sense broad enough to encompass intentions, one, for example, that can include in its description of the consequences of an act whereby A kills B a statement like “B was killed by A *intentionally*”. This sort of consequentialism is thus open to evaluate consequences differently because of agents’ intentions, so that, for example, consequences of the act whereby A kills B intentionally may have a different normative status from consequences of the act whereby A kills B accidentally. The enlargement of the concept of consequences exemplified by the inclusion of intentions in consequence descriptions is a strategy consequentialism may employ in order to avoid some counterintuitive results and thus resist attacks from deontological moral theories. On this, see Portmore (2007).

4. Are collectivities moral agents?

The duty to follow the course of action with the best consequences can only be intelligibly ascribed to collectivities if there are acts belonging to the latter in the morally relevant sense. Only collectivities that can act may attend (or failed to attend) to moral duties, there included the consequentialist duty.

It seems that the issue of knowing whether someone or something is able to act in the relevant moral sense must be answered on the basis of what morality in a general way requires. Put another way, capacity of acting must be acknowledged in accordance with the nature of moral duties. For example, if moral obligations are such that one is able to abide by (or fail to meet) them only through intentional behavior, capacity of acting must accordingly be granted only to those who can act intentionally.

In face of this, let us think about which conception of moral agency fits best when moral duties include duties of the consequentialist sort examined above, i.e. duties that are not attached to the agent's intentions or (exception made for the subjectivist account) beliefs. It seems unavoidable to conclude that, at least as regards the objective and prospective versions of the consequentialist obligation, the status of moral agent should be recognized to anyone or anything that is causally linked to a given consequence. Assuming that "consequences" are any sort of event, this entails granting the status of agent to anyone or anything that is cause of an event. With things seen in this way, it is not just the man who throws a stone against a window, for example, who possesses the status of actor; the stone itself also acts, since the stone, and not only the man's action, is also causally linked to some consequence or event, which is in this case the broken window.

This solution may sound counterintuitive, but is well-suited to the way in which the consequentialist duty (from both objective and prospective standpoints) is conceived. Once granted that the status of moral agent must be recognized in accordance with morality demands, extending to non-human animals and even to inanimate things the condition of moral agent becomes an inevitable step to those seeing moral duties in a consequentialist (objective or prospective) fashion.¹⁴ Imagine, to illustrate, that my dog ate my shoes this morning, preventing me from going to work. Imagine, further, that had I gone to work, I would have caused a terrible car accident. By assessing my dog's act through the lens of the objective consequentialist duty, it could be said that she did well, since, although she did not know (neither me), eating my shoes was the course of action with the best results. Under the prospective account of the duty, on the other hand, my dog's act was probably wrong, as the expected benefit from she eating my shoes (considering the odds of me causing serious harm by leaving home) was rather low. It could not be argued, against this idea of treating my dog as a duty bearer, that she did not intend to cause or prevent any harm by eating the shoes, since intention is immaterial to evaluate if someone (including human beings) has complied with consequentialist obligation in both objective and prospective versions.

Taking into account the precedent analysis, it is not hard to conclude that collectivities are capable of acting. For a collectivity being a moral agent in the sense just defended, it suffices that there is some consequence or event causally linked to the existence of the group. The collective agent conceived in this way may be either a long-standing and hierarchically organized group, like a corporation, or an uncoordinated, hazardingly joined multitude of people.

It can be objected at this point that, although the recognition of the agent status to a collectivity coheres with the way moral obligation is conceived under both objective and prospective versions of the consequentialist duty, moral agency in collective's case is superfluous since any evaluative judgment falling upon collective action would merely replicate what holds for at least part of the individual actions of the members of the group. My neighbor would not be rendered sleepless if one or more of the people invited to my party last night had not spoke loudly. Thus the claim that the group of my guests as a whole violated a moral duty in this case is only true because it is also true that at least some of my guests acted wrongly (by speaking loudly). For the concept of collective agency being of any interest, so follows the objection, it would be necessary to acknowledge not only that a group of people can violate a duty, as also that, by doing it, the group as a whole becomes susceptible to blame (rather than only the members of the group who individually contributed to the event at issue). This, however, is the same as declaring that the group is morally responsible for what its members have done, but collective moral responsibility may have to satisfy

¹⁴ Some proponents of the thesis that collectivities are moral agents argue that groups (some of them, at least) own the status of agents because they satisfy requisites far more demanding than that of being simply causally linked to some event (Pettit, 2007; pp. 179-80; Killoren & Williams, 2013, pp. 304-05). These scholars, however, also repute moral agency as one of the necessary conditions for being morally responsible.

further conditions (like intentionality) beyond the mere causal link between the event and the existence of the group.

This objection fails, however, since it ignores that consequentialism can face “collective action problems” (Kagan, 2011), cases in which the joint contribution of a group of individuals leads to an undesirable result to which none of the group members has contributed decisively. The existence of collective action problems suggests the possibility of affirming that, while none of the individual members of the group has violated any duty from a consequentialist standpoint, the group, as a whole, did it. If cases like this really exist, the claim that collective agency (unless tied to the ascription of moral responsibility) is superfluous fails. When consequentialism is confronted with cases as those just imagined, the acknowledgment of collective agency allows for the imposition of a “new” duty, a duty with no correspondence among the individual duties of the members of the group.¹⁵

5. The “ought” implies “can” maxim and collective duties

The two previous sections offered a picture of some moral duties that can be assigned to companies without necessarily assuming them as volitional agents. Corporate duties can be conceived as duties to follow the course of action with the best consequences in any of three (objective, prospective and subjective) senses. It was also argued (this time regarding the objective and prospective accounts of moral obligation) that collectivities in general are capable of acting in the morally relevant sense as long as there is some consequence or event that is causally linked to their existence.

In the current section, the idea that corporations are duty bearers is reassessed under the challenge of the “ought implies can” maxim. According to this maxim, an agent can only bear the duty to perform φ if she can φ . A possible objection to seeing companies as bearers of the duty to take the course of action with the best consequences is that companies often cannot do that. Claiming that a company that cannot φ has, nonetheless, the duty of doing φ contradicts the “ought” implies “can” maxim.

The present objection raises two different issues. The first is that of knowing what collectivities like companies can do (the “can” issue), while the other is assessing whether the “ought implies can” maxim actually holds in the case of collectivities, that is, if it is really a necessary condition for a collective agent to bear the duty to do φ that the agent can do φ . Both issues are addressed in the following.

5.1 What collectivities can do?

The meaning of the “ought” implies “can” maxim (hereinafter, the “maxim”) varies in accordance with the way each of its three components, “ought”, “implies” and “can” is constructed (Vranas, 2007, p. 169). This part of the article focuses on the interpretation of the third component, “can”. What does it mean to claim that an agent can do something?

When moral agents include collective agents, answer to this question is hardened by the fact that analyses of “can” are usually concerned with individuals (for an exception, see Lawford-Smith, 2012). One may thus begin with some account of “can” tailored for individual agents and then ask about what this account entails for collectivities.

Recent works on the maxim (Vranas, 2007; Graham, 2011) define “can” as “ability” plus “opportunity”. According to Vranas (2007, pp. 169-170; original references omitted):

¹⁵ If cases of collective duty with no correspondence among the duties of individual members really exist is a matter of controversy. Kagan (2011) is skeptical on this point, but his argument against the existence of such cases is based on expected utility of individual behavior, being therefore attached to a prospective conception of moral obligation. For arguments favoring the “moral autonomy of collectivities” which include the claim that a collectivity can bear duties that none of its members has, see Copp (2007).

The agent has the ability to do the thing in the sense of having the requisite skills, physical capacities, and knowledge – even if psychologically she is “unable” to do it (e.g., she “cannot” get herself to stick her arm into a cesspool to retrieve her wallet), and even if it would be unreasonable to expect her to do it (e.g., because she would die by doing it). (The agent’s skills etc. need not guarantee success or even make it likely: she may have the ability to beat an opponent at chess even if the opponent usually beats her.) The agent has the opportunity to do the thing in the sense of being in a situation which allows her to exercise her ability; e.g., she is scheduled to play chess with someone and thus has the opportunity to beat him (she cannot beat someone who refuses to play with her, even if she has the ability to beat him). The claim that an agent can do something does not presuppose that the agent knows she can do the thing; maybe a given opponent is weaker than she thinks, and she can beat him although she thinks she cannot. On the other hand, the claim does presuppose that the agent knows how to do the thing; if she does not know how to play chess then she cannot play, although she is physically capable of moving the pieces in ways accidentally compatible with the rules of chess.

Once “can” is defined as a combination of ability and opportunity¹⁶, one may think about what a collectivity can do as something related to what its members can individually do, that is, as something related to what individual members have the ability and opportunity to do. Consider the following claims on the relation between individual and collective “can”.

(1) A collectivity sometimes is able to do ϕ because, while none of its members can do ϕ alone, they are together able to do ϕ .

(2) A collectivity sometimes is *not* able to do ϕ although its members are together capable of doing ϕ .

First claim is obviously true. When the members of a collective put together their physical and intellectual attributes for the achievement of a common goal, they become able, thanks to the sum of their abilities, to do what none of them would have been able to do alone (for example, to lift a piano that fell down the stairway). The second claim, on the other hand, is doubtful. If the members of a collectivity are jointly apt of realizing ϕ , what could lead to the conclusion that, in spite of this, the collectivity is unable to do ϕ ? It may be thought that (2) is false because, if the members of a group together can do ϕ , then, by definition, the group can ϕ . Call this the “aggregation thesis” – the thesis according to which a collectivity necessarily can do whatever can be done through the sum of the individual contributions of its participants.¹⁷

Before assessing (2)’s plausibility, notice that any argument against the aggregation thesis is an argument stressing the importance of the maxim as a constraint to collective duties. If a collectivity sometimes cannot do what their members are together able to do, the issue of establishing whether it is really a necessary condition for a collectivity to bear the duty to ϕ that the collectivity can ϕ grows in relevance.

An argument favoring (2) is the following. Assume that the members of a group are together capable of doing ϕ . Let us then call “cooperative” behavior any individual behavior conducive to ϕ and “defective” behavior individual behavior falling to contribute to the achievement of ϕ .¹⁸ (2) may be defended on the grounds that, although individual members are jointly apt to do ϕ , there are cases in which defection by a large parcel of them (large enough to preclude the collectivity from reaching ϕ) is highly likely. In these cases, although it remains correct to say that the members of the group are together capable of doing ϕ , it cannot be stated, paradoxically, that the collectivity can ϕ .

To illustrate, take the example of a collectivity constituted by the individuals in a theater that starts to fire. ϕ , let us assume, consists of all of them abandoning the theater without any one getting hurt. The public in the theater is together able to do ϕ , but, in order this to happen, all or at least most of them must cooperate, and cooperating means, in this case, *calmly* abandoning the room. What the argument affirms is that if defection by a significant number of people in the firing theater is highly likely, then, although ϕ hangs exclusively on a kind of behavior that each one of the group participants can individually perform (they all can avoid panic and leave the theater calmly), the group as a whole cannot ϕ .

¹⁶ Graham’s account (2011, pp. 341-42) is similar except for the fact that, for him, having the ability to do something requires being also psychologically (rather than only physically) able to do it. He offers the example of an arachnophobe who, thanks to his phobia, lacks the “specific ability” to touch a spider.

¹⁷ For a defense of the aggregation thesis, see Lawford-Smith (2012).

¹⁸ Cooperative behavior need not be the same for all members of the group. If the group is an orchestra and ϕ the execution of a Beethoven’s symphony, the contribution each musician must give for the group reaching ϕ varies according to the instrument each one plays. Essential is that the members of the group be jointly able to do ϕ .

A brief note on the “highly likely” clause: in what concerns individual agents, it seems correct to say that someone lacking “the requisite skills, physical capacities, and knowledge” (Vranas, 2007, p. 169) to do φ may be someone whose failure to do φ is highly likely (rather than sure). By lacking the requisite skills, an amateur chess player cannot beat Kasparov even though there is a remote chance of Kasparov being defeated (by falling asleep during the game) by the former. Thus the claim that a collectivity cannot φ because it is highly likely that it will not succeed at achieving φ does not depart from what “can” implies in the case of individual agents.

Another way to argue that the aggregation thesis is mistaken is by accusing it of incurring in a sort of “addition fallacy”. Such fallacy occurs when, from the fact that an agent can separately do “A, B, n” it is inferred that she can do “A plus B plus n”. That this constitutes a fallacy becomes clear through the following example: while it may be correct to affirm that a policeman can stay awake during all day every Sunday, every Monday, every Tuesdays etc., this evidently does not entail that she can stay awake during all day every Sunday and Monday and Tuesday etc. Or take the case of chess players X and Y, whose playing skills are roughly the same: while it is right to say that X can beat Y in a isolated match, it is not the case that X can beat Y in a hundred consecutive matches (given that they skills are similar, it is highly unlikely that one will defeat the other in a so great number of consecutive games). By claiming that a collectivity can φ whenever its participants are able to cooperate in such a way that the joint result of their individual contributions is φ (regardless of the probability that a sufficient number of members cooperate), the aggregation thesis seems victim of the same fallacy found in those examples.¹⁹

5.2 Does collective “ought” imply collective “can”?

The importance of the maxim for collective duties depends upon what collectivities can do. If the aggregation thesis is correct, collective agents can do things that are a potential result of the individual contributions of their constituent parts. With collective “can” so understood, groups are powerful, thus rendering the maxim into a minor threat when it comes to collective obligations. There is no much to worry about collective “ought” implying collective “can” if groups can do a lot.

The scenario changes, however, if the aggregation thesis is flawed. Take the case of big transnational corporations. It is plausible to say that these collectivities could help to solve egregious social and environmental problems if only each one of their members contributed in the right way. It is well-known, on the other hand, that the realistic results of corporate responsible behavior (what business collectivities may realistically be expected to) are far more modest than what shareholders, managers and employees of big companies would jointly capable of doing. Hence if the high probability of defection by a enough number of corporate agents entails that corporations cannot fulfill certain goals, the issue of knowing if a corporation may have a duty to do φ in spite of the fact that it cannot do φ gains in relevance.

Does “ought” really implies “can”? Providing a general answer to this question is beyond the scope of the present article (for recent work supporting the maxim, see Copp, 2008, Vranas, 2007, Streumer, 2007, Howard-Snyder, 2006; against it, see Graham, 2011, Stern, 2004). The following analysis shall instead be restricted to examine if arguments aimed at defending the maxim are equally compelling when applied to the duties of collective agents. Two arguments will be discussed, the argument from fairness and the argument from morality as a guide for action.²⁰

Argument from fairness: it is not fair to ascribe the duty to do φ to an agent that cannot φ (Copp, 2008, p. 71).

Whatever its persuasive strength regarding individual agents,²¹ the fairness argument seems less compelling in the case of group agents. Recognizing collectivities as moral agents able to bear duties does not entail seeing them as being entitled to fair treatment to the same extent other moral agents (like

¹⁹ The argument favoring proposition (2) has, notwithstanding, the inconvenient of rendering collective “can” dependent from the will of the members of the group. It suffices that an enough number of individual members decide not to cooperate for that, according to the argument, the group becomes unable to do φ . It is true, on the other hand, that since each one of the participants remains apt to contribute to the achievement of φ , the maxim does not preclude affirming that *they* are individually obligated to do so.

²⁰ For a general presentation of these arguments, see Copp, 2008, p. 71.

²¹ For general criticism about the fairness argument, see Graham (2011, pp. 364-67) and Stern (2004, pp. 46-47).

humans and other animals) are.²² The objection of unfair treatment is thus at a minimum a weaker one when it comes to ascribing to collectivities duties of doing things they cannot do.

The conclusion just stated may seem too fast given the possibility that individual duties of the members of a group derive from duties of the group itself. For example, among the individual duties of the shareholders of a pharmaceutical company, there may be duties stemming from the company's duty of selling medicaments at subsidized prices to citizens of poor countries. But if the acknowledgment of this collective obligation contravenes the maxim (as it will do if the company is not able to reduce its prices), shareholders could complain about having individual duties following from a duty that the group to which they belong is not able to comply with. Alternatively, individual duties of group members might arise in virtue of breach of a collective duty. If, again, this latter duty contraries the maxim, group participants can claim that they are unfairly treated by having to bear individual duties emerging from the violation of a collective duty to do something that the group was not able to do. Returning to the example, shareholders may claim that it is unfair to them to have any duty coming from the company's failure to abide by its duty to sell medicaments at low prices, since violation of this duty by the company was unavoidable.

Notice, however, that complains by group participants in these cases are not properly directed at the collective obligation itself but at individual duties associated to it. As such, those are not complains against the existence of collective duties offending the maxim. Claims of unfairness raised by the shareholders could be met through the imposition of special requirements for the existence of individual duties originated by collective ones (or by the failure to abide by the latter). Furthermore, in cases where a collectivity is unable to do something because of the defective behavior of its members, it may be not unfair to assign duties to individual members who caused collective incapacity by their refuse to cooperate.

Argument from morality as a guide for action. Morality's role is to serve as a guide for action; moral predicaments fail to perform this role, however, if they told an agent to do what she is not able to do (Copp, 2008, p. 71). Under a slightly distinct version of the argument, stating that an agent ought to do φ is the same as stating that she has a reason (although not necessarily a definitive one) to do φ . Yet an agent cannot have a reason to do what she is incapable of doing, what turns ability to do φ a necessary condition for being morally required to do φ (Streumer, 2007; Vranas, 2007).

The persuasiveness of the argument from morality as a guide for action seems to hang on how "can" is precisely constructed. It hangs, more particularly, on what is assumed that an agent can do once the difference between what the agent can do now (current "can") and what she may become apt to do in the future (future "can") is taken into account. If "can" is limited to current "can", the argument becomes easily rebuttable, since the fact that morality preconizes something that the agent cannot (currently) do but may become apt to do in the future is perfectly compatible with the thought that morality should be a guide for action. Even if the agent cannot do φ now, the fact that morality requires her to do φ is important to guide her conduct from now on, that is, to tell her that she ought to take the necessary steps to become capable of doing φ in the future.²³ The construction of "can" restricted to current "can" can also be easily conciliated with the idea that moral obligation is a matter of reasons for acting, since the fact that an agent currently cannot do φ does not prevent her from having a reason to do φ if φ is among the things that she can become able to perform in the future.

The argument from morality as a guide for action is hence only able to sustain the maxim insofar as "can" is taken to encompass not only what the agent can do now as also what she can become apt to do in the future – i.e. current *plus* future "can". At least in the case of collectivities, however, this broader account of "can" reduces considerably the importance of the maxim as a requirement to duty ascription. As observed above, one reason to view the maxim as a relevant threat to the duties of collectives is the thought that (contrary to the aggregation thesis) a collectivity may not be able, due to the high probability of defective behavior, to do things that can be achieved through the sum of the individual contributions of its members. But since cooperation problems are, in a general way, surmountable, things that a collectivity is deemed unable to do

²² This does not mean that collectivities are not entitled to any moral right.

²³ It could be objected that the agent's obligation in this case is not of doing φ , but of taking the necessary steps to become able to do φ in the future. Morality would thus still be confined to prescribe what the agent ought to do *among the things that she currently is able to do*, since taking the necessary steps to become able to do φ in the future is among the things that the agent currently can do. The answer is that it is hard to explain why the agent must take the necessary steps to become able to do φ in the future without first assuming that φ is something that morality *already* requires from her. If the duty to take steps to become able of doing φ in the future derives from the duty of doing φ , then morality really asks from the agent something that she is not able to do now (that is, φ) without thereby failing to function as a guide for action.

now because its participants are not likely to cooperate may become realizable in the future after the adoption of effective measures for eliciting cooperative behavior by individual members.²⁴

6. A final note: corporate duties, consequentialism and human rights

The precedent sections have dealt with objections against the claim that corporations (and not only their shareholders or directors) are bearers of moral duties. It has been pointed out that the capacity for being a duty bearer can be distinguished from the capacity for being morally responsible. If these are different capacities, not everything standing as a necessary condition for one of them is forcefully also a necessary condition for the other. Intention, traditionally taken as a condition for corporate moral responsibility, may therefore be not a condition for assigning moral duties to companies.

Once the premise according to which agents are morally responsible only for what they intentionally do is accepted, a disconnection between the ideas of being morally responsible and violating a moral duty takes place whenever moral obligation is conceived in ways allowing for non-intentional instances of breach. A common example of a moral duty that is often conceived in this way is the duty to take the course of action with the best consequences (consequentialist duty). This affirmation holds for three different accounts – objective, prospective and subjective – of this duty currently found in the literature. Except for the subjective account, the consequentialist duty is also constructed in such a way that renders its content independent from the agent’s beliefs, therefore making possible to assign it to collective agents in spite of the fact that the latter are unable to form beliefs of their own.

The bare fact that a moral obligation may be breached through non-intentional behavior is obviously not enough to conclude that non-volitional agents can bear such obligation. A possible objection against the claim that allegedly non-volitional entities like corporations are not duty bearers is that these entities are incapable of acting. This objection may have the broader sense of stating that collectivities do not stand as moral agents, i.e. that they are not capable of acting in a general way, or instead refer only to specific acts that collective agents are unable to perform, what, according to the “ought” implies “can” maxim, prevents charging them with the duty of performing these same acts. Regarding the issue of collective moral agency in general, the paper argued that collectivities become actors in the morally relevant sense whenever a given consequence or event is causally linked to their existence. As for the claim that collectivities cannot be obligated to do what they are unable to do, it was noted, first, that a possible rebuttal of the aggregation thesis increases the importance of assessing the validity of the “ought” implies “can” maxim for collective duties. The article argued, however, that one of the arguments supporting the maxim, the argument from fairness, is less convincing when it comes to collective duties, while another argument, from morality as a guide for action, is only able to sustain the maxim if “can” is constructed as encompassing both current *and* future “can”. This extensive interpretation of “can”, however, greatly enlarges the list of things that collectivities are able to do once cooperation problems are circumvented, what turns the “ought” implies “can” maxim into a minor threat against the recognition of collective duties.

A final point worth of mentioning is the following. Accepting that the consequentialist duty is also a duty of collective agents – corporations among them – it remains to be assessed whether, and to what extent, this conclusion bears on the issue of human rights duties that are nowadays often attributed to companies. The question, in other words, is that of knowing if the duties to take the course of action with the best consequences and to respect human rights²⁵ can be conciliated, so that arguments supporting the claim that corporations are bearers of the former can also be taken as arguments in defense of corporate human rights duties.

Against a positive answer to this question stands the fact that, as it has been argued elsewhere (reference omitted), human rights duties that are commonly ascribed to companies are duties whose violation can occur only through intentional behavior. This holds both for (negative) duties to not cause harm and for (positive) beneficence duties. In the former case, the corporate duty to not infringe the rights of others is

²⁴ Taking “defection” in the sense of selfish behavior and “cooperation” as behavior aimed at the realization of common goals, there is an extensive literature on successful strategies that groups are able to develop in order to elicit cooperative behavior among their participants. For a classical reference on this topic, see Ostrom (1990).

²⁵ The locution “duty to respect human rights” has in the text above a general meaning encompassing both (negative) duties to not infringe the rights of others and obligations of positively acting in order to satisfy human rights demands.

conceived of as duty to not *intentionally* cause harm (United Nations, 2008). In the case of positive obligations, necessary conditions to violation of the duty are that the company knows that someone is in need for help and is capable of giving assistance.²⁶ The picture offered by these accounts of human rights corporate duties puts these duties beyond the umbrella of a general consequentialist obligation, to which, as observed, agents' intentions are irrelevant.

In spite of this, the importance of collective consequentialist duties for the business and human rights issue should not be ruled out. Corporate duties can be redefined in order to become instances of the duty to take the course of action with the best consequences. In what concerns duties to not cause harm, such reconfiguration could be made by turning the content of the duty dependent on the magnitude of the harm caused rather than on the agent's intention of causing it, while beneficence duties may be thought of as duties whose violation may take place through the bare omission of providing help, and thus regardless of the agent's knowledge about the victim's state of need. Notice, finally, that this proposal of treating corporate human rights duties as instances of the consequentialist duty does not entail that all human rights constraints to business activity are subordinated to a consequentialist morality (whatever its more precise nature). Treating business human rights duties as instances of a general consequentialist obligation is perfectly compatible with claiming that *individual agents* such as shareholders and managers are bearers of deontological human rights duties, thus allowing for non-consequentialist safeguard of human rights against the effects of business activities.

References

- Arnold DG, 2006. Corporate moral agency *Midwest Studies in Philosophy*, 30: 279-291.
- Arnold DG, 2010. Transnational corporations and the duty to respect basic human rights. *Business Ethics Quarterly*, 20: 371-99.
- Austin JL 1956-1957. A plea for excuses. *Proceedings of the Aristotelian Society*, 57: 1-30.
- Bilchitz D, 2010. Do corporations have positive fundamental rights obligations? *Theoria: A Journal of Social & Political Theory*, 57: 1-35.
- Corlett JA, 2001. Collective moral responsibility. *Journal of Social Philosophy*, 32: 573-584.
- Copp D, 2007. The collective moral autonomy thesis. *Journal of Social Philosophy*, 38: 369-388.
- Copp D, 2008. 'Ought' implies 'can' and the derivation of the principle of alternate possibilities. *Analysis*, 68: 67-75.
- Driver J, 2012. What the objective standard is good for. In *Oxford Studies in Normative Ethics*. Volume 2. Edited by Mark Timmons. Oxford: Oxford University Press, 28-44.
- French, PA, 1979. The corporation as a moral person. *American Philosophical Quarterly*, 16: 207-215.
- Graham PA, 2010. In defense of objectivism about moral obligation. *Ethics*, 121: 88-115.
- Graham PA, 2011. 'Ought' and ability. *Philosophical Review*, 120: 337-382.
- Howard-Snyder F, 2006. "Cannot" implies "not ought". *Philosophical Studies*, 130: 233-246.
- Jackson F, 1991. Decision-theoretic consequentialism and the nearest and dearest objection. *Ethics*, 101: 461-482.
- Kagan S, 2011. Do I make a difference? *Philosophy & Public Affairs*, 39: 105-141.
- Keeley M, 1981. Organizations as non-persons. *Journal of Value Inquiry*, 15: 149-155.

²⁶ On capacity as a necessary condition to violation of business beneficence duties, see Wood (2012) e Wettstein (2012).

- Killoren D, Williams B, 2013. Group agency and over determination. *Ethical Theory Moral Practice*, 16:295-307.
- Lawford-Smith H, 2012. The feasibility of collectives' actions. *Australasian Journal of Philosophy*, 90: 453-467.
- Mäkelä P, 2007. Collective agents and moral responsibility. *Journal of Social Philosophy*, 38: 456-468.
- Mason E, 2012. Objectivism and prospectivism about rightness. *Journal of Ethics & Social Philosophy*, 7: 2-21.
- Ostrom E. 1990. *Governing the Commons: the evolution of institutions for collective action*. New York: Cambridge University Press.
- Pettit P, 2007. Responsibility incorporated. *Ethics*, 117: 171-201.
- Portmore DW, 2007. Consequentializing moral theories. *Pacific Philosophical Quarterly*, 88: 39-73.
- Railton P, 1984. Alienation, consequentialism, and the demands of morality *Philosophy & Public Affairs*, 13: 134-171.
- Rivera-López E, 2006. Can there be full excuses for morally wrong actions? *Philosophy and Phenomenological Research*, 53: 124-142.
- Stern R, 2004. Does ‘ought’ imply ‘can’? And did Kant think it does? *Utilitas*, 16: 42-61.
- Streumer B, 2007. Reasons and impossibility. *Philosophical Studies*, 136:351-384.
- United Nations, 2008. *Protect, respect and remedy: a framework for business and human rights*. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, A/HRC/8/5. Human Rights Council, Eighth session [<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement>]
- van de Poel I, 2011. The relation between forward-looking and backward-looking responsibility. In *Moral Responsibility: beyond free will and determinism*. Edited by Vincent N, van de Poel I, van den Hoven J. Dordrecht: Springer, 37-52.
- Velasquez M, 2003. Debunking corporate moral responsibility. *Ethics*, 13: 531-562.
- Vranas PBM, 2007. I ought, therefore I can. *Philosophical Studies*, 136:167-216.
- Wettstein F, 2010. For better or for worse: corporate responsibility beyond “do no harm”. *Business Ethics Quarterly*, 20: 275-83.
- Wettstein F, 2012. Silence as complicity: elements of a corporate duty to speak out against the violation of human rights. *Business Ethics Quarterly*, 22: 37-61.
- Wood S, 2012. The case for leverage-based corporate human rights responsibility. *Business Ethics Quarterly*, 22: 63-98.
- Zimmerman MJ, 2004. Another plea for excuses. *American Philosophical Quarterly*, 41: 259-266.
- Zimmerman MJ, 2006. Is moral obligation objective or subjective? *Utilitas*, 18: 329-361.
- Zimmerman MJ, 2008 *Living with Uncertainty: the moral significance of ignorance*. Cambridge: Cambridge University Press.